

RAS 7125

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 12/09/03

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

_____)	
In the Matter of)	
DUKE ENERGY CORPORATION)	Docket Nos. 50-369-LR
(McGuire Nuclear Station, Units 1 and 2,)	50-370-LR
Catawba Nuclear Station, Units 1 and 2))	50-413-LR
_____)	50-414-LR

CLI-03-17

MEMORANDUM AND ORDER

Duke Energy Corporation (“Duke”) seeks to renew its operating licenses for the McGuire Nuclear Station, Units 1 and 2, and the Catawba Nuclear Station, Units 1 and 2. In earlier Commission decisions, we outlined in detail the background of this proceeding, and need not repeat that history here.¹ Before us today is the Blue Ridge Environmental Defense League’s (BREDL’s) petition for review of LBP-03-17, a recent Atomic Safety and Licensing Board decision rejecting BREDL’s Amended Contention 2. After careful consideration of the petition, the responses, and the record, the Commission finds no basis to revisit the Board’s conclusions. Accordingly, we deny the petition for review.

I. Background

Our last substantive decision in this proceeding, CLI-02-28, remanded particular issues to the Board. We directed the Board to determine, among other things, whether BREDL’s original Contention 2 (which the Board had admitted) had become moot. BREDL’s original

¹ See CLI-02-28, 56 NRC 373 (2002); CLI-02-17, 56 NRC 1 (2002).

contention alleged that Duke's Environmental Reports for the Catawba and McGuire facilities – specifically, the Severe Accident Mitigation Analysis (“SAMA”) sections -- were deficient for failure to acknowledge new findings made in NUREG/CR-6427, an NRC-sponsored study issued by the Sandia National Laboratories.² In CLI-02-28, we suggested that the NUREG/CR claim appeared moot because subsequently-issued Draft Environmental Impact Statements acknowledged and discussed the study's findings.³ In the meantime, however, the Board had given BREDL an opportunity to file an Amended Contention 2, to be based only upon “any new information not previously available” at the time their original contention had been filed.⁴ We directed the Board on remand to determine whether the BREDL's Amended Contention raised timely, adequately supported, and genuine disputes for litigation.⁵

In LBP-03-17, the Board found Amended Contention 2 inadmissible (with one judge dissenting). The Amended Contention alleged that the “Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents” because it “fails to provide an adequate discussion of information from NUREG/CR-6427.”⁶ The Contention outlined alleged deficiencies in Duke's SAMA analysis in eight separate numbered sections, or “subparts.” In its petition for review, BREDL claims that the Board erred in denying admission of “subparts” 2, 5, and 8. Below, after a brief introduction, we discuss each subpart in turn.

² NUREG/CR-6427, “Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments” (April 2000)(“Sandia study”).

³ The Licensing Board ultimately declared the original contention moot. See Order (Feb. 4, 2003)(unpublished).

⁴ See CLI-02-28, 56 NRC at 386.

⁵ See *id.* at 384-88.

⁶ BREDL and NIRS's Amended Contention 2 (May 20, 2002)(“Amended Contention”) at 4.

II. Analysis

BREDL seeks Commission review under 10 C.F.R. § 2.786(b). First, we must consider the argument, advanced by Duke and the NRC staff, that (properly speaking) BREDL should have brought this case to the Commission on a direct appeal under 10 C.F.R. § 2.714a. This argument has practical significance because there is a 15-day deadline for “petitions for review” but only a 10-day deadline for “appeals.” BREDL’s petition is timely under the 15-day standard, but untimely under the 10-day standard.⁷

Where, as here, an already-admitted intervenor seeks Commission consideration of a Board dismissal of the last remaining contention in the case, our rules do not specify whether the proper vehicle is an appeal or a petition for review. Petitions for review are reserved, generally, for merits-based initial decisions or for partial initial decisions, whereas appeals apply to threshold determinations of standing and contention-admissibility. At the threshold of this case the Board found standing and admissible contentions and thus admitted BREDL as an intervenor. BREDL has actively been litigating various contentions ever since. In these circumstances, we conclude that BREDL properly brought its challenge to the Board’s latest decision as a petition for review under section 2.786(b). We construe section 2.714a to apply only to disappointed petitioners for intervention,⁸ not to already-admitted “intervenors.” Hence, we will treat BREDL’s petition as timely filed.

⁷ BREDL filed its petition for review within 15 days of the Board’s final ruling in the case, LBP-03-19 (Oct. 16, 2003) (rejecting BREDL’s motion to reinstate a MOX contention). Had it sought review prior to that ruling, the petition would have been an improper interlocutory appeal.

⁸ By its own terms, section 2.714a authorizes appeals only by “petitioners” (or license applicants), not by “intervenors.” By contrast, section 2.786 authorizes “a party” -- *e.g.*, an admitted intervenor like BREDL -- to file petitions for review.

We grant petitions for review, of course, only where the petitioner raises a “substantial question” about specified matters: “clearly erroneous” fact findings; “necessary” legal conclusions that are “without precedent” or “depart from” established law; “substantial and important” questions of law, fact, or policy; “prejudicial procedural error;” or “any other consideration” the Commission deems in the “public interest.”⁹ Here, none of these standards calls for further Commission review of the Board decision that BREDL challenges.

We turn now to BREDL’s specific claims.

A. Subpart 2: Failure to provide adequate support for conclusory results in RAI responses

Subpart 2's claim is that “Duke has not supported its SAMA analysis by publication of its PRA [probabilistic risk assessment].”¹⁰ BREDL states that it cannot evaluate “the adequacy of the [SAMA] analysis” without seeing the full PRA.¹¹ BREDL further claims that Duke merely has published the “summary results” of its PRA, and that this “is insufficient to support the SAMA analysis, because there is no way to determine whether the assumptions underlying the calculations are reasonable.”¹² Subpart 2 also references several responses that Duke made to the NRC staff’s Requests for Additional Information. Calling these responses “summary” or “qualitative in nature,” BREDL cites them as “examples” of the alleged “difficulty of verifying the reasonableness of Duke’s SAMA analysis.”¹³

⁹ 10 C.F.R. § 2.786(b)(4).

¹⁰ BREDL’s and NIRS’s Amended Contention 2 (May 20, 2002), at 4.

¹¹ *Id.*

¹² *Id.* at 4-5.

¹³ *Id.* at 5-6.

The Board agreed with Duke and the NRC staff that the public record already contained ample PRA information sufficient to allow BREDL to raise substantive challenges to the SAMA analyses, and that BREDL had not provided an adequate basis explaining why additional PRA data was indispensable. The Board pointed out that Duke had submitted various portions of its PRAs and additional “supplementary quantitative and qualitative information regarding changes to its PRAs.”¹⁴ These publications, noted the Board, “include data sought by BREDL/NIRS.”¹⁵ Accordingly, the Board rejected BREDL’s “Subpart 2” claim as, in effect, an impermissible effort to obtain discovery to formulate contentions.¹⁶

In its petition for review, BREDL argues that Subpart 2 is not an issue of discovery but of public disclosure under NEPA.¹⁷ BREDL emphasizes that NEPA requires an Environmental Impact Statement (EIS) to take a “hard look” at the environmental consequences of agency decisions, to ensure that the agency has “*adequately considered and disclosed*” the environmental impacts of its actions.¹⁸ Subpart 2, BREDL claims, raises the issue of “what constitutes ‘adequate’ disclosure.”¹⁹ In addition, BREDL states that the “only way to make a meaningful evaluation” of Duke’s “qualitative and summary” RAI responses is by publication of Duke’s entire PRA, with all “quantitative assumptions and data that went into the analysis.”²⁰

¹⁴ LBP-03-17, slip op. at 10-11.

¹⁵ *Id.*

¹⁶ *See id.* at 11-12.

¹⁷ BREDL’s Petition for Review of LBP-03-17 (Nov. 4, 2003)(“Petition”) at 5.

¹⁸ *Id.* (emphasis in original).

¹⁹ *Id.* at 6.

²⁰ *See id.* at 5-6.

BREDL's petition for review does not persuade us that we should second guess the Board's rejection of BREDL's "Subpart 2" claim. As we see it, the Board was quite right to view it as an effort to obtain impermissible discovery. As the Commission long has emphasized, our contention rules bar contentions where petitioners have only "what amounts to generalized suspicions, hoping to substantiate them later," or "simply desire more time and more ... information" in order to identify a genuine material dispute for litigation.²¹ Here, while BREDL's Amended Contention "criticizes the qualitative and summary nature"²² of statements contained in Duke's RAI responses, there is no indication from either BREDL's counsel or technical expert that BREDL reviewed the extensive supporting background PRA information that was available publicly, and no description of why this available information was insufficient for BREDL to challenge the SAMA analysis in the NRC Staff's EISs.

At the outset, we must stress that the EISs contain SAMA analyses in addition to and often quite different from those provided in Duke's Environmental Reports and RAI responses. We frankly do not comprehend BREDL's continued concentration (in its Amended Contention and petition for review) on supposed flaws in Duke's submissions, as opposed to the more recent, decisive EISs.

Moreover, in this case all PRA information reviewed by and relied upon by the staff for the EIS severe accident mitigation alternatives analysis was publicly available. What BREDL seeks is *additional* PRA information -- information never sought, reviewed, or relied upon by the NRC staff when it conducted its SAMA analyses. To be litigable, BREDL's contention

²¹ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999).

²² Petition at 5.

needed to indicate why the PRA information that the NRC staff relied on in the EIS was inadequate or too sparse. BREDL never did so.

BREDL claims that the Board improperly reached the merits of the PRA issue when it found “that portions of the PRA that had been submitted ... were sufficient to satisfy the concerns of Subpart 2.”²³ But the Board did not find that the available PRA information is accurate, or that it verifies the SAMA analyses’ conclusions. The Board merely found that ample PRA information exists in the record, and therefore it was incumbent upon BREDL to indicate, with some specificity, why more information is necessary to evaluate the SAMA analyses.

While the Board did not elaborate on its conclusion, even a cursory glance at the record finds generous support for the Board’s finding. For example, at oral argument before the Board, a Duke spokesman explained that, years ago, as part of its Individual Plant Examination (IPE) submittal,²⁴ Duke had provided full PRA information for both McGuire and Catawba; he also pointed out that since then, whenever Duke has revised its PRAs, it has submitted detailed summaries of the changes made.²⁵ Duke “considered submitting the entire PRA ... whenever we did the current revisions,” the PRA manager explained, but because the PRA information contains “a lot” of Duke proprietary information and “a lot” of vendor-specific proprietary information, the decision was made “not to put the entire PRA on the docket but to put together summary revisions that give the information necessary to understand the risk insights for the

²³ *Id.* at 6.

²⁴ Licensees have performed individual plant examinations as part of the Commission’s ongoing regulatory programs. The IPE looks for plant vulnerabilities to internally initiated events. A separate IPE for externally initiated events is called the IPEEE. These examinations are “essentially site-specific probabilistic risk assessments that identify the probabilities of core damage and evaluate containment performance under severe accident conditions.” CLI-02-17, 56 NRC 1, 7 n.12 (2002)(citation omitted).

²⁵ July 10, 2002 Transcript at 981-84.

plant.”²⁶ He described these summaries as “very detailed” reports that “include[] the system models, the data that was used in the PRA, the initiating event frequencies and how they were calculated, the human reliability data, and the top 100 cut sets for both internal events and external events as well as an explanation for the difference in the results between that and the original IPE submittal.”²⁷ He said that using the information Duke has provided “someone could very easily ... do a SAMA evaluation for virtually anything.”²⁸

At oral argument before the Board, the administrative judges repeatedly and explicitly pressed BREDL on whether it had reviewed the portions of the PRA that are published and available and asked why the public PRA information was inadequate.²⁹ The Board inquired whether BREDL had tried to perform any kind of “independent calculations” or analysis to point out anything lacking or wrong in the available PRA information.³⁰ But BREDL did not indicate that it (or its expert) had even reviewed the available PRA information, much less attempted any independent analysis. BREDL’s request for PRA information apparently emerged during settlement discussions, when Duke repeatedly asked BREDL to “please read what’s out there [on the PRA] first,” and advise Duke if something “additionally is needed.”³¹ No request for specific additional items was made.

²⁶ *Id.* at 989-90.

²⁷ *Id.* at 982; *see also* Mar. 18, 2003 Transcript at 1449.

²⁸ July 10, 2002 Transcript At 982-84; *see also* Mar. 18, 2003 Transcript at 1426-28, 1449-50.

²⁹ *Id.* at 972, 980, 981, 991.

³⁰ *Id.* at 991; March 18, 2003 Transcript at 1219, 1448.

³¹ April 10, 2002 Transcript at 878; *see also id.* at 890, 851-53.

Instead, BREDL simply asserted to the Board that it needed more “details” and demanded disclosure of the entire PRA.³² BREDL’s technical expert said only that “[s]ome of the summary information ... provided by Duke is generally simply numerical results and it is very difficult to establish the entire reasoning behind some of the numerical results.”³³ But the Board in a majority opinion written by two judges with technical backgrounds found the available PRA information considerable, so much so that BREDL should have indicated in its contention why anything more was needed. The Board noted that even the so-called “Summary Report” of PRA Revision 2 was “not insubstantial,” “occup[ying] one full cart of microfiche plus an extra page.”³⁴ The Board majority found no basis to support BREDL’s claim that without the entire PRA “it is not possible to evaluate the adequacy of the [SAMA] analysis.”³⁵ The Board’s finding seems to us a reasonable one. It does not warrant further Commission review under 10 C.F.R. § 2.786.³⁶

³² See, e.g., July 10, 2002 Transcript at 972; April 10, 2002 Transcript at 852.

³³ July 10, 2002 Transcript at 991.

³⁴ November 6, 2002 Transcript at 1160-61.

³⁵ Amended Contention 2 at 4.

³⁶ The dissent suggests that “if the persons with whom the NRC contracted to produce NUREG/CR-6427 were not aware of the [PRA] documents in question, one may question the holding of intervenors to a higher standard, notwithstanding the differing contexts of an NRC-contracted study and the filing of contentions by petitioners for an adjudicatory hearing.” But the comparison is faulty. The intervenors had the Environmental Reports, which discuss or reference the Individual Plant Examination (IPE), Individual Plant Examination External Events (IPEEE), and the PRA Revision 2 (for McGuire) or Revision 2b (for Catawba). There was no reason, then, for the intervenors not to be “aware” of these items. The NUREG/CR, on the other hand, was a generic study which did not purport to have the most recent or comprehensive plant-specific PRA information and qualified its conclusions accordingly. See, e.g., NUREG/CR-6427 at 6-7 (“detailed and credible Level I and Level II probabilistic analyses, specific to each plant” are the “best way” to assess issues raised in the study but were “outside the scope” of the study).

We are disinclined to take up the PRA issue for another reason, not mentioned by the Board -- that is, BREDL's PRA contention is blatantly untimely. At bottom, BREDL's claim is that the SAMA analysis is deficient, overall, for failure to verify Duke's PRA submissions through demanding more data from Duke. But this claim has been available from the outset of this adjudication. BREDL offers no reason why its original contentions did not raise a claim of deficient PRA information. As the NRC staff says, "[t]he fact that Duke's entire PRA had not been made public was apparent from the date the license renewal application was filed in June of 2001."³⁷

BREDL attempted to revive the issue by "tying" it to statements made in Duke's post-contention RAI responses.³⁸ But Duke did not alter its PRAs when responding to the RAIs. The mere fact that the staff, in an RAI, may ask for clarification of particular information in Environmental Reports -- in fact, a common practice -- does not serve to "restart the clock" on the timeliness of claims that could have been identified and raised earlier.

Petitioners must raise and reasonably specify at the outset their objections to a license application.³⁹ BREDL argued before the Board that raising its PRA concerns in its original contention would have required "anticipating deficiencies that we haven't seen" because Duke had not yet considered the information in the Sandia study.⁴⁰ But Duke's initial Environmental Reports contain numerous references to the PRA studies that Duke used in performing the

³⁷ NRC Staff's Response to BREDL's Petition for Review of LBP-03-17 (Nov. 19, 2003) at 6-7.

³⁸ July 10, 2002 Transcript at 978.

³⁹ *Oconee*, 49 NRC at 388; see also 10 C.F.R. § 2.714(b)(2)(iii).

⁴⁰ March 18, 2003 Transcript at 1235.

SAMA analysis.⁴¹ If BREDL had concerns about the availability or adequacy of those studies, it could have and should have raised the issue in its original contention.⁴²

B. Subpart 5: Failure to take adequate account of uncertainties

BREDL's Subpart 5 alleges that Duke failed "to take adequate account of uncertainties and their effect on the results of its analysis," and, "to a significant extent," did not perform an uncertainty analysis. BREDL also claims that to the extent an uncertainty analysis has been performed, Duke "has not taken uncertainties into account in an adequate manner."⁴³

The Board rejected these claims on timeliness grounds (among others), noting that they "could have been filed earlier."⁴⁴

In its petition for review, BREDL offers just one argument to overturn the Board's lateness finding. As BREDL's argument goes, "[a]t the time the ER [Environmental Report] was submitted, BREDL filed a contention challenging the ER for failing to take NUREG/CR-6427 into account."⁴⁵ BREDL claims that it did not raise the uncertainty analysis issue in its original contention because "it was reasonable to believe that Duke would [go on to] perform an

⁴¹ See, e.g. Attachment H to Catawba Environmental Report (May 2001) at 1-6, 8-11, 22, 32.

⁴² Indeed, when alerted to the extensive PRA information provided with the IPE submittal and the subsequent detailed summaries which describe how the PRA has been since updated, BREDL's technical expert emphasized that "the IPE itself is flawed" and therefore unreliable. See March 18, 2003 Transcript at 1450. If BREDL's key concern about the PRA is a flawed underlying IPE, it is not apparent why BREDL could not have raised that issue based upon Duke's Environmental Reports.

⁴³ Amended Contention at 9-10.

⁴⁴ LBP-03-17, slip op at 19, 21.

⁴⁵ Petition at 8 n.12.

uncertainty analysis in evaluating the highly significant information in NUREG/CR-6427.”⁴⁶ This is unpersuasive.

BREDL’s argument is based on the fact that at the time that BREDL filed its original contention, the NRC staff in an RAI had requested Duke to assess how the conditional containment failure probabilities (found in the Sandia study) would impact the SAMA analyses. But simply because the staff had requested Duke to incorporate the study’s conditional containment failure probabilities into its analyses does not, in the least, suggest that Duke would respond to the staff’s specific request by also “perform[ing] an uncertainty analysis.” Nowhere was there any staff directive to redo or perform additional uncertainty analyses.⁴⁷

The adequacy or lack of an uncertainty analysis (like alleged inadequacies in a PRA analysis, discussed above) is a broad-based yet distinct issue that goes to the methodology and data Duke used in its SAMA analysis. Such issues clearly could have been raised specifically in BREDL’s original contention. BREDL seems to believe that by merely pointing to the Sandia study (*i.e.*, NUREG/CR-6427) in its original contention, BREDL had adequately put the Board and the other litigants on notice that BREDL intended to litigate any and all of the study’s recommendations or underlying assumptions.⁴⁸ BREDL’s expectation, however, is a far

⁴⁶ *Id.*

⁴⁷ Moreover, as the Board noted when questioning BREDL on timeliness, the lengthy Sandia study itself does not have much to say on the subject of uncertainty analysis, other than merely to recommend that “PRA studies ideally should be accompanied by uncertainty quantification.” March 18, 2003 Transcript at 1215 (quoting NUREG/CR-6427 at 113). The study even acknowledges that the NRC traditionally has not required such uncertainty analysis, the Board observed. *Id.* See also *id.* at 1238.

⁴⁸ See, *e.g.*, July 10, 2002 Transcript at 1042:

Dr. Lyman (BREDL’s technical expert): My view of taking into account this [Sandia study] document is not simply swapping one conditional containment failure frequency for another It is taking into account, and examining, and comparing, Duke’s PRA analysis from the beginning with all the assumptions and discussion in [the Sandia study], and indicating all the places where they are different, and making the appropriate

cry from our contention standards, which require petitioners to plead specific grievances, not simply to provide general “notice pleadings.”

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time he or she “realize[d] ... that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”⁴⁹ Petitioners have an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment. We agree with the Board that BREDL did not do so with its “uncertainty analysis” claim.⁵⁰

C. Subpart 8: Failure to justify conclusion that return fans are essential

In Subpart 8 of the Amended Contention, BREDL takes issue with Duke’s position that air return fans are necessary to ensure the effectiveness of hydrogen igniters and thus renders igniters less cost effective. Duke’s view “has the effect of inflating the cost of the mitigative

adjustments.

Judge Kelber: Where is that brought out in the Contention?

Dr. Lyman: That is our Contention.

⁴⁹ CLI-02-28, 56 NRC at 386 n.61 (quoting *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990)).

⁵⁰ The Board explicitly found that BREDL had “failed to demonstrate any ‘new information’ in those RAI responses bearing upon” uncertainty analyses, and that therefore BREDL provided no justification for its late claims. LBP-03-17, slip op. at 21. BREDL gives us no reason to question that conclusion. Moreover, as the Board also found, it appears that BREDL misunderstood information in an RAI response (RAI 2), and as a result its subpart 5 contention presented a “misleading” or unsupported allegation on uncertainty values. See *id.*

measure of hydrogen ignition,” BREDL says.⁵¹ As the basis for its claim, BREDL states that it “agree[s] with” the NRC’s conclusion in the draft EISs that, “based on available technical information, it is not clear that operation of an air-return fan is necessary to provide effective hydrogen control.”⁵² BREDL quotes approvingly from the staff’s conclusion in the draft EISs indicating that air return fans may not be needed for the hydrogen control SAMA and, even if needed, the SAMA may still prove cost-beneficial:

If only the igniters need to be powered during SBO [station blackout], a less-expensive option of powering a subset of igniters from a back-up generator, addressed by Duke in responses to RAIs, is within the range of averted risk benefits and would warrant further consideration. Even if air-return fans are judged to be necessary to ensure effective hydrogen control in SBOs, the results of sensitivity studies suggest that this combined SAMA might also be cost-beneficial.⁵³

BREDL’s Subpart 8 concludes that Duke’s view on air-return fans should be rejected “unless supported by detailed analysis because it results in the artificial inflation of the cost” of the SAMA.⁵⁴

In rejecting Subpart 8, the Board majority noted that the NRC staff’s *final* EISs *did* conclude, as BREDL had argued, that the “use of an air-return fan may not be advantageous.” The Board concluded from this that BREDL had already obtained the relief it sought in its

⁵¹ Amended Contention at 17.

⁵² *Id.* (quoting NUREG-1437, Supp. 8 to Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding McGuire Nuclear Station Units 1 & 2, NUREG-1437 (May 2002)(Draft Report) at 5-30.

⁵³ *Id.*

⁵⁴ *Id.*

“return fans” contention (Subpart 8) and refused to admit the contention for further litigation or hearing.⁵⁵

In its Petition for Review, BREDL asks the Commission to reverse the Board’s finding.⁵⁶ BREDL says that the final EISs “merely suggest that Duke *may* be wrong, but provide no firm analysis that supports the suggestion.”⁵⁷ BREDL apparently finds the EISs inadequate because they do not resolve, definitively, whether air return fans are needed. BREDL thus calls the EIS conclusion inappropriately “equivocal,” and states that the NRC staff under NEPA cannot “postpon[e]” the resolution of the air-return question.⁵⁸

BREDL’s Petition for Review contradicts its own Amended Contention. Nowhere does BREDL’s Contention (Subpart 8) object to the NRC staff’s formulation of the “return fan” issue in the draft EIS. Neither does it suggest that the staff’s conclusion is overly “equivocal,” “vague,” or otherwise inadequate. On the contrary, the *exact* language that BREDL previously endorsed and quoted in Subpart 8 appears in the conclusion of the final EISs.⁵⁹ We do not, therefore, discern any “clear error” in the Board’s rejection of Subpart 8, and decline to set aside or further consider the Board’s findings.⁶⁰

⁵⁵ LBP-03-17, slip op. at 30.

⁵⁶ Petition at 9.

⁵⁷ *Id.*

⁵⁸ *Id.* at 10.

⁵⁹ NUREG-1437, Supp. 9 at 5-28 to 5-29 (Catawba)(Final Report)(Dec. 2002); NUREG-1437, Supp. 8 at 5-29 to 5-30 (McGuire)(Final Report)(Dec. 2002). Now, in its Petition for Review, BREDL quotes one of the very same sentences as an example of the EIS’s “equivocal” statements. Petition at 10 n.14.

⁶⁰ The final EIS explains Duke’s position on a need for air return fans and the staff’s view that fans may not be necessary. The EIS goes on to provide SAMA cost-benefit estimates both with and without the air return fans. The EIS points out that the staff to date has not yet reached a definitive determination on the issue. The staff continues actively to consider the air return fan issue under Generic Safety Issue -189. This ongoing generic safety review will

We conclude with an overriding observation applicable to all the SAMA claims we consider today. As BREDL's SAMA contention has evolved, it amounts to a demand for a stronger NRC endorsement of the beneficial effects of providing backup hydrogen control capability. But, as we indicated when this case was last before us,⁶¹ the EISs at issue here *already find the backup capability cost-beneficial*, albeit under particular assumptions. It is not apparent why BREDL continues to pursue the issue. While the cost-benefit discussion in the EISs may not be as detailed or unequivocal as BREDL would like, the Supreme Court has made clear that the underlying statute, NEPA, demands no "fully developed plan" or "detailed explanation of specific measures which *will* be employed" to mitigate adverse environmental effects.⁶²

Under NEPA, mitigation (and the SAMA issue is one of mitigation) need only be discussed in "sufficient detail to ensure that environmental consequences [of the proposed project] have been fairly evaluated."⁶³ Here, in a generic EIS the NRC has conducted a thorough NEPA evaluation of the probability and consequences of severe reactor plant accidents,⁶⁴ and in plant-specific EISs the NRC staff has discussed at length possible mitigation

determine whether the NRC ultimately will require ice condenser plants like McGuire and Catawba to implement a hydrogen control SAMA.

⁶¹ 56 NRC at 387-88.

⁶² *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (emphasis the Court's). See also, e.g., *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476-77 (9th Cir. 2000); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999).

⁶³ *Robertson*, 490 U.S. at 352.

⁶⁴ See NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Vol. 1 (Final Report)(May 1996). The probability-weighted consequences associated with severe accidents was found to be of small significance for all plants. *Id.* at 5-115.

measures. The mitigation analysis outlines relevant factors, discloses opposing viewpoints, and indicates particular assumptions under which the staff ultimately concludes that “providing backup power to hydrogen igniters is cost-beneficial.”⁶⁵ The staff presented its analysis and conclusion based upon the “available technical information.”⁶⁶ NEPA requires no more.

NRC adjudicatory hearings are not EIS editing sessions. Our busy boards do not sit to parse and fine-tune EISs. To litigate a NEPA claim, an intervenor must allege, with adequate support, that the NRC staff has failed to take a “hard look” at significant environmental questions – *i.e.*, the staff has unduly ignored or minimized pertinent environmental effects. Here, given the extensive discussion of backup hydrogen control capability in the EISs, BREDL’s suggestion that the NRC has not given the issue a “hard look” borders on the frivolous.

III. Conclusion

The Commission *denies* BREDL’s petition for review.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of December 2003

⁶⁵ NUREG-1437, Supp.9 (Catawba) at 5-5, 5-29; *see also, e.g.*, NUREG-1437, Supp. 8 (McGuire) at 5-5 (providing backup power to hydrogen igniter “is cost-beneficial under the assumptions presented); *see also id.* at 5-30.”

⁶⁶ NUREG-1437, Supp. 9 (Catawba) at 5-28; NUREG-1437, Supp. 9 (McGuire) at 5-29.