

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Dale E. Klein  
Kristine L. Svinicki

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In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

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) Docket No. 52-011-ESP  
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**CLI-10-05**

**MEMORANDUM AND ORDER**

Southern Nuclear Operating Company (Southern) filed an application for an early site permit (ESP) for two reactors using the Westinghouse Electric Company's AP1000 certified design to be added at the existing Vogtle Electric Generating Plant site near Waynesboro, Georgia. Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League (collectively, Joint Intervenors), filed a petition for review<sup>1</sup> of the Atomic Safety and Licensing Board's First Partial Initial

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<sup>1</sup> *Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)* (July 15, 2009) (Petition for Review).

Decision in the contested portion of this proceeding.<sup>2</sup> Southern<sup>3</sup> and the NRC Staff<sup>4</sup> oppose the petition for review; Joint Intervenors replied to these pleadings.<sup>5</sup>

For the reasons provided below, we deny the petition for review.

## I. BACKGROUND

A detailed description of the procedural history of this proceeding, conducted under 10 C.F.R. Part 2, Subpart L, is provided in the Board's decision.<sup>6</sup> In brief, Joint Intervenors proposed a total of eight environmental contentions (ECs), three of which — contentions EC 1.2, EC 1.3, and EC 6.0 — were admitted for hearing.<sup>7</sup> The Board held an evidentiary hearing on these three contentions in Augusta, Georgia, on March 16-19, 2009.<sup>8</sup> The Board subsequently ruled against Joint Intervenors on the merits of all three contentions.<sup>9</sup> Joint Intervenors have petitioned for review of the Board's decision on contentions EC 1.2 and EC 6.0 only.

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<sup>2</sup> LBP-09-7, 69 NRC \_\_\_\_ (June 22, 2009) (slip op.).

<sup>3</sup> *Southern Nuclear Operating Company's Answer Opposing Petition for Review* (July 27, 2009) (Southern Answer).

<sup>4</sup> *NRC Staff's Answer to "Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)"* (July 27, 2009) (Staff Answer).

<sup>5</sup> *Joint Intervenors' Reply to NRC Staff and [Southern]'s Answer to Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)* (Aug. 3, 2009).

<sup>6</sup> LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 2-12).

<sup>7</sup> *Id.*, 69 NRC \_\_\_\_ (slip op. at 1).

<sup>8</sup> See Tr. at 506-1660.

<sup>9</sup> LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 2, 158).

**A. Contention EC 1.2**

Contention EC 1.2, as initially proposed, stated:

Contention 1.2: The [Environmental Report (ER)] fails to identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources.<sup>10</sup>

In explaining the basis for the “cumulative impacts” portion of this contention,

Joint Intervenors stated in their Intervention Petition:

[T]he ER does not adequately address the cumulative impacts on aquatic resources of the *new cooling system facilities*, combined with the current impacts of *the existing intake* and discharge. In 1984, the NRC examined impingement and entrainment associated with the existing intake in the FE[IS] for operation of the existing units at Plant Vogtle and concluded there will be no significant impacts on the aquatic community of the Savannah River. According to the ER, “twenty years of operating experience suggest that Savannah River fish populations have not been adversely affected by operation of the existing” intake structure. ER at 5.3-3. In two decades of operation, however, [Southern] has not monitored impingement or entrainment associated with the existing structure. Thus, the ER fails to provide a meaningful basis to evaluate the cumulative impacts of the *new and existing intake structures* on aquatic species. There is no data on the rate of entrainment and impingement for any of the fish species that inhabit the Savannah River.<sup>11</sup>

The Board admitted a narrowed version of Contention EC 1.2 after oral argument on the admissibility of proffered contentions based upon the factual support provided by affidavit by Joint Intervenors’ expert. This factual support included specific references to asserted errors in the ER “[f]or each of the asserted deficiencies concerning the ER impact discussion regarding the intake/discharge structure for the two new proposed

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<sup>10</sup> *Petition for Intervention* (Dec. 12, 2006) (Intervention Petition) at 10.

<sup>11</sup> *Id.* at 12-13 (emphasis added).

facilities — impingement<sup>12</sup>/entrainment,<sup>13</sup> chemical discharges, and thermal discharges, *including cumulative impacts from these items associated with the existing Vogtle facilities.*<sup>14</sup> The Board provided additional direction on the scope of the contention, stating that litigation on the merits of the contention “may involve the question of the adequacy of the baseline information provided by [Southern] relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities.”<sup>15</sup>

As part of its decision on a summary disposition motion filed by Southern, the Board narrowed Contention EC 1.2 by deleting the “chemical discharges” component of the contention.<sup>16</sup> (Joint Intervenors conceded the “chemical discharge” issue was moot because the Staff’s Draft Environmental Impact Statement (DEIS) properly addressed the impact of chemical discharges on aquatic life.<sup>17</sup>) The balance of the contention — concerning the adequacy of baseline information on water flows and aquatic populations, entrainment/impingement of aquatic organisms due to water withdrawals, and thermal pollution — survived the motion for summary disposition.<sup>18</sup>

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<sup>12</sup> “Impingement” occurs “when aquatic organisms collide with cooling system components.” LBP-08-2, 67 NRC 54, 73 (2008).

<sup>13</sup> “Entrainment” occurs “when aquatic organisms are carried into the cooling system.” *Id.*

<sup>14</sup> LBP-07-3, 65 NRC 237, 258 (2007) (emphasis added).

<sup>15</sup> *Id.* at 259.

<sup>16</sup> LBP-08-2, 67 NRC at 81-82.

<sup>17</sup> *Id.* at 82.

<sup>18</sup> *See id.* at 68-80, 82-83.

In their answer to Southern's summary disposition motion, Joint Intervenors argued for the first time that the impacts of water withdrawals by non-Vogtle site users were part of the contention.<sup>19</sup> The Board rejected this new argument, noting that in Joint Intervenors' original petition and their expert's supporting material:

[T]he discussion of cumulative withdrawals includes only the existing Vogtle units. . . . Consequently, in their existing issue statement EC 1.2 and its supporting bases (which they choose not to amend), Joint Intervenors have failed to provide the other parties with notice that the issue of the impacts of cumulative withdrawals was intended to include anything other than the existing and proposed Vogtle units. Given . . . that a purpose of the bases of a contention [is] "to put the other parties on notice as to what issues they will have to defend against or oppose," . . . Joint Intervenors current argument that the DEIS must consider the cumulative impacts of water withdrawals by other facilities on the Savannah River . . . is outside the scope of EC 1.2.<sup>20</sup>

As admitted by the Board in final form, the contention stated:

**EC 1.2 — ER FAILS TO IDENTIFY AND ADEQUATELY CONSIDER COOLING SYSTEM IMPACTS ON AQUATIC RESOURCES**

**CONTENTION:** The ER fails to identify and adequately consider direct, indirect, and cumulative impingement/entrainment and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.<sup>21</sup>

Prior to the evidentiary hearing, the Board ruled on two sets of *in limine* motions, challenging, respectively, Joint Intervenors' pre-filed direct and rebuttal testimony and

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<sup>19</sup> See *Joint Intervenors['] Answer Opposing Southern Nuclear Operating Co.'s Motion for Summary Disposition of Environmental Contention 1.2* (Nov. 13, 2007) (Joint Intervenors' Opposition to Summary Disposition) at 18-19.

<sup>20</sup> LBP-08-2, 67 NRC at 77-78. Joint Intervenors' discussion of the cumulative impacts of water withdrawals is followed by a discussion of the cumulative impacts of effluent discharges. With respect to *discharges* only, the description of basis adds the argument that cumulative impacts from "other sources of pollution in the area" must be considered. Intervention Petition at 13.

<sup>21</sup> LBP-08-2, 67 NRC at 83-84.

exhibits. In response to the first set of *in limine* motions, Joint Intervenors claimed that portions of the challenged EC 1.2 testimony and exhibit language (discussing non-Vogtle site water withdrawals) were intended to “demonstrate the inherent weakness of the methodology” the Staff used in its cumulative impact analysis, and thus should not be excluded.<sup>22</sup> Based on its review of the materials, however, the Board ruled that Joint Intervenors’ concerns were already clear without the challenged language — which, contrary to Joint Intervenors’ argument, went to matters outside the scope of the contention.<sup>23</sup>

In response to the second set of *in limine* motions, Joint Intervenors argued (in connection with EC 1.2) that the Staff’s discussion of river flow rates measured upstream at Thurmond Dam and entrainment studies across the river at DOE’s Savannah River Site (SRS) “opened the door” to rebuttal testimony on non-Vogtle ESP site withdrawals of water.<sup>24</sup> The Board concluded that excluding the challenged language would not affect Joint Intervenors’ ability to address “current aquatic baselines versus aquatic baselines at the time of the SRS studies,”<sup>25</sup> and that the Staff’s testimony on flow rates at Thurmond Dam did not “open the door” to rebuttal testimony because “the appropriateness of assuming a flow rate at the Vogtle site equal to the discharge rate

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<sup>22</sup> *Joint Intervenor[s] Response to Motions In Limine to Exclude Portions of Testimony and Exhibits* (Jan. 21, 2009) at 8. Joint Intervenors did not challenge the exclusions related to EC 1.3 and EC 6.0 raised in the motions. *Id.* at 2 n.2.

<sup>23</sup> Memorandum and Order (Ruling on [*In Limine*] Motions) (Jan. 26, 2009) (unpublished) (slip op. at 3).

<sup>24</sup> *Joint Intervenors’ Response to Southern Nuclear Operating Company’s and NRC Staff’s Motions In Limine to Exclude Portions of Rebuttal Testimony and Exhibits filed by Joint Intervenors* (Feb. 17, 2009) at 4-5.

<sup>25</sup> Memorandum and Order (Ruling on [*In Limine*] Motions) (Feb. 23, 2009) (unpublished) (slip op. at 3).

from the Thurmond Dam appears to be a separate question from the cumulative impingement and entrainment impacts of water withdrawals between the two locations.”<sup>26</sup>

**B. Contention EC 6.0**

After the Staff issued its Final Environmental Impact Statement (FEIS),<sup>27</sup> Joint Intervenor moved for admission of a new contention:

Proposed Contention EC 6.0: The discussion of potential impacts associated with dredging and use of the Savannah River Federal navigation channel is inadequate and fails to comply with [the National Environmental Policy Act (NEPA)] because it relies on the Army Corps of Engineers (the “Corps”) to analyze these impacts in the future. As a result, the [S]taff’s conclusion that impacts would be moderate runs counter to the evidence in the hearing record. Additionally, the FEIS wholly fails to address impacts of navigation on the Corps’ upstream reservoir operations, an important aspect of the problem.<sup>28</sup>

The Board admitted this contention as supported by three of the eight proffered bases:

- The [S]taff’s conclusion, as set forth in the “Cumulative Impacts” chapter of the FEIS, that the large-scale dredging from Savannah Harbor to the [Vogtle] site could have moderate impacts is inadequately supported.
- Dredging the federal navigation channel has potentially significant impacts on the environment.

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<sup>26</sup> *Id.*

<sup>27</sup> NUREG-1872, Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site (Aug. 2008) (FEIS) (ML082240145 & ML082240165) (also, Errata (Sept. 2008) (ML082550040)).

<sup>28</sup> *Joint Intervenor’s Motion to Admit New Contention* (Sept. 22, 2008) (Motion to Admit New Contention) at 2.

- Navigation requires release of significant amounts of water from upstream reservoirs, which is not addressed in the FEIS.<sup>29</sup>

As admitted by the Board, the contention read:

EC 6.0 — FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS)  
FAILS TO PROVIDE ADEQUATE DISCUSSION OF IMPACTS  
ASSOCIATED WITH DREDGING THE SAVANNAH RIVER FEDERAL  
NAVIGATION CHANNEL

Because Army Corps of Engineers (Corps) dredging of the Savannah River Federal navigation channel has potentially significant impacts on the environment, the NRC [S]taff's conclusion, as set forth in the "Cumulative Impacts" chapter of the FEIS, that such impacts would be moderate is inadequately supported. Additionally, the FEIS fails to address adequately the impacts of the Corps' upstream reservoir operations as they support navigation, an important aspect of the problem.<sup>30</sup>

### **C. Hearing and Board Decision**

The Board heard testimony and received evidence from witnesses on behalf of all three parties<sup>31</sup> during its nearly four-day hearing, subsequently ruling on the merits in favor of the Staff and Southern. With respect to contention EC 1.2, the Board found Joint Intervenors had failed to show by a preponderance of the evidence that the information the Staff relied on to evaluate the impingement, entrainment, and thermal discharge impacts on aquatic life of the proposed Vogtle units was inadequate. The Board also found that Joint Intervenors had failed to show that the river flow data used by the Staff was inadequate and that certain protected species should also be

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<sup>29</sup> Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) (unpublished) (slip op. at 4, 16-17).

<sup>30</sup> *Id.* (slip op. at 20 (Appendix A)).

<sup>31</sup> The Staff's witnesses included a panel of witnesses from the Corps. See Tr. at 1383-1466. See also *U.S. Army Corps of Engineers Testimony of William G. Bailey, Carol L. Bernstein, Lyle J. Maciejewski, and Stanley L. Simpson Concerning Environmental Contention EC 6.0* (Jan. 9, 2009) (after Tr. 1385).



designated as “special status species,” and had failed to support their challenges to the Staff’s finding that impacts related to impingement, entrainment, and thermal discharges would be SMALL. Finally, the Board found that Joint Intervenors had failed to show that the Staff’s analysis of the cumulative impacts of the new and existing Vogtle units was inadequate.<sup>32</sup>

With respect to contention EC 6.0, the Board found that the Staff’s analysis of impacts of potential dredging of the Savannah River satisfied the Staff’s NEPA obligations given available information. The Board found that “the preponderance of the evidence presented at the hearing support[ed] the [S]taff’s finding that the cumulative impacts from dredging could be MODERATE.”<sup>33</sup> The Board found that, should a plan to dredge become reality, additional information likely would be included in environmental review documents produced in response to that plan by the Corps, by the Staff in connection with the Vogtle ESP application, or by the Staff in connection with Southern’s pending Vogtle combined license application, depending on timing. Finally, the Board found that releases from upstream reservoirs apart from the Corps’ normal flood control operations were not reasonably foreseeable, so the Staff was not required to analyze impacts of such releases.<sup>34</sup>

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<sup>32</sup> LBP-09-7, 69 NRC \_\_\_ (slip op. at 89-90).

<sup>33</sup> *Id.*, 69 NRC \_\_\_ (slip op. at 157).

<sup>34</sup> *Id.*, 69 NRC \_\_\_ (slip op. at 157-58).

## II. DISCUSSION

### A. Standards for Review

We grant review on a discretionary basis, giving due weight to a petitioner's showing that there is a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.<sup>35</sup>

The licensing board's principal role in our adjudicatory process "is carefully to review all of the evidence, including testimony and exhibits, and to resolve any factual disputes."<sup>36</sup> We do not exercise our authority to make *de novo* findings of fact "where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact."<sup>37</sup> As we have stated on other occasions, "[w]hile [we have] discretion to review all underlying factual issues *de novo*, we are disinclined to do so where a Board has

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<sup>35</sup> 10 C.F.R. § 2.341(b)(4).

<sup>36</sup> *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009), citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

<sup>37</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003). See also *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465, 473 (1987); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005).

weighed arguments presented by experts and rendered reasonable, record-based factual findings.”<sup>38</sup> We defer to a board’s factual findings and “generally step in only to correct ‘clearly erroneous’ findings — that is, findings ‘not even plausible in light of the record viewed in its entirety’”<sup>39</sup> — where there “is strong reason to believe that . . . a board has overlooked or misunderstood important evidence.”<sup>40</sup> “Our standard of ‘clear error’ for overturning a Board’s factual finding is quite high.”<sup>41</sup>

“As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board’s legal rulings if they are ‘a departure from or contrary to established law.’”<sup>42</sup>

Decisions on evidentiary questions fall within our boards’ authority to regulate hearing procedure.<sup>43</sup> “[A] licensing board normally has considerable discretion in

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<sup>38</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility) CLI-06-22, 64 NRC 37, 40 (2006) (some internal quotation marks omitted).

<sup>39</sup> *Louisiana Energy Services*, CLI-06-22, 64 NRC at 40 (some internal quotation marks omitted), citing *Hydro Resources, Inc.*, (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-01, 63 NRC 1, 2 (2006), *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985), and *Private Fuel Storage*, CLI-03-8, 58 NRC at 25-26.

<sup>40</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Private Fuel Storage*, CLI-05-19, 62 NRC at 411.

<sup>41</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Private Fuel Storage*, CLI-03-8, 58 NRC at 26.

<sup>42</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown’s Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004).

<sup>43</sup> See, e.g., 10 C.F.R. § 2.319(d).

making evidentiary rulings.”<sup>44</sup> We review decisions on evidentiary questions under an abuse of discretion standard.<sup>45</sup>

## **B. Analysis**

Joint Intervenors challenge the Board’s ruling on the merits of EC 1.2 and EC 6.0, arguing that both should have been resolved in their favor. Joint Intervenors’ petition for review focuses on claims of legal and evidentiary errors by the Board. They base their petition for review on 10 C.F.R. § 2.341(b)(4)(ii), (iii), and (iv)<sup>46</sup> for EC 1.2, and on 10 C.F.R. § 2.341(b)(4)(ii) and (iii) for EC 6.0. For the reasons discussed below, we find that Joint Intervenors have not shown a “substantial question” warranting further Commission review of the Board’s decision.

### **1. Contention EC 1.2**

Rather than challenging the fact findings made by the Board in connection with contention EC 1.2 — an aquatic impacts contention with a “cumulative impacts” component — Joint Intervenors’ petition for review focuses almost entirely on the Staff’s (and the Board’s) asserted failure to analyze the cumulative impacts of “other” water withdrawals from the Savannah River in addition to withdrawals associated with the existing and proposed Vogtle units. In other words, Joint Intervenors make legal

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<sup>44</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); *see also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

<sup>45</sup> *Catawba*, CLI-04-21, 60 NRC at 27.

<sup>46</sup> “A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law.” 10 C.F.R. § 2.341(b)(4)(ii). “A substantial and important question of law, policy, or discretion has been raised.” 10 C.F.R. § 2.341(b)(4)(iii). “The conduct of the proceeding involved a prejudicial procedural error.” 10 C.F.R. § 2.341(v)(4)(iv).

arguments against the Board's pre-hearing threshold ruling on the scope of the admitted contention, not record-based factual arguments against the Board's ruling on the merits after the hearing.

In our view, Joint Intervenors' concept of the contention's scope — which matches neither the contention's language and bases as initially worded, nor the Board's formulation of the contention, as ultimately admitted for hearing — misinforms their view of the range of evidence properly admissible. Joint Intervenors also confuse the separate purposes of our adjudicatory and NEPA processes — contested proceedings litigate particular contentions that may include arguable NEPA-analysis shortfalls, whereas the Staff's NEPA analysis encompasses the full range of NEPA issues whether or not a contested proceeding even takes place. In short, Joint Intervenors provide no basis for granting their petition for review with respect to contention EC 1.2.

The Staff opposes Joint Intervenors' argument that the Board should have considered cumulative impacts related to withdrawals from non-Vogtle sites. The Staff argues that the Board properly limited the scope of the contention to include only cumulative impacts of the existing and proposed reactors — correctly matching the scope of the contention to the bases provided for it by Joint Intervenors in their petition to intervene.<sup>47</sup> The Staff argues that the Board's decisions on the admissibility of evidence likewise matched the scope of the contention — so testimony and evidence addressing cumulative impacts other than those of the existing and proposed reactors were properly excluded.<sup>48</sup> We agree with the Staff's position.

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<sup>47</sup> Staff Answer at 7-8.

<sup>48</sup> *Id.* at 9.

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases,<sup>49</sup> unless the contention is satisfactorily amended in accordance with our rules.<sup>50</sup> Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

In this instance, Joint Intervenors' contention and its bases explicitly limited its critique of the ER's cumulative impacts analysis to the combined effects of water withdrawals by the intake structures of the proposed and existing Vogtle units — “the ER fails to provide a meaningful basis to evaluate the cumulative impacts of the *new and existing intake structures* on aquatic species.”<sup>51</sup> The exhibits attached to the Intervention Petition also limited the discussion to cumulative impacts resulting from the combination of proposed and existing Vogtle units.<sup>52</sup> Under NRC rules and practice, this limitation defined the scope of the cumulative impacts portion of the contention,

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<sup>49</sup> See 10 C.F.R. § 2.309(f). See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 378-81 (2002).

<sup>50</sup> See 10 C.F.R. § 2.309(f)(2).

<sup>51</sup> Intervention Petition at 13 (emphasis added).

<sup>52</sup> For example: “Without proper scientific study and analysis, there is no basis to conclude the proposed new intake and discharge structures, alone or *in combination with the existing facility*, will not have significant impacts on the Savannah River fish assemblage.” Intervention Petition, Exh. 1.3 at 3 (emphasis added). “At minimum, a study of entrainment and impingement associated with *the existing intake structure* is necessary to determine the cumulative withdrawal effects.” *Id.* at 4 (emphasis added).

rendering testimony and evidence addressing cumulative impacts of water withdrawals by non-Vogtle facilities outside the scope of the contention.<sup>53</sup>

Nonetheless, Joint Intervenors maintain on appeal that they “repeatedly” challenged the ER’s evaluation of the cumulative impacts of other withdrawals together with withdrawals at the existing and proposed Vogtle units. To support this position, Joint Intervenors cite “arguments, testimony, and evidence proffered by Joint Intervenors in their summary disposition answer, their prefiled direct testimony and supporting affidavits, and prefiled rebuttal testimony.”<sup>54</sup> They assert that the Board erred as a matter of law when it excluded this testimony and evidence, and that we should therefore grant review pursuant to 10 C.F.R. § 2.341(b)(4)(ii).<sup>55</sup>

The problem with Joint Intervenors’ argument is that all of the submissions they mention were filed *after* their initial contention and the Board’s ruling on it. As Southern points out,<sup>56</sup> the question of water withdrawals from sites other than the Vogtle site was

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<sup>53</sup> See *McGuire*, CLI-02-28, 56 NRC at 379, citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *pet. for review denied sub nom. Massachusetts v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991).

<sup>54</sup> Petition for Review at 8 & n.42, 9 n.43, citing *Joint Intervenors[ ] Answer Opposing [Southern’s] Motion for Summary Disposition of EC 1.2* (Nov. 13, 2007) at 18-19. Also citing statements stricken from the record in: *Pre[-]filed Direct Testimony of Barry W. Sulkin in Support of EC 1.2* (Jan. 9, 2009); *Affidavit of Young in Support of Joint Intervenors[ ] Answer Opposing [Southern’s] Motion for Summary Disposition of EC 1.2* (Nov. 13, 2007); *Declaration of Shawn Paul Young* (Sept. 22, 2008) (cited as Exh. JTI000005, with incorrect title and date, but quoting language from stricken ¶ 17 of that exhibit); *Affidavit of Sulkin in Support of Joint Intervenors[ ] Answer Opposing [Southern’s] Motion for Summary Disposition of EC 1.2* (Nov. 9, 2007) at ¶¶ 4, 22-24; *Pre[-]filed Rebuttal Testimony of Barry W. Sulkin Concerning Contention EC 1.2* (Feb. 6, 2009).

<sup>55</sup> Petition for Review at 9.

<sup>56</sup> Southern Answer at 6.

not raised at all until Joint Intervenors raised it in their response to Southern's motion for summary disposition, which was filed eleven months after their Intervention Petition.<sup>57</sup> The Board rejected this new argument as outside the scope of the contention. We conclude that the Board's rejection of the new argument was proper — given that, by its own terms, EC 1.2 was limited to the cumulative impacts of withdrawals by proposed and existing units at the Vogtle site.<sup>58</sup>

As Southern also argues, even though the Board more than once excluded testimony as outside the scope of the contention, Joint Intervenors “never moved to supplement or expand the scope of EC 1.2.”<sup>59</sup> A motion to that effect, compliant with our requirements for late-filed and amended contentions, while not guaranteed success, would have been the correct procedural route for Joint Intervenors to take. As it is, Joint Intervenors' answer to the summary disposition motion did not address our amended and late-filed contention pleading requirements, so their answer cannot be viewed as standing in for such a motion. Similarly, Joint Intervenors' discussions of non-Vogtle site water withdrawals in their prefiled direct and rebuttal testimony (and supporting affidavits) were outside the scope of contention EC 1.2, and did not serve to amend that scope.

In another attempt to belatedly expand the scope of the contention, Joint Intervenors argue that the Board incorrectly limited the definition of the term “cumulative

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<sup>57</sup> Joint Intervenors' Opposition to Summary Disposition at 18-19, attached *Affidavit of Barry W. Sulkin* (Nov. 9, 2007) at ¶¶ 22-24, and attached *Affidavit of Shawn Paul Young, Ph.D.* (Nov. 13, 2007) at ¶ 28.

<sup>58</sup> See LBP-08-2, 67 NRC at 77-78.

<sup>59</sup> Southern Answer at 7; also LBP-08-2, 67 NRC at 77-78.



impact.”<sup>60</sup> Joint Intervenors argue, based on the regulatory definition of “cumulative impact,”<sup>61</sup> that their use of the term in and of itself was sufficient to incorporate a challenge to the adequacy of the analysis of water withdrawals by all nearby facilities, not just the Vogtle-site intake structures.<sup>62</sup> We disagree. As Southern argues,<sup>63</sup> the flaw in Joint Intervenors’ argument is their failure to understand the distinction between the scope of admitted contentions in a contested NRC adjudication and the scope of the NEPA in general, as followed by the NRC Staff in its review and by the Board in its review in the mandatory, uncontested portion of the proceeding.

There is a difference between what an agency like the NRC must look at in order to evaluate cumulative impacts under NEPA — regardless of any contentions that may be filed by a party — and the scope of a particular cumulative impacts contention, which may, as here, be a subset of the total array of cumulative impacts required to be examined.<sup>64</sup> Consequently, Joint Intervenors’ argument that the Board’s exclusion of

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<sup>60</sup> Petition for Review at 11.

<sup>61</sup> “Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

<sup>62</sup> Petition for Review at 12.

<sup>63</sup> Southern Answer at 15.

<sup>64</sup> In other words, the Staff was required to perform the analysis of cumulative impacts called for under NEPA even though the contention did not challenge the broader set of cumulative impacts. The Staff’s water use and quality analysis in fact considered “cumulative impacts of the proposed [Vogtle] Units 3 and 4, the existing [Vogtle] Units 1 and 2, the DOE’s Savannah River Site directly across the Savannah River from the [Vogtle] site, and other water users in the region.” FEIS at 7-3. See also *id.* at 7-22, 7-23 to 7-25. Overall, the Staff concluded “that cumulative impacts to aquatic resources as a result of the proposed [Vogtle] Units 3 and 4 would be SMALL.” *Id.* at 7-25. The Continued . . .

evidence found outside the scope of the contention limited the scope of the full cumulative impacts analysis, contrary to established law, is incorrect. The Board's ruling did not address the proper scope of "cumulative impacts" analysis as a matter of general NEPA law. The Board ruled merely that the expanded "cumulative impacts" approach Joint Intervenors belatedly advocated had not been preserved for adjudication.

Joint Intervenors maintain that, in any event, they "expressly"<sup>65</sup> pled their contention to include water withdrawals by non-Vogtle site facilities. To support this, Joint Intervenors point to the unrelated discussion in their intervention petition of the cumulative impact of new effluent *discharge* (not water *withdrawals*) combined with "other sources of pollution in the area."<sup>66</sup> As the Board reasonably found, however, this was "certainly not enough to give [Southern] and the Staff notice that Joint Intervenors meant anything other than the existing Vogtle units when discussing cumulative impacts and water withdrawals."<sup>67</sup>

Joint Intervenors next reiterate the claim they made below that discussions of "other withdrawals" by the Staff and Southern "opened the door for Joint Intervenors' response,"<sup>68</sup> and complain that the Board based its merits decision "on a record that purposefully excluded any input from Joint Intervenors" related to the impacts of non-

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Board also independently examined the Staff's water use cumulative impacts analysis in the separate, uncontested portion of this proceeding (See LBP-09-19, 70 NRC \_\_\_\_ (Aug. 17, 2009) (slip op. at 13-22, 25-26)) — which is not under consideration in today's decision.

<sup>65</sup> Petition for Review at 12.

<sup>66</sup> *Id.* at 12, citing Intervention Petition at 13.

<sup>67</sup> LBP-08-2, 67 NRC at 78 n.17.

<sup>68</sup> Petition for Review at 12.

Vogtle site facilities.<sup>69</sup> But Joint Intervenors' position misapprehends the purpose of the "other withdrawal" evidence of the Staff and Southern.

As the Board made clear when it admitted EC 1.2, the contention included the issue of the adequacy of the baseline information for the part of the Savannah River at the Vogtle site intake structures.<sup>70</sup> The Board also stated that "arguments regarding the Savannah River's minimum water levels and the maximum percentage withdrawn from the river" were within the scope of the contention.<sup>71</sup> The Board recapitulated that issues within the scope of the contention included:

(1) how the aquatic environment in the Vogtle environs should be characterized in terms of the fish and other creatures that inhabit the Savannah River; (2) what river flows should be used in assessing the impingement/entrainment/thermal discharge impacts at issue; and (3) the degree to which there is what Joint Intervenors have labeled a "lower baseline" for certain of the aquatic creatures in the [Vogtle-site] environs such that they should be accorded "special creature status."<sup>72</sup>

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<sup>69</sup> *Id.* at 13.

<sup>70</sup> LBP-07-3, 65 NRC at 259.

<sup>71</sup> LBP-08-2, 67 NRC at 77.

<sup>72</sup> LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 28).

The testimony and the decisional language to which Joint Intervenors refer<sup>73</sup> (in making their argument that they should have been allowed to present non-Vogtle site cumulative impact evidence) addressed these within-scope issues, not cumulative impacts taking into account non-Vogtle withdrawals. As such, the Staff's (and Southern's) "other withdrawals" evidence was directed toward selecting the river flow levels at the Vogtle site that should be evaluated in the impact analysis and defining the current "baseline" against which cumulative impacts to aquatic resources from the proposed and existing Vogtle units should be measured.

These river flow level and baseline questions related to the adequacy of the Staff's methodology rather than to cumulative impacts from ongoing non-Vogtle site water withdrawals, and the door properly was open for such within-scope "methodology" evidence. We find that the Board's decision, in not expanding the range of cumulative impacts beyond the scope of the contention, did not rely on unanswered testimony on that point.

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<sup>73</sup> As examples of language they believe makes their point, Joint Intervenors quote (Petition for Review at 13 & nn.65-66) a passage from note 33 and passages from paragraphs 4.115 and 4.116 of the challenged decision (LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 88 n.33, 89-90)). Contrary to Joint Intervenors' argument, it is clear that, when considered in connection with the text it relates to, note 33 discusses the Savannah River environs in connection with special species/low baseline designations for aquatic species. Paragraph 4.115 is the concluding paragraph of the discussion of the analysis of cumulative impacts relating to the existing and proposed Vogtle units, given the aquatic organism and water flow rate baseline information provided. Paragraph 4.116 summarizes the Board's findings on the cumulative impacts, as bounded by the scope of the contention, and given the baseline information, which includes the baseline status of the Savannah River environs. The same holds true for the portions of the record Joint Intervenors direct us to via note 62 (& note 40) of the petition for review — the purpose is to discuss baselines, not broader cumulative impacts. And the cited transcript pages discuss the differences between once-through and closed cycle cooling systems, not cumulative impacts (Tr. 698-99).

Joint Intervenors also argue that the Commission should take review of the Board's decision, pursuant to 10 C.F.R. § 2.341(b)(4)(iii), to clarify the required extent of a cumulative impacts analysis because this is an issue that will arise in future ESP and combined license proceedings.<sup>74</sup> The Staff counters that there is no "important question" justifying our review under § 2.341(b)(4)(iii) because the Board's decision merely interprets the scope of a proceeding-specific contention — rather than the meaning of the term "cumulative impacts" — and this scope question has no generic implications for other reactor licensing proceedings.<sup>75</sup>

We agree with the Staff. The Board's decision is case-specific. It is limited to the contention before it and does not make generic pronouncements regarding the scope of NEPA cumulative impact analysis that must be undertaken in connection with reactor licensing proceedings. Thus, there is no need for us to clarify the required extent of future cumulative impact analyses. Joint Intervenors raise no "important question" justifying granting their petition for review.

As their final point, Joint Intervenors argue that "[a]s a matter of fairness, Joint Intervenors should have had the opportunity to raise issues concerning the [S]taff's cumulative impacts analysis as it relates to withdrawals other than those from the proposed and existing Vogtle units," so the Commission should grant review pursuant to 10 C.F.R. § 2.341(b)(4)(v).<sup>76</sup> We reject this argument. Orderly adjudication requires an orderly (and timely) raising of claims. Here, Joint Intervenors easily could have pled

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<sup>74</sup> Petition for Review at 13-14.

<sup>75</sup> Staff Answer at 12.

<sup>76</sup> Petition for Review at 14.

their contention to include the impacts of withdrawals by facilities other than the proposed and existing Vogtle units. They did not do so. Nor did they attempt to use NRC's existing mechanisms to amend contentions or to add new ones. It was not "unfair" for the Board to confine its hearing to the contention Joint Intervenors actually filed, rather than to expand it to include a different contention.

For these reasons, we deny Joint Intervenors' petition for review of the Board's decision on contention EC 1.2.

## **2. Contention EC 6.0**

Joint Intervenors make a series of arguments urging us to take review of the Board's decision on the merits of Contention EC 6.0 — concerning dredging of the Savannah River — pursuant to 10 C.F.R. § 2.341(b)(4)(ii) (error of law), and also urge us to take review pursuant to § 2.341(b)(4)(iii) based on the purported existence of a question that is likely to arise in other proceedings. For the reasons we discuss below, we see nothing in Joint Intervenors' arguments that compels a result different from the Board's conclusions, and we do not agree that Joint Intervenors have raised an important question that is likely to recur in future proceedings.

Joint Intervenors argue that the Board erred when it (according to Joint Intervenors) "determin[ed] that the direct impacts of dredging need not be considered in the FEIS",<sup>77</sup> and also erred when it (again according to Joint Intervenors) "conclud[ed] that the Commission's NEPA obligations are fulfilled by deference to a non-existent analysis that may be performed by the Corps sometime in the future."<sup>78</sup> Joint

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<sup>77</sup> Petition for Review at 14.

<sup>78</sup> *Id.* at 15.

Intervenors maintain further that they repeatedly raised the issue of the Staff's failure to assess all of the environmental impacts of dredging, including the direct impacts, during the course of the proceeding.<sup>79</sup>

The Staff argues in response that Joint Petitioners' "claims mischaracterize the basis for the Board's factual and legal findings, in particular by ignoring the Board's finding that 'the [S]taff's conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion[.]'"<sup>80</sup> According to the Staff, "Joint Intervenors mistakenly assert that the Staff failed to reach its own impact conclusion and that the Board thus found 'deferral' of NEPA analysis to be sufficient. . . ." <sup>81</sup> Southern argues, similarly, that Joint Intervenors mischaracterize the Board's decision, and adds that, directly contrary to Joint Petitioners' arguments, the Board took evidence on the scope and extent of potential dredging and examined the actual impacts of dredging and did not rely on future analysis of dredging that might be undertaken by the Corps.<sup>82</sup>

In our view, the Staff's analysis of dredging in its Environmental Impact Statement (EIS), and the Board's evaluation of that analysis, comported with the reality

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<sup>79</sup> *Id.* at 15-16, citing Motion to Admit New Contention at 4-5, their statements of position, pre-filed direct and rebuttal testimony, and their proposed and rebuttal findings of fact and conclusions of law. See also Petition for Review at 15 nn.77-80, citing *Joint Intervenors' Re-Revised Initial Written Statement of Position and Pre-filed Direct Testimony* (Feb. 13, 2009) at 19-22; *Joint Intervenors' Revised Response Statement and Pre-Filed Rebuttal Testimony* (Mar. 2, 2009) at 31-34; *Joint Intervenor[s]' Proposed Findings of Fact and Conclusions of Law* (Apr. 24, 2009) at 33-36; and *Joint Intervenors' Reply to Staff Proposed Findings* (May 8, 2009) at 13-17.

<sup>80</sup> Staff Answer at 13, citing LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 139).

<sup>81</sup> *Id.* at 15.

<sup>82</sup> Southern Answer at 17.

of current plans for delivering heavy components to the Vogtle site. There is currently no specific proposal for any dredging of the federal navigation channel.<sup>83</sup> As the Board found, Southern “could forego barging altogether and decide to transport its components solely by rail or by truck,”<sup>84</sup> even though barging is the “optimal and desired method” for delivering the heavier components to the site.<sup>85</sup> And even if barging is chosen, it will not necessarily require dredging — current drought conditions, for example, may end.<sup>86</sup> There is no “proposal” for dredging the federal navigation channel — in other words, no proposal for “major Federal action” within the meaning of NEPA § 102(C)<sup>87</sup> — and therefore no requirement for a NEPA analysis of such dredging.<sup>88</sup>

That said, even though there is no proposed action, the Staff evaluated the potential impacts of such dredging under a cumulative impacts rubric. Therefore, the Board, during the adjudication, considered the Staff’s evaluation, within the parameters set by contention EC 6.0. As for how the Board went about its adjudication, we see no error justifying further review.

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<sup>83</sup> See *Southern Nuclear Operation Company’s Testimony of Thomas Moorer Concerning EC 6.0* (Jan. 2009) at 6-7 (after Tr. 1291); Tr. at 1306, 1314-16, 1557-58; LBP-09-7, 69 NRC \_\_\_\_ (slip op. at 139).

<sup>84</sup> LBP-09-7, 69 NRC at \_\_\_\_ (slip op. at 128), citing Tr. at 1315.

<sup>85</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 120), citing *Southern Nuclear Operating Company’s Testimony of Jeffrey Neubert, Benjamin Smith, and David Scott Concerning EC 6.0* (Mar. 6, 2009) (after Tr. 1290) at 3.

<sup>86</sup> See *id.*, 69 NRC at \_\_\_\_ (slip op. at 121-24).

<sup>87</sup> See also 40 C.F.R. § 1508.23.

<sup>88</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 401-02 (1976) (“[T]he statutory language requires an impact statement only in the event of a proposed action. . . . In the absence of a proposal . . . there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.” *Id.* at 401. Impact statements are “required in conjunction with specific proposals for action.” *Id.* at 402 n.12.).



In its merits decision finding the Staff's approach to dredging adequate under NEPA, the Board relied on a number of points in the Staff's analysis. For example, the Board pointed to the Staff's conservative assumptions for purposes of its NEPA analysis — first, that if dredging were required, most of the length of the federal navigation channel would have to be dredged for barging to be possible at normal river flow rates, and second, that the river would be dredged to the depth of nine feet and the width of ninety feet,<sup>89</sup> namely the dimensions to which the Corps is authorized to maintain the channel if dredging is funded.<sup>90</sup> The Board recognized that actual dredging requirements could be less.<sup>91</sup> The Board also pointed out that the Staff had limited information regarding Southern's transportation plans and the potential extent of the dredging, if any, that would be required should barging be chosen for transportation of the heavier reactor components. This, held the Board, is why the Staff could not conduct a quantitative assessment. Instead, the Board said, the Staff reasonably conducted a qualitative analysis, relying on the experience of its expert and on its knowledge of the Corps' environmental review process and the considerations the Corps would include in its assessment.<sup>92</sup>

The Board canvassed the areas the Staff considered. As part of its qualitative assessment, for example, the Staff concluded that dredging the federal navigation channel and disposing of dredged material "would likely have an effect on aquatic

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<sup>89</sup> LBP-09-7, 69 NRC at \_\_\_ (slip op. at 131).

<sup>90</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 124, 140).

<sup>91</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 140).

<sup>92</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 130-31).

organisms for most trophic levels,” that is, food-chain strata.<sup>93</sup> The Staff also reviewed potential impacts of dredging and disposal on water quality, stating that these could include physical, chemical, and biological impacts.<sup>94</sup> The Staff analyzed the types of environmental impacts that dredging the channel and disposing of the dredged matter might cause as well as mitigation measures to minimize the impacts.<sup>95</sup> The Staff discussed potential mitigation measures “as examples only and not as specific recommendations . . . because there was (and is) no formal request or permit application to dredge the [f]ederal navigation channel before the Corps for its review.”<sup>96</sup> The Staff indicated that mitigation measures, in the event of an actual plan to dredge, could include scheduling dredging for periods that do not include peak reproductive and migratory times, seasonal restrictions, minimizing dredging in certain areas, (or, as a last resort, relocating organisms, specifically, any endangered mussels that might be present), and implementing best management practices, with limitations on the type and size of dredges, types of buckets, sediment control measures, etc.<sup>97</sup>

The Board heard extensive testimony and received substantial written testimony and exhibits into evidence (sponsored by multiple expert witnesses on behalf of each of

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<sup>93</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 131), quoting *NRC Staff Testimony of Mark D. Notich, Anne R. Kuntzleman, Rebekah H. Krieg, Dr. Christopher B. Cook, and Lance W. Vail Concerning Environmental Contention EC 6.0* (Feb. 26, 2009) (after Tr. 1477) (Staff EC 6.0 Direct Testimony) at 13; also citing Staff EC 6.0 Direct Testimony at 14-15.

<sup>94</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 132), citing Staff EC 6.0 Direct Testimony at 15.

<sup>95</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 131), citing Staff EC 6.0 Direct Testimony at 14.

<sup>96</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 134), citing Staff EC 6.0 Direct Testimony at 20 (ellipsis in original).

<sup>97</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 133-34).

the parties).<sup>98</sup> With this testimony and evidence before it, and based on its consideration of the Staff's qualitative review, the Board found that "the [S]taff's conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion given the limited information available regarding the nature and extent of any dredging."<sup>99</sup> We see nothing in the record ourselves, and Joint Intervenors have pointed to nothing, that calls the Board's findings into question and thereby justifies taking review of this facet of the Board's decision.

Joint Intervenors also argue that the Board erred in failing to determine whether dredging the federal navigation channel and issuing the ESP were "connected actions,"<sup>100</sup> (as Joint Intervenors argue they were), prior to determining the nature of the impacts that needed to be assessed. Joint Intervenors argue that NEPA requires an analysis of all impacts of connected actions, including direct, indirect, and cumulative impacts, and that the Board erred when it (according to Joint Intervenors) concluded that only a cumulative analysis, and not a direct analysis, of dredging the river was necessary.<sup>101</sup>

We reject this argument as beside the point given the lack of a specific proposal to dredge.<sup>102</sup> But in any case, as the Staff points out, "Joint Intervenors have not shown

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<sup>98</sup> See Tr. at 1287-1631, with associated (interspaced) testimony.

<sup>99</sup> LBP-09-7, 69 NRC at \_\_\_\_ (slip op. at 139).

<sup>100</sup> See 40 C.F.R. § 1508.25(a)(1).

<sup>101</sup> Petition for Review at 17.

<sup>102</sup> In performing NEPA evaluations, agencies must consider: three types of actions (connected, cumulative, and similar), three types of alternatives (no action, other  
Continued . . .

how or why the Staff's analysis and conclusion regarding possible impacts from dredging could change if characterized as 'direct' as opposed to 'cumulative' impacts."<sup>103</sup> The Staff is also correct that "Joint Intervenors have not shown, either in the record or in the [petition for review], that there are potential impacts that could have been analyzed that were omitted from the FEIS."<sup>104</sup> As Southern says, Joint Intervenors fail to challenge "any of the Board's findings on the impacts of dredging to or from: fish, mussels, aquatic resources, snag removal, sediment disposal, etc." but argue only, without explanation or identification, "that additional impacts should have been considered under the label of 'direct impacts.'"<sup>105</sup> Given the constraints on the analysis due to lack of information and lack of certainty, we agree with Southern that no matter the label attached to the impacts the Board examined — whether characterized as "*cumulative* impacts of issuance of the ESP or *direct* impacts of dredging" — "the actual analysis, in this case, would be the same given that the Board has already addressed the undisputed evidence concerning *any* impacts."<sup>106</sup>

Joint Intervenors argue that the Staff's deference to a future Corps' NEPA analysis is "incorrect as a matter of law," citing the NRC's Environmental Standard

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reasonable actions, and mitigation measures), and three types of impacts (direct, indirect, and cumulative). See 40 C.F.R. § 1508.25.

<sup>103</sup> Staff Answer at 16-17.

<sup>104</sup> *Id.* at 17-18.

<sup>105</sup> Southern Answer at 20.

<sup>106</sup> *Id.*

Review Plan.<sup>107</sup> Joint Intervenors claim that the NRC cannot “either fail to perform an adequate evaluation or . . . evade a NEPA responsibility by deferring to another agency,”<sup>108</sup> and that the Board erred when it allowed the deferral of the dredging issue, including possible mitigation measures, to future Corps analysis.<sup>109</sup>

But as we see the case, the Board did not “allow the deferral” of the NRC’s NEPA obligations to another agency, so there was no evasion of responsibility. The Staff’s EIS, after all, did consider the potential for dredging and analyzed its environmental impacts in qualitative terms. The Board found the Staff’s approach reasonable. So do we. As we stated earlier, a full NEPA evaluation is not possible absent a specific proposal to dredge. There is no such proposal here. Consequently, there was nothing to defer to another agency. Instead, the Staff reasonably looked at potential impacts of dredging that might occur, based on current information. The Staff and the Board also concluded, reasonably, that should an actual proposal for dredging

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<sup>107</sup> Petition for Review at 19, citing NUREG-1555, Environmental Standard Review Plan: Standard Review Plans for environmental Reviews for Nuclear Power Plants (Mar. 2000) (ML003702134 & ML003701937).

<sup>108</sup> *Id.* at 21. In support, Joint Intervenors cite *Wyoming Outdoor Council v. U.S. Army Corps*, 351 F.Supp.2d 1232, 1242 (D. Wyo. 2005) and *Ohio Valley Environmental Coalition v. Hurst*, 604 F.Supp.2d 860, 887 (S.D. W. Va. 2009). Petition for Review at 20-21. These cases are distinguishable. In *Wyoming*, the Corps failed to consider cumulative impacts at all in connection with issuing a general permit for discharge of dredge and fill materials, postponing that assessment to future individual permits. In *Ohio*, the Corps failed to provide analysis supporting its cumulative impact analysis in a nationwide permit, based on further consideration in individual permits. In both cases, unlike the NRC here, the Corps had actual proposals under consideration. Moreover, the Staff did analyze potential impacts of dredging the federal navigation channel to the extent possible given available information for the hypothetical scenario where dredging occurs, and performed its analysis using conservative assumptions regarding the amount of dredging.

<sup>109</sup> Petition for Review at 22-23.

emerge later, the Corps appropriately would contribute its own analysis, based on its expertise with dredging projects, at that time.

For similar reasons, we also reject Joint Intervenors' argument<sup>110</sup> that the Staff's supposed "deference" is contrary to the terms of the NRC's Memorandum of Understanding (MOU) with the Corps.<sup>111</sup> As we have stressed, in the absence of a specific proposal there is nothing to defer — but in any event, as evidenced by the Corps' participation in the proceeding,<sup>112</sup> the NRC and the Corps are already cooperating to the extent possible given current information.<sup>113</sup>

Finally, Joint Intervenors seek Commission review by arguing that delegating NEPA duties to other agencies is important and likely to arise in numerous proceedings in the future. Hence, Joint Intervenors say, future litigants "need to have a clear understanding of whether and to what extent dredging impacts must be considered in an

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<sup>110</sup> *Id.* at 22.

<sup>111</sup> See Notice of Availability of Memorandum of Understanding Between U.S. Army Corps of Engineers and U.S. Nuclear Regulatory Commission on Environmental Reviews Related to the Issuance of Authorizations [t]o Construct and Operate Nuclear Power Plants, 73 Fed. Reg. 55,546 (Sept. 25, 2008) (the text of the MOU appears at 55,547-49). The MOU establishes a framework for early cooperation, coordination, and streamlining of the two agencies' respective regulatory responsibilities and processes. Under the terms of the MOU, the NRC serves as lead agency in the preparation of the EIS, and the Corps generally serves as a cooperating agency in most circumstances unless a different form of coordination is more efficacious. *Id.* at 55,547. Presentation of a specific dredging proposal will not alter this arrangement.

<sup>112</sup> See n.31, *supra*.

<sup>113</sup> We note that the Staff will supplement the EIS for the ESP in the EIS prepared for the combined license. If any significant new information regarding dredging impacts develops in the future, it would be addressed in the combined license EIS. See LBP-09-7, 69 NRC at \_\_\_\_ (slip op. at 152-53). We expect the Staff to continue to coordinate with the Corps to ensure that the Staff promptly obtains any new information relevant to the Staff's environmental review, including dredging.

FEIS.”<sup>114</sup> The Staff counters that the petition for review does not explain why the question of delegating the Staff’s NEPA responsibilities to the Corps, insofar as this case even involves the question, might have generic implications.<sup>115</sup>

Given our holding today that the question of delegating NEPA responsibilities does not even arise in this case, we do not see Joint Intervenors’ unidentified generic implications as a basis for taking review. Additionally, the scope of review of dredging impacts in future environmental analyses will be determined when and if specific dredging proposals are presented. Future litigants are not without guidance in the form of existing statutes, regulations, and case law. Joint Intervenors have not shown that the Board’s decision raises an important question of law requiring our review.

For these reasons, Joint Intervenors’ petition for review of the Board’s decision on contention EC 6.0 is denied.

### III. CONCLUSION

For the foregoing reasons, we *deny* the petition for review.

IT IS SO ORDERED.

For the Commission

**(NRC SEAL)**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 7<sup>th</sup> day of January, 2010.

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<sup>114</sup> Petition for Review at 23.

<sup>115</sup> Staff Answer at 18.