NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

January 1, 2024 – June 30, 2024

Volume 99
Pages 1 - 125

Prepared by the
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(301-415-0955)

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PREFACE

This is the ninety-ninth volume of issuances (1–125) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2024, to June 30, 2024.

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

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

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

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

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Emily I. Krause, Chair
Dr. Sue H. Abreu
Dr. Michael F. Kennedy

In the Matter of **Docket Nos. 50-250-SLR-2**
50-251-SLR-2
(ASLBP No. 24-981-01-SLR-BD01)

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating Units 3 and 4)

January 31, 2024

In this proceeding concerning the subsequent license renewal of Turkey Point Nuclear Generating Units 3 and 4, the Licensing Board seeks the Commission's direction on a certified question pertaining to the timing of the Staff's issuance of the notice of opportunity for hearing.

LICENSING BOARDS: CASE MANAGEMENT

A presiding officer "has the duty to conduct a fair and impartial hearing according to law," with "all the powers necessary to those ends," including the power to "certify questions to the Commission." 10 C.F.R. § 2.319(*l*).

LICENSING BOARDS: CERTIFIED QUESTIONS

The Commission may review a certified question that raises "significant and novel legal or policy issues, or [if] resolution of the issues would materially advance the orderly disposition of the proceeding." 10 C.F.R. § 2.341(f)(1).

LICENSING BOARDS: CERTIFIED QUESTIONS

The Commission has instructed presiding officers to seek immediate Commission direction when questions arise regarding the scope of a presiding officer's delegated authority. *See Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-5, 79 NRC 254, 264 (2014); *see also Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 103 (2022); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980).

MEMORANDUM
(Certifying Question to the Commission Regarding Timing of Notice of Opportunity for Hearing)

This proceeding commenced with the Nuclear Regulatory Commission Staff's issuance of a notice in the *Federal Register* announcing an opportunity for members of the public to request a hearing on the Staff's Draft Supplemental Environmental Impact Statement (Draft SEIS) for the subsequent license renewal of Turkey Point Nuclear Generating Units 3 and 4.[1] In response to that notice, Miami Waterkeeper filed a timely hearing request with five proposed contentions challenging the Draft SEIS.[2]

Prior to filing its hearing request, Miami Waterkeeper requested that the Secretary of the Commission withdraw the Staff's notice of opportunity for hearing.[3] Miami Waterkeeper argued that the notice was premature because it did not follow the Commission's direction in CLI-22-3, which instructed the Staff to issue the notice "'[a]fter each site-specific review is complete.'"[4] Miami Waterkeeper asserted that the Staff should have waited to provide the hearing notice until after the Staff had completed its site-specific environmental review for Turkey Point — that is, after public comments had been considered and

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[1] *See* Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 88 Fed. Reg. 62,110 (Sept. 8, 2023) (Draft SEIS Notice); 10 C.F.R. § 2.318.

[2] Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Nov. 27, 2023) (Hearing Request).

[3] E-mail from Sydnei Cartwright, Environmental Policy Specialist, Miami Waterkeeper, to the Secretary of the Commission (Oct. 30, 2023) at 1, attaching Letter from Sydnei Cartwright, Environmental Policy Specialist, Miami Waterkeeper, to the Secretary of the Commission (Oct. 27, 2023). Because the email and attachment are combined in one portable document format (PDF) file, we refer to the page numbers in the PDF.

[4] *Id.* at 4 (quoting *Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 42 (2022)).

upon the issuance of a Final Supplemental Environmental Impact Statement (Final SEIS) — rather than providing the hearing notice upon the issuance of a draft.[5] In the alternative, Miami Waterkeeper requested a sixty-day extension of time to file its hearing request.[6] Florida Power & Light Company opposed the extension request.[7]

The Secretary granted Miami Waterkeeper a partial extension of an additional twenty days to file a hearing request.[8] With respect to Miami Waterkeeper's request to withdraw the notice of opportunity for hearing, however, the Secretary denied the request.[9] The Secretary determined that withdrawal of the notice was beyond the scope of her delegated authority under 10 C.F.R. § 2.346.[10]

On November 27, 2023, in accordance with the Secretary's order, Miami Waterkeeper filed its hearing request. Miami Waterkeeper reserved "the right to challenge the premature timing of the hearing notice on the ground that it is inconsistent with CLI-22-03."[11] The Secretary referred Miami Waterkeeper's hearing request to the Chief Administrative Judge for appropriate action, and this Licensing Board was established to preside over the proceeding.[12]

A presiding officer — here, this Licensing Board — "has the duty to conduct a fair and impartial hearing according to law," with "all the powers necessary to those ends," including the power to "certify questions to the Commission."[13] The Commission may review a certified question that raises "significant and novel legal or policy issues, or [if] resolution of the issues would materially advance the orderly disposition of the proceeding."[14] In the Board's view, this proceeding presents an important question involving the Staff's compliance with the Commission's order in CLI-22-3 with regard to the proper timing of the

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[5] *Id.* (citing *Oconee,* CLI-22-3, 95 NRC at 42).

[6] *Id.* at 4-5.

[7] Florida Power & Light Company Answer in Opposition to Miami Waterkeeper Extension Request (Nov. 2, 2023).

[8] Order of the Secretary (Nov. 6, 2023) at 4.

[9] *Id.* at 3.

[10] *Id.*

[11] Hearing Request at 10 n.31; *see also* Tr. at 10.

[12] *See* Memorandum from Carrie M. Safford, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Nov. 28, 2023); Florida Power & Light Company; Establishment of Atomic Safety and Licensing Board, 88 Fed. Reg. 84,835 (Dec. 6, 2023).

[13] 10 C.F.R. § 2.319(*l*).

[14] *Id.* § 2.341(f)(1).

notice of opportunity for hearing.[15] The Board therefore seeks the Commission's direction on the following certified question:

> Should the NRC Staff have waited to issue the notice of opportunity for hearing until it completed the Final SEIS, and if so, how does that impact the conduct of this proceeding?

The Board respectfully submits that this question meets the Commission's standard for interlocutory review of certified questions.[16]

First, this question is significant. The notice of opportunity for hearing served as the initiating event for this adjudicatory proceeding.[17] If it turns out that the Staff has issued the notice prematurely, Miami Waterkeeper will not receive the full benefit of a fresh opportunity to challenge the adequacy of the Staff's environmental review. With the Commission's decision, and the new notice, petitioners were relieved of the requirement to meet the heightened pleading standards for new and amended contentions.[18] Starting the proceeding at the Draft SEIS stage, however, means that petitioners will have to meet the heightened, "good cause" standard for any new or amended contentions filed after the Staff completes its review and issues the Final SEIS.[19] In other words, a premature notice of hearing arguably frustrates the remedy the Commission fashioned when it found the Staff's original environmental analysis incomplete and, in the

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[15] *See Oconee,* CLI-22-3, 95 NRC at 42 ("After each site-specific review is complete, a new notice of opportunity for hearing — limited to contentions based on new information in the site-specific environmental impact statement — will be issued.").

[16] *See* 10 C.F.R. § 2.341(f)(1).

[17] *See id.* § 2.318(a).

[18] *See Oconee,* CLI-22-3, 95 NRC at 42 ("This approach will not require [petitioners] to meet heightened pleading standards in 10 C.F.R. § 2.309(c) for newly filed or refiled contentions.").

[19] *See* 10 C.F.R. § 2.309(c). In this memorandum, we make no determination on the viability of Miami Waterkeeper's hearing request. In the event a licensing board were to deny a hearing request and terminate a proceeding at the Draft SEIS stage and before the issuance of a Final SEIS, a petitioner would face the additional burden of meeting the Commission's reopening standards if it wished to raise contentions challenging the Final SEIS. *See id.* § 2.326; *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), CLI-21-9, 93 NRC 244, 246-47 (2021) (explaining that, together, the reopening requirements, the showing of good cause for new and amended contentions, and the contention admissibility requirements "impose a higher standard for admitting a new contention after the Board has terminated a proceeding than would otherwise apply"). Moreover, a petitioner's appellate rights may differ. The Commission's rules grant a petitioner an appeal as-of-right on the issue whether a hearing request should have been granted. 10 C.F.R. § 2.311(c). A petitioner seeking review of other contention admissibility-related decisions, however, must persuade the Commission to exercise its discretionary authority. *See id.* § 2.341(a)-(b); *Interim Storage Partners,* CLI-21-9, 93 NRC at 246 (citing *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012)).

interests of fairness and efficiency, ordered the Staff to issue a new notice of hearing when it had completed its review.[20]

Second, this question is novel. This case presents the first test of the Staff's implementation of the Commission's direction in CLI-22-3 regarding the Staff's site-specific environmental reviews of subsequent license renewal applications. As the Staff acknowledged at oral argument, the posture of this proceeding is out of the ordinary;[21] in other licensing cases, hearing notices generally are timed closely with the Staff's docketing of a license application,[22] and contentions must be filed at the earliest opportunity, which for environmental contentions means that petitioners must challenge an applicant's environmental report.[23] But the Commission has issued an order governing this proceeding and four other subsequent license renewal proceedings that addresses the timing for issuing hearing opportunity notices.[24] Thus, the Staff's usual practice arguably does not apply here.[25]

The Commission directed that the new notice of opportunity for hearing be issued "[a]fter each site-specific review is complete."[26] This direction seems clear on its face: complete means complete, not "substantially complete."[27] Other language in the Commission's order supports that conclusion. In particular, the sentence immediately preceding the Commission's direction on the timing of the hearing request contemplates that the public comment period would occur "during the development of the site-specific environmental impact statements."[28]

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[20] *See Oconee,* CLI-22-3, 95 NRC at 41-42; *cf. Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-2, 95 NRC 26, 33, 36 (2022) (describing and giving significant weight to the interest of meaningful public participation in agency decision-making, including the Staff's subsequent license renewal environmental reviews).

[21] *See* Tr. at 25, 35.

[22] *See generally* 10 C.F.R. §§ 2.101, 2.104, 2.105; *see also* Tr. at 32-34.

[23] *See id.* § 2.309(f)(2).

[24] *See Oconee,* CLI-22-3, 95 NRC at 40, 42-43. In CLI-22-3, the Commission does not appear to set *Turkey Point* apart from the other four cases. The Commission mentions plural "site-specific environmental impact statements." *Id.* at 42. Additionally, the next line in the decision describes "*each* site-specific review." *Id.* (emphasis added). And throughout the decision, when the Commission provides instructions for specific proceedings, rather than for all five captioned proceedings, it does so expressly. *See id.* at 42-43.

[25] Because a plant may continue to operate during a subsequent license renewal review, having the Staff wait to issue the notice of opportunity for hearing until after the Final SEIS is complete in these five cases would not add the undue delay that might be a concern in a proceeding relating to new plant construction. *See* 10 C.F.R. § 2.109(b); *cf. id.* § 2.104(a) (For applications for a limited work authorization, construction permit, early site permit, or combined license, "the notice must be issued as soon as practicable after the NRC has docketed the application.").

[26] *Oconee,* CLI-22-3, 95 NRC at 42.

[27] *See* Tr. at 32-33.

[28] *Oconee,* CLI-22-3, 95 NRC at 42.

The process of developing an environmental impact statement is distinct from its completion. One must precede the other. But here, the Staff issued the notice of opportunity for hearing simultaneously with the opportunity to comment on the Draft SEIS — during the development process — calling into question whether the site-specific review was complete.[29]

Finally, as an alternative ground for Commission review, the Commission's resolution of the Board's certified question would materially advance the orderly disposition of this proceeding, as well as other subsequent license renewal proceedings.[30] Briefing on Miami Waterkeeper's hearing request is complete, and the Board will issue its decision on standing and contention admissibility in accordance with 10 C.F.R. § 2.309(j)(1).[31] But a decision from the Commission addressing the Board's certified question would give the Board clear direction as to (1) whether this proceeding either should be suspended or terminated to await the issuance of the Final SEIS or a new hearing opportunity notice; or (2) if the proceeding remains ongoing, whether Miami Waterkeeper must meet heightened standards for new and amended contentions if it seeks to challenge the Final SEIS.[32]

In other cases, the Commission has instructed presiding officers to seek immediate Commission direction when questions arise regarding the scope of a presiding officer's delegated authority.[33] Similarly, we are seeking the Commission's direction on a question that falls squarely within the bounds of the

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[29] *See* Draft SEIS Notice, 88 Fed. Reg. at 62,110.

[30] A motion similar to Miami Waterkeeper's withdrawal request has been filed in response to the notice of opportunity for hearing in the *North Anna* subsequent license renewal proceeding, which is opposed by the Staff and the applicant in that case. *See* Motion by Beyond Nuclear and Sierra Club for Withdrawal of Premature Hearing Notice (Jan. 18, 2024; corrected Jan. 22, 2024); NRC Staff's Answer to Beyond Nuclear and Sierra Club's "Motion for Withdrawal of Premature Hearing Notice" (Jan. 29, 2024); Applicant's Answer Opposing Beyond Nuclear's and Sierra Club's Motion for Withdrawal of Hearing Notice (Jan. 29, 2024).

[31] At oral argument, Miami Waterkeeper expressed an interest in the Board's resolution of its contentions, notwithstanding its challenge to the timing of the Staff's notice of opportunity for hearing. *See* Tr. at 10-11.

[32] The Staff stated at oral argument that it plans to issue the Final SEIS at the end of March 2024. *Id.* at 31. As discussed in note 19 above, the timing of the notice of opportunity for hearing also may impact the application of the standards for motions to reopen and a petitioner's appellate rights.

[33] *See Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-5, 79 NRC 254, 264 (2014); *see also Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 103 (2022); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980).

Commission's inherent supervisory authority over the conduct of adjudicatory proceedings.[34] Only the Commission can answer it.[35]

For the foregoing reasons, we respectfully request direction from the Commission on the Board's certified question.

THE ATOMIC SAFETY AND
LICENSING BOARD

Emily I. Krause, Chair
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 31, 2024

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[34] *See Oklo Power LLC* (Aurora Reactor), CLI-20-17, 92 NRC 521, 523 (2020); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 51-53 (1998); *Shearon Harris,* CLI-80-12, 11 NRC at 516-17.

[35] *See Shearon Harris,* CLI-80-12, 11 NRC at 516 ("It is . . . clear that the Boards do not direct the staff in performance of their administrative functions. The Commission does have authority to do so, however, as part of its inherent supervisory authority even over matters in adjudication."); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-04-28, 60 NRC 412, 414 (2004) (reserving, for the Commission's consideration, a question regarding the adequacy of a notice of opportunity for hearing). Although the Commission has delegated authority to the Secretary to act in agency proceedings, that authority is limited to the powers expressly delineated in 10 C.F.R. § 2.346 and is not applicable here. *See* Order of the Secretary at 3 (acknowledging that the request to withdraw the hearing notice was not within the authority delegated to the Secretary by the Commission in section 2.346).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chair
Nicholas G. Trikouros
Dr. Craig M. White

In the Matter of **Docket No. 40-8943-MLA**
(ASLBP No. 07-859-03-MLA-BD01)

CROW BUTTE RESOURCES, INC.
(North Trend Expansion Project) **February 29, 2024**

In this proceeding concerning a 10 C.F.R. Part 40 source material license amendment application by Crow Butte Resources, Inc. (CBR) requesting authorization to conduct in situ uranium recovery (ISR) operations within the so-called North Trend Expansion Area (NTEA), the Licensing Board grants CBR's motion to withdraw its NTEA-associated license amendment application without prejudice and terminates this proceeding.

RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS); MOTIONS (WITHDRAWAL OF LICENSE APPLICATION); NOTICE OF HEARING (LICENSING BOARD JURISDICTION OVER APPLICATION WITHDRAWAL MOTION)

Consistent with 10 C.F.R. § 2.107(a), when a hearing petition challenging a license application has been granted and a notice of hearing has been issued, the licensing board presiding over the adjudicatory proceeding has jurisdiction to determine the disposition of a subsequent request to withdraw that application. *See Public Service Co. of Indiana, Inc. and Wabash Valley Power Ass'n, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 723-24 (1988) (citing 10 C.F.R. § 2.107(a) in concluding that in the absence

of a notice of hearing issued after an intervention petition is granted, a licensing board lacks jurisdiction to consider whether to impose conditions on a motion to terminate an operating license proceeding).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (LICENSING BOARD CONSIDERATION OF APPLICANT'S BUSINESS JUDGMENT)

As the filing of a license application is usually voluntary, an applicant's decision to withdraw its application "is generally considered a business judgment, the soundness of which is not a matter for licensing board consideration." *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-16-1, 83 NRC 97, 104 (2016) (citing *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983)).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (IMPOSITION OF CONDITIONS)

LICENSING BOARD(S): DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

Licensing board approval of a license application withdrawal request is subject to any appropriate conditions the board may impose. *See Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981); *U.S. Department of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010), *aff'd by an equally divided Commission,* CLI-11-7, 74 NRC 212 (2011). This includes a determination whether to approve the withdrawal request with or without prejudice to the submission of a future application. *See Bellefonte,* LBP-16-1, 83 NRC at 104.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (SIGNIFICANCE OF MERITS DISPOSITION FOR WITHOUT PREJUDICE WITHDRAWAL)

Agency caselaw indicates that if a resolution of the health, safety, and environmental issues associated with an application has not been reached, a withdrawal "without prejudice" generally is appropriate, signifying the lack of a merits disposition and permitting the application to be refiled. *See Fulton,* ALAB-657, 14 NRC at 973; *Bellefonte,* LBP-16-1, 83 NRC at 104.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (WITH OR WITHOUT PREJUDICE)

Owing to the "severe sanction" imposed on the applicant by eliminating the possibility of resubmitting an application, "it is highly unusual" to grant a "with prejudice" withdrawal absent a showing of "substantial prejudice to the opposing party or to the public interest in general." *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981); *see Fulton,* ALAB-657, 14 NRC at 974 (stating prohibiting an applicant from refiling "is a particularly harsh and punitive term imposed upon withdrawal").

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (STANDARD TO IMPOSE CONDITIONS)

LICENSING BOARD(S): DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

If a licensing board determines there has been an adequate showing of harm to a party or the public interest in general associated with permitting the application to be refiled, the board can grant a withdrawal "with prejudice," precluding the application from being refiled, or may impose such other conditions as it deems appropriate. *See Bellefonte,* LBP-16-1, 83 NRC at 104. But "conclusory statements and generalized concerns" will not meet a proponent's burden of describing the possible deficiency that could be remedied through a requested condition. *Sequoyah Fuels Corp.,* CLI-95-2, 41 NRC 179, 192-93 (1995). Moreover, "the record must support any findings concerning the conduct and the harm" purportedly supporting such a condition. *Fulton,* ALAB-657, 14 NRC at 974.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (STANDARD TO IMPOSE CONDITIONS)

LICENSING BOARD(S): DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

While a licensing board thus has significant leeway in defining the circumstances under which an application can be withdrawn, any conditions imposed, including granting withdrawal with prejudice to the submission of a new application, "must bear a rational relationship to the conduct and legal harm at which they are aimed." *Fulton,* ALAB-657, 14 NRC at 974.

RULES OF PRACTICE: MOOTNESS (WITHDRAWAL OF LICENSE APPLICATION)

The withdrawal of a license application, whether with or without prejudice, effectively moots any adjudicatory proceeding regarding that application. *See Bellefonte,* LBP-16-1, 83 NRC at 103 (citing *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-00-9, 51 NRC 293, 294 (2000)).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (BURDEN OF PROOF)

As the proponent of an order seeking dismissal of a license amendment application proceeding without prejudice, the applicant has the burden of proof. See 10 C.F.R. § 2.325.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (LICENSING BOARD CONSIDERATION OF APPLICANT'S BUSINESS JUDGMENT)

A licensing board will not second-guess an applicant's business judgment, at least in the absence of a showing of bad faith. *See Bellefonte,* LBP-16-1, 83 NRC at 104; *see also North Coast,* ALAB-662, 14 NRC at 1138 (indicating that when facts regarding reactor application withdrawal do not show an applicant bent on hiding its intentions from the Commission, the decision to proceed is best left to the applicant and its consideration of the range of energy options without the "artificial exclusion" of the proposed site by imposing a "with prejudice" withdrawal).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (STANDARD TO IMPOSE CONDITIONS)

To justify placing a "with prejudice" condition on the dismissal of CBR's application, Consolidated Intervenors must demonstrate substantial harm to them or the public interest that is of "comparable magnitude" to the punitive harm to CBR that would result from imposing such a restraining term. *See North Coast,* ALAB-662, 14 NRC at 1132 (citing *Fulton,* ALAB-657, 14 NRC at 974).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (STANDARD TO IMPOSE CONDITIONS)

Licensing Board must bear in mind the Commission's exhortation that "con-

clusory statements and generalized concerns" will not meet Consolidated Intervenors' burden of showing the requisite impact to them or the public interest necessary to support the imposition of a "with prejudice" withdrawal. *See Sequoyah Fuels Corp.,* CLI-95-2, 41 NRC at 193.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (POSSIBILITY OF FUTURE LITIGATION AS BASIS FOR WITH PREJUDICE WITHDRAWAL)

"[T]he possibility of future litigation — with its expenses and uncertainties — is precisely the consequence of *any* dismissal without prejudice . . . [and] does not provide a basis for departing from the usual rule that a dismissal should be without prejudice." *North Coast,* ALAB-662, 14 NRC at 1135; *see Fulton,* ALAB-657, 14 NRC at 979.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION (STANDARD FOR PERMITTING FURTHER PLEADINGS OR ORAL HEARING REGARDING WITHDRAWAL MOTION CHALLENGE)

A challenge to a motion seeking withdrawal "without prejudice" can "trigger further inquiry" in the form of additional pleadings or an oral hearing. *Fulton,* ALAB-657, 14 NRC at 978 n.12. It has been recognized as well that the "threshold standard" for requiring such an inquiry "should be related to the substantive standard that a [challenge] of that kind must satisfy." *North Coast,* ALAB-662, 14 NRC at 1133.

LICENSE APPLICATION: RESPONSIBILITY OF APPLICANT AND NRC STAFF IN SUBMITTING AND EVALUATING LICENSE APPLICATION

Both an applicant in submitting its licensing request and the Nuclear Regulatory Commission (NRC) Staff in undertaking its licensing evaluation, already are obligated to use their best efforts to ensure that the substance and seasonableness of the application's information are sufficient to address the various applicable Atomic Energy Act, National Environmental Policy Act, and other statutory and associated regulatory requirements that govern and inform the agency's safety and environmental reviews. *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 627 (1973) (indicating agency regulatory staff has continuing responsibility and duty under the AEA to ensure applicants and licensees comply with applicable requirements

"both on paper and in reality"); *see also* Office of Nuclear Material Safety and Safeguards (NMSS), NRC, NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications at iii (June 2003) (ADAMS Accession No. ML032250177) (Relationship of 10 CFR Part 40, Appendix A Requirements to Standard Review Plan Sections) (table outlining correlation between Part 40, Appendix A criteria, which were written for conventional uranium recovery facilities, and NUREG 1569 standard review plan provisions providing guidance on information to be included in ISR facility applications); NMSS, NRC, NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs at 1-1 (Aug. 2003) ("This document is primarily intended to serve as guidance to NMSS staff to meet the requirements established by legislation and regulations. . . . In a similar manner, applicants and licensees are encouraged, but not required, to use Chapter 6[, which discusses information that should be considered for inclusion in an ER,] when preparing [ERs] for submission to the NRC.") (ADAMS Accession No. ML032450279).

MEMORANDUM AND ORDER
(Granting Motion to Withdraw Application Without Prejudice and Terminating Proceeding)

On December 29, 2023, Crow Butte Resources, Inc. (CBR) filed a motion to withdraw its pending application to amend its existing 10 C.F.R. Part 40 source materials license to authorize CBR to conduct in situ uranium recovery (ISR) operations for the North Trend Expansion Area (NTEA), without prejudice to the submission of a new application seeking authorization for NTEA ISR operations.[1] In an answer dated January 10, 2024, Consolidated Intervenors assert that any grant of CBR's withdrawal request (1) should be with prejudice, so as to preclude CBR from submitting a new NTEA license amendment application; or (2) if without prejudice, must include conditions to ensure any new application includes up-to-date information and is in compliance with then-existing Nuclear Regulatory Commission (NRC) regulations and policies.[2]

For the reasons detailed below, we grant CBR's request to withdraw its NTEA-associated license amendment application without prejudice and terminate this proceeding.

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[1] *See* Motion to Withdraw License Amendment Application (Dec. 29, 2023) at 3-4 [hereinafter CBR Withdrawal Motion].

[2] Consolidated Intervenors' Answer to Crow Butte Motion to Withdraw License Amendment Application (Jan. 10, 2024) at 1-2 [hereinafter Consolidated Intervenors Answer].

I. BACKGROUND

This long-standing proceeding began in 2007 when CBR applied for NRC authorization to conduct ISR operations within the NTEA, which is located in Dawes County, Nebraska, about one-half mile north of the City of Crawford.[3] In response to a September 2007 hearing opportunity notice posted on the NRC's public website, various organizations and individuals, including Consolidated Intervenors,[4] submitted hearing requests, and this Licensing Board was established in December 2007 to rule on those intervention petitions.[5] In a May 2008 ruling, the Board granted the hearing requests of Consolidated Intervenors, with a single contention ultimately admitted for litigation.[6] Additionally, the Board granted 10 C.F.R. § 2.315(c) interested governmental entity status to the Oglala Sioux Tribe (OST) and the Oglala Delegation of the Great Sioux Nation Treaty Council (Treaty Council), allowing both OST and the Treaty Council to participate in this proceeding as well.[7]

Thereafter, in a series of conferences with the parties, the Board sought to establish a schedule for this proceeding but postponed that effort in recognition of ongoing NRC Staff work to complete and issue its safety and environmental

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[3] *See* Letter from Stephen P. Collins, President, CBR, to Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs (FSME), NRC, at 1 (May 30, 2007) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML071550057); CBR, 1 Application for Amendment of USNRC Source Materials License SUA-1534, [NTEA], Environmental Report [(ER)] at 3.1-2 (May 30, 2007) (ADAMS Accession No. ML071870300) [hereinafter ER]. As was the case with CBR's already-licensed Marsland Expansion Area (MEA), CBR's request for authorization to conduct ISR operations at the NTEA was submitted as an amendment to CBR's current license covering ISR operations at its existing central uranium processing facility and the surrounding area, located just to the southeast of Crawford, Nebraska. *See Crow Butte Resources, Inc.* (Marsland Expansion Area), LBP-19-2, 89 NRC 18, 30 & n.1 (2019), *petition for review denied,* CLI-20-1, 91 NRC 79, (2020).

[4] Consolidated Intervenors consist of the Western Nebraska Resources Council (WNRC), Debra White Plume, and Owe Aku/Bring Back the Way.

[5] *See* [CBR]; Establishment of Atomic Safety and Licensing Board, 72 Fed. Reg. 71,448, 71,448 (Dec. 17, 2007). In the intervening years, the original members of the Board have been replaced by the Board's current members. *See* [CBR] (North Trend Expansion Project); Notice of Atomic Safety and Licensing Board Reconstitution, 76 Fed. Reg. 22,231, 22,231 (Apr. 21, 2015); [CBR] (North Trend Expansion Project); Notice of Atomic Safety and Licensing Board Reconstitution, 83 Fed. Reg. 29,144, 29,144 (June 22, 2018); Notice of Atomic Safety and Licensing Board Reconstitution: [CBR] (North Trend Expansion Project), 84 Fed. Reg. 55,339, 55,339 (Oct. 16, 2019).

[6] *See* LBP-08-6, 67 NRC 241, 344 (2008), *aff'd in part and rev'd in part,* CLI-09-12, 69 NRC 535, 573 (2009).

[7] *See* LBP-09-12, 69 NRC 11, 52 (2009), *rev'd on other grounds,* CLI-09-12, 69 NRC at 573; LBP-08-6, 67 NRC at 344.

review documents for the NTEA license amendment application.[8] Further, as an aid to this scheduling effort, in March 2009 the Board directed that the NRC Staff submit monthly reports on the status of its efforts regarding those review documents. *See* March 2009 Board Order at 1.

These monthly reports continued until January 2016 when the NRC Staff advised the Board in a December 2015 letter that the Staff had acceded to a CBR request to suspend its review of the NTEA application so that the Staff could prioritize review of CBR's also-pending license amendment application for the nearby MEA ISR project.[9] In response to that letter, the Board suspended the Staff's monthly status reports on its still-ongoing NTEA environmental review process, albeit with a direction that the Staff advise the Board when the MEA proceeding was completed.[10]

Subsequently, the NRC Staff informed the Board in a May 2018 letter that the Staff's licensing review of the MEA application was completed but that the suspension of its NTEA environmental review continued based on an April 2018 CBR request citing the "'significantly depressed'" uranium market.[11] The Board then issued a May 2018 order reinstituting the requirement that the Staff file periodic reports on the status of its environmental review of the NTEA application, albeit now on a quarterly basis beginning in July 2018. *See* May 2018

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[8] *See, e.g.,* Licensing Board Order (Confirming Matters Addressed at March 4, 2009, Telephone Conference) (Mar. 5, 2009) at 1 (unpublished) [hereinafter March 2009 Board Order]; Licensing Board Order (Confirming Matters Addressed at July 7, 2009, Scheduling Conference) (July 8, 2009) at 1-2 (unpublished); Licensing Board Order (Confirming Matters Addressed at September 17, 2013, Telephone Conference) (Sept. 26, 2013) at 1 (unpublished); *see also* 10 C.F.R. § 2.332(d) (while presiding officer may allow evidentiary hearing on safety issues to proceed prior to issuance of NRC Staff's safety evaluation, evidentiary hearing on environmental impact statement (EIS)-associated issues may not begin until Staff's EIS is issued).

[9] *See* Letter from David M. Cylkowski, NRC Staff Counsel, to Licensing Board at 1 (Dec. 24, 2015).

[10] *See* Licensing Board Memorandum and Order (Regarding NRC Staff License Review Scheduling Status Reports) (Jan. 12, 2016) at 1-2 (unpublished). As the Board noted in this issuance, the NRC Staff's final safety evaluation report (SER) for the NTEA application was made publicly available in July 2013. *See id.* at 2 n.1 (citing FSME, NRC, [SER], License Amendment for the [CBR NTEA] ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (July 2013) (ADAMS Accession No. ML110820512) [hereinafter NTEA SER]).

[11] Licensing Board Memorandum and Order (Reinstituting NRC Staff Status Reporting Requirement in Response to Applicant-Requested Suspension of Licensing Review Process) (May 7, 2018) at 1-2 (unpublished) (citing Letter from David M. Cylkowski, NRC Staff Counsel, to Licensing Board at 1 (May 2, 2018), and quoting Letter from Walter Nelson, SHEQ Coordinator, Cameco Resources, Crow Butte Operation, to Director, Office of Nuclear Material Safety and Safeguards (NMSS), NRC at 1 (Apr. 4, 2018) (ADAMS Accession No. ML18102A537)) [hereinafter May 2018 Board Order].

Board Order at 2. Through July 2023, these status reports continued to indicate that the Staff's NTEA environmental review process remained suspended.[12]

Then, in a September 15, 2023 issuance, the Board advised the parties and interested governmental entities that, in lieu of the NRC Staff's October 2023 quarterly status report, it intended to hold a virtual prehearing conference to explore, among other things, the continued interest of Consolidated Intervenors in pursuing this litigation and the continued degree of CBR's concern about the "significantly depressed" uranium market.[13] The conference ultimately was scheduled for, and held on, October 3, 2023.[14]

At the October 3 conference, Consolidated Intervenors expressed their interest in continuing this adjudication.[15] CBR, on the other hand, stated that while it was not asking that the suspension of the NRC Staff's NTEA application review be lifted, it would provide an update by the end of the 2023 calendar year if recent "'[uranium] market changes do substantially change [CBR's] position as to the [NTEA].'" October 2023 Board Order at 2 (quoting Tr. at 811 (Leidich)). And for its part, the NRC Staff indicated that, given the length of time since the NTEA application was first submitted to the NRC, during any reinstated application review process, which could take in excess of a year, there would need to be updates to the CBR application. *See id.* at 2-3. Additionally, the Staff confirmed that it planned to issue a draft environmental assessment or EIS for public comment during a resumed review process, followed by a final environmental review document. *See id.* at 3. After considering all the participants' positions, the Board entered an October 26, 2023 directive continuing the Staff's quarterly status reports beginning in January 2024. *See id.*

By letter dated December 18, 2023, CBR advised the Board that (1) CBR had sent an attached December 18, 2023 letter to the NRC Staff seeking to withdraw the NTEA license amendment application; and (2) pursuant to 10 C.F.R. §§ 2.107(a) and 2.323(a), by December 29, 2023, CBR expected to file with the Board a motion to withdraw the NTEA application without prejudice.[16] Subse-

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[12] *See, e.g.,* Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (July 2, 2018); Letter from Travis Jones, NRC Staff Counsel, to Licensing Board at 1 (July 3, 2023).

[13] *See* Licensing Board Memorandum and Order (Scheduling Prehearing Conference) (Sept. 15, 2023) at 1-3 & nn.4-5 (unpublished).

[14] *See* Licensing Board Memorandum and Order (Scheduling Prehearing Conference; Providing Information Technology and Administrative Information) (Sept. 26, 2023) at 1 (unpublished); Tr. at 779-833.

[15] Licensing Board Memorandum and Order (Confirming Matters Addressed at October 3, 2023 Prehearing Conference and Continuing NRC Staff Status Reporting Requirement) (Oct. 26, 2023) at 2 (unpublished) [hereinafter October 2023 Board Order].

[16] *See* Letter from Anne R. Leidich, CBR Counsel, to Licensing Board at 1 (Dec. 18, 2023); *id.* attach. 1, at 1 (Letter from Tate Hagman, Manager, Restoration, CBR, to Director, NMSS, NRC, at 1 (Dec. 18, 2023)).

quently, on December 29, 2023, CBR filed the now-pending motion to withdraw the NTEA application without prejudice. *See* CBR Withdrawal Motion at 1. In this motion, CBR recites that, in response to its 10 C.F.R. § 2.323(b) inquiries to ascertain the participants' positions regarding its withdrawal request, (1) the NRC Staff and section 2.315(c) interested governmental entities OST and the Treaty Council indicated they do not oppose CBR's withdrawal request; and (2) Consolidated Intervenors stated that the withdrawal motion should be granted "with prejudice" because the NTEA application "is outdated" and "relates to the expansion of a facility that is itself in remediation." *Id.*

Thereafter, in a January 2, 2024 order the Board established a schedule for written responses to CBR's withdrawal motion.[17] Neither the NRC Staff nor the section 2.315(c) interested governmental entities made a responsive filing. Consolidated Intervenors, however, filed a January 10, 2024 answer arguing that Board approval of CBR's withdrawal request should be either (1) with prejudice to any future CBR attempt to submit a license application seeking to conduct ISR recovery operations at the NTEA because circumstances over the past sixteen years have made the current CBR application "outdated"; or (2) without prejudice, but only if conditions are included to (a) bar the resubmission of an "identical" application, and (b) require CBR to submit an application that complies "with updated NRC rules, regulations and policies concerning Tribal Consultation, compliance with Trust Responsibility, Climate Change, Environmental Justice" and contains "updated scientific and site[-]specific information concerning the proposed site." Consolidated Intervenors Answer at 1-2. Neither CBR nor any of the other participants sought permission from the Board to file a reply to Consolidated Intervenors' answer. *See* 10 C.F.R. § 2.323(c).

II. ANALYSIS

A. Standards Governing License Application Withdrawal Motions

Consistent with 10 C.F.R. § 2.107(a), when a hearing petition challenging a license application has been granted and a notice of hearing has been issued, the licensing board presiding over the adjudicatory proceeding has jurisdiction to determine the disposition of a subsequent request to withdraw that application.[18]

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[17] *See* Licensing Board Memorandum and Order (Establishing Schedule for Responses to Motion to Withdraw Application) (Jan. 2, 2024) at 2 (unpublished).

[18] *See Public Service Co. of Indiana, Inc. and Wabash Valley Power Ass'n, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 723-24 (1988) (citing 10 C.F.R. § 2.107(a) in concluding that in the absence of a notice of hearing issued after an intervention petition is granted, a licensing board lacks jurisdiction to consider whether to impose conditions on a motion to terminate an operating license proceeding).

As the filing of a license application is usually voluntary, an applicant's decision to withdraw its application "is generally considered a business judgment, the soundness of which is not a matter for licensing board consideration."[19] Nonetheless, licensing board approval of a license application withdrawal request is subject to any appropriate conditions the board may impose.[20] This includes a determination whether to approve the withdrawal request with or without prejudice to the submission of a future application. *See Bellefonte,* LBP-16-1, 83 NRC at 104.

In making such a decision, agency caselaw indicates that if a resolution of the health, safety, and environmental issues associated with an application has not been reached, a withdrawal "without prejudice" generally is appropriate, signifying the lack of a merits disposition and permitting the application to be refiled.[21] Indeed, owing to the "severe sanction" imposed on the applicant by eliminating the possibility of resubmitting an application, "it is highly unusual" to grant a "with prejudice" withdrawal absent a showing of "substantial prejudice to the opposing party or to the public interest in general."[22] If, however, a licensing board determines there has been an adequate showing of harm to a party or the public interest in general associated with permitting the application to be refiled, the board can grant a withdrawal "with prejudice," precluding the application from being refiled, or may impose such other conditions as it deems appropriate. *See Bellefonte,* LBP-16-1, 83 NRC at 104.

But "conclusory statements and generalized concerns" will not meet a proponent's burden of describing the possible deficiency that could be remedied through a requested condition.[23] Moreover, "the record must support any findings concerning the conduct and the harm" purportedly supporting such a condition. *Fulton,* ALAB-657, 14 NRC at 974. While a licensing board thus has significant leeway in defining the circumstances under which an application can be withdrawn, any conditions imposed, including granting withdrawal with prejudice to the submission of a new application, "must bear a rational relationship to the conduct and legal harm at which they are aimed." *Id.*

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[19] *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-16-1, 83 NRC 97, 104 (2016) (citing *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983)).

[20] *See Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981); *U.S. Department of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010), *aff'd by an equally divided Commission,* CLI-11-7, 74 NRC 212 (2011).

[21] *See Fulton,* ALAB-657, 14 NRC at 973; *Bellefonte,* LBP-16-1, 83 NRC at 104.

[22] *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981); *see Fulton,* ALAB-657, 14 NRC at 974 (stating prohibiting an applicant from refiling "is a particularly harsh and punitive term imposed upon withdrawal").

[23] *Sequoyah Fuels Corp.,* CLI-95-2, 41 NRC 179, 192-93 (1995).

Finally, the withdrawal of a license application, whether with or without prejudice, effectively moots any adjudicatory proceeding regarding that application.[24]

B. Parties' Positions Regarding CBR's Withdrawal Motion

1. CBR's Withdrawal Motion

Citing the Atomic Safety and Licensing Appeal Board decisions in *Fulton* and *North Coast,*[25] CBR maintains that this NRC precedent establishes that a "with prejudice" dismissal, being "particularly harsh and punitive," is not appropriate in the absence of a showing of "substantial prejudice to the opposing party or to the public interest in general."[26] Further, according to CBR, such a showing cannot be demonstrated here because there has not been "any decision on the merits" of Consolidated Intervenors' admitted contention challenging the NTEA application. CBR Withdrawal Motion at 3. CBR states as well that it "does not want to expend additional resources to complete licensing" and so "has no plans to re-file an application for the site." *Id.* CBR thus concludes that this proceeding should be dismissed "without imposing terms or conditions on this withdrawal," making it "without prejudice" to CBR's submission of a future NTEA application. *Id.* at 4.

2. Consolidated Intervenors' Answer

Consolidated Intervenors ask that the Board dismiss the NTEA application with prejudice or, alternatively, impose reasonable conditions for resubmitting an application if the Board dismisses without prejudice. *See* Consolidated Intervenors Answer at 9-15. In support of their withdrawal "with prejudice" claim, Consolidated Intervenors assert that CBR has failed to provide "any citation to the record" demonstrating that it will suffer any negative impacts from a "with

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[24] *See Bellefonte,* LBP-16-1, 83 NRC at 103 (citing *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-00-9, 51 NRC 293, 294 (2000)).

[25] Given the prominence attached by CBR and Consolidated Intervenors to these two Appeal Board decisions, we note that while the Atomic Safety and Licensing Appeal Panel was abolished in 1991, the decisions of its Appeal Boards continue to be binding precedent to the degree they concern a regulation or regulatory matter that has not been revised or otherwise materially altered. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).

[26] CBR Withdrawal Motion at 3 (quoting *Fulton,* ALAB-657, 14 NRC at 974; *North Coast,* ALAB-662, 14 NRC at 1132). Although CBR's motion references the *Fulton* proceeding in support of these two quotations, *see id.* at 3 nn.11, 13, the second quotation in fact comes from the *North Coast* decision.

prejudice" dismissal so as to meet CBR's burden to justify a "without prejudice" determination. *Id.* at 9. Instead, Consolidated Intervenors argue that CBR has stated only that "it has no intention to re-file an application for the NTEA," distinguishing this case from the Appeal Board decisions in *Fulton* and *North Coast* in which a "with prejudice" dismissal was identified as an impermissibly harsh and punitive sanction. *Id.* at 9-10 (citing *North Coast,* ALAB-662, 14 NRC at 1132). Because CBR "expressly" intends not to re-file its application, Consolidated Intervenors contend that the "magnitude of the harshness" accruing to CBR from a "with prejudice" dismissal is "nil." *Id.* Consequently, a showing of even a "scintilla of public harm" is sufficient, according to Consolidated Intervenors, to warrant a Board ruling dismissing the CBR application with prejudice. *Id.* at 9-10; *see id.* at 12 ("Since CBR has no intention of refiling the license amendment application, a ruling 'with prejudice' would not be particularly harsh or severe in this proceeding . . . .").

Consolidated Intervenors then seek to establish the necessary measure of harm to themselves and the public interest in not dismissing the NTEA application with prejudice.[27] Referencing various declarations provided in support of their original intervention petitions along with a statement made by an OST tribal chief during a January 2018 prehearing conference,[28] the elements of their showing of harm include (1) the heightened public stress and anxiety associated with possibly having to again oppose a new NTEA application given (a) the Lakota people's view that "water is sacred" so that "any action that might adulterate the water should be avoided," and (b) the "cost prohibitive" expense of such opposition given the poverty in the local area near the NTEA and on OST's South Dakota Pine Ridge Reservation; and (2) "the negative [e]ffect on [the] property values" of those in the City of Crawford or near the NTEA's perimeter "created by the specter of mining the NTEA." *Id.* at 10-11.

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[27] While contending that CBR has the burden of proof regarding its motion, Consolidated Intervenors also acknowledge that "to the extent they are viewed as the proponent of the 'with prejudice' ruling they would bear the burden of proof" for showing a basis exists for such a withdrawal condition. Consolidated Intervenors Answer at 2 & n.1 (citing 10 C.F.R. § 2.325).

[28] *See* Consolidated Intervenors Answer at 10 (citing Affidavit of Rita Long Visitor Holy Dance paras. 5-6, 9 (Feb. 22, 2008); Affidavit of Beatrice Long Visitor Holy Dance paras. 5-6, 10, 14 (Feb. 22, 2008); Affidavit of Harvey Whitewoman paras. 11, 13 (Feb. 19, 2008); Tr. at 179-80 (Chief Joe American Horse); Request for Hearing and/or Petition to Intervene [of WNRC], ex. A, at A-2, para. 3(b) (Nov. 12, 2007) (Statement of Buffalo Bruce (undated) [hereinafter Buffalo Bruce Statement]). The Board notes that in referencing the affidavit of Harvey Whitewoman, Consolidated Intervenors provided the ADAMS accession number for the affidavit of Flordemayo. The correct ADAMS accession number for the Harvey Whitewoman affidavit is ML080660097. We observe as well that while the statements of Rita Long Visitor Holy Dance, Beatrice Long Visitor Holy Dance, and Harvey Whitewoman were sworn, those of Buffalo Bruce and Chief Joe American Horse were not, the latter being in the nature of a 10 C.F.R. § 2.315(a) limited appearance statement.

Additionally, Consolidated Intervenors maintain that since the 1981 *Fulton* decision and the start of this proceeding in 2007, the NRC's understanding of environmental justice and proper dealings with indigenous peoples has evolved, culminating in NRC's 2017 adoption of its Tribal Policy Statement in which the NRC recognizes that it "has a Trust Responsibility to protect Tribal treaty rights, lands, assets and resources as well as a duty to carry out the mandates of Federal law with respect to Indian Tribes."[29] From this, Consolidated Intervenors assert that the Board is "obligated to consider the viewpoints of indigenous people who have filed testimony in this proceeding with respect to their interests, rights and treaty benefits." *Id.* at 11. They also note that it is not just the prospect of a second proceeding that causes them hardship, but the "prospect of respecting the rights of and performing additional obligations owed to indigenous people concerning their view on the sacredness of the water as a form of living spirit of God." *Id.* at 12. Finally, Consolidated Intervenors declare that any action that may harm the earth, including "perceived threats to their environment may be viewed [by Native Americans] as direct threats to their health, culture and spiritual well-being."[30]

Based on these factual and legal arguments, Consolidated Intervenors conclude that "[i]n the balance of equity" the Board should grant CBR's withdrawal motion with prejudice. *Id.* Such a determination is required because a "with prejudice" withdrawal is not "particularly hard or severe" for CBR, especially in light of CBR's stated intention not to refile an NTEA application, while a "without prejudice" ruling "would provide no relief" to the people living in the vicinity of the NTEA. *Id.*

Alternatively, Consolidated Intervenors ask that if the Board dismisses the pending application without prejudice, the Board should impose conditions for resubmitting an NTEA application that would (1) bar submission of an application "identical" to the NTEA license amendment application; (2) require CBR to demonstrate compliance with "then[-]current federal law and NRC policies concerning climate change, environmental justice, [and] respect for the rights of and consultation with indigenous people including [OST]"; and (3) compel CBR to include "updated site[-]specific data and information concerning water use, water availability and shortages" around the area of the NTEA. *Id.* at 12-

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[29] *Id.* at 11 (citing Tribal Policy Statement, 82 Fed. Reg. 2402, 2404-05 (Jan. 9, 2017) (definition of "Trust Responsibility") [hereinafter NRC Tribal Policy Statement]); *see id.* at 5 (citing NMSS, NRC, NUREG-2173, Tribal Protocol Manual (rev. 1 July 2018) (ADAMS Accession No. ML18214A663) [hereinafter NRC Tribal Protocol Manual]).

[30] *Id.* at 12 (quoting FSME, NRC, Tribal Protocol Manual at 10 (draft Sept. 2012) (ADAMS Accession No. ML12261A423)). In the current final version of the agency's Tribal Protocol Manual, this statement has been revised to read "[t]hreats to the environment are often viewed as direct threats to Tribal health, culture, and spiritual well-being." NRC Tribal Protocol Manual at 15.

13. More specifically, Consolidated Intervenors assert that "[f]urther reasonable conditions based on the record" should be required by the Board such that a new NTEA application must (1) "demonstrate that mining in the NTEA will not impact any water wells in or adjacent to the NTEA";[31] (2) demonstrate that the commercial value of the uranium concentrations at the NTEA exceeds the value of water that would be unusable as a result of approval of the application for mining, *see id.* at 13 (citing NDEQ Aquifer Technical Review at 5); (3) provide sufficient detail so the application "enables the NRC to be able to demonstrate compliance with then[-]applicable NRC rules, regulations, guidance and policy including those concerning climate change, environmental justice, tribal consultations, and Trust Responsibility";[32] (4) "demonstrate that it contains updated site[-]specific data and updated scientific information and published research as of the date of re-application," *id.* (citing NDEQ Aquifer Technical Review at 8); and (5) contain "sufficient detail and information" to enable NRC to comply with its obligations under applicable federal statutes, treaties, and international covenants.[33]

C. Licensing Board Determination Regarding CBR's Withdrawal Motion

1. Consolidated Intervenors' Claim That CBR's Withdrawal Motion Should Be Granted "With Prejudice" to the Submission of Any Future NTEA-Associated License Amendment Application

In ruling on the efficacy of Consolidated Intervenors' challenge to CBR's

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[31] Consolidated Intervenors Answer at 13 (citing Letter from Dr. Steven A. Fischbein, Program Manager, Neb. Dep't of Env't Quality (NDEQ), to Stephen P. Collins, President, CBR, unnumbered encl. at 16 (Nov. 8, 2007) ([CBR] Petition for Aquifer Exemption: [NTEA], Technical Review of Aquifer Exemption Petition Dated August 15, 2007) (ADAMS Accession Nos. ML081090240 and ML073300399) [hereinafter NDEQ Aquifer Technical Review]. This document, which was identified as "Exhibit B" at the Board's January 2008 prehearing conference, subsequently was accepted by the Board for consideration in the context of ruling on the hearing petitioners' contention admissibility claims. *See* LBP-08-6, 67 NRC at 260, *aff'd,* CLI-09-12, 69 NRC at 548-52.

[32] *See* Consolidated Intervenors Answer at 13 (citing LR Leung & LW Vail, Pac. Nw. Nat. Lab., PNNL-24868, Potential Impacts of Accelerated Climate Change (May 2016) (ADAMS Accession No. ML16208A282); Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004); NRC Tribal Policy Statement; NRC Tribal Protocol Manual; David Ball, et al., BOEM 2015-047, A Guidance Document for Characterizing Tribal Cultural Landscapes (Nov. 30, 2015) (ADAMS Accession No. ML19058A360)).

[33] *See* Consolidated Intervenors Answer at 13-14 (citing Request for Hearing and/or Petition to Intervene [of Debra White Plume, Director, Owe Aku, Bring Back the Way] (Nov. 12, 2007); Tr. at 179-80 (Chief Joe American Horse) (making 10 C.F.R. § 2.315(a)-like limited appearance statement at January 2018 prehearing conference); Tr. at 182-84 (Chief Oliver Red Cloud) (same).

"without prejudice" license amendment application withdrawal request,[34] we begin by acknowledging that as the proponent of an order seeking dismissal of this proceeding without prejudice, CBR has the burden of proof. *See* 10 C.F.R. § 2.325. And although CBR's submission intended to meet its initial burden is terse, we nonetheless conclude that with that presentation CBR has met its burden.

CBR is correct that at this juncture, terminating this case will not involve any merits disposition regarding Consolidated Intervenors' challenge to the NTEA application, a central consideration in granting a "without prejudice" withdrawal. *See Fulton,* ALAB-657, 14 NRC at 973; *North Coast,* ALAB-662, 14 NRC at 1133. Additionally, we find unpersuasive Consolidated Intervenors' attempt to attribute to CBR's "no plans" statement the mantle of finality they assert supports their claim that CBR will suffer no harm from a "with prejudice" withdrawal. CBR's request for a "without prejudice" withdrawal that would allow an NTEA application to be resubmitted was made in the face of Consolidated Intervenors' unambiguous objection to such a disposition prior to CBR's submission of its pending motion. *See supra* p. 18. Therefore, in our view, CBR's "no plans" statement can hardly constitute a binding affirmation of its final and irrevocable intention never to change its plans or file an application for NTEA ISR operations authorization at some point in the future, which is the gravamen of Consolidated Intervenors "no harm" argument.[35]

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[34] Because a notice of hearing was issued in this proceeding, *see* Atomic Safety and Licensing Board Panel; Before the Licensing Board: G. Paul Bollwerk, III, Chair, Nicholas G. Trikouros, Dr. Craig M. White; In the Matter of: [CBR] (North Trend Expansion Project); Memorandum and Order (Notice of Hearing), 88 Fed. Reg. 88,989, 88,989 (Dec. 26, 2023), in accord with section 2.107(a) the Board has jurisdiction to issue an initial ruling regarding CBR's withdrawal motion.

[35] Other CBR representations suggest this as well. *See* Tr. at 810 ("[CBR] still has long[-]term interest in the NTEA, but it's not prepared to make a definitive decision on the expansion today.") (Leidich); Tr. at 812 (indicating the NTEA, along with the rest of the CBR property, has "some value to [CBR] over the long term") (Leidich). Also with respect to CBR's "no plans" statement, relative to the discussion at the October 2023 status conference about the apparently rising uranium market, *see* Tr. at 809-12, it might be argued that the withdrawal of CBR's NTEA application is additional evidence of its intent to abandon the NTEA permanently. We find this unavailing, however, as contrary to the general precept that in considering a withdrawal motion, a licensing board will not second-guess an applicant's business judgment, at least in the absence of a showing of bad faith. *See Bellefonte,* LBP-16-1, 83 NRC at 104; *see also North Coast,* ALAB-662, 14 NRC at 1138 (indicating that when facts regarding reactor application withdrawal do not show an applicant bent on hiding its intentions from the Commission, the decision to proceed is best left to the applicant and its consideration of the range of energy options without the "artificial exclusion" of the proposed site by imposing a "with prejudice" withdrawal). Moreover, such an "abandonment" view does not account for the fact that, notwithstanding the seemingly rising "spot" or short-term supply price of uranium, a CBR decision to continue with the application currently could depend

(Continued)

We also are not persuaded by Consolidated Intervenors' attempt to distinguish the *Fulton* and *North Coast* Appeal Board determinations about the generally harsh and punitive nature of "with prejudice" withdrawals on the basis of CBR's "no plans" statement. *See* CBR Withdrawal Motion at 3-4. In *Fulton,* ALAB-657, 14 NRC at 974-79, the Appeal Board considered whether a withdrawal with prejudice was appropriate for a pending nuclear power plant construction permit application. The Appeal Board concluded that notwithstanding the lack of any "firm plan" by the applicant to pursue reactor construction in the future, mandating a "with prejudice" withdrawal would impose a "particularly harsh and punitive term" by effectively precluding the applicant from using the site at issue for any future reactor facility. *Id.* at 974. To be sure, the Appeal Board's *Fulton* proceeding ruling was made in the context of determining whether the agency's construction permit regulations required a "firm plan" for future construction in order to sustain an applicant's request that the agency undertake an early site review to determine site suitability for reactor construction. *See id.* at 974-77. Nonetheless, its holding is instructive here given the Appeal Board's conclusion that the apparent lack of planning alone did not in any way undercut the precept that granting a withdrawal with prejudice imposes significant harm on the applicant.

North Coast likewise does not support Consolidated Intervenors' argument that CBR's "no plans" statement establishes that CBR will face no harm from a "with prejudice" withdrawal. There, faced with an intervenor's allegation that a utility seeking withdrawal of its construction permit application had improperly hidden its intention to abandon the project, the Appeal Board concluded that the applicant's statement that it was indefinitely postponing the project was sufficient to counter any assertion of substantial harm to the public interest arising from the applicant's conduct. *See North Coast,* ALAB-662, 14 NRC at 1135. In finding this claim wanting as support for a "with prejudice" withdrawal, the *North Coast* Appeal Board recognized, just as the Appeal Board had in *Fulton,* that a withdrawal with prejudice would entail the facility site's "artificial exclusion" from reinstituting the project, a decision that, in the first instance, was best left in the hands of the applicant as it assessed whether the facility would be necessary to meet local energy needs. *Id.* at 1138.

In the absence of a merits disposition associated with the NTEA application, and in accord with the *Fulton* and *North Coast* Appeal Board decisions, we conclude that CBR has met its threshold burden relative to its "without prejudice" withdrawal request. Consequently, to justify placing a "with prejudice" condition on the dismissal of CBR's application, Consolidated Intervenors must

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on a number of factors, including whether there is a market for long-term uranium supply contracts sufficient to provide an adequate return on investment and the increased cost of mining over the past several years, *see* Tr. at 811 (Leidich), some or all of which might change in the future.

demonstrate substantial harm to them or the public interest that is of "comparable magnitude" to the punitive harm to CBR that would result from imposing such a restraining term. *See North Coast,* ALAB-662, 14 NRC at 1132 (citing *Fulton,* ALAB-657, 14 NRC at 974).

On this score, as we noted above, *see supra* pp. 21-22, Consolidated Intervenors posit several assertions about impacts to them and the public interest they contend justify a "with prejudice" dismissal.[36] But in reviewing those claims, we must bear in mind the Commission's exhortation that "conclusory statements and generalized concerns" will not meet Consolidated Intervenors' burden of showing the requisite impact to them or the public interest necessary to support the imposition of a "with prejudice" withdrawal. *See Sequoyah Fuels Corp.,* CLI-95-2, 41 NRC at 193.

One substantial harm identified by Consolidated Intervenors is the potential anxiety and stress associated with the possibility of a future NTEA-associated license amendment application. *See* Consolidated Intervenors Answer at 10. According to Consolidated Intervenors, because the poverty of the local area would make further opposition to NTEA operation cost prohibitive, a "with prejudice" dismissal is warranted. *See id.* Yet, as both the *North Coast* and *Fulton* decisions make clear, "the possibility of future litigation — with its expenses and uncertainties — is precisely the consequence of *any* dismissal without prejudice . . . [and] does not provide a basis for departing from the usual rule that a dismissal should be without prejudice." *North Coast,* ALAB-662, 14 NRC at 1135; *see Fulton,* ALAB-657, 14 NRC at 979. Even more to the point, notwithstanding the economic circumstances attendant to the local area, Consolidated Intervenors have been able to pursue this litigation with its associated costs, including retaining and continuing to be represented by counsel,

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[36] As we noted above, *see supra* p. 18, in voicing their objection to CBR filing its withdrawal motion, Consolidated Intervenors declared that a "with prejudice" withdrawal was justified because the CBR application "relates to the expansion of a facility that is itself in remediation." CBR Withdrawal Motion at 1. While it is true that following the conclusion of uranium extraction activities, groundwater restoration currently is under way at the main CBR site, it also is the case that CBR has indicated it wants to retain that site's yellowcake processing capabilities for use in connection with any available satellite expansion areas. *See* FSME, NRC, [SER], License Renewal of the [CBR] ISR Facility Dawes County, Nebraska, Materials License No. SUA-1534, at 1-2 (Aug. 2014) (ADAMS Accession No. ML14149A433); NTEA SER at 7. And in fact, CBR's current license provides for continued yellowcake processing at its main site as well as ISR uranium extraction activities at CBR's licensed MEA site. *See* Materials License, [CBR] License No. SUA-1534, Amend. No. 5, at 10-11, 18-20 (Mar. 4, 2021) (license conditions 10.2.1 (main facility drying and packaging operations) and 11.3-12 (MEA pre-operational and operational requirements)) (ADAMS Accession No. ML20324A073) [hereinafter CBR License]. Nothing before us suggests that CBR will not seek to maintain continued authorization for yellowcake processing at its main facility and for MEA ISR operations under its existing license that, while expiring in November 2024, can be renewed.

throughout this proceeding's fifteen-year pendency.[37] Therefore, as a showing of future harm to Consolidated Intervenors or the public interest, we conclude this claim lacks sufficient supporting information and so falls into the category of "[m]ere allegations" that the *Fulton* decision instructs would be wanting as grounds for imposing a "with prejudice" withdrawal. *Fulton,* ALAB-657, 14 NRC at 979.

Another negative impact emphasized by Consolidated Intervenors is the purported effect on local property values created by the continued "specter of mining the NTEA." Consolidated Intervenors Answer at 10. This claim falls short for the same reason assigned to a similar complaint in the *Fulton* proceeding, i.e., a lack of sufficient supporting information showing a cognizable claim of substantial injury. There, the Appeal Board questioned the adequacy of the support for a property values-based concern identified by an intervenor group, none of whose members had property in the reactor facility exclusion zone in which property values allegedly would be negatively affected. *See Fulton,* ALAB-657, 14 NRC at 979 n.15. Similarly here, the statement referenced by Consolidated Intervenors as supporting this claim describes a concern about an adverse (although indeterminate) effect upon a petitioner's property values resulting from "an approval of the amendment." Buffalo Bruce Statement at A-2, para. (3)(b). As a current harm, this would be foreclosed by CBR's withdrawal

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[37] We observe as well that there has been no claim of harm to Consolidated Intervenors and the public interest based on their already-accrued expenses in this proceeding. As the discussion in Section I above indicates, while this case has been pending for some time, there were no serious evidentiary hearing preparations over the last ten years owing to CBR's request to suspend the NRC Staff's environmental review process. Thus, to a large degree, it appears this proceeding "hardly got off the ground" so as to entail the type of significant resource expenditures by Consolidated Intervenors that might warrant some kind of withdrawal condition regarding reimbursement. *North Coast,* ALAB-662, 14 NRC at 1135 & n.11. The lack of any claim for reimbursement of costs and expenses also means we need not reach the issue of a licensing board's ability to award such fees relative to a withdrawal request, an issue that involves some uncertainty, particularly as it applies to a reimbursement condition imposed on an applicant. *See* 5 U.S.C. § 504 note (referencing Pub. L. 102-377, title V, § 502, 106 Stat. 1342 (1992), barring the use of NRC appropriated funds to pay the expenses of, or otherwise compensate, intervenors in agency adjudications or rulemakings); 10 C.F.R. § 12.101 (agency licensing adjudications are excluded from the litigation cost reimbursement provisions of the Equal Access to Justice Act, 5 U.S.C. § 504). *Compare Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 52-53 (1999) (finding applicant reimbursement of costs and expenses could be imposed by licensing board as a condition of withdrawal), *with Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983) (holding that Commission is without equitable powers or authority from enabling legislation to impose party's costs and expenses), *and Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762, 766-68 (1982) (indicating that because Commission has not adopted a policy that goes beyond the American rule that litigants bear their own attorneys' fees and expenses, licensing board has no authority to impose a withdrawal condition awarding such reimbursement).

of its application. And as a potential future harm, based on the record before us we are unwilling to infer that a general concern about harm to property values creates a cognizable claim of substantial injury, especially when the purported harm is footed in the mere possibility that there could be such harm if at some juncture a new NTEA application were submitted. Again, we consider this to be within the category of "[m]ere allegations," like those found wanting in *Fulton* as insufficient to impose a "with prejudice" withdrawal. *Fulton,* ALAB-657, 14 NRC at 979.

Finally, Consolidated Intervenors posited two separately expressed, but seemingly related claims that supposedly support a "with prejudice" withdrawal condition. One concerns the tribal view that water is sacred and that any action adulterating water should be avoided as enhancing the potential anxiety and stress associated with the possibility of a future NTEA license amendment application. *See* Consolidated Intervenors Answer at 10. The other concerns the more broad-ranging assertion that tribal interests must be viewed as "legitimate" and given "careful consideration." *Id.* at 11. Consolidated Intervenors find support for this claim in what they describe as the agency's recently evolved legal and policy declarations regarding "environmental justice and the rights and interests of indigenous people," and more specifically the agency's "Trust Responsibility to protect Tribal treaty rights, lands, assets and resources as well as a duty to carry out the mandates of Federal law with respect to Indian Tribes" as outlined in the NRC's Tribal Policy Statement. *Id.* According to Consolidated Intervenors, this requires agency respect for "the rights of and . . . additional obligations owed to indigenous people," including "their view of the sacredness of the water as a form of living spirit of God," *id.* at 12, and in particular here obligates the Board "to provide deference to the views of Native American petitions, affidavits and testimony in this proceeding," especially when unrebutted, and require that applicant CBR "refrain from actions that would interfere with hunting, fishing, gathering and trapping activities by Tribal members," *id.* at 4-5.

While we acknowledge the importance of Board respect for and careful consideration of tribal views, including those about the sacredness of water and the scope of the agency's Trust Responsibility, that does not permit us to set aside the established legal precepts that govern the agency's Atomic Energy Act (AEA)-mandated adjudicatory process. As the Commission observed in addressing a similar claim raised by then-intervening party OST in a licensing proceeding regarding authorization for ISR operations at CBR's Crawford-vicinity MEA:

> The Tribe is correct that as an agency of the federal government, the NRC owes a fiduciary duty to the Native American tribes affected by its decisions. But unless there is a specific duty that has been placed on us with respect to Native

> American tribes, we discharge this duty by compliance with the AEA and [the National Environmental Policy Act (NEPA)]. The Tribe is not entitled to greater rights than it would otherwise have under those statutes as an interested party.[38]

In this instance, we likewise are unable to conclude that these assertions about tribal views on the sacredness of water and the NRC's Trust Responsibility toward Native American tribes allow us to look past Consolidated Intervenors' failure to proffer "a colorable claim of substantial prejudice" to their interests or to the public interest that is required to justify imposing a "with prejudice" withdrawal condition. *North Coast,* ALAB-662, 14 NRC at 1135.

Accordingly, because Consolidated Intervenors have not made the requisite showing,[39] in approving CBR's motion to withdraw its license amendment application we cannot impose a condition that such withdrawal is "with prejudice."

2. Consolidated Intervenors' Claim That Granting CBR's Withdrawal Motion "Without Prejudice" Requires Imposing Conditions Ensuring Any Future NTEA-Associated License Amendment Application Demonstrates Compliance with Then-Existing NRC Requirements and Policies

Thus having concluded that CBR's withdrawal request should be granted "without prejudice," we turn to Consolidated Intervenors' assertion that such a grant should be conditioned (1) to bar CBR from submitting a future NTEA license amendment application "identical" to its current application; and (2) to require that any new application "demonstrates compliance with then[-]current federal law and NRC policies concerning climate change, environmental justice, respect for the rights of and consultation with indigenous people[,] including [OST,] and updated site[-]specific data and information concerning water use, water availability and shortages in and around the City of Crawford and Dawes County." Consolidated Intervenors Answer at 12-13. As it turns out, however, the substance of their request will, for all essential purposes, be fulfilled simply by the operation of the agency's license review process.

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[38] *Marsland,* CLI-20-1, 91 NRC at 101 (footnotes omitted).

[39] We recognize that a challenge to a motion seeking withdrawal "without prejudice" can "trigger further inquiry" in the form of additional pleadings or an oral hearing. *Fulton,* ALAB-657, 14 NRC at 978 n.12. It has been recognized as well that the "threshold standard" for requiring such an inquiry "should be related to the substantive standard that a [challenge] of that kind must satisfy." *North Coast,* ALAB-662, 14 NRC at 1133. For the same reasons Consolidated Intervenors have failed to make the requisite showing of prejudice to their interests or the public interest needed to support the entry of a withdrawal "with prejudice," we also conclude they have not made a showing "of sufficient weight and moment to cause reasonable minds to inquire further" so as to warrant a further inquiry into their claims. *Id.* at 1134.

Because of the extended period during which the NRC Staff's review of the NTEA application was suspended, the Staff recognized during the October 2023 status conference that CBR undoubtedly would be required to update or supplement both the safety and environmental portions of its application to reflect current circumstances regarding the NTEA site and CBR's proposed operations.[40] *See* Tr. at 815-16 (Simon). This concern about the timeliness and sufficiency of CBR-provided information is consistent with the Staff's approach generally regarding the adequacy of an application's information to support the Staff's safety and environmental reviews.[41] Accordingly, and notwithstanding Consolidated Intervenors' claim that a withdrawal condition is necessary to ensure that any new NTEA application contains "sufficient detail and information to enable NRC" to ensure compliance with applicable statutory and regulatory provisions,[42] both an applicant in submitting its licensing request and the NRC

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[40] Consolidated Intervenors expressed a concern about a later application being "identical" to CBR's current licensing request. Consolidated Intervenors Answer at 12. Considering this Staff recognition that CBR in all likelihood would have to provide more current information in support of its existing NTEA application, as a practical matter this claim about a future is not an instance demonstrating "substantial prejudice to an opposing party or to the public interest in general" so as to warrant imposing a condition barring a duplicate NTEA application. *North Coast,* ALAB-662, 14 NRC at 1133.

[41] *See* NMSS, NRC, NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications at iii (June 2003) ("An applicant for a . . . commercial-scale license, or for the renewal or amendment of an existing license, is required to provide detailed information on the facilities, equipment, and procedures used and an [ER] that discusses the effects of proposed operations on the health and safety of the public and on the environment.") (ADAMS Accession No. ML032250177) [hereinafter ISR Standard Review Plan]; *see also* Office of Nuclear Regulatory Research, NRC, Regulatory Guide 3.46, Standard Format and Content of License Applications, Including [ERs], for In Situ Uranium Solution Mining at vii (1982) ("Each subject should be treated in sufficient depth and with sufficient documentation to permit the Commission to independently evaluate the information presented." (footnote omitted)) (ADAMS Accession No. ML003739441).

[42] Consolidated Intervenors Answer at 13-14. In this regard, Consolidated Intervenors seek withdrawal conditions based on NDEQ aquifer exemption-associated requests for CBR showings regarding (1) NTEA mining's impact on adjacent water wells; and (2) NTEA-mined uranium's commercial value relative to the value of unusable water caused by the mining operation. *See* Consolidated Intervenors Answer at 13 (citing NDEQ Aquifer Technical Review at 5, 16). These demands, however, fail to recognize that, notwithstanding whatever relevance NDEQ's requests for aquifer exemption-related information and CBR's responses might have to the admission and litigation of an aquifer mixing/water quality-based contention, *see supra* note 31, the focus of the agency's licensing review otherwise is limited to whether CBR has obtained such an exemption from the appropriate federal and state agencies. *See* ISR Standard Review Plan at 6-5 ("In addition to the NRC license, the [Environmental Protection Agency (EPA)] Authorized States issue underground injection control permits for in situ leaching operations, after the EPA grants an exemption from ground-water protection provisions for the portion of the aquifer undergoing uranium extraction (the exploited ore zone in an aquifer). . . . The EPA Authorized State may impose ground-water

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Staff in undertaking its licensing evaluation already are obligated to use their best efforts to ensure that the substance and seasonableness of the application's information are sufficient to address the various applicable AEA, NEPA, and other statutory and associated regulatory requirements that govern and inform the agency's safety and environmental reviews.[43]

In sum, imposing Consolidated Intervenors' requested conditions on any new NTEA application would afford no relief from any purported prejudice to themselves or the public interest. Accordingly, we see no basis for including such strictures as a specification of CBR's withdrawal.

III. CONCLUSION

Having determined that (1) applicant CBR has provided sufficient justification to support its request to withdraw its pending NTEA license amendment application "without prejudice"; and (2) Consolidated Intervenors have failed

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restoration requirements that are more stringent than the delegated federal program. . . . The [NRC] reviewer is advised to closely coordinate the NRC licensing review activities with the underground injection control permitting programs of EPA Authorized States to avoid unnecessary duplication of effort."); *id.* at 10-1 ("The reviewer should determine that the applicant has satisfied all license, permit, and other approvals of construction and operations that are required by federal, state, local, and regional authorities with jurisdiction for the protection of the environment. Types of licenses or permits may include but are not limited to . . . (vi) aquifer exemption.").

[43] *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 627 (1973) (indicating agency regulatory staff has continuing responsibility and duty under the AEA to ensure applicants and licensees comply with applicable requirements "both on paper and in reality"); *see also* ISR Standard Review Plan, app. B (Relationship of 10 CFR Part 40, Appendix A Requirements to Standard Review Plan Sections) (table outlining correlation between Part 40, Appendix A criteria, which were written for conventional uranium recovery facilities, and NUREG-1569 standard review plan provisions providing guidance on information to be included in ISR facility applications); NMSS, NRC, NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs at 1-1 (Aug. 2003) ("This document is primarily intended to serve as guidance to NMSS staff to meet the requirements established by legislation and regulations. . . . In a similar manner, applicants and licensees are encouraged, but not required, to use Chapter 6[, which discusses information that should be considered for inclusion in an ER,] when preparing [ERs] for submission to the NRC.") (ADAMS Accession No. ML032450279).

We would add that in claiming the need for withdrawal conditions mandating that any new NTEA application contain information that in scope, detail, and timeliness is sufficient to adequately address all then-current federal laws and NRC policies, Consolidated Intervenors apparently discount the precept that, absent a showing of bad faith (which has not been demonstrated here), it is presumed that the Staff and an applicant will honor their regulatory responsibilities. *See Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 132 (2015) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)), *petition for review denied,* CLI-16-13, 83 NRC 566 (2016), *petition for review denied, Natural Resources Defense Council v. NRC,* 879 F.3d 1202 (D.C. Cir. 2018)).

to meet their burden of establishing that (a) applicant CBR's license amendment application withdrawal request should be granted "with prejudice," or (b) additional conditions should be attached to such a withdrawal, in the exercise of its authority under 10 C.F.R. § 2.107(a), the Licensing Board grants CBR's December 29, 2023 motion to withdraw its pending NTEA license amendment application without prejudice, thereby concluding this adjudicatory proceeding.

For the foregoing reasons, it is this twenty-ninth day of February 2024, ORDERED that:

A. The December 29, 2023 motion of applicant Crow Butte Resources, Inc., to withdraw its May 30, 2007 application to amend its 10 C.F.R. Part 40 source material license to authorize CBR to conduct ISR operations on the NTEA is *granted* without prejudice to CBR filing another license application seeking such authority and this proceeding is *terminated.*

B. In accordance with 10 C.F.R. § 2.341(a)(2), this memorandum and order will constitute a final decision of the Commission 120 days from the date of issuance, i.e., on *Friday, June 28, 2024,* unless a petition for review is filed in accordance with 10 C.F.R. § 2.341(b)(1) or the Commission directs otherwise. Any petition for review must be filed within twenty-five (25) days after service of this memorandum and order. Answers supporting or opposing Commission review must be filed within twenty-five (25) days after service of a petition for review. A petition for review and any answers must conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chair
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Dr. Craig M. White
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 29, 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chair
David A. Wright
Annie Caputo
Bradley R. Crowell

In the Matter of	**Docket Nos. 50-250-SLR-2** **50-251-SLR-2**
FLORIDA POWER & LIGHT COMPANY **(Turkey Point Nuclear Generating Units 3 and 4)**	**March 7, 2024**

CERTIFIED QUESTIONS

Under 10 C.F.R. § 2.341(f)(1), the Commission may review a question certified by the licensing board if the certification raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding.

NOTICE OF HEARING; SUBSEQUENT LICENSE RENEWAL

For the five proceedings covered in CLI-22-3, the Staff appropriately adapted its ordinary practice of announcing hearings at the earliest opportunity by issuing hearing notices after draft site-specific environmental impact statements were complete.

MEMORANDUM AND ORDER

This proceeding relates to the subsequent license renewal of Turkey Point

Nuclear Generating Units 3 and 4. The Licensing Board is considering the hearing request of Miami Waterkeeper.[1] Before issuing a decision on the request, the Board certified a question for interlocutory review regarding the timing of the NRC Staff's issuance of the notice of opportunity for hearing in this proceeding.[2] We accept the Board's certification and find the timing of the Staff's notice to be a reasonable interpretation of our instructions in CLI-22-3.[3]

I. BACKGROUND

The NRC Staff issued a notice in the *Federal Register* announcing an opportunity for members of the public to request a hearing on the Staff's Draft Supplemental Environmental Impact Statement (Draft SEIS).[4] In response to that notice, Miami Waterkeeper requested that the Secretary of the Commission withdraw the Staff's notice of opportunity for hearing.[5] The Secretary denied the request to withdraw the hearing notice as beyond the scope of her delegated authority under 10 C.F.R. § 2.346 but granted Miami Waterkeeper a partial extension of an additional twenty days to file a hearing request.[6] Miami Waterkeeper then filed a timely hearing request with five proposed contentions challenging the Draft SEIS.[7]

The Board held an initial prehearing conference to hear oral argument on the issues presented in Miami Waterkeeper's hearing request.[8] After oral argument, the Board issued an order certifying the following question for our consideration:

> Should the NRC Staff have waited to issue the notice of opportunity for hearing until it completed the Final SEIS, and if so, how does that impact the conduct of this proceeding?[9]

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[1] Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Nov. 27, 2023) (Hearing Request).

[2] LBP-24-1, 99 NRC 1, 4 (2024); *see* 10 C.F.R. § 2.341(f)(1).

[3] *See Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40 (2022).

[4] *See* Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 88 Fed. Reg. 62,110 (Sept. 8, 2023).

[5] Email from Sydnei Cartwright, Miami Waterkeeper, to Brooke Clark, NRC (Oct. 30, 2023), at 1 (attaching Letter from Sydnei Cartwright, Miami Waterkeeper, to Brooke Clark, NRC (Oct. 27, 2023)) (ADAMS accession no. ML23305A127).

[6] Order of the Secretary (Nov. 6, 2023), at 3-4 (unpublished).

[7] Hearing Request at 11-81.

[8] Licensing Board Order (Scheduling Initial Prehearing Conference) (Dec. 21, 2023) (unpublished) (scheduling conference for January 24, 2024).

[9] LBP-24-1, 99 NRC at 4.

II. DISCUSSION

Today we accept the Board's certification regarding the timing of the hearing notice. For the reasons outlined by the Board, we find that the Board raises a significant and novel issue whose early resolution will materially advance the orderly disposition of this proceeding.[10] Therefore, we grant review of the Board's certified question.

In CLI-22-3, we provided direction for five open subsequent license renewal proceedings.[11] We directed the Staff to update the 2013 Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS)[12] so that it covers operations during the subsequent license renewal period.[13] We also provided that applicants that do not wish to wait for the GEIS update and associated rulemaking could submit a revised environmental report providing information on environmental impacts during the subsequent license renewal period.[14] In either case, the Staff would publish a site-specific environmental impact statement (EIS). We stated that:

> After each site-specific review is complete, a new notice of opportunity for hearing — limited to contentions based on new information in the site-specific environmental impact statement — will be issued. This approach will not require intervenors to meet heightened pleading standards in 10 C.F.R. § 2.309(c) for newly filed or refiled contentions.[15]

As the Board noted, there are different views on what constitutes a "complete" site-specific environmental review and thus when the hearing notice should have been published. Miami Waterkeeper asserted that the Staff should have published the hearing notice after the Staff completed its Final Supplemental Environmental Impact Statement (Final SEIS) rather than after the Draft SEIS. In

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[10] *See* LBP-24-1, 99 NRC at 4-7; 10 C.F.R. § 2.341(f)(1) ("A ruling referred or question certified to the Commission under §§ 2.319(*l*) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding."). As the Board noted, resolution of the certified question would also materially advance the orderly disposition of other subsequent license renewal proceedings. *Id.* at 6 & n.30. Beyond Nuclear and Sierra Club moved to withdraw the hearing notice as premature in the *North Anna* proceeding. Motion by Beyond Nuclear and Sierra Club for Withdrawal of Premature Hearing Notice (Jan. 18, 2024; corrected Jan. 22, 2024) (ML24018A150, ML24022A066).

[11] *Oconee*, CLI-22-3, 95 NRC at 41.

[12] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (Final Report), NUREG-1437, rev. 1, vols. 1-3 (June 2013) (ML13107A023) (package).

[13] *Oconee*, CLI-22-3, 95 NRC at 41.

[14] *Id.* at 42.

[15] *Id.*

its view, the Staff's site-specific environmental review for Turkey Point is not complete until the Final SEIS is issued.[16] Similarly, the Board emphasized that CLI-22-3 used the phrase "[a]fter each site-specific review is complete," which "seems clear on its face: complete means complete, not 'substantially complete.'"[17] The Board also points out that the sentence preceding this phrase provides for a public comment period "during the development of the site-specific environmental impact statements," and that "the process of developing an EIS is distinct from its completion" — development precedes completion.[18] On the other hand, FPL argued that "[i]n all material respects, the Staff's site-specific *review* of the applicant's site-specific application materials is complete upon issuance of the draft SEIS. To complete the overall *process*, the Staff will then respond to public comments and make any necessary final adjustments before issuing the final SEIS."[19] In addition, the Staff announced its intention to issue hearing notices after publication of draft site-specific EISs at a public meeting held to describe its path forward on environmental reviews for subsequent license renewals.[20] At the prehearing conference, the Staff acknowledged that this proceeding is unique and that it interpreted the language in CLI-22-3 in a manner consistent with its usual practice of issuing hearing notices at the earliest stage, which is typically at the environmental report stage for reactor license renewals, but in this case, for the five subsequent license renewal applications listed in CLI-22-3, it would be after publication of the Draft SEIS.[21]

We recognize that the language in CLI-22-3 could be interpreted in different ways. After considering the views expressed by the Board and the participants, we find that the Staff reasonably interpreted the language in CLI-22-3 as allowing the issuance of hearing notices after draft site-specific EISs were complete. While the circumstances surrounding this subsequent license renewal proceeding (as well as the other four proceedings covered in CLI-22-3) are unusual, the Staff appropriately adapted its ordinary practice of announcing hearings at the earliest opportunity to promote efficiency. Consideration of public comments is an important part of the National Environmental Policy Act (NEPA) process.

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[16] Hearing Request at 10 & n.31.

[17] LBP-24-1, 99 NRC at 5.

[18] *Id.* at 5-6.

[19] Florida Power & Light Company Answer in Opposition to Miami Waterkeeper Extension Request (Nov. 2, 2023), at 3 n.10.

[20] *Id.* (referring to August 17, 2022 public meeting); *see* Public Meeting Announcement, "Public Meeting on Path Forward for Site-Specific Environmental Reviews for Subsequent License Renewal" (Aug. 10, 2022) (ML22222A129); Public Meeting Summary, "Public Meeting on the Path Forward for Site-Specific Environmental Reviews of Subsequent License Renewal" (Sept. 6, 2022), at 2 (ML22238A305).

[21] Tr. at 35.

We hesitate to narrowly interpret the language in CLI-22-3 as requiring that the notices of hearing be issued after the consideration of public comments and publication of final EISs, in effect identifying that stage as the "completion" of the NEPA process. Even a final EIS can be supplemented before the agency issues its record of decision. For example, the Staff may issue a supplemental EIS based on new and significant circumstances or information arising after the publication of the final EIS.[22] Similarly, information developed during any hearing on environmental contentions would supplement the environmental record.[23] As such, we find that the Staff's identification of the issuance of the draft site-specific EIS as the point of completion of its site-specific review reflects a reasonable interpretation of the Commission's direction in CLI-22-3.

III. CONCLUSION

For the foregoing reasons, we *accept* the Board's certification and *find* the Staff's interpretation of our instructions in CLI-22-3 with respect to the timing of *Federal Register* notices announcing the opportunity for a hearing to be acceptable.

IT IS SO ORDERED.

For the Commission

Carrie M. Safford
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of March 2024.

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[22] *See* 10 C.F.R. § 51.92(a); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 388 (2012).

[23] *See* 10 C.F.R. §§ 51.102, 51.103; *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) ("The adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the [final EIS].").

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Emily I. Krause, Chair
Dr. Sue H. Abreu
Dr. Michael F. Kennedy

In the Matter of **Docket Nos. 50-250-SLR-2**
50-251-SLR-2
(ASLBP No. 24-981-01-SLR-BD01)

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating Units 3 and 4)

March 7, 2024

In this proceeding concerning the subsequent license renewal of Turkey Point Nuclear Generating Units 3 and 4, the Licensing Board grants Miami Waterkeeper's hearing request and admits a reformulated contention for hearing.

RULES OF PRACTICE: PRESIDING OFFICER, JURISDICTION

"Unless the Commission orders otherwise, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. . . . A proceeding commences when a . . . notice of proposed action under § 2.105 is issued." 10 C.F.R. § 2.318(a).

RULES OF PRACTICE: PRECEDENTIAL EFFECT

"Unreviewed Board decisions do not create binding legal precedent." *South-*

ern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013).

ATOMIC ENERGY ACT: HEARING RIGHTS

Section 189a of the Atomic Energy Act of 1954, as amended, requires the NRC to "grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A).

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission has established general standing criteria that require a petitioner to provide certain identifying information (name, address, and telephone number) and require a petitioner to state (1) the nature of its right under the statute governing the proceeding to be made a party; (2) the nature and extent of its property, financial, or other interest; and (3) the possible effect of any decision made in the proceeding on that interest. 10 C.F.R. § 2.309(d)(1)(i)-(iv); *see also Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

RULES OF PRACTICE: STANDING TO INTERVENE

When determining whether a petitioner has met the agency's standing requirements, the Commission and licensing boards generally look to contemporaneous judicial concepts of standing — a three-part inquiry that assesses whether the petitioner has "(1) allege[d] an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015). The NRC's standing analysis also includes a "zone-of-interests" test whereby the injury must arguably be within the zone of interests protected by the governing statute. *Calvert Cliffs,* CLI-09-20, 70 NRC at 915 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission "is not strictly bound by judicial standing doctrines," and in certain power reactor licensing proceedings, the Commission has recognized a presumption of standing for petitioners who reside within fifty miles of the facility to be licensed. *Calvert Cliffs,* CLI-09-20, 70 NRC at 915.

RULES OF PRACTICE: STANDING TO INTERVENE, REPRESENTATIONAL

An organization that seeks to intervene on behalf of its members also must meet the agency's representational standing requirements. The organization must demonstrate that at least one of its members has standing and has authorized the organization to request a hearing on that member's behalf. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). In addition, the interests that the organization seeks to protect must be germane to its purpose, and neither the asserted claim nor the requested relief must require the member's participation. *Id.*; *see also Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 237-38 & n.83 (2020) (citing *Turkey Point,* CLI-15-25, 82 NRC at 394).

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

A petitioner must provide a specific statement of the issue of law or fact it seeks to raise and a brief explanation of the basis for each contention. 10 C.F.R. § 2.309(f)(1)(i)-(ii). The petitioner must support its claims with "a concise statement of . . . alleged facts or expert opinions" — with reference to specific sources and documents — sufficient to show "that a genuine dispute exists with the applicant . . . on a material issue of law or fact." *Id.* § 2.309(f)(1)(v)-(vi). The petitioner must reference specific portions of the application in dispute or identify information that should have been included as a matter of law. *Id.* § 2.309(f)(1)(vi). And the petitioner must demonstrate that its issues are within the scope of the proceeding and material to the findings the NRC must make to support the underlying licensing action. *Id.* § 2.309(f)(1)(iii)-(iv).

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

The contention admissibility rule is "strict by design," *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016), but it is not insurmountable. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999) (explaining that the rule should not be used as a "fortress to deny intervention") (internal quotation marks and citation omitted); *see Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 104-05 (2022) (admitting for hearing portions of a contention that raised a genuine material dispute with the application). The rule serves to assess the scope, materiality, and support provided for a proposed contention, to ensure that the hearing process is "properly reserve[d] . . . for genuine, material controversies between knowledgeable liti-

gants." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 396 (2012) (internal quotation marks omitted).

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

Contentions must have "some reasonably specific factual or legal basis." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015) (internal quotation marks omitted); *see also Palisades,* CLI-22-8, 96 NRC at 45 (rejecting argument that did not "establish a supported genuine dispute with the application"). Specificity is key: mere speculation is insufficient, *see, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 216 (2003) (rejecting an argument that, at best, was based on speculation); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000) (finding "bare assertions and speculation" insufficient to trigger a contested hearing), and a petitioner may not simply reference documents without clearly identifying or summarizing the portions of the documents on which it relies. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). Licensing boards should not be expected to parse through lengthy references to ascertain the basis for a contention. *Seabrook,* CLI-89-3, 29 NRC at 241.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS, NATIONAL ENVIRONMENTAL POLICY ACT

For contentions that challenge the agency's compliance with the National Environmental Policy Act (NEPA), simply suggesting that additional information could be considered is not enough. *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012). A petitioner must explain how that information would make a material difference in the agency's NEPA review, either by showing that the analysis lacks information the agency was obligated to include or by demonstrating that the existing analysis is otherwise unreasonable. *See id.* at 323 ("[T]he proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA. We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely 'suggestions' of other ways an analysis could have been done, or other details that could have been included."); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC

10, 13 (2005) ("Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances. If the [environmental report] (or EIS) on its face 'comes to grips with all important considerations' nothing more need be done." (internal citations omitted)).

RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS

The agency's rules of practice include heightened pleading standards for new and amended contentions, which require a showing of good cause that hinges on the newness of the information supporting those contentions, along with an inquiry into whether the information could not have been raised previously. *See* 10 C.F.R. § 2.309(c)(1) (requiring a showing that "(i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information").

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

For a contention of omission, it is enough for a petitioner to show what information is missing and explain why that information is required to be included. *See* 10 C.F.R. § 2.309(f)(1)(vi) (allowing a petitioner to demonstrate a genuine dispute on a failure "to contain information on a relevant matter as required by law" by identifying "each failure and the supporting reasons for the petitioner's belief"); *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, 382-83 (2002) ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application.").

NATIONAL ENVIRONMENTAL POLICY ACT

As the Commission has recognized, NEPA "is intended to 'foster both informed decision-making and informed public participation.'" *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 10 (2002) (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)).

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS, NATIONAL ENVIRONMENTAL POLICY ACT

A petitioner must connect the dots to explain how its claims call into question the adequacy of existing analyses. *See Seabrook,* CLI-12-5, 75 NRC at 323-24; *see also Oglala Sioux Tribe v. NRC,* 45 F.4th 291, 305 (D.C. Cir. 2022) (dismissing challenge to agency's NEPA analysis for "continu[ing] to ignore" and "fail[ing] to engage with the agency's actual . . . analysis").

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS, NATIONAL ENVIRONMENTAL POLICY ACT

As the Commission has observed, petitioners often might find new information to consider, potentially making the environmental review process never-ending if not for the required showing that the new information is material to the Staff's analysis. *See, e.g., Seabrook,* CLI-12-5, 75 NRC at 324; *Grand Gulf,* CLI-05-4, 61 NRC at 13.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS, RIPENESS

The Commission has held that contentions claiming deficiencies from an alleged "failure to consult" are not ripe if the Staff has not yet completed the relevant consultation requirements. *See Crow Butte Resources, Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 261 (2020) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 348-51 (2009)). And the Commission disfavors contentions that serve as "placeholders" for future events. *See, e.g., Union Electric Co.* (Callaway Plant, Unit 1), CLI-15-11, 81 NRC 546, 548-50 (2015); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (affirming licensing board's rejection of "placeholder" motion).

RULES OF PRACTICE: REPLY BRIEFS

A reply must be narrowly focused on the legal or factual arguments originally raised in the hearing request or the answers. *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

MEMORANDUM AND ORDER
(Granting Request for Hearing)

This proceeding concerns the twenty-year subsequent renewal of the operating licenses for Turkey Point Nuclear Generating Units 3 and 4. The licenses currently authorize Florida Power & Light Company (FPL) to operate Units 3 and 4 until July 19, 2032, and April 10, 2033, respectively. Miami Waterkeeper filed a hearing request with five proposed contentions challenging the Nuclear Regulatory Commission Staff's August 2023 Draft Supplemental Environmental Impact Statement (Draft SEIS). For the reasons set forth below, the Board grants Miami Waterkeeper's hearing request and admits Contention 1 as narrowed and reformulated by the Board.

I. BACKGROUND

In 2018, FPL submitted a subsequent license renewal application to operate Turkey Point Nuclear Generating Units 3 and 4 for an additional twenty years beyond the expiration dates of its initial renewed licenses.[1] A twenty-year extension would allow FPL to operate Units 3 and 4 until July 19, 2052, and April 10, 2053, respectively. The NRC Staff docketed the application and provided an opportunity for members of the public to request a hearing.[2]

In response, the agency received three hearing requests — one filed by Southern Alliance for Clean Energy (SACE), another by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Joint Petitioners), and a third by Albert Gomez — with several proposed contentions challenging FPL's application.[3] In LBP-19-3, a licensing board granted SACE's and Joint Peti-

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[1] *See* Florida Power & Light Company, Turkey Point Nuclear Plant Units 3 and 4, Subsequent License Renewal Application, Rev. 1 (Apr. 2018) (ADAMS Accession No. ML18113A146); *see generally Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245 (2019). Our decision today recounts only a brief portion of the history of the agency's review of FPL's subsequent license renewal application for Turkey Point. For a complete recitation of the procedural background, see the Commission's decisions in CLI-22-6, CLI-22-3, CLI-22-2, and CLI-20-3, and the prior licensing board's decisions in LBP-19-8, LBP-19-6, and LBP-19-3, citations to which are provided as these cases are discussed.

[2] *See* Florida Power & Light Company; Turkey Point Nuclear Generating, Unit Nos. 3 and 4, 83 Fed. Reg. 19,304 (May 2, 2018).

[3] *See Turkey Point,* LBP-19-3, 89 NRC at 255.

tioners' hearing requests, reformulating and admitting two of each petitioner's contentions.[4] The board denied Mr. Gomez's hearing request.[5]

The proceeding continued apace, with the board ultimately dismissing the admitted contentions as moot,[6] dismissing the petitioners' proposed new and amended contentions, and terminating the proceeding.[7] The petitioners appealed the board's rulings to the Commission.[8] In December 2019, the Staff completed its review of FPL's application and issued the subsequent renewed licenses.[9]

In CLI-22-2, however, as it considered the pending appeals, the Commission reversed its earlier decision allowing the Staff to rely on a Generic Environmental Impact Statement (GEIS) for subsequent license renewal environmental reviews.[10] The Commission held that the GEIS applied only to initial license renewal proceedings, and thus found that the Staff's environmental review of FPL's application, which relied on the GEIS, was incomplete.[11] The Commission left the subsequent renewed licenses for Turkey Point Units 3 and 4 in place, but with amended end dates to match the initial license renewal term to allow the agency to fulfill its obligations under the National Environmental Policy Act (NEPA).[12] The Commission also directed the parties to provide their views on the practical effects of this remedy as well as the practical effects of reinstating the initial renewed licenses.[13]

On the same day, the Commission issued CLI-22-3, in which the Commission outlined the path forward to remedy the incomplete environmental review

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[4] *Id.* at 301-02. Judges E. Roy Hawkens, Sue H. Abreu, and Michael F. Kennedy comprised that licensing board.

[5] *Id.* at 302.

[6] SACE withdrew from the proceeding on April 9, 2019, making Joint Petitioners the sole intervening party. *See* Southern Alliance for Clean Energy's Notice of Withdrawal (Apr. 9, 2019).

[7] *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-8, 90 NRC 139, 178 (2019); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-6, 90 NRC 17, 26 (2019).

[8] *See* Friends of the Earth's, Natural Resources Defense Council's, and Miami Waterkeeper's Petition for Review of the Atomic Safety and Licensing Board's Rulings in LBP-19-3 and LBP-19-06 (Aug. 9, 2019); Friends of the Earth's, Natural Resources Defense Council's, and Miami Waterkeeper's Petition for Review of the Atomic Safety and Licensing Board's Ruling in LBP-19-08 (Nov. 18, 2019).

[9] *See* Notification of License Issuance (Dec. 5, 2019) at 1-2 (ML19339H994).

[10] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-2, 95 NRC 26, 27 (2022), *rev'g* CLI-20-3, 91 NRC 133 (2020).

[11] *Id.* at 27, 36.

[12] *Id.* at 36-37.

[13] *Id.* at 37.13

in *Turkey Point* and four other subsequent license renewal proceedings.[14] The Commission directed the Staff to review and update the GEIS "and take appropriate action with respect to the pending subsequent license renewal applications to ensure that the environmental impacts for the period of subsequent license renewal are considered."[15]

In addition, the Commission observed that applicants might not wish to wait for the completion of the GEIS updates and the associated rulemaking proceeding.[16] Thus, the Commission provided an alternate track, allowing applicants to supplement their environmental reports with site-specific information that otherwise would have been addressed generically in an updated GEIS.[17] The Commission expected that the Staff would then consider the information in the supplemental environmental reports to generate revised site-specific environmental impact statements.[18] The Commission further directed the Staff to issue "a new notice of opportunity for hearing . . . limited to contentions based on new information in the site-specific environmental impact statement" after the completion of each site-specific review.[19] As the Commission explained, this approach would allow petitioners to submit newly filed or refiled contentions without meeting the heightened, "good cause" standard for new and amended contentions.[20] The Commission dismissed the motions, petitions, and appeals pending before it in *Turkey Point* without prejudice.[21]

In CLI-22-6, the Commission revisited the remedy it provided in CLI-22-2

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[14] *See Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 41-43 (2022) (addressing the *Oconee, Peach Bottom, Turkey Point, Point Beach,* and *North Anna* subsequent license renewal proceedings).

[15] *Id.* at 41; *see also* Staff Requirements — SECY-21-0066 — Rulemaking Plan for Renewing Nuclear Power Plant Operating Licenses — Environmental Review (RIN 3150-AK32; NRC-2018-0296) (Feb. 24, 2022) (ML22053A308). On March 3, 2023, the NRC published a proposed rule that would amend the regulations governing the agency's environmental review of license renewal applications in 10 C.F.R. Part 51. *See* Renewing Nuclear Power Plant Operating Licenses — Environmental Review, 88 Fed. Reg. 13,329, 13,329 (Mar. 3, 2023). The proposed rule is based on an updated draft revised GEIS that addresses the impacts of an initial license renewal and one subsequent license renewal. *See id.* On February 21, 2024, the Staff submitted a draft final rule and updated draft revised GEIS for the Commission's review and approval. *See* "Final Rule: Renewing Nuclear Power Plant Operating Licenses — Environmental Review (RIN 3150-AK32; NRC-2018-0296)," Commission Paper SECY-24-0017 (Feb. 21, 2024) (ML23202A179 (package)).

[16] *Oconee,* CLI-22-3, 95 NRC at 41.

[17] *Id.*

[18] *See id.* at 41-42.

[19] *Id.* at 42.

[20] *Id.* (citing 10 C.F.R. § 2.309(c)).

[21] *Id.* at 43.

regarding the status of the operating licenses for Turkey Point Units 3 and 4.[22] After considering the parties' views, the Commission confirmed its decision to leave in place the subsequent renewed licenses for Turkey Point Units 3 and 4 with shortened end dates to match the initial license renewal term.[23] The Commission reasoned that "this remedy is the best way to fulfill our statutory duty [under NEPA] while maintaining the enhanced aging management programs and safety enhancements of the subsequently renewed licenses favored by all parties to the proceeding."[24] The Commission thus affirmed its direction in CLI-22-2 and terminated the proceeding.[25]

FPL elected to supplement its environmental report, which it submitted in June 2022.[26] The Staff issued its Draft SEIS in August 2023.[27] In preparing the Draft SEIS, the Staff undertook a site-specific evaluation of "Category 1" issues that previously had been dispositioned as generic in the Staff's 2019 Supplemental Environmental Impact Statement (2019 SEIS) in reliance on the GEIS.[28] In addition, the Staff considered whether, with the passage of time, any new and significant information would change the Staff's previous analyses of site-specific, "Category 2," issues.[29]

On September 8, 2023, the Staff published a *Federal Register* notice announcing an opportunity to request a hearing on the Draft SEIS.[30] In accordance with a twenty-day extension granted by the Secretary of the Commission, Miami Waterkeeper filed its hearing request on November 27, 2023.[31] On November 30, 2023, this Board was established to rule on Miami Waterkeeper's standing to

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[22] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-6, 95 NRC 111, 112 (2022).

[23] *Id.* at 112-15.

[24] *Id.* at 114.

[25] *Id.* at 115.

[26] Subsequent License Renewal Application — Appendix E Environmental Report Supplement 2 (June 9, 2022) (ML22160A301).

[27] NUREG-1437, "Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants," Supplement 5a, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment (Aug. 2023) (ML23242A216) (Draft SEIS); *see also* Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 88 Fed. Reg. 62,110 (Sept. 8, 2023) (Draft SEIS Notice). The Draft SEIS was issued as a supplement to the Staff's October 2019 Final Supplemental Environmental Impact Statement. NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Final Report (Oct. 2019) (ML19290H346) (2019 SEIS).

[28] *See* Draft SEIS at iii.

[29] *See id.*

[30] Draft SEIS Notice, 88 Fed. Reg. at 62,110.

[31] Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Nov. 27, 2023) (Hearing Request); Order of the Secretary (Nov. 6, 2023) at 4 (unpublished).

intervene and the admissibility of its proposed contentions and to preside at any hearing.[32] We issued an initial prehearing order to establish a briefing schedule for answers and replies and to address other administrative matters governing the proceeding.[33]

FPL and the Staff filed answers in opposition to Miami Waterkeeper's hearing request on December 22, 2023, to which Miami Waterkeeper replied on January 8, 2024.[34] FPL followed with a motion to strike portions of Miami Waterkeeper's reply on January 18, 2024, to which Miami Waterkeeper responded on January 23, 2024.[35] We held oral argument on the issues raised in Miami Waterkeeper's hearing request on January 24, 2024.[36]

II. ANALYSIS

The posture of this proceeding is unusual. As discussed above, this is the second proceeding involving FPL's subsequent license renewal application, and

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[32] Florida Power & Light Company; Establishment of Atomic Safety and Licensing Board, 88 Fed. Reg. 84,835 (Dec. 6, 2023).

[33] *See* Licensing Board Order (Initial Prehearing Order) (Dec. 6, 2023) (unpublished).

[34] Florida Power & Light Company's Answer Opposing Miami Waterkeeper's Hearing Request and Petition for Leave to Intervene (Dec. 22, 2023) (FPL Answer); NRC Staff Answer Opposing Miami Waterkeeper Hearing Request (Dec. 22, 2023) (Staff Answer). We granted Miami Waterkeeper's motion to extend the reply deadline; thus, Miami Waterkeeper's reply was timely filed on January 8, 2024. *See* Licensing Board Order (Granting Motion for Extension of Time) (Dec. 19, 2023) (unpublished); Reply in Support of Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Jan. 8, 2024) (Reply).

[35] Florida Power & Light Company's Motion to Strike Portions of the Reply Filed by Miami Waterkeeper (Jan. 18, 2024) (Motion to Strike); Miami Waterkeeper's Response in Opposition to Florida Power & Light Company's Motion to Strike Portions of Miami Waterkeeper's Reply (Jan. 23, 2024). On February 1, 2024, Miami Waterkeeper filed an unopposed motion to amend its response to FPL's motion to strike to bring it within the page limit established in our initial prehearing order. Unopposed Motion for Leave to File Amended Response in Opposition to FPL's Motion to Strike Portions of Miami Waterkeeper's Reply (Feb. 1, 2024). Miami Waterkeeper included its amended response with the motion. Miami Waterkeeper's Amended Response in Opposition to FPL's Motion to Strike Portions of Miami Waterkeeper's Reply (Feb. 1, 2024) (Amended Response). We granted Miami Waterkeeper's motion on February 13, 2024. Licensing Board Order (Granting Unopposed Motion for Leave to File Amended Response) (Feb. 13, 2024) (unpublished).

[36] *See* Tr. at 1, 7; *see also* Licensing Board Order (Providing Administrative Information and Topic for Initial Prehearing Conference) (Jan. 9, 2024) at 2 (unpublished). Following the prehearing conference, we certified to the Commission a question whether the Staff's notice of opportunity for hearing was premature, and if so, the impact that would have on this proceeding. *See* LBP-24-1, 99 NRC 1 (2024). The Commission accepted the certified question and held that the timing of the notice reflected a reasonable interpretation of the Commission's direction in CLI-22-3 that the notice follow the completion of the Staff's review. *See* CLI-24-1, 99 NRC 33, 37 (2024); *Oconee,* CLI-22-3, 95 NRC at 42.

we are the second licensing board to rule on hearing requests filed in response to a notice of opportunity for hearing related to that application.

As an initial matter, we note that this proceeding is not a continuation of the previous *Turkey Point* subsequent license renewal adjudication. Miami Waterkeeper, the Staff, and FPL appear to agree on this point.[37] In CLI-22-6, the Commission terminated the prior proceeding.[38] And in accordance with 10 C.F.R. § 2.318(a), the current proceeding commenced with the Staff's issuance of a *Federal Register* notice announcing the opportunity to request a hearing on the Draft SEIS.[39] Because the Commission dismissed the appeals of the prior board's contention admissibility decisions without reviewing them,[40] we view the prior board's rulings as persuasive but not binding on this proceeding.[41]

A. Miami Waterkeeper's Standing to Intervene

FPL and the Staff do not challenge Miami Waterkeeper's standing.[42] Nevertheless, a licensing board independently must determine whether a petitioner has fulfilled the agency's standing requirements.[43] We conclude that Miami Waterkeeper has met these requirements.

Section 189a of the Atomic Energy Act of 1954, as amended, requires the NRC to "grant a hearing upon the request of any person whose interest may be affected by the proceeding."[44] The Commission has established general standing criteria that require a petitioner to provide certain identifying information (name, address, and telephone number) and require a petitioner to state (1) the nature

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[37] *See* Reply at 10, 29-30, 45; Staff Answer at 2; FPL Answer at 1-2; Tr. at 19, 27-28, 42.

[38] *Turkey Point,* CLI-22-6, 95 NRC at 115; *see* 10 C.F.R. § 2.318(a).

[39] *See* 10 C.F.R. § 2.318(a) ("Unless the Commission orders otherwise, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. . . . A proceeding commences when a . . . notice of proposed action under § 2.105 is issued."); Draft SEIS Notice, 88 Fed. Reg. at 62,110.

[40] *Oconee,* CLI-22-3, 95 NRC at 43.

[41] *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013) ("Unreviewed Board decisions do not create binding legal precedent.").

[42] *See* Staff Answer at 13-14; FPL Answer at 2 n.7.

[43] 10 C.F.R. § 2.309(d)(2). The board in the first *Turkey Point* subsequent license renewal proceeding found that Miami Waterkeeper, along with the other two Joint Petitioners, had demonstrated standing to intervene. *See Turkey Point,* LBP-19-3, 89 NRC at 285-86 & n.60. A finding of standing in one proceeding, however, does not automatically confer standing in another proceeding. *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 342-43 (2009) (holding that affidavits used in one proceeding were insufficient to authorize representation in another proceeding involving the same license because they did not make specific reference to the proceeding in which standing was sought).

[44] 42 U.S.C. § 2239(a)(1)(A).

of its right under the statute governing the proceeding to be made a party; (2) the nature and extent of its property, financial, or other interest; and (3) the possible effect of any decision made in the proceeding on that interest.[45]

When determining whether a petitioner has met the agency's standing requirements, the Commission and licensing boards generally look to contemporaneous judicial concepts of standing — a three-part inquiry that assesses whether the petitioner has "(1) allege[d] an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision."[46] But the Commission is "not strictly bound by judicial standing doctrines," and in certain power reactor licensing proceedings, the Commission has recognized a presumption of standing for petitioners who reside within fifty miles of the facility to be licensed.[47] In view of the fact that licensing boards have routinely, with the Commission's implicit endorsement,[48] applied this "proximity presumption" in reactor license renewal proceedings, the board in the prior proceeding concluded that subsequent license renewal proceedings should be treated no differently.[49] For the same reasons, we agree that the fifty-mile proximity presumption applies here.

An organization that, like Miami Waterkeeper, seeks to intervene on behalf of its members also must meet the agency's representational standing requirements. The organization must demonstrate that at least one of its members has standing and has authorized the organization to request a hearing on that member's behalf.[50] In addition, the interests that the organization seeks to protect must be germane to its purpose, and neither the asserted claim nor the requested relief must require the member's participation.[51]

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[45] 10 C.F.R. § 2.309(d)(1)(i)-(iv); *see also Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

[46] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015). The NRC's standing analysis also includes a "zone-of-interests" test whereby the injury must arguably be within the zone of interests protected by the governing statute. *Calvert Cliffs,* CLI-09-20, 70 NRC at 915 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

[47] *Calvert Cliffs,* CLI-09-20, 70 NRC at 915.

[48] *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 394 & n.4 (2012) (affirming in part, and reversing in part, licensing board decision granting a request for hearing that found standing based on geographic proximity); *accord Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 431 n.16 (2011).

[49] *Turkey Point,* LBP-19-3, 89 NRC at 258-59.

[50] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

[51] *Id.*; *see also Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 237-38 & n.83 (2020) (citing *Turkey Point,* CLI-15-25, 82 NRC at 394).

Miami Waterkeeper has supplied declarations from two members who state that they reside within fifty miles of Turkey Point Units 3 and 4 — and whose standing is thus presumed based on their proximity to the plant.[52] These members state that they support the petition and have authorized Miami Waterkeeper to request a hearing on their behalf.[53] And Miami Waterkeeper asserts that its mission is to "protect and preserve the Biscayne Bay watershed"[54] — a purpose that falls squarely within the interests it seeks to protect in this proceeding, which involves the environmental impacts from the subsequent license renewal of Turkey Point Units 3 and 4, a plant geographically located near the Biscayne Bay.[55] Moreover, the direct participation of Miami Waterkeeper's members is not required to resolve the issue whether the Staff has adequately considered the environmental impacts of subsequent license renewal and met its obligations under NEPA. Finally, Miami Waterkeeper's requested relief, which would have the Staff correct a purportedly deficient NEPA analysis, likewise does not require the direct participation of Miami Waterkeeper's members. Accordingly, we find that Miami Waterkeeper has demonstrated its representational standing to challenge the Staff's Draft SEIS.

B. Miami Waterkeeper's Proposed Contentions

A hearing request "must set forth with particularity the contentions sought to be raised."[56] A petitioner must provide a specific statement of the issue of law or fact it seeks to raise and a brief explanation of the basis for each contention.[57] The petitioner must support its claims with "a concise statement of . . . alleged facts or expert opinions" — with reference to specific sources and documents — sufficient to show "that a genuine dispute exists with the applicant . . . on a material issue of law or fact."[58] The petitioner must reference specific portions of the application in dispute or identify information that should have been included as a matter of law.[59] And the petitioner must demonstrate that its

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[52] Declaration of Rachel Silverstein, Ph.D. (Nov. 20, 2023) (Silverstein Declaration); Declaration of Philip K. Stoddard, Ph.D. (Nov. 3, 2023) (Stoddard Declaration). Both declarations contain contact information for each member. *See* Silverstein Declaration at 4; Stoddard Declaration at 1.

[53] Silverstein Declaration at 3; Stoddard Declaration at 4.

[54] Hearing Request at 4.

[55] *See* Draft SEIS at 2-23.

[56] 10 C.F.R. § 2.309(f)(1).

[57] *Id.* § 2.309(f)(1)(i)-(ii).

[58] *Id.* § 2.309(f)(1)(v)-(vi).

[59] *Id.* § 2.309(f)(1)(vi). In this case, the Staff's *Federal Register* notice provided an opportunity for hearing on the Draft SEIS; accordingly, Miami Waterkeeper's contentions challenge the Draft SEIS and not FPL's application directly. *See* Draft SEIS Notice, 88 Fed. Reg. at 62,110.

issues are within the scope of the proceeding and material to the findings the NRC must make to support the underlying licensing action.[60]

The contention admissibility rule is "strict by design,"[61] but it is not insurmountable.[62] The rule serves to assess the scope, materiality, and support provided for a proposed contention, to ensure that the hearing process is "properly reserve[d] . . . for genuine, material controversies between knowledgeable litigants."[63] Contentions must have "some reasonably specific factual or legal basis."[64] Specificity is key: mere speculation is insufficient,[65] and a petitioner may not simply reference documents without clearly identifying or summarizing the portions of the documents on which it relies.[66] For contentions that challenge the agency's compliance with NEPA, simply suggesting that additional information could be considered is not enough.[67] A petitioner must explain how that information would make a material difference in the agency's NEPA review, either by showing that the analysis lacks information the agency was obligated to include or by demonstrating that the existing analysis is otherwise unreasonable.[68]

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[60] 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

[61] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

[62] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999) (explaining that the rule should not be used as a "fortress to deny intervention") (internal quotation marks and citation omitted); *see Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 104-05 (2022) (admitting for hearing portions of a contention that raised a genuine material dispute with the application).

[63] *Davis-Besse,* CLI-12-8, 75 NRC at 396 (internal quotation marks omitted).

[64] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015) (internal quotation marks omitted); *see also Palisades,* CLI-22-8, 96 NRC at 45 (rejecting argument that did not "establish a supported genuine dispute with the application").

[65] *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 216 (2003) (rejecting an argument that, at best, was based on speculation); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000) (finding "bare assertions and speculation" insufficient to trigger a contested hearing).

[66] *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). Licensing boards should not be expected to parse through lengthy references to ascertain the basis for a contention. *See Seabrook,* CLI-89-3, 29 NRC at 241.

[67] *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012).

[68] *See id.* at 323 ("[T]he proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA. We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely 'suggestions' of other ways an analysis could have been done, or other details that could have been included."); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site),

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Before we address each of Miami Waterkeeper's five contentions, we begin with a discussion concerning this proceeding's scope. In CLI-22-3, the Commission stated that the new hearing opportunity would be "limited to contentions based on new information in the site-specific environmental impact statement."[69] Miami Waterkeeper argues that the Commission's decisions in CLI-22-2, CLI-22-3, and CLI-22-6 provide it with a clean slate to challenge the Staff's compliance with NEPA, going so far as to assert that in CLI-22-3 the Commission vacated the prior board's rulings.[70]

The Staff asserts that in CLI-22-3 the Commission intended "not to allow the re-litigation of pre-existing information for which a hearing opportunity had already been offered, but to allow for the litigation of new information that could not have been challenged previously."[71] The Staff argues that Contentions 2, 3, and 5 impermissibly challenge pre-existing information in the 2019 SEIS.[72] FPL shares the Staff's view that, absent new information, arguments rejected in the earlier adjudication or arguments that challenge information in earlier environmental documents are outside this proceeding's scope.[73] FPL also claims that Contentions 2, 3, and 5 raise issues that are not new and would have us dismiss a portion of Contention 1 for the same reason.[74]

Although we disagree with Miami Waterkeeper that the Commission vacated the prior board's decisions — if it had wished to do so, it would have done so expressly[75] — we conclude that Miami Waterkeeper's proposed contentions are within the scope of this proceeding. In both form and substance, Miami Water-

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CLI-05-4, 61 NRC 10, 13 (2005) ("Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances. If the [environmental report] (or EIS) on its face 'comes to grips with all important considerations' nothing more need be done.") (internal citations omitted)).

[69] *Oconee,* CLI-22-3, 95 NRC at 42.

[70] *See* Reply at 10, 29, 45; *see also* Tr. at 13, 19.

[71] Staff Answer at 37; *see also id.* at 1-2 (asserting that arguments that dispute information in documents that pre-date the Draft SEIS and that are not tied to the Draft SEIS are outside the scope of the proceeding); *accord* Tr. at 25-31.

[72] Tr. at 25; Staff Answer at 35-38, 43, 50. Miami Waterkeeper used Roman numerals to number the contentions but used Arabic numerals in its reply. We use Arabic numerals for ease of reference.

[73] *See* FPL Answer at 2, 30-31, 53.

[74] *See id.* at 27-28, 30-31, 38, 53. The Staff and FPL also argue that Contention 5 is outside the scope of the proceeding to the extent it challenges safety issues. Staff Answer at 50; FPL Answer at 53.

[75] *See San Onofre,* CLI-13-9, 78 NRC at 558 (addressing the question whether vacatur was appropriate in a proceeding that had become moot due to intervening events). As FPL points out, the Commission's decisions in CLI-22-2, CLI-22-3, and CLI-22-6 do not contain the word "vacate." Tr. at 43. In any event, Commission vacatur would only impact the persuasive weight we would accord the prior board's decisions. *See San Onofre,* CLI-13-9, 78 NRC at 559 & n.34 (explaining that the Commission and licensing boards will determine the persuasive weight of arguments made in reliance on vacated decisions).

keeper bases its contentions on the Draft SEIS.[76] Although Miami Waterkeeper references documents and repeats arguments that pre-date the Draft SEIS, Miami Waterkeeper makes clear that it remains unsatisfied with the Staff's treatment of these issues in the Draft SEIS.[77]

Further, we find significant the Commission's express permission in CLI-22-3 for petitioners to refile contentions.[78] Although the Commission advised petitioners of its expectation that refiled contentions would be accompanied with updated references, petitioners were told that they would be responsible solely for meeting the agency's standing and general contention admissibility requirements.[79] The agency's rules of practice include heightened pleading standards for new and amended contentions, which require a showing of good cause that hinges on the newness of the information supporting those contentions, along with an inquiry into whether the information could not have been raised previously.[80] But here the Commission excused petitioners from satisfying these heightened pleading standards in their new hearing requests.[81] Were we to credit the Staff's and FPL's cabined reading of CLI-22-3 to preclude Miami Waterkeeper's refiled contentions and references to documents that pre-date the Draft SEIS, we would, in effect, have shoehorned the heightened pleading standards for new and amended contentions into the scope inquiry.

Rather, we find that the best way to give full effect to the Commission's instructions in CLI-22-3 is to treat the newness of the information underlying Miami Waterkeeper's refiled contentions as a materiality issue rather than a scope issue.[82] Thus, as a general matter, the failure to provide new information

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[76] *See infra* sections II.B.1 to 5.

[77] *See, e.g.,* Hearing Request at 13-14, 34-35, 50, 75-76.

[78] *Oconee,* CLI-22-3, 95 NRC at 42 & n.8.

[79] *Id.* (citing 10 C.F.R. § 2.309(a)).

[80] *See* 10 C.F.R. § 2.309(c)(1) (requiring a showing that "(i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information").

[81] *Oconee,* CLI-22-3, 95 NRC at 42.

[82] At oral argument, counsel for FPL asserted that the Commission's instructions can be reconciled if we assume the Commission intended for any refiled contentions that fail to establish a connection with the Draft SEIS to be refiled only on appeal. *See* Tr. at 39-40. We disagree. When discussing the new opportunity for hearing that would follow the Staff's environmental review, the Commission spoke generally about the five captioned proceedings, including *Turkey Point. See Oconee,* CLI-22-3, 95 NRC at 41-43. Significantly, the Commission did not expressly reserve issues (e.g., certain refiled contentions) for the Commission's sole review. Moreover, it is not clear what the mechanism would be for the Commission to consider refiled contentions if they are deemed beyond the scope of the proceeding. A proceeding commences with a notice of opportunity for hearing, and that

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or discuss its significance might risk failing to persuade us (or the Commission, on appeal) that a refiled contention previously dismissed by the prior board should now be admitted. But that failure does not require us to find a refiled contention beyond the scope of this proceeding.[83]

We therefore do not find fault with Miami Waterkeeper's proposed contentions under 10 C.F.R. § 2.309(f)(1)(iii). Whether Miami Waterkeeper otherwise has met the requirements for a hearing on its proposed contentions is another matter, however, and one we turn to now.

1. Contention 1: "The 2023 Draft [SEIS] Fails to Take a Hard Look at Impacts to Groundwater Quality"

In Contention 1, Miami Waterkeeper asserts that the Draft SEIS lacks the requisite "hard look" at impacts to groundwater quality during the subsequent license renewal period resulting from operation of the cooling canal system (CCS) for Turkey Point Units 3 and 4 and the measures undertaken to "offset its legacy of significant environmental impacts."[84] In addition to groundwater quality, and interwoven throughout its discussion of Contention 1, Miami Waterkeeper raises concerns regarding groundwater use conflicts and the impacts of non-radiological contaminants on aquatic organisms.[85] At oral argument, counsel for Miami Waterkeeper clarified that its main points are captured in a four-

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"proceeding" may include licensing board and Commission review. *See* 10 C.F.R. § 2.318(a). The Commission terminated the prior proceeding. The Staff's notice of opportunity for hearing on the Draft SEIS initiated this proceeding. Thus, if refiled issues are not part of the new proceeding in its broadest sense (i.e., an adjudication that includes licensing board and Commission review), when would they be raised?

[83] For example, the lack of updated information might go to the issue whether a petitioner has provided sufficient support or raised a genuine dispute. But where, as here, the Commission expressly has allowed petitioners to refile contentions that would not be subject to a heightened "new information" standard, the lack of updated information would not be the determining factor for the scope inquiry.

[84] Hearing Request at 12.

[85] *See, e.g., id.* at 15-16 (raising concerns regarding use conflicts and groundwater quality impacts within the discussion of the interceptor ditch); *id.* at 21-22 (raising concerns regarding use conflicts and groundwater-quality impacts within the discussion of the hypersaline plume); *id.* at 29-30 (raising concerns regarding impacts to aquatic organisms along with impacts to groundwater quality). Miami Waterkeeper references several lengthy reports, including declarations from William K. Nuttle and James Fourqurean, along with declarations they provided in prior litigation concerning the Turkey Point plant and before the prior board. *See id.* at 14-16, 19-20, 22-23, 26-30, 33; Declaration of Dr. William K. Nuttle (undated) (attaching expert reports from May 2018 and June 2019) (Nuttle Declaration); Declaration of James Fourqurean, Ph.D. (Nov. 22, 2023) (attaching expert reports from January 2021 and June 2019) (Fourqurean Declaration). Each of these declarations combine multiple documents in one portable document format (PDF) file. When citing these declarations, we refer to the page numbers in the PDF files.

sentence summary near the end of its discussion of Contention 1, in which Miami Waterkeeper states that it contests: (1) the Staff's conclusion in section 2.8.3 of the Draft SEIS that the impacts on groundwater quality will be small or moderate; (2) the Staff's conclusion in section 2.8.2.1 of the Draft SEIS that groundwater use conflicts in the Biscayne aquifer will be small; (3) the Staff's conclusion in section 2.8.2.2 of the Draft SEIS that impacts to groundwater use conflicts in the Upper Floridan aquifer will be moderate; and (4) the Staff's conclusion that the effect of non-radiological contaminants on aquatic organisms will be small.[86]

Although we determine that the bulk of Contention 1 lacks the specificity required for an admissible contention, we admit a narrow portion of Miami Waterkeeper's challenge regarding the Draft SEIS discussion of groundwater-quality impacts. Miami Waterkeeper takes issue with the Staff's conclusion that due to uncertainty regarding the success of FPL's efforts to remediate the hypersaline plume resulting from operation of the CCS, the impacts on groundwater quality could increase from small to moderate.[87] We conclude that with this challenge, Miami Waterkeeper has identified an omission in the Staff's analysis — specifically that the Draft SEIS lacks an explanation as to how the uncertainty in the success of FPL's remediation efforts leads to a finding of moderate impacts.

In its brief statement of this issue and its basis,[88] Miami Waterkeeper asserts that the Staff's determination that groundwater-quality impacts could be moderate "is not a reasonable conclusion" and lacks the requisite hard look under NEPA.[89] This issue is within the scope of the proceeding and is material to the findings the Staff must make to support the twenty-year subsequent license renewal of Turkey Point Units 3 and 4 because it calls into question

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[86] Hearing Request at 33; Tr. at 15. Counsel for Miami Waterkeeper also stated at oral argument that Contention 1 includes the "key point . . . that the 2023 DEIS has failed to compare the positive and remedial impact of . . . discontinuing CCS use against the perpetuating impact of the proposed action of continuing to use the CCS." *Id.* (citing Hearing Request at 12). We question whether this argument was raised in the hearing request, but it does appear in Miami Waterkeeper's reply. *See* Reply at 13, 15-17. FPL argues that the argument is new and that we should strike it for exceeding the proper scope of a reply. Motion to Strike at 4-5. Miami Waterkeeper asserts that discussing the benefits of discontinuing the use of the CCS is another way of challenging the impacts of its use and that FPL opened the door to these arguments in its answer. Amended Response at 4-5. As we discuss below, we admit only a narrow portion of Contention 1 and conclude that all other claims, including this one, are inadmissible. Therefore, even were we to consider Miami Waterkeeper's argument regarding the benefits of discontinuing use of the CCS, it would not change our admissibility determination for Contention 1.

[87] *See* Hearing Request at 21-22.

[88] *See* 10 C.F.R. § 2.309(f)(1)(i)-(ii).

[89] Hearing Request at 21-22 (citing Draft SEIS at 2-31); *see also id.* at 12, 33; Nuttle Declaration at 2 (stating that a "more thorough, more critical analysis" is needed).

the Staff's compliance with NEPA in the Draft SEIS.[90] The Commission tasked the Staff in CLI-22-3 with remedying an incomplete NEPA analysis, and Miami Waterkeeper's dispute goes to the heart of the Staff's compliance with the Commission's direction and the agency's statutory obligation under NEPA.[91]

Further, Miami Waterkeeper specifically references the portion of the Draft SEIS in dispute — section 2.8.3.[92] Miami Waterkeeper argues that, contrary to its obligations under NEPA, the Staff "resorted to guesswork and speculation" in its discussion of the possible impacts to groundwater quality in the event FPL is unable to retract the hypersaline groundwater plume to within the Turkey Point Units 3 and 4 site boundary before the subsequent license renewal term.[93] In section 2.8.3.2 of the Draft SEIS, the Staff states that impacts to groundwater quality would be small "if FPL can retract and maintain the hypersaline plume to within the FPL site boundary prior to the [subsequent license renewal] term."[94] The Staff further states that "because some uncertainty exists" about FPL's success in retracting the plume beforehand, the impacts could be moderate.[95] But, as Miami Waterkeeper maintains, the Draft SEIS lacks an explanation why the Staff chose "moderate" for the impacts that might result if FPL is not successful in retracting the hypersaline plume.[96]

For its part, Miami Waterkeeper argues that the impacts to groundwater quality would be large.[97] And in support of this claim, Miami Waterkeeper relies on the declarations of its experts, as well as studies that it provided to the Staff during the scoping process for the Draft SEIS.[98] Miami Waterkeeper also cites a recent analysis that it claims calls into question FPL's ability to retract the hypersaline plume.[99] But Miami Waterkeeper's arguments go to the uncertainty in the plume retraction itself, not to whether a failure to retract the plume will

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[90] *See* 10 C.F.R. § 2.309(f)(1)(iii)-(iv); Hearing Request at 30-31.

[91] *See Oconee,* CLI-22-3, 95 NRC at 41-42.

[92] *See* Hearing Request at 21-22, 33; Reply at 23; 10 C.F.R. § 2.309(f)(1)(vi).

[93] Reply at 23 (citing Draft SEIS at 2-31); *see also* Hearing Request at 21-22; Nuttle Declaration at 2.

[94] Draft SEIS at 2-31.

[95] *Id.* Consequently, the Staff concludes that its overall groundwater quality impact finding based on this uncertainty is small to moderate. *Id.*

[96] *See* Hearing Request at 21-22; *see also* Reply at 23 ("[F]ortune telling and crystal balls are not the NEPA standard; rather, NEPA demands that agencies draw scientifically supported conclusions from reliable data.").

[97] Hearing Request at 12.

[98] *See id.* at 14-30.

[99] *See id.* at 24-25.

produce large effects.[100] And the Staff already has acknowledged in the Draft SEIS that uncertainty exists in FPL's ability to retract the plume.[101] At bottom, Miami Waterkeeper fails to make the connection between the uncertainties regarding the plume's retraction and the "significant, clearly noticeable, and destabilizing environmental impacts" it claims will result.[102] We therefore conclude that, at this time, Miami Waterkeeper has not provided a sufficient showing to support its assertion that groundwater-quality impacts would be large.[103]

But for the purposes of a contention of omission, Miami Waterkeeper has sufficiently called into question the reasonableness of a Staff analysis that contains no explanation for the Staff's conclusion that the impacts to groundwater quality "could be moderate."[104] For a contention of omission, it is enough for a petitioner to show what information is missing and explain why that information is required to be included.[105] Here, Miami Waterkeeper has done just that.

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[100] *See, e.g., id.* at 23 ("With conflict occurring between state and local regulators, NRC [S]taff should reassess their confidence that cooperation between [Florida Department of Environmental Protection and Department of Environmental Resources Management] will shepherd FPL's remediation measures to a successful result."); *id.* at 25 ("Therefore, it is unknown the degree to which FPL's remediation plan has been effective."). In its reply, Miami Waterkeeper appears to assert that the NRC has the authority to order FPL to discontinue use of the CCS. *See* Reply at 22 (contrasting NRC's authority with that of state and local regulators and asserting that "[t]he NRC is the regulatory agency with authority to holistically address the hypersaline plume by ordering FPL to cease operating the CCS, and the Board should reject the attempt by NRC Staff and FPL to defer to the necessarily limited efforts of [s]tate and local authorities on that issue"). FPL moved to strike this argument as beyond the proper scope of a reply. Motion to Strike at 5-6. Miami Waterkeeper asserts that its argument directly responds to FPL's assertion that the NRC lacks authority to require FPL to address groundwater pollution from the CCS. Amended Response at 7. But at oral argument, counsel clarified that Miami Waterkeeper was not asserting that NEPA required the Staff to order FPL to discontinue using the CCS and explained that its argument should be viewed in reference to the Staff's "hard look" obligation. Tr. at 17-18, 23. We view Miami Waterkeeper's argument through that lens — in relation to NEPA's "hard look" requirement — which was raised in the hearing request.

[101] Draft SEIS at 2-31.

[102] Hearing Request at 25.

[103] *See* 10 C.F.R. § 2.309(f)(1)(vi).

[104] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7 (2002) (finding that "[w]hile the contention might have been more detailed or otherwise better supported," the petitioners had done enough to raise a question whether an applicant's severe accident mitigation alternatives analyses should have incorporated information from a then-recent study).

[105] *See* 10 C.F.R. § 2.309(f)(1)(vi) (allowing a petitioner to demonstrate a genuine dispute on a failure "to contain information on a relevant matter as required by law" by identifying "each failure and the supporting reasons for the petitioner's belief"); *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,

(Continued)

Miami Waterkeeper asserts that the Staff resorted to guesswork and speculation, contrary to NEPA.[106] As the Commission has recognized, NEPA "is intended to 'foster both informed decision-making and informed public participation.'"[107] The Staff must provide some basis on which to judge the reasonableness of its conclusion that the impacts from not successfully remediating the hypersaline plume prior to the subsequent license renewal term could be moderate, as opposed to small.[108] We therefore reformulate and admit a portion of Contention 1, as follows:

> The 2023 Draft SEIS fails to take a hard look at impacts to groundwater quality because it does not include an explanation for the Staff's conclusion that the uncertainty in retracting the hypersaline groundwater plume could result in moderate impacts.

We find inadmissible Miami Waterkeeper's remaining arguments in Contention 1, including Miami Waterkeeper's challenges concerning groundwater use conflicts and non-radiological impacts to aquatic organisms. For these claims, Miami Waterkeeper has not provided sufficient information to raise a genuine, material dispute with the existing information in the Draft SEIS.[109] With regard to groundwater use conflicts, for example, Miami Waterkeeper asserts that "[o]peration of the interceptor ditch [near the CCS] represents a large, undocumented demand on the regional freshwater resource provided by the Biscayne aquifer," which should cause the Staff to reassess its conclusion that the impacts on the Biscayne aquifer would be small.[110] Additionally, Miami Water-

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382-83 (2002) ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application.").

[106] *See, e.g.,* Hearing Request at 13 (citing *Sierra Club v. FERC,* 867 F.3d 1357, 1367 (D.C. Cir. 2017)).

[107] *McGuire/Catawba,* CLI-02-17, 56 NRC at 10 (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)).

[108] *See* 42 U.S.C. § 4332 ("[T]o the fullest extent possible . . . (2) all agencies of the Federal Government shall . . . (D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document; [and] (E) make use of reliable data and resources in carrying out this Chapter."); 10 C.F.R. § 51.71(d) ("To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms."); *cf. New York v. NRC,* 681 F.3d 471, 478-79 (D.C. Cir. 2012) (reasoning that "[u]nder NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass," and finding that the agency had failed to satisfy NEPA because it had not considered the consequences of failing to establish a permanent repository for nuclear waste when such a repository would be needed).

[109] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[110] Hearing Request at 15-16.

keeper argues that "the recovery well system and the Upper Floridan Aquifer pumping exert additional pressure on existing groundwater use conflicts," which should cause the Staff to reassess its conclusion that the impacts on the Floridan aquifer would be moderate.[111] But Miami Waterkeeper does not explain how this information would change the analyses in the Draft SEIS, nor does Miami Waterkeeper otherwise show that the Staff's analyses are unreasonable. For a contention to be admitted, a petitioner must connect the dots to explain how its claims call into question the adequacy of existing analyses.[112] Miami Waterkeeper's claims amount to a bare assertion that more analysis is needed, which is insufficient to support an admissible contention.[113]

Likewise, Miami Waterkeeper's arguments regarding non-radiological impacts to aquatic organisms lack the specificity required for an admissible contention.[114] Miami Waterkeeper asserts that operation of the CCS will lead to seagrass decline, in which "seagrasses are killed and replaced by fast-growing, noxious seaweed or planktonic algae," leading to the replacement of animal species dependent on seagrass for food and shelter with "less desirable species."[115] Section 2.10.4 of the Draft SEIS discusses non-radiological impacts on aquatic organisms.[116] But Miami Waterkeeper does not address with any specificity the analysis in section 2.10.4 or any other portion of the Draft SEIS.[117] Although Miami Waterkeeper provides its own view of impacts to aquatic organisms in relation to seagrass decline, it does not engage with the analyses in the Draft SEIS and thus fails to raise a genuine dispute with respect to this issue.[118] Accordingly, with the exception of the portion of Contention 1 as reformulated above, we dismiss the remaining claims in Contention 1 for failing to establish a genuine, material dispute with the Draft SEIS.

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[111] *Id.* at 21.

[112] *See Seabrook,* CLI-12-5, 75 NRC at 323-24; *see also Oglala Sioux Tribe v. NRC,* 45 F.4th 291, 305 (D.C. Cir. 2022) (dismissing challenge to agency's NEPA analysis for "continu[ing] to ignore" and "fail[ing] to engage with the agency's actual . . . analysis").

[113] *See Seabrook,* CLI-12-5, 75 NRC at 324 (finding that a proposal for an alternative NEPA analysis "that may be no more accurate or meaningful" was insufficient to establish a genuine, material dispute).

[114] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[115] Hearing Request at 26.

[116] *See* Draft SEIS at 2-46 to -47.

[117] *See* Hearing Request at 12-34.

[118] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi); *Seabrook,* CLI-12-5, 75 NRC at 323-24.

2. *Contention 2: "The Draft [SEIS] Fails to Adequately Analyze Cooling Towers as a Reasonable Alternative that Could Mitigate Adverse Impacts of the [CCS] in Connection with the Subsequent License Renewal of Turkey Point Units 3 and 4"*

In Contention 2, Miami Waterkeeper asserts that the Draft SEIS lacks an adequate analysis of reasonable alternatives because it relies on a discussion in the 2019 SEIS that "at best, only analyzes the adverse impacts of constructing and operating an alternative cooling system without looking specifically and in any detail at the environmental and other benefits that would accrue from replacing the . . . CCS with a cooling tower."[119] According to Miami Waterkeeper, the 2019 SEIS lacks a discussion of "the benefits to groundwater and aquatic organisms" from the cooling water system alternative.[120] In addition, Miami Waterkeeper argues that the Staff did not adequately discuss "how replacing [FPL's use of] the existing CCS with cooling towers would reduce adverse environmental impacts."[121] In support of its contention, Miami Waterkeeper incorporates several of its claims from Contention 1 regarding groundwater use conflicts, impacts to groundwater quality, and non-radiological impacts on aquatic organisms resulting from use of the CCS.[122] Miami Waterkeeper also references a declaration from its expert, Bill Powers, to support the claim that replacing the CCS with cooling towers is a "reasonable and cost-effective alternative."[123]

We conclude that Contention 2 is inadmissible for failure to raise a genuine, material dispute with the Draft SEIS.[124] First, as a contention of omission, Miami Waterkeeper fails to raise a genuine dispute because the information Miami Waterkeeper claims to be missing — a discussion of the benefits of the cooling system alternative — is present.[125] The Draft SEIS references the cooling system alternative analysis from the 2019 SEIS.[126] And in the 2019 SEIS, the Staff states that (1) "[t]he benefits of the alternative cooling water system are . . . the impacts of . . . [using the CCS that] would be avoided";[127] (2) the impacts of using the CCS "are discussed extensively in th[e] SEIS"; and (3) the no-action alternative analysis in section 4.5.2 discusses "the avoidance of those impacts . . . (e.g.,

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[119] Hearing Request at 34-35 (citing 10 C.F.R. § 51.71(d)).

[120] *Id.* at 35.

[121] *Id.*

[122] *See id.* at 37-38.

[123] *Id.* at 39.

[124] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[125] *See id.* § 2.309(f)(1)(vi).

[126] Draft SEIS at 3-2 (explaining that the Staff "evaluated an alternative cooling water system to mitigate potential impacts associated with the continued use of the existing cooling canal system" in the 2019 SEIS).

[127] 2019 SEIS at 2-13.

on groundwater resources)."[128] Similarly, Miami Waterkeeper's arguments that replacing the CCS with cooling towers is "reasonable and cost-effective" go to whether the Staff should evaluate the cooling tower alternative in the first place.[129] Thus, because the Draft SEIS references the 2019 SEIS discussion that evaluates the cooling tower alternative, Miami Waterkeeper fails to raise a genuine dispute on this issue.[130]

To the extent Miami Waterkeeper frames Contention 2 as a contention of adequacy, Miami Waterkeeper has not provided sufficient support to demonstrate a genuine, material dispute with the Draft SEIS.[131] Miami Waterkeeper generally asserts that the Staff's analysis did not look "specifically" or "in any detail" at the benefits of replacing the CCS with a cooling tower.[132] Miami Waterkeeper characterizes the Staff's discussion as "cursory" and lacking "any meaningful analysis."[133] But in the Draft SEIS and the 2019 SEIS, the Staff specifically references the sections it deemed relevant to its conclusion regarding the benefits of the cooling tower alternative.[134] Miami Waterkeeper does not explain why NEPA or the agency's implementing regulations would require the Staff to do more.

Moreover, Miami Waterkeeper does not contest with any specificity the Staff's conclusions regarding the benefits of the alternative cooling water system that were analyzed in the 2019 SEIS and referenced in the Draft SEIS.[135] Miami Waterkeeper provides information that it would have wished to see in the Staff's analysis, but it fails to make the necessary connection between its preferred analysis and its claim that the Staff's analysis fails to satisfy NEPA.[136] We therefore do not admit Contention 2.

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[128] *Id.*

[129] Hearing Request at 39. In that respect, Miami Waterkeeper appears to repeat arguments that were made in support of a contention admitted by the prior board and later cured when the Staff supplied the omitted analysis. *See Turkey Point,* LBP-19-6, 90 NRC at 19, 23, 26; *Turkey Point,* LBP-19-3, 89 NRC at 286-87.

[130] *See* Draft SEIS at 3-2; 2019 SEIS at 2-13; 10 C.F.R. § 2.309(f)(1)(vi).

[131] 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[132] Hearing Request at 34-35.

[133] Reply at 33.

[134] Draft SEIS at 3-2; 2019 SEIS at 2-13.

[135] *See* Hearing Request at 34-43. The prior board dismissed similar claims regarding the sufficiency of the Staff's draft 2019 alternatives analysis for the same reason — i.e., failing to engage with the Staff's analysis of the cooling tower alternative and the benefits of discontinuing use of the CCS. *See Turkey Point,* LBP-19-8, 90 NRC at 151-54.

[136] *See Seabrook,* CLI-12-5, 75 NRC at 323-24.

3. Contention 3: "The Draft [SEIS] Fails to Adequately Consider the Cumulative Impacts of Continued Operation of Units 3 and 4"

In Contention 3, Miami Waterkeeper argues that the Draft SEIS does not adequately consider the cumulative impacts on the environment, particularly on water resources, from continued operation of Turkey Point Units 3 and 4 through the subsequent license renewal period, contrary to 10 C.F.R. § 51.71(d).[137] Miami Waterkeeper takes issue with the Staff's discussion of climate-change impacts on environmental resources in the Draft SEIS, which references the Staff's discussion of cumulative impacts in the 2019 SEIS.[138] Miami Waterkeeper asserts that the Staff's analyses are inadequate because they do not address new information showing that "the effects of climate change, including reasonably foreseeable increases in sea level and air temperature, will have significant adverse impacts on the continued operation of Units 3 and 4."[139] Along with information regarding sea-level rise and increases in air temperature, Miami Waterkeeper provides information on the effects of climate change on coastal storms, rainfall, storm surge, and flooding.[140]

We conclude that Contention 3 is inadmissible because it does not provide sufficient information to demonstrate a genuine, material dispute with the Draft SEIS.[141] Although Miami Waterkeeper offers several sources of purportedly new information in support of its contention, it does not explain the significance of that information to the Staff's review.[142] As the Commission has observed, petitioners often might find new information to consider, potentially making the environmental review process never-ending if not for the required showing that the new information is material to the Staff's analysis.[143] Here, Miami Waterkeeper does not explain how its proffered information would amount to more than fine-tuning the information in the Draft SEIS.

For example, Miami Waterkeeper argues that the Draft SEIS should have used values on sea-level rise from a February 2022 National Oceanic and Atmospheric Administration (NOAA) technical climate change report.[144] Miami

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[137] *See* Hearing Request at 45, 63; 10 C.F.R. § 51.71(d) (stating that the "draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects, including any cumulative effects, of the proposed action").

[138] Hearing Request at 45 (citing Draft SEIS at E-8 to -9; 2019 SEIS § 4.16).

[139] *Id.*

[140] *Id.* at 52-59.

[141] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[142] *See Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 390-91 (2012) (finding inadequate a contention that asserted a new report must be considered without including a sufficient explanation of the report's significance).

[143] *See, e.g., Seabrook,* CLI-12-5, 75 NRC at 324; *Grand Gulf,* CLI-05-4, 61 NRC at 13.

[144] *See* Hearing Request at 50-54.

Waterkeeper argues that the 2022 NOAA report is new and must be considered in the Draft SEIS, but it does not dispute the values for sea-level rise the NRC Staff used in the 2019 SEIS or provide a reason why those values are insufficient.[145]

Miami Waterkeeper also repeats arguments that the prior board considered and found inadmissible for lack of support and failing to raise a genuine, material dispute.[146] For example, Miami Waterkeeper argues that the Draft SEIS "has not adequately considered the reasonably foreseeable impacts of Bay waters increasingly over-topping the banks of the [CCS]," of which repeated inundation and constant flooding "would mean that the surface waters of the cooling canal will flow into Biscayne Bay National Park, carrying with it thermal pollution, and high levels of tritium, phosphorus, and salt-concentrated waters."[147] In the face of a substantively similar argument, the prior board found it lacked "such necessary information as the relationship between th[e] projected sea levels and the relevant elevations of the Turkey Point site, its sea level barriers, or the CCS, to support th[e] claim that the site will be flooded and the CCS . . . overtopped or breached."[148] We agree, for the same reason.

In addition, Miami Waterkeeper argues that an "increase in air temperature during the subsequent license renewal period will increase the rate of evaporation from the cooling water canals, thereby increasing salinity in the canals and cumulative impacts on groundwater."[149] But the prior board rejected a substantively similar argument, finding that it was not accompanied by sufficient support "to demonstrate that the [postulated] higher temperatures . . . would increase evaporation in the CCS to any particular extent, much less to an extent that would be sufficient to increase the CCS salinity such that it would, in turn, affect the environment."[150] That reasoning applies equally here. Miami Waterkeeper has not remedied the deficiencies identified by the prior board or provided the necessary link that would call into question the sufficiency of the Staff's existing analyses.[151] We therefore do not admit Contention 3.

4. Contention 4: "The Draft [SEIS] Fails to Take a Hard Look at Impacts to Endangered Species"

In Contention 4, Miami Waterkeeper argues that the Draft SEIS "unlawfully

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[145] *See* 2019 SEIS at 4-120, 4-122 to -124.

[146] *See Turkey Point,* LBP-19-3, 89 NRC at 288-90.

[147] Hearing Request at 57.

[148] *Turkey Point,* LBP-19-3, 89 NRC at 288; *see* 10 C.F.R. § 2.309(f)(1)(v).

[149] Hearing Request at 59.

[150] *Turkey Point,* LBP-19-3, 89 NRC at 288-89.

[151] *See Seabrook,* CLI-12-5, 75 NRC at 323-24; 10 C.F.R. § 2.309(f)(1)(v)-(vi).

fails to address whether the continued operation of Turkey Point Units 3 and 4 and its cooling canals will affect . . . South Florida's endemic Miami cave crayfish (*Procambarus milleri*)," which the U.S. Fish and Wildlife Service proposed for listing as a threatened species on September 20, 2023.[152] According to Miami Waterkeeper, the Draft SEIS does not mention or consider impacts to the Miami cave crayfish, and therefore the Staff has not complied with its statutory obligations under section 7(a)(2) of the Endangered Species Act and the NRC's NEPA-implementing regulations, namely 10 C.F.R. § 51.71(c).[153] Miami Waterkeeper asserts that operation of Turkey Point Units 3 and 4 contributes to two sources that could impact the species: tritium and saltwater intrusion.[154]

We conclude that Contention 4 is premature based on controlling Commission precedent. The Commission has held that contentions claiming deficiencies from an alleged "failure to consult" are not ripe if the Staff has not yet completed the relevant consultation requirements.[155] And the Commission disfavors contentions that serve as "placeholders" for future events.[156] Here, the Staff provided notice of its issuance of the Draft SEIS on September 8, 2023.[157] The Fish and Wildlife Service issued the proposed listing for the Miami cave crayfish on September 20, 2023, almost two weeks after the Draft SEIS had issued.[158] Because the Draft SEIS predates the proposed listing, it understandably does not reflect Staff engagement with the Fish and Wildlife Service on the Miami cave crayfish.

In its answer, the Staff states that it "will comply with [Fish and Wildlife Service] regulations concerning conferences on proposed species."[159] And the Staff acknowledges that the proposed listing "can be considered new informa-

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[152] Hearing Request at 64; *see* Endangered and Threatened Wildlife and Plants; Threatened Species Status with Section 4(d) Rule for the Miami Cave Crayfish, 88 Fed. Reg. 64,856 (Sept. 20, 2023) (corrected at 88 Fed. Reg. 65,356 (Sept. 22, 2023)) (Proposed Listing).

[153] *See* Hearing Request at 63-65; 10 C.F.R. § 51.71(c) (stating that the "draft environmental impact statement will list all Federal permits, licenses, approvals, and other entitlements which must be obtained in implementing the proposed action and will describe the status of compliance with those requirements," and "[i]f it is uncertain whether a Federal permit, license, approval, or other entitlement is necessary, the draft environmental impact statement will so indicate").

[154] Hearing Request at 67; *see also id.* at 68-74.

[155] *See Crow Butte Resources, Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 261 (2020) (citing *Crow Butte,* CLI-09-9, 69 NRC at 348-51).

[156] *See, e.g., Union Electric Co.* (Callaway Plant, Unit 1), CLI-15-11, 81 NRC 546, 548-50 (2015); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (affirming licensing board's rejection of "placeholder" motion).

[157] *See* Draft SEIS Notice, 88 Fed. Reg. at 62,110. The Staff's notice is dated August 31, 2023, but it was published in the *Federal Register* on September 8. *Id.* at 62,112.

[158] Proposed Listing, 88 Fed. Reg. at 64,856.

[159] Staff Answer at 48.

tion . . . in developing the [Final Supplemental Environmental Impact Statement (Final SEIS)]."[160] The Staff further states that "[a]s long as it remains at least a proposed species before the issuance of the [Final SEIS], the Miami cave crayfish is material to the NRC's findings in this proceeding and will be addressed in the [Final SEIS], as appropriate."[161] Thus, Miami Waterkeeper will have an opportunity to advance any arguments regarding the agency's Endangered Species Act compliance relative to the Miami cave crayfish in a new or amended contention when the Staff issues the Final SEIS.[162] Accordingly, we do not admit Contention 4.[163]

5. Contention 5: "The Draft [SEIS] Fails to Consider the Effects of Climate Change on Accident Risk"

In Contention 5, Miami Waterkeeper argues that the Draft SEIS fails to consider the "potentially significant" effects of climate change on accident risk and thus fails to satisfy NEPA's "hard look" requirement.[164] In addition, Miami Waterkeeper asserts that the failure to consider climate change impacts on the operation of Turkey Point's safety systems contravenes recent Council on Environmental Quality guidance that encourages agencies to "consider climate change impacts on proposed actions and mitigative actions to 'reduce climate risks and promote resilience and adaptation.'"[165] As a result, Miami Waterkeeper maintains, the NRC "generally underestimates the environmental impacts of continuing to operate Turkey Point for another twenty years" and "omit[s] or understate[s] the benefits of the no-action alternative and mitigation alternatives."[166]

In support of its contention, Miami Waterkeeper provides a declaration from Jeffrey T. Mitman and asserts that "the failure to address climate change im-

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[160] *Id.*

[161] *Id.*

[162] At that time, Miami Waterkeeper must address the general admissibility criteria in 10 C.F.R. § 2.309(f)(1) and the heightened pleading standards for new and amended contentions in 10 C.F.R. § 2.309(c). *See Crow Butte,* CLI-20-8, 92 NRC at 266-69.

[163] We are not persuaded by Miami Waterkeeper's argument that Contention 4 is appropriate for consideration now because it raises a broader question concerning the Staff's compliance with NEPA's "hard look" standard. Reply at 65. Although Miami Waterkeeper mentions NEPA in Contention 4, it does so in the context of a question regarding the agency's compliance with the Endangered Species Act, and therefore it must await an opportunity for the Staff to confer with the Fish and Wildlife Service. *See* Hearing Request at 63-74.

[164] Hearing Request at 75.

[165] *Id.* (quoting National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1209 (Jan. 9, 2023)).

[166] *Id.*

pacts on accident risks constitutes a significant omission, because climate change impacts on safe operation of nuclear reactors may be significant."[167] Miami Waterkeeper argues that climate change affects accident risk in three ways: (1) climate change "increases the likelihood or initiating event frequency of events" (e.g., "increased storm frequency can lead to higher initiating event frequency for losses of offsite power"); (2) climate change "can increase the probability of failure of design features or mitigation equipment"; and (3) climate change can affect the "cliff edge" effect unique to flooding risks, whereby "a small increase in the hazard can cause a dramatic and often overwhelming impact on a structure."[168]

Taking Miami Waterkeeper at its word that it seeks to challenge the Draft SEIS and does not seek to challenge the Staff's safety analysis, we analyze Contention 5 as an environmental contention, and not a safety contention.[169] We conclude that Contention 5 is inadmissible because it does not provide sufficient information to show that a genuine, material dispute exists with the Draft SEIS.[170] Although Miami Waterkeeper insists that its contention identifies an omission in the Draft SEIS,[171] the Draft SEIS includes an analysis of the environmental impacts of design-basis accidents and severe accidents.[172] Therefore, at bottom, Miami Waterkeeper's arguments go to the adequacy of that analysis — i.e., whether it is deficient for failing to address climate-change impacts.[173]

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[167] *Id.* at 76 (citing Declaration of Jeffrey T. Mitman (Nov. 27, 2023) ¶ 6 (Mitman Declaration)).

[168] *Id.* at 76-77.

[169] As the Staff and FPL correctly point out, challenges to the Staff's safety analysis are beyond the scope of the proceeding. Staff Answer at 50; FPL Answer at 53; *see Oconee,* CLI-22-3, 95 NRC at 42; *see also Turkey Point,* CLI-22-6, 95 NRC at 115 ("Our ruling in CLI-22-2 did not disturb the safety review."); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-10 (2001) (explaining that the Staff's safety review of license renewal applications is limited as described in 10 C.F.R. Part 54). Miami Waterkeeper maintains that its claims are directed at the Draft SEIS. *See* Reply at 74 & n.302.

[170] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[171] *See* Hearing Request at 76, 78; Reply at 71.

[172] *See* Draft SEIS at 2-65 to -68, app. D.

[173] The Staff reads Contention 5 as a claim that the agency must consider the "environmental effects on a plant," rather than "the effects of the plant on the environment," and thus argues that it is outside the scope of the proceeding and amounts to an impermissible challenge to the agency's NEPA-implementing regulations. Staff Answer at 50-51. But the Staff's reading ignores Miami Waterkeeper's arguments (although lacking support) that climate change could impact accident risk. The agency analyzes the environmental impacts of accidents as part of its review of license renewal applications, either in the GEIS, or as here, in a site-specific supplemental environmental impact statement, which may include an evaluation of how external events might impact that analysis. *See Diablo Canyon,* CLI-11-11, 74 NRC at 442-43 (affirming licensing board decision admitting contention that challenged the lack of probabilistic risk assessment of a newly discovered fault

(Continued)

But Miami Waterkeeper provides only a passing reference to a portion of the Staff's analysis, and it has not provided sufficient support to raise a genuine, material dispute.[174]

Throughout the contention, Miami Waterkeeper's arguments, as well as the Mitman Declaration on which Miami Waterkeeper relies, speculate that climate change impacts "may be significant" or "could be significant."[175] Miami Waterkeeper asserts that a project sponsored by NOAA and undertaken by the National Academies will consider updates to the methodology for determining probable maximum precipitation and suggests that the results of this project could inform the Staff's review.[176] But Miami Waterkeeper would have the Staff wait for a future project that might not result in any changes to the Staff's accident analyses in the Draft SEIS,[177] and Miami Waterkeeper relies on bare assertions regarding the significance of climate change impacts without tying them directly to the existing environmental impact analysis for the subsequent license renewal of Turkey Point Units 3 and 4.[178] Therefore we do not admit Contention 5.

C. FPL's Motion to Strike

After Miami Waterkeeper filed its reply to the Staff's and FPL's answers, FPL moved to strike portions of Miami Waterkeeper's reply.[179] As FPL correctly points out, a reply must be narrowly focused on the legal or factual arguments originally raised in the hearing request or the answers.[180] We nonetheless decline to administer a line-by-line strike-through of Miami Waterkeeper's arguments, as FPL would have us do. Given that we find all but a narrow portion of Contention 1 inadmissible, even were we to find some of Miami Waterkeeper's arguments beyond the permissible scope of a reply, our consideration of them would not change our ruling on any of the five contentions. We therefore deny FPL's motion to strike as moot.

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relative to the Staff's severe accident mitigation alternatives analysis, a "Category 2" site-specific issue in that proceeding).

[174] *See* Hearing Request at 76 (citing Draft SEIS, app. D); 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[175] Hearing Request at 75-78; *see also* Reply at 71-72; Mitman Declaration at 1-3.

[176] Hearing Request at 77-78.

[177] *See supra* note 156 and accompanying text (regarding the Commission's disfavor of placeholder contentions).

[178] *See Seabrook,* CLI-12-5, 75 NRC at 323-24; *Fansteel,* CLI-03-13, 58 NRC at 204; *Oyster Creek,* CLI-00-6, 51 NRC at 208.

[179] *See supra* note 35 and accompanying text.

[180] *See* Motion to Strike at 3 (citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)).

III. CONCLUSION

For the foregoing reasons, we (1) *grant* Miami Waterkeeper's hearing request, admitting Contention 1 as narrowed and reformulated by the Board; (2) *dismiss* Contentions 2 through 5 and the remaining portions of Contention 1; and (3) *deny* FPL's motion to strike portions of Miami Waterkeeper's reply as moot.

This proceeding will be conducted in accordance with the Simplified Hearing Procedures for NRC Adjudications in 10 C.F.R. Part 2, Subpart L.[181] The Staff, FPL, and Miami Waterkeeper should confer and jointly propose a scheduling order to govern the future conduct of this proceeding, in accordance with 10 C.F.R. § 2.332, by March 22, 2024.[182]

Any appeal to the Commission from this Memorandum and Order must be filed in accordance with 10 C.F.R. § 2.311.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Emily I. Krause, Chair
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 7, 2024

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[181] *See* 10 C.F.R. § 2.310(a).

[182] The proposed scheduling order should include (1) proposed due dates for initial and continuing disclosures under 10 C.F.R. § 2.336(d); and (2) the Staff's estimated date for issuing the Final SEIS.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of **Docket No. 50-440-LR**
(ASLBP No. 24-982-01-LR-BD01)

ENERGY HARBOR NUCLEAR CORP.
(Perry Nuclear Power Plant, Unit 1) **March 13, 2024**

In this proceeding concerning an application to renew an operating license by Energy Harbor Nuclear Corp. for its Perry Nuclear Power Plant Unit 1 (Perry) to continue operating Perry for an additional 20 years beyond its current license expiration date, the Licensing Board denies petitioners Ohio Nuclear-Free Network's and Beyond Nuclear's intervention request, concluding Petitioners have established representational standing but have failed to show that any of its three contentions are admissible under 10 C.F.R. § 2.309(f)(1).

RULES OF PRACTICE: STANDING TO INTERVENE

To participate in an NRC adjudicatory proceeding, a petitioner must first establish standing. *See* 10 C.F.R. § 2.309(a). NRC regulations on standing require that a hearing request include (1) the name, address, and telephone number of the petitioner; (2) the "nature of the [petitioner's] right under [the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA)] to be made a party to the proceeding"; (3) the "nature and extent of the [petitioner's] property, financial, or other interest in the proceeding"; and (4) the possible effect on the petitioner's interest of any decision or order that may be issued in the proceeding. *Id.* § 2.309(d)(1).

RULES OF PRACTICE: STANDING TO INTERVENE

The petitioner bears the "burden of setting forth a clear and coherent argument for standing." *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). But when assessing standing, "we construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

Further, where an organization, like ONFN or BN here, seeks to establish representational standing on behalf of its membership, the organization must show that (1) "at least one member has standing and has authorized the organization to represent [them] and to request a hearing on [their] behalf," (2) "the interests the representative organization seeks to protect [are] germane to its own purpose," and (3) "neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action." *Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 238 (2020).

RULES OF PRACTICE: STANDING TO INTERVENE (TRADITIONAL REQUIREMENTS)

In determining whether a petitioner meets the first requirement for representational standing, the Commission has made clear that licensing boards are to apply "contemporaneous judicial concepts of standing" that require a showing of a concrete and particularized injury that is fairly traceable to the challenged action and that is likely to be redressed by a favorable decision. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

RULES OF PRACTICE: STANDING (PROXIMITY PRESUMPTION)

In certain power reactor license proceedings, the Commission routinely applies a "proximity presumption." *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009). The proximity presumption allows a petitioner to establish standing without the need to make an individualized showing of injury, causation, and redressability if that petitioner resides, *id.,* has frequent contacts, *see Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993), or has a significant property

interest, *USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 314 (2005), within 50 miles of the subject nuclear power reactor. *Calvert Cliffs,* CLI-09-20, 70 NRC at 915.

RULES OF PRACTICE: STANDING TO INTERVENE

A licensing board is charged with independently determining a petitioner's standing even when no participant contests it. 10 C.F.R. § 2.309(d)(2); *see also Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff'd on other grounds,* CLI-20-11, 92 NRC 335 (2020).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A petitioner not only must establish standing to intervene, but also must proffer at least one admissible contention. 10 C.F.R. § 2.309(a). To be admissible, a contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the [petitioner's] position on the issue . . . , together with references to the specific sources and documents on which the [petitioner] intends to rely to support its position on the issue; [and]
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> (vi) [P]rovide sufficient information to show that a genuine dispute exists with the [applicant] on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . . *Id.* § 2.309(f)(1).

A petitioner's failure to comply with any of these requirements renders a contention inadmissible. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

LICENSING BOARD(S): SCOPE OF REVIEW (CONTENTIONS)

The contention admissibility regulations are "strict by design," *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)), in order to exclude vague, unparticularized, or unsupported contentions. *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). While petitioners need not prove their contentions at the admissibility stage, the contention admissibility standards do require petitioners to "proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). Contentions must be based on a genuine material dispute, rather than mere disagreement with an application. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 480 (2006) ("Contentions . . . must be based on a genuine material dispute, not the possibility that petitioners, if they perform their own additional analyses, may ultimately disagree with the application.").

NEPA: SUFFICIENCY OF CONTENTIONS

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

NRC rules require that an applicant's ER provide a "sufficiently complete" discussion of alternatives to its proposed action (here, renewal of the Perry license) in order to aid the NRC in its NEPA review. 10 C.F.R. § 51.45(b)(3) (citing 42 U.S.C. § 4332(2)(H)). At the same time, however, an ER is not required to discuss every conceivable alternative. *See* 42 U.S.C. § 4332(2)(C)(iii), (F). Rather NEPA mandates only the consideration of reasonable alternatives that are capable of meeting the purpose and need of the proposed action. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991).

NEPA: CONSIDERATION OF ALTERNATIVES

NRC rules demand that the ER evaluate the environmental costs and benefits that would flow from not approving a project, the so-called "no-action" alternative. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97-99 (1998). Discussions of the no-action alternative

can be brief and can incorporate by reference other sections of the ER that address adverse consequences from the proposed project. *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 54 (2001) ("[f]or the 'no-action' alternative, there need not be much discussion"); *Claiborne,* CLI-98-3, 47 NRC at 98 ("We do not find the [final environmental impact statement's] incorporation by reference approach unreasonable as such."). The no-action alternative, like all NEPA requirements, is governed by a "rule of reason." *Claiborne,* CLI-98-3, 47 NRC at 97. In evaluating the sufficiency of no-action alternatives, licensing boards are not to "flyspeck" environmental documents or add nuances. *See Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (quoting *Systems Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)). In fact, as long as "the [ER] on its face 'comes to grips with all important considerations' nothing more need be done." *See Clinton,* CLI-05-29, 62 NRC at 811.

NEPA: ENVIRONMENTAL REPORT

As a general rule, an ER is to address the *environmental* impacts of alternatives, and it need not discuss either the *economic* costs and benefits of such alternatives or the need for power. Office of Nuclear Reactor Regulation, NRC, NUREG-1437, Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants, Main Report, Final Report at 1-15 (rev. 1 June 2013) (ADAMS Accession No. ML13106A241) ("The NRC will not make a decision or any recommendations on the basis of information presented in this GEIS regarding the need for power at nuclear power plants [whose applicants are seeking a renewal of an operating license]. The regulatory authority over licensee economics (including the need for power) falls within the jurisdiction of the States and, to some extent, within the jurisdiction of FERC."). An exception to this rule is 10 C.F.R. § 51.53(c)(2), which states that an economic analysis can be appropriate in an ER where the costs and benefits of the alternatives are "essential for a determination regarding the inclusion of an alternative in the range of alternatives considered." 10 C.F.R. § 51.53(c)(2).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

To establish the admissibility of a contention of omission, a petitioner must show what specific information is missing and explain why that information is required to be included in an environmental document, such as the ER here. *See* 10 C.F.R. § 2.309(f)(1)(vi); *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, 382-83 (2002) ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application.").

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

A disputed issue "is material if its resolution would make a difference in the outcome of the licensing proceeding." *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 190 (2020) (internal quotation marks omitted).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING); CHALLENGE TO COMMISSION REGULATIONS

In the 2013 GEIS, the Commission's intent in issuing the GEIS was to determine which environmental impacts would result "in essentially the same (generic) impact at all nuclear power plants and which ones could result in different levels of impacts at different plants . . . . For those issues that could not be generically addressed, the NRC would prepare [a] plant-specific supplemental [EIS] to the GEIS." 2013 GEIS at S-1. Further, under the Commission's regulations governing the consideration of NEPA issues in a license renewal proceeding, those generic issues falling within the Category 1 designation in 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 do not require further site-specific consideration in an applicant's ER or the Staff's GEIS supplement. *See* 10 C.F.R. § 51.53(c)(3)(i)-(ii). Because these Category 1 issues have been so codified, they cannot be challenged in a licensing proceeding except where a petitioner first obtains a waiver under 10 C.F.R. § 2.335 — which Petitioners have not done. *See, e.g., Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384 (2012). The Commission has made clear that Category 1 determinations "are not subject to site-specific review and . . . fall beyond the scope of individual license renewal proceedings." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001); *see* 10 C.F.R. § 51.53(c)(3)(i)-(ii).

MEMORANDUM AND ORDER
(Denying Intervention Petition and Terminating Proceeding)

Before this Licensing Board is the November 28, 2023 request for hearing

and petition for leave to intervene of Ohio Nuclear-Free Network (ONFN) and Beyond Nuclear (BN) (collectively Petitioners) seeking to challenge the license renewal application (LRA) of Energy Harbor Nuclear Corp. (Energy Harbor) for its Perry Nuclear Power Plant Unit 1 (Perry). The Board concludes that Petitioners have established representational standing but that they have not submitted an admissible contention. Accordingly, Petitioners' hearing request is denied and this proceeding is terminated.

I. BACKGROUND

On July 3, 2023, Energy Harbor submitted an application to renew Perry's operating license for an additional 20 years beyond Perry's current license expiration date of November 7, 2026.[1] After receipt of Energy Harbor's LRA, the Nuclear Regulatory Commission Staff (NRC Staff) published a notice in the *Federal Register* announcing the opportunity to request a hearing to contest Perry's renewal application.[2] On November 28, 2023, Petitioners jointly submitted a timely hearing request that proffered three contentions.[3]

The next day, the Secretary of the Commission referred Petitioners' hearing request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for further action.[4] On December 4, 2023, the Chief Administra-

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[1] Letter from Rob L. Penfield, Site Vice President, Energy Harbor, to Document Control Desk, Nuclear Regulatory Commission at 1-3 (July 3, 2023) (ADAMS Accession No. ML23184A081). The Energy Harbor renewal request consists of the license renewal application and five appendices. *See id.* encl. 1 ([Perry] License Renewal Application (rev. 0 July 2023)) [hereinafter LRA]. Of central importance to this proceeding is the final appendix to the LRA because that appendix contains the Environmental Report (ER). *See* LRA app. E ([Energy Harbor's ER], License Renewal Stage, Perry Nuclear Power Plant Unit 1 (May 2023)) [hereinafter ER].

[2] *See* Energy Harbor Corp.; Energy Harbor Generation LLC; [Energy Harbor]; Perry Nuclear Power Plant, Unit 1, 88 Fed. Reg. 67,373 (Sept. 29, 2023).

[3] *See* Petition of [ONFN] and [BN] for Leave to Intervene in Perry Nuclear Power Plant License Extension Proceeding, and Request for a Hearing (Nov. 28, 2023) [hereinafter Petition]. Petitioners also submitted an Appendix to their Petition that includes their members' declarations as well as other data that are referenced in the Petition. *See* Appendix of Exhibits (Nov. 28, 2023) (ADAMS Accession No. ML23332A786) [hereinafter Petition Appendix]. Petitioners use the term "exhibits" to refer to the attachments in their Petition Appendix, but as explained in the Licensing Board's December 7, 2023 Order (as amended), the term "exhibits" should be reserved for designating items submitted for an evidentiary hearing. *See* 10 C.F.R. § 2.304(g). Nevertheless, in this case, the Board did not require Petitioners to refile their Petition Appendix to correct this error. *See* Licensing Board Memorandum and Order (Initial Prehearing Order (amended)) (Dec. 7, 2023) at 4 n.12 (unpublished). Instead, we have referred to Petitioners' "exhibits" as "enclosures" while keeping the Petitioners' letter designations for each document.

[4] *See* Memorandum from Carrie M. Safford, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge (Nov. 29, 2023).

tive Judge designated this Licensing Board to rule on standing and contention admissibility matters and to preside at any hearing.[5]

Energy Harbor and the NRC Staff timely filed their answers[6] on December 22, 2023 and December 26, 2023, respectively, and Petitioners timely filed their reply to those answers on January 2, 2024.[7] In their reply, Petitioners declared they withdrew Contention 1.[8]

On January 30, 2024, this Board heard oral argument from counsel for Petitioners, the NRC Staff, and Energy Harbor regarding whether Petitioners have standing and whether their proffered contentions are admissible.[9] We address standing first.

II. STANDING

A. Legal Standard for Standing

To participate in an NRC adjudicatory proceeding, a petitioner must first establish standing.[10] NRC regulations on standing require that a hearing request include (1) the name, address, and telephone number of the petitioner; (2) the "nature of the [petitioner's] right under [the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA)] to be made a party to the proceeding"; (3) the "nature and extent of the [petitioner's] property, financial, or other interest in the proceeding"; and (4) the possible effect on the petitioner's interest of any decision or order that may be issued in the proceeding.[11] Although the petitioner bears the "burden of setting forth a clear and coherent argument for

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[5] *See* [Energy Harbor]; Establishment of Atomic Safety and Licensing Board, 88 Fed. Reg. 85,666 (Dec. 8, 2023); Establishment of Atomic Safety and Licensing Board (Amended); [Energy Harbor], 88 Fed. Reg. 85,932 (Dec. 11, 2023).

[6] *See* Energy Harbor's Answer Opposing the Petition for Leave to Intervene and Request for Hearing of [ONFN] and [BN] (Dec. 22, 2023) [hereinafter Energy Harbor Answer]; NRC Staff's Answer Opposing [ONFN] and [BN] Hearing Request (Dec. 26, 2023) [hereinafter NRC Staff Answer].

[7] *See* [ONFN's] and [BN's] Combined Reply in Support of Petition for Leave to Intervene (Jan. 2, 2024) [hereinafter Reply].

[8] *Id.* at 3.

[9] *See* Tr. at 1-124.

[10] *See* 10 C.F.R. § 2.309(a).

[11] *Id.* § 2.309(d)(1).

standing,"[12] when assessing standing, "we construe the petition in favor of the petitioner."[13]

Further, where an organization, like ONFN or BN here, seeks to establish representational standing on behalf of its membership, the organization must show that (1) "at least one member has standing and has authorized the organization to represent [them] and to request a hearing on [their] behalf," (2) "the interests the representative organization seeks to protect [are] germane to its own purpose," and (3) "neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action."[14]

In determining whether a petitioner meets the first requirement for representational standing, the Commission has made clear that licensing boards are to apply "contemporaneous judicial concepts of standing" that require a showing of a concrete and particularized injury that is fairly traceable to the challenged action and that is likely to be redressed by a favorable decision.[15] However, in certain power reactor license proceedings, the Commission routinely applies a "proximity presumption."[16] The proximity presumption allows a petitioner to establish standing without the need to make an individualized showing of injury, causation, and redressability if that petitioner resides,[17] has frequent contacts,[18] or has a significant property interest[19] within 50 miles of the subject nuclear power reactor.[20]

B. Analysis

Although neither Energy Harbor nor the NRC Staff contest ONFN's or BN's standing to participate in this proceeding,[21] this Board nevertheless is charged

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[12] *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999).

[13] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[14] *Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 238 (2020).

[15] *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

[16] *Id.*

[17] *Id.*

[18] *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993).

[19] *USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 314 (2005).

[20] *Calvert Cliffs,* CLI-09-20, 70 NRC at 915.

[21] *See* Energy Harbor Answer at 2 n.4; NRC Staff Answer at 5-6.

with independently determining their standing.[22] In this regard, ONFN and BN each maintain that they satisfy representational standing requirements based on their members' proximity to, and frequent contacts with, the area near Perry.[23]

1. Analysis of ONFN's Standing

To demonstrate representational standing, ONFN proffers declarations from two of its members.[24] The first lives 17 miles from Perry and the second lives about 4 miles from Perry.[25] Both members designate ONFN to serve "as [their] representative in this proceeding,"[26] both state that they are concerned, among other things, with public and environmental health, and both maintain that the license for Perry should not be renewed.[27]

Additionally, an officer of ONFN provided a declaration that ONFN opposes Perry's relicensing and intends, on its members' behalf, to ensure that those members' interests in a "safe and healthy environment" are protected.[28] ONFN describes itself as "an unincorporated association dedicated to ending the use of commercial nuclear power in Ohio."[29] The organization is specifically "concerned about nuclear weapons, radioactive waste, and the radioactive contamination of air, water, and soil."[30]

Based on the two individual member declarations, the proximity presumption clearly affords both individuals standing to intervene in this proceeding and both have authorized ONFN to represent them in this proceeding. The ONFN declarations also establish that the interests it seeks to protect in this proceeding, i.e., the health and safety of the public and environment, are germane to ONFN's purpose. Lastly, neither ONFN's asserted claim, nor its requested relief, require that an individual member of ONFN participate in this proceeding because all members will benefit from the requested relief and no member has a unique injury requiring individualized proof.[31]

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[22] 10 C.F.R. § 2.309(d)(2); *see also Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff'd on other grounds,* CLI-20-11, 92 NRC 335 (2020).

[23] *See* Petition at 7-10.

[24] *See* Petition Appendix, encls. B & C.

[25] *Id.*

[26] *Id.*

[27] *See id.*

[28] *Id.* encl. A.

[29] *Id.*

[30] Petition at 2.

[31] *See Vogtle,* CLI-20-6, 91 NRC at 238; *see also Warth v. Seldin,* 422 U.S. 490, 515-16 (1975)

(Continued)

We therefore conclude that ONFN has established its representational standing in this proceeding.

2. Analysis of BN's Standing

Like ONFN, BN provides a member's declaration to demonstrate representational standing.[32] This member states that he lives, and actively farms, approximately 11 miles from Perry and that he designates BN to serve as his representative in this proceeding.[33] This member also states that he is concerned, among other things, that renewing Perry's license will adversely impact safety, public health, and the environment.[34]

Additionally, an officer of BN provided a declaration stating that BN opposes the renewal of the Perry operating license and that BN intends to ensure its members' interests in a safe and healthy environment.[35] BN further explains that it is a "not-for-profit public policy, research, [and] education organization . . . that advocates the immediate expansion of renewable energy sources to replace commercial nuclear power generation."[36]

Based on the declaration of this BN member, the proximity presumption clearly affords him individual standing to intervene in this proceeding and he has authorized BN to represent him in this proceeding. And the declaration of an officer of BN also establishes that the interests BN seeks to protect in this proceeding, i.e., the health and safety of the public and the environment, are germane to BN's purpose. Lastly, neither BN's asserted claim, nor its requested relief, require that an individual member of BN participate in this proceeding because all members will benefit from the requested relief and no member has a unique injury requiring individualized proof.[37]

We therefore conclude that, like ONFN, BN has established its representational standing in this proceeding.

(holding that an organization could not seek damages for the profits and business losses of its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of the injury would require individualized proof.").

[32] *See* Petition Appendix, encl. E.

[33] *Id.*

[34] *See id.*

[35] *Id.* encl. D.

[36] Petition at 4.

[37] *See Vogtle,* CLI-20-6, 91 NRC at 238; *see supra* note 31.

III. CONTENTION ADMISSIBILITY

A. Legal Standard for Contention Admission

For a hearing to be granted, a petitioner not only must establish standing to intervene, but also must proffer at least one admissible contention.[38] To be admissible, a contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the [petitioner's] position on the issue . . . , together with references to the specific sources and documents on which the [petitioner] intends to rely to support its position on the issue; [and]
>
> (vi) [P]rovide sufficient information to show that a genuine dispute exists with the [applicant] on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . .[39]

A petitioner's failure to comply with any of these requirements renders a contention inadmissible.[40] The contention admissibility regulations are "strict by design"[41] in order to exclude vague, unparticularized, or unsupported contentions.[42] While petitioners need not prove their contentions at the admissibility stage, the contention admissibility standards do require petitioners to "proffer at least some minimal factual and legal foundation in support of their con-

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[38] 10 C.F.R. § 2.309(a).

[39] *Id.* § 2.309(f)(1).

[40] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

[41] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)).

[42] *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

tentions."[43] Contentions must be based on a genuine material dispute, rather than mere disagreement with an application.[44]

B. Analysis

1. Contention 1

Petitioners' first contention alleges that the Severe Accident Mitigation Analysis in Energy Harbor's Environmental Report (ER) is inadequate.[45] However, in their Reply, Petitioners withdrew Contention 1[46] and they confirmed their withdrawal of Contention 1 during the January 30 oral argument.[47]

Accordingly, Contention 1 is no longer at issue in this proceeding.

2. Contention 2

Petitioners' second contention concerns the no-action alternative analysis in Energy Harbor's ER.[48]

NRC rules require that an applicant's ER provide a "sufficiently complete" discussion of alternatives to its proposed action (here, renewal of the Perry license) in order to aid the NRC in its NEPA review.[49] At the same time, however, an ER is not required to discuss every conceivable alternative.[50] Rather NEPA mandates only the consideration of reasonable alternatives that are capable of meeting the purpose and need of the proposed action.[51]

In addition, NRC rules demand that the ER evaluate the environmental costs and benefits that would flow from not approving a project,[52] the so-called "no-

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[43] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[44] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 480 (2006) ("Contentions . . . must be based on a genuine material dispute, not the possibility that petitioners, if they perform their own additional analyses, may ultimately disagree with the application.").

[45] Petition at 12.

[46] Reply at 3.

[47] *See* Tr. at 15 (Lodge).

[48] *See* Petition at 21. NRC regulations direct petitioners that "[o]n issues arising under [NEPA], participants shall file contentions based on the applicant's [ER]." 10 C.F.R. § 2.309(f)(2).

[49] 10 C.F.R. § 51.45(b)(3) (citing 42 U.S.C. § 4332(2)(H)).

[50] *See* 42 U.S.C. § 4332(2)(C)(iii), (F).

[51] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991).

[52] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97-99 (1998).

action" alternative. Discussions of the no-action alternative can be brief and can incorporate by reference other sections of the ER that address adverse consequences from the proposed project.[53] The no-action alternative, like all NEPA requirements, is governed by a "rule of reason."[54] In evaluating the sufficiency of no-action alternatives, licensing boards are not to "flyspeck" environmental documents or add nuances.[55] In fact, as long as "the [ER] on its face 'comes to grips with all important considerations' nothing more need be done."[56]

For purposes of this proceeding, the no-action alternative assumes that Perry's proposed renewal of its current operating license would not be granted, that Perry's current operating license would expire on November 7, 2026, that Energy Harbor would transition to decommissioning Perry,[57] and that Perry's "baseload power would not be available for distribution in Ohio."[58] Consequently, Energy Harbor's ER evaluates over a dozen options to replace Perry's power.[59] These options include new power plants, new solar facilities, new wind generation, conservation, and purchasing replacement power from nearby generating facilities.[60] Energy Harbor considered some of these options reasonable and others not reasonable.[61]

Even though Petitioners frame Contention 2 as a dispute with the ER's discussion of the no-action alternative, in fact Contention 2 only mounts a challenge to one portion of this discussion — the "Purchased Power" alternative in section 7.2.2.1 of the ER.[62] This section of the ER evaluates the option of replacing Perry's power generation with power purchased from other states,[63] and concludes that this purchased power option is unreasonable — and therefore, that it requires no further evaluation.[64] Energy Harbor provides three separate

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[53] *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 54 (2001) ("[f]or the 'no-action' alternative, there need not be much discussion"); *Claiborne,* CLI-98-3, 47 NRC at 98 ("We do not find the [final environmental impact statement's] incorporation by reference approach unreasonable as such.").

[54] *Claiborne,* CLI-98-3, 47 NRC at 97.

[55] *See Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (quoting *Systems Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)).

[56] *See Clinton,* CLI-05-29, 62 NRC at 811.

[57] *See* ER at 7-1 to -3.

[58] *Id.* at 7-1.

[59] *See id.* at 7-3 to 7-10.

[60] *See id.*

[61] *See, e.g., id.* at 7-3 (finding natural gas alternative is reasonable) and *id.* at 7-8 (finding geothermal energy alternative is not).

[62] *See, e.g.,* Petition at 23.

[63] *See* ER at 7-3 to -4.

[64] *See id.* at 7-4.

reasons for deeming the purchased power option unreasonable: (1) "uncertainty in energy reliability"; (2) uncertainty created by ongoing closure of coal-fired plants; and (3) adverse environmental impacts from purchased power.[65]

In Contention 2, Petitioners object to the brevity of section 7.2.2.1 and characterize the content of this ER section as being "fact-averse."[66] Specifically, Petitioners argue that (1) Energy Harbor's analysis of the environmental harms arising from the purchased power alternative are unsupported by data; and (2) Energy Harbor's ER creates an exaggerated perception of Perry's role as a power producer because Perry's contribution is "redundant and not needed."[67] It is noteworthy that in raising these arguments, Petitioners never challenge any of the three reasons Energy Harbor provides in section 7.2.2.1 for considering the purchase power option to be unreasonable.

Likewise, Petitioners do not challenge Energy Harbor's evaluation that a shutdown of Perry would require the state of Ohio to replace its energy generation with purchased power from other states that would produce "greater uncertainties in energy reliability that are not within Energy Harbor's control."[68] Nor do Petitioners challenge Energy Harbor's assessment that the ongoing closure of coal-fired plants will create even more uncertainty in energy reliability as well as changes to the availability of baseload generation.[69] And Petitioners do not challenge Energy Harbor's argument that the adverse environmental impacts of the purchased power alternative "could be substantial" due to increased air emissions, greater water use, degraded water quality, and impaired land use.[70]

Because Petitioners failed to challenge the reasons Energy Harbor posits for concluding that the purchased power alternative is unreasonable, they run afoul of our contention admissibility rules. We require petitioners to explain how their claims call into question the adequacy of an existing analysis, not merely suggest other details that could have been included in an analysis.[71] For this reason alone, Contention 2 fails to raise a genuine dispute with the relevant portion of the application.[72]

Despite Petitioners' failure to dispute Energy Harbor's analysis in ER section 7.2.2.1, they claim Contention 2 is nevertheless admissible for economic

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[65] *Id.* at 7-3 to -4.

[66] Petition at 22.

[67] *Id.*

[68] ER at 7-3.

[69] *See id.*

[70] *Id.* at 7-4.

[71] *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012) ("[T]he proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA.")

[72] *See* 10 C.F.R. § 2.309(f)(1)(vi).

reasons. As a general rule, an ER is to address the *environmental* impacts of alternatives, and it need not discuss either the *economic* costs and benefits of such alternatives or the need for power.[73] To work around this, Petitioners attempt to invoke 10 C.F.R. § 51.53(c)(2), which states that an economic analysis can be appropriate in an ER where the costs and benefits of the alternatives are "essential for a determination regarding the inclusion of an alternative in the range of alternatives considered."[74]

Although Petitioners seek to hang their hat on this language in section 51.53(c)(2), they provide no basis for their claim that such an economic cost and benefit analysis is essential here. All Petitioners offer is the mere assertion that "[a] comprehensive understanding of the costs as well as the benefits of the power generated by Perry is essential to determine whether purchased power affords a viable alternative and has been adequately considered."[75] But under our contention admissibility rules, Petitioners bear the responsibility of setting forth their grievances clearly.[76] By failing to provide any facts to support their claim that an economic cost and benefit analysis is essential here, Petitioners have not established that the substance of this contention, even if true, is material to the findings the NRC must make relative to the Energy Harbor application.

Based on the above analysis, the Board concludes that Contention 2 is inadmissible.

3. Contention 3

Petitioners' third contention concerns releases of tritium from Perry and the potential adverse environmental effects of such releases.[77] In this regard, Petitioners assert the following claims: (1) Energy Harbor's LRA "is inadequate

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[73] Office of Nuclear Reactor Regulation, NRC, NUREG-1437, Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants, Main Report, Final Report at 1-15 (rev. 1 June 2013) (ADAMS Accession No. ML13106A241) ("The NRC will not make a decision or any recommendations on the basis of information presented in this GEIS regarding the need for power at nuclear power plants [whose applicants are seeking a renewal of an operating license]. The regulatory authority over licensee economics (including the need for power) falls within the jurisdiction of the States and, to some extent, within the jurisdiction of FERC.") [hereinafter 2013 GEIS].

[74] 10 C.F.R. § 51.53(c)(2).

[75] Reply at 4.

[76] *See Zion,* CLI-99-4, 49 NRC at 194 ("We do not expect our adjudicatory Boards, unaided by the parties, to sift through the parties' pleadings to uncover and resolve arguments not advanced by litigants themselves. The burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner. . . . Boards should not speculate about what a pleading is supposed to mean.") (internal quotation marks omitted).

[77] *See* Petition at 31.

because it fails to include considerable information on the release of tritium and other radionuclides" from Perry; (2) Energy Harbor's LRA omits analyses of pipe leaks or breakage from an aging nuclear reactor that may occur in the future, as well as any resultant radiation releases; (3) Energy Harbor's LRA omits any "discussion of the additive or synergistic relationships that might exist between tritium and other leaked radionuclides and the biocide chemicals" used to kill aquatic organisms; (4) Energy Harbor's LRA omits analyses of cumulative radiological impacts and the resulting potential health risks from operating Perry for an additional 20 years; and (5) Energy Harbor's LRA "omit[s] to take cognizance of or to analyze the potential health impacts to workers and the communities surrounding Perry" including any cumulative impacts.[78]

Because Contention 3 asserts that information is missing from the ER, it is characterized as a contention of omission. To establish the admissibility of a contention of omission, a petitioner must show what specific information is missing and explain why that information is required to be included in an environmental document, such as the ER here.[79] Taking each claim in turn, we begin with Petitioners' argument that Energy Harbor's ER does not include information related to the release of tritium. As explained below, this portion of Contention 3 is not admissible because Petitioners fail to demonstrate that a genuine dispute exists as to a material issue of law or fact.[80]

In this regard, Petitioners refer us to no law or regulation mandating the inclusion of this information in an ER. In fact, Petitioners admitted during oral argument that they were unaware of any requirement that such release information be addressed in an ER.[81] Actually, there is such a rule. It is 10 C.F.R. § 51.53(c)(3)(ii)(P), which requires that inadvertent releases of radionuclides into groundwater be assessed in the ER and that such "assessment must also include a description of any past inadvertent releases and the projected impact to the environment . . . during the license renewal term."[82] To comply with this rule, Energy Harbor addressed Perry's historical releases in ER section 3.6.4.2,[83] and

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[78] *Id.*

[79] *See* 10 C.F.R. § 2.309(f)(1)(vi); *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, 382-83 (2002) ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application.").

[80] 10 C.F.R. § 2.309(f)(1)(vi).

[81] *See* Tr. at 85 (Lodge) (stating "I would have included [the legal requirement], . . . had I been able to find anything.").

[82] 10 C.F.R. § 51.53(c)(3)(ii)(P).

[83] ER at 3-93 to -94.

it addressed the potential impacts of these releases during Perry's license renewal term in ER section 4.5.5.4.[84]

Petitioners assert, however, that the ER fails to include information regarding a liquid release containing detectable quantities of tritium that occurred after Energy Harbor had prepared its ER.[85] But as Energy Harbor makes clear in its Answer, nothing in the Petition demonstrates that the inclusion of this one recent release in the ER is material to the findings the NRC must make to support the action in accordance with 10 C.F.R. § 2.309(f)(1)(iv).[86] A disputed issue "is material if its resolution would make a difference in the outcome of the licensing proceeding."[87] Petitioners have not established that, relative to the completeness of the ER or otherwise, the failure to include this information would make a difference in the outcome of this licensing proceeding.

Petitioners' second claim in Contention 3 asserts the ER contains no analysis of possible future pipe leaks or breakage that may result in a release of radiation.[88] Again, however, Petitioners' argument fails to raise a genuine dispute with the application.

Under 10 C.F.R. § 54.29(a), the applicant is required to provide reasonable assurance that it will manage "the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review."[89] As Energy Harbor explains in its Answer, the LRA "presents a comprehensive and systematic analysis of aging issues across more than 1,600 pages of content."[90] In addition, the LRA includes 44 "aging management programs" that Energy Harbor plans to implement at Perry during the license renewal term "to monitor, identify, and manage the effects of aging on plant systems, structures, and components."[91]

Though Petitioners acknowledge that the LRA contains such aging management information,[92] they maintain the LRA should have additionally evaluated

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[84] *Id.* at 4-15 to -16.

[85] *See* Petition at 40.

[86] Energy Harbor Answer at 24 n.106. Notably, Petitioners also say nothing in their Reply to dispute this information in Energy Harbor's Answer addressing the subject release.

[87] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 190 (2020) (internal quotation marks omitted).

[88] *See* Petition at 31. Petitioner clarified during oral argument that this contention is not a safety contention but is strictly an environmental one. *See* Tr. at 86 (Lodge).

[89] 10 C.F.R. § 54.29(a)(1).

[90] Energy Harbor Answer at 14.

[91] *Id.*

[92] *See* Petition at 31 (stating that "[t]here is mention of pipe leaks or other breakage that has led to some radiation releases.").

possible future pipe leaks or other breakage.[93] Yet Petitioners cite no law or regulation obligating Energy Harbor to include an environmental analysis of potential future pipe leaks and breakage to support the agency's NEPA review. With no citation to a specific deficiency in the ER, much less to any environmental impacts that may result from Energy Harbor's aging management program described in detail in the LRA, Petitioners have not raised a genuine dispute with the application and so their argument fails to support an admissible contention.[94] Further, Petitioners provide no factual support for their claim that there could be leakage under the plant or that the tritium contamination will worsen in the future.[95] As such, both assertions are mere speculation and cannot support an admissible contention.

Petitioners' third claim in Contention 3 criticizes the ER for not addressing the "additive or synergistic effects of tritium."[96] As for any purported absence of any discussion of the additive effects of tritium, we note that Energy Harbor did examine what Petitioners consider "additive" effects of radioactive releases in the ER's cumulative impacts analysis. The ER states that there are only two other NRC-licensed operating facilities within 50 miles of Perry and that both are currently undergoing decommissioning.[97] Accordingly, the ER concludes that operating Perry "for an additional 20-year period would not cause an increase in annual radioactive effluent releases."[98]

With respect to the absence of any discussion of the alleged synergistic effects of tritium, Petitioners rely on language in *Kleppe v. Sierra Club* regarding "consideration of 'cumulative or synergistic environmental impact[s].'"[99] On closer reading, however, *Kleppe* cannot support Petitioners' assertion that Energy Harbor's ER must contain an evaluation of tritium's possible synergistic effects at Perry.

In *Kleppe,* the United States Supreme Court considered whether NEPA required a federal agency to expand its analysis of the development of coal resources in a specific region into a comprehensive environmental impact statement (EIS) covering the area as a whole.[100] The Court concluded that no com-

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[93] *Id.* ("[T]there is no analysis of similar pipe leaks or breakage that may occur in the future and the related radiation release increase that could result in aging nuclear reactors.")

[94] *See* 10 C.F.R. § 2.309(f)(1)(vi).

[95] *See* Petition at 43.

[96] *Id.* at 31.

[97] ER at 4-41. The two facilities are Advanced Medical Systems, which is approximately 35 miles southwest of Perry and the Whittaker Corporation, which is approximately 48 miles southeast of Perry.

[98] *Id.*

[99] Petition at 46 (citing *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976)); Tr. at 76.

[100] *See Kleppe,* 427 U.S. at 395.

prehensive EIS was required under NEPA because there was no existing or proposed plan in place to develop the region as a whole.[101] In holding that NEPA requires such a concrete proposed federal action in order to trigger a comprehensive EIS,[102] the Court explained that the situations requiring a comprehensive EIS include those where "several proposed actions are pending at the same time."[103]

Here, in an attempt to support their claim that the ER should address the cumulative or synergistic effects of tritium, Petitioners focus on one specific passage in *Kleppe* that explains when an agency is obligated to conduct a comprehensive EIS. That passage states: "when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together."[104]

It is difficult to see how this passage in *Kleppe* discussing multiple related agency actions could be deemed to obligate a nuclear power plant renewal applicant to consider the synergistic effects of tritium with other radionuclides or other chemicals. Significantly, during oral argument, Petitioners conceded they were not aware of any requirement for an applicant to consider synergistic effects,[105] and the NRC Staff confirmed that, while there is guidance on cumulative impacts, none exists on synergistic impacts.[106]

Although Petitioners did provide information about certain chemicals found in Lake Erie,[107] they offered no data or scientific studies showing there to be any synergistic effect of tritium with these chemicals.[108] With no factual support for their argument regarding the alleged synergistic effects of tritium, this claim is far too speculative to support an admissible contention.[109] Likewise, Petitioners have referred us to no law or regulation mandating that such information be

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[101] *See id.* at 414-15.

[102] *See id.*

[103] *Id.* at 409.

[104] *Id.* at 410.

[105] *See* Tr. at 76 (Lodge) (stating "I don't know of any guidance, but I do know that there are many qualified chemists in the country and that there is certainly an understanding within that profession of synergy and certainly the capability to analyze it.").

[106] *See id.* at 75 (Carpentier).

[107] *See* Petition at 45.

[108] When questioned about the lack of specific evidence of synergistic effects at Perry, Petitioners' counsel responded that "[w]e're basing our opinion on the . . . discussion in the [2013 GEIS]." Tr. at 88 (Lodge). In fact, however, neither "synergy" nor "synergistic" appear in the 2013 GEIS.

[109] *See, e.g., GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000) (finding "bare assertions and speculation" insufficient to trigger a contested hearing).

included in an ER. As a consequence, Petitioners have failed to demonstrate that the issue is material or that there is a genuine dispute of law or fact.[110]

Next, Petitioners make several claims that the ER fails to include a cumulative impact analysis of potential future health risks posed to workers and to the communities surrounding Perry.[111] Significantly, however, Petitioners seek to adjudicate the very impacts and health risks of operating the plant for an additional 20 years that are designated as Category 1 issues in the 2013 Generic Environmental Impact Statement (GEIS) and in Table B-1 of Appendix B to Subpart A of 10 C.F.R. Part 51. In fact, during oral argument, counsel for Petitioners conceded as much.[112]

As is noted in the 2013 GEIS, the Commission's intent in issuing the GEIS was to determine which environmental impacts would result "in essentially the same (generic) impact at all nuclear power plants and which ones could result in different levels of impacts at different plants . . . . For those issues that could not be generically addressed, the NRC would prepare [a] plant-specific supplemental [EIS] to the GEIS."[113] Further, under the Commission's regulations governing the consideration of NEPA issues in a license renewal proceeding, those generic issues falling within the Category 1 designation in 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 do not require further site-specific consideration in an applicant's ER or the Staff's GEIS supplement.[114]

Because these Category 1 issues have been so codified, they cannot be challenged in a licensing proceeding except where a petitioner first obtains a waiver under 10 C.F.R. § 2.335 — which Petitioners have not done.[115] The Commission has made clear that Category 1 determinations "are not subject to site-specific review and . . . fall beyond the scope of individual license renewal proceedings."[116] In particular here, radiation doses to the public, radiation doses to plant workers, exposure of aquatic and terrestrial organisms to radionuclides, and cooling tower impacts on vegetation have all been deemed Category 1 issues

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[110] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[111] *See* Petition at 31.

[112] *See* Tr. at 51-52, 71 (Lodge) (conceding during oral argument that the 2013 GEIS addressed all of the claims originally pleaded in Petitioners Contention 3 except for the possible cumulative and synergistic effects of tritium with other substances). Petitioners also acknowledged during oral argument that their claim concerning inadequate monitoring frequency was resolved by Energy Harbor's Answer that explained Energy Harbor had made a clerical error in its LRA. *See* Tr. at 63-64 (Lodge); Energy Harbor Answer at 24 n.107.

[113] 2013 GEIS at S-1.

[114] *See* 10 C.F.R. § 51.53(c)(3)(i)-(ii).

[115] *See, e.g., Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384 (2012).

[116] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001); *see* 10 C.F.R. § 51.53(c)(3)(i)-(ii).

with an impact level of "SMALL."[117] Energy Harbor has incorporated these generic analyses of Category 1 issues by reference in its ER.[118] Because Petitioners have not requested a 10 C.F.R. § 2.335 waiver, they are precluded from challenging these Category 1 issues here. Accordingly, any claim that radiological and health impacts were not analyzed in the ER fails to raise a genuine dispute with Energy Harbor's application and falls beyond the scope of this proceeding. Because Petitioners' argument fails to meet section 2.309(f)(1)(iii) and (vi) of our contention admissibility standards, it does not support an admissible contention.

Nevertheless, even were we to construe Petitioners' argument as implicating cumulative impacts that are site-specific (i.e., Category 2 issues under the 2013 GEIS), Petitioners' argument still fails to raise a genuine dispute with the application. NRC regulations require that an applicant provide information about site-specific cumulative impacts, defined as "other past, present, and reasonably foreseeable future actions occurring in the vicinity of the nuclear plant that may result in a cumulative effect."[119]

Moreover, and contrary to Petitioners' assertion, Energy Harbor's ER does include such a cumulative impacts analysis.[120] Specifically, section 4.12 of the ER, titled "Cumulative Impacts," includes discussions on air quality, water resources, surface water, ground water, ecological resources, and human health, to name only a few.[121] For surface water quality, Energy Harbor concludes that Perry complies with its National Pollutant Discharge Elimination System permits, that Perry's operations do not contribute to nearby tributary impairment, and therefore, that "the cumulative impact to surface water quality would be SMALL."[122]

Likewise, section 4.12.8 of the ER, titled "Human Health," discusses both radiological and non-radiological cumulative human health impacts.[123] Specifically, the ER states,

> Operating [Perry] for an additional 20-year period would not cause an increase in annual radioactive effluent releases. The cumulative impact of [Perry]'s Unit 1

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[117] 10 C.F.R. pt. 51, subpart A, app. B, tbl. B-1.

[118] *See* ER at 4-2, 6-1.

[119] 10 C.F.R. § 51.53(c)(3)(ii)(O).

[120] *See* ER at 4-34 to -42.

[121] *Id.* Note that ER section 4.12.2.1 addresses cumulative impacts on air quality, ER section 4.12.5.1 addresses cumulative impacts on terrestrial species, ER section 4.12.5.2 addresses cumulative impacts on aquatic species, and ER section 4.12.8 addresses cumulative impacts on human health.

[122] ER at 4-38.

[123] *Id.* at 4-41.

> operation, and the decommissioning activities in the region, would be expected to be SMALL because the plant and [its associated Independent Spent Fuel Storage Installation] are designed to maintain doses [as low as reasonably achievable], and all routine releases and occupational exposure would be subject to federal regulations.[124]

From this, the ER concludes that "[t]he cumulative impacts on human health are expected to be SMALL."[125]

Petitioners neither challenge this cumulative impacts analysis nor explain how it is in any way deficient. Because analyses of cumulative impacts are included in the ER, Petitioners have not raised a genuine dispute of material fact or law and, as such, fail to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Based on the above analysis, the Board concludes that Contention 3 is inadmissible.

IV. CONCLUSION

For the reasons set forth in section II, Petitioners have established their representational standing in this initial license renewal proceeding for Perry Nuclear Power Plant Unit 1. For the reasons described in section III, however, we conclude that, under the applicable standards of 10 C.F.R. § 2.309(f)(1), Petitioners have failed to establish the grounds for admitting any of their three contentions.

Accordingly, Petitioners' hearing request is denied.

For the foregoing reasons, it is the thirteenth day of March 2024, ORDERED that:

1. The November 28, 2023 hearing request of petitioners Ohio Nuclear-Free Network and Beyond Nuclear is *denied* and this proceeding is *terminated.*

2. Because this memorandum and order rules upon an intervention petition, in accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Com-

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[124] *Id.*

[125] *Id.* at 4-42.

mission from this memorandum and order must be taken within twenty-five days after this issuance is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chair
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 13, 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chair
G. Paul Bollwerk, III
Dr. Sue H. Abreu

In the Matter of **Docket No. 40-8903-LA**
(ASLBP No. 23-980-03-LA-BD01)

HOMESTAKE MINING COMPANY OF CALIFORNIA
(Denial of License Amendment Request) **March 26, 2024**

In this proceeding concerning the denial of Homestake Mining Company of California's (HMC) license amendment application seeking Nuclear Regulatory Commission (NRC) approval to change the location of the background radon and gamma radiation monitoring stations at HMC's Grants Reclamation Project, the Licensing Board concluded that a proposed settlement agreement fulfills the requirements of 10 C.F.R. § 2.338(g), (h), and (i) and so granted HMC's and the NRC Staff's joint motion asking the Board (1) to approve the proposed settlement agreement; and (2) to terminate the proceeding.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES (FORM OF SETTLEMENT)

NRC regulations encourage "[t]he fair and reasonable settlement of issues proposed for litigation" in NRC adjudicatory proceedings. 10 C.F.R. § 2.338; *see Rockwell Int'l Corp.* (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990) ("Commission policy strongly favors settlement of adjudicatory proceedings."). Section 2.338(g) outlines the form for such settlements:

> A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.

10 C.F.R. § 2.338(g).

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES (CONTENT OF SETTLEMENT AGREEMENT)

In addition, 10 C.F.R. § 2.338(h) states that a proposed settlement agreement must contain the following items:

> (1) An admission of all jurisdictional facts;
>
> (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;
>
> (3) A statement that the order has the same force and effect as an order made after full hearing; and
>
> (4) A statement that matters identified in the agreement[ ] required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

Id. § 2.338(h).

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES (SETTLEMENT APPROVAL PROCESS)

Finally, and particularly pertinent to the Board's consideration of the parties' pending joint motion, section 2.338(i) describes the settlement agreement approval process:

> Following issuance of a notice of hearing, a settlement must be approved by the presiding officer . . . to be binding in the proceeding. The presiding officer . . . may order the adjudication of the issues that the presiding officer . . . finds is required in the public interest to dispose of the proceeding. . . . If approved, the terms of the settlement . . . must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

Id. § 2.338(i).

NOTICE OF HEARING: SETTLEMENT OF CONTESTED CASES (SETTLEMENT APPROVAL PROCESS)

Because a notice of hearing was issued in this proceeding, *see* Order; (Providing Notice of Hearing), 88 Fed. Reg. 67,828 (Oct. 2, 2023), section 2.338(i) provides the Board with the authority to approve the parties' proposed Settlement Agreement.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES ("PUBLIC INTEREST" INQUIRY IN APPROVING SETTLEMENT)

The Commission noted in its decision in *Sequoyah Fuels* that "[i]n any pending proceeding [in which presiding officer approval of a settlement agreement is required], the presiding officer . . . must give due consideration to the public interest." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997) (quoting *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)) (footnote omitted). The Commission then went on to explain that this "public interest" inquiry requires the presiding officer to consider:

> (1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation.

Id. at 209 (footnote omitted).

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES ("PUBLIC INTEREST" INQUIRY IN APPROVING SETTLEMENT)

Although adopted by the Commission in an enforcement context, these factors are appropriately applied here in assessing whether the public interest would be served by approving the parties' proposed settlement agreement in that "the Commission derived these factors from an array of federal court settlement approval decisions that dealt with settlements ranging from public school desegregation class actions to antitrust enforcement suits." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 837 (2006) (footnote omitted).

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES ("PUBLIC INTEREST" INQUIRY INTO RISKS AND BENEFITS OF FUTURE LITIGATION)

In reviewing a proposed settlement agreement, the first "public interest" factor the Board examines "is the risks and benefits of settling as compared to litigating the proceeding." *Sequoyah Fuels,* CLI-97-13, 46 NRC at 209. More specifically, as is appropriate here, the Board considers "(1) the likelihood (or uncertainty) of success at trial, (2) the range of possible recovery . . . , and (3) the complexity, length, and expense of continued litigation." *Id.*

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES ("PUBLIC INTEREST" INQUIRY INTO RISKS AND BENEFITS OF FUTURE LITIGATION)

Importantly, the Board observes that it need not reject a proposed settlement agreement merely because one of the parties might have received a more favorable result had the case been fully litigated or because the settlement is not the best that could be obtained. *See id.* at 215. Instead, it is the Board's obligation to determine whether the particular proposed settlement agreement before it "is within the reaches of the public interest." *Id.* (quoting *United States v. Microsoft,* 56 F.3d 1498, 1462 (D.C. Cir. 1995)) (emphasis omitted).

RULES OF PRACTICE: DENIAL OF APPLICATION (OPPORTUNITY TO INTERVENE)

While the NRC Staff did not issue a notice affording other interested persons an opportunity to request a hearing in this proceeding, this does not impede the Board's ability to approve the parties' proposed settlement agreement. Given the agency's regulations in 10 C.F.R. § 2.309(b)(4)(ii), participation by interested persons was not foreclosed. *See Cammenga and Associates, LLC* (Denial of License Amendment Requests), LBP-23-3, 97 NRC 59, 75 n.26 (2023).

RULES OF PRACTICE: SUA SPONTE REVIEW (LICENSING BOARD APPROVAL OF SETTLEMENT AGREEMENT)

"Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341." 10 C.F.R. § 2.338(i). By its terms, paragraph (a)(1) of section 2.341 generally affords the parties the opportunity to proffer any challenges to a licensing board ruling resolving a proceeding by submitting a petition seeking Commission review of that decision. *Id.* § 2.341(a)(1). Nonetheless, because the Board approved the parties' proposed settlement agree-

ment without modification and they waived any right to challenge the validity of the Board's approval order, *see* Joint Motion to Approve Proposed Settlement Agreement and Terminate Proceeding (Feb. 29, 2024), attach. A at 3 (Proposed Settlement Agreement Between [NRC] and [HMC] (Feb. 29, 2024)), absent an unanticipated development, Commission consideration of the Board's settlement approval determination will occur under its section 2.341(a)(2) sua sponte review authority. *See Cammenga,* LBP-23-3, 97 NRC at 76 n.27.

MEMORANDUM AND ORDER
(Approving Proposed Settlement Agreement and Terminating Proceeding)

This proceeding arose from the December 18, 2020 request of Homestake Mining Company of California (HMC) to amend its 10 C.F.R. Part 40 source materials license (License No. SUA-1471). HMC's license amendment request (LAR) sought to modify Condition 10 of the license to change the location of the background radon and gamma radiation monitoring stations at its Grants Reclamation Project (GRP).[1] The GRP is the site of a former uranium milling operation located 5.5 miles north of Milan, in Cibola County, New Mexico.[2]

On August 15, 2023, the Nuclear Regulatory Commission Staff (NRC Staff) denied HMC's LAR.[3] On September 5, 2023, HMC filed a Hearing Demand challenging this denial.[4]

Pending before the Licensing Board is a February 29, 2024 joint motion from HMC and the NRC Staff asking the Board (1) to approve the proposed Settlement Agreement that the parties negotiated, which is discussed in detail below; and (2) to issue a consent order terminating this proceeding.[5]

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[1] Letter from Brad R. Bingham, Closure Manager, GRP, to Ron Linton, Project Manager, Office of Nuclear Material Safety and Safeguards (NMSS), NRC at 1 (Dec. 18, 2020) (ADAMS Accession No. ML20356A288) [hereinafter LAR].

[2] Joint Motion to Approve Proposed Settlement Agreement and Terminate Proceeding (Feb. 29, 2024) at 1 [hereinafter Joint Motion].

[3] *See* Letter from Jane Marshall, Division Director, NMSS, NRC, to Brad R. Bingham, Closure Manager, GRP (Aug. 15, 2023) (ADAMS Accession No. ML23186A150) [hereinafter Denial Letter]).

[4] *See* [HMC]'s Demand for Hearing on the NRC Staff's Denial of the License Amendment Request to Change the Background Monitoring Location for Radon and Ambient Gamma Radiation for Source Materials License No. SUA-1471 (Sept. 5, 2023) [hereinafter Hearing Demand].

[5] *See* Joint Motion at 1, 8; *id.,* attach. A (Proposed Settlement Agreement Between [NRC] and [HMC] (Feb. 29, 2024)) [hereinafter Proposed Settlement Agreement]; *id.,* attach. B (Proposed Consent Order (Feb. 29, 2024)) [hereinafter Consent Order].

For the reasons set forth below, and pursuant to 10 C.F.R. § 2.338(i), we grant the parties' joint motion; approve the February 29, 2024 proposed Settlement Agreement, a copy of which is attached to this issuance as Appendix A; and terminate this proceeding.

I. BACKGROUND

HMC's LAR sought to modify Condition 10 of its source materials license, which prescribes public dose and background monitoring locations for radon gas (radon-222) and direct gamma radiation at the GRP.[6] HMC's current environmental monitoring program for radon gas and direct gamma radiation includes (1) public exposure monitoring locations near occupied residences (i.e., point of compliance stations) designated as stations HMC-4 and HMC-5; and (2) a background radon and direct gamma radiation monitoring location designated as station HMC-16.[7] Because the radiation dose to the public from the GRP site excludes background radiation, Condition 10 obligated HMC to collect data from both HMC-4 and HMC-5, then to subtract from the highest of these two readings the background data obtained at HMC-16. Under Condition 10, this net value was used to show the maximum radiation dose to the public from operations at the GRP site and to demonstrate compliance with 10 C.F.R. § 20.1301(a), as required by 10 C.F.R. § 20.1302.[8] HMC's LAR sought to change Condition 10 by eliminating HMC-16 as a background monitoring station and replacing it with two new background monitoring stations that HMC designated as HMC-1OFF and HMC-6OFF.[9]

HMC requested that the background monitoring location be moved because it was convinced that "conditions at HMC-16 are not representative of background radon conditions at the [GRP] Site."[10] According to HMC, HMC-16 had been placed in an upland area "where geomorphic/geological characteristics differ significantly from the floor of the San Mateo Creek (SMC) valley in

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[6] *See* Joint Motion at 2; 10 C.F.R. § 20.1003 ("*Public dose* means the dose received by a member of the public from exposure to radiation or to radioactive material released by a licensee, or to any other source of radiation under the control of a licensee. Public dose does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released under § 35.75, or from voluntary participation in medical research programs.").

[7] *See* Joint Motion at 2.

[8] *See id.*

[9] *See id.*

[10] *Id.* at 3-4 (quoting LAR at 2).

which the [GRP] site is situated."[11] HMC thus proposed to terminate background monitoring at HMC-16 and to replace it with background monitoring at HMC-1OFF and HMC-6OFF. HMC's LAR asserted that HMC-1OFF and HMC-6OFF would yield more accurate background data because they "are located near the middle of the northern portions of the SMC basin, distant enough to preclude measurable impacts from the Site, yet close enough to be representative of the geologic/geomorphic setting in which the Site is situated."[12]

The NRC Staff found that HMC's proposed change in background monitoring locations would not result in accurate calculations of the radiation dose to the public at the GRP site as determined from the radiation measurements at HMC-4 and HMC-5.[13] Because these two point of compliance stations "are adjacent to and impacted by an area where remediation work performed by the licensee has lowered the background [radiation] levels . . . below the [levels] for non-remediated areas," HMC's background monitoring locations must account for this lowered level.[14] The NRC Staff explained that the "[s]election of a background monitoring location that is in an area [such as the sites HMC proposed] where remediation had not taken place (a preoperational location), will result in a calculation of an annual public dose that is lower than what . . . the maximum exposed individual is receiving."[15]

The NRC Staff thus denied HMC's LAR on the ground that changing HMC's background monitoring station from HMC-16 to the non-remediated areas at the proposed locations of HMC-1OFF and HMC-6OFF would fail to satisfy the applicable regulations in 10 C.F.R. Part 20, "Standards for Protection Against Radiation." Specifically, the NRC Staff's denial of HMC's LAR maintained that monitoring for background radiation at HMC-1OFF and HMC-6OFF "would not make an appropriate survey pursuant to 10 [C.F.R. §] 20.1302(a) and (b), and would not make [a] reasonable survey pursuant to 10 [C.F.R. §] 20.1501(a) to demonstrate compliance with the radiation dose limits for individual members

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[11] *Id.* at 4 (quoting LAR, attach. 1, at 2 (Technical Report, Revised Assessment of Background Radon Monitoring Locations (rev. 1 Dec. 18, 2020) [hereinafter Technical Report]).

[12] *Id.* (quoting Technical Report at 28).

[13] *See* Denial Letter, encl. at iv, 12-19 (NRC, Safety Evaluation Report, [HMC, GRP], Request to Change the Background Monitoring Location for Radon and Ambient Gamma Radiation (Aug. 2023)) (ADAMS Accession No. ML23186A151) [hereinafter SER].

[14] Denial Letter at 2.

[15] *Id.* The GRP site public radiation dose is found by subtracting the background station data from the point of compliance station data. *See supra* note 8 and accompanying text. According to the NRC Staff, using background data collected in non-remediated areas (with its higher radiation amount) to calculate the radiation dose to the public from past milling operations undervalues the public's radiation exposure. *See* Denial Letter at 2; *see also* SER at 17-18.

of the public in 10 CFR [§] 20.1301 when reviewed in accordance with the NRC guidance."[16]

This Licensing Board was established after HMC filed its Hearing Demand challenging the NRC Staff's denial of HMC's LAR.[17] At the Board's initial status conference, the parties indicated they were discussing a possible settlement.[18] Accordingly, in addition to granting HMC's Hearing Demand, the Board deferred setting a date for a conference to establish schedules for mandatory disclosures and for an evidentiary hearing in this proceeding.[19] The Board also instructed the parties to submit a report to the Board on the status of their settlement negotiations no later than November 6, 2023.[20]

The NRC Staff and HMC submitted a timely update regarding the status of their settlement discussions, and they jointly proposed they be allowed to continue discussions,[21] a request that the Board granted.[22] On December 14, 2023, the parties submitted their second status update that again jointly proposed they be allowed to continue settlement discussions.[23] Although the Board granted this request, it did so with the proviso that the Board intended to hold a status conference with the parties in February 2024 unless, no later than January 29, 2024, the parties submitted either (1) a proposed settlement agreement in accord with the provisions of 10 C.F.R. § 2.338(g)-(h) or (2) a joint notice of a tentative settlement that provided a date by which the parties' proposed settlement agreement would be filed.[24]

Subsequently, on January 26, 2024, the NRC Staff and HMC filed a joint notice of settlement in which the parties declared that they had "reached an agreement in principle and are preparing the proposed settlement agreement in accord with the provisions of 10 C.F.R. § 2.338(g)-(h) for submission to the

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[16] Joint Motion at 5 (quoting Denial Letter at 2). In doing so, however, the NRC Staff also agreed with HMC that the "current background location at HMC-16 is located in a different geological setting which is not representative of the [point of compliance] monitoring stations." *Id.* at 6 (quoting SER at 34).

[17] *See* Hearing Demand; Establishment of Atomic Safety and Licensing Board, 88 Fed. Reg. 62,829 (Sept. 13, 2023).

[18] *See* Tr. at 10-12.

[19] *See* Licensing Board Order (Granting Hearing Demand; Deferring Scheduling Conference) (Sept. 25, 2023) at 1-2 (unpublished).

[20] *See id.* at 2.

[21] *See* Joint Settlement Status Update (Nov. 2, 2023) at 1.

[22] *See* Licensing Board Order (Second Deferral of Setting Date for Scheduling Conference Pending Continued Settlement Discussions) (Nov. 3, 2023) at 2 (unpublished).

[23] *See* Second Joint Settlement Status Update (Dec. 14, 2023) at 1.

[24] *See* Licensing Board Order (Third Deferral of Setting Date for Scheduling Conference Pending Continued Settlement Discussions) (Dec. 15, 2023) at 3 (unpublished).

Board."[25] In this joint notice, the parties also requested that they be allowed to file their proposed settlement agreement on or before February 29, 2024.[26] The Board granted this request on January 31, 2024, but indicated that if the parties were unable to meet their self-imposed deadline of February 29, 2024, they were to advise the Board, no later than February 26, 2024, in a filing that explained the reason for the delay and provided a date certain by which they would be submitting their proposed settlement agreement.[27]

As noted earlier, on February 29, 2024, HMC and the NRC Staff submitted a joint motion asking the Board to approve their proposed Settlement Agreement and to issue a consent order terminating this proceeding.[28] More specifically, HMC and the NRC Staff have agreed to a modification of License Condition 10 that will obligate HMC to determine background radon and gamma radiation data by averaging the radiation measurements obtained from three monitoring stations: HMC-1OFF, HMC-1A, and HMC-6.[29] In their joint motion, the parties recognize that different factors must be considered when siting representative background radon and gamma radiation monitors, "including geology, topography, meteorology, and the duration of the dose limit being an annual average value."[30] To ensure representative monitoring, HMC and the NRC Staff agreed that HMC could average data from the three newly designated background monitoring locations, i.e., HMC-1OFF, HMC-1A, and HMC-6.[31] In addition, HMC and the NRC Staff agreed that HMC will average the data obtained from point of compliance stations HMC-4 and HMC-5 when calculating the public radiation dose, and both parties agree this approach "will provide reliable and stable data in the public dose calculations."[32]

Additionally, under the terms of the proposed Settlement Agreement, HMC agreed that, within 30 days of Board approval of the proposed Settlement Agreement, it will provide a letter to the NRC Staff with a copy of the changes to Table 1, as referenced in License Condition 10, reflecting the modifications described above.[33] For its part, the NRC Staff agreed that within 30 days of receiving HMC's letter it will issue the license amendment to HMC. This license amendment will specify that all regulatory requirements and conditions therein

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[25] Joint Notice of Settlement (Jan. 26, 2024) at 1.

[26] *See id.*

[27] *See* Licensing Board Order (Setting Date for Filing Joint Proposed Settlement Agreement) (Jan. 31, 2024) at 3 (unpublished).

[28] *See supra* note 5 and accompanying text.

[29] *See* Joint Motion at 7; Proposed Settlement Agreement at p. 112.

[30] *See* Joint Motion at 7.

[31] *See id.*; Proposed Settlement Agreement at p. 112.

[32] Joint Motion at 7-8; *see* Proposed Settlement Agreement at p. 112.

[33] *See* Proposed Settlement Agreement at p. 112.

shall apply to HMC as a licensee under 10 C.F.R. Part 40, just as they would have applied to HMC had the NRC Staff initially approved the LAR through the traditional licensing process.[34] HMC also stated that it will withdraw its Hearing Demand, effective upon Board approval of the proposed Settlement Agreement and termination of this proceeding.[35]

Finally, HMC and the NRC Staff agreed "the public interest does not require the adjudication of the issues," as "the settlement is a reasonable compromise between parties that are represented by counsel" and is consistent with public health and safety as well as with Commission policy of encouraging the fair and reasonable settlement and resolution of issues.[36]

II. ANALYSIS

A. Standards Governing the Approval of Proposed Settlement Agreements

NRC regulations encourage "[t]he fair and reasonable settlement and resolution of issues proposed for litigation" in NRC adjudicatory proceedings.[37] Section 2.338(g) outlines the form for such settlements:

> A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.[38]

In addition, section 2.338(h) states that a proposed settlement agreement must contain the following items:

> (1) An admission of all jurisdictional facts;
>
> (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;
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> (3) A statement that the order has the same force and effect as an order made after full hearing; and
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> (4) A statement that matters identified in the agreement[ ] required to be ad-

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[34] *See id.*

[35] *See id.*

[36] Joint Motion at 8.

[37] 10 C.F.R. § 2.338; *see Rockwell Int'l Corp.* (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990) ("Commission policy strongly favors settlement of adjudicatory proceedings.").

[38] 10 C.F.R. § 2.338(g).

judicated have been resolved by the proposed settlement agreement and consent order.[39]

Finally, and particularly pertinent to the Board's consideration of the parties' pending joint motion, section 2.338(i) describes the settlement agreement approval process:

> Following issuance of a notice of hearing, a settlement must be approved by the presiding officer . . . to be binding in the proceeding. The presiding officer . . . may order the adjudication of the issues that the presiding officer . . . finds is required in the public interest to dispose of the proceeding. . . . If approved, the terms of the settlement . . . must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.[40]

The Commission noted in its decision in *Sequoyah Fuels* that "[i]n any pending proceeding [in which presiding officer approval of a settlement agreement is required], the presiding officer . . . must give due consideration to the public interest."[41] The Commission then went on to explain that this "public interest" inquiry requires the presiding officer to consider:

> (1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation.[42]

With these standards in mind, we undertake our section 2.338(g), (h), and

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[39] *Id.* § 2.338(h).

[40] *Id.* § 2.338(i). Because a notice of hearing was issued in this proceeding, *see* Order; (Providing Notice of Hearing), 88 Fed. Reg. 67,828 (Oct. 2, 2023), section 2.338(i) provides the Board with the authority to approve the parties' proposed Settlement Agreement.

[41] *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997) (quoting *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)) (footnote omitted).

[42] *Id.* at 209 (footnote omitted). Although adopted by the Commission in an enforcement context, these factors are appropriately applied here in assessing whether the public interest would be served by approving the parties' proposed Settlement Agreement in that "the Commission derived these factors from an array of federal court settlement approval decisions that dealt with settlements ranging from public school desegregation class actions to antitrust enforcement suits." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 837 (2006) (footnote omitted).

(i) review of the proposed Settlement Agreement between the NRC Staff and HMC.

B. Licensing Board Determination

1. 10 C.F.R. § 2.338(g) and (h): The Form and Content of the Proposed Settlement Agreement

We first turn to section 2.338(g), which governs the form a settlement agreement is to follow. Here, the parties' filing contains each of the 2.338(g) elements: (1) a proposed settlement agreement; (2) a consent order; and (3) a motion for its entry including the reasons why it should be accepted.[43] The proposed Settlement Agreement is also signed by the duly authorized representatives of the parties.[44] We thus conclude that this proposed Settlement Agreement fulfills the form requirements of section 2.338(g).

We next consider section 2.338(h), which outlines the specific content of a settlement agreement. As required by section 2.338(h)(1)-(4), the proposed settlement agreement includes (1) the "admission of all jurisdictional facts";[45] (2) the "express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise contest the validity of the consent order";[46] (3) the statement that the "order has the same force and effect as an order made after full hearing";[47] and (4) the statement that "matters identified in the agreement that were required to be adjudicated have been resolved by the proposed settlement agreement and consent order."[48] We therefore conclude that the above referenced provisions of the parties' proposed Settlement Agreement fulfill the requirements of section 2.338(h).

2. 10 C.F.R. § 2.338(i): The Proposed Settlement Agreement and the Public Interest

In deciding whether to approve a proposed settlement agreement, the Board

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[43] *See* Joint Motion; Proposed Settlement Agreement; Consent Order.

[44] *See* Proposed Settlement Agreement at p. 112.

[45] *Id.* at pp. 112-13.

[46] *Id.* at p. 112.

[47] *Id.*

[48] *Id.*

must give "due consideration to the public interest."[49] As noted above, the public interest inquiry outlined in *Sequoyah Fuels* contains four distinct factors.[50] In analyzing these factors below, the Board concludes that the public interest does not require any issues to be adjudicated before terminating this proceeding, thereby allowing us to approve this proposed Settlement Agreement.

a. Risks and Benefits

In reviewing a proposed settlement agreement, the first "public interest" factor the Board examines "is the risks and benefits of settling as compared to litigating the proceeding."[51] More specifically, as is appropriate here, the Board considers "(1) the likelihood (or uncertainty) of success at trial, (2) the range of possible recovery . . . , and (3) the complexity, length, and expense of continued litigation."[52] Importantly, we first observe that we need not reject a proposed settlement agreement merely because one of the parties might have received a more favorable result had the case been fully litigated or because the settlement is not the best that could be obtained.[53] Instead, it is the Board's obligation to determine whether the particular proposed settlement agreement before it "is within the reaches of the public interest."[54] Here, considering the risks of future litigation posed by the NRC Staff's denial of HMC's LAR, this proposed Settlement Agreement appears to be a reasonable compromise between parties that are each ably represented by counsel.

In the context of this proposed Settlement Agreement, HMC provided the NRC Staff with sufficient information to make the requisite regulatory findings and to approve a modification of License Condition 10 reflecting that (1) "the new background radon and gamma monitoring station locations are HMC-1OFF, HMC-1A, and HMC-6"; (2) "data derived from these stations will be averaged"; and (3) "going forward HMC will average the data obtained from point of compliance stations HMC-4 and HMC-5 when calculating public dose."[55] Additionally, HMC agreed to withdraw its Hearing Demand.[56] The parties therefore

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[49] *Sequoyah Fuels,* CLI-97-13, 46 NRC at 207 (quoting *Sequoyah Fuels,* CLI-94-12, 40 NRC at 71).

[50] *See id.* at 209.

[51] *Id.*

[52] *Id.*

[53] *See id.* at 215.

[54] *Id.* (quoting *United States v. Microsoft,* 56 F.3d 1498, 1462 (D.C. Cir. 1995)) (emphasis omitted).

[55] Proposed Settlement Agreement at p. 112.

[56] *See id.*

agreed that, as a result of settling HMC's Hearing Demand challenging the NRC Staff's denial of HMC's LAR, "there are no disputed issues to litigate."[57]

While the parties' proposed Settlement Agreement contains provisions that approve HMC's LAR, it also incorporates some clarifying strictures, i.e., (1) the selection of background radon and gamma radiation monitoring stations different from what was originally sought in HMC's LAR; (2) the averaging of data collected from the new background radon and gamma radiation monitoring station locations; and (3) the averaging of data collected from the point of compliance stations.[58] Relative to the Commission's concern in *Sequoyah Fuels* with the "range of possible recovery," these additional requirements suggest that this proposed Settlement Agreement involved negotiation by both sides to reach a mutually agreeable result that provides a reasonable outcome for both parties.

Under these circumstances, we see no basis for questioning the "risk and benefits" judgments made by the NRC Staff and HMC and conclude that their proposed Settlement Agreement achieves a reasonable result on this score.

b. Implementation and Enforcement

The second "public interest" factor looks to "whether the terms of the settlement appear incapable of effective implementation and enforcement."[59] Here, the proposed Settlement Agreement contemplates a series of well-defined events, i.e., HMC will provide a letter to the NRC Staff with a copy of the changes to Table 1, as referenced in License Condition 10, reflecting the modifications agreed upon by the parties in the proposed Settlement Agreement within 30 days of Board approval of this proposed Settlement Agreement, the NRC Staff will issue the license amendment within 30 days of receiving HMC's letter, and HMC will withdraw its Hearing Demand upon the Board's approval of the parties' proposed Settlement Agreement and the termination of this proceeding.[60] Taken together, these steps appear capable of being effectively implemented and enforced. Certainly, nothing presented by the parties suggests otherwise.

These considerations likewise support approval of the proposed Settlement Agreement between the NRC Staff and HMC.

c. Public Health and Safety

The third "public interest" factor looks to "whether the settlement jeopar-

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[57] *Id.*

[58] *See id.*

[59] *Sequoyah Fuels,* CLI-97-13, 46 NRC at 209.

[60] *See* Proposed Settlement Agreement at p. 112.

dizes the public health and safety."[61] The NRC Staff has concluded that, as embodied in the parties' proposed Settlement Agreement, the modifications to HMC's monitoring program for radon gas and direct gamma radiation meet the NRC's regulatory requirements that address protection of the public from radiation exposure, which are set out in 10 C.F.R. §§ 20.1301(a)(1), 20.1302(b)(1), and 20.1501(a).[62] Further, the NRC Staff concluded that the proposed Settlement Agreement is consistent with the public health and safety because its provisions afford the NRC Staff with "reasonable assurance that the public dose calculation required under 10 C.F.R. § 20.1301(a) is reasonably accurate."[63]

Our review of the terms of the proposed Settlement Agreement thus leads us to conclude that it is consistent with the agency's mission of protecting the public health and safety and so supports the Board's approval of the proposed Settlement Agreement between the NRC Staff and HMC.

d. Meaningful Participation

Last, we look to "whether the settlement approval process deprives interested parties of meaningful participation."[64] In the instant case, no intervenors or other interested participants have come forward to assert that they might be adversely impacted by the terms of the proposed Settlement Agreement.[65] Instead, this proceeding has involved only the NRC Staff and HMC, and both participants fully support the Board's approval of their proposed Settlement Agreement.

Accordingly, we conclude that our approval of the proposed Settlement Agreement does not deprive any interested party of meaningful participation in this proceeding.

III. CONCLUSION

Finding both that the proposed Settlement Agreement's form and content complies with the requirements of section 2.338(g)-(h) and that, pursuant to section 2.338(i), the public interest does not require any issues to be adjudicated for an appropriate disposition of this proceeding, the Board determines that the

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[61] *Sequoyah Fuels,* CLI-97-13, 46 NRC at 209.

[62] *See* Proposed Settlement Agreement at p. 112.

[63] *Id.* at 111-12.

[64] *Sequoyah Fuels,* CLI-97-13, 46 NRC at 209.

[65] *See id.* at 222-23. While the NRC Staff did not issue a notice affording other interested persons an opportunity to request a hearing in this proceeding, this does not impede our ability to approve the parties' proposed Settlement Agreement. Given the agency's regulations in 10 C.F.R. § 2.309(b)(4)(ii), participation by interested persons was not foreclosed. *See Cammenga and Associates, LLC* (Denial of License Amendment Requests), LBP-23-3, 97 NRC 59, 75 n.26 (2023).

proposed Settlement Agreement between the NRC Staff and HMC should be approved and that this proceeding should be terminated.

For the foregoing reasons, it is ORDERED that:

1. The February 29, 2024 joint motion of HMC and the NRC Staff is *granted,* and we *approve* the parties' February 29, 2024 proposed Settlement Agreement and *terminate* this proceeding.

2. In accordance with 10 C.F.R. §§ 2.338(i) and 2.341(a)(2), this issuance will constitute a final decision of the Commission 120 days from the date of issuance, i.e., on Wednesday, July 24, 2024, unless the Commission directs otherwise.[66]

THE ATOMIC SAFETY
AND LICENSING BOARD

Michael M. Gibson, Chair
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 26, 2024

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[66] "Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341." 10 C.F.R. § 2.338(i). By its terms, paragraph (a)(1) of section 2.341 generally affords the parties the opportunity to proffer any challenges to a licensing board ruling resolving a proceeding by submitting a petition seeking Commission review of that decision. *Id.* § 2.341(a)(1). Nonetheless, because we have approved the parties' proposed Settlement Agreement without modification and they have waived any right to challenge the validity of this order, *see* Proposed Settlement Agreement at 3, absent an unanticipated development, Commission consideration of our settlement approval determination will occur under its section 2.341(a)(2) sua sponte review authority. *See Cammenga,* LBP-23-3, 97 NRC at 76 n.27.

APPENDIX A

Proposed Settlement Agreement Between U.S. Nuclear Regulatory Commission and Homestake Mining Company of California

This agreement is made by and between the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") and Homestake Mining Company of California ("Homestake" or "HMC"), to wit:

Whereas, HMC is the holder of NRC source materials license No. SUA-1471 for the Grants Reclamation Project ("GRP") located in Grants, New Mexico;

Whereas, HMC submitted an application requesting an amendment to License Condition 10 of its license to eliminate the specification of background monitoring station HMC-16 in Table 1 and replace it with stations HMC-1OFF and HMC-6OFF as new approved locations for routine monitoring of ambient background radon and direct gamma radiation at the GRP;

Whereas, the Staff reviewed HMC's license amendment application, as supplemented, and issued an August 15, 2023, letter denying the application;

Whereas, on September 5, 2023, HMC filed a hearing demand challenging the denial of its application;

Whereas, on September 20, 2023, at a status conference held by the Atomic Safety and Licensing Board (Board), the Staff stated that it did not oppose HMC's hearing demand, and the Staff and HMC jointly requested deferral of a hearing to engage in settlement discussions;

Whereas, on September 25, 2023, the Board granted HMC's hearing demand and the parties' request to defer scheduling a hearing during settlement negotiations;

Whereas, the parties held multiple settlement conferences and reached an agreement regarding new approved background radiation monitoring station locations and data reporting methods at the point of compliance monitoring stations;

Whereas, the Parties agree that the public interest does not require adjudication of the issues resolved by the settlement agreement because the provisions of the agreement provide the Staff with reasonable assurance that the public dose calculation required under 10 C.F.R. § 20.1301(a) is

reasonably accurate and therefore is consistent with the public health and safety, and there are no disputed issues to litigate. The settlement agreement is also consistent with the Commission's policy encouraging the "fair and reasonable settlement and resolution of issues;"[1] and

Whereas, the PARTIES AGREE TO THE FOLLOWING IN SETTLEMENT:

1. Based on information provided in the LAR application and during settlement discussions, the Staff has determined that amending Table 1, as referenced in License Condition 10 of HMC source materials license No. SUA-1471 for the GRP, as follows meets the regulatory requirements of 10 C.F.R. §§ 20.1301(a)(1), 20.1302(b)(1), and 20.1501(a). The Staff will amend License Condition 10 of source materials license No. SUA-1471 upon receipt of a letter from HMC enclosing a copy of changes to Table 1 reflecting that: 1) the new background radon and gamma monitoring station locations are HMC 1-OFF, HMC-1A, and HMC-6, 2) data derived from these stations will be averaged, and 3) going forward HMC will average the data obtained from point of compliance stations HMC-4 and HMC-5 when calculating public dose;

2. HMC agrees to provide by letter to the Staff a copy of the changes to Table 1, as referenced in License Condition 10, reflecting the license amendment described in paragraph (1) within 30 days of the Board approving this settlement agreement.

3. The Staff agrees to issue the license amendment described in paragraph (1) to HMC within 30 days of receiving HMC's letter enclosing Table 1 changes described in this settlement agreement.[2]

4. HMC agrees to withdraw its hearing request regarding the LAR at issue in this proceeding. The hearing request withdrawal shall be effective upon the Board approval of this settlement agreement and termination of this proceeding.

5. All regulatory requirements and conditions that apply to HMC as a licensee under 10 C.F.R. Part 40 shall apply to HMC just as they would if the approval described in Paragraph (3) had been issued through the traditional licensing process.

6. Consistent with 10 C.F.R. § 2.338(h), the Parties agree that:

   a. This proposed settlement agreement admits all jurisdictional facts;

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[1] 10 C.F.R. § 2.338.

[2] *See* 10 C.F.R. § 2.306 (providing procedures for counting of days).

b. The Parties expressly waive further procedural steps before the presiding officer, any right to challenge or contest the validity of the order entered into in accordance with this proposed settlement agreement, and all rights to seek judicial review or otherwise contest the validity of the consent order;

c. The order implementing this proposed settlement agreement has the same force and effect as an order made after full hearing; and

d. The matters identified in this proposed settlement agreement that were required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

7. This Settlement Agreement shall be effective upon the Board's approval. Should the Board disapprove this Settlement Agreement, it shall be null and void.

WHEREOF, the Parties have executed this agreement as of the last date written below.

Jane Marshall, Director
Division of Decommissioning, Uranium Reclamation, and Waste
Office of Nuclear Material Safety and Safeguards
Mail Stop: OWFN 14 A44
U.S. NUCLEAR REGULATORY COMMISSION
Washington, DC 20555-0001
Telephone: (301) 415-2918
Email: Jane.Marshall@NRC.GOV
2/26/24
Date

Michael McCarthy
Director
Homestake Mining Company of California
310 South Main Street Suite 1150
Salt Lake City, Utah 84101
Telephone: (775) 401-4409
Email: mmccarthy@barrick.com
2/26/24
Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chair
David A. Wright
Annie Caputo
Bradley R. Crowell

In the Matter of **Case Nos. 3-2023-007**
3-2023-012

Subpoena Duces Tecum
Issued to the MISSOURI DEPARTMENT
OF PUBLIC SAFETY **April 9, 2024**

The Commission denies Missouri Department of Public Safety's motion to quash or modify a subpoena issued by the Nuclear Regulatory Commission's Office of Investigations, and the subpoena remains in force with a new return date of not later than thirty days from the issuance of this decision.

ATOMIC ENERGY ACT: SUBPOENAS

Section 161c. of the Atomic Energy Act of 1954, as amended (AEA), authorizes the NRC to obtain information it deems necessary or proper "to assist it in exercising any authority" in the AEA, or in administering or enforcing the AEA and any regulations or orders issued thereunder. 42 U.S.C. § 2201(c).

ATOMIC ENERGY ACT: SUBPOENAS

The NRC is empowered to issue subpoenas to compel the production of records. 42 U.S.C. § 2201(c).

ATOMIC ENERGY ACT: SUBPOENAS

An NRC-issued subpoena is judicially enforceable where: (1) it is issued in connection with an inquiry that is within the authority of the agency; (2) the information sought by the subpoena is reasonably relevant to that inquiry; and (3) the demand for production is not too indefinite, unreasonably broad, or burdensome. *Shaw Group, Inc.* (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 227 (2013); *see also United States v. Whispering Oaks Residential Care Facility, LLC,* 673 F.3d 813, 818 (8th Cir. 2012) (citing *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950)).

ADMINISTRATIVE SUBPOENAS

An administrative subpoena should be enforced when it seeks evidence that "is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties." *Whispering Oaks Residential Care Facility,* 673 F.3d at 818 (quoting *Doe v. United States,* 253 F.3d 256, 266 (6th Cir. 2001)).

NUCLEAR REGULATORY COMMISSION: PERFORMANCE APPRAISALS

A request for the performance appraisals of an individual under investigation for violations of NRC requirements falls within the agency's authority to enforce the AEA and NRC regulations.

NUCLEAR REGULATORY COMMISSION: MOTIONS TO QUASH

The NRC's regulations authorize the Commission to quash or modify a subpoena "if it is unreasonable or requires evidence not relevant to any matter in issue." 10 C.F.R. § 2.702(f)(1).

NUCLEAR REGULATORY COMMISSION: OFFICE OF INVESTIGATIONS

Documents obtained during investigations performed by the Office of Investigations are protected as investigative information and not made public without OI's authorization.

NUCLEAR REGULATORY COMMISSION: OFFICE OF INVESTIGATIONS

The Office of Investigations grants access to investigatory material to NRC employees and federal law enforcement agencies on a strict need-to-know basis.

NUCLEAR REGULATORY COMMISSION: RECORDS; DISCLOSURE

The NRC can withhold certain categories of records from public disclosure under 10 C.F.R. § 2.390(a).

MEMORANDUM AND ORDER

This matter is before us on a motion to quash or modify a subpoena issued by the U.S. Nuclear Regulatory Commission's (NRC) Office of Investigations (OI).[1] The subpoena requires the Missouri Department of Public Safety (DPS) to produce, on behalf of the Missouri State Emergency Management Agency (SEMA), certain records in connection with two OI investigations of potential wrongdoing at SEMA.[2] As discussed below, we deny DPS's motion to quash or modify the subpoena. The OI inquiries are within the agency's statutory authority and seek information reasonably relevant to those inquiries. In addition, the subpoena is not too indefinite, overbroad, or overly burdensome. Finally, Missouri law does not relieve DPS of its obligation to comply with the subpoena, and case law cited by DPS does not establish otherwise.

I. BACKGROUND

SEMA is a division of DPS established to respond to emergencies and disasters in Missouri.[3] SEMA operates the Radiological Emergency Preparedness (REP) Program, which plans and prepares for potential radiological incidents that could affect Missouri residents.[4] The REP Program also calibrates radiological equipment for state and local agencies pursuant to an NRC-issued materials

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[1] Motion to Quash and/or Modify the Office of Investigation's Subpoena (Oct. 27, 2023) (Motion).

[2] Subpoena duces tecum in the Matter of NRC Investigation Case No. 3-2023-007, 3-2023-012 (Sept. 29, 2023) (non-public) (Subpoena).

[3] *See* Preparedness Division, SEMA, https://sema.dps.mo.gov/about/prepardness.php (last visited Jan. 11, 2024).

[4] *Id.*

license.[5] The NRC is investigating potential wrongdoing in connection with an unescorted-access incident at SEMA on September 19, 2022, and potential wrongdoing related to a violation of recordkeeping requirements identified during an NRC inspection on August 31, 2022.[6]

As part of these investigations, OI requested records pertaining to the two incidents, including certain personnel records of a manager in the REP Program.[7] DPS declined to produce the personnel records on the basis that they were "closed records" under Missouri law, but it raised no objections to OI's other requests.[8] After meeting with NRC counsel, DPS again declined to voluntarily produce the requested records. OI then served SEMA with a subpoena compelling production of the records.

DPS has filed a motion to quash or modify the subpoena pursuant to 10 C.F.R. § 2.702(f) and asserts that the subpoena is overbroad and unlimited in time and subject matter, and that disclosing the confidential personnel records would violate employee privacy rights recognized in Missouri law.[9] As to two of the requests, DPS claims SEMA held no responsive documents, but that, "[t]o the extent that the NRC seeks emails," SEMA was willing to conduct a search with agreed-upon parameters.[10] The NRC Staff opposes DPS's motion to quash or modify the subpoena.[11]

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[5] *Id.*; *see* NRC Materials License 24-07974-03, Amend. No. 18 (ADAMS Accession No. ML-21272A047) (non-public). On January 26, 2024, SEMA requested to terminate this license. *See* "Certificate of Disposition of Materials," NRC Form 314 (Jan. 26, 2024) (ML24025A149) (non-public).

[6] NRC Staff's Opposition to Missouri Department of Public Safety's Motion to Quash (Nov. 6, 2023) (non-public) (NRC Staff Response), Attach., Decl. of Gustave Woerner ¶¶ 2-3.

[7] NRC Staff Response at 3.

[8] *Id.*

[9] *See* Motion at 2-5. The Office of the Secretary (SECY) received the motion by e-mail and informed counsel for the Missouri Department of Public Safety (DPS) of the requirements of the Commission's E-filing rule. *See* 10 C.F.R. §§ 2.302, 2.305. SECY referred DPS Counsel to the NRC's Electronic Filing Help Desk to obtain credentials to file the motion through the Electronic Information Exchange (EIE), as required by the NRC's rules of practice and procedure. *See* 10 C.F.R. §§ 2.302, 2.305. DPS Counsel obtained a digital certificate and was added to the electronic docket for this matter. SECY staff and the Electronic Filing Help Desk have communicated with DPS counsel on several occasions to provide assistance accessing the EIE. To date, DPS counsel has not filed the motion electronically, nor has DPS counsel provided SECY with a signed non-disclosure agreement required to receive non-public filings.

[10] *See* Motion at 1.

[11] The parties later agreed to the terms of a protective order governing access to, and use of, information in the NRC Staff's response designated as sensitive unclassified non-safeguards information. *See* Order of the Secretary (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information) (Nov. 27, 2023) (unpublished).

II. DISCUSSION

Section 161c. of the Atomic Energy Act of 1954, as amended (AEA), authorizes the NRC to obtain information it deems necessary or proper "to assist it in exercising any authority" in the AEA, or in administering or enforcing the AEA and any regulations or orders issued thereunder.[12] Pursuant to this statutory authority, the NRC is empowered to issue subpoenas to compel the production of records.[13] An NRC-issued subpoena is judicially enforceable where: (1) it is issued in connection with an inquiry that is within the authority of the agency; (2) the information sought by the subpoena is reasonably relevant to that inquiry; and (3) the demand for production is not too indefinite, unreasonably broad, or burdensome.[14] The NRC's regulations authorize us to quash or modify a subpoena "if it is unreasonable or requires evidence not relevant to any matter in issue."[15]

DPS seeks to quash or modify the subpoena's requests for personnel records on the grounds that the requests are too indefinite, overly broad, or seek information unrelated to the OI investigations.[16] DPS also argues that disclosing the confidential personnel records would violate employee privacy rights recognized in Missouri law.[17] As to two particular requests, DPS claims it has no responsive documents but is willing to conduct email searches after agreeing to specific search parameters.[18] As explained below, we reject each of these assertions and decline to quash or modify the subpoena.

A. Requests I.C.1 Through I.C.5

DPS claims that the requests in subparagraphs I.C.1 through I.C.5 are "unlimited in subject matter," "unlimited in scope," "overly broad," "vague," or "irrelevant."[19] A plain reading of the subpoena's text, however, does not support these objections.

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[12] 42 U.S.C. § 2201(c).

[13] *See id.*; *United States v. Comley,* 890 F.2d 539, 542 (1st Cir. 1989) ("Congress has vested the NRC with the authority to issue subpoenas in conjunction with investigations that the NRC deems necessary to protect public health or to minimize danger to life or property in matters involving nuclear materials.") (citing 42 U.S.C. § 2201(c)).

[14] *Shaw Group, Inc.* (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 227 (2013); *see also United States v. Whispering Oaks Residential Care Facility, LLC,* 673 F.3d 813, 818 (8th Cir. 2012) (citing *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950)).

[15] 10 C.F.R. § 2.702(f)(1).

[16] *See, e.g.,* Motion at 2.

[17] *See id.* (citing Mo. Rev. Stat. § 610.021(13) (2023)).

[18] *See id.* at 1.

[19] *See id.* at 2-4.

DPS's arguments do not address the text at the beginning of paragraph I.C, which states that the NRC seeks records related to the REP Program manager's "employment at SEMA involving activities conducted under NRC license 24-07974-03, including, but not limited to, [the manager's] tenure in the REP Program."[20] Because this clause is at the start of paragraph I.C, it applies to, and therefore narrows the scope of, the requests in each of the subparagraphs under paragraph I.C. When, for instance, subparagraph I.C.1 is read in conjunction with the text at the beginning of paragraph I.C, the scope of potentially responsive records is limited not only to complaints against the named REP Program employee, but also to complaints against that employee involving activities conducted under SEMA's NRC license.

Thus, we disagree that complaints irrelevant to the OI investigations, such as a complaint alleging a violation of SEMA's copyright or anti-discrimination policies, would fall within the scope of the request. Such complaints do not "involv[e] activities conducted under" the NRC license and would therefore be nonresponsive to the subpoena. The same analysis applies equally to the other subparagraphs: The clause in paragraph I.C limits the scope of each subparagraph to activities conducted under the NRC license by the REP Program manager. Therefore, none of those requests are "unlimited in subject matter," "unlimited in scope," or "overly broad." We decline to quash or modify the subpoena on those bases.

We also disagree that the request in subparagraph I.C.1 is "unlimited in time" for similar reasons. The language at the beginning of paragraph I.C limits the request to the period during which the REP Program manager had *both* been employed at SEMA *and* involved in activities conducted under the NRC license. Therefore, the subpoena is limited in time.[21] DPS raises the same unlimited-in-time argument with respect to the requests in subparagraphs I.C.2 through I.C.5.[22] But the limiting terms at the beginning of paragraph I.C apply equally to those requests, and thus DPS's argument fails as to those requests as well. The subpoena's requests in subparagraphs I.C.1 through I.C.5 are not unlimited in time, and we therefore decline to quash or modify those requests on that basis.[23]

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[20] Subpoena ¶ I.C.

[21] A subpoena need not specify an exact date range to be sufficiently limited in time. SEMA can determine for itself, given its knowledge of its employees' roles and responsibilities, the precise date range to use in its searches.

[22] *See* Motion at 2-4.

[23] Since none of the requests is unlimited in either scope or time, we hold they are likewise not burdensome, and we therefore reject DPS's claim that the request for training records in subparagraph I.C.5 is burdensome. *See id.* at 4.

DPS raises two additional arguments in opposition to the request in subparagraph I.C.4, which seeks the REP Program manager's performance appraisals and related correspondence. DPS argues such records are "irrelevant" and "wholly outside the scope of the NRC's regulatory authority."[24] We disagree.

An administrative subpoena should be enforced when it seeks evidence that "is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties."[25] The performance of the REP Program manager is relevant to assessing that individual's understanding of NRC requirements, which in turn assists with determining the individual's mental state and whether any alleged misconduct was deliberate—one of the issues under investigation here.[26] Therefore, the request for performance appraisals is not irrelevant.

Section 161c. of the AEA authorizes the NRC to issue subpoenas as it deems "necessary or proper to assist it in exercising *any* authority provided in [the AEA], or in the administration or enforcement of" the AEA and regulations issued thereunder.[27] A request for the performance appraisals of an individual under investigation for violations of NRC requirements falls within the agency's authority to enforce the AEA and NRC regulations. Therefore, the request in subparagraph I.C.4 is within the scope of the NRC's regulatory authority.

We thus reject DPS's claims that the request is irrelevant and outside the NRC's authority and decline to quash or modify the subpoena on those bases.

B. Requests I.A and I.B

In addition to the personnel and other records pertaining to the REP Program manager, the subpoena also seeks information related to the two incidents that triggered the OI investigations.[28] In its motion to quash or modify, DPS asserts that SEMA "has no such documents," but also states, "[to] the extent that the NRC seeks emails," SEMA would be willing to conduct searches of emails using agreed-upon parameters, including date ranges, email addresses,

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[24] *Id.*

[25] *Whispering Oaks Residential Care Facility,* 673 F.3d at 818 (quoting *Doe v. United States,* 253 F.3d 256, 266 (6th Cir. 2001)).

[26] *See* Subpoena at 1; 10 C.F.R. § 30.10(c) (defining "deliberate misconduct" to mean, in relevant part, an intentional act or omission that a person knows (1) would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of a license issued by the NRC; or (2) constitutes a violation of a requirement, procedure, instruction, or policy of a licensee).

[27] 42 U.S.C. § 2201(c) (emphasis added).

[28] *See* Subpoena ¶¶ I.A (seeking records related to sealed source test results and inventories and documentation of annual radiation protection program reviews), I.B (seeking records related to unescorted access incident that occurred on September 19, 2022, involving REP Program personnel).

and search terms.[29] This response implies that the subpoena did not provide adequate parameters in the first instance.

But paragraph I.A of the subpoena seeks records "from January 2021 to the present" related to "sealed source leak tests, sealed source inventories, and documentation of annual radiation protection program reviews . . . ."[30] And paragraph I.B requests records "from September 2022 to the present" related to "an unescorted access incident involving SEMA Radioactive Emergency Preparedness (REP) Program personnel . . . that occurred on September 19, 2022."[31]

In our view, these requests provide sufficient information for SEMA to conduct the necessary searches. Each provides a date range and supplies sufficient contextual information for the development of search terms. Moreover, the subpoena does not need to list specific email addresses to be searched; the descriptions in paragraphs I.A and I.B are sufficient for SEMA to identify the employees potentially concerned, specifically, those who work on sealed sources and those who could have been or were involved in the unescorted access incident that occurred on September 19, 2022, respectively.

In short, the subpoena supplies SEMA with reasonable parameters to identify any responsive records. We therefore decline to quash or modify the requests in paragraphs I.A and B.

C. Missouri Law

DPS maintains that it cannot produce any records responsive to the requests in paragraph I.C because they are "closed records" under Missouri law.[32] To support this assertion, DPS cites section 610.021 of the Revised Statutes of Missouri, which states, in relevant part: "Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close . . . [i]ndividually identifiable personnel records, performance ratings or records pertaining to employees . . . ."[33] As further described below, we find DPS's reliance on this provision unavailing.

Section 610.021 states that a Missouri state agency is "authorized to close . . . records" to the extent they relate to certain enumerated categories.[34] But this is not relevant to whether a federal agency can compel production of those closed records. Even were DPS to close all responsive records in this matter under section 610.021, that fact alone would not allow DPS to refuse to comply

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[29] Motion at 1.

[30] Subpoena ¶ I.A.

[31] *Id.* ¶ I.B.

[32] Motion at 2-5.

[33] Mo. Rev. Stat. § 610.021(13) (2023).

[34] *Id.*

with the subpoena; rather, it would permit DPS to shield the records from the public.

But the subpoena at issue here does not implicate disclosure of records to the public. For one, the NRC withholds investigatory material as a matter of course.[35] In addition, OI grants access to investigatory material to NRC employees and federal law enforcement agencies on a strict need-to-know basis.[36] OI also maintains a system of records for investigatory material that is separate from the NRC's publicly accessible Agencywide Documents Access and Management System.[37] Moreover, the NRC can withhold certain categories of records from public disclosure under its regulations.[38]

Further, regardless of whether the records sought are withheld, the authority section 610.021 grants to close records yields by its own terms when "disclosure is otherwise required by law."[39] The NRC exercised its statutory authority to enforce and administer the AEA when it issued the subpoena, and DPS is therefore required by law to produce the requested records.[40] Thus, section 610.021 provides no basis for DPS to refuse to comply with the subpoena.[41]

The case law DPS cites does not persuade us otherwise. DPS argues that a Missouri Supreme Court decision, *Delmar Gardens v. Gartner,* prevents it from disclosing the records sought in paragraph I.C.[42] But this case is distinguishable. *Delmar Gardens* involved a challenge to a discovery order that required a party in a private action to produce the entire personnel file of a witness for purposes of impeachment.[43] Civil discovery raises the prospect that records produced to an opposing party could be publicly disclosed if, for example, they are introduced as evidence at trial. By contrast, and as previously stated, records produced

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[35] *See* NRC Staff Response, Attach., Decl. of Gustave Woerner ¶ 9 (noting that documents obtained during OI investigations are protected as investigative information and not made public without OI's authorization).

[36] *Id.*

[37] *Id.*

[38] *See* 10 C.F.R. § 2.390(a) (exempting from disclosure, in relevant part, personnel records when disclosure would constitute a clearly unwarranted invasion of personal privacy; certain records compiled for law enforcement purposes; and records specifically exempted from disclosure by statute).

[39] Mo. Rev. Stat. § 610.021.

[40] *See* 42 U.S.C. § 2201(c) ("the Commission is authorized . . . by subpoena to *require* any person to . . . produce documents") (emphasis added).

[41] Because we determine that there is no conflict between § 610.021 and the NRC's subpoena authority, our decision today does not take a position on whether Missouri's statute is preempted by the NRC's subpoena authority.

[42] *See, e.g.,* Motion at 2 (quoting *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner,* 239 S.W.3d 608, 611 (Mo. 2007) (en banc)).

[43] *Delmar Gardens,* 239 S.W.3d at 609-10.

pursuant to an NRC-issued subpoena are withheld from public disclosure.[44] The numerous safeguards described above that apply to records produced pursuant to an NRC subpoena are not available in the civil discovery process. Moreover, as discussed above, rather than requesting an individual's entire personnel file, the subpoena limits the scope of responsive records to those relevant to activities conducted under SEMA's NRC license. In short, we disagree that *Delmar Gardens* permits DPS to withhold records responsive to the subpoena.[45]

With respect to the subpoena's request for disciplinary-related records, DPS argues that these, too, are closed records under Missouri law.[46] DPS cites *Laut v. City of Arnold,* but as with *Delmar Gardens,* we are not persuaded. *Laut* addressed whether Missouri privacy law protected from public disclosure the disciplinary records of two municipal police department employees.[47] In that case, the records would have been publicly released had the court granted the movants' petition. Here, compliance with the subpoena will not result in public disclosure. Therefore, *Laut* is distinguishable.

In sum, we decline to quash or modify the subpoena on the basis of Missouri privacy law and related case law grounds.

III. CONCLUSION

For the foregoing reasons, we *deny* DPS's motion to quash or modify. The subpoena remains in force with a new return date of not later than thirty days from the issuance of this decision.

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[44] *See* NRC Staff Response, Attach., Decl. of Gustave Woerner ¶ 9.

[45] Two additional points regarding *Delmar Gardens* are worth mentioning. DPS asserts that personnel records are closed under Missouri law. *See, e.g.,* Motion at 3 ("the Missouri Supreme Court recognizes an employee's privacy rights, which *prevent* the disclosure of the personnel records that are sought") (citing *Delmar Gardens,* 239 S.W.3d at 611) (emphasis added). But the holding in *Delmar Gardens* is not nearly so absolute: It recognized that personnel records are not "entirely undiscoverable in every case," and that there are instances where their discovery is appropriate. 239 S.W.3d at 611. Second, because of the trial court's unbounded request for *all* personnel records of the subpoenaed individual, the Missouri Supreme Court remanded the case to determine whether *some* amount of discovery may nevertheless be appropriate. *Id.* at 612-13. The court would not have contemplated such an outcome if personnel records were per se excluded from disclosure under the state statute. Therefore, *Delmar Gardens* does not establish a blanket prohibition on the disclosure of personnel records under Missouri law.

[46] Motion at 3.

[47] *Laut v. City of Arnold,* 417 S.W.3d 315, 317 (Mo. Ct. App. 2013).

IT IS SO ORDERED.

For the Commission

Carrie M. Safford
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of April 2024.

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licensing boards are to apply contemporaneous judicial concepts of standing that require a showing of a concrete and particularized injury that is fairly traceable to the challenged action and that is likely to be redressed by a favorable decision; LBP-24-4, 99 NRC 71, 79 (2024)
NRC's standing analysis also includes a zone-of-interests test whereby the injury must arguably be within the zone of interests protected by the governing statute; LBP-24-3, 99 NRC 39, 51 (2024)
proximity presumption allows petitioner to establish standing without the need to make an individualized showing of injury, causation, and redressability if that petitioner resides within 50 miles of the subject nuclear power reactor; LBP-24-4, 99 NRC 71, 79 (2024)
standing criteria require petitioner to provide certain identifying information and state nature of its right to be made a party, nature and extent of its interest; and possible effect of any decision on that interest; LBP-24-3, 99 NRC 39, 51 (2024)

Cammenga and Associates, LLC (Denial of License Amendment Requests), LBP-23-3, 97 NRC 59, 75 n.26 (2023)
although NRC Staff did not issue a notice of hearing in the settlement proceeding, participation by interested persons was not foreclosed; LBP-24-5, 99 NRC 95, 109 n.65 (2024)

Cammenga and Associates, LLC (Denial of License Amendment Requests), LBP-23-3, 97 NRC 59, 76 n.27 (2023)
where parties' proposed Settlement Agreement has been approved without modification and they have waived any right to challenge the validity of this order, Commission consideration of settlement approval will occur under its sua sponte review authority; LBP-24-5, 99 NRC 95, 110 n.66 (2024)

Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980)
boards do not direct NRC Staff in performance of their administrative functions, but the Commission has authority to do so; LBP-24-1, 99 NRC 1, 7 n.35 (2024)

Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980)
board seeks Commission's direction on a question that falls squarely within the Commission's inherent supervisory authority over conduct of adjudicatory proceedings; LBP-24-1, 99 NRC 1, 6-7 (2024)

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Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980)
presiding officers are to seek immediate Commission direction when questions arise regarding the scope of a presiding officer's delegated authority; LBP-24-1, 99 NRC 1, 6 (2024)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)
NRC's standing analysis also includes a zone-of-interests test whereby the injury must arguably be within the zone of interests protected by the governing statute; LBP-24-3, 99 NRC 39, 51 n.46 (2024)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993)
proximity presumption allows petitioner to establish standing without the need to make an individualized showing of injury, causation, and redressability if that petitioner has frequent contacts within 50 miles of the subject nuclear power reactor; LBP-24-4, 99 NRC 71, 79 (2024)

Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)
boards are not expected to sift through parties' pleadings to uncover and resolve arguments not advanced by litigants themselves; LBP-24-4, 99 NRC 71, 86 n.76 (2024)
petitioner bears the burden of setting forth a clear and coherent argument for standing; LBP-24-4, 99 NRC 71, 79 (2024)

Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 342-43 (2009)
affidavits used in one proceeding were insufficient to authorize representation in another proceeding involving the same license because organization did not make specific reference to the proceeding in which standing was sought; LBP-24-3, 99 NRC 39, 50 n.43 (2024)

Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 348-51 (2009)
contentions claiming deficiencies from an alleged failure to consult are not ripe if NRC Staff has not yet completed the relevant consultation requirements; LBP-24-3, 99 NRC 39, 66 (2024)

Crow Butte Resources, Inc. (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 261 (2020)
contentions claiming deficiencies from an alleged failure to consult are not ripe if NRC Staff has not yet completed the relevant consultation requirements; LBP-24-3, 99 NRC 39, 66 (2024)

Crow Butte Resources, Inc. (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 266-69 (2020)
petitioner will have an opportunity to advance any arguments on NRC's Endangered Species Act compliance in a new or amended contention when NRC Staff issues the final SEIS and must address the general admissibility criteria and heightened pleading standards for new and amended contentions; LBP-24-3, 99 NRC 39, 67 n.162 (2024)

Crow Butte Resources, Inc. (Marsland Expansion Area) CLI-20-1, 91 NRC 79, 101 (2020)
Native American tribe is not entitled to greater rights than it would otherwise have under the Atomic Energy Act and the National Environmental Policy Act as an interested party; LBP-24-2, 99 NRC 9, 29 (2024)

Doe v. United States, 253 F.3d 256, 266 (6th Cir. 2001)
administrative subpoena should be enforced when it seeks evidence that is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties; CLI-24-2, 99 NRC 115, 121 (2024)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 216 (2003)
mere speculation is insufficient to support an admissible contention; LBP-24-3, 99 NRC 39, 53 n.65 (2024)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009)
Commission disfavors contentions that serve as placeholders for future events; LBP-24-3, 99 NRC 39, 66 (2024)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
contention admissibility regulations are strict by design; LBP-24-4, 99 NRC 71, 82 (2024)

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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005)
failure to comply with any of the contention admission requirements renders a contention inadmissible; LBP-24-4, 99 NRC 71, 82 (2024)

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40 (2022)
Commission accepts board's certification and find the timing of NRC Staff's notice to be a reasonable interpretation of the Commission's instructions; CLI-24-1, 99 NRC 33, 34 (2024)

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 41 (2022)
Commission directed NRC Staff to update the 2013 Generic Environmental Impact Statement for License Renewal of Nuclear Plants so that it covers operations during the subsequent license renewal period; CLI-24-1, 99 NRC 33, 35 (2024)
Commission provided direction for five open subsequent license renewal proceedings; CLI-24-1, 99 NRC 33, 35 (2024)

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 41-42 (2022)
in interests of fairness and efficiency, NRC Staff was ordered to issue a new notice of hearing when it had completed its review; LBP-24-1, 99 NRC 1, 5 n.20 (2024)
premature notice of hearing arguably frustrates the remedy the Commission fashioned when it found the Staff's original environmental analysis incomplete; LBP-24-1, 99 NRC 1, 5 n.20 (2024)

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 42 (2022)
after each site-specific review is complete, a new notice of opportunity for hearing, limited to contentions based on new information in the site-specific environmental impact statement, will be issued; LBP-24-1, 99 NRC 1, 4 n.15 (2024)
applicants that do not wish to wait for the GEIS update and associated rulemaking could submit a revised environmental report providing information on environmental impacts during the subsequent license renewal period; CLI-24-1, 99 NRC 33, 35 (2024)
timing of issuance of notice of NRC Staff's draft and final supplemental environmental impact statement is contested; LBP-24-1, 99 NRC 1, 2 (2024)
with new notice of opportunity for hearing, petitioners were relieved of requirement to meet heightened pleading standards for new and amended contentions; LBP-24-1, 99 NRC 1, 4 n.18 (2024)

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 42-43 (2022)
timing for issuing hearing opportunity notices is changed for subsequent license renewal involving site-specific environmental impact statements; LBP-24-1, 99 NRC 1, 5 (2024)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7 (2002)
for a contention of omission, it is enough for petitioner to show what information is missing and explain why that information is required; LBP-24-3, 99 NRC 39, 59 n.104 (2024)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 10 (2002)
NEPA is intended to foster both informed decision-making and informed public participation; LBP-24-3, 99 NRC 39, 60 (2024)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)
contentions that merely allege an omission of information differ from those that challenge substantively and specifically how particular information has been discussed in a license application; LBP-24-3, 99 NRC 39, 59-60 n.105 (2024); LBP-24-4, 99 NRC 71, 87 n.79 (2024)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
petitioners need not prove their contentions at the admissibility stage, but the standards do require petitioners to proffer at least some minimal factual and legal foundation in support of their contentions; LBP-24-4, 99 NRC 71, 83 (2024)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)
contention admissibility rule should not be used as a fortress to deny intervention; LBP-24-3, 99 NRC 39, 53 n.62 (2024)

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Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 627 (1973)
NRC Staff has continuing responsibility and duty under the AEA to ensure applicants and licensees comply with applicable requirements both on paper and in reality; LBP-24-2, 99 NRC 9, 31 n.43 (2024)

Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016)
contention admissibility rule is strict by design; LBP-24-3, 99 NRC 39, 53 (2024); LBP-24-4, 99 NRC 71, 82 (2024)

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 45 (2022)
argument that did not establish a supported genuine dispute with the application was rejected; LBP-24-3, 99 NRC 39, 53 n.64 (2024)

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 103 (2022)
presiding officers are to seek immediate Commission direction when questions arise regarding the scope of a presiding officer's delegated authority; LBP-24-1, 99 NRC 1, 6 (2024)

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 104-05 (2022)
portions of a contention that raised a genuine material dispute with the application were admitted for hearing; LBP-24-3, 99 NRC 39, 53 n.62 (2024)

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015)
contentions must have some reasonably specific factual or legal basis; LBP-24-3, 99 NRC 39, 53 n.64 (2024)

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 837 (2006)
Commission derived public interest factors from an array of federal court settlement approval decisions; LBP-24-5, 99 NRC 95, 105 n.42, 107 (2024)

Exelon Generation Co. (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005)
as long as an environmental report on its face comes to grips with all important considerations, nothing more need be done; LBP-24-4, 99 NRC 71, 84 (2024)
in evaluating sufficiency of no-action alternatives, licensing boards are not to flyspeck environmental documents or add nuances; LBP-24-4, 99 NRC 71, 84 (2024)

Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384 (2012)
Category 1 issues have been codified and they cannot be challenged in a licensing proceeding except where a petitioner first obtains a waiver under 10 C.F.R. 2.335; LBP-24-4, 99 NRC 71, 92 (2024)

Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff'd on other grounds,* CLI-20-11, 92 NRC 335 (2020)
board is charged with independently determining standing even if unchallenged; LBP-24-4, 99 NRC 71, 79-80 (2024)

Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003)
bare assertions about significance of climate change impacts without tying them directly to existing environmental impact analysis for subsequent license renewal are inadmissible; LBP-24-3, 99 NRC 39, 69 (2024)
petitioner may not simply reference documents without clearly identifying or summarizing portions of the documents on which it relies; LBP-24-3, 99 NRC 39, 53 n.66 (2024)

FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 394 & n.4 (2012)
licensing boards have routinely, with the Commission's implicit endorsement, applied the proximity presumption in reactor license renewal proceedings; LBP-24-3, 99 NRC 39, 51 n.48 (2024)

FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 396 (2012)
contention admissibility rule serves to assess the scope, materiality, and support provided for a proposed contention, to ensure that the hearing process is properly reserved for genuine, material controversies between knowledgeable litigants; LBP-24-3, 99 NRC 39, 53 (2024)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-10 (2001)
NRC Staff's safety review of license renewal applications is limited as described in 10 C.F.R. Part 54; LBP-24-3, 99 NRC 39, 68 n.169 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001)
Category 1 determinations are not subject to site-specific review and fall beyond the scope of individual license renewal proceedings; LBP-24-4, 99 NRC 71, 91 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)
Commission and licensing boards generally look to contemporaneous judicial concepts of standing; LBP-24-3, 99 NRC 39, 51 (2024)
interests that the organization seeks to protect must be germane to its purpose, and neither the asserted claim nor the requested relief must require the member's participation; LBP-24-3, 99 NRC 39, 51 (2024)
three-part inquiry into standing assesses petitioner's injury, causation, and redressability; LBP-24-3, 99 NRC 39, 51 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-2, 95 NRC 26, 33, 36 (2022)
significant weight is given to the interest of meaningful public participation in agency decision-making, including NRC Staff's subsequent license renewal environmental reviews; LBP-24-1, 99 NRC 1, 5 n.20 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 258-59 (2019)
proximity presumption has been applied in subsequent license renewal proceedings; LBP-24-3, 99 NRC 39, 51 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 288 (2019)
contention lacked necessary information about the relationship between projected sea levels and site flooding; LBP-24-3, 99 NRC 39, 65 (2024)

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 288-89 (2019)
contention that air temperature during subsequent license renewal period will increase evaporation from cooling water canals, thereby increasing salinity and impacts on groundwater is inadmissible; LBP-24-3, 99 NRC 39, 65 (2024)

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
when assessing standing, boards construe the petition in favor of the petitioner; LBP-24-4, 99 NRC 71, 79 (2024)

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000), *petition for review denied,* CLI-16-13, 83 NRC 566 (2016), *petition for review denied, Natural Resources Defense Council v. NRC,* 879 F.3d 1202 (D.C. Cir. 2018)
absent a showing of bad faith, it is presumed that NRC Staff and applicant will honor their regulatory responsibilities; LBP-24-2, 99 NRC 9, 31 n.43 (2024)

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
bare assertions about significance of climate change impacts without tying them directly to the existing environmental impact analysis for the subsequent license renewal are inadmissible; LBP-24-3, 99 NRC 39, 69 (2024)
bare assertions and speculation are insufficient to trigger a contested hearing; LBP-24-3, 99 NRC 39, 53 n.65 (2024); LBP-24-4, 99 NRC 71, 90 n.100 (2024)
with no factual support for their argument regarding alleged synergistic effects of tritium, this claim is far too speculative to support an admissible contention; LBP-24-4, 99 NRC 71, 90 (2024)

Holtec International (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 190 (2020)
disputed issue is material if its resolution would make a difference in the outcome of the licensing proceeding; LBP-24-4, 99 NRC 71, 88 (2024)

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Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 54 (2001)
discussions of the no-action alternative in an environmental report can be brief and can incorporate by reference other sections of the ER that address adverse consequences from the proposed project; LBP-24-4, 99 NRC 71, 84 n.53 (2024)

Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), CLI-21-9, 93 NRC 244, 246 (2021)
petitioner seeking review of contention admissibility-related decisions other than where hearing request has been denied must persuade the Commission to exercise its discretionary authority; LBP-24-1, 99 NRC 1, 4 n.19 (2024)

Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), CLI-21-9, 93 NRC 244, 246-47 (2021)
together, the reopening requirements, showing of good cause for new and amended contentions, and contention admissibility requirements impose a higher standard for admitting a new contention after the board has terminated a proceeding than would otherwise apply; LBP-24-1, 99 NRC 1, 4 n.19 (2024)

Kleppe v. Sierra Club, 427 U.S. 390, 395 (1976)
Court considered whether NEPA required a federal agency to expand its analysis of the development of coal resources in a specific region into a comprehensive environmental impact statement covering the area as a whole; LBP-24-4, 99 NRC 71, 89 (2024)

Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976)
comprehensive EIS is required where several proposed actions are pending at the same time; LBP-24-4, 99 NRC 71, 90 (2024)

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976)
assertion that applicant's environmental report must contain an evaluation of tritium's possible synergistic effects is inadmissible; LBP-24-4, 99 NRC 71, 89 (2024)
when several proposals for actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together; LBP-24-4, 99 NRC 71, 90 (2024)

Kleppe v. Sierra Club, 427 U.S. 390, 414-15 (1976)
NEPA requires a concrete proposed federal action in order to trigger a comprehensive EIS; LBP-24-4, 99 NRC 71, 90 (2024)
no comprehensive EIS to cover an area as a whole is required under NEPA where there is no existing or proposed plan in place to develop the region as a whole; LBP-24-4, 99 NRC 71, 89-90 (2024)

Laut v. City of Arnold, 417 S.W.3d 315, 317 (Mo. Ct. App. 2013)
employee records that would have been publicly released are protected, but compliance with a federal subpoena would not result in public disclosure; CLI-24-2, 99 NRC 115, 124 (2024)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991)
NEPA mandates only consideration of reasonable alternatives that are capable of meeting the purpose and need of the proposed action; LBP-24-4, 99 NRC 71, 83 (2024)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)
NEPA is intended to foster both informed decision-making and informed public participation; LBP-24-3, 99 NRC 39, 60 (2024)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
adjudicatory record, board decision, and any Commission appellate decisions become, in effect, part of the final EIS; CLI-24-1, 99 NRC 33, 37 n.23 (2024)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97 (1998)
no-action alternative is governed by a rule of reason; LBP-24-4, 99 NRC 71, 84 (2024)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97-99 (1998)
applicant's environmental report must evaluate the environmental costs and benefits that would flow from not approving a project; LBP-24-4, 99 NRC 71, 83 (2024)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 98 (1998)
final environmental impact statement's incorporation by reference approach is not unreasonable; LBP-24-4, 99 NRC 71, 84 n.53 (2024)

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Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012)
- petitioner seeking review of contention admissibility-related decisions other than where hearing request has been denied must persuade the Commission to exercise its discretionary authority; LBP-24-1, 99 NRC 1, 4 n.19 (2024)

Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 388 (2012)
- NRC Staff may issue a supplemental EIS based on new and significant circumstances or information arising after the publication of the final EIS; CLI-24-1, 99 NRC 33, 37 (2024)

Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 390-91 (2012)
- contention that asserted a new report must be considered without including a sufficient explanation of the report's significance was inadmissible; LBP-24-3, 99 NRC 39, 64 (2024)

New York v. NRC, 681 F.3d 471, 478-79 (D.C. Cir. 2012)
- under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass; LBP-24-3, 99 NRC 39, 60 n.108 (2024)

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012)
- proper question is not whether there are plausible alternative choices for use in the environmental analysis, but whether the analysis that was done is reasonable under NEPA; LBP-24-3, 99 NRC 39, 53 n.68 (2024)

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012)
- bare assertions about significance of climate change impacts without tying them directly to the existing environmental impact analysis for the subsequent license renewal are inadmissible; LBP-24-3, 99 NRC 39, 69 (2024)
- challenge to NRC's compliance with NEPA by simply suggesting that additional information could be considered is not enough; LBP-24-3, 99 NRC 39, 53 (2024)
- contention that air temperature during subsequent license renewal period will increase evaporation from cooling water canals, thereby increasing salinity impacts on groundwater is inadmissible; LBP-24-3, 99 NRC 39, 66 (2024)
- for a contention to be admitted, petitioner must connect the dots to explain how its claims call into question the adequacy of existing analyses; LBP-24-3, 99 NRC 39, 61 (2024)
- petitioner fails to make the necessary connection between its preferred analysis and its claim that NRC Staff's analysis fails to satisfy NEPA; LBP-24-3, 99 NRC 39, 63 (2024)
- petitioner provides its own view of impacts to aquatic organisms in relation to seagrass decline, but does not engage with the analyses in the draft SEIS and thus fails to raise a genuine dispute; LBP-24-3, 99 NRC 39, 61 (2024)
- petitioners must explain how their claims call into question the adequacy of an existing analysis, not merely suggest other details that could have been included; LBP-24-4, 99 NRC 71, 85 n.71 (2024)

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 324 (2012)
- bare assertion that more analysis is needed is insufficient to support an admissible contention; LBP-24-3, 99 NRC 39, 61 (2024)
- petitioners often might find new information to consider, potentially making the environmental review process never-ending if not for the required showing that the new information is material to the Staff's analysis; LBP-24-3, 99 NRC 39, 64 (2024)
- proposal for an alternative NEPA analysis that may be no more accurate or meaningful was insufficient to establish a genuine, material dispute; LBP-24-3, 99 NRC 39, 61 n.113 (2024)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-00-9, 51 NRC 293, 294 (2000)
- withdrawal of a license application, with or without prejudice, effectively moots any adjudicatory proceeding regarding that application; LBP-24-2, 99 NRC 9, 20 (2024)

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998)
- board seeks Commission's direction on a question that falls squarely within the Commission's inherent supervisory authority over conduct of adjudicatory proceedings; LBP-24-1, 99 NRC 1, 6-7 (2024)

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North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999)
contention admissibility regulations are strict by design in order to exclude vague, unparticularized, or unsupported contentions; LBP-24-4, 99 NRC 71, 82 (2024)

Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762, 766-68 (1982)
licensing board has no authority to impose a withdrawal condition awarding reimbursement; LBP-24-2, 99 NRC 9, 27 n.37 (2024)

Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)
reply must be narrowly focused on the legal or factual arguments originally raised in the hearing request or the answers; LBP-24-3, 99 NRC 39, 69 (2024)

Oglala Sioux Tribe v. NRC, 45 F.4th 291, 305 (D.C. Cir. 2022)
challenge to agency's NEPA analysis was dismissed for continuing to ignore and failing to engage with the agency's actual analysis; LBP-24-3, 99 NRC 39, 61 n.112 (2024)

Oklo Power LLC (Aurora Reactor), CLI-20-17, 92 NRC 521, 523 (2020)
board seeks Commission's direction on a question that falls squarely within the Commission's inherent supervisory authority over conduct of adjudicatory proceedings; LBP-24-1, 99 NRC 1, 6-7 (2024)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 431 n.16 (2011)
licensing boards have routinely, with the Commission's implicit endorsement, applied the proximity presumption in reactor license renewal proceedings; LBP-24-3, 99 NRC 39, 51 (2024)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 442-43 (2011)
contention that challenged lack of probabilistic risk assessment of a newly discovered fault was admissible; LBP-24-3, 99 NRC 39, 68-69 n.173 (2024)
NRC analyzes environmental impacts of accidents as part of its review of license renewal applications, in either the GEIS or a site-specific supplemental environmental impact statement, which may include an evaluation of how external events might impact that analysis; LBP-24-3, 99 NRC 39, 68 n.173 (2024)

Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983)
applicant's decision to withdraw its application is generally considered a business judgment, the soundness of which is not a matter for licensing board consideration; LBP-24-2, 99 NRC 9, 19 (2024)

Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983)
Commission is without equitable powers or authority from enabling legislation to impose party's costs and expenses; LBP-24-2, 99 NRC 9, 27 n.37 (2024)

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981)
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terminating a case will not involve any merits disposition regarding a challenge to the application and is a central consideration in granting a "without prejudice" withdrawal; LBP-24-2, 99 NRC 9, 24 (2024)

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981)
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Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974-77 (1981)

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Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974-79 (1981)

Appeal Board considered whether a withdrawal with prejudice was appropriate for a pending nuclear power plant construction permit application; LBP-24-2, 99 NRC 9, 25 (2024)

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978 n.12 (1981)

challenge to a motion seeking withdrawal without prejudice can trigger further inquiry in the form of additional pleadings or an oral hearing; LBP-24-2, 99 NRC 9, 29 n.39 (2024)

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981)

mere allegations are insufficient to impose a withdrawal with prejudice; LBP-24-2, 99 NRC 9, 28 (2024)

possibility of future litigation with its expenses and uncertainties does not provide a basis for dismissal with prejudice; LBP-24-2, 99 NRC 9, 26 (2024)

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 & n.15 (1981)

claim of future harm to intervenors or the public interest lacks sufficient supporting information and so falls into the category of mere allegation; LBP-24-2, 99 NRC 9, 27 (2024)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)

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Public Service Co. of Indiana, Inc. and Wabash Valley Power Ass'n, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 723-24 (1988)

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Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989)

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Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989)

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Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132 (1981)

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- grant of license application withdrawal with prejudice absent a showing of substantial prejudice to the opposing party or to the public interest in general is highly unusual; LBP-24-2, 99 NRC 9, 19 (2024)
- terminating a case will not involve any merits disposition regarding a challenge to the application and is a central consideration in granting a "without prejudice" withdrawal; LBP-24-2, 99 NRC 9, 24 (2024)
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Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1134 (1981)
- petitioners have not made a showing of sufficient weight and moment to cause reasonable minds to inquire further so as to warrant a further inquiry into their claims; LBP-24-2, 99 NRC 9, 29 n.39 (2024)

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981)
- possibility of future litigation with its expenses and uncertainties does not provide a basis for dismissal with prejudice; LBP-24-2, 99 NRC 9, 26 (2024)
- tribal views on the sacredness of water and NRC's trust responsibility allow the board to look past intervenors' failure to proffer a colorable claim of substantial prejudice to their interests or to the public interest that is required to justify imposing a withdrawal with prejudice; LBP-24-2, 99 NRC 9, 29 (2024)

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 & n.11 (1981)
- proceeding that hardly got off the ground does not entail the type of significant resource expenditures that might warrant a withdrawal condition involving reimbursement; LBP-24-2, 99 NRC 9, 27 n.37 (2024)

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1138 (1981)
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- withdrawal with prejudice would entail the facility site's artificial exclusion from reinstituting a project; LBP-24-2, 99 NRC 9, 24 (2024)

Rockwell Int'l Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990)
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Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993)
- NEPA mandates only the consideration of reasonable alternatives that are capable of meeting the purpose and need of the proposed action; LBP-24-4, 99 NRC 71, 83 (2024)

Sequoyah Fuels Corp., CLI-95-2, 41 NRC 179, 192-93 (1995)
- conclusory statements and generalized concerns will not meet a proponent's burden of describing the possible deficiency that could be remedied through a requested condition on license withdrawal; LBP-24-2, 99 NRC 9, 19 (2024)

Sequoyah Fuels Corp., CLI-95-2, 41 NRC 179, 193 (1995)
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Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)
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Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997)
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Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207, 215 (1997)
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Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207, 222-23 (1997)
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Shaw Group, Inc. (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 227 (2013)
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Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013)
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Southern Nuclear Operating Co., Inc. (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 238 (2020)
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State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner, 239 S.W.3d 608, 612-13 (Mo. 2007) (en banc)
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Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 132 (2015)
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System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)
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Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-16-1, 83 NRC 97, 104 (2016)
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