

DATED: OCTOBER 22, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DUKE ENERGY CAROLINAS, LLC

(Oconee Nuclear Station, Units 1, 2, and 3)

Docket Nos. 50-269, 50-270,
and 50-287-SLR

NRC STAFF'S ANSWER OPPOSING BEYOND NUCLEAR AND THE SIERRA CLUB'S
HEARING REQUEST

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INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i), the U.S. Nuclear Regulatory Commission Staff (the Staff) files its answer opposing the hearing request, petition to intervene, and waiver filed by Beyond Nuclear, Inc. (Beyond Nuclear) and the Sierra Club, (together, the Petitioners),¹ concerning the subsequent renewal of the renewed facility operating licenses submitted by Duke Energy Carolinas (Duke or the Applicant) for Oconee Nuclear Power Plant, Units 1, 2, and 3 (Oconee).² The Petitioners offer three contentions in their petition that challenge Duke's

¹ "Hearing Request and Petition to Intervene By Beyond Nuclear And Sierra Club and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.53(c)(3)(ii)(L), 51.71(d), 51.95(c)(1), and 10 C.F.R. Part 51 Subpart A, Appendix B, Table B-1 to Allow Consideration of Category 1 NEPA Issues" (Sept. 27, 2021) (ML21270A250) (Petition).

Attached to Petition are: Declaration of Jeffrey T. Mitman in Support of Beyond Nuclear and Sierra Club Hearing Request (Sept. 27, 2021), Curriculum Vitae for Jeffrey T. Mitman, Reports and Papers by Jeffrey T. Mitman (As of Sept. 2021); Declaration of Jane F. Powell (Sept. 21, 2021); Declaration of Frank M. Powell (Sept. 21, 2021); Declaration of Rosellen Alequire (Sept. 21, 2021); Declaration of Diane Curran In Support Of Petition For Waiver Of 10 C.F.R. §§ 51.53(c)(3) (i), 51.53(c)(ii)(L), 51.71(d), 51.95(c)(1), AND 10 C.F.R. Subpart A, Appendix B, Table B-1 to Allow Consideration of Category 1 NEPA Issues and SAMA Issues (Sept. 27, 2021) (ML21270A251).

² Letter from Steven M. Snider, Site Vice President, Oconee Nuclear Station, to NRC, Application for Subsequent Renewed Operating Licenses (June 7, 2021) (ML21158A194) (SLRA).

The enclosures to the letter include: Encl. 3, Oconee Nuclear Station Subsequent License Renewal Application (ML21158A194) (Subsequent License Renewal Application (SLRA)); Encl 3, Att. 1, Oconee

Environmental Report (ER) and Duke's failure to consider what the Petitioners characterize as new and significant information as it relates to the failure of the Jocassee Dam, but fail to present a seriously different picture of the environmental impact of the proposed subsequent license renewal from what was previously envisioned and analyzed for the site.

While the Staff does not challenge the Petitioners' standing in this matter, the petition is insufficient because it does not meet the prima facie requirements to grant a waiver from the NRC's regulations and does not propose at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). Accordingly, the hearing request, petition to intervene, and waiver petition should be denied because the petition raises issues outside the scope of license renewal and is based on information that is neither new nor materially significant. Specifically, proposed Contention 1 is not admissible in that it does not show a genuine dispute exists with Duke on a material issue of law as required by 10 C.F.R. § 2.309(f)(1)(vi). Proposed Contentions 2 and 3 are not admissible because they fail to satisfy the criteria in 10 C.F.R. § 2.309(f)(1)(iii), (iv) and (vi)—the contentions do not demonstrate that the issues raised are within the scope of the proceeding or are material to the findings that must be made to support the action here, nor do the contentions provide sufficient information to show that a genuine dispute exists on a material issue of fact or law. Because none of the proposed contentions are admissible, consistent with 10 C.F.R. § 2.309(a), the petition should be denied.

BACKGROUND

The Oconee units are pressurized-water reactors designed by Babcock and Wilcox Company and are located on the shore of Lake Keowee in Oconee County, South Carolina, approximately 8 miles (13 km) northeast of Seneca.³ The current renewed operating licenses

Nuclear Station Subsequent License Renewal Application (Safety Report (ML21158A194)); Encl. 3, Att. 2, Oconee Nuclear Station Subsequent License Renewal Application, Appendix E, Environmental Report (ML21158A195), (ML21158A196), (ML21158A197), (ML21158A198), (ML21158A199), and (ML21158A200).

³ See SLRA at 1-9.

for Oconee Units 1, 2, and 3 expire at midnight on February 6, 2033, October 6, 2033, and July 19, 2034, respectively.⁴ By letter dated June 7, 2021, Duke applied to renew the Oconee operating licenses for an additional 20 years, which would extend the Unit 1 license to February 6, 2053, the Unit 2 license to October 6, 2053, and the Unit 3 license to July 19, 2054.⁵

Under 10 C.F.R. § 54.29, the NRC may grant a license renewal application if, among other things, it finds that specific safety and environmental requirements are satisfied. The NRC review of a license renewal application consists of two concurrent reviews—a safety review and an environmental review. To support these safety and environmental reviews, Duke submitted as part of its application a subsequent license renewal application (SLRA) and an Environmental Report.

On July 28, 2021, the NRC published a notice of opportunity to request a hearing and to petition for leave to intervene on the Duke application.⁶ In response, on September 27, 2021, Petitioners submitted the instant petition, which asserts that a hearing should be granted on three proposed contentions challenging Duke's SLRA. On October 4, 2021, the Atomic Safety and Licensing Board (Board) was established to preside over the contested proceeding.⁷

DISCUSSION

Under the Commission's Rules of Practice in 10 C.F.R. Part 2, "Any person [petitioner] whose interests may be affected by a proceeding and who desires to participate as a party must

⁴ See SLRA at 1-1.

⁵ See SLRA at 1-5.

⁶ Duke Energy Carolinas, LLC; Duke Energy; Oconee Nuclear Station, Units 1, 2, and 3, 86 Fed. Reg. 40,662 (July 28, 2021).

⁷ Duke Energy Carolina, LLC (Oconee Nuclear Station, Units 1, 2, and 3), Establishment of Atomic Safety and Licensing Board [ASLBP] (Oct. 4, 2021) (ML21277A235). On October 19, 2021, another Board Establishment Notice was issued (ML21292A190), which supersedes the one on October 4, 2021, in order to correct the ASLBP docket number.

file a written request for hearing” or petition for leave to intervene (petition).⁸ The petition must include the contentions that the petitioner seeks to have litigated in the hearing.⁹ The presiding officer will grant the petition if it determines that the petitioner has standing under 10 C.F.R.

§ 2.309(d) and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).¹⁰

I. Standing

A. The Requirements for Standing

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a petition must state:

- (i) The name, address, and telephone number of the petitioner;
- (ii) The nature of the petitioner’s right under the Atomic Energy Act of 1954, as amended (AEA), to be made a party to the proceeding;
- (iii) The nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest.¹¹

⁸ 10 C.F.R. § 2.309(a). “Person” is defined in 10 C.F.R. § 2.4, as “(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission..., any State or any political subdivision of, or any political entity within a State, any foreign government or nation..., or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.”

⁹ *Id.*

¹⁰ *Id.*

¹¹ 10 C.F.R. § 2.309(d)(1).

The regulations state that, in ruling on a petition, the presiding officer “must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in” 10 C.F.R. § 2.309(d)(1).¹²

As the Commission has observed, the NRC has “long applied contemporaneous ‘judicial concepts of standing,’” which require “an actual or threatened injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and arguably falls within the ‘zone of interest’ protected by the AEA.”¹³ The “injury ‘must be both concrete and particularized, not conjectural, or hypothetical.’”¹⁴ Further, at “the heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists [that] will sharpen the presentation of issues.”¹⁵

While the Commission generally requires the elements of standing to be pled with specificity, standing to intervene has been found to exist in construction permit and operating license proceedings based upon a “proximity” presumption.¹⁶ In such proceedings, standing is presumed for persons who reside in, or have frequent contact with, the zone of possible harm around the nuclear reactor.¹⁷ In practice, the Commission has found standing based on the

¹² 10 C.F.R. § 2.309(d)(2). The presiding officer may also consider a request for discretionary intervention when a petitioner is determined to lack standing to intervene as a matter of right, where a sufficient showing is made with respect to the factors enumerated in 10 C.F.R. § 2.309(e).

¹³ *El Paso Elec. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-20-7, 92 NRC 225, 230 (2020) (quoting *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009)).

¹⁴ *Palo Verde*, CLI-20-7, 92 NRC at 230 (quoting *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 72 (1994)).

¹⁵ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

¹⁶ See, e.g., *Calvert Cliffs*, CLI-09-20, 70 NRC at 915–17 (citing, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150 (2001), *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001) (applying proximity presumption in reactor operating license renewal proceeding)).

¹⁷ *Id.* at 915.

proximity presumption for persons who reside within approximately 50 miles (80 km) of the facility.¹⁸ As noted by the Commission, licensing boards have also employed the proximity presumption to establish standing to intervene in reactor operating license renewal proceedings.¹⁹

An organization seeking to intervene “must satisfy the same standing requirements as an individual seeking to intervene.”²⁰ The organization may establish standing based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding) or representational standing (based on the standing of its members). Where an organization seeks to establish “representational standing,” the organization must demonstrate that “at least one of its members may be affected” by the proceeding and that these members, who must be identified by name, have authorized the organization to represent them and to request a hearing on their behalf.²¹ Further, the “member seeking representation must qualify for standing in [their] own right; the interests that the representative organization seeks to protect must be germane to its purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action.”²²

¹⁸ *Id.* at 915–16.

¹⁹ *Id.* at 915 n.15 (noting that the Board in *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150, *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001) was “applying [the] proximity presumption in [a] reactor operating license renewal proceeding”).

²⁰ *Palo Verde*, CLI-20-7, 91 NRC at 231.

²¹ *FirstEnergy Nuclear Operating Co. and FirstEnergy Nuclear Generation, LLC* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Nuclear Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-20-5, 91 NRC 214, 220 (2020); *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409–10 (2007).

²² *Beaver Valley*, CLI-20-5, 91 NRC at 220 (citing *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258–59 (2008); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)).

B. Beyond Nuclear Has Satisfied its Burden of Demonstrating Standing

Beyond Nuclear is “a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both...”²³ Beyond Nuclear seeks to establish representational standing to intervene in this proceeding based on the standing of one of its members.²⁴ The petition includes a signed and dated declaration from a member, Jane Powell, which includes Ms. Powell’s home address and a statement that she lives within a 50-mile radius of Oconee Nuclear Power Station.²⁵ Ms. Powell states that she believes nuclear facilities are inherently dangerous and that renewing Oconee’s license for a period of 20 years “could cause a severe nuclear accident in the reactor(s) and/or irradiated fuel storage pool(s)[,] thereby causing death, injury, illness, dislocation, and economic damage to [her] and [her] family.”²⁶ Ms. Powell also believes that the Oconee SLR could cause “devastating environmental damage.”²⁷ Ms. Powell states that she authorizes Beyond Nuclear to represent her interests in the Oconee subsequent license renewal proceeding.²⁸

The petition and declaration of Ms. Jane Powell demonstrate that at least one member of Beyond Nuclear has authorized it to represent them in this proceeding. Ms. Powell would have standing to intervene in her own right based on the proximity presumption. Further, the interests that Beyond Nuclear seeks to protect are germane to its purpose, and neither the asserted claim nor the requested relief require an individual member to participate in this

²³ Petition at 5.

²⁴ *Id.* at 6; see also Declaration of Jane F. Powell.

²⁵ Declaration of Jane F. Powell at 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

proceeding. Therefore, the Staff does not oppose the standing of Beyond Nuclear in this proceeding.

C. The Sierra Club Has Satisfied its Burden of Demonstrating Standing

The Sierra Club is a national environmental organization whose purposes “are to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.”²⁹ The Sierra Club seeks to establish representational standing to intervene in this proceeding based on the standing of two of its members.³⁰ The petition includes signed and dated declarations from its members, Frank M. Powell and Rosellen Aleguire, which include their respective home addresses and a statement that they each live within a 50-mile radius of Oconee Nuclear Power Station.³¹ Both Mr. Powell and Ms. Aleguire state that they believe nuclear facilities are inherently dangerous and that renewing Oconee’s license for a period of 20 years “could cause a severe nuclear accident in the reactor(s) and/or irradiated fuel storage pool(s)[,] thereby causing death, injury, illness, dislocation, and economic damage to [them] and [their] famil[ies].”³² Mr. Powell and Ms. Aleguire also believe that the Oconee SLR could cause “devastating environmental damage.”³³ Mr. Powell and Ms. Aleguire state that they each authorize the Sierra Club to represent their respective interests in the Oconee subsequent license renewal proceeding.³⁴

²⁹ Petition at 6.

³⁰ *Id.* at 6; see also Declaration of Frank M. Powell and Declaration of Rosellen Aleguire.

³¹ Declaration of Frank M. Powell at 1; Declaration of Rosellen Aleguire at 1.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

The petition and declarations of Mr. Powell and Ms. Aleguire demonstrate that they have authorized the Sierra Club to represent them in this proceeding. Both Mr. Powell and Ms. Aleguire would have standing to intervene in their own right based on the proximity presumption. Further, the interests that the Sierra Club seeks to protect are germane to its purpose, and neither the asserted claim nor the requested relief require an individual member to participate in this proceeding. Therefore, the Staff does not oppose the standing of the Sierra Club in this proceeding.

II. The Requirements for Contention Admissibility

The legal requirements governing the admissibility of contentions are set forth in 10 C.F.R. § 2.309(f)(1)-(2). Specifically, a petition must “set forth with particularity” the contentions that a petitioner seeks to raise and, for each contention, the petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;³⁵
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;³⁶
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;³⁷

³⁵ Contentions “cannot be based on speculation” and “must have some reasonably specific factual or legal basis.” *Entergy Nuclear Vt. Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015). (citation omitted).

³⁶ All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board panel. *See, e.g., Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 328–29 (2000). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See, e.g., Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 435–36 (2011).

³⁷ “A dispute at issue is material if its resolution would make a difference in the outcome of the licensing proceeding.” *Holtec Int’l* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 190 (2020) (internal quotations omitted).

- (v) Provide a concise statement of the alleged facts or expert opinions that support the petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue;³⁸ and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.³⁹

Additionally, “[c]ontentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner.”⁴⁰ Notably, “[o]n issues arising under the National Environmental Policy Act [of 1969, as amended (NEPA)]⁴¹, participants shall file contentions based on the applicant’s environmental report.”⁴²

³⁸ The petitioner is obligated to present the facts and expert opinions necessary to support admission of its contention. See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 457 (2006) (it is the petitioner’s responsibility to satisfy the basic contention admissibility requirements; “it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves [and] boards may not simply ‘infer’ unarticulated bases of contentions”). See also *Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155 (1991).

³⁹ To show that a genuine dispute exists, the contention “must include references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute” and “[i]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner’s belief.” *Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3)*, CLI-20-11, 92 NRC 335, 342 (2020). (citations omitted).

⁴⁰ 10 C.F.R. § 2.309(f)(2).

⁴¹ 42 U.S.C. § 4321 *et seq.*

⁴² 10 C.F.R. § 2.309(f)(2).

The Commission's regulations governing contention admissibility are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."⁴³ The Commission has stated that the NRC's case law "makes clear" that the contention admissibility rules are "strict by design."⁴⁴ Failure to satisfy any one of the six requirements "renders a contention inadmissible."⁴⁵ The rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."⁴⁶ While a petitioner does not have to prove its contention at the admissibility stage,⁴⁷ the contention admissibility standards are meant to only afford hearings to those who "proffer at least some minimal factual and legal foundation in support of their contentions."⁴⁸ The petitioner must provide some support for the contention, either in the form of facts or expert testimony, and failure to do so

⁴³ See, e.g., *S. Nuclear Operating Co., Inc.* (Vogle Elec. Generating Plant, Unit 3), LBP-20-8, 92 NRC 23, 46 (2020) (quoting "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)); *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, NE), LBP-15-15, 81 NRC 598, 601 (2015).

⁴⁴ *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2) CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) and *S. Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010)). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁴⁵ *Indian Point*, CLI-16-5, 83 NRC at 136; see also *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334–35 (1999) (the heightened contention admissibility rules are designed to preclude contentions that appear to be "based on little more than speculation"). The requirements are intended, among other things, to ensure that a petitioner reviews the application and supporting documents before filing contentions; that contentions are supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute before a contention is admitted for litigation, to avoid the practice of filing contentions that lack any factual support and seeking to "flesh [them] out through discovery." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167–68 (1991). (citation omitted).

⁴⁶ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118–19 (2006) (quoting *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155–56 (1991)).

⁴⁷ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

⁴⁸ *Oconee*, CLI-99-11, 49 NRC at 334.

requires that the contention be rejected.⁴⁹ Any supporting material provided by the petitioner is subject to scrutiny by the presiding officer and the presiding officer must confirm that the proffered material provides adequate support for the contention.⁵⁰ The Commission has long held that the “basis” requirements are intended to: (1) ensure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) put other parties sufficiently on notice of the issues to be litigated.⁵¹

If a petitioner neglects to provide the requisite support for its contentions, then the presiding officer should not make assumptions of fact that favor the petitioner or search for or supply information that is lacking.⁵² Moreover, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is grounds for the presiding officer to reject the contention.⁵³ In sum, the information, facts, and expert opinions provided by the petitioner are to be examined by the presiding officer to determine whether they provide adequate support for the proffered contentions.⁵⁴

⁴⁹ *Palo Verde*, CLI-91-12, 34 NRC at 155; *accord*, *Indian Point*, CLI-16-5, 83 NRC at 136; see Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (“This requirement does not call upon the intervener to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.”). Additionally, “neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention.” *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)).

⁵⁰ See *Vt. Yankee Nuclear Power Co.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); see also *Tenn. Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), LBP-10-7, 71 NRC 391, 421 (2010).

⁵¹ *Oconee*, CLI-99-11, 49 NRC 328, 334; See also *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974).

⁵² See *USEC*, CLI-06-10, 63 NRC at 457.

⁵³ See *Fansteel*, CLI-03-13, 58 NRC at 205.

⁵⁴ *USEC*, CLI-06-10, 63 NRC at 457; see *Bellefonte Nuclear Plant*, LBP-10-7, 71 NRC at 421.

Under the Commission’s caselaw, and absent a waiver, a contention must be rejected if it challenges applicable statutory requirements, regulations, or the basic structure of the Commission’s regulatory process.⁵⁵ Contentions that are nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be must also be rejected.⁵⁶ Further, attempts to advocate for requirements stricter than those imposed by regulation constitute collateral attacks on the Commission’s rules and are therefore inadmissible.⁵⁷

III. The Scope of License Renewal Proceedings

The Commission’s regulations in 10 C.F.R. Part 54 limit the scope of license renewal proceedings to those matters that must be considered for the license renewal application to be granted and that have not been addressed by rulemaking or on a generic basis.⁵⁸ Under 10 C.F.R. § 54.29(a), when determining whether to grant a license renewal application, the Commission requires actions be identified that have been or will be taken with regard to:

- (1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under 10 C.F.R. § 54.21(a)(1); and
- (2) time-limited aging analyses that have been identified to require review under 10 C.F.R. § 54.21(c).⁵⁹

⁵⁵ As set forth in 10 C.F.R. § 2.335(a), “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding” absent a waiver petition granted by the Commission; *see also*, *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). Accordingly, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission’s regulatory process without a waiver must be rejected. *Id.*

⁵⁶ *Millstone*, CLI-03-14, 58 NRC at 218.

⁵⁷ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012) (citations omitted); *See Peach Bottom*, ALAB-216, 8 AEC at 20–21 (explaining that a contention that seeks to raise an issue that is not proper for adjudication in the proceeding or that does not apply to the facility in question, or seeks to raise an issue that is not concrete or litigable must also be rejected).

⁵⁸ *Oyster Creek*, CLI-06-24, 64 NRC at 117–18; *see also* 10 C.F.R. § 54.29; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8-10 (2001) 8–10.

⁵⁹ 10 C.F.R. § 54.29(a).

These actions must provide reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis,⁶⁰ and that any changes made to the plant's current licensing basis are "in accord with the Act [AEA] and the Commission's regulations."⁶¹ Additionally, a renewed license may be issued if the Commission finds that "[a]ny applicable requirements of [Subpart A of 10 C.F.R. Part 51] have been satisfied" and "[a]ny matters raised under [10 C.F.R.] § 2.335 have been addressed".⁶²

Notably, the Commission has found it generally unnecessary, in the license renewal stage, to review issues already monitored and reviewed in ongoing regulatory oversight processes in adjudicatory proceedings.⁶³ The scope of issues that may be considered in a license renewal proceeding are established in 10 C.F.R. § 54.29(a), along with other regulations in 10 C.F.R. Part 54 and the environmental regulations related to license renewal set forth in 10 C.F.R. Part 51 and Appendix B.⁶⁴ The NRC's license renewal regulations are "derive[d] from years of extensive technical study, review, interagency input, and public comment."⁶⁵

⁶⁰ The current licensing basis, as defined in 10 C.F.R. § 54.3, is "the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect...."

⁶¹ 10 C.F.R. § 54.29(a).

⁶² 10 C.F.R. § 54.29(b)-(c).

⁶³ See, e.g., *Turkey Point*, CLI-01-17, 54 NRC at 8-10 (holding that "[i]ssues like emergency planning—which already are the focus of ongoing regulatory processes—do not come within the NRC's safety review at the license renewal stage").

⁶⁴ See generally *Nuclear Power Plant License Renewal*, 56 Fed. Reg. 64,943 (Dec. 13, 1991); *Nuclear Power Plant License Renewal; Revisions*, 60 Fed. Reg. 22,461 (May 8, 1995). As made clear by the Commission in 2014, the existing regulatory framework and regulatory process for license renewal also apply to subsequent license renewal. See *Staff Requirements—SECY-14-0016—Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal* (Aug. 29, 2014) (ML14241A578) (SRM-SECY-14-0016) (declining rulemaking; directing the Staff to update license renewal guidance, as needed, to provide clarity and to "address emerging technical issues and operating experience through alternative vehicles").

⁶⁵ *Turkey Point*, CLI-01-17, 54 NRC at 7.

Additionally, in a license renewal proceeding, the adequacy and manner of the Staff's review may not be challenged.⁶⁶

Under 10 C.F.R. Part 54, "the NRC conducts a technical review of the license renewal application to ensure that public health and safety requirements are satisfied."⁶⁷ The Commission has a continuing "responsibility to oversee the safety and security of" ongoing plant operations,⁶⁸ and it routinely oversees a broad range of operating issues under its statutory responsibility to ensure the protection of the public health and safety for operations under existing operating licenses, regardless of whether a facility has filed a license renewal application. However, the focus of NRC's license renewal safety review is on "plant systems, structures, and components for which current [regulatory] activities and requirements may not be sufficient to manage the effects of aging in the period of extended operation."⁶⁹ Adjudications on license renewal applications are bounded by the same rules and scope as the

⁶⁶ See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 n.56 (2010) (citations omitted) (noting that adjudicatory challenges that focus on the "Staff's review of the application rather than upon errors or omissions in the application itself" are not permitted in NRC adjudications); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476–77, 481-82 (2008) (citations omitted) (stating that "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications" and that it is "the applicant, not the Staff, that has the burden of proof in litigation"). Further, licensing boards are not generally empowered to correct or supervise the Staff's performance of its research activities. See 10 C.F.R. § 2.319. Licensing boards "simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the Board." *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) (citations omitted). Staff non-adjudicatory functions include safety reviews and the approaches to conducting environmental reviews. See *id.* ("[L]icensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews.").

⁶⁷ *Turkey Point*, CLI-01-17, 54 NRC at 6.

⁶⁸ *Id.* at 8.

⁶⁹ *Id.* at 10 (quoting 60 Fed. Reg. at 22,469).

NRC's license renewal review.⁷⁰ Contentions falling outside this scope are inadmissible and must be rejected.⁷¹

As relevant here, “[f]lood protection issues are considered during site-specific safety reviews and, more specifically, are addressed on an ongoing basis through the reactor oversight process and other NRC safety programs, which are separate from the license renewal process.”⁷² Notably, when “new information or operating experience relating to flooding becomes available, the NRC evaluates the information to determine if any changes are needed at existing plants.”⁷³ Therefore, the NRC’s ongoing regulatory oversight, which includes the oversight of flood protection issues, remains separate from the license renewal process.⁷⁴ Here, because the Petitioners raise issues that are addressed through the NRC’s normal, ongoing regulatory oversight of the Oconee facility, they have failed to offer an admissible contention appropriate for resolution in subsequent license renewal adjudication and accordingly, the petition should be denied.

⁷⁰ *Id.* (“Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.”).

⁷¹ 10 C.F.R. § 2.309(f)(1)(iii); *see, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

⁷² “Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants—Final Report,” NUREG-1437, rev. 1, vol. 1 at 3-61 (May 2013) (ML13106A241) (2013 GEIS). Additionally, the 2013 GEIS states, “The regulations require that plant structures, systems, and components important to safety be designed to withstand the effects of natural phenomena including flooding, without loss of capability to perform safety functions. Site-specific design bases for flood protection are prescribed by a nuclear power plant’s FSAR/UFSAR [Final Safety Analysis Report/Updated Final Safety Analysis Report] and by applicable technical specifications.” *Id.*

⁷³ *Id.*

⁷⁴ *Id.* *E.g., Tennessee Valley Authority* (Sequoyah Nuclear Power Plant, Units 1 and 2), LBP-13-8, 78 NRC 1, 12 (2013), (“In short, licensees are required to protect their nuclear power plants against the risk of flooding as a part of their current regulatory obligations under the AEA (i.e., as part of the [current licensing basis]) and any challenge to the adequacy of the licensee's flood management measures is not with the scope of the license renewal process.”).

A. Environmental Review Requirements for License Renewal Applications

The National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. § 4321 *et seq.*, requires federal agencies to include in any recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment, a detailed statement on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.⁷⁵

In accordance with its NEPA responsibilities, the NRC is required to take a “hard look” at the environmental impacts of a proposed major federal action that could significantly affect the environment, as well as reasonable alternatives to that action.⁷⁶ This “hard look” is “subject to a ‘rule of reason’ in that consideration of environmental impacts need not address ‘all theoretical possibilities,’ but rather only those that have some ‘reasonable possibility’ of occurring.”⁷⁷ Notably, the “agency need not perform analyses concerning events that would be considered ‘worst case’ scenarios . . . or those considered remote and highly speculative[;]” rather an

⁷⁵ See NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

⁷⁶ See *Crow Butte Resources, Inc.* (Marsland Expansion Area), LBP-19-2, 89 NRC 18, 40 (2019) (citation omitted); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87–88 (1998)).

⁷⁷ *Id.* (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973)).

agency thus need only address impacts that are reasonably foreseeable.⁷⁸ Additionally, “NEPA ‘does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.’”⁷⁹ NEPA also gives agencies “broad discretion ‘to keep their inquiries within appropriate and manageable boundaries.’”⁸⁰ The Commission has stated that, “NEPA requires consideration of ‘reasonable’ alternatives, not all conceivable ones.”⁸¹ Further, the Commission has previously held that the “Staff’s EISs [environmental impact statements] need only discuss those alternatives that . . . will bring about the ends of the proposed action—a principle equally applicable to Environmental Reports.”⁸²

To implement the agency’s NEPA responsibilities, the NRC has adopted regulations in 10 C.F.R. Part 51 and has divided the license renewal environmental review into “Category 1” generic issues and “Category 2” site-specific issues⁸³ based on NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (GEIS).⁸⁴ Table B–1 of Appendix B to Subpart A of 10 C.F.R. Part 51, which lists each issue and its categorization, and

⁷⁸ *Holtec Int’l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC 353, 375, 388 (2019) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002) and *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 754–55 (3d Cir. 1989)).

⁷⁹ *Marsland*, LBP-19-2, 89 NRC at 40 (quoting *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005)).

⁸⁰ *Id.* (quoting *LES*, CLI-98-3, 47 NRC at 103).

⁸¹ *Seabrook*, CLI-12-5, 75 NRC at 338 (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837, 838 (D.C. Cir. 1972)).

⁸² *Id.* at 339 (footnotes and quotation marks omitted).

⁸³ See Appendix B to Subpart A of 10 C.F.R. Part 51—Environmental Effect of Renewing the Operating License of a Nuclear Power Plant (“The Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant” and “Table B–1 summarizes the Commission’s findings . . . subject to an evaluation of those issues identified in Category 2 as requiring further analysis and possible significant new information....”).

⁸⁴ “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” NUREG-1437, Rev. 1, Vols. 1–3, (2013) (ML13106A241, ML13106A242, and ML13106A244) (identifying 78 environmental impact issues for license renewal, 59 of which were determined to be generic Category 1 issues, 17 are site-specific Category 2 issues, and 2 are uncategorized).

lists the findings of the environmental impact analyses conducted for the GEIS.⁸⁵ By combining the site-specific analysis of the Category 2 issues with the generic analysis of the Category 1 issues, including consideration of any new and significant information, the NRC can satisfy its NEPA obligations for license renewal.⁸⁶

Under 10 C.F.R. § 51.53(c)(3)(ii), a license renewal applicant is required to include “analyses of the environmental impacts of the proposed action . . . for those issues identified as Category 2 issues...” in its environmental report.⁸⁷ However, the environmental report is “not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1”⁸⁸ except to the extent there is “any new and significant information regarding the environmental impacts....”⁸⁹ Specifically, under 10 C.F.R. § 51.53(c)(3)(iv), the environmental report “must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.”⁹⁰ These requirements are applicable to both initial and subsequent license renewal applications.⁹¹ Therefore, an applicant must provide a plant-specific review of the Category 2 issues in its environmental report and must address any new and significant information that might render the Commission’s Category 1 determinations inapplicable in that proceeding.⁹²

⁸⁵ 10 C.F.R. Part 51, Subpart A, Appendix B, Table B–1, “Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants” (endnotes omitted).

⁸⁶ See *Massachusetts v. NRC*, 522 F.3d 115, 120–21 (1st Cir. 2008).

⁸⁷ 10 C.F.R. § 51.53(c)(3)(ii).

⁸⁸ 10 C.F.R. § 51.53(c)(3)(i).

⁸⁹ 10 C.F.R. § 51.53(c)(3)(iv).

⁹⁰ *Id.*

⁹¹ *Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4)*, CLI-20-3, 91 NRC 133, 152–53 (2020). *accord*, *Peach Bottom*, CLI-20-11, 92 NRC at 340-41.

⁹² See, e.g., *Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2)*, CLI-13-7, 78 NRC 199, 212–13 (2013); *Turkey Point*, CLI-01-17, 54 NRC at 11–12; *Entergy Nuclear Generation Company and*

In accordance with 10 C.F.R. § 51.95(c), the Staff is required to prepare an environmental impact statement, which is published as a supplement to the GEIS, and is referred to as a supplemental environmental impact statement (SEIS).⁹³ The 2013 GEIS (NUREG-1437, Rev. 1) and the “Standard Review Plans for Environmental Reviews of Nuclear Power Plants—Operating License Renewal” (NUREG-1555, Supp. 1, Rev. 1) (June 2013) guide the Staff’s license renewal environmental review. While the NRC Staff, like the applicant, is not required to address Category 1 impacts in its plant-specific environmental impact statement, the Staff must address any new and significant information that might affect the applicability of the Commission’s generic Category 1 determinations in the proceeding.⁹⁴ The Staff must also address any new and significant information that might affect the Category 2 site-specific findings in its draft or final SEIS, including, as relevant here, any new and significant information that might affect the Staff’s previous severe accident mitigation alternatives (SAMA) analysis.⁹⁵

Contentions raising environmental issues in a license renewal proceeding are limited to those issues that are affected by license renewal and have not been addressed by rulemaking or on a generic basis.⁹⁶ Therefore, as the Commission has stated, Category 1 issues “are not

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-09-10, 69 NRC 521, 527–28 (2009).

⁹³ 10 C.F.R. § 51.95(c).

⁹⁴ See, e.g., *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-16-8, 83 NRC 417, 439 (2016).

⁹⁵ See, *Limerick*, CLI-13-7, 78 NRC at 211, 216-17 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)). Following publication of a site-specific supplement to the GEIS, further supplementation is required only “if there are ‘significant new circumstances or information’ . . . [that] paint[s] a dramatically different picture of impacts compared to the description of impacts in the EIS.” *Massachusetts v. NRC*, 708 F.3d 63, 68-69 (1st Cir. 2013) (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 7, 12 (1st Cir. 2008)); accord, *Limerick*, CLI-13-7, 78 NRC at 211, 216-17. Additionally, the Commission has indicated that such information “‘must present ‘a seriously different picture of the environmental impact of the proposed action from what was previously envisioned.’” *Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167-68 (2011) (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 871200), CLI-99-22, 50 NRC 3, 14 (1999)).

⁹⁶ *Turkey Point*, CLI-01-17, 54 NRC at 11–12; see 10 C.F.R. § 51.53(c)(3)(i)-(ii).

subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings.”⁹⁷ As these generic environmental analyses were incorporated into an NRC rule, their conclusions “may not be challenged in litigation unless the rule is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.”⁹⁸ Consequently, a contention challenging a Category 1 generic determination, even if based on new and significant information, can only be admitted if the Commission grants a waiver of its regulations.⁹⁹

IV. Petitioners Have Not Met Their Burden of Proposing at Least One Admissible Contention

Although the Petitioners demonstrate that they have standing under the provisions of 10 C.F.R. § 2.309(d), they do not proffer an admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). Moreover, as discussed more fully in Section V, the Petitioners do not meet the NRC standards that govern the issuance of a waiver under 10 C.F.R. § 2.335.

Therefore, pursuant to 10 C.F.R. § 2.309(a), the petition should be denied.

A. Proposed Contention 1 Is Not Admissible

Proposed Contention 1 states that:

Duke’s Environmental Report fails to satisfy 10 C.F.R. § 51.53(c)(2) because it fails to fulfill that provision’s requirement to discuss “the environmental impacts of alternatives and any other matters described in [10 C.F.R.] § 51.45.” In particular, Duke incorrectly relies on 10 C.F.R. § 51.53(c)(3) to excuse it from discussing

⁹⁷ *Turkey Point*, CLI-01-17, 54 NRC at 16; The Commissioner also recognized that the rules “provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule.” *Id.* at 12.

⁹⁸ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 (2007) (footnotes omitted), *reconsid. denied*, CLI-07-13, 65 NRC 211, 214 (2007); *accord Massachusetts v. NRC*, 708 F.3d at 74. This approach has been found to comply with NEPA. *See, e.g., Massachusetts v. NRC*, 708 F.3d at 68–69.

⁹⁹ *Turkey Point*, CLI-20-3, 91 NRC at 152–53.

significant environmental impacts classified as “Category 1” in 10 C.F.R. Part 51, Part A, Appendix B.¹⁰⁰

Petitioners argue in Contention 1 that Duke’s ER fails to satisfy 10 C.F.R. § 51.53(c)(2), which requires that an applicant’s ER include a discussion of the impacts of alternatives to the proposed action as well as all the information required by 10 C.F.R. § 51.45.¹⁰¹ Petitioners state that Duke improperly relies on 10 C.F.R. § 51.53(c)(3), which provides that applicants for license renewal need not include in the ER analyses of impacts of license renewal identified as Category 1 issues in Appendix B to Subpart A of Part 51.¹⁰² Instead, Petitioners argue that section 51.53(c)(3) applies only to applicants for *initial* license renewal; therefore, as an applicant for a *subsequent* license renewal, Duke may not rely on section 51.53(c)(3) and the Category 1 environmental findings in the GEIS in its ER.¹⁰³ Petitioners contend that, as a subsequent license renewal applicant, Duke is required to comply with 10 C.F.R. §§ 51.53(c)(2) and 51.45(a) and discuss in its ER “all significant environmental impacts of the proposed approval of Duke’s SLR application, including the environmental impacts of reactor accidents and alternatives for avoiding or mitigating those impacts.”¹⁰⁴ Because Duke’s ER adopted the GEIS Category 1 analyses in Table B-1, Appendix B, Subpart A, Part 51 in accordance with section 51.53(c)(3), Petitioners argue that the ER is insufficient and does not meet the NRC’s regulations.¹⁰⁵

¹⁰⁰ Petition at 11.

¹⁰¹ *Id.*

¹⁰² *Id.* at 12. Appendix B to Subpart A contains Table B-1, which codifies the analyses in NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (2013 GEIS) (June 2013).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 11.

¹⁰⁵ *Id.* at 12.

Petitioners acknowledge that their reading of section 51.53(c)(3) is contrary to the Commission's interpretation of this regulation in two other subsequent license renewal cases.¹⁰⁶ The Commission has held in two separate subsequent license renewal proceedings that an applicant for a subsequent license renewal, like Duke, may rely on section 51.53(c)(3) and the analyses in the GEIS as codified in Table B-1 in its ER.¹⁰⁷ Nevertheless, Petitioners argue that the rationale of the dissenting opinions in the *Turkey Point* and *Peach Bottom* Commission decisions should be adopted and followed in this proceeding.¹⁰⁸ The Petitioners have not, however, demonstrated that the Commission decisions in these subsequent license renewal cases were clearly erroneous, that applying them here would result in a manifest injustice, that intervening controlling authority makes reconsideration appropriate, or that substantially different evidence that impacts the Commission's holdings was introduced in a subsequent proceeding. As a result, the Commission decisions in these cases are controlling here and Contention 1 is inadmissible because it does not raise a genuine dispute with the application on a material issue of law, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).

In CLI-20-3, the Commission upheld the Board's interpretation that section 51.53(c)(3) applied to subsequent license renewals.¹⁰⁹ The language of section 51.53(c)(3) is as follows:

For those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995, the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations:

- (i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.

¹⁰⁶ *Id.* (citing *Turkey Point*, CLI-20-3, 91 NRC 141-45, and *Peach Bottom*, CLI-20-11, 92 NRC 343-44).

¹⁰⁷ *Turkey Point*, CLI-20-3, 91 NRC 133 and *Peach Bottom*, CLI-20-11, 92 NRC 335.

¹⁰⁸ Petition at 12.

¹⁰⁹ *Turkey Point*, CLI-20-3, 91 NRC at 135.

The Commission held that the plain regulatory language of section 51.53(c)(3) is ambiguous “because it ‘neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.’”¹¹⁰ The Commission found that a “holistic” reading of Part 51 and an examination of legislative history and NRC guidance supports the conclusion that section 51.53(c)(3) applies to all applicants for license renewal, including applicants for subsequent license renewal.¹¹¹

To begin its analysis, the Commission looked at other provisions in Part 51. The Commission noted that 10 C.F.R. §§ 51.95 and 51.71 do not differentiate between initial and subsequent license renewals by their terms.¹¹² However, both section 51.95(c) and section 51.71(d) direct the agency to analyze Category 2 issues in the draft SEIS, but to rely on the GEIS, as codified in Appendix B to Subpart A for Category 1 issues.¹¹³ The Commission concluded that to read section 51.53(c)(3) as applying only to initial license renewals “would require an applicant to provide analyses of Category 1 issues that the agency may not use in preparing the Draft SEIS because section 51.71(d) [and section 51.95(c)] already require[] the agency to consider the codified conclusions in Table B-1 for Category 1 issues.”¹¹⁴

The Commission further determined that restricting the applicability of section 51.53(c)(3) to initial license renewal applications would have the effect of limiting the applicability of the other subsections of 51.53(c)(3) to initial license renewals.¹¹⁵ As such, applicants for subsequent license renewals would not be able to use the Category 1 analyzes contained in

¹¹⁰ *Id.* at 141 (citing *Fla. Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4)*, LBP-19-3, 89 NRC 245, 265 (2019)).

¹¹¹ *Id.* at 141.

¹¹² *Id.* at 142-44.

¹¹³ *Id.* at 143.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 144.

Table B-1 (10 C.F.R. § 51.53(c)(3)(i)), but applicants for subsequent license renewal would also not be required to analyze Category 2 issues for specific plant designs as identified in Table B-1 (10 C.F.R. § 51.53(c)(3)(ii)), evaluate mitigation for Category 2 issues (10 C.F.R. § 51.53(c)(3)(iii)), or consider new and significant information related to license renewal (10 C.F.R. § 51.53(c)(3)(iv)).¹¹⁶ The Commission could not identify a reasoned basis for restricting the applicability of section 51.53(c)(3)(i) to initial license renewal applications without restricting the other subsections in the same manner; as such, the Commission determined that “the regulatory language and structure of section 51.53(c)(3) itself further supports [a] holistic reading of the regulation.”¹¹⁷

The Commission also considered the regulatory history of the 2013 update to the GEIS and determined that “the agency understood the subject of the GEIS—environmental impacts during a license renewal term—to include both impacts from an initial renewal or a subsequent license renewal.”¹¹⁸ The Commission also noted that agency guidance, namely Regulatory Guide 4.2, does not distinguish between initial and subsequent license renewal applicants.¹¹⁹

The Commission issued the decision in the *Peach Bottom* proceeding, CLI-20-11, about seven months after it decided the *Turkey Point* case. Petitioners in *Peach Bottom* raised the same issue regarding the interpretation of section 51.53(c)(3) as they raised in the *Turkey Point* proceeding. In *Peach Bottom*, the Commission reaffirmed its determination that section 51.53(c)(3) applies to both initial and subsequent license renewal applications.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 145 (citing *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-10, 53 NRC 353, 361 (2001)).

¹¹⁸ *Id.* at 146 (citing, 2013 GEIS at 7-27, 1-2 (“The GEIS for license renewal of nuclear power plants assesses the environmental impacts that could be associated with license renewal and an additional [twenty] years of power plant operation.”)).

¹¹⁹ *Id.* at 150.

The Commission's decisions in both *Turkey Point* and *Peach Bottom* regarding the interpretation of section 51.53(c)(3) are "controlling precedent" and should preclude acceptance of Petitioners' arguments in Contention 1.¹²⁰ A prior Commission decision on an issue should be applied to the issues raised in this petition unless the Board finds that: (1) the Commission decisions were clearly erroneous and their enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.¹²¹

Notwithstanding the dissenting opinions in *Turkey Point* and *Peach Bottom*, and despite Petitioners' argument that the dissents' reasoning should be adopted by the Board, the Commission's decisions in those cases were not "clearly erroneous" and the interpretation that section 51.53(c)(3) includes subsequent license renewals would not "work a manifest injustice," for all the reasons set forth by the Commission. Further, there has been no intervening controlling authority between the Commission's decisions and the present case and there has been no substantially different evidence provided here. As such, the determination that section 51.53(c)(3) applies to subsequent as well as initial license renewal applications should be applied as precedent in this case.

Even if the Board were to determine that section 51.53(c)(3) should be read as applying to initial license renewal only, Duke's reliance on the GEIS in its ER as a subsequent license renewal applicant is still permitted by the regulations. As acknowledged by the Commission in *Turkey Point*, Table B-1 in Appendix B to Part 51 applies to all license renewals.¹²² As stated in the regulations, Table B-1 "represents the analysis of the environmental impacts associated with

¹²⁰ *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-11, 63 NRC 483, 488 (2006) (internal citations omitted).

¹²¹ *Id.* at 488-89.

¹²² *Turkey Point*, CLI-20-3, 91 NRC at 157.

the renewal of *any* operating license and is to be used in accordance with § 51.95(c).¹²³

According to the Commission, “the codification of Category 1 issues rests in a different section of Part 51 than section 51.53(c). Therefore, even if section 51.53(c)(3) did not apply to subsequent license renewal applicants, a contention regarding a Category 1 issue in a license renewal proceeding would still be a challenge to section 51.71(d), section 51.95(c), and Table B-1 and hence inadmissible without a waiver.”¹²⁴

Petitioners’ Contention 1 is inadmissible because it does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi). The Commission has determined that 10 C.F.R. § 51.53(c)(3) applies to both initial and subsequent license renewals and, therefore, Duke’s reliance on this regulation to use the codified findings in the GEIS, as set forth in Table B-1 in Appendix B to Subpart A of Part 51, is permissible. The Commission’s decisions on this matter should be applied to the issue raised in Contention 1. And even if Petitioners were correct and Duke was prohibited from relying on section 51.53(c)(3), Duke would still be permitted to incorporate the GEIS findings in Table B-1 into its ER by the terms of Table B-1, which apply to “any license renewal.”¹²⁵ Accordingly, Petitioners fail to raise a material dispute on an issue of law in Contention 1 and the contention is, therefore, inadmissible.

V. Petition for Waiver

The Petitioners in this matter assert that “Duke’s Environmental Report fails to comply with the requirements of the NEPA and NRC implementing regulations.”¹²⁶ Generally, Petitioners assert that Duke fails to consider “new and significant” information as it relates to

¹²³ 10 C.F.R. Part 51, Subpart. A, Appendix B (emphasis added).

¹²⁴ *Turkey Point*, CLI-20-3, 91 NRC at 158.

¹²⁵ 10 C.F.R. Part 51, Subpart. A, Appendix B

¹²⁶ Petition at 2.

Oconee's SAMA analysis and the failure of the Jocassee Dam.¹²⁷ Petitioners also correctly assert that a petition for waiver is needed in order to admit the Petitioners' proposed Contentions 2 and 3.¹²⁸ The NRC Staff agrees with the Petitioners that a waiver is necessary to allow the Petitioners to challenge Category 1 findings, but the Petitioners neither meet the NRC standards that govern the issuance of a waiver nor proffer an admissible contention under 10 C.F.R. § 2.309(f)(1). As discussed in Sections IV and V, this petition should therefore be denied.

A. Standards Governing Petitions for Waiver

The rules concerning "Consideration of Commission rules and regulations in adjudicatory proceedings" are set forth in 10 C.F.R. § 2.335. Generally, NRC's rules and regulations are not "subject to attack" in an adjudicatory proceeding.¹²⁹ However, a participant to an adjudicatory proceeding may petition that the application of a specific regulation be waived or an exception be made for the particular proceeding.¹³⁰ The waiver request must demonstrate 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 purpose for which the rule or regulation was adopted," because rules apply generically, not on a case-by-case basis.¹³¹

If the presiding officer determines that the petitioner has not made "a prima facie

¹²⁷ *Id.* at 2-3.

¹²⁸ *Id.* at 18.

¹²⁹ 10 C.F.R. § 2.335(a); *see also Millstone*, CLI-03-14, 58 NRC at 218.

¹³⁰ 10 C.F.R. § 2.335(b).

¹³¹ 10 C.F.R. § 2.335(b); *See Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC 295, 302 (2015). The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit "must state with particularity the special circumstances alleged to justify the waiver or exception requested." 10 C.F.R. § 2.335(b). Other participants may file a response by counter-affidavit or otherwise. *Id.*

showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted[,] the presiding officer may not further consider the matter.”¹³² Still, even if the presiding officer does determine that a prima facie showing has been made, the presiding officer is required to certify the matter directly to the Commission, prior to ruling on the petition, so that the Commission can determine whether the application of the Commission rule or regulation or a provision thereof should be waived or an exception made, in consideration of a particular aspect or aspects of the subject matter of the proceeding.¹³³

In *Millstone*, the Commission established a four-factor test for waiver applications (also referred to as the *Millstone* factors):

- (i) the rule’s strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist 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) waiver of the regulation is necessary to reach a significant safety or environmental problem.¹³⁴

¹³² 10 C.F.R. § 2.335(c).

¹³³ 10 C.F.R. § 2.335(d).

¹³⁴ See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005). E.g., *Diablo Canyon*, CLI-15-21, 82 NRC at 302 (citation omitted). Regarding the fourth factor, the Commission later clarified that it “also may apply to a significant environmental issue.” *Limerick*, CLI-13-7, 78 NRC at 209.

All four factors must be met for a petitioner to obtain a waiver.¹³⁵ Notably, a petitioner seeking waiver of the rule must show that “there is something extraordinary about the subject matter of the proceeding such that the rule should not apply” to challenge the generic application of a rule.¹³⁶ The Commission has noted that the “waiver standard is stringent by design,” and that the waiver petitioner faces a “substantial burden.”¹³⁷

These requirements are applicable to contentions challenging the generic “Category 1” determinations in the GEIS for license renewal, including challenges based on “new and significant information.”¹³⁸ As the Commission explained, “[f]undamentally, any contention on a ‘Category 1’ issue amounts to a challenge to our regulation that bars challenges to generic environmental findings,” and “[a]djudicating Category 1 issues site by site based on merely a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”¹³⁹ Consequently, an intervenor must first obtain a waiver of the Commission’s rules adopting its generic environmental findings to challenge the Staff’s analysis of “new and significant” information on a Category 1 issue.¹⁴⁰

¹³⁵ *Millstone*, CLI-05-24, 62 NRC at 560. (citations omitted).

¹³⁶ *Limerick*, CLI-13-7, 78 NRC at 207. (citations omitted).

¹³⁷ *Id.* at 207-08. (citations omitted).

¹³⁸ *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 (2007).

¹³⁹ *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC 13, 20-21.

¹⁴⁰ *Exelon Generation Co.* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 386 (2012) (where the plant’s SAMAs were previously considered in an EIS a waiver is required to litigate new information concerning SAMA issues, given the proscription of such further litigation under 10 C.F.R. § 51.53(c)(3)(ii)(L)—which the Commission viewed “as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license renewal adjudications”).

B. Petitioners Do Not Make a Prima Facie Showing for a Waiver

The Petitioners seek a waiver of the NRC's regulations in 10 C.F.R. §§ 51.53(c)(3)(i), 51.53(c)(3)(ii)(L), 51.71(d), 51.95(c)(1), and 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1, to the extent these sections bar consideration of the Petitioner's contentions on Category 1 issues, but fail to make the requisite prima facie showing.¹⁴¹ Specifically, the Petitioners challenge "that the potential for a core melt accident caused by failure of the Jocassee Dam is significantly higher than estimated by Duke in its SAMA analysis"; that Duke failed to consider "new and significant" information in its ER, "showing that the past environmental analyses on which Duke relies are now demonstrably wrong, and that the risk of a core melt accident during a second license renewal term is significant and must be addressed"; and that "Duke fails to address the environmental significance of the Staff's 2011 Safety Evaluation that the potential for a random (i.e., "sunny day") Jocassee Dam failure constitutes an 'adequate protection' issue."¹⁴² Here, Petitioners do not meet the requirements for a prima facie showing that supports granting a waiver regarding these issues.

1. Petitioners Fail to Demonstrate that Strict Application of the Rule Would Not Serve the Purposes for Which it was Adopted

The Petitioners argue, in essence, that if they cannot raise these arguments against Category 1 exclusions in this adjudication, denial of their contentions would defeat the purpose of NEPA "by barring consideration of new and significant information."¹⁴³ For the first factor, the Petitioners provide the following:

¹⁴¹ To the extent the Petitioners discuss 10 C.F.R. § 51.71(d) and 10 C.F.R. § 51.95(c)(1), the Petitioners merely state that "[i]n reasonable anticipation that the same issues will arise upon publication by the NRC Staff of the draft and final Supplemental Environmental Impact Statements ("SEISs") for subsequent renewal of Duke's operating license, Petitioners also seek a waiver of 10 C.F.R. § 51.71(d) (which would apply the Category 1 exclusion to the draft SEIS) and 10 C.F.R. § 51.95(c)(1) (which would apply the Category 1 to the Final SEIS)." Petition at 18-19. Otherwise, the Petitioners do not provide other support for those sections.

¹⁴² Petition at 2–3, 21. (citations omitted)

¹⁴³ Petition at 20.

Application of the Category 1 exclusions in this proceeding would defeat the Commission's purpose of ensuring NEPA compliance and improving the quality of site-specific license renewal reviews, by barring consideration of new and significant information regarding the environmental impacts of operating Oconee Units 1, 2 and 3 in a subsequent license renewal term.¹⁴⁴

To the contrary, Duke must provide "new and significant information," as required by NRC's NEPA implementing regulations in 10 C.F.R. § 51.53(c)(3)(iv), and the NRC must consider it, regardless of whether a waiver or hearing are granted. Under 10 C.F.R. § 51.53(c)(3)(iv), an Applicant's ER "must include any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware."¹⁴⁵ Here, Duke has included an assessment of new and significant information in its ER.¹⁴⁶

Thus, to the extent that the Petitioners argue that the NRC must conduct a hearing in every case to properly consider "new and significant" information and meet its responsibilities under NEPA, their position is inconsistent with the regulations and Commission caselaw. The Commission has determined that admissible contentions must meet 10 C.F.R. Part 2 requirements and a hearing is not, in all cases, "necessary to satisfy [NRC's] NEPA obligations."¹⁴⁷ Regardless of whether a waiver or hearing is granted,¹⁴⁸ the NRC must consider

¹⁴⁴ *Id.* at 20-21.

¹⁴⁵ 10 C.F.R. § 51.53(c)(3)(iv).

¹⁴⁶ Environmental Report at 4-77.

¹⁴⁷ See *Limerick*, CLI-13-7, 78 NRC at 211 (citing *Blue Ridge Env'tl. Def. League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013) (deferring to NRC's decision not to admit petitioners' NEPA contentions for hearing where the NRC found the contentions did not satisfy 10 C.F.R. Part 2 contention admissibility requirements)); see also *Massachusetts v. NRC*, 708 F.3d at 78; *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 22.

¹⁴⁸ Petitioners may also submit information they believe to be new and significant by participating in the NRC's parallel NEPA process when, among other things, the Staff provides an opportunity for public comment on the draft supplemental EIS. See, *Limerick*, CLI-13-7, 78 NRC at 212. (citing 10 C.F.R. §§ 51.73, 51.74).

new and significant information.¹⁴⁹ Notably, the Commission has held that it “expect[s] that the Staff will incorporate any new SAMA-related information that it finds to be significant in the final supplemental EIS.”¹⁵⁰ Therefore, the Petitioners have failed to demonstrate that applying the rule that excludes Category 1 issues from consideration in this proceeding would bar such information from the environmental review of the Oconee SLR,¹⁵¹ or that strictly applying the rule would not serve the purposes for which the rule was adopted.¹⁵²

Instead, the Petitioners appear to be alleging a deficiency in the ER and providing another way the SAMA analysis could be done, but they fail to demonstrate that the SAMA analysis, as conducted, was unreasonable under NEPA standards. The Petitioners assert that “Duke does not comply with § 51.53(c)(3)(iv) because it has failed to consider new and significant information that would affect the outcome of its SAMA analysis.”¹⁵³ Additionally, Petitioners assert that there are additional mitigative measures that Duke should incorporate into its SAMA analysis, as discussed more fully in Section VI.A.2 of this answer.¹⁵⁴ In essence,

¹⁴⁹See 10 C.F.R. § 51.53(c)(3)(iv); see also *Limerick*, CLI-13-7, 78 NRC at 216 (The Commission “recognize[d] the NRC’s continuing duty to take a “hard look” at new and significant information for each “major federal action” to be taken.).

¹⁵⁰ *Limerick*, CLI-13-7, 78 NRC at 211.

¹⁵¹ 10 C.F.R. § 51.53(c)(3)(iv); see, e.g., *Limerick*, CLI-13-07, 78 NRC at 212-13; *Turkey Point*, CLI-01-17, 54 NRC at 11-12; *Pilgrim/Vermont Yankee*, CLI-09-10, 69 NRC at 527.

¹⁵²*Limerick*, CLI-13-7, 78 NRC at 208 (Noting that the first and second *Millstone* factor “track the plain language” of § 2.335(b) (citing, *Exelong Generation Company, LLC* (Limerick Generation Station, Units 1 and 2) LBP-13-1, 77 NRC 57, 64 (2013). See 10 C.F.R. § 2.335(b) (“The 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.”)).

¹⁵³ Petition at 16.

¹⁵⁴ Petition at 17. (citing, Mitman, Jeffrey T., *NRC Relicensing Crisis at Oconee Nuclear Station: Stop Duke from Sending Safety Over the Jocassee Dam* (Sept. 2021) at 24 (Mitman Report)).

the Petitioners argue that Duke must perform a new SAMA analysis as part of this license renewal process to account for the “new and significant” information the Petitioners assert.¹⁵⁵

Contentions admitted for litigation must, however, point to a deficiency in the application and not merely suggest other ways the analysis could have been conducted or other details that could have been included.¹⁵⁶ As 10 C.F.R. § 51.53(c)(3)(ii)(L) acts as a “functional equivalent of a Category 1 designation” for plants where a SAMA has already been conducted, “the issue has been carved out from adjudication.”¹⁵⁷ To support a waiver under 10 C.F.R. § 2.335 and admit Contention 1 for hearing, the Petitioners must demonstrate not that there are other ways of conducting a SAMA analysis, but that the SAMA analysis in this application has a “potentially significant deficiency...that credibly could render the SAMA analysis unreasonable under NEPA standards.”¹⁵⁸

Petitioners, challenging the previous SAMA analysis by providing “another input or methodology that could have been used in the SAMA[.]”¹⁵⁹ fail to meet the standards for waiver or contention admissibility.¹⁶⁰ Accordingly, the Petitioners do not provide information sufficient to show that strict application of the exception in 10 C.F.R. § 51.53(c)(3)(ii)(L) would not serve the purposes for which it was adopted and fail to meet the first *Millstone* factor.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Limerick*, CLI-13-7, 78 NRC at 216 (citations omitted).

¹⁵⁷ *Id.* at 211-12. (citations omitted).

¹⁵⁸ *Id.* at 215-16 (citations omitted).

¹⁵⁹ *Id.* at 216 (citing *Entergy Nuclear Generation Comp. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) CLI-12-1, 75 NRC 39, 57 (2012); see also *Seabrook*, CLI-12-5, 75 NRC at 323.)

¹⁶⁰ *Seabrook*, CLI-12-5, 75 NRC at 323 (“[T]he proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA. We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely ‘suggestions’ of other ways an analysis could have been done, or other details that could have been included.”).

2. Petitioners Do Not Demonstrate That Special Circumstances, Previously Not Considered, Exist with Respect to this License Renewal Review

The Petitioners challenge the Applicant's ER and its SAMA analysis, but their arguments generally pertain to the current operating status of the facility, rather than issues appropriate for consideration in the context of the license renewal application. The sole support the Petitioners offer to meet the second factor is as follows:

This Waiver Petition raises special circumstances that were not previously considered, because no previous environmental impact statement has considered the new and significant information presented in Mr. Mitman's Expert Report and Petitioners' Contentions 2 and 3.¹⁶¹

The information on which the Petitioners rely does not demonstrate special circumstances that were not previously considered. Additionally, the concerns the Petitioners raise regarding protection against a failure of the Jocassee Dam are known. External flood hazards are appropriately considered—and indeed, have been considered—in ongoing oversight of Oconee's operations.¹⁶² In particular, in the 2016 "Staff Assessment of Response to Request for Information Pursuant to 10 C.F.R. § 50.54(f) Flood-Causing Mechanisms Reevaluation ... and Path Forward on Confirmatory Action Letter" cited to by the Petitioners' expert,¹⁶³ the NRC Staff stated that:

[t]he licensee's 2015 submittal ... considered the potential for hydrologic, seismic, and sunny-day failures of Jocassee dam, whereas the licensee's submittal in 2010 only considered the potential for sunny-day failure."¹⁶⁴

¹⁶¹ Petition at 21.

¹⁶² *E.g.*, Oconee Nuclear Station, Units 1, 2 & 3, Revision 27 to "Updated Final Safety Analysis Report", Chapter 2, Site Characteristics, "2.4.4 Potential Dam Failures, Seismically Induced", 2.4-4 (Dec. 2017) (ML18192A896); "Oconee Nuclear Station, Units 1, 2, and 3—Flood Hazard Mitigation Strategies Assessment (CAC NOS. MF7950, MF7951 AND MF7952)" (July 11, 2017) (ML17166A260) (2017 MSA) ("The purpose of this letter is to provide the NRC's assessment of the Oconee MSA [flooding mitigation strategies assessment].").

¹⁶³ See Mitman Report at 5.

¹⁶⁴ "Response to Freedom of Information Act (FOIA Request)": "Oconee Nuclear Station, Units 1, 2, and 3—Staff Assessment of Response to Request for Information Pursuant to 10 C.F.R. § 50.54(f) Flood-Causing Mechanisms Reevaluation (CAC Nos. MF1012, MF1013, and MF1014) and Path Forward on Confirmatory Action Letter" (2016 Staff Assessment), Enclosure 2: "Addendum to Oconee Nuclear Station

The NRC Staff also included a footnote (Footnote 6) to that sentence which states:

In 2010, the staff considered hydrologic and seismic failure when originally approaching the issue of reviewing the Jocassee Dam failure question, but determined those failures to have minimal impact on the site. So while the submittal and SA [Staff Assessment] are silent on those two failure mechanisms they were considered during the review process of the 2010 submittal.¹⁶⁵

Additionally, the licensee's 2015 submittal referenced above states that:

Enclosure 1 to this letter is the revised "*Flood Hazard Reevaluation Report*" for Oconee Nuclear Station. It incorporates the results of a revised flood analysis which utilizes alternate breach methodologies, as requested by the September 15, 2014 RAI. It also incorporates a recently completed seismic analysis specific to the Jocassee Dam, which satisfies the request framed by RAI1 of the March 20, 2014 RAI.¹⁶⁶

The "new and significant information" the Petitioners cite at Oconee and their preferred alternatives for completing a SAMA analysis to protect against external flood hazards—here, the failure of the Jocassee Dam—are neither new nor within the scope of license renewal. Therefore, the Petitioners have not demonstrated that the external flood hazard from a Jocassee Dam failure is a special circumstance not previously considered. Accordingly, the Petitioners have not met the second *Millstone* factor.

3. Petitioners Do Not Show That Special Circumstances Exist that Are Unique to Oconee Units 1, 2, and 3

Petitioners argue that Duke's risk assessment is "unique to the circumstances of that nuclear plant" because it considers information specific to Oconee, however, this argument could be applied to all nuclear plants that conduct a SAMA analysis, as the nature of the analysis requires consideration of information specific to the site. To the extent the Petitioners are referring to Duke's SAMA analysis for Oconee, 10 C.F.R. Part 51, Subpart A, Appendix B,

Units 1, 2, And 3 FHRR [Flood Hazard Reevaluation Report] Staff Assessment" at 3. (ML16273A128) (The letter (dated, Apr. 14, 2016) is also available at: ML15352A207).

¹⁶⁵ 2016 Staff Assessment, Enclosure 2 at 3 (ML16273A128).

¹⁶⁶ "Revised Flood Hazard Reevaluation Report per NRC's Request for Additional Information" (ML15072A106) (Mar. 6, 2015) (2015 Revised Flood Hazard Reevaluation Report).

Table B-1 identifies “Severe accidents” as “Category 2.”¹⁶⁷ Table B-1 goes on to define “Category 2” as “[f]or the issue, the analysis reported in the Generic Environmental Impact Statement has shown that one or more of the criteria of Category 1 cannot be met, and therefore additional plant-specific review is required.”¹⁶⁸ As a result, as SAMA analysis is considered a Category 2 issue¹⁶⁹, site-specific information is required.¹⁷⁰

In support of the third factor, the Petitioners’ assert:

This Waiver Petition raises circumstances that are unique to Oconee Units 1, 2 and 3, because the risk assessment relied on by Duke for Oconee Units 1, 2 and 3 is unique to the circumstances of that nuclear plant, i.e., a large 3-unit nuclear reactor complex built beneath two large dams (Jocassee and Keowee). Oconee is also unique because there is no NRC generic environmental impact statement that addresses the environmental impacts of operating another reactor in the shadow of a large dam, in consideration of the risk information presented in the Mitman Report.¹⁷¹

To the extent Petitioners state that Oconee is unique because of its site characteristics, the Staff agrees, and accordingly, because of the site characteristics, a site-specific evaluation of the dam failure during initial license renewal was required, and was performed.¹⁷² The crux of the

¹⁶⁷ 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1, “Postulated Accidents”.

¹⁶⁸ 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1, End Note 2, “Category 2”.

¹⁶⁹ Notably, the 1996 “Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report (NUREG-1437, Volume 1)” in Section 1.5, “1.5 Analytical Approach Used in the GEIS”, states, “For example, severe accident mitigation design alternatives under the issue “severe accidents” is the focus for a plant-specific review because the other aspects of the issue, specifically the off-site consequences, have been adequately addressed in the GEIS.” (1996 GEIS) (Available at: <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/v1/index.html#1Contents>).

¹⁷⁰ As noted in the 1996 GEIS in Section 5.4.1.5., “Conclusion,” “[A] site-specific consideration of alternatives to mitigate severe accidents shall be performed for license renewal unless such a consideration has already been included in a previous EIS or related supplement.” See also *Limerick*, CLI-13-7, 78 NRC at 211 (“[T]he exception in section 10 C.F.R. § 51.53(c)(3)(ii)(L) operates as the ‘functional equivalent’ of a Category 1 designation ‘[f]or Limerick and similarly-situated plants for which SAMAs were already considered in an Environmental Impact Statement or Environmental Assessment.’” (citations omitted)).

¹⁷¹ Petition at 21-22.

¹⁷² E.g., “Applicant’s Environmental Report”, Attachment K, “Oconee Nuclear Station Severe Accident Mitigation Alternatives (SAMAs) Analysis” (Apr. 1998) (Available at: <https://www.nrc.gov/reactors/operating/licensing/renewal/applications/oconee/exhibitd.pdf> - Page 244/312)

Petitioners' support for the third *Millstone* factor is that Oconee's consideration of site-specific information is "unique," but each SAMA analysis, by its nature, requires site-specific analysis of the unique characteristics of each site. As such, Petitioners' argument could apply to all licensees conducting a SAMA analysis and offers nothing unique to Oconee. Accordingly, the Petitioners do not demonstrate that special circumstances support their waiver request.

4. Petitioners Have Not Demonstrated that a Waiver of the Requested Regulations is Necessary to Reach a Significant Safety or Environmental Issue

The Petitioners generally challenge the current operating condition of Oconee, in that their arguments assert that "Duke's failure to implement [NRC identified measures] constitute information that is relevant to environmental risk from operation of Oconee and therefore warrants consideration under NEPA."¹⁷³ Notably, the Commission has previously stated in the *Diablo Canyon* decision that:

At bottom, [the Petitioner] argues that a safety issue relating to the current operation of [the site] requires attention as part of this license renewal proceeding. But we contemplated precisely this type of circumstance when we devised the licensing structure of Part 54. We were aware, when adopting the rule, that issues "relevant to current plant operation" could arise while a license renewal application was under review, and, based on our confidence in the NRC's regulatory process, we reaffirmed our view that those issues are best addressed as part of our regular oversight activities, outside of license renewal.¹⁷⁴

at 15-16 ("A possible way of reducing the frequency of the initiating event 'random failure of Jocassee Dam' is to redesign and strengthen the dam. The cost to perform this modification will far exceed the benefit of core damage frequency reduction." ... "The current five foot high flood barrier surrounding the Oconee SSF is considered to be effective 80% of the time (60% for seismically caused Jocassee Dam failure.").

¹⁷³ Petition at 22.

¹⁷⁴ *Diablo Canyon*, CLI-15-21, 82 NRC at 307 (citing License Renewal Rule, 60 Fed. Reg. at 22,463-64. ... "Yet, when issuing our license renewal regulations, we explained plant licensing basis as follows: 'The [current licensing basis] represents the *evolving* set of requirements and commitments for a specific plant *that are modified as necessary over the life of a plant* to ensure continuation of an adequate level of safety.' License Renewal Rule, 60 Fed. Reg. at 22,473 (emphasis added). Modifications to a plant's licensing basis made outside of license renewal could include, for instance, changes addressing newly discovered seismic risks.")

Additionally, as discussed above on the first *Millstone* factor, the Commission has observed that a hearing is not, in all cases, “necessary to satisfy [NRC’s] NEPA obligations.”¹⁷⁵

Here, the Petitioners’ support of the fourth *Millstone* factor is as follows:

Petitioners respectfully submit that waiver of the regulations is necessary to address significant adverse environmental impacts that have not previously been considered, as well as SAMAs that may be cost-effective in preventing or mitigating those impacts but that have not previously been considered. These SAMAs include measures deemed necessary by NRC under its Atomic Energy Act-based regulations, but which were not implemented to Petitioners’ knowledge. The NRC’s identification of these measures as necessary, and Duke’s failure to implement them, constitute information that is relevant to environmental risk from operation of Oconee and therefore warrants consideration under NEPA.¹⁷⁶

While the “measures” purportedly required or not implemented are not identified with specificity, the Petitioners’ concerns appear to point to a current condition of the site—the impact of flooding from a potential failure of the Jocassee Dam on the site. The Petitioners appear to challenge Oconee’s compliance with existing requirements; such challenges are outside the scope of license renewal. Accordingly, the Petitioners have not demonstrated that a waiver of the requested regulations is necessary to reach a significant safety or environmental issue, and therefore, do not meet the fourth *Millstone* factor.

VI. Admissibility of Petitioners’ Contentions 2 and 3

Contentions 2 and 3 challenge the adequacy of Duke’s Environmental Report, and more specifically, Duke’s alleged failure to consider the environmental implications of a core melt accident caused by a Jocassee dam failure.¹⁷⁷ However, as Petitioners acknowledge, these

¹⁷⁵ See *Limerick*, CLI-13-7, 78 NRC at 211 (citations omitted).

¹⁷⁶ Petition at 22.

¹⁷⁷ *Id.* at 18.

issues may not be challenged in litigation absent a waiver under 10 C.F.R. § 2.335.¹⁷⁸ Because the Petitioners neither meet the standards for waiver, as demonstrated above, nor, as discussed below, demonstrate that the issues they raise are within the scope of this licensing proceeding, Contentions 2 and 3 must be rejected.

A. Analysis of Proposed Contentions 2 and 3

1. Statements of Contention

Contentions 2 and 3 of the Petition are very similar in nature. In fact, Petitioners discuss and incorporate by reference much of Contention 2 into the analysis for Contention 3. As a result of the overlapping information contained in both contentions, this analysis addresses Contentions 2 and 3 together.

In support of their contentions, Petitioners rely on NEPA, 10 C.F.R. § 51.45, and the Mitman Report.¹⁷⁹ Petitioners assert in Contention 2 that Duke violated NRC's NEPA implementing regulations, in contravention of NEPA and 10 C.F.R. § 51.53(c)(3)(iv) by failing to address "new and significant information regarding the environmental impacts of license renewal of which [Duke] is aware."¹⁸⁰ Petitioners assert in Contention 3 that Duke violated 10 C.F.R. § 51.53(c)(3)(iv) by failing to "consider new and significant information that would affect the outcome of [Duke's] SAMA analysis."¹⁸¹ More specifically, the Petitioners' "statement of contention" for Contention 2 reads:

The new and significant information of which Duke is aware, and that is not addressed in the Environmental Report, consists of the following:

- Duke's own risk analyses show that the likelihood of a core melt accident and containment failure caused by a random failure of the Jocassee Dam is significantly higher than presented in Duke's Environmental Report. And

¹⁷⁸ *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 17-18 (footnotes omitted), reconsid. denied, CLI 07-13, 65 NRC 211, 214 (2007).

¹⁷⁹ Petition at 14, 17.

¹⁸⁰ *Id.* at 13.

¹⁸¹ *Id.* at 16.

even this higher estimate of Jocassee Dam failure frequency is too low, given Duke's failure to consider the additional credible contributors to Jocassee dam failure frequency of seismic events and dam overtopping.

- Duke fails to address the environmental significance of a 2011 Safety Evaluation, in which the NRC Staff determined that the potential for a random (i.e., "sunny day") Jocassee Dam failure constitutes an "adequate protection" issue requiring Duke to implement additional measures to protect against flooding of essential safety equipment and thereby prevent a reactor meltdown. By establishing the risk of a core melt accident with an associated containment failure due to failure of the Jocassee Dam as an adequate protection issue, the NRC effectively established it as a significant environmental issue as well.¹⁸²

Petitioners' "[s]tatement of contention" for Contention 3 reads:

The new and significant information of which Duke is aware and that is not addressed in the Environmental Report consists of the following:

- As discussed above in Contention 2, Duke's own risk analyses show that the likelihood of a core melt accident caused by a random failure of the Jocassee Dam is significantly higher than presented in Duke's Environmental Report. And even this higher estimate of Jocassee Dam failure frequency is too low, given Duke's failure to consider the additional credible contributors to Jocassee dam failure frequency of seismic events and dam overtopping. Contention 2 is hereby adopted and incorporated by reference.
- The NRC's 2011 Safety Evaluation, discussed above in Contention 2, required Duke to implement certain measures for protection against a random (i.e., "sunny day") Jocassee Dam failure as a matter of providing "adequate protection" to public health and safety. By deeming these measures necessary, the NRC established them as SAMAs worthy of consideration. Indeed, in order to exclude a necessary safety measure, Duke would have a very high burden of justification. Yet, these measures are not discussed or implemented in the Environmental Report.
- The Environmental Report fails to consider additional mitigative measures that may well be cost-effective at Oconee, given the increased likelihood of a core melt accident. These measures include preemptively shutting down the reactors when reservoir water levels get too high, lowering the water levels in the lake behind the Jocassee and Keowee Dams, or lowering the crest elevation of some of the surround earthworks such that they overtop before the Jocassee Dam, thus lowering the flood impacts at [Oconee].¹⁸³

¹⁸² *Id.* at 14.

¹⁸³ *Id.* at 16-17.

2. Staff Response to Contentions 2 and 3

Contentions 2 and 3 fail to satisfy the criteria in 10 C.F.R. § 2.309(f)(1)(iii), (iv) and (vi)—the contentions do not demonstrate that the issues raised are within the scope of the proceeding or are material to the findings that the NRC must make to support the action here, nor do the contentions provide sufficient information to show that a genuine dispute exists on a material issue of fact or law. Therefore, the contentions should not be admitted and the petition should be denied.

The analysis of combined Contentions 2 and 3 is addressed in the following order: (i) Duke failed to consider new and significant information showing that its risk analysis for a random sunny day failure at Jocassee Dam is wrong and it failed to consider additional contributors such as seismically-induced dam failure and dam overtopping;¹⁸⁴ (ii) Duke failed to address the safety and environmental significance of the NRC's 2011 Safety Evaluation in its Environmental Report, which required Duke to implement additional measures to protect against flooding of essential safety equipment and which Petitioners assert would have made these measures a *de facto* SAMA;¹⁸⁵ and (iii) Duke failed to consider additional mitigative measures that may be cost-effective at Oconee and would also lower the flood impacts at Oconee.¹⁸⁶

- i. The Petitioners' claims that Duke's risk analysis of a random sunny day failure at Jocassee Dam is "wrong" and that Duke failed to consider seismically-induced dam failure and dam overtopping are out of scope, not material to required findings, and fail to show a genuine dispute with Duke.

¹⁸⁴ *Id.* at 14-16.

¹⁸⁵ *Id.* at 14, 16-17.

¹⁸⁶ *Id.* at 17.

The NRC Staff evaluates new and significant information during subsequent license renewal as it relates to the previous SAMA analysis.¹⁸⁷ The Petitioners assert that Duke failed to consider “new and significant” information and that the underlying original SAMA analysis for the site is “wrong”, based upon the calculations and assumptions of Petitioners’ expert.¹⁸⁸ Specifically, the Petitioners argue in their “basis statement” that a “reasonable best estimate for core damage frequency from a Jocassee Dam failure is 2.8E-4 per year, which is significantly larger than the probability of 5.9E-06, as presented in Duke’s SAMA analysis.”¹⁸⁹ The “new and significant information” Petitioners proffer is that Duke’s own risk analyses showing the likelihood of a core melt accident and containment breach caused by a “sunny day” failure at Jocassee Dam is, according to the Petitioners’ expert, significantly higher than presented in Duke’s ER.¹⁹⁰ The Petitioners assert that the significance of this is “highlighted by the fact that a core damage frequency of 2.8E-04 per year is larger than the total core damage frequency from all Oconee internal events of 2.4E-05 per year, and also larger than Duke’s estimate of 6.3E-05 per year for all external events”¹⁹¹ The Petitioners also claim that Duke failed to

¹⁸⁷ See, e.g., *Limerick*, CLI-13-7, 78 NRC at 216-17. Notably, the NRC Staff provides guidance in Regulatory Guide 4.2, Supplement 1, Revision 1, “Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications” (June 2013) that defines “new and significant information” as (1) information that identifies a significant environmental impact issue that was not considered or addressed in the GEIS and, consequently, not codified in Table B-1, “Summary of Findings on NEPA Issues for License Renewal of Nuclear Plants,” in Appendix B, “Environmental Effect of Renewing the Operating License of a Nuclear Power Plant,” to Subpart A, “National Environmental Policy Act—Regulations Implementing Section 102(2),” of 10 CFR Part 51, or (2) information not considered in the assessment of impacts evaluated in the GEIS leading to a seriously different picture of the environmental consequences of the action than previously considered, such as an environmental impact finding different from that codified in Table B-1. Further, a significant environmental issue includes, but is not limited to, any new activity or aspect associated with the nuclear power plant that can act upon the environment in a manner or an intensity and/or scope (context) not previously recognized.” (ML13067A354). (citations omitted)

¹⁸⁸ Mitman Report at 18-25.

¹⁸⁹ Petition at 15 (citing Mitman Report at 21).

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.* at 15 (citing Mitman Report at 21).

consider assertedly new and significant information that takes into account additional contributors to dam failure risk, such as seismically-induced dam failure and dam overtopping.¹⁹² The Petitioners do not, however, establish how this information is new and significant.¹⁹³

The Commission has set out the particular showing for a contention asserting an inadequate SAMA analysis in the license renewal context. In order for the Petitioners to litigate SAMA-related issues in an adjudication, they must demonstrate “a ‘potentially significant deficiency’ in the SAMA analysis—that is, a deficiency that credibly could render the SAMA analysis unreasonable under NEPA standards.” Otherwise, “[i]t always will be possible to conceive of yet another input or methodology that could have been used in the SAMA computer modeling, and many different inputs and approaches may all be reasonable choices.”¹⁹⁴ As also noted above, the Commission has held that “the proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA.”¹⁹⁵ Here, the Petitioners simply wish for more analysis to be done; they have not explained how this “new and significant” information renders the Staff’s SAMA analysis for Oconee unreasonable under the applicable standards.

¹⁹² *Id.*

¹⁹³ *See Id.* at 21. (In discussion of the petition for waiver, to support the assertion that the information provided by the Petitioners is “new”, the Petitioners state: “The information is new because it has not previously been considered in any environmental document by Duke or the NRC.” To support the assertion that the aforementioned information is “significant”, the Petitioners state the following: “The information is significant because the difference in risk estimates is high enough to present a seriously different picture of the risk of a core melt accident at Oconee, and affects the cost-benefit analysis of SAMAs to avoid or mitigate those impacts.” (citing Mitman [] Report at 24)”)

¹⁹⁴ *Limerick*, CLI-13-7, 78 NRC at 216 (citing, *Pilgrim*, CLI 12-1, 75 NRC at 57).

¹⁹⁵ *Id.* n.93 (quoting *Seabrook*, CLI-12-5, 75 NRC at 323).

Since 2010, as part of its ongoing regulatory oversight, the NRC Staff has engaged extensively with Duke on its flood hazard analysis for Oconee.¹⁹⁶ Notably, in the 2016 Staff Assessment:

The NRC staff has determined that the 2010 licensee evaluation reflects a bounding flood hazard analysis for Oconee based on conservative assumptions. The 2015 evaluation reflects a reasonable analysis that removes some conservatism from the 2010 analysis, and is consistent with recent Commission direction regarding licensees' flood hazard reevaluation in response to the 50.54(f) letter. Therefore, the NRC staff concluded that the licensee's estimated flood levels at [Oconee] are considered reasonable and satisfy the information requests for each letter. Further, the staff concludes that the revised 2015 FHRR [Flood Hazard Reevaluation Report] provides an acceptable alternative flood hazard analysis for [Oconee] for the purpose of meeting the terms of the June 22, 2010, NRC Confirmatory Action Letter (CAL). Following the completion of the associated flooding modifications by June 2016, the NRC will evaluate whether the terms of the CAL have been satisfied.^[197]

By letter dated January 8, 2016, Duke submitted supplemental information regarding the external flooding hazards for Oconee. In that letter, Duke indicated its intent to maintain in effect certain compensatory actions implemented in response to the CAL. The NRC views these actions as an important element in Duke's overall strategy to mitigate the risks associated with a potential failure of the Jocassee Dam. Also in that letter, you stated your intent to revise the Oconee Updated Final Safety Analysis Report to reflect the results of the revised FHRR and the related actions taken by Duke to resolve external flooding issues, in accordance with forthcoming NRC guidance. Going forward, the NRC staff will address ongoing external flooding issues for Oconee within the framework of the Fukushima Near-Term Task Force Recommendation 2.1 process, to ensure consistency in the staff's approach to addressing these issues for all plants.¹⁹⁸

¹⁹⁶ *E.g.*, 2015 Revised Flood Hazard Reevaluation Report; 2016 Staff Assessment.

¹⁹⁷ *See also*, "Oconee Nuclear Station—Confirmatory Action Letter Followup Inspection Report 05000269/2016009, 05000270/2016009, AND 05000287/2016009", at 1 (June 16, 2016) (2016 Confirmatory Action Letter Followup Inspection Report) (ML16168A176) ("The NRC has determined that the results of this inspection, in conjunction with previously completed inspection activities related to interim compensatory measures, and the April 14, 2016, NRC staff assessment letter approving the revised Flood Hazard Reevaluation Report (FHRR) (ML15352A207), provide adequate assurance that the required terms as directed by the June 22, 2010 CAL have been satisfied by [Oconee]. The June 22, 2010, Confirmatory Action Letter is now closed. As stated in the April 14, 2016, letter the NRC staff will address ongoing external flooding issues for [Oconee] within the framework of the Fukushima Near-Term Task Force Recommendation 2.1 process, to ensure consistency in the staff's approach to addressing these issues for all plants.")

¹⁹⁸ 2016 Staff Assessment at 2. (Noting on page 4 of "Enclosure 2: Addendum to Oconee Nuclear Station Units 1, 2, And 3 FHRR [Flood Hazard Reevaluation Report] Staff Assessment" that "...the staff concludes that the revised 2015 FHRR provides an acceptable evaluation of a postulated sunny day failure of the

Furthermore, the Staff also stated in the 2016 Staff Assessment that: “[t]he licensee’s 2015 submittal ... considered the potential for hydrologic, seismic, and sunny-day failures of Jocassee Dam, whereas the licensee’s submittal in 2010 only considered the potential for sunny-day failure”, and included a footnote indicating that, “[i]n 2010, the staff considered hydrologic and seismic failure when originally approaching the issue of reviewing the Jocassee Dam failure question, but determined those failures to have minimal impact on the site. So, while the submittal and SA [Staff Assessment] are silent on those two failure mechanisms they were considered during the review process of the 2010 submittal.”¹⁹⁹

Moreover, as the Commission stated in *Limerick*, alternatives to SAMA methodology or inputs will always be possible: a showing that the alternative information would have a significant impact on the environmental analysis is therefore necessary to raise a cognizable claim in an adjudicatory proceeding.²⁰⁰ Here, the Petitioners state generally that, “Duke’s failure to account for this information is profoundly significant, because a significant flooding event at Jocassee would inevitably lead to containment failure and a core melt accident.”²⁰¹ Additionally,

Jocassee Dam, and is appropriate to consider in assessing the need for specific actions included in the June 22, 2010 NRC Confirmatory Action Letter.”); *See also*, “Oconee Nuclear Station, Units 1,2,3–Staff Assessment of Flooding Focused Evaluation (CAC NOS. MG0265, MG0266, MG0267, and EPID L-2017-JLD-0029)” (ML18141A755) (June 18, 2018). (“The NRC staff has further concluded that the licensee has demonstrated that effective flood protection, if appropriately implemented, exists for the [local intense precipitation], streams and rivers, and dam breach flood mechanisms during a beyond-design-basis external flooding event. No further information is needed from the licensee related to the reevaluated flooding hazard portion of the 50.54(f) letter and this letter closes out the NRC Staff’s efforts associated with CAC Nos. MG0265, MG0266, MGD267, and EPID L-2017-JLD-0029.”); *See also* “Oconee Nuclear Station, Units 1, 2, and 3–Documentation of The Completion of Required Actions Taken In Response to The Lessons Learned From The Fukushima Dai-Ichi Accident.” (Nov. 17, 2020) (ML20304A369). (“The purpose of this letter is to acknowledge and document that the actions required by the U.S. Nuclear Regulatory Commission (NRC) in orders issued following the accident at the Fukushima Dai-ichi Nuclear Power Station have been completed for Oconee Nuclear Station, Units 1, 2, and 3 (Oconee).”)

¹⁹⁹ 2016 Staff Assessment, Enclosure 2 at 3.

²⁰⁰ *Limerick*, CLI-13-7, 78 NRC at 215-16.

²⁰¹ Petition at 15. (citing Mitman Report at 22).

the Petitioners' expert has calculated an alternate core damage frequency (CDF) for the SAMA but has not shown that Duke's calculation is unreasonable or how the recalculated CDF would significantly impact the Staff's environmental analysis, especially in light of the aforementioned 2016 Staff Assessment. The information provided by the Petitioners does not, as required, "present 'a seriously different picture of the environmental impact of the proposed action from what was previously envisioned."²⁰² Because the information proffered by the Petitioners is not new and significant, they have not raised an issue that is material to the findings the NRC must make in this licensing action and do not raise a material dispute with the application on an issue of fact.

Petitioners also erroneously conflate safety issues with the consideration of environmental impacts under NEPA.²⁰³ Seismic and flood hazard issues are addressed by the NRC as part of its ongoing oversight activities at all licensed nuclear facilities, and therefore the NRC's assessment of seismic and flood hazards for existing nuclear power plants is "a separate and distinct process from license renewal reviews."²⁰⁴ A licensee's purported failure to consider

²⁰² See *Callaway*, CLI-11-5, 74 NRC at 167-68 (citing *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 14).

²⁰³ *Distinguish, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-06-23, 64 NRC 257, 340, 349 (2006) ("While emergency planning ... is one of the safety issues that need not be re-examined within the context of license renewal, what is challenged here is whether particular bits of information taken from such a plan are sufficiently accurate for use in computing the health and safety consequences of an accident, as an environmental issue. Such a challenge is not a challenge to existing emergency planning for this plant or to the plan itself, but is instead focused upon the accuracy of certain assumptions and input data used in the SAMA computations and how they affect the validity of the SAMA analysis under NEPA—and as such, we find [Pilgrim Watch's] challenge to the accuracy of the input data to be appropriate..." ... "Applicant's SAMA analysis for the Pilgrim plant is deficient in that the input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives..." (internal quotes removed). Here, while the Petitioners assert a different calculation regarding a particular input in Duke's SAMA analysis, the crux of the Petitioners' concerns focuses chiefly on addressing a purported ongoing safety concern that goes to the current operating status of Oconee, rather than to an environmental concern as noted in *Pilgrim*. (See also Mitman Report at 18). And the Petitioners offer their preferred approach for SAMA analysis but do not demonstrate that what the applicant did was deficient. Petition at 15.

²⁰⁴ 2013 GEIS at 1-16.

seismically-induced dam failure and dam overtopping, if true, would be a “current operating issue” that would be addressed through ongoing oversight of operation of the facility, not through license renewal, which focuses on issues associated with aging of the facility.²⁰⁵ NRC “regulations rely on the regulatory processes applicable to all currently operating reactors to address most safety and security issues, limiting license renewal proceedings to consideration of only certain issues related specifically to plant aging.”²⁰⁶ Additionally, assuming the Petitioners are referring to the CDF from external flooding,²⁰⁷ the focus of the Petitioners’ argument turns on the accuracy and sufficiency of the licensee’s external flood hazard analysis. This information goes directly to the licensee’s analysis as to the current state of Oconee’s operating status to protect against external flood hazards, here a “sunny day” Jocassee Dam failure.²⁰⁸ In sum, the Petitioners appear to assert that because their contention raises an alleged safety concern, that there would be, by default, “new and significant” information that would be required for the NRC to consider to meet its obligations under NEPA.²⁰⁹ But the Petitioners do not challenge any aspect of Duke’s aging management review or evaluation of the plant’s systems, structures, and components subject to time-aging analysis, and therefore

²⁰⁵ See *Diablo Canyon*, CLI-15-21, 82 NRC at 304–05.

²⁰⁶ *Id.* at 304-5 (citing 10 C.F.R. §§ 54.4, 54.21, and 54.29(a)).

²⁰⁷ The SAMA analysis table, referenced on page 21 of the Mitman Report, shows core damage frequency from four different external events: seismic (3.9E-05), tornado (1.4E-05), external flooding (5.9E-06), and fire (4.5E-06), with a core damage frequency for total external events being 6.3E-05.

²⁰⁸ See *Turkey Point*, CLI-01-17, 54 NRC at 16 (The Commission found that the “[t]he Licensing Board correctly concluded that [a contention was] outside of the scope of license renewal reviews and proceedings [because as] the Board found, the contention ‘does not raise any aspect of the Applicant’s aging management review or evaluation of the plant’s systems, structures, and components subject to time-aging analysis.’ It does not, then, identify any issue encompassed by the NRC safety review for license renewal, conducted under 10 C.F.R. Part 54, that focuses on aging.”) (internal citations omitted).

²⁰⁹ See Mitman Report at 18. (“Yet, it is my understanding that NRC regulations for license renewal exclude it from the scope of safety issues that may be reviewed, because it does not relate to the aging of Oconee’s safety equipment. However, the NRC must also review Duke’s SLR application under the National Environmental Policy Act (NEPA), which requires NRC to fully evaluate the environmental impacts of its proposed actions, including the environmental impacts of reasonably foreseeable accidents.”).

do not identify any issue encompassed by the NRC safety review for license renewal, which focuses on aging.

The Petitioners also argue that Duke “fails to consider the risk contribution from shutdown operations,”²¹⁰ but shutdown operations are a current operating issue, and not unique to whether Oconee’s licenses should be renewed.²¹¹ As the Commission noted in *Diablo Canyon*, “a central principle of our license renewal regulations is that such issues [i.e. safely shutting down following an earthquake] must be addressed as they arise.”²¹² The Petitioners fail to offer more than a conclusory statement to support their assertion that Duke failed to consider the risk of shutdown operations.²¹³ Accordingly, this aspect of Contentions 2 and 3 should be rejected under 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding and as not material to the findings the NRC must make in this licensing action (10 C.F.R. § 2.309(f)(1)(iv)), and thus fails to demonstrate that a genuine dispute exists with Duke on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

- ii. The Petitioners’ arguments that Duke failed to address the safety and environmental significance of the NRC’s 2011 Safety Evaluation in its Environmental Report are out of scope, not material to required findings, and fail to show a genuine dispute with Duke’s application.

²¹⁰ Petition at 15.

²¹¹ See *Diablo Canyon*, CLI-15-21, 82 NRC at 304-5 (stating that petitioner’s contention relating to the safe shutdown of a plant is outside the scope of the license renewal proceeding because it raises a “current operating issue” that is “not unique to whether [the Applicant’s] licenses...should be renewed.”) (citation omitted).

²¹² *Id.* at 304 (citing License Renewal Rule, 60 Fed. Reg. at 22,463-64).

²¹³ See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181) (“an expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.”).

The Petitioners argue that Duke failed to implement certain measures in NRC's 2011 Safety Evaluation, where Staff considered issues associated with a 2010 Confirmatory Action Letter closed.²¹⁴ More specifically, the Petitioners argue that Duke was required to implement certain measures for protection against a random sunny day Jocassee Dam failure as a matter of adequate protection to public health and safety, as well as to protect against flooding of essential safety equipment.²¹⁵ To the extent that the Petitioners argue that Duke is not meeting requirements under its current license, they raise issues related to current operation of the plant, which is outside the scope of this subsequent license renewal proceeding and, therefore, do not

²¹⁴ See, "Staff Assessment of Duke's Response to Confirmatory Action Letter Regarding Duke's Commitments to Address External Flooding Concerns at the Oconee Nuclear Station, Units 1, 2, and 3 (ONS) (TAC NOS. ME3065, ME3066, AND ME3067)" at 1-2. (Jan. 28, 2011) (ML110280153) (2011 Safety Evaluation). ("By letter dated June 22, 2010, [the NRC] issued a confirmatory action letter (CAL) to Duke Energy Carolinas, LLC (Duke, the licensee), associated with the mitigation of external flooding hazards at [Oconee], resulting from a postulated failure of the Jocassee Dam." Additionally, "...the NRC staff determined that the licensee provided the documentation necessary to demonstrate to the staff that the inundation of the [Oconee] site resulting from the postulated failure of the Jocassee Dam was bounded. Therefore, the staff considers the CAL action associated with this issue to be closed."); See also, "Oconee Nuclear Station, Units 1, 2, and 3—Response to Questions Regarding Modifications to Address External Flooding Hazards (TAC Nos. ME7970, ME7971, and ME7972)" (Sep. 20, 2012) (ML12219A163) ("The NRC intends to maintain the CAL dated June 22, 2010, active until it can be superseded by regulatory action related to the Fukushima responses."); See also, 2016 Confirmatory Action Letter Followup Inspection Report.

²¹⁵ Petition at 14, 16-17. These issues have been previously addressed as part of the NRC's ongoing oversight of operation of the facility. *E.g.*, In 2012, the NRC "issued a request for information to all power reactor licensees and holders of construction permits in active or deferred status, pursuant to Title 10 of the *Code of Federal Regulations*, Section 50.54(f), 'Conditions of Licenses' [ML12053A340] ... in connection with implementing lessons learned from the 2011 accident at the Fukushima Dai-ichi nuclear power plant, as documented in the NRC's Near-Term Task Force report [ML111861807]. Enclosure 2 to the 50.54(f) letter requested that licensees reevaluate flood hazards for their site(s) using present-day methods and regulatory guidance used by the NRC staff when reviewing applications for early site permits and combined licenses." See 2017 MSA. (The NRC Staff concluded that "the licensee has demonstrated that the mitigation strategies appear to be reasonably protected from reevaluated flood hazards conditions.") *Id.* at 11; "Oconee Nuclear Station, Units 1,2,3—Staff Assessment of Flooding Focused Evaluation (CAC NOS. MG0265, MG0266, MG0267, and EPID L-2017-JLD-0029)" (June 18, 2018). (ML18141A755) ("The NRC staff has further concluded that the licensee has demonstrated that effective flood protection, if appropriately implemented, exists for the [local intense precipitation], streams and rivers, and dam breach flood mechanisms during a beyond-design-basis external flooding event. No further information is needed from the licensee related to the reevaluated flooding hazard portion of the 50.54(f) letter and this letter closes out the NRC staff's efforts associated with CAC Nos. MG0265, MG0266, MGD267, and EPID L-2017-JLD-0029.").

satisfy the requirement in 10 C.F.R. § 2.309(f)(1)(iii).²¹⁶ These issues are appropriately addressed under the Staff's ongoing regulatory oversight activities, and thus fall outside the scope of this license renewal proceeding.²¹⁷

The Petitioners also argue that Duke failed to “address the environmental significance of the Staff's 2011 Safety Evaluation” with respect to flooding.²¹⁸ However, the Petitioners fail to describe with any specificity what section of the Environmental Report is deficient—or how—as it relates to the purported requirements. Notably, the Commission has previously held that a contention must specify the portions of the application on which the petitioner has a dispute and provide support for each dispute²¹⁹ as well as that the Board should not be expected to “sift through” in search of asserted factual support not specified by the petitioner.²²⁰ Accordingly, this aspect of the contentions should be rejected under 10 C.F.R. § 2.309(f)(1)(iii) because it is outside the scope of this proceeding and is not material to the findings the NRC must make in

²¹⁶ See *Turkey Point*, CLI-01-17, 54 NRC at 16 (The Commission found that the “[t]he Licensing Board correctly concluded that [a contention was] outside of the scope of license renewal reviews and proceedings [because as] the Board found, the contention ‘does not raise any aspect of the Applicant’s aging management review or evaluation of the plant’s systems, structures, and components subject to time-aging analysis.’ It does not, then, identify any issue encompassed by the NRC safety review for license renewal, conducted under 10 C.F.R. Part 54, that focuses on aging.”) (internal citations omitted).

²¹⁷ See *Diablo Canyon*, CLI-15-21, 82 NRC at 307 (“We were aware, when adopting the [license renewal rule], that issues relevant to current plant operation could arise while a license renewal application was under review, and based on our confidence in the NRC’s regulatory process, we reaffirmed our view that those issues are best addressed as part of our regulatory oversight activities, outside of license renewal.”) (internal quotations removed). If, in the alternative, the Petitioners assert that the current operation of Oconee is inadequate in light of the 2011 Safety Evaluation, such issues are similarly outside the scope of a subsequent license renewal proceeding but can be raised as part of a 10 C.F.R. § 2.206 petition for enforcement. See *Turkey Point*, CLI-01-17, 54 NRC at 23.

²¹⁸ Petition at 3.

²¹⁹ Additionally, “[i]f the petitioner believes that the application [i] fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner’s belief.” *Peach Bottom*, CLI-20-11, 92 NRC at 342.

²²⁰ See *Seabrook*, CLI-12-5, 75 NRC at 332 (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999) (petitioner bears burden for setting forth clear argument for contention); *USEC*, CLI-06-10, 63 NRC at 457 (a “contention must make clear why cited references provide a basis”).

this licensing action under 10 C.F.R. § 2.309(f)(1)(iv), and thus both contentions fail to demonstrate that a genuine dispute exists with Duke on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

- iii. The Petitioners' arguments that the Environmental Report fails to consider additional mitigative measures at Oconee are out of scope, not material to the required findings, and fail to show a genuine dispute with the application.

The Petitioners argue that Duke should have considered additional mitigative measures to lower the flood impacts at Oconee as they "may well be cost-effective", such as (1) "preemptively shutting down the reactors when reservoir water levels get too high," (2) "lowering the water levels in the lake behind the Jocassee and Keowee Dams," or (3) lowering the crest elevation of some of the surround earthworks such that they overtop before the Jocassee Dam[.]"²²¹ More specifically, the Petitioners argue that "Duke's SAMA analysis does not reflect any consideration of the extensive work done to incorporate the Jocassee Dam failure and flood routing analysis[.]"²²² However, the Petitioners fail to provide information that "present[s] 'a seriously different picture of the environmental impact of the proposed action from what was previously envisioned," as is required.²²³ Specifically, Petitioners "must point to a deficiency in the application, and not merely 'suggestions' of other ways an analysis could have been done, or other details that could have been included."²²⁴

²²¹ Petition at 17. To note, in Section 3.7.8-2 of "Appendix A to Operating License Nos. DPR-38, 47, 55 Technical Specifications for the Oconee Nuclear Station Units 1, 2, and 3[.] Duke Energy Corporation[.] Docket Nos. 50-269, 270, 287", Surveillance Requirement (SR) 3.7.8.2 states, "Verify Keowee Lake water level is within limits" at a frequency that is "[i]n accordance with the Surveillance Frequency Control Program". (ML052840238).

²²² Mitman Report at 24.

²²³ See *Callaway*, CLI-11-5, 74 NRC at 167-68 (citing *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 14).

²²⁴ See *Limerick*, CLI-13-7, 78 NRC at 216 (quoting *Seabrook*, CLI-12-5, 75 NRC at 323).

Here, the Petitioners offer only general support for their assertion in the Mitman Report, which broadly states these three mitigative measures are “obvious ways to reduce the flood hazard from Oconee,”²²⁵ without explaining the basis for the assertions or how it presents a seriously different picture from what was previously analyzed.²²⁶ Furthermore, these specific mitigative measures for external flooding hazards do not support the Petitioners’ environmental Contentions 2 and 3 because, as mentioned above, the NRC’s review of “flood hazards for existing nuclear power plants is a separate and distinct process from license renewal reviews,”²²⁷ and flood hazards for operating nuclear power plants are instead evaluated and addressed as safety issues.²²⁸ As noted above, for example, the NRC Staff has engaged extensively with Duke on its flood hazard analysis as part of the NRC’s ongoing oversight of operation of the facility. Accordingly, this aspect of the contentions should be rejected under 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding. Because flood hazards are addressed through ongoing oversight and are not material to the findings the NRC must make in this subsequent license renewal action, the Petitioners also fail to demonstrate that Contentions 2 and 3 raise a genuine dispute with Duke on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

²²⁵ Mitman Report at 24.

²²⁶ See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 328 (2015) (“[A]n expert opinion that merely states a conclusion...without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.”). (citation omitted).

²²⁷ 2013 GEIS at 1-16.

²²⁸ Notably, the 2013 GEIS states, “If new information or operating experience relating to flooding becomes available, the NRC evaluates the new information to determine if any changes are needed at existing plants. Flood protection issues are considered during site-specific safety reviews and, more specifically, are addressed on an ongoing basis through the reactor oversight process and other NRC safety programs, which are separate from the license renewal process.” See 2013 GEIS at 3-61.

CONCLUSION

As discussed above, while the Staff does not oppose their standing, the Board should deny the intervention petition of Beyond Nuclear and Sierra Club for failure to meet the requirements of a petition for waiver and failure to proffer at least one admissible contention.

Respectfully submitted,

/Signed (electronically) by/

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Dated this 22nd day of October 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DUKE ENERGY CAROLINAS, LLC

(Oconee Nuclear Station, Units 1, 2, and 3)

Docket No. 50-269, 50-270,
and 50-287-SLR

Certificate of Service

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing “NRC STAFF’S ANSWER OPPOSING BEYOND NUCLEAR AND THE SIERRA CLUB’S HEARING REQUEST,” dated October 22nd, 2021, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the captioned proceeding, this 22nd day of October 2021.

/Signed (electronically) by/

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Dated this 22nd day of October 2021