

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

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

January 1, 2020 – June 30, 2020

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PREFACE

This is the ninety-first volume of issuances (1–257) 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, 2020, to June 30, 2020.

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).

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Michael M. Gibson
Dr. Sue H. Abreu

In the Matter of

Docket No. IA-19-027-EA
(ASLBP No. 20-963-01-EA-BD01)

THOMAS B. SAUNDERS
(Confirmatory Order)

January 8, 2020

Pending before the Licensing Board is an intervention request by Leonard Sparks that seeks to challenge a Confirmatory Order (CO) issued by the NRC Staff to Thomas Saunders. Mr. Sparks' request includes a motion to consolidate this enforcement proceeding with other enforcement proceedings. This Board denies Mr. Sparks' motion to consolidate.

RULES OF PRACTICE: CONSOLIDATION

“On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings . . . if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice.” 10 C.F.R. § 2.317(b).

RULES OF PRACTICE: CONSOLIDATION

Only a “party” to a proceeding has a “right to a formal consolidation.” *Edlow*

International Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977).

RULES OF PRACTICE: PARTIES

In NRC administrative adjudications, a “party” to a proceeding is distinguished from a “participant.” The latter is defined as an individual who “has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status.” 10 C.F.R. § 2.4 (defining “Participant”).

RULES OF PRACTICE: CONSOLIDATION

10 C.F.R. § 2.317(b) confers discretion on a licensing board to grant consolidation “on its own initiative . . . [if such] action will be conducive to the proper dispatch of its business and to the ends of justice.” 10 C.F.R. § 2.317(b); *see Edlow Int’l Co.*, CLI-77-16, 5 NRC at 1328.

RULES OF PRACTICE: CONSOLIDATION

The consolidation standard in 10 C.F.R. § 2.317(b) “mirrors Rule 42(a) of the Federal Rules of Civil Procedure which . . . provides that, if actions involve common questions of law or fact, they may be consolidated if consolidation would ‘avoid unnecessary costs or delay.’” *Edlow Int’l Co.*, CLI-77-16, 5 NRC at 1328 (quoting Fed. R. Civ. P. 42(a)(3) (1966)).

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

In an NRC adjudication, a motion must include “a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). If the motion fails to include such certification, it “must be rejected.” *Id.*

MEMORANDUM AND ORDER
(Denying Motion to Consolidate)

Pending before this Licensing Board is a request by Leonard Sparks to intervene in this proceeding to challenge a Confirmatory Order (CO) issued by

the NRC Staff to Thomas Saunders.¹ Mr. Sparks' request includes a motion to consolidate this proceeding with a challenge he is bringing to a CO issued by the NRC Staff to the Southern Nuclear Operating Company (SNC) in a different proceeding. *See* Sparks' Motion at 1.² For the reasons discussed below, we deny Mr. Sparks' motion to consolidate his intervention requests. We will address Mr. Sparks' request to intervene in this proceeding in a subsequent memorandum and order.³

I. BACKGROUND

For a consolidation request to be granted, a movant must demonstrate "good cause." 10 C.F.R. § 2.317(b). As discussed more fully *infra* Part II, to satisfy the "good cause" standard, the movant must establish that the proceedings (here, Mr. Sparks' two intervention requests) involve common questions of law or fact such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice. We summarize below the two challenged COs that Mr. Sparks seeks to consolidate as a prelude to our analysis of the commonality of questions of law or fact involved in Mr. Sparks' intervention requests.

A. The CO Issued to Mr. Saunders

In 2017, Mr. Saunders held the position of Contracts and Procurement Director for Construction at SNC's Vogtle Electric Generating Plant, Units 3 and 4 (Vogtle), in Georgia.⁴ In November 2018, the NRC Office of Investigations issued a report concluding that Mr. Saunders appeared to have willfully violated 10 C.F.R. § 52.5.⁵ According to the report, the offense occurred in July 2017

¹ *See* Motion to Intervene [in the Saunders Proceeding] and Motion to Combine Opposition with Related Proceeding (Nov. 29, 2019) [hereinafter Sparks' Motion].

² When Mr. Sparks filed his November 29 request seeking intervention and consolidation, he had not yet filed a challenge to the SNC CO. He filed such a challenge on December 20, 2019. *See* Motion to Intervene [in the SNC Proceeding] and Motion to Combine Opposition with Related Proceeding (Dec. 20, 2019) [hereinafter Sparks' SNC Petition].

³ To be clear, our ruling is limited to denying Mr. Sparks' motion to consolidate his intervention requests. It does not preclude him from again seeking consolidation in the event he were to attain "party" status — i.e., in the event his intervention requests were granted and he wished to seek to consolidate the adjudication of any admitted contentions. *See infra* note 12.

⁴ *See* [CO to Thomas B. Saunders] Effective Upon Issuance (IA-19-027) at 1 (Oct. 21, 2019) (ADAMS Accession No. ML19269C005) [hereinafter Saunders CO], published at 84 Fed. Reg. 57,778 (Oct. 28, 2019).

⁵ Section 52.5(a) provides that "[d]iscrimination . . . against an employee for engaging in certain
(Continued)

when Mr. Saunders directed that Mr. Sparks (who was a contract employee at Vogtle) be removed from the site and terminated. *See* Saunders CO at 2. When Mr. Saunders took that action, he was aware that Mr. Sparks previously had engaged in protected activity by raising numerous safety-related concerns. *See id.* at 1-2; Sparks’ Motion at 3-4.⁶

In June 2019, the NRC Staff notified Mr. Saunders of the results of the investigation and provided him with two options: (1) attend a predecisional enforcement conference; or (2) participate in an alternative dispute resolution (ADR) mediation session with the NRC.⁷ *See* Saunders CO at 2. Mr. Saunders chose the latter option, and on August 15, 2019, he and the NRC Staff participated in an ADR mediation session arranged through Cornell University’s Institute on Conflict Resolution. *See id.*

The mediator assisted the parties in reaching the settlement agreement embodied in the Saunders CO. *See* Saunders CO at 2. In that October 21, 2019 CO, Mr. Saunders “acknowledge[d] that a violation of 10 [C.F.R. §] 52.5 (Employee Protection) occurred,” *id.*, and he committed to taking specified corrective actions. In particular, Mr. Saunders committed to making presentations at SNC meetings and training sessions addressing “lessons learned regarding the importance of employee protection (to include contractors), why it is necessary to ensure proper follow-up in response, and proper follow-up when evaluating any potentially adverse personnel decisions.” *Id.* Those presentations will be “based on Mr. Saunders’ personal case study and [he] will honestly answer questions about what he failed to do ([specifically, he failed to] follow STAR [i.e., the SNC stop, think, act, review protocol governing employee protection matters], seek advice from management, consult with [the SNC Human Resources office], and engage with the consolidated concerns department).” *Id.* at 3. Mr. Saunders also committed to (1) making presentations at five nuclear industry forums within one year of the CO’s issuance; (2) submitting an article for publication to a nuclear industry forum; and (3) presenting at the NRC’s annual Regulatory Information Conference (RIC), if asked by the NRC Staff. *See id.* at 5-6.

The NRC Office of Enforcement concluded that Mr. Saunders’ commitments were “acceptable and necessary” and “that with these commitments the public health and safety are reasonably assured.” Saunders CO at 4.

protected activities is prohibited.” 10 C.F.R. § 52.5(a). “Protected activities” include the raising of safety-related concerns. *See id.* § 52.5(a)(1)(i).

⁶ Although Mr. Sparks is not identified by name in the Saunders CO, he attests (and neither Mr. Saunders nor the NRC Staff disputes) that he is the adversely impacted employee described therein. *See* Sparks’ Motion at 3 n.1.

⁷ An ADR mediation process is one in which a neutral mediator, with no decision-making authority, assists the parties in reaching an agreement on resolving any differences regarding a dispute. *See* Saunders CO at 2.

The CO stipulated that it “settle[d] the matter between the parties,” Saunders CO at 4, and that Mr. Saunders waived his right to a hearing. *See id.* The CO provided, however, that any other person adversely affected by the CO may request a hearing. *See id.* at 7. Mr. Sparks filed an intervention request in which he seeks to challenge, *inter alia*, the accuracy of the facts in the CO and the sufficiency of the corrective actions. *See Sparks’ Motion* at 7. Mr. Sparks moved to consolidate his challenge to the Saunders CO with his challenge to the SNC CO. *See Sparks’ Motion* at 1.

Mr. Saunders opposes Mr. Sparks’ intervention request and his motion to consolidate. *See Answer of Thomas B. Saunders in Opposition to Leonard Sparks’ Motion to Intervene and Request for Hearing* at 1-2 (Dec. 26, 2019) [hereinafter Saunders’ Answer]. The NRC Staff opposes Mr. Sparks’ intervention request but does not take a position on consolidation. *See NRC Staff’s Answer to Request for Hearing by Leonard Sparks* (Dec. 19, 2019) [hereinafter NRC Staff’s Answer]. Mr. Sparks filed a reply to Mr. Saunders’ answer, *see Sparks’ Reply to Saunders’ Answer to Sparks Motion to Intervene* (Jan. 3, 2020),⁸ but he did not reply to the NRC Staff’s answer.

B. The CO Issued to SNC

The November 20, 2019 CO issued by the NRC Office of Enforcement to SNC⁹ embodies a settlement agreement between the two parties resulting from an ADR mediation session in August 2019 addressing two allegedly willful violations of 10 C.F.R. § 52.5.¹⁰ *See SNC CO* at 1-2. In one incident, the NRC Office of Investigations determined that “SNC directed a contract employee at the Vogtle Units 3 and 4 construction site be removed in December 2015, in part, for engaging in protected activity.” *Id.* at 2. The other incident involved Mr. Saunders’ 2017 misconduct toward Mr. Sparks that is described *supra* Part I.A; specifically, the NRC Office of Investigations determined that “a contract employee [i.e., Mr. Sparks] was removed from the site by an SNC official [i.e.,

⁸ Mr. Sparks accompanied his reply with an unopposed motion to extend the January 2, 2020 deadline for filing his reply. *See Consent Motion for Extension of Time* (Jan. 3, 2020). We granted that motion. *See Licensing Board Order (Granting Consent Motion for Extension of Time)* (Jan. 7, 2020) (unpublished).

⁹ *See [CO to SNC] Modifying License Effective Upon Issuance (EA-18-130; EA-18-171)* (Nov. 20, 2019) (ADAMS Accession No. ML19249B612) [hereinafter SNC CO], published at 84 Fed. Reg. 65,426 (Nov 27, 2019).

¹⁰ Like the ADR session between the NRC and Mr. Saunders, the ADR session between the NRC and SNC was arranged through Cornell University’s Institute on Conflict Resolution and performed by a professional mediator. *See SNC CO* at 2.

Mr. Saunders] on July 13, 2017, in part, for engaging in protected activity.”¹¹ *Id.* Recognizing the “substantially similar broad corrective actions expected from the two cases, the NRC and SNC agreed to include both cases in [a single mediation session].” *Id.*

Although the “NRC and SNC agree[d] to disagree as to whether the violations occurred,” SNC CO at 1, 9, SNC nevertheless agreed to NRC modifications of its operating licenses for the Joseph M. Farley Nuclear Plant, the Edwin I. Hatch Nuclear Plant, and the Vogtle Electric Generating Plant to incorporate multiple corrective actions, including the following: (1) SNC will establish a fleetwide Employee Concerns Program that, *inter alia*, manages the intake of all construction concerns raised by employees and tracks corrective actions; (2) SNC will institute a review process covering termination or suspension of SNC employees that will consider, prior to termination or suspension, whether such adverse actions were the result of protected activity; (3) SNC will maintain a Discipline Review Process that must be followed by SNC, contractors, and subcontractors at the Vogtle project site when termination of a contract employee engaged in nuclear safety-related work is under consideration; (4) for three years, SNC will require all SNC employees who are onboarding to complete Safety Conscious Work Environment (SCWE) training, including training on the relevant NRC regulations protecting employees from discrimination based on protected activity; (5) for three years, SNC will require all new SNC supervisors to receive SCWE training within six months of beginning work as a supervisor; (6) within twelve months, SNC will present SCWE insights derived from these events to an industry-sharing forum (e.g., the NRC’s RIC or the National Association of Employee Concerns Professionals); (7) within three months, SNC will revise its SCWE policy to address lessons learned; (8) within three months, a senior SNC executive will issue a written communication to all SNC employees and contractors at the Vogtle project site reinforcing SNC’s commitment to maintaining an SCWE and reaffirming SNC’s insistence on the protection of employees’ rights and obligations to raise safety issues without fear of retaliation; and (9) within six months, and again within thirty months, SNC will obtain a third-party, independent SCWE survey of the Vogtle project site, and the results of both surveys will be made available to the NRC. *See* SNC CO at 1, 3-14.

The NRC Office of Enforcement concluded that SNC’s commitments were “acceptable and necessary” and “that with these commitments the public health and safety are reasonably assured.” SNC CO at 10.

¹¹ The SNC CO does not identify Mr. Saunders or Mr. Sparks by name; however, Mr. Sparks attests (and neither Mr. Saunders nor the NRC Staff disputes) that they were the parties involved in the July 2017 incident. *See* Sparks’ Motion at 4. Mr. Saunders was *not* the SNC official involved in the December 2015 incident that is described in the SNC CO. *See id.*; Saunders’ Answer at 8-9; NRC Staff’s Answer at 2 n.5.

The CO stipulated that it “settle[d] the matter between the parties,” SNC CO at 9, and that SNC waived its right to a hearing. *See id.* The CO provided, however, that any other person adversely affected by the CO may request a hearing. *See id.* at 14. On December 20, 2019, Mr. Sparks filed an intervention request in which he seeks to challenge, *inter alia*, the adequacy of the facts in the CO and the sufficiency of the corrective actions. *See Sparks’ SNC Petition* at 7.

II. LEGAL STANDARD

The NRC regulation governing consolidation provides in relevant part:

On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings . . . if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice . . .

10 C.F.R. § 2.317(b). Pursuant to Commission case law, only a “party” to a proceeding has a “right to a formal consolidation.” *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977).¹² Section 2.317(b) nevertheless confers discretion on a licensing board to grant consolidation “on its own initiative . . . [if such] action will be conducive to the proper dispatch of its business and to the ends of justice.” 10 C.F.R. § 2.317(b); *see Edlow Int’l Co.*, CLI-77-16, 5 NRC at 1328. Finally, the consolidation standard in section 2.317(b) “mirrors Rule 42(a) of the Federal Rules of Civil Procedure which . . . provides that, if actions involve common questions of law or fact, they may be consolidated if consolidation would ‘avoid unnecessary costs or delay.’” *Edlow Int’l Co.*, CLI-77-16, 5 NRC at 1328 (quoting Fed. R. Civ. P. 42(a)(3) (1966)).

III. ANALYSIS

Mr. Sparks moves to consolidate his intervention request challenging the accuracy and sufficiency of the Saunders CO with his intervention request challenging the adequacy and sufficiency of the SNC CO. *See Sparks’ Motion* at 1,

¹² In NRC administrative adjudications, a “party” to a proceeding is distinguished from a “participant.” The latter is defined as an individual who, like Mr. Sparks, “has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status.” 10 C.F.R. § 2.4 (defining “Participant”).

8-9.¹³ At the outset, we observe that two independent threshold obstacles impede consolidation. First, insofar as Mr. Sparks currently is not a “party” to either proceeding, *see supra* note 12, he has “no right to a formal consolidation.” *Edlow Int’l Co.*, CLI-77-16, 5 NRC at 1328. Second, Mr. Sparks failed to comply with the NRC regulatory requirement establishing that a motion must include “a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). Because of this failure, Mr. Sparks’ “motion must be rejected.” *Id.*

We nevertheless have discretion to consider consolidation on our own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice. *See* 10 C.F.R. § 2.317(b). Exercising this discretion, we conclude that consolidation is not warranted.¹⁴

At first glance, one might conclude that Mr. Sparks’ challenges to the two COs would involve common questions of law or fact because both relate to unlawful employment discrimination by SNC management based on protected conduct. On closer examination, however, it is clear that the two COs are more notable for their differences than their similarities.

As discussed *supra* Part I.A, the Saunders CO was issued to an individual who — having acknowledged a violation of the NRC’s Employee Protection regulation, 10 C.F.R. § 52.5 — agreed to make presentations at SNC meetings and training sessions at the Vogtle site “based on [his] personal case study,” including his failure to comply with company policies that are designed to protect employees. Saunders CO at 3. In addition, he agreed to make similar presentations at five nuclear industry forums and to submit an article for publication to an industry forum. *See id.* at 5-6.

In contrast, as discussed *supra* Part I.B, the SNC CO was issued to a company that — although it denied violating the agency’s Employee Protection regulation, 10 C.F.R. § 52.5 — agreed to adopt broad corrective actions that were not

¹³ Mr. Sparks also requests in passing that we consolidate this proceeding with a “Notice of Violation [NOV] against yet another SNC manager . . . for ‘blacklisting’ employees engaged in protected activities.” Sparks’ Motion at 8. We summarily deny that request because the NOV is not an agency enforcement order and, thus, does *not* include a provision allowing third parties an opportunity to intervene or seek a hearing. *See* [NOV] to Mark Rauckhorst (Nov. 20, 2019) (ADAMS Accession No. ML19301C710). Moreover, Mr. Sparks’ request to consolidate this proceeding with the NOV suffers from the two threshold impediments described above in text.

¹⁴ Mr. Sparks’ pleadings fail to cite, much less discuss, the NRC regulation governing consolidation. Nor does he craft a cogent argument demonstrating that the challenges he raises in his intervention requests involve common questions of law or fact sufficient to conclude that consolidation would promote adjudicatory efficiency.

limited to the Vogtle site, but that extended to its fleet of nuclear plants. *See* SNC CO at 1. Additionally, the curative actions SNC agreed to implement, which were institutional in nature and embodied in SNC’s licenses, included such programmatic changes as maintaining a fleetwide Employee Concerns Program; maintaining an adverse action review process for employees; maintaining a Discipline Review Process for contractors and subcontractors; and enhancing fleetwide awareness and effectiveness of the SCWE policy. *See id.* at 10-14.

In sum, Mr. Sparks is challenging *different* COs, issued to *different* respondents, arising from *different* (albeit partly overlapping) facts, and containing *different* corrective actions tailored to provide *different* (albeit complementary) cures. Moreover, in the Saunders CO, the respondent acknowledged a regulatory violation, whereas in the SNC CO, the respondent denied it. In light of these significant differences, we conclude that consolidation of the intervention requests would neither promote efficiency nor “be conducive to the proper dispatch of [adjudicatory] business.” 10 C.F.R. § 2.317(b). Consolidation is therefore not warranted. *Cf. Molycorp, Inc.* (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 172 (2000) (declining to consolidate two separately noticed materials license amendment proceedings, observing that each proceeding authorizes “its own discrete activities,” and the fact that “some factual or legal questions may overlap . . . is fortuitous, not legally controlling”).

IV. CONCLUSION

For the foregoing reasons, we *deny* Mr. Sparks’ motion to consolidate. It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Michael M. Gibson
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 8, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Sue H. Abreu
Dr. Gary S. Arnold

In the Matter of

Docket Nos. 50-289
50-320
(ASLBP No. 20-962-01-LA-BD01)

EXELON GENERATION
COMPANY, LLC
(Three Mile Island Nuclear Station,
Units 1 and 2)

January 23, 2020

In this proceeding concerning the license amendment application of Exelon Generation Co., LLC, seeking authorization to revise the Three Mile Island Nuclear Station (TMI) site emergency plan and emergency action level scheme to reflect the permanently defueled condition of both reactors at the TMI facility, finding that hearing petitioners Eric J. Epstein and Three Mile Island Alert, Inc., lack standing and have failed to proffer an admissible contention, the Licensing Board denies their hearing request and terminates the proceeding before the Board.

**OPERATING LICENSE AMENDMENTS: NO SIGNIFICANT
HAZARDS CONSIDERATION**

Under the Commission's regulations in 10 C.F.R. §§ 50.91(a)(4), 50.92(c), that implement the provisions of Atomic Energy Act of 1954 (AEA) section 189a(2)(A), 42 U.S.C. § 2239(a)(2)(A), upon an NRC Staff no significant haz-

ards consideration finding that a requested amendment to a 10 C.F.R. Part 50 reactor operating license or a 10 C.F.R. Part 52 reactor combined license would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety, the agency may make the requested amendment effective upon issuance despite the pendency of a hearing petition.

RULES OF PRACTICE: INTERVENTION PETITION(S) (PLEADING REQUIREMENTS; PRO SE PETITIONER)

STANDING TO INTERVENE (CONSTRUCTION OF PRO SE PETITION; BURDEN OF ESTABLISHING STANDING)

In an agency licensing proceeding, a hearing petition generally will be “construe[d] . . . in favor of the petitioner” as it seeks to demonstrate standing, while a pro se petitioner will not be held “to the same ‘standards of clarity and precision to which a lawyer might reasonably be expected to adhere.’” *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015) (quoting *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995), and *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 468, *aff’d*, CLI-15-25, 82 NRC 389, 394 (2015)). At the same time, whether pro se or otherwise, the petitioner bears the burden of establishing its standing. *See Turkey Point*, CLI-15-25, 82 NRC at 394.

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a request for a hearing/petition for leave to intervene must include:

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

10 C.F.R. § 2.309(d)(1)(i)-(iv). Ultimately, to establish standing, the Commission “insist[s] that an intervenor have some direct interest in the outcome of a proceeding.” *Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach

Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579 (2005).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT; ZONE OF INTERESTS)

A petitioner may establish traditional standing using contemporaneous judicial standing concepts by showing an injury-in-fact within the zones of interest protected by the statutes that govern agency proceedings (e.g., the AEA and the National Environmental Policy Act (NEPA)), causation, and redressability. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Specifically, the petitioner must demonstrate “a ‘concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,’ where the injury is ‘to an interest arguably within the zone of interests protected by the governing statute.’” *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) (quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

OPERATING LICENSE AMENDMENTS: STANDING TO INTERVENE (INJURY IN FACT)

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

“[A] petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility.” *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (citations omitted), *aff’d* LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom. Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000) (unpublished table decision); see also *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (“Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact’ that will result from the action taken”). This, in turn, requires that a petitioner must establish “a plausible nexus between the challenged license amendments and [petitioner’s] asserted harm.” *Zion*, LBP-98-27, 48 NRC at 277. Further, in making this showing a petitioner must “indicate *how* the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products.” *Zion*, CLI-99-4, 49 NRC at 189.

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

The proximity presumption, which has generally been applied in proceedings for reactor “construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool,” relieves a petitioner of the need to satisfy these traditional elements of standing. *St. Lucie*, CLI-89-21, 30 NRC at 329 (citation omitted). Rather, the proximity presumption permits a petitioner to establish standing based on proximity to the geographic zone of potential harm from a nuclear reactor. Specifically, a petitioner may use the proximity presumption if the petitioner lives, *see Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16; *St. Lucie*, CLI-89-21, 30 NRC at 329, has a significant property interest, *see USEC Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 314 (2005) (granting standing based on petitioner’s holding title to house near nuclear facility), or otherwise has frequent contacts within approximately 50 miles of a nuclear reactor, *see Perry*, CLI-93-21, 38 NRC at 95. A petitioner must specify contacts with the affected area in the petition, *see Consumers Energy Co. (Palisades Nuclear Plant)*, CLI-07-18, 65 NRC 399, 410 (2007) (stating the Commission requires “fact-specific standing allegations, not conclusory assertions,” such as “general assertions of proximity” to establish the proximity presumption); *see also Peach Bottom*, CLI-05-26, 62 NRC at 581, and the failure to include such crucial information constitutes grounds for denying standing, *see PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant)*, CLI-10-7, 71 NRC 133, 139 (2010); *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-99-10, 49 NRC 318, 325 (1999).

OPERATING LICENSE AMENDMENTS: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

The Commission does not automatically grant standing to a petitioner residing within a 50-mile radius of a reactor facility. Rather, in instances other than proceedings for the issuance or renewal of a reactor construction permit/operating license under 10 C.F.R. Part 50 or an early site permit/combined license under 10 C.F.R. Part 52, the proximity presumption is determined on a “case-by-case basis,” *Peach Bottom*, CLI-05-26, 62 NRC at 580, considering the petitioner’s location and “the nature of the proposed action and the significance of the radioactive source,” *id.* at 580-81 (quoting *Georgia Tech*, CLI-95-12, 42 NRC at 116-17). Notably, in license amendment cases the proximity presumption applies “only if the challenged license amendments present an obvious potential for offsite [radiological] consequences,” *Zion*, LBP-98-27, 48 NRC at 276

(quotation and citation omitted), which, in turn, depends on the “kind of action at issue, when considered in light of the radioactive sources at the plant,” *Peach Bottom*, CLI-05-26, 62 NRC at 581.

**RULES OF PRACTICE: STANDING TO INTERVENE
(ORGANIZATIONAL; REPRESENTATIONAL)**

Standing also can be shown by an organization by establishing either a cognizable injury to its organizational interests, i.e., organizational standing, or, alternatively, harm to the interests of its members, i.e., representational standing. *See Strata Energy, Inc. (Ross In Situ Recovery Uranium Project)*, LBP-12-3, 75 NRC 164, 177, *aff'd*, CLI-12-12, 75 NRC 603 (2012).

**RULES OF PRACTICE: STANDING TO INTERVENE
(REPRESENTATIONAL)**

To establish representational standing, an organization must demonstrate that “(1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization’s lawsuit.” *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). Moreover, in this context, an organization must demonstrate “how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member.” *International Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, 250 (2001).

RULES OF PRACTICE: DISCRETIONARY INTERVENTION

Under the agency’s rules of practice, a petitioner can request that the presiding officer consider granting discretionary standing when the petitioner cannot establish its standing as of right under one of the standards above. Such a request can be considered, however, only if another petitioner “has established standing and at least one contention has been admitted so that a hearing will be held.” 10 C.F.R. § 2.309(e). Discretionary standing thus is not an independent basis to establish standing.

**RULES OF PRACTICE: STANDING TO INTERVENE (SHOWING
BASED ON STANDING IN PRIOR PROCEEDING)**

A petitioner generally “must make a fresh standing demonstration in *each* proceeding in which intervention is sought because a petitioner’s circumstances may change from one proceeding to the next,” *Bell Bend*, CLI-10-7, 71 NRC at 138 & n.26 (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)) (“[T]he Board correctly concluded that Mr. Epstein could not rely on other boards’ findings of standing in the two prior proceedings concerning the Susquehanna facility.”), although a narrow exception may exist for a petitioner who establishes standing in one case to employ that standing determination in another proceeding that is “merely another round in a continuing controversy,” *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974).

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY;
BURDEN TO SATISFY ADMISSIBILITY CRITERIA)**

The contention admissibility standards are set forth in 10 C.F.R. § 2.309(f)(1). For a proposed contention to be admitted for litigation, it must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (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 requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief

10 C.F.R. § 2.309(f)(1)(i)-(vi). These six criteria aim to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) [hereinafter 2004 Part 2 Changes]. The petitioner bears the burden to satisfy each of the criteria, *see Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant)*, CLI-15-23, 82 NRC 321, 329 (2015) (“[I]t is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission.”) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)), and a failure to comply with any of the requirements constitutes grounds for rejecting a proposed contention, *see* 2004 Part 2 Changes, 69 Fed. Reg. at 2221; *see also Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; PRO SE PETITIONER)

With regard to a pro se petitioner, while the Commission has stated that “[a] board may consider the readily apparent legal implications of a *pro se* petitioner’s arguments, even if not expressly stated in the petition,” it also has indicated that this “authority is limited in that the petitioner — not the board — must provide the information required to satisfy our contention admissibility standards.” *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-18-4, 87 NRC 89, 96-97 (2018) (quotations and citations omitted).

RULES OF PRACTICE: NOTICE OF HEARING; SCOPE OF PROCEEDING

The hearing notice generally determines the scope of the hearing and may include any health, safety or environmental issues “fairly raised” by the proposed licensing action. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *see Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981) (“[T]he scope of any hearing should include the proposed [reactor decommissioning] license amendments, and any health, safety or environmental issues fairly raised by them.”).

RULES OF PRACTICE: CONTENTIONS (CHARACTER/ INTEGRITY OF APPLICANT/LICENSEE); SCOPE OF PROCEEDING

The Commission has emphasized that every agency licensing action does not “throw[] open an opportunity to engage in a free-ranging inquiry into the ‘character’ of the licensee.” *Georgia Power Co.* (Vogtle Electric Generating Plant,

Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). Instead, for such an inquiry to be warranted, there must be some “direct and obvious relationship” between the licensing action and the potential character issues. *Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 477 & n.62 (2019) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001)); *Zion*, CLI-99-4, 49 NRC at 189 (quoting *Vogtle*, CLI-93-16, 38 NRC at 32).

NEPA: CONTENTIONS (CATEGORICAL EXCLUSION)

NRC case law recognizes that a petitioner may challenge the invocation of a categorical exclusion to justify not preparing an environmental assessment or an environmental impact statement either by showing “the existence of ‘special circumstances’” or by showing “that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure.” *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 144 (2016).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; PRO SE PETITIONER)

While a licensing board does not require technical perfection in pleadings, see *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001) (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)), particularly in the case of a pro se petitioner, see *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999), any litigable concerns must meet the 10 C.F.R. § 2.309(f)(1) requirements for admissible contentions.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

As the Commission has recognized, directing a licensing board to an essentially undifferentiated mass of material with the claim that it contains relevant information will not fulfill the contention admissibility standards of section 2.309(f)(1). See *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (“It is simply insufficient, for example, for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application,

if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention.” (footnote omitted)).

OPERATING LICENSE AMENDMENTS: NO SIGNIFICANT HAZARDS CONSIDERATION

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

Based on well-established Commission precedent, an asserted challenge to an NRC Staff no significant hazards consideration determination is beyond the scope of the proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(iii), and is an impermissible challenge to NRC regulations under the provisions of 10 C.F.R. § 2.335. *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 8 (2019) (declaring that petitioner’s request to review a Staff no significant hazards consideration finding “is inconsistent with 10 C.F.R. § 50.58(b)(6), which states that “[n]o petition or other request for review of or hearing on the staff’s significant hazards consideration determination will be entertained by the Commission. The staff’s determination is final, subject only to the Commission’s discretion, on its own initiative, to review the determination.”); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (“Our regulations provide that “[n]o petition or other request for review of or hearing on the staff’s [no] significant hazards consideration determination will be entertained by the Commission.” . . . The regulations are quite clear in this regard.”) (quoting 10 C.F.R. § 50.58(b)(6)).

LICENSING BOARD(S): CONSIDERATION OF GENERIC ISSUES

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; MODE OF FORMULATION)

Considered beyond the scope of this proceeding is a petitioner’s request that the Board “review” a letter forwarded to the Board and the service list by e-mail. A licensing board’s authority in a proceeding such as this is not to review generalized concerns raised by a petitioner, but to develop an adequate adjudicatory record regarding, and reach a considered determination about, relevant issues presented in the context of any admissible contention, which petitioner’s e-mail (and its contents) clearly is not.

MEMORANDUM AND ORDER
(Denying Intervention Petition and Terminating Proceeding)

This proceeding stems from a July 1, 2019 license amendment request (LAR) by Exelon Generation Company, LLC, (Exelon) to amend the 10 C.F.R. Part 50 operating license for Three Mile Island Nuclear Station, Unit 1 (TMI-1).¹ Pursuant to 10 C.F.R. § 50.90, in its LAR Exelon asks to revise the Three Mile Island Nuclear Station (TMI) site emergency plan and emergency action level scheme to reflect the permanently defueled condition of both reactors at the TMI facility.² Pending before the Licensing Board is the November 12, 2019 hearing request of pro se petitioners Eric J. Epstein (Epstein) and Three Mile Island Alert, Inc. (TMIA), that sets forth two contentions challenging the Exelon LAR.³ Both the NRC Staff and Exelon filed answers opposing the petition, asserting Petitioners lack standing and have failed to proffer an admissible contention.⁴

For the reasons set forth below, we conclude that Petitioners have failed to establish their standing or to proffer an admissible contention. Accordingly, we deny Petitioners' hearing request and terminate this proceeding.

I. BACKGROUND

A. The TMI Facility and the Exelon TMI-1 LAR

The LAR at issue in this proceeding would revise the operating license for TMI-1, one of two permanently shutdown reactors at the TMI facility, which is located on an island in the Susquehanna River in Londonderry Township,

¹ See Letter from Michael P. Gallagher, Vice President, Exelon, to Nuclear Regulatory Commission (NRC) (July 1, 2019) (ADAMS Accession No. ML19182A182) [hereinafter LAR].

² See *id.* at 1-2. The LAR includes as attachments a more detailed description and evaluation of the proposed changes as well as the revised emergency plan and the emergency action levels and bases reflecting the defueled status of the two TMI reactors. See *id.* attach. 1 ([TMI] Description and Evaluation of Proposed Changes) [hereinafter LAR Changes Evaluation]; *id.* attach. 2 ([TMI] Permanently Defueled Emergency Plan (PDEP)) [hereinafter Defueled Emergency Plan]; *id.* attach. 3 ([Exelon TMI] Permanently Defueled Emergency Action Levels and Bases Document).

³ See [Epstein/TMIA] Petition to Intervene and Hearing Request (Nov. 12, 2019) at 28-49 [hereinafter Epstein/TMIA Petition]. Although the hearing petition is captioned "Eric J. Epstein, Chairman of [TMIA]'s Petition to Intervene and Hearing Request" and often refers to Mr. Epstein in a way that suggests he is the source of the concerns set forth in the petition, see, e.g., *id.* at 2 (stating "Mr. Epstein disputes"), given the petition also states that both Mr. Epstein and TMIA seek a hearing, see *id.* at 1, 52, we will refer to Mr. Epstein and TMIA collectively as "Petitioners."

⁴ See NRC Staff Answer to [TMIA] Petition (Dec. 6, 2019) [hereinafter Staff Answer]; [Exelon]'s Answer Opposing [Epstein]'s and [TMIA]'s Petition to Intervene (Dec. 9, 2019) [hereinafter Exelon Answer].

Pennsylvania. Originally owned by three subsidiaries of General Public Utilities Corp., later renamed GPU, Inc., (GPU) and operated by the GPU-created operating company GPU Nuclear, Inc., (GPUN) TMI-1 ownership and operating authority was transferred to AmerGen Energy Co., LLC, (AmerGen) in 1999,⁵ which nearly a decade later was consolidated into Exelon.⁶ The NRC issued a renewed operating license for TMI-1 to Exelon in October 2009.⁷

The other TMI unit, the Unit 2 reactor (TMI-2), is maintained by GPUN, which is now a wholly-owned subsidiary of FirstEnergy, Inc., (FirstEnergy) following a 2001 GPU/First Energy merger, albeit under a possession-only license because the TMI-2 reactor has been in the post-defueled monitored storage phase of the NRC's SAFSTOR process since 1993.⁸ Through a service agreement with FirstEnergy, AmerGen-successor Exelon retains the emergency planning responsibilities for both TMI-1 and TMI-2. *See* LAR at 2.

On June 20, 2017, Exelon submitted a certification to the NRC conveying its decision to permanently cease operations at TMI-1 no later than September 30, 2019.⁹ The LAR being challenged by Petitioners, one of several sought by Exelon in connection with the permanent shutdown of TMI-1, seeks to revise the site emergency plan and emergency action level scheme for the TMI site to reflect the cessation of operations and the defueling of TMI-1. *See id.* at 1-2.

Prior to submitting this LAR, Exelon sought and received approval for several other actions related to the permanent cessation of operations at TMI-1. On July 25, 2018, Exelon requested that the NRC revise the TMI-1 license and

⁵ *See* [GPUN] et al.; [TMI-1]; Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19,202, 19,203 (Apr. 19, 1999).

⁶ *See* In the Matter of [AmerGen]; [Exelon] ([TMI-1]); Order Approving Transfer of License and Conforming Amendment, 74 *id.* 127, 127 (Jan. 2, 2009).

⁷ *See* [Exelon], [TMI-1]; Notice of Issuance of Renewed Facility Operating License No. DPR-50 for an Additional 20-Year Period, 74 *id.* 55,871, 55,871 (Oct. 29, 2009); *see also* [Exelon] ([TMI-1]), Docket No. 50-289, Renewed Facility License No. DPR-50 (Oct. 22, 2009) (ADAMS Accession No. ML052720274).

⁸ *See* Letter from Gregory H. Halnon, President, GPUN, to NRC, attach. at 3 (Dec. 4, 2015) ([TMI-2] Post-Shutdown Decommissioning Activities Report (rev. 2 Dec. 2015)) (ADAMS Accession No. ML15338A222) [hereinafter TMI-2 PSDAR]; *see also* LAR at 2; Staff Answer at 3 n.11 (indicating post-defueling monitoring storage "is technically similar" to SAFSTOR).

SAFSTOR is a method of decommissioning in which a nuclear power facility is placed and maintained in a stable condition, with the fuel removed from the reactor vessel, so as to allow the facility to be safely stored and subsequently decontaminated to levels that permit release for unrestricted use. *See* Office of Nuclear Reactor Regulation (NRR), NRC, Staff Responses to Frequently Asked Questions Concerning Decommissioning of Nuclear Power Reactors, NUREG-1628, at 5 (June 2000) (ADAMS Accession No. ML003726190); *SAFSTOR*, NRC Library, Basic References, Glossary, <https://www.nrc.gov/reading-rm/basic-ref/glossary/safstor.html> (last visited Jan. 22, 2020).

⁹ *See* Letter from J. Bradley Fewell, Senior Vice President and General Counsel, Exelon, to NRC at 1 (June 20, 2017) (ADAMS Accession No. ML17171A151).

associated technical specifications to incorporate “Permanently Defueled Technical Specifications.”¹⁰ The Staff granted this request on August 29, 2019.¹¹ In addition, on April 5, 2019, Exelon submitted to the NRC the TMI-1 spent fuel management plan, site-specific decommissioning cost estimate, and post-shutdown decommissioning activities report (PSDAR).¹² Thereafter, on April 12, 2019, Exelon requested exemptions from 10 C.F.R. §§ 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) to (1) permit the use of funds from the TMI-1 decommissioning trust fund for spent fuel management activities, in accordance with the TMI-1 site-specific decommissioning cost estimate; and (2) make those withdrawals without prior NRC notification.¹³ The Staff granted the requested exemptions on October 17, 2019. *See* [Exelon]; [TMI-1], 84 Fed. Reg. 56,846, 56,846 (Oct. 23, 2019).

Citing the non-operational status of the TMI-1 and TMI-2 reactors, the LAR at issue here requests approval of a reduction in the scope of onsite and offsite emergency planning for the TMI facility proportional with the reduced risk Exelon claims is associated with both of the reactors in a permanently shutdown condition, i.e., in a SAFSTOR condition or with all spent fuel removed from the reactor and stored in the spent fuel pool. *See* LAR at 2. NRC approval of the LAR also would require favorable agency action on several exemption requests that were submitted in conjunction with the LAR. *See id.* In this regard, Exelon seeks exemptions from (1) certain standards found at 10 C.F.R. § 50.47(b) for onsite and offsite emergency response plans; (2) requirements in 10 C.F.R. § 50.47(c)(2) for plume exposure and ingestion pathway emergency planning zones for nuclear power plants; and (3) certain requirements in 10 C.F.R. Part 50, Appendix E, Section IV for the content of emergency plans.¹⁴ Relative to

¹⁰ *See* Letter from Michael P. Gallagher, Vice President, Exelon, to NRC at 1 (July 25, 2018) (ADAMS Accession No. ML18206A545), *as supplemented*, Letter from Michael P. Gallagher, Vice President, Exelon, to NRC (Mar. 6, 2019) (ADAMS Accession No. ML19065A217).

¹¹ *See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 84 Fed. Reg. 50,078, 50,086 (Sept. 24, 2019).

¹² *See* Letter from Michael P. Gallagher, Vice President, Exelon, to NRC, attach. (Apr. 5, 2019) (Spent Fuel Management Plan) (ADAMS Accession Nos. ML19095A009); Letter from Michael P. Gallagher, Vice President, Exelon, to NRC, attach. 1 (Apr. 5, 2019) ([TMI-1] Site-Specific Decommissioning Cost Estimate) (ADAMS Accession No. ML19095A010); Letter from Michael P. Gallagher, Vice President, Exelon, to NRC, attach. (Apr. 5, 2019) ([TMI-1 PSDAR]) (ADAMS Accession No. ML19095A041).

¹³ *See* Letter from Michael P. Gallagher, Vice President, Exelon, to NRC, attach. (Apr. 12, 2019) (Request for Exemption) (ADAMS Accession No. ML19102A085).

¹⁴ *See* Letter from Michael P. Gallagher, Vice President, Exelon, to NRC at 1-2 (July 1, 2019) (ADAMS Accession No. ML19182A104) [hereinafter Exemption Request]. Included as attachments

(Continued)

both the LAR and associated exemption requests, Exelon declares that 488 days after permanent cessation of operations at TMI-1 (i.e., on or about January 30, 2021), the requested exemptions, the proposed permanently defueled emergency plan, which encompasses emergency planning for both TMI-1 and TMI-2, and the permanently defueled emergency action level scheme may be implemented at the site, thereby reducing the scope of emergency planning. *See id.*; *see also* LAR Changes Evaluation at 2, 5; Exemption Request Description at 3-4. The proposed permanently defueled emergency plan and the requested exemptions also state that, even with the reduction in the scope of emergency planning, (1) the classification of an emergency will be made within 30 minutes after the availability of indications to operators that an emergency action level threshold has been breached; and (2) notification to State authorities will be made within 30 minutes after declaring an emergency.¹⁵

According to the LAR analysis supporting the proposed emergency planning changes for the TMI facility, the revisions are appropriate as a result of spent-fuel decay by the time the LAR and the associated exemptions would be implemented 488 days after TMI-1 reactor operations cease. At that point, no design-basis accident or reasonably conceivable beyond-design-basis accident will be expected to result in radioactive releases exceeding the Environmental Protection Agency's (EPA) protective action guidelines outside the site boundary.¹⁶ *See* LAR Changes Evaluation at 2; *see also* Exemption Request Description at 6-7. Further, as this LAR analysis explains, at that 488-day juncture implementing the 30-minute emergency classification and notification times and the reduced scope of onsite and offsite emergency response plans will not pose any undue risk to public health and safety because of the reduced accident risk and the slow development of the remaining postulated accident scenarios.¹⁷ *See*

to the Exelon exemption request was a description of the requested exemptions and a zirconium fire thermal hydraulic analysis for a drained spent fuel pool. *See id.* attach. 1 ([TMI] Request for Exemptions from Portions of 10 CFR 50.74(b), 10 CFR 50.47(c)(2) and 10 CFR Part 50 Appendix E) [hereinafter Exemption Request Description]; *id.* attach. 2 ([TMI] Zirconium Fire Analysis for Drained Spent Fuel Pool) [hereinafter Exemption Request Zirconium Fire Analysis].

¹⁵ *See* LAR Changes Evaluation at 2; Defueled Emergency Plan at 5, 12, 27, 38; Exemption Request Description at 20, 21-22 (providing for 30-minute notification for event classification and notification activities, as compared to 15-minute notification for these activities required for operating power reactors).

¹⁶ A "design-basis accident" is "[a] postulated accident that a nuclear facility must be designed and built to withstand without loss to the systems, structures, and components necessary to ensure public health and safety." *Design-basis accident*, NRC Library, Basic References, Glossary, <https://www.nrc.gov/reading-rm/basic-ref/glossary/design-basis-accident.html> (last visited Jan. 22, 2020).

¹⁷ In accord with Staff guidance, the accident scenario assessed by Exelon relative to reducing
(Continued)

LAR Changes Evaluation at 2, 7; *see also* Exemption Request Description at 21-22.

On September 26, 2019, in accordance with 10 C.F.R. § 50.82(a)(1)(ii), Exelon certified to the NRC that it had permanently removed all fuel from TMI-1 and placed the fuel in the spent fuel pool.¹⁸ Accordingly, the TMI-1 license no longer authorizes placement or retention of fuel in the reactor vessel or reactor operation. *See* TMI-1 Cessation Letter at 1 (citing 10 C.F.R. § 50.82(a)(2)).

B. This LAR Proceeding

On September 3, 2019, the NRC Staff issued a public hearing opportunity notice regarding the July 1, 2019 Exelon LAR, which was designated as a proposed “no significant hazards consideration” amendment pursuant to 10 C.F.R. § 50.92.¹⁹ On November 12, 2019, Mr. Epstein and TMIA timely filed their intervention petition asserting that both have standing and have proffered two admissible contentions. *See* Epstein/TMIA Petition at 17-49. Contention 1 challenges the financial assurance/qualifications and character/integrity of Exelon and FirstEnergy. *See id.* at 24-25, 28-40. Contention 2, on the other hand, raises a National Environmental Policy Act (NEPA) issue, stating “that the LAR cannot be approved without an updated environmental report based

the scope of offsite emergency planning consistent with the requested exemptions was the length of the decay period that would be required so that the TMI-1 spent fuel in the spent-fuel pool would not reach the zirconium ignition temperature of 900° Celsius in fewer than 10 hours following a loss of cooling, assuming adiabatic heatup (i.e., a conservative approach that assumes no cooling and no heat transfer). *See* LAR Changes Evaluation at 4-7 (citing NSIR/DPR-ISG-02, Interim Staff Guidance, Emergency Planning Exemption Requests for Decommissioning Nuclear Power Plants at 9-10 (May 11, 2015) (ADAMS Accession No. ML14106A147)); *see also* Exemption Request Description at 3-4; Exemption Request Zirconium Fire Analysis at 8 (indicating 488 days is minimum decay time needed for TMI-1 fuel assembly with maximum heat load).

¹⁸ *See* Letter from Michael P. Gallagher, Vice President, Exelon, to NRC at 1 (Sept. 26, 2019) (ADAMS Accession No. ML19269E480) [hereinafter TMI-1 Cessation Letter]. Based on this cessation date, implementation of the requested changes to the TMI facility emergency plan could be implemented on January 26, 2021.

¹⁹ *See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 84 Fed. Reg. 47,542, 47,548 (Sept. 10, 2019) [hereinafter Hearing Notice]. Under the Commission’s regulations in 10 C.F.R. §§ 50.91(a)(4), 50.92(c), that implement the provisions of AEA section 189a(2)(A), 42 U.S.C. § 2239(a)(2)(A), upon an NRC Staff no significant hazards consideration finding that a requested amendment to a 10 C.F.R. Part 50 reactor operating license or a 10 C.F.R. Part 52 reactor combined license would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety, the agency may make the requested amendment effective upon issuance despite the pendency of a hearing petition. *See* Hearing Notice, 84 Fed. Reg. at 47,543.

on a thorough environmental assessment performed at the beginning of the decommissioning process” *Id.* at 25. Petitioners in their hearing request also make several other arguments not strictly tied to their contentions, including disputing the Staff’s no significant hazards consideration analysis and finding and arguing the proposed offsite emergency planning “retreat to the [TMI site] fence line” embodied in the LAR “involve[s] a significant reduction in [the] margin of safety” so as to endanger nearby communities and leave them “underfunded and vulnerable.” *Id.* at 2-3.

The Staff opposes granting the petition. While recognizing that both Mr. Epstein and TMIA established standing in some prior agency licensing proceedings, the Staff argues that “neither past findings of standing nor past denials of standing are determinative for future proceedings.” Staff Answer at 13. The Staff maintains as well that Petitioners have failed to establish standing under the rubric of the proximity presumption, representational standing, or traditional standing. *See id.* at 12-18. Furthermore, the Staff asserts that both contentions are inadmissible for various reasons, including being beyond the scope of this proceeding and lacking materiality, and claims that the Petitioners’ ancillary arguments not explicitly labeled as contentions are meritless.²⁰ *See id.* at 20-33.

Exelon likewise opposes the petition, declaring that “Petitioners fail to demonstrate standing to intervene in this proceeding, either as a matter of right or as a matter of discretion under 10 C.F.R. § 2.309(d) and § 2.309(e), respectively,” maintaining that Petitioners failed to allege a particularized injury that could plausibly flow from the LAR or to explain why a hearing on the LAR is necessary to protect Petitioners’ interests. Exelon Answer at 2, 13-22. Further, Exelon argues that the petition should be rejected for failing to proffer an admissible contention and that Petitioners’ attack on the Staff’s proposed no significant hazards consideration finding is an impermissible challenge to NRC regulations and therefore outside the scope of this proceeding. *See id.* at 2, 3, 24-34.

By memorandum dated December 5, 2019, the Secretary of the Commission referred the petition to the Atomic Safety and Licensing Board Panel’s

²⁰ In connection with the scope of this proceeding, citing *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013), the Staff acknowledges that the relationship between Exelon’s LAR and its exemption request is such that “the hearing rights associated with the July 1, 2019 LAR extend also to the July 1, 2019 exemption request, and the scope of this proceeding should be construed to include the July 1, 2019 exemption request.” Staff Answer at 7; *see* Exelon Answer at 9-10 (indicating that both the LAR and the exemption request “are directly relevant to the proceeding”); *see also* *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549-54 (2016) (finding within the scope of the proceeding an emergency planning exemption request that would be implemented by a requested license amendment to reflect reactor facility’s permanently shutdown and defueled status).

Chief Administrative Judge. *See* Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Chief Administrative Judge (Dec. 5, 2019) [hereinafter SECY Referral Memorandum]. On December 9, 2019, the Chief Administrative Judge assigned the hearing request to this Licensing Board to rule initially on the standing and contention admissibility matters associated with the petition and, thereafter, preside at any hearing that might follow if the petition is granted. *See* [Exelon], Establishment of Atomic Safety and Licensing Board, 84 Fed. Reg. 67,969, 67,969-70 (Dec. 12, 2019). Following the receipt of the Staff and Exelon answers to the Epstein/TMIA petition, on December 10, 2019, the Board issued its initial prehearing order that, among other things, established December 16, 2019, as the date by which any petitioner could reply to the Staff and Exelon answers. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 10, 2019) at 2 (unpublished). The Petitioners did not file a reply pleading by that date.²¹ The Board issued a memorandum two days later indicating that, in accord with 10 C.F.R. § 2.309(j), the Board anticipated issuing a decision on the pending Epstein/TMIA hearing request by January 23, 2020. *See* Licensing Board Memorandum and Order (Information Regarding Schedule for Proceeding) (Dec. 18, 2019) at 2 (unpublished).

II. ANALYSIS

A. Standing

1. Standards for Establishing Standing

In an agency licensing proceeding, a hearing petitioner generally will be “construe[d] . . . in favor of the petitioner” as it seeks to demonstrate standing, while a pro se petitioner (such as Mr. Epstein and TMIA) will not be held “to the same ‘standards of clarity and precision to which a lawyer might reasonably

²¹ Petitioner Epstein did make an additional submission, however. In a December 26, 2019 e-mail directed to those on the proceeding’s service list, he provided (1) an ADAMS link to a December 20, 2019 letter from the Federal Emergency Management Agency (FEMA) to the NRC Office of Nuclear Security and Incident Response (NSIR) commenting on a Staff draft paper to the Commission concerning the Exelon-requested exemptions from certain emergency planning requirements for the TMI facility, *see* Letter from Michael S. Casey, Director, FEMA Technological Hazards Division, to Kathryn M. Brock, Director, NSIR Division of Preparedness and Response (Dec. 20, 2019) (ADAMS Accession No. ML19360A127) [hereinafter FEMA Letter]; and (2) the statement “Please review FEMA letter regarding Emergency Plan Exemptions.” E-mail from Eric Epstein to Hearing Docket and Service List (Dec. 26, 2019, 7:11 p.m. EST). In a December 27, 2019 order, the Board provided a schedule for Staff and Exelon responses to this e-mail, *see* Licensing Board Memorandum and Order (Establishing Schedule for Responses to Hearing Petitioner’s E-Mail) (Dec. 27, 2019) at 2 (unpublished) [hereinafter Board E-mail Order], but neither filed an answer.

be expected to adhere.”²² At the same time, whether pro se or otherwise, the petitioner bears the burden of establishing its standing. *See Turkey Point*, CLI-15-25, 82 NRC at 394. To establish standing, a request for a hearing/petition for leave to intervene must include:

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

10 C.F.R. § 2.309(d)(1)(i)-(iv). Ultimately, to establish standing, the Commission “insist[s] that an intervenor have some direct interest in the outcome of a proceeding.” *Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579 (2005).

In practice, depending on the proceeding, a petitioner may use one of several approaches to establish standing, such as traditional judicial standing, the proximity presumption, and organizational or representational standing. Further, as Petitioners referenced in their hearing request, in some instances a licensing board may grant discretionary standing. *See Epstein/TMIA* Petition at 23 (citing 10 C.F.R. § 2.309(e)).

A petitioner may establish traditional standing using contemporaneous judicial standing concepts by showing an injury-in-fact within the zones of interest protected by the statutes that govern agency proceedings (e.g., the Atomic Energy Act of 1954 (AEA) and NEPA), causation, and redressability. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Specifically, the petitioner must demonstrate “a ‘concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,’ where the injury is ‘to an interest arguably within the zone of interests protected by the governing statute.’”²³ In addition, “a petitioner seeking to intervene in a license amendment proceeding must assert

²² *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015) (quoting *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995), and *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 468, *aff’d*, CLI-15-25, 82 NRC 389, 394 (2015)).

²³ *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) (quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility.”²⁴ This, in turn, requires that a petitioner must establish “a plausible nexus between the challenged license amendments and [petitioner’s] asserted harm.” *Zion*, LBP-98-27, 48 NRC at 277. Further, in making this showing a petitioner must “indicate *how* the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products.” *Zion*, CLI-99-4, 49 NRC at 189.

Conversely, the proximity presumption, which has generally been applied in proceedings for reactor “construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool,” relieves a petitioner of the need to satisfy these traditional elements of standing. *St. Lucie*, CLI-89-21, 30 NRC at 329 (citation omitted). Rather, the proximity presumption permits a petitioner to establish standing based on proximity to the geographic zone of potential harm from a nuclear reactor. Specifically, a petitioner may use the proximity presumption if the petitioner lives,²⁵ has a significant property interest,²⁶ or otherwise has frequent contacts²⁷ within approximately 50 miles of a nuclear reactor. A petitioner must specify contacts with the affected area in the petition,²⁸ and the failure to include such crucial information constitutes grounds for denying standing.²⁹

The Commission, however, does not automatically grant standing to a petitioner residing within a 50-mile radius of a reactor facility. Rather, in instances other than proceedings for the issuance or renewal of a reactor construction permit/operating license under 10 C.F.R. Part 50 or an early site permit/combined license under 10 C.F.R. Part 52, the proximity presumption is determined on a “case-by-case basis,” *Peach Bottom*, CLI-05-26, 62 NRC at 580, considering the

²⁴ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (citations omitted), *aff’d* LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom. Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000) (unpublished table decision); *see also Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (“Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact’ that will result from the action taken . . .”).

²⁵ *See Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16; *St. Lucie*, CLI-89-21, 30 NRC at 329.

²⁶ *See USEC Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 314 (2005) (granting standing based on petitioner’s holding title to house near nuclear facility).

²⁷ *See Perry*, CLI-93-21, 38 NRC at 95.

²⁸ *See Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007) (stating the Commission requires “fact-specific standing allegations, not conclusory assertions,” such as “general assertions of proximity” to establish the proximity presumption); *see also Peach Bottom*, CLI-05-26, 62 NRC at 581.

²⁹ *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

petitioner's location and "the nature of the proposed action and the significance of the radioactive source," *id.* at 580-81 (quoting *Georgia Tech*, CLI-95-12, 42 NRC at 116-17). Notably, in license amendment cases the proximity presumption applies "only if the challenged license amendments present an obvious potential for offsite [radiological] consequences," *Zion*, LBP-98-27, 48 NRC at 276 (quotation and citation omitted), which, in turn, depends on the "kind of action at issue, when considered in light of the radioactive sources at the plant," *Peach Bottom*, CLI-05-26, 62 NRC at 581.

Standing also can be shown by an organization such as TMIA by establishing either a cognizable injury to its organizational interests, i.e., organizational standing, or, alternatively, harm to the interests of its members, i.e., representational standing. See *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 177, *aff'd*, CLI-12-12, 75 NRC 603 (2012). And to establish representational standing, an organization must demonstrate that "(1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit." *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Moreover, in this context, an organization must demonstrate "how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member." *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001).

Under the agency's rules of practice, a petitioner can request that the presiding officer consider granting discretionary standing when the petitioner cannot establish its standing as of right under one of the standards above. Such a request can be considered, however, only if another petitioner "has established standing and at least one contention has been admitted so that a hearing will be held." 10 C.F.R. § 2.309(e). Discretionary standing thus is not an independent basis to establish standing.

Finally, a petitioner generally "must make a fresh standing demonstration in *each* proceeding in which intervention is sought because a petitioner's circumstances may change from one proceeding to the next,"³⁰ although a narrow exception may exist for a petitioner who establishes standing in one case to em-

³⁰ *Bell Bend*, CLI-10-7, 71 NRC at 138 & n.26 (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)) ("[T]he Board correctly concluded that Mr. Epstein could not rely on other boards' findings of standing in the two prior proceedings concerning the Susquehanna facility.").

ploy that standing determination in another proceeding that is “merely another round in a continuing controversy.”³¹

With these legal precepts in mind, we turn to the question of whether Mr. Epstein and/or TMIA has demonstrated standing to intervene in this proceeding.

2. *Petitioners’ Standing*

a. *Eric J. Epstein*

In seeking to establish his standing, Mr. Epstein argues that he has (1) “personal standing” as “an area resident with a vested interest in Three Mile Island dating back to 1982”;³² (2) standing as chairman of TMIA; and (3) standing as a Board Director of the Central Dauphin School District, which is asserted to be within ten miles of the TMI facility. Epstein/TMIA Petition at 20, 27. In addition, Mr. Epstein claims that his participation in prior NRC proceedings “dating back to the 1970[s],” including a TMI-1 license transfer proceeding, grants him standing in this matter.³³

Initially, the Board notes that Mr. Epstein’s prior participation in other NRC proceedings does not, a priori, grant him standing in this case. Even disregarding the fact that the prior TMI-1 proceeding concerning facility ownership cited by Mr. Epstein as establishing his right to intervene as an individual resulted in a determination that he lacked standing,³⁴ that license transfer proceeding clearly is distinct from this case, which involves an LAR relating to the cessation of reactor operations at TMI-1.³⁵ Accordingly, Mr. Epstein must establish his standing to participate in this specific matter.

To accomplish this end, Mr. Epstein seeks to invoke the proximity presumption, *see* Epstein/TMIA Petition at 20, 27, but his showing in this regard is

³¹ *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974).

³² Mr. Epstein provides an address in the hearing petition, *see* Epstein/TMIA Petition at 52, but makes no specific showing regarding where he lives relative to the TMI facility, although in a 2005 proceeding he indicated that he “lives and operates a business 12 miles from the TMI nuclear facility,” *AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574 (2005).

³³ Epstein/TMIA Petition at 23; *see id.* at 18 (“The NRC has consistently found that Eric Epstein and TMI-Alert had standing in earlier NRC proceedings dating [back to] Restart of TMI-1 in 1980 through License Transfer of Unit-1 from AmerGen to Exelon in 2009.”).

³⁴ *See id.* at 18 (citing *TMI-1*, CLI-05-25, 62 NRC at 573-74); *TMI-1*, CLI-05-25, 62 NRC at 574-76 (concluding Mr. Epstein lacks standing).

³⁵ By the same token, although Mr. Epstein references his participation as chairman of TMIA and the EFMR Monitoring Group in negotiating various agreements with TMI facility owners regarding citizen radiation monitoring and other matters, *see* Epstein/TMIA Petition at 19-20, he has not demonstrated these activities are connected to this LAR proceeding by identifying any harm to his interests relative to these groups.

unsuccessful as well. Putting aside the question of whether his various assertions about the nature of his interests and contacts relative to the TMI facility are cognizable as “proximity” elements sufficient to establish his standing,³⁶ he has not made any effort in the context of this LAR proceeding to show there is an “obvious potential for offsite radiological consequences” arising from the proposed licensing action. Certainly, he has not made any attempt to distinguish this case from the previously referenced *Zion* proceeding. *See supra* note 24. There, in making a standing determination in the context of a license amendment proceeding to revise a permanently shutdown reactor facility’s technical specifications regarding such items as shift staffing numbers and composition, the Commission held that “given the shutdown and defueled status of the units, the license amendments do not on their face present any ‘obvious’ potential of offsite radiological consequences” so as to support the invocation of the proximity presumption. *Zion*, CLI-99-4, 49 NRC at 191.

As was the case in *Zion*, both TMI-1 and TMI-2 are permanently shut down and defueled. Ninety-nine percent of the TMI-2 spent-fuel assemblies and damaged core material already have been removed from the TMI site and are being stored by the Department of Energy. *See* TMI-2 PSDAR at 5. Further, based on an analysis of spent-fuel decay, the TMI-1 LAR indicates that in this permanently defueled condition, 488 days after permanent shutdown and defueling the requested amendment can be implemented. According to the LAR, at that time, “the number and severity of potential radiological accidents is significantly less than when the plant is operating,” such that “the offsite radiological consequences of accidents possible at TMI are substantially lower” and no design basis accident is expected that would result in offsite releases exceeding EPA’s protective action guidelines. LAR Changes Evaluation at 2, 4-7; *see* Exemption Request Description at 2-4. Mr. Epstein has not provided a credible showing of any offsite releases in the face of this LAR analysis. Accordingly, consistent with the Commission’s *Zion* decision, we find that Mr. Epstein has not demonstrated that the LAR, if granted, would pose any obvious potential for offsite radiological consequences at TMI and so has failed to establish proximity presumption standing.

Because the proximity presumption does not apply, our analysis turns next to a traditional standing inquiry and whether Mr. Epstein has demonstrated “an injury-in-fact associated with *the challenged license amendment.*” *Zion*, CLI-99-4, 49 NRC at 188. Yet his traditional standing arguments run afoul of the same difficulties that befell him in the *Peach Bottom* proceeding. *Peach Bottom* concerned a license transfer request pursuant to 10 C.F.R. § 50.80 in which Mr.

³⁶ *See Bell Bend*, CLI-10-7, 71 NRC at 140 (“Mr. Epstein’s additional claim that he is on the board of directors of two organizations with interests within 50 miles of the site is likewise insufficiently specific to articulate the requisite pattern of regular contacts with the area.”).

Epstein wished to intervene due to “his particular interest in the Peach Bottom facility.” *Peach Bottom*, CLI-05-26, 62 NRC at 580. The Commission found that Mr. Epstein failed adequately to address the standing requirement “that the proposed [licensing action] would injure his financial, property, or other interests.” *Id.* at 579 (citing 10 C.F.R. § 2.309(d)). According to the Commission, Mr. Epstein’s showing of past involvement at the facility, “both personal and through organizations,” “d[id] not demonstrate injury” because a “mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing.”³⁷ *Id.* at 579, 580. For essentially the same reasons outlined in *Peach Bottom*, Mr. Epstein has failed to establish an injury-in-fact stemming from the LAR at issue in this proceeding.

No more successful are Mr. Epstein’s standing assertions based on a purported interest in avoiding the “risk if there is a shortfall in the Decommissioning Fund that prevents the site from being fully decontaminated and restored” and a related concern about whether there is “financial assurance” that evacuation plans will be executed if required. Epstein/TMIA Petition at 21-22. These concerns amount to the type of “general objection[s]” that are not “associated with *the challenged license amendment*” and so are insufficient to establish standing. *Zion*, CLI-99-4, 49 NRC at 188. Here, Exelon seeks to alter emergency planning measures by reducing the scope of offsite and onsite emergency planning commensurate with the permanently defueled condition of TMI-1 (as well as TMI-2). *See* LAR at 2. There is nothing to suggest that such a change negatively implicates decommissioning funding, countering any assertion of a particularized injury showing a “plausible nexus” to the LAR. *Zion*, LBP-98-27, 48 NRC at 277.

Mr. Epstein thus has failed to establish his standing as of right to intervene in the LAR proceeding.

b. Three Mile Island Alert, Inc.

Although TMIA does not claim organizational standing, TMIA does assert

³⁷ In making that finding, the Commission declared:

Mr. Epstein never squarely addresses this “injury” requirement. Rather, he merely points to his involvement — both personal and through organizations — in numerous activities related to Peach Bottom. Specifically, Mr. Epstein points to his leadership roles in two citizen groups that monitor Peach Bottom and other plants for safety and radiation levels, his participation in negotiations regarding mergers of companies with a financial interest in Peach Bottom, his participation in negotiations involving the decommissioning tariff for Peach Bottom and other nuclear facilities, his roles as publisher and researcher of documents addressing nuclear and electric issues, and finally his status as an intervenor before both this Commission and the Pennsylvania Public Utility Commission on nuclear and electric issues.

Peach Bottom, CLI-05-26, 62 NRC at 579-80.

it is entitled to representational standing because it represents members who “live within the 10-mile geographical zone that might be affected by a release of fission products into the environment during or after decommissioning.” Epstein/TMIA Petition at 20. TMIA further states that its members’ interests in the LAR extend to “all aspects of TMI’s radiological decommissioning, spent nuclear fuel management, and site restoration.” *Id.* at 21 (citation omitted). Therefore, TMIA declares that it “is entitled to the presumption of injury-in-fact for persons residing within that zone.” *Id.* at 20. In support of these claims, TMIA submitted two affidavits from members opposed to the LAR. *See id.*, app. A (Affidavits). Both affidavits state the individuals are TMIA members who reside within ten miles of TMI, authorize TMIA to advocate on their behalf in this proceeding, and oppose the LAR. *See id.*

For the same reasons we rejected Mr. Epstein’s claims of standing, we are unable to accept TMIA’s declarations as adequate. TMIA failed to satisfy the first requirement of representational standing, namely, that “its members would otherwise have standing to sue in their own right.” *Private Fuel Storage*, CLI-99-10, 49 NRC at 323. The affidavits fail to show any obvious potential for offsite radiological consequences, fail to allege a particularized injury-in-fact stemming from the LAR, and otherwise fail to demonstrate “some scenario suggesting how th[is] particular [LAR] would result in a distinct new harm or threat to” these members. *Zion*, CLI-99-4, 49 NRC at 192. Because these TMIA members failed to establish standing in their own right, TMIA cannot claim representational standing on their behalf.

In sum, we conclude that neither Mr. Epstein nor TMIA established standing as of right to intervene in this proceeding. And as the only petitioners, discretionary standing under 10 C.F.R. § 2.309(e) is not available here.

B. Contention Admissibility

While Petitioners’ lack of standing alone requires dismissal of their petition, for the sake of completeness we also consider the admissibility of their proposed contentions.

1. Contention Admissibility Standards

The contention admissibility standards are set forth in 10 C.F.R. § 2.309(f)(1). For a proposed contention to be admitted for litigation, it must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(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 requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief

. . . .

10 C.F.R. § 2.309(f)(1)(i)-(vi). These six criteria aim to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) [hereinafter 2004 Part 2 Changes]. The petitioner bears the burden to satisfy each of the criteria,³⁸ and a failure to comply with any of the requirements constitutes grounds for rejecting a proposed contention.³⁹ And with regard to a pro se petitioner such as TMIA or Mr. Epstein, while the Commission has stated that “[a] board may consider the readily apparent legal implications of a *pro se* petitioner's arguments, even if not expressly stated in the petition,” it also has indicated that this “authority is limited in that the petitioner — not the board — must provide the information required to satisfy our contention admissibility standards.” *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-18-4, 87 NRC 89, 96-97 (2018) (quotations and citations omitted).

2. *Petitioners' Contentions*

a. *Contention 1*

Petitioners' Contention 1 states:

³⁸ See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015) (“[I]t is Petitioners' responsibility, not the Board's, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission.”) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)).

³⁹ See 2004 Part 2 Changes, 69 Fed. Reg. at 2221; see also *Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

Exelon's LAR does not provide financial assurances. It does not demonstrate that either Exelon or FirstEnergy are fiscally responsible, or that either have access to adequate funds for decommissioning[.] Neither does the LAR address the confused management organization, or where resources will be derived to deal with environmental impacts that would place the public health, safety, and the environment at risk.

Epstein/TMIA Petition at 28. In support of this "financial assurance" contention, Petitioners argue the LAR "do[es] not ensure that adequate funds for decommissioning will be available" and "[p]rovides [n]o [a]ssurance that TMI-1 and TMI-2 [h]ave the [f]unds [n]ecessary to [d]ecommission the [TMI independent spent fuel storage installation]." *Id.* at 33, 40. Petitioners also claim that FirstEnergy's current bankruptcy proceeding must be resolved before the NRC can approve the LAR, *see id.* at 16, and state that "NRC approval of the [LAR] would effectively approve the PSDAR," *id.* at 31. In addition, the Petitioners express concern about the use of the TMI decommissioning trust fund for spent fuel management activities and raise arguments regarding corporate management, the potential for spent fuel accidents, the challenges of high-burnup fuel, and prior radiological releases. *See id.* at 34-40.

As we outline below, Contention 1 is inadmissible because, at a minimum, the matters it raises are beyond the scope of this proceeding, and so this issue statement fails to fulfill the section 2.309(f)(1)(iii) element of contention admissibility.

The hearing notice generally determines the scope of the hearing and may include any health, safety or environmental issues "fairly raised" by the proposed licensing action.⁴⁰ In this instance, as the September 2019 hearing notice makes clear, the scope of the proceeding is defined by the LAR's proposal to "revise the site emergency plan and [e]mergency [a]ction [l]evel scheme for the permanently defueled condition [of TMI-1 and TMI-2]." Hearing Notice, 84 Fed. Reg. at 47,548. Contention 1 seeks to redirect the focus of this proceeding to Exelon's April 12, 2019 exemption request to use a portion of the decommissioning trust fund for spent fuel management activities,⁴¹ which was approved by the NRC Staff on October 16, 2019.⁴² The scope of this proceeding, however, is limited to the LAR- and exemption-request-identified modifications to

⁴⁰ *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *see Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981) ("[T]he scope of any hearing should include the proposed [reactor decommissioning] license amendments, and any health, safety or environmental issues fairly raised by them.").

⁴¹ *See* Epstein/TMIA Petition at 33 (citing *id.*, app. B ([TMIA's] Opposition to Exelon's Request for Exemptions Relating to [TMI-1]'s Decommissioning Trust Funds)).

⁴² *See* [Exelon]; [TMI-1]; Exemptions; Issuance, 84 Fed. Reg. 56,846 (Oct. 23, 2019).

emergency planning procedures proposed by Exelon to reflect the permanently shutdown and defueled status of TMI-1 and TMI-2.

Likewise beyond the scope of the proceeding are Petitioners' additional arguments concerning corporate structure, high-burnup fuel, potential spent-fuel accidents, and prior radiological releases, which assert generally that these matters raise decommissioning financial assurance issues. *See* Epstein/TMIA Petition at 34-40. None of these issues are discussed in, or are otherwise necessary components of, the LAR, as is apparent from the Exelon analysis provided in support of the LAR.⁴³ *See* LAR Changes Evaluation at 2; *see also supra* section I.A.

Petitioners' arguments concerning the "character and integrity" of Exelon and FirstEnergy are similarly beyond the scope of the proceeding. *See* Epstein/TMIA Petition at 24-25. At the outset, we emphasize that FirstEnergy is not the applicant nor is it a participant in this matter. FirstEnergy, as the corporate owner of TMI-2, entered into a service agreement with Exelon granting Exelon authority over emergency preparedness for TMI-2. *See* LAR at 2; LAR Changes Evaluation at 2; Defueled Emergency Plan at 1. Therefore, any references to the actions or inactions of FirstEnergy are beyond the scope of this proceeding.⁴⁴ Further regarding the "character and integrity" of Exelon, the Commission has emphasized that every agency licensing action does not "throw[] open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee." *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). Instead, for such an inquiry to be warranted, there must be some "direct and obvious relationship" between the licensing action and the potential character issues.⁴⁵ Nothing referenced by Petitioners provides a reasonable basis to suggest the character and integrity of

⁴³ Although Petitioners do postulate various spent-fuel pool-related accidents, *see* Epstein/TMIA Petition at 35-37, 39, to the degree these claims might be seen as challenging the LAR's technical basis, they fail to comply with the requirements of 10 C.F.R. § 2.309(f)(1)(v), (vi), as lacking support sufficient to establish the basis for an admissible contention.

⁴⁴ Petitioners make several arguments regarding FirstEnergy, such as claiming the LAR "usurps" FirstEnergy's license. Epstein/TMIA Petition at 7. We have been presented with nothing to suggest that the LAR does any such thing. Because each reference to an issue with FirstEnergy is beyond the scope of this proceeding, it is not necessary to address each FirstEnergy-related point. *See id.* at 7, 9, 13, 14, 15, 16.

⁴⁵ *Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 477 & n.62 (2019) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001)); *Zion*, CLI-99-4, 49 NRC at 189 (quoting *Vogtle*, CLI-93-16, 38 NRC at 32).

Exelon is relevant to the technical issue of the alteration of emergency plans at a permanently shutdown reactor.⁴⁶

In addition, Petitioners have attempted to mischaracterize the LAR as a license transfer proceeding and thereby make that a basis for this contention. *See* Epstein/TMIA Petition at 25. The LAR, however, only seeks an alteration of post-shutdown emergency planning procedures for the TMI site. Nor is there any validity to Petitioners' assertions that the LAR would "effectively approve the PSDAR." *Id.* at 31. As was noted above, the NRC Staff received PSDARs for TMI-1 and TMI-2, but not as part of this LAR. *See supra* notes 8 & 12. Moreover, the possibility of a surrogate approval of the PSDARs through this LAR is not a matter that requires any consideration in this proceeding. While a licensee must submit a PSDAR to the NRC and cannot perform major decommissioning activities until 90 days after a PSDAR is submitted, a PSDAR is not subject to NRC approval.⁴⁷ For those reasons, Petitioners' arguments related to the TMI PSDARs are beyond the scope of this proceeding.

In sum, Contention 1 is inadmissible because it is beyond the scope of this proceeding and so fails to fulfill the requirement of 10 C.F.R. § 2.309(f)(1)(iii).

b. Contention 2

Petitioners' Contention 2 provides:

The License Amendment Request Does Not Include the Environmental Report Required by 10 [C.F.R. §] 51.53(d), and has Not Undergone the Environmental Review Required by the National Environmental Policy Act.

Epstein/TMIA Petition at 40. In support of this issue statement, Petitioners contend that "[e]ven if the proposed [LAR] might not have any environmental impacts, the *possibility* of significant environmental impacts precludes a FONSI [(i.e., finding of no significant impact)] and triggers the need for an Environmental Impact Statement." *Id.* at 42. As backing for this claim, Petitioners cite to NEPA, the Council on Environmental Quality's NEPA-implementation regulations at 40 C.F.R. Part 1502, and several federal cases. *See id.* at 40-46.

⁴⁶ *See Zion*, CLI-99-4, 49 NRC at 190 (indicating post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity).

⁴⁷ *See* 10 C.F.R. § 50.82(a)(5). The NRC Staff does, however, inspect sites in decommissioning to ensure that decommissioning activities are conducted in accordance with applicable regulations and licensee commitments, including the PSDAR. *See* NRR, NRC, Inspection Manual Chapter 2561, Decommissioning Power Reactor Inspection Program at 3, 8, 9-10, 13, 15 (Mar. 6, 2018) (ADAMS Accession No. ML17348A400); *see also Oyster Creek*, CLI-19-6, 89 NRC at 476 (indicating that the NRC "performs onsite inspections of decommissioning activities").

Petitioners also declare that the potential for severe storms, flooding, spills into the Susquehanna River, and potential accidents warrant further NEPA analysis. *See id.* at 47-52.

Contention 2 is inadmissible because, at a minimum, it fails to “show that a genuine dispute exists with the [LAR] on a material issue of law or fact” and fails to “include references to specific portions of the [LAR].” 10 C.F.R. § 2.309(f)(1)(vi).

The LAR states that an environmental assessment is not required for this type of license amendment, citing 10 C.F.R. § 51.22(b). *See* LAR Changes Evaluation at 13. That provision of NRC’s 10 C.F.R. Part 51 NEPA-implementing regulations declares that absent “special circumstances,” an environmental assessment or environmental impact statement “is not required for any action within a category of actions included in the list of categorical exclusions set out in [10 C.F.R. § 51.22(c)].” 10 C.F.R. § 51.22(b). In supporting a categorical exclusion, the LAR discusses section 51.22(c)(9), *see* LAR Changes Evaluation at 13, which excludes license amendments from the environmental review requirement if three specified criteria are satisfied:

- (i) The amendment or exemption involves no significant hazards consideration;
- (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and
- (iii) There is no significant increase in individual or cumulative occupational radiation exposure.

10 C.F.R. § 51.22(c)(9)(i)-(iii). So too, the exemption request invokes section 51.22(c)(25) as justifying a categorical exclusion. *See* Exemption Request Description at 55-57. In addition to the three criteria specified above, that provision also requires that:

- (iv) There is no significant construction impact;
- (v) There is no significant increase in the potential for or consequences from radiological accidents; and
- (vi) The requirements from which an exemption is sought involve:
 - • • • •
 - (I) Other requirements of an administrative, managerial, or organizational nature.

10 C.F.R. § 51.22(c)(25)(iv)-(v), (vi)(I). In support of both the LAR and the exemption request, after analyzing the applicable requirements in 10 C.F.R. § 51.22(c)(9), (25), Exelon concluded that “no environmental impact statement or environmental assessment need be prepared in connection with” issuance of the LAR or the exemption proposal. LAR Changes Evaluation at 13; Exemption Request Description at 55-57; *see also* Staff Answer at 28-29.

NRC case law recognizes that a petitioner may challenge the invocation of a categorical exclusion either by showing “the existence of ‘special circumstances’” or by showing “that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure.” *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 144 (2016). Here, Petitioners “did not avail [themselves] of these opportunities.” *Id.* at 145. Indeed, Petitioners did not even acknowledge Exelon’s analysis of the matter, thus failing to fulfill their “‘iron-clad obligation’ to review the [LAR] thoroughly and to base their challenges on its contents,” as required by 10 C.F.R. § 2.309(f)(1)(vi).⁴⁸

Instead, in support of Contention 2 Petitioners allege other potential environmental impacts on the TMI facility that they claim have not been assessed in prior TMI environmental impact statements. For instance, Petitioners state that “[d]ue to the topography of the [TMI] site, contaminants will leak into the Susquehanna River,” and declare that the area is prone to flooding, which “can result in loss of offsite power and potential damage to nuclear generating stations,” and “can facilitate the dispersion of radioactive material to the environment.” Epstein/TMIA Petition at 46-48. Yet, in outlining these concerns, Petitioners fail to challenge the LAR’s categorical exclusion either by seeking to establish “special circumstances” or by controverting the section 51.22(c)(9) and (25) factors as analyzed by Exelon. *See Indian Point*, CLI-16-5, 83 NRC at 144-45. This likewise is fatal to the admissibility of their Contention 2.

In sum, Contention 2 is inadmissible because it fails to “show that a genuine dispute exists with the [LAR] on a material issue of law or fact” and fails to “include references to specific portions of the [LAR,]” contrary to the contention pleading requirements set forth in 10 C.F.R. § 2.309(f)(1)(vi).⁴⁹

3. *Additional Arguments*

Although they do not clearly fall within the ambit of either of the two proposed contentions, Petitioners made several additional arguments generally

⁴⁸ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 312 (2012) (citation omitted); *see Oyster Creek*, CLI-19-6, 89 NRC at 479-80 (concluding contention asserting further NEPA analysis is needed for a decommissioning-related license transfer application is inadmissible as failing to state a genuine material dispute because of petitioner’s failure to address license application section referencing and relying on categorical exclusion).

⁴⁹ With respect to the various federal court cases cited by Petitioners, we agree with the NRC Staff that those authorities are not relevant to the admissibility of Contention 2. *See Staff Answer* at 27 & n.177.

related to the TMI facility.⁵⁰ While we do not require technical perfection in pleadings,⁵¹ particularly in the case of a pro se petitioner,⁵² in addressing a few of the more noteworthy arguments below we do so with the understanding that to be litigable any concerns must meet the 10 C.F.R. § 2.309(f)(1) requirements for admissible contentions.

Petitioners first assert that the permanently defueled emergency plan does not account for TMI's "unique status" as an "isolated island with limited access" that is "further exasperated by frequent ice jams"; that TMI lies in proximity to an international airport, tourist attractions, Amish communities, and child care, memory care, and non-ambulatory facilities; and that TMI historically has had issues with communication failures and blizzard-related problems. Epstein/TMIA Petition at 4, 47; *id.* ex. 3, at i, ii (Critique of [LAR]). But these are mere allegations for which Petitioners fail to provide support with facts or expert opinions, to say nothing of relevant regulations or case law. Consequently, these assertions are inadmissible as contention material pursuant to 10 C.F.R. § 2.309(f)(1)(v), (vi).

Petitioners also dispute the NRC Staff's proposed no significant hazards consideration finding for the LAR, arguing the Staff performed a "cookie cutter" analysis that "was fatally flawed, limited in scope, and produced technically deficient conclusions." Epstein/TMIA Petition at 5, 7. Based on well-established Commission precedent,⁵³ however, Petitioners' assertion is beyond the scope

⁵⁰ In this regard, relative to both contentions, Petitioners make liberal use of "cross-referencing" to point the Board toward lengthy attachments, information on internet websites, and cited (but not provided) reports that they assert will support their contentions. *See, e.g.*, Epstein/TMIA Petition at 32, 34-35, 37, 39, 48, 50. As the Commission has recognized, directing a licensing board to an essentially undifferentiated mass of material with the claim that it contains relevant information will not fulfill the contention admissibility standards of section 2.309(f)(1). *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) ("It is simply insufficient, for example, for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention." (footnote omitted)).

⁵¹ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001) (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)).

⁵² *See Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999).

⁵³ *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 8 (2019) (declaring that petitioner's request to review a Staff no significant hazards consideration finding "is inconsistent with 10 C.F.R. § 50.58(b)(6), which states that '[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion,

(Continued)

of the proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(iii), and is an impermissible challenge to NRC regulations under the provisions of 10 C.F.R. § 2.335.

Thus, Petitioners' other arguments likewise are unavailing as admissible contentions.⁵⁴

III. CONCLUSION

Petitioners' hearing request in this license amendment proceeding expresses many concerns about the ongoing decommissioning process for the TMI facility. Nonetheless, both the support they provide for their standing to raise those concerns and the concerns themselves are wholly lacking as a basis for granting their hearing petition. Accordingly, their hearing request must be denied.

For the foregoing reasons, it is this twenty-third day of January 2020, ORDERED, that:

1. The November 12, 2019 hearing request of petitioners Eric J. Epstein and TMIA is *denied* and this proceeding is *terminated*.
2. In accordance with the provisions of 10 C.F.R. § 2.311, as this memorandum and order rules upon an intervention petition, any appeal to the Com-

on its own initiative, to review the determination.”); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (“Our regulations provide that “[n]o petition or other request for review of or hearing on the staff’s [no] significant hazards consideration determination will be entertained by the Commission.” . . . The regulations are quite clear in this regard.”) (quoting 10 C.F.R. § 50.58(b)(6)); *see also* SECY Referral Memorandum at 1 (stating that inasmuch as “no petition or other request for review of or hearing on the staff’s no significant hazards consideration determination will be entertained by the Commission,” the referral memorandum “is not to be construed as reflecting a determination that Mr. Epstein is entitled to a review of, or hearing on, the staff’s no significant hazards consideration determination.”).

⁵⁴ Putting aside the issue of Mr. Epstein’s procedurally problematic use of e-mail rather than the agency’s E-Filing system to forward the December 20, 2019 FEMA letter for Board consideration, *see* Board E-mail Order at 2 n.*, we also consider beyond the scope of this proceeding his request that the Board “review” the letter. A licensing board’s authority in a proceeding such as this is not to review generalized concerns raised by a petitioner, but to develop an adequate adjudicatory record regarding, and reach a considered determination about, relevant issues presented in the context of any admissible contention, which Mr. Epstein’s e-mail (and its contents) clearly is not.

mission from this memorandum and order must be taken within 25 days after this issuance is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 23, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Michael M. Gibson
Dr. Sue H. Abreu

In the Matter of

Docket No. IA-19-027-EA
(ASLBP No. 20-963-01-EA-BD01)

THOMAS B. SAUNDERS
(Confirmatory Order)

January 29, 2020

Pending before this Licensing Board is an intervention request from Leonard Sparks that seeks to challenge a Confirmatory Order (CO) issued by the NRC Staff to Thomas Saunders for wrongfully discriminating against Mr. Sparks. The Board denies Mr. Sparks' intervention request, thereby terminating this proceeding at the licensing board level.

RULES OF PRACTICE: INTERVENTION (ENFORCEMENT)

For an intervention request in an enforcement proceeding to be granted, a petitioner must (1) demonstrate standing; (2) proffer an admissible contention; and (3) satisfy the *Bellotti* doctrine, which derives its name from *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (affirming *Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)).

RULES OF PRACTICE: STANDING

In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner

to show “(1) an injury in fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.” *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (internal quotation marks omitted).

RULES OF PRACTICE: STANDING

Under section 189a of the Atomic Energy Act, the NRC is required 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). Pursuant to the agency’s regulation implementing general standing requirements, a petitioner’s hearing request must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [relevant statute] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

10 C.F.R. § 2.309(d)(1)(i)-(iv).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

In addition to demonstrating standing, a petitioner who seeks to intervene in an NRC adjudicatory proceeding must proffer a contention that satisfies the Commission’s six-factor standard for contention admissibility. Specifically, a petitioner must (1) provide a statement of the issue of law or fact being challenged; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner’s position on the issue; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The Commission has emphasized that the six-factor contention admissibility standard in 10 C.F.R. § 2.309(f)(1) is “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure by a petitioner to comply with any

admissibility requirement “renders a contention inadmissible.” *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

**RULES OF PRACTICE: STANDING TO INTERVENE
(ENFORCEMENT ACTIONS)**

Pursuant to the *Bellotti* doctrine, the threshold question in an enforcement proceeding, “intertwined with both standing and contention admissibility issues[] is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the Confirmatory Order should be sustained.” *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). Regarding standing, an “injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a [Confirmatory Order],” because such an assertion fails to establish harm that is traceable to the Confirmatory Order. *Id.* at 158.

**RULES OF PRACTICE: CONTENTIONS (ENFORCEMENT
ACTIONS)**

Regarding contention admissibility, a contention challenging a Confirmatory Order will be rejected as outside the scope of the proceeding unless it “oppose[s] the issuance of the order as unwarranted, so as to require relaxation, or [as] affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).” *Davis-Besse*, CLI-04-23, 60 NRC at 158 (quoting *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004)).

**ATOMIC ENERGY ACT: ENFORCEMENT ACTION (HEARING
RIGHT)**

The Commission has held that the dispositive inquiry under *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), for a third-party challenge to a CO “is whether the [CO] improves the licensee’s health and safety conditions. If it does, no hearing is appropriate.” *Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408 (2004).

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

When a respondent in an enforcement action has agreed to the terms of a

Confirmatory Order, “a challenge to the facts themselves by a [third party] is not cognizable.” *Alaska DOT*, CLI-04-26, 60 NRC at 408.

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

Allowing a third party “to attack a [CO] under the guise of a factual dispute would effectively permit an end run around *Bellotti*,” and would also “undercut our salutary policy favoring enforcement settlements.” *Alaska DOT*, CLI-04-26, 60 NRC at 408, 409.

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

The avenue for a petitioner to seek a personal remedy for alleged wrongful termination is through the U.S. Department of Labor. *See Alaska DOT*, CLI-04-26, 60 NRC at 407 & n.35; 10 C.F.R. § 52.5(b). If a petitioner believes that additional enforcement action is necessary to remedy employee discrimination, relief may be sought under 10 C.F.R. § 2.206, which provides that “[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a); *see also Alaska DOT*, CLI-04-26, 60 NRC at 407 n.35.

**MEMORANDUM AND ORDER
(Denying Intervention Request and Terminating Proceeding)**

Pending before this Licensing Board is an intervention request from Leonard Sparks that seeks to challenge a Confirmatory Order (CO) issued by the NRC Staff to Thomas Saunders for wrongfully discriminating against Mr. Sparks.¹ For the reasons discussed below, we deny Mr. Sparks’ intervention request, thereby terminating this proceeding at the licensing board level.

¹ *See* Motion to Intervene and Motion to Combine Opposition with Related Proceeding (Nov. 29, 2019) [hereinafter Sparks’ Petition]. Pursuant to NRC regulations, pleadings requesting to intervene are characterized as “petitions to intervene.” *See* 10 C.F.R. § 2.309(a). Accordingly, although Mr. Sparks labels his pleading as a motion to intervene, we will refer to it as a petition.

I. BACKGROUND

On October 21, 2019, the NRC Staff issued a CO to Mr. Saunders, the former Contracts and Procurement Director for Construction at Southern Nuclear Operating Company's (SNC's) Vogtle Electric Generating Plant, Units 3 and 4 (Vogtle), in Georgia.² The CO was the result of an agreement reached by Mr. Saunders and the NRC Staff during an Alternative Dispute Resolution mediation session that Mr. Saunders requested after the NRC Staff notified him of his apparent willful violation of 10 C.F.R. § 52.5.³ *See* Saunders CO at 2. According to a report prepared by the NRC Office of Investigations, the violation occurred in July 2017 when Mr. Saunders directed that Mr. Sparks (who was a contract employee at Vogtle) be removed from the site and discharged. *See id.* When Mr. Saunders took that action, he was aware that Mr. Sparks previously had raised numerous safety-related concerns, i.e., engaged in activity that is protected under section 52.5. *See id.* at 1-2.⁴

In the October 2019 CO, Mr. Saunders “acknowledge[d] that a violation of 10 [C.F.R. §] 52.5 (Employee Protection) occurred.” Saunders CO at 2. In consequence of that violation, Mr. Saunders agreed to take specified actions designed to enhance awareness of and compliance with section 52.5. In particular, Mr. Saunders agreed to make presentations at SNC meetings and training sessions addressing “lessons learned regarding the importance of employee protection (to include contractors), why it is necessary to ensure proper follow-up in response, and proper follow-up when evaluating any potentially adverse personnel decisions.” *Id.* Those presentations will be “based on Mr. Saunders’ personal case study and [he] will honestly answer questions about what he failed to do ([specifically, he failed to] follow STAR [i.e., the SNC stop, think, act, review protocol governing employee protection matters], seek advice from management, consult with [the SNC Human Resources office], and engage with the consolidated concerns department).” *Id.* at 3. Additionally, Mr. Saunders committed to (1) making presentations at five nuclear industry forums within one year of the CO’s issuance; (2) submitting an article for publication to a nuclear industry forum; and (3) making a presentation at the NRC’s annual Regulatory

² *See* [CO to Thomas B. Saunders] Effective Upon Issuance (IA-19-027) (Oct. 21, 2019) (ADAMS Accession No. ML19269C005) [hereinafter Saunders CO], published at 84 Fed. Reg. 57,778 (Oct. 28, 2019).

³ Section 52.5(a) provides that “[d]iscrimination . . . against an employee for engaging in certain protected activities is prohibited.” 10 C.F.R. § 52.5(a). “Protected activities” include the raising of safety-related concerns associated with the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974. *See id.* § 52.5(a)(1)(i).

⁴ Although Mr. Sparks is not identified by name in the Saunders CO, he attests (and neither Mr. Saunders nor the NRC Staff disputes) that he is the adversely impacted employee described therein. *See* Sparks’ Petition at 3 n.1.

Information Conference (if asked by the NRC Staff) that would address his regulatory violation and honestly answer questions about his misconduct. *See id.* at 5-6.

The NRC Office of Enforcement concluded that Mr. Saunders' commitments in the CO were "acceptable and necessary" and "that with these commitments the public health and safety are reasonably assured." Saunders CO at 4. The CO stipulated that it "settle[d] the matter between the parties," and that Mr. Saunders waived his right to a hearing. *Id.* The CO provided, however, that any other person adversely affected by the CO may request a hearing, *see id.* at 7, and, if a hearing were granted, "the issue to be considered . . . shall be whether this CO should be sustained." *Id.* at 10.

Mr. Sparks filed an intervention request in which he proffered two contentions. One contention challenged the facts in the CO, and the other challenged the sufficiency of the corrective actions. *See Sparks' Petition* at 7-8.⁵ The NRC Staff and Mr. Saunders filed answers opposing Mr. Sparks' intervention request.⁶ Mr. Sparks filed a reply to Mr. Saunders' answer,⁷ but he did not reply to the NRC Staff's answer.

II. LEGAL STANDARDS

For Mr. Sparks' intervention request to be granted, he must (1) demonstrate standing; (2) proffer an admissible contention; and (3) satisfy the *Bellotti* doctrine, which derives its name from *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (affirming *Boston Edison Co. (Pilgrim Nuclear Power Station)*, CLI-82-16, 16 NRC 44 (1982)). The *Bellotti* doctrine impacts standing *and* contention admissibility analyses in the context of enforcement proceedings. We summarize the legal standard associated with each of these requirements below.

⁵ Mr. Sparks also moved to consolidate this intervention request with (1) a Notice of Violation issued to a different individual; and (2) an intervention request challenging a CO issued to SNC. *See Sparks' Petition* at 7; 8-9. We denied that motion in a January 8, 2020 Memorandum and Order. *See LBP-20-1*, 91 NRC 1, 7-9 (2020).

⁶ *See NRC Staff's Answer to Request for Hearing by Leonard Sparks* (Dec. 19, 2019) [hereinafter *NRC Staff's Answer*]; *Answer of Thomas B. Saunders in Opposition to Leonard Sparks' Motion to Intervene and Request for Hearing* (Dec. 26, 2019) [hereinafter *Saunders' Answer*].

⁷ *See Sparks' Reply to Saunders' Answer to Sparks' Motion to Intervene* (Jan. 3, 2020) [hereinafter *Sparks' Reply*]. Mr. Sparks accompanied his reply with an unopposed motion to extend the January 2, 2020 deadline for filing his reply. *See Consent Motion for Extension of Time* (Jan. 3, 2020). We granted that motion. *See Licensing Board Order (Granting Consent Motion for Extension of Time)* (Jan. 7, 2020) (unpublished).

A. Standing

To intervene in an NRC adjudicatory proceeding, a petitioner must demonstrate standing. *See* 10 C.F.R. § 2.309(a).⁸ In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner to show “(1) an injury in fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.” *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (internal quotation marks omitted).

B. Contention Admissibility

In addition to demonstrating standing, a petitioner who seeks to intervene in an NRC adjudicatory proceeding must proffer a contention that satisfies the Commission’s six-factor standard for contention admissibility. Specifically, a petitioner must (1) provide a statement of the issue of law or fact being challenged; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner’s position on the issue; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi). The Commission has emphasized that the contention admissibility standard is “strict by design.” *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)). Failure by a petitioner to comply with any admissibility requirement “renders a contention inadmissible.” *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

⁸ Under section 189a of the Atomic Energy Act, the NRC is required 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). Pursuant to the agency’s regulation implementing general standing requirements, a petitioner’s hearing request must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [relevant statute] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

10 C.F.R. § 2.309(d)(1)(i)-(iv).

C. The *Bellotti* Doctrine

Pursuant to the *Bellotti* doctrine,⁹ the threshold question in an enforcement proceeding, “intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the [CO] should be sustained.” *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). Regarding standing, an “injury alleged as a result of failure to grant *more extensive relief* is not cognizable in a proceeding on a [CO],” because such an assertion fails to establish harm that is traceable to the CO. *Id.* at 158. Regarding contention admissibility, a contention challenging a CO will be rejected as outside the scope of the proceeding unless it “oppose[s] the issuance of the order as unwarranted, so as to require relaxation, or [as] affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).” *Id.* (quoting *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004)).

The Commission has held that the dispositive inquiry under *Bellotti* for a third-party challenge to a CO “is whether the [CO] improves the licensee’s health and safety conditions. If it does, no hearing is appropriate.” *Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408 (2004) [hereinafter *Alaska DOT*].

III. ANALYSIS

In his intervention request, Mr. Sparks seeks to challenge the facts and the proposed sanction in the CO (Contention 1), as well as the sufficiency of the corrective actions (Contention 2). Sparks’ Petition at 7. His proffered contentions state in full:

1. Whether the facts, as stated in the [CO], are true; and whether the proposed sanction is supported by these facts;

⁹In the *Bellotti* case, the Attorney General of Massachusetts, Francis Bellotti, challenged an enforcement order the NRC Staff had issued to the licensee of the Pilgrim Nuclear Power Station. The enforcement order limited the scope of any challenge brought by a third party to the issue of whether “this Order should be sustained.” *Bellotti*, 725 F.2d at 1382 n.2. Bellotti challenged the adequacy of the order (not its issuance), arguing that the order should be strengthened by adding corrective actions. *See id.* at 1382 & n.2. The Commission denied Bellotti’s intervention request because (1) his challenge to the adequacy of the order was outside the scope of the proceeding; and (2) he failed to assert injuries that were traceable to the order and thus failed to establish standing. *See Pilgrim*, CLI-82-16, 16 NRC at 45-46 & n.*. The United States Court of Appeals for the District of Columbia Circuit affirmed. *See Bellotti*, 725 F.2d at 1381-82.

2. Whether the actions agreed upon in the [CO] are sufficient to ensure that . . . Mr. Saunders; and the Licensee (SNC), and its supervisors, managers, executives and support infrastructure, i.e., [Human Resources], Compliance and Concerns Departments, and [Employee Concerns Program], as well as contractors, are sufficient to ensure that the workforce (employees and contractors), are free to raise safety concerns without fear of reprisal, in compliance with the NRC's requirements for Employee Protections[,] 10 [C.F.R. §] 52.5 "Employee Protection."

Id. at 7-8.

The NRC Staff and Mr. Saunders argue that Mr. Sparks' intervention request should be denied because, pursuant to the *Bellotti* doctrine, Mr. Sparks lacks standing and fails to proffer an admissible contention. *See* NRC Staff's Answer at 4-13; Saunders' Answer at 9-20. We agree.¹⁰

A. The Commission's Application of *Bellotti* in the Alaska DOT Decision

We begin our analysis by reviewing the Commission's 2004 decision in *Alaska DOT*, which, in our view, is identical in all material respects to this case. In that case, the NRC Staff issued a Notice of Violation (NOV) in which it concluded that Alaska DOT had discriminated against Robert Farmer, a Statewide Radiation Safety Officer, in retaliation for his having raised safety concerns. *See Alaska DOT*, CLI-04-26, 60 NRC at 402. Rather than contest the NOV, Alaska DOT agreed to comply with a CO that required it to take planning and training actions designed to ensure future compliance with the NRC's employee protection regulation. *See id.*

Farmer filed an intervention request with two contentions arguing that the CO should be rescinded and its corrective actions "replace[d] or supplement[ed] . . . with civil penalties and enforcement actions against individual managers." *Id.* at 402. Contention 1 included an attack on the adequacy of the CO because it allegedly failed to address the "illegal retaliatory actions and behaviors of Licensee managers, [and] the failure of the managers to address employee concerns about safety and compliance." *Id.* Contention 2 asserted that the CO should be rescinded because "it is not based upon an accurate assessment and

¹⁰Mr. Saunders also argues that the intervention request should be denied because it was not timely filed through the NRC's Electronic Information Exchange system, and it was filed beyond the deadline without a demonstration of good cause. *See* Saunders' Answer at 2, 7. Because we deny the intervention request for lack of standing and failure to proffer an admissible contention, we do not address these alternative procedural arguments for denial advanced by Mr. Saunders.

analysis of all the facts available to the Commission, or on a correct interpretation and application of [regulation and policy].” *Id.*¹¹

The Commission held that “*Bellotti* means that Farmer lacks ‘standing’ to seek a hearing and also lacks admissible contentions.” *Id.* at 404. Regarding standing, the Commission observed that the CO “mandates numerous actions for [Alaska DOT] to take to ensure a Safety Conscious Work Environment. These actions, including independent policy review, training, and a plan for assuring compliance with [NRC regulatory policy], cannot conceivably cause Farmer to suffer any injury.” *Id.* at 406. Absent injury attributable to the CO, held the Commission, “Farmer does not have standing.” *Id.* Regarding contention admissibility, the Commission concluded that both of Farmers’ contentions were outside the scope of the proceeding “because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures — in contravention of . . . *Bellotti*.” *Id.* at 405.

B. The *Bellotti* Doctrine, as Applied in *Alaska DOT*, Mandates Denial of Mr. Sparks’ Intervention Request for Lack of Standing and Lack of an Admissible Contention

Mr. Sparks claims that he has standing because the “vague” language in the CO harms his “professional reputation and credibility,” Sparks’ Petition at 6, and “do[es] nothing to ‘improve safety’ at the Vogtle facility.” Sparks’ Reply at 4 n.5; *see also* Sparks’ Petition at 6 (safety concerns at the Vogtle site are “ill served by this [CO]”). In other words, Mr. Sparks attacks the CO because, in his view, it is not adequately descriptive and it fails to impose adequate corrective actions. Here, as in *Alaska DOT*, “[t]his is really a request to impose different or additional enforcement measures — in contravention of . . . *Bellotti*.” 60 NRC at 405.

Significantly, here, as in *Alaska DOT*, the challenged CO mandates numerous corrective actions designed to enhance awareness of, and compliance with, the NRC regulation barring discrimination against employees for engaging in protected activities. *Compare* Saunders CO at 2-6 (describing corrective actions to be taken by Mr. Saunders), *with Alaska DOT*, 60 NRC at 406 (describing

¹¹ The *Alaska DOT* licensing board rejected Contention 1, concluding that it impermissibly sought to strengthen the relief in the CO, contrary to the *Bellotti* doctrine. *See Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), LBP-04-16, 60 NRC 99, 117 (2004). However, a majority of the board found that Contention 2 supported standing and raised a legitimate factual question that warranted a hearing. *See id.* at 117-18. Judge Bollwerk dissented from this ruling, concluding that the *Bellotti* doctrine precluded the admission of Contention 2. *See id.* at 120-23 (Separate Views of Bollwerk, J., Dissenting in Part). On appeal, the Commission “agree[d] with Judge Bollwerk’s dissent.” *Alaska DOT*, CLI-04-26, 60 NRC at 401.

corrective actions to be taken by Alaska DOT). The corrective actions in the Saunders CO — including presentations by Mr. Saunders at SNC meetings and training sessions that are “based on [his] personal case study” and that require him to “honestly answer questions about what he failed to do,” Saunders CO at 3 — “cannot conceivably cause [Mr. Sparks] to suffer any injury.” 60 NRC at 406; *see also id.* (“[A] petitioner . . . is not adversely affected by a [CO] that improves the safety situation over what it was in the absence of the order.”). Absent injury traceable to the CO, Mr. Sparks (like the petitioner in *Alaska DOT*) “does not have standing.” *Id.*

Mr. Sparks also fails to proffer an admissible contention under the *Bellotti* doctrine. Both of his contentions challenge the adequacy of the corrective actions in the CO,¹² and that is precisely what *Bellotti* forbids. *See Alaska DOT*, CLI-04-26, 60 NRC at 405. Pursuant to *Bellotti*, a contention challenging a CO must be rejected as outside the scope of the proceeding unless it claims that (1) the CO is unwarranted and, accordingly, its terms should be relaxed; or (2) the CO should be rescinded (as opposed to supplemented) because it is affirmatively detrimental to the public health and safety. *See Davis Besse*, CLI-04-23, 60 NRC at 158; *accord Alaska DOT*, CLI-04-26, 60 NRC at 406. Mr. Sparks’ contentions do not assert that the corrective measures in the Saunders CO should be relaxed or that the CO itself should be rescinded (as opposed to supplemented) for being detrimental to the public health and safety. His contentions thus fail to satisfy the *Bellotti* standard and, therefore, are inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding.

Finally, Mr. Sparks’ attempt to circumvent the *Bellotti* doctrine by characterizing Contention 1 as a factual challenge to the CO is foreclosed by the rationale in *Alaska DOT*, where the Commission concluded that when a respondent in an enforcement action (here, Mr. Saunders) has agreed to the terms of a CO, “a challenge to the facts themselves by a [third party] is not cognizable.” 60 NRC at 408. As the Commission explained, allowing a third party “to attack a [CO] under the guise of a factual dispute would effectively permit an end run around *Bellotti*,” and would also “undercut our salutary policy favoring enforcement settlements.” *Id.* at 408, 409.¹³

Admittedly, *Alaska DOT* is distinguished from this case in the following

¹² Contention 1 questions the facts and whether the “proposed sanction is supported by the[] facts,” i.e., whether the proposed sanction is adequate. Sparks’ Petition at 7. Contention 2 questions whether the corrective “actions agreed upon in the [CO] are sufficient” to ensure future compliance with the NRC’s employee protection regulation. *Id.*

¹³ The Commission recognized in *Alaska DOT* that the NRC Staff has broad discretion in enforcement matters, and the NRC’s “adjudicatory process is not an appropriate forum for petitioners . . . to second-guess enforcement decisions on resource allocations, policy priorities, or the likelihood of success at hearings.” 60 NRC at 407.

respect: there, the respondent who agreed to the CO was a licensee (Alaska DOT), whereas here, the respondent who agreed to the CO is a company official (Mr. Saunders). In our judgment, this is a distinction without a difference. In either circumstance, allowing a third party like Mr. Sparks to challenge a CO under the guise of a factual dispute would eviscerate the *Bellotti* doctrine and create a disincentive for respondents to settle enforcement matters. *See Alaska DOT*, CLI-04-26, 60 NRC at 408-09.¹⁴

We are not insensitive to the fact that Mr. Sparks, like the petitioner in *Alaska DOT*, “appears to have been a victim of retaliatory misbehavior,” or that, also like the petitioner in *Alaska DOT*, “the corrective measures outlined in the [challenged CO] do not improve [Mr. Sparks’] personal situation.” 60 NRC at 406, 407. But for purposes of considering Mr. Sparks’ intervention request, those facts are beside the point. The NRC’s “charter does not include providing [Mr. Sparks] a personal remedy.” *Id.* at 407. Rather, the NRC’s role “is to procure corrective action for the Licensee’s program, and by example, other licensee’s programs,” *id.*, and the enforcement measures in the Saunders CO serve that purpose.

Mr. Sparks’ avenue for seeking a personal remedy for alleged wrongful termination is through the U.S. Department of Labor, *see Alaska DOT*, CLI-04-26, 60 NRC at 407 & n.35,¹⁵ and he declares that he is pursuing relief through that channel. *See Sparks’ Petition* at 3; *Sparks’ Reply* at 4. And insofar as Mr. Sparks maintains that additional NRC enforcement action is necessary to remedy employee discrimination at Vogtle, he can seek relief under 10 C.F.R. § 2.206, which provides that “[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a); *see also Alaska DOT*, CLI-04-26, 60 NRC at 407 n.35.

IV. CONCLUSION

For the foregoing reasons, we *deny* Mr. Sparks’ request to intervene, thereby terminating this proceeding at the licensing board level. This Memorandum

¹⁴ Even putting the *Bellotti* doctrine aside, we conclude that the two contentions proffered by Mr. Sparks are inadmissible because his pleadings fail to show that (1) the issues raised are material to the proceeding; (2) adequate facts support his position; and (3) a genuine dispute exists on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi); *see also Saunders’ Answer* at 18.

¹⁵ *See* 10 C.F.R. § 52.5(b) (describing the process for seeking a remedy from the Department of Labor for any employee who believes he or she was discharged or otherwise discriminated against for engaging in protected activities).

and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311(b) and (c).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Michael M. Gibson
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 29, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Michael M. Gibson
Dr. Sue H. Abreu

In the Matter of

Docket Nos. 52-025
52-026
(ASLBP No. 20-965-03-EA-BD01)

**SOUTHERN NUCLEAR OPERATING
COMPANY**
(Vogtle Electric Generating Plant,
Units 3 and 4)

February 11, 2020

Pending before this Licensing Board is an intervention request that (1) seeks to challenge a Confirmatory Order issued by the NRC Staff to Southern Nuclear Operating Company; and (2) moves to consolidate this case with other enforcement proceedings. The Board denies both requests.

ENFORCEMENT ORDERS: CONFIRMATORY ORDERS

A Confirmatory Order is an enforcement order issued by the NRC Staff pursuant to 10 C.F.R. § 2.202(d) whereby a licensee (or other respondent) consents to an order and waives its right to challenge the order. Such orders create a legally binding agreement between the NRC and the licensee to take specified corrective actions. *See* NRC Enforcement Manual at 151 (rev. 11 Oct 1, 2019).

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

The NRC regulation governing consolidation provides in relevant part: “On motion and for good cause shown . . . the presiding officers of each affected proceeding may consolidate . . . two or more proceedings . . . if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice . . .” 10 C.F.R. § 2.317(b). Good cause can be established by showing that the relevant proceedings “involve common questions of law or fact [such that] consolidation would ‘avoid unnecessary costs or delay.’” *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977) (quoting Fed. R. Civ. P. 42(a)(3) (1966)).

RULES OF PRACTICE: INTERVENTION (ENFORCEMENT)

For an intervention request in an enforcement proceeding to be granted, a petitioner must (1) demonstrate standing; (2) proffer an admissible contention; and (3) satisfy the *Bellotti* doctrine, which derives its name from *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

RULES OF PRACTICE: STANDING

In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner to show “(1) an injury in fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.” *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (internal quotation marks omitted).

RULES OF PRACTICE: STANDING

Under section 189a of the Atomic Energy Act, the NRC is required 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). Pursuant to the agency’s regulation implementing general standing requirements, a petitioner’s hearing request must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [relevant statute] to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1)(i)-(iv).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

In addition to demonstrating standing, a petitioner who seeks to intervene in an NRC adjudicatory proceeding must proffer a contention that satisfies the Commission's six-factor standard for contention admissibility. Specifically, a petitioner must (1) provide a statement of the issue of law or fact being challenged; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner's position on the issue; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The Commission has emphasized that the six-factor contention admissibility standard in 10 C.F.R. § 2.309(f)(1) is "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure by a petitioner to comply with any admissibility requirement "renders a contention inadmissible." *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

RULES OF PRACTICE: STANDING TO INTERVENE (ENFORCEMENT ACTIONS)

Pursuant to the *Bellotti* doctrine, the threshold question in an enforcement proceeding, "intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the Confirmatory Order should be sustained." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). Regarding standing, an "injury alleged as a result of failure to grant *more extensive relief* is not cognizable in a proceeding on a [Confirmatory Order]," because such an assertion fails to establish harm that is traceable to the Confirmatory Order. *Id.* at 158.

**RULES OF PRACTICE: STANDING TO INTERVENE
(ENFORCEMENT ACTIONS)**

Under the *Bellotti* doctrine, which establishes that a petitioner lacks standing if he seeks to challenge an enforcement order that improves safety, “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That’s because such orders presumably enhance rather than diminish public safety.” *Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 406 n.28 (2004).

**RULES OF PRACTICE: CONTENTIONS (ENFORCEMENT
ACTIONS)**

Pursuant to the *Bellotti* doctrine, a contention challenging a Confirmatory Order will be rejected as outside the scope of the proceeding unless it “oppose[s] the issuance of the order as unwarranted, so as to require relaxation, or [as] affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).” *Davis-Besse*, CLI-04-23, 60 NRC at 158 (quoting *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004)).

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

An NRC Notice of Violation constitutes notice that the NRC Staff has determined that a violation of NRC requirements occurred; it is not an agency enforcement order and, thus, does not provide third parties with an opportunity to intervene or seek a hearing. *See* NRC Enforcement Manual at 13-15 (rev. 11 Oct. 1, 2019); *Thomas B. Saunders* (Confirmatory Order), LBP-20-1, 91 NRC 1, 8 n.13 (2020).

RULES OF PRACTICE: RESPONSIBILITIES OF COUNSEL

A motion to consolidate must include “a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). Motions that fail to include such a certification “must be rejected.” *Id.*

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

A third party cannot circumvent the *Bellotti* doctrine by asserting a factual dispute with a Confirmatory Order. When a licensee in an enforcement action has agreed to the terms of a Confirmatory Order, “a challenge to the facts themselves by a [third party] is not cognizable.” *Alaska DOT*, CLI-04-26, 60 NRC at 408.

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

Allowing a third party “to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around *Bellotti*,” and would also “undercut our salutary policy favoring enforcement settlements.” *Alaska DOT*, CLI-04-26, 60 NRC at 408, 409.

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

In considering an intervention request challenging a Confirmatory Order, the fact that the corrective measures in the order do not improve the petitioner’s personal situation is beside the point. The NRC’s “charter does not include providing a personal remedy.” *Alaska DOT*, CLI-04-26, 60 NRC at 407. Rather, the NRC’s role “is to procure corrective action for the Licensee’s program, and by example, other licensee’s programs.” *Id.*

**RULES OF PRACTICE: LITIGABILITY OF ISSUES
(ENFORCEMENT ACTIONS)**

The avenue for a petitioner to seek a personal remedy for alleged wrongful termination is through the U.S. Department of Labor. *See Alaska DOT*, CLI-04-26, 60 NRC at 407 & n.35; 10 C.F.R. § 52.5(b). If a petitioner believes that additional enforcement action is necessary to remedy employee discrimination, relief may be sought under 10 C.F.R. § 2.206, which provides that “[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a); *see also Alaska DOT*, CLI-04-26, 60 NRC at 407 n.35.

MEMORANDUM AND ORDER
(Denying Intervention Request and Motion to Consolidate,
and Terminating Proceeding)

Pending before this Licensing Board is an intervention request from Leonard Sparks¹ that challenges a Confirmatory Order (CO)² issued by the NRC Staff to the Southern Nuclear Operating Company (SNC). The CO is the product of an enforcement action arising from the NRC Staff's conclusion that SNC officials wrongfully discriminated against employees at the project site for SNC's Vogtle Electric Generating Plant, Units 3 and 4 (Vogtle). In his intervention request, Mr. Sparks also moves to consolidate this proceeding with two other enforcement actions. *See* Sparks' Petition at 1, 8. For the reasons discussed below, we (1) deny Mr. Sparks' motion to consolidate; and (2) deny his request to intervene, thereby terminating this proceeding at the licensing board level.

I. BACKGROUND

On November 20, 2019, the NRC Staff issued a CO to SNC memorializing an agreement the two parties reached during an Alternative Dispute Resolution (ADR) mediation session.³ The parties convened the ADR mediation session pursuant to SNC's request after the NRC Staff notified it of two apparent violations at Vogtle of the agency's employee protection regulation, 10 C.F.R. § 52.5.⁴ *See* SNC CO at 1-2.

One alleged violation occurred when an SNC official, Mark Rauckhorst (a former SNC Vice President), "directed [that] a contract employee at the Vog-

¹ *See* Motion to Intervene and Motion to Combine Opposition with Related Proceeding (Dec. 20, 2019) [hereinafter Sparks' Petition]. Pursuant to NRC regulations, pleadings requesting to intervene are characterized as "petitions to intervene." *See* 10 C.F.R. § 2.309(a). Accordingly, although Mr. Sparks labels his pleading as a motion to intervene, we will refer to it as a petition.

² A CO is an enforcement order issued by the NRC Staff pursuant to 10 C.F.R. § 2.202(d) whereby (as relevant here) a licensee consents to an order and waives its right to challenge the order. Such orders create a legally binding agreement between the NRC and the licensee to take specified corrective actions. *See* NRC Enforcement Manual at 151 (rev. 11 Oct. 1, 2019) (ADAMS Accession No. ML19274C228).

³ *See* [CO to SNC] Modifying License Effective Upon Issuance (EA-18-130; EA-18-171) (Nov. 20, 2019) (ADAMS Accession No. ML19249B612) [hereinafter SNC CO], *published at* 84 Fed. Reg. 65,426 (Nov 27, 2019).

⁴ Section 52.5(a) provides that "[d]iscrimination . . . against an employee for engaging in certain protected activities is prohibited." 10 C.F.R. § 52.5(a). "Protected activities" include the raising of safety-related concerns associated with the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974. *See id.* § 52.5(a)(1)(i).

the Units 3 and 4 construction site be removed in December 2015, in part, for engaging in protected activity. The contract employee was subsequently [discharged] by his employer on February 3, 2016.” SNC CO at 2.⁵ The other alleged violation occurred when “a contract employee [i.e., the petitioner in this case, Mr. Sparks] was removed from the site by an SNC official [i.e., Thomas Saunders] on July 13, 2017, in part, for engaging in protected activity . . . [Mr. Sparks] was subsequently [discharged] by his employer on July 14, 2017.”⁶ *Id.* The NRC Staff and SNC agreed to include the 2015 Rauckhorst incident and the 2017 Saunders incident in a single mediation session, recognizing the “substantially similar broad corrective actions expected from the two cases.” *Id.*

During the mediation session, the “NRC and SNC agree[d] to disagree as to whether the violations occurred.” SNC CO at 1, 9. SNC nevertheless agreed to NRC modifications of its operating licenses for the Joseph M. Farley Nuclear Plant, the Edwin I. Hatch Nuclear Plant, and the Vogtle Electric Generating Plant to incorporate multiple corrective actions, including the following:

- (1) SNC will establish a fleetwide Employee Concerns Program that, *inter alia*, manages the intake of all construction concerns raised by employees and tracks corrective actions;

⁵ Mr. Rauckhorst is not identified by name in the SNC CO, but there is no dispute that he was the SNC official involved in the 2015 incident. *See, e.g.*, Sparks’ Petition at 4 n.3, 7 & n.6. The NRC Staff subsequently issued a Notice of Violation (NOV) to Mr. Rauckhorst advising him that, as relevant here, the NRC determined he had engaged in deliberate misconduct in December 2015 when, in violation of 10 C.F.R. § 52.5, he caused a contract employee to be removed from the Vogtle site. *See* [NOV] to Mr. Mark Rauckhorst at 1-2 (Nov. 20, 2019) (ADAMS Accession No. ML19301C710) [hereinafter Rauckhorst NOV].

As discussed *infra* in text, Mr. Sparks has moved to consolidate the *Rauckhorst* enforcement proceeding with this case. *See* Sparks’ Petition at 8.

⁶ Mr. Sparks and Mr. Saunders are not identified by name in the SNC CO, but there is no dispute that they were the two individuals involved in the 2017 incident. *See, e.g.*, Sparks’ Petition at 3 n.2. In October 2019, the NRC Staff issued a CO to Mr. Saunders for wrongfully discriminating against Mr. Sparks. *See* [CO to Thomas B. Saunders] Effective Upon Issuance (IA-19-027) (Oct. 21, 2019) (ADAMS Accession No. ML19269C005) [hereinafter Saunders CO], *published at* 84 Fed. Reg. 57,778 (Oct. 28, 2019). Mr. Sparks petitioned to intervene in the *Saunders* case to challenge the Saunders CO, and in that petition he moved to consolidate the *SNC* and *Rauckhorst* enforcement proceedings with the *Saunders* case. *See* [Sparks’] Motion to Intervene [in the *Saunders* Proceeding] and Motion to Combine Opposition with Related Proceeding at 8-9 (Nov. 29, 2019). A licensing board denied Mr. Sparks’ motion to consolidate, *see Thomas B. Saunders* (Confirmatory Order), LBP-20-1, 91 NRC 1, 7-9 (2020), and it also denied his request to intervene in the *Saunders* case, thereby terminating that proceeding. *See Thomas B. Saunders* (Confirmatory Order), LBP-20-3, 91 NRC 42, 51-53 (2020).

As discussed *infra* in text, Mr. Sparks has moved to consolidate the *Saunders* enforcement proceeding with this case. *See* Sparks’ Petition at 8.

- (2) SNC will institute a fleetwide review process covering termination or suspension of SNC employees that will consider, prior to termination or suspension, whether such adverse actions were the result of protected activity;
- (3) SNC will maintain a Discipline Review Process that must be followed by SNC, contractors, and subcontractors at the Vogtle project site when removal or termination of a contract employee engaged in nuclear safety-related work is under consideration;
- (4) for three years, SNC will require all SNC employees who are onboarding to complete safety conscious work environment (SCWE) training, including training on the relevant NRC regulations protecting employees from discrimination based on protected activity;
- (5) for three years, SNC will require all new SNC supervisors to receive SCWE training within six months of beginning work as a supervisor;
- (6) within four months, SNC will provide training to existing management at the Vogtle project site addressing SCWE and relevant NRC regulations protecting employees from discrimination based on protected activity;
- (7) within twelve months, SNC will present SCWE insights derived from these events to an industry-sharing forum (e.g., the NRC's Regulatory Information Conference, the National Association of Employee Concerns Professionals);
- (8) within three months, SNC will revise its SCWE policy fleetwide to address lessons learned;
- (9) within three months, a senior SNC executive will issue a written communication to all SNC employees and to contractors at the Vogtle project site reinforcing SNC's commitment to maintaining an SCWE and reaffirming SNC's insistence on the protection of employees' rights to raise safety issues without fear of retaliation; and
- (10) within six months, and again within thirty months, SNC will obtain a third-party, independent SCWE survey of the Vogtle project site, and the results of both surveys will be made available for inspection by the NRC staff.

See SNC CO at 1, 3-14.

The NRC Office of Enforcement concluded that SNC's commitments were "acceptable and necessary" and "that with these commitments the public health and safety are reasonably assured." SNC CO at 10. The CO stipulated that it "settle[d] the matter between the parties," *id.* at 9, and that SNC waived its right to a hearing. *See id.* The CO provided, however, that any person adversely affected by the CO may request a hearing, *see id.* at 14, and if a hearing were to be granted, "the issue to be considered . . . shall be whether this [CO] shall be sustained." *Id.* at 18.

Mr. Sparks petitioned to intervene, and he proffered two contentions. One

contention challenged the sufficiency of the facts in the SNC CO, and the other challenged the sufficiency of the corrective actions. *See* Sparks’ Petition at 7. His petition also included a motion to consolidate the *Saunders* and *Rauckhorst* enforcement proceedings with this case. *See id.* at 8-9; *supra* notes 5 & 6. The NRC Staff and SNC filed answers opposing Mr. Sparks’ petition.⁷ Mr. Sparks did not file a reply.

II. LEGAL STANDARDS

For Mr. Sparks’ consolidation motion to be granted, he must show “good cause.” For his intervention request to be granted, he must (1) demonstrate standing; (2) proffer an admissible contention; and (3) satisfy the *Bellotti* doctrine,⁸ which impacts standing *and* contention admissibility analyses in the context of enforcement proceedings. We discuss the legal standards associated with these requirements below.

A. Consolidation

The NRC regulation governing consolidation provides in relevant part: “On motion and for good cause shown . . . the presiding officers of each affected proceeding may consolidate . . . two or more proceedings . . . if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice . . .” 10 C.F.R. § 2.317(b). Good cause can be established by showing that the relevant proceedings “involve common questions of law or fact [such that] consolidation would ‘avoid unnecessary costs or delay.’” *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977) (quoting Fed. R. Civ. P. 42(a)(3) (1966)).

B. Standing

To intervene in an NRC adjudicatory proceeding, a petitioner must demon-

⁷ *See* NRC Staff’s Answer to Request for Hearing by Leonard Sparks (Jan. 10, 2020) [hereinafter NRC Staff’s Answer]; [SNC’s] Answer in Opposition to Leonard Sparks’ Motion to Intervene and Motion to Combine (Jan. 13, 2020) [hereinafter SNC’s Answer].

⁸ The *Bellotti* doctrine derives its name from *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

strate standing. See 10 C.F.R. § 2.309(a).⁹ In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner to show “(1) an injury in fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.” *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (internal quotation marks omitted).

C. Contention Admissibility

In addition to demonstrating standing, a petitioner who seeks to intervene in an NRC adjudicatory proceeding must proffer a contention that satisfies the Commission’s regulatory six-factor standard for contention admissibility. Specifically, a petitioner must (1) provide a statement of the issue of law or fact being challenged; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner’s position on the issue; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi). The Commission has emphasized that the contention admissibility standard is “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any admissibility requirement “renders a contention inadmissible.” *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

⁹ Under section 189a of the Atomic Energy Act, the NRC is required 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). Pursuant to the agency’s regulation implementing general standing requirements, a petitioner’s hearing request must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [relevant statute] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

10 C.F.R. § 2.309(d)(1)(i)-(iv).

D. The *Bellotti* Doctrine

Pursuant to the *Bellotti* doctrine,¹⁰ the threshold question in an enforcement proceeding, “intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the [CO] should be sustained.” *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). Regarding standing, an “injury alleged as a result of failure to grant *more extensive relief* is not cognizable in a proceeding on a [CO],” because such an assertion fails to establish harm that is traceable to the CO. *Id.* at 158. Regarding contention admissibility, a contention challenging a CO will be rejected as outside the scope of the proceeding unless it “oppose[s] the issuance of the order as unwarranted, so as to require relaxation, or [as] affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).” *Id.* (quoting *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004)).

III. ANALYSIS

A. Mr. Sparks’ Motion to Consolidate Lacks Merit

Mr. Sparks moves to consolidate the *Saunders* and *Rauckhorst* enforcement proceedings with this case. See Sparks’ Petition at 8-9; *supra* notes 5 & 6. We need not consider whether Mr. Sparks’ motion satisfies the “good cause” standard in 10 C.F.R. § 2.317(b), see *supra* Part II.A, because his challenges to the *Saunders* and *Rauckhorst* enforcement proceedings are not litigable and his motion therefore must be denied.

Regarding the *Saunders* enforcement proceeding, as mentioned *supra* note 6, in January 2020, a licensing board (1) denied Mr. Sparks’ request to challenge the *Saunders* CO; and (2) terminated the *Saunders* enforcement proceeding. See LBP-20-3, 91 NRC at 51-53. Because the *Saunders* enforcement proceeding is

¹⁰ In the *Bellotti* case, the Attorney General of Massachusetts, Francis Bellotti, challenged an enforcement order the NRC Staff had issued to the licensee of the Pilgrim Nuclear Power Station. The enforcement order limited the scope of any challenge brought by a third party to the issue of whether “this Order should be sustained.” *Bellotti*, 725 F.2d at 1382 n.2. Bellotti challenged the adequacy of the order (not its issuance), arguing that the order should be strengthened by adding corrective actions. See *id.* at 1382 & n.2. The Commission denied Bellotti’s intervention request because (1) he failed to assert injuries that were traceable to the order and thus failed to establish standing; and (2) his challenge to the adequacy of the order was outside the scope of the proceeding. See *Pilgrim*, CLI-82-16, 16 NRC at 45-46 & n.*. The United States Court of Appeals for the District of Columbia Circuit affirmed. See *Bellotti*, 725 F.2d at 1381-82.

no longer a live case, we deny as moot Mr. Sparks' motion to consolidate that case with this one.

We likewise deny Mr. Sparks' motion to consolidate the *Rauckhorst* enforcement proceeding with this case. As mentioned *supra* note 5, the NRC issued a Notice of Violation (NOV) to Mr. Rauckhorst in November 2019. An NOV constitutes notice that the NRC Staff has determined that a violation of NRC requirements occurred; it is *not* an agency enforcement order and, thus, does *not* provide third parties with an opportunity to intervene or seek a hearing. See Rauckhorst NOV at 1-2; see also NRC Enforcement Manual at 13-15. We therefore deny Mr. Sparks' motion to consolidate the *Rauckhorst* proceeding with this case.¹¹ See *Saunders*, LBP-20-1, 91 NRC at 8 n.13 (rejecting Mr. Sparks' request to consolidate *Rauckhorst* enforcement proceeding with *Saunders* enforcement proceeding).¹²

B. The *Bellotti* Doctrine Mandates Denial of Mr. Sparks' Intervention Request

Mr. Sparks challenges the sufficiency of facts and the sufficiency of the corrective actions in the SNC CO. See Sparks' Petition at 7. His proffered contentions state in full:

1. What are the facts, as determined by the NRC Staff, that form the basis for the proposed [CO] Modifying License?
2. Whether the actions agreed upon in the [CO] are sufficient to ensure that the Licensee, and its supervisors, managers, executives and support infrastructure, i.e., [the SNC Office of Human Resources], Compliance and Concerns Departments, and [Employee Concerns Program], as well as all contractors, ensure that the workforce (employees and contractors), are free to raise safety concerns without fear of reprisal, in compliance with the NRC's requirements for Employee Protections[,] 10 [C.F.R. §] 52.5 "Employee Protection."

Id. (emphasis omitted).

¹¹ If the NRC Staff were to issue an enforcement order to Mr. Rauckhorst, that order — like the SNC CO that is being challenged here — would provide third parties with an opportunity to intervene or seek a hearing. Any third-party claim based on an NOV, however, is not ripe and therefore not litigable.

¹² Mr. Sparks' motion to consolidate also suffers from a procedural infirmity. It does not include "a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." 10 C.F.R. § 2.323(b). Motions that fail to include such a certification "must be rejected." *Id.*

The NRC Staff and SNC argue that Mr. Sparks' intervention request should be denied because, pursuant to the *Bellotti* doctrine, Mr. Sparks lacks standing and fails to proffer an admissible contention. See NRC Staff's Answer at 4-13; SNC's Answer at 4-12. We agree.

1. The Commission's Application of Bellotti in the Alaska DOT Decision

We begin our analysis by reviewing the Commission's 2004 decision in *Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399 (2004), which, in our view, is identical in all material respects to this case. In that case, the NRC Staff issued an NOV in which it concluded that the Alaska Department of Transportation and Public Facilities [hereinafter Alaska DOT] had discriminated against Robert Farmer, a Statewide Radiation Safety Officer, in retaliation for his having raised safety concerns. See *id.* at 402. Rather than contest the NOV, Alaska DOT agreed to comply with a CO that required it to take planning and training actions designed to ensure future compliance with the NRC's employee protection regulation. See *id.*

Farmer filed an intervention request with two contentions arguing that the CO should be rescinded and its corrective actions "replace[d] or supplement[ed] . . . with civil penalties and enforcement actions against individual managers." CLI-04-26, 60 NRC at 402. Contention 1 included an attack on the adequacy of the CO because it allegedly failed to address the "illegal retaliatory actions and behaviors of Licensee managers, [and] the failure of the managers to address employee concerns about safety and compliance." *Id.* Contention 2 asserted that the CO should be rescinded because "it is not based upon an accurate assessment and analysis of all the facts available to the Commission, or on a correct interpretation and application of [regulation and policy]." *Id.*¹³

The Commission held that "*Bellotti* means that Farmer lacks 'standing' to seek a hearing and also lacks admissible contentions." CLI-04-26, 60 NRC at 404. Regarding standing, the Commission observed that the CO "mandates numerous actions for [Alaska DOT] to take to ensure [an SCWE]. These actions,

¹³ The *Alaska DOT* licensing board rejected Contention 1, concluding that it impermissibly sought to strengthen the relief in the CO, contrary to the *Bellotti* doctrine. See *Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), LBP-04-16, 60 NRC 99, 117 (2004). However, a majority of the board found that Contention 2 supported standing and raised a legitimate factual question that warranted a hearing. See *id.* at 117-18. Judge Bollwerk dissented from the latter ruling, concluding that the *Bellotti* doctrine precluded the admission of Contention 2. See *id.* at 120-23 (Separate Views of Bollwerk, J., Dissenting in Part). On appeal, the Commission "agree[d] with Judge Bollwerk's dissent." *Alaska DOT*, CLI-04-26, 60 NRC at 401.

including independent policy review, training, and a plan for assuring compliance with [NRC regulatory policy], cannot conceivably cause Farmer to suffer any injury.” *Id.* at 406. Absent injury attributable to the CO, held the Commission, “Farmer does not have standing.” *Id.* Regarding contention admissibility, the Commission concluded that both of Farmer’s contentions were outside the scope of the proceeding “because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures — in contravention of . . . *Bellotti.*” *Id.* at 405.

2. As Applied in Alaska DOT, the Bellotti Doctrine Mandates Denial of Mr. Sparks’ Intervention Request for Lack of Standing and Lack of an Admissible Contention

Applying *Bellotti*, the Commission in *Alaska DOT* held that a petitioner lacks standing to challenge a CO that improves the licensee’s health and safety conditions because a petitioner “is not adversely affected by a [CO] that improves the safety situation over what it was in the absence of the order.” CLI-04-26, 60 NRC at 406. That principle mandates denial of Mr. Sparks’ intervention request for lack of standing.¹⁴

Here, as in *Alaska DOT*, the challenged CO requires the licensee to implement extensive corrective actions to improve the SCWE. *See supra* Part I; compare SNC CO at 3-8 (describing corrective actions in the SNC CO that promote safety), with *Alaska DOT*, CLI-04-26, 60 NRC at 406 (describing corrective actions in the Alaska DOT CO that promote safety). Significantly, Mr. Sparks does not dispute that the SNC CO will enhance safety. Indeed, he *concedes* that the SNC CO includes “enhancements” to “[SNC’s] Employee Concerns Program, Corrective Action program, senior leadership training, and an updated SCWE policy. In addition, SNC agreed to further enhancements to the [Employee Concerns Program] presence at Vogtle [], and other changes to the Adverse Action review processes [and] training” Sparks’ Petition at 4-5. Pursuant to *Bellotti*, Mr. Sparks’ concession that the SNC CO enhances safety is fatal to his assertion of standing because remedial measures that improve safety “cannot conceivably cause [him] to suffer any injury.” *Alaska DOT*, CLI-04-26, 60 NRC at 406. Absent injury traceable to the CO, Mr. Sparks “does not have standing.” *Id.*¹⁵

¹⁴That principle also explains why “it is unlikely that petitioners will often obtain hearings on [COs]. That’s because such orders presumably enhance rather than diminish public safety.” *Alaska DOT*, CLI-04-26, 60 NRC at 406 n.28.

¹⁵As the Commission made clear in *Alaska DOT*, “[t]he critical concept . . . is that, with the [CO] in place, [Alaska DOT’s] employees undoubtedly have considerably more whistleblower protection

(Continued)

Mr. Sparks also fails to proffer an admissible contention under the *Bellotti* doctrine. Both of his contentions challenge the adequacy of the corrective actions in the CO,¹⁶ and that is precisely what *Bellotti* forbids. See *Alaska DOT*, CLI-04-26, 60 NRC at 405. Pursuant to *Bellotti*, a contention challenging a CO must be rejected as outside the scope of the proceeding unless it claims that (1) the CO is unwarranted and, accordingly, its terms should be relaxed; or (2) the CO should be rescinded (as opposed to supplemented) because it is affirmatively detrimental to public health and safety. See *Davis-Besse*, CLI-04-23, 60 NRC at 158; accord *Alaska DOT*, CLI-04-26, 60 NRC at 406. Mr. Sparks' contentions do not assert that the corrective measures in the SNC CO should be relaxed or that the CO itself should be rescinded (as opposed to supplemented) for being detrimental to public health and safety. His contentions thus fail to satisfy the *Bellotti* standard and, therefore, are inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding.

Mr. Sparks nevertheless claims that the *Bellotti* doctrine does not preclude him from arguing in Contention 1 that the SNC CO should be rescinded for "failing to set out the facts and circumstances within SNC that led to his retaliatory termination." Sparks' Petition at 5.¹⁷ We disagree. In *Alaska DOT*, the Commission held that a third party cannot circumvent the *Bellotti* doctrine by asserting a factual dispute with the CO. More specifically, the Commission concluded that when a licensee in an enforcement action (here, SNC) has agreed to the terms of a CO, "a challenge to the facts themselves by a nonlicensee is not cognizable." CLI-04-26, 60 NRC at 408. As the Commission explained, allowing a third party "to attack a [CO] under the guise of a factual dispute would effectively permit an end run around *Bellotti*," and would also "undercut

than without it. Accordingly, [petitioner] does not have standing to contest the order." CLI-04-26, 60 NRC at 407-08. The same "critical concept" applies here and defeats Mr. Sparks' assertion of standing.

¹⁶ Contention 1 challenges the sufficiency of the facts in the SNC CO, see Sparks' Petition at 7, and is based on Mr. Sparks' view that additional facts "will improve the [SCWE]." *Id.* at 2. Contention 2 challenges the sufficiency of the corrective actions in the CO for ensuring compliance with the NRC's employee protection regulation. See *id.* at 7.

¹⁷ Mr. Sparks claims that the absence of facts in the SNC CO renders it "fatally defective," Sparks' Petition at 6, but he fails to identify any support for that assertion, as required by 10 C.F.R. § 2.309(f)(1)(vi). This failure is not surprising insofar as the CO was the product of an ADR mediation session. See SNC CO at 1. That ADR session was facilitated by a professional mediator who assisted the parties in their efforts to resolve differences and reach an agreement. See *id.* at 2-3. As the NRC Staff states, when parties engage in this type of ADR, the purpose of the mediation is not to resolve factual disputes and establish a factual record; "rather, the goal of the process is for the parties to reach agreement on forward-looking actions that enhance safety and security." NRC Staff's Answer at 6; accord *Alaska DOT*, CLI-04-26, 60 NRC at 407. In any event, the factual circumstances that precipitated the NRC Staff's enforcement action are described in Section II of the SNC CO. See SNC CO at 1-2.

our salutary policy favoring enforcement settlements.” *Id.* at 408, 409. That rationale applies with equal force to *all* fact-based challenges to a CO (including Mr. Sparks’ claim of factual insufficiency) and mandates the rejection of Contention 1 as “not cognizable.” *Id.* at 408.¹⁸

We are not insensitive to the fact that Mr. Sparks, like the petitioner in *Alaska DOT*, “appears to have been a victim of retaliatory misbehavior,” or that, also like the petitioner in *Alaska DOT*, “the corrective measures outlined in the [CO] do not improve [his] personal situation.” CLI-04-26, 60 NRC at 406, 407; *see also Saunders*, LBP-20-3, 91 NRC at 52-53. But for purposes of considering Mr. Sparks’ intervention request, those facts are beside the point. The NRC’s “charter does not include providing a personal remedy.” *Alaska DOT*, CLI-04-26, 60 NRC at 407. Rather, the NRC’s role “is to procure corrective action for the Licensee’s program, and by example, other licensee’s programs.” *Id.* The enforcement measures in the SNC CO serve that purpose.

Mr. Sparks’ avenue for seeking a personal remedy for alleged wrongful termination is through the United States Department of Labor, *see Alaska DOT*, CLI-04-26, 60 NRC at 407 & n.35,¹⁹ and he declares that he is pursuing relief through that channel. *See Sparks’ Petition* at 3. And insofar as Mr. Sparks maintains that additional NRC enforcement action is necessary to remedy employee discrimination within SNC, he can seek relief under 10 C.F.R. § 2.206, which provides that “[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a); *see also Alaska DOT*, CLI-04-26, 60 NRC at 407 n.35.

IV. CONCLUSION

For the foregoing reasons, we (1) *deny* Mr. Sparks’ motion to consolidate; and (2) *deny* his petition to intervene, thereby terminating this proceeding at

¹⁸ SNC correctly observes that, even putting the *Bellotti* doctrine aside, Mr. Sparks’ two contentions are inadmissible because he fails to provide adequate supporting facts, as required by 10 C.F.R. § 2.309(f)(1)(v), and he fails to show a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). *See SNC’s Answer* at 8-12.

¹⁹ *See* 10 C.F.R. § 52.5(b) (describing the process for seeking a remedy from the Department of Labor for any employee who believes he or she was discharged or otherwise discriminated against for engaging in protected activities). In addition to his claim of wrongful termination, Mr. Sparks asserts in passing that SNC is guilty of “blacklisting.” *Sparks’ Petition* at 3. He states, however, that this latter claim is under review by the NRC Office of Investigations and, thus, “is not ripe for consideration.” *Id.* If Mr. Sparks ultimately wishes to seek a personal remedy for blacklisting, his recourse for that claim also lies with the Department of Labor.

the licensing board level. This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311(b) and (c).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Michael M. Gibson
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 11, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
William J. Froehlich
Dr. Gary S. Arnold

In the Matter of

Docket No. 30-35252-EA
(ASLBP No. 20-964-02-EA-BD01)

TEAM INDUSTRIAL SERVICES, INC.
(Order Imposing Civil Monetary
Penalty)

February 21, 2020

This proceeding arises from a challenge by TEAM Industrial Services, Inc. (TEAM) to an order imposing a civil monetary penalty for a violation that involved moving a radiographic device before ensuring that the device was fully locked. The Licensing Board considered a motion to approve a settlement agreement between the NRC Staff and TEAM. Finding the settlement agreement to be a fair and reasonable resolution of the proceeding, the Board approved the settlement.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(LICENSING BOARD RESPONSIBILITIES)

Licensing Boards are encouraged to approve fair and reasonable settlements.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(“PUBLIC INTEREST” INQUIRY)

The Commission has determined that, when deciding whether a settlement is

in the public interest, a Licensing Board should 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. *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-97-13, 46 NRC 195, 209 (1997).

MEMORANDUM AND ORDER
(Granting Joint Motion to Approve Settlement and
Terminating Proceeding)

Before the Board, in this enforcement proceeding, is the parties' joint motion to approve a settlement agreement.¹ Because the Board is satisfied that the terms of the parties' settlement reflect a fair and reasonable resolution of the issues in this proceeding, and that the public interest does not require adjudication of these issues, we grant the motion and terminate the proceeding.

I. BACKGROUND

On September 20, 2019, the NRC Staff issued an order to TEAM Industrial Services, Inc. (TEAM), imposing a civil monetary penalty of \$14,500, for a violation that involved moving a radiographic exposure device before ensuring that the device was in a fully locked position.² In requesting a hearing, TEAM admitted the violation, but challenged the NRC Staff's claim that two TEAM personnel engaged in deliberate misconduct.³ Rather, TEAM contends, an inadvertent mistake occurred and, absent deliberate misconduct, there can be no basis for the NRC Staff's order.⁴

In responding to TEAM's hearing request, the NRC Staff acknowledged TEAM's right to a hearing.⁵ However, with TEAM's concurrence, the NRC

¹ Joint Motion to Approve Settlement Agreement and Terminate Proceedings at 1 (Feb. 12, 2020) [hereinafter Joint Motion].

² Order Imposing Civil Monetary Penalty — \$14,500 at 1 (Sept. 20, 2019) (ADAMS Accession No. ML19263E598).

³ Team Industrial Services, Inc.'s Answer and Request for Hearing at 1 (Dec. 12, 2019).

⁴ *Id.*

⁵ NRC Staff Answer to Request for a Hearing at 1 (Jan. 6, 2020).

Staff moved to suspend issuance of a discovery schedule to permit the parties to engage in settlement discussions.⁶ The Board granted the motion.⁷

On February 12, 2020, the parties submitted their Joint Motion, together with the Settlement Agreement that is appended to this Memorandum and Order as Attachment 1.⁸

II. DISCUSSION

As more fully set forth in Attachment 1, the essence of the Settlement Agreement is that TEAM will undertake an employee training program and the NRC Staff will withdraw its current notice of violation and reissue one with less severity and with no finding of deliberate or willful misconduct. We address the parties' compromise in light of three principal considerations:⁹

First, the Commission instructs us that “[t]he fair and reasonable settlement and resolution of issues proposed for litigation . . . is encouraged.”¹⁰

Second, in enforcement proceedings such as this, the Commission instructs that we “shall accord due weight to the position of the NRC staff when reviewing the settlement.”¹¹

Third, the Board recognizes that TEAM is represented by experienced and able counsel.

Given the Commission's policy of encouraging settlements, and the absence of any reason to suspect that either party was at a relative disadvantage in their negotiations, we conclude that the Settlement Agreement is fair and reasonable.

We have also weighed the considerations for approving settlements that the Commission outlined in *Sequoyah Fuels Corp.*¹² As explained by the Commis-

⁶ *Id.*

⁷ Licensing Board Order (Granting Unopposed Motion to Suspend Discovery) (Jan. 7, 2020) at 1 (unpublished).

⁸ Joint Motion, Attach. 1, Settlement Agreement Between the U.S. Nuclear Regulatory Commission Staff and Team Industrial Services, Inc. (Feb. 12, 2020).

⁹ Neither party questions the Board's authority to approve their Settlement Agreement. Moreover, although 10 C.F.R. § 2.338(i) could possibly be read to confer such authority only “[f]ollowing issuance of a notice of hearing” (which has not yet occurred in this case), the regulatory history makes clear that the Board's authority to review and approve settlements is not so limited. *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-15-30, 82 NRC 339, 344 n.25 (2015).

¹⁰ 10 C.F.R. § 2.338.

¹¹ *Id.* § 2.338(i).

¹² *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209 (1997).

sion, when determining whether a settlement is in the public interest, a Licensing Board should 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.¹³

None of these considerations prevents approval of the Settlement Agreement here. As discussed, the settlement appears to be a reasonable compromise between parties that are each ably represented. As set forth in Attachment 1, the Settlement Agreement contemplates a series of well-defined events that can be effectively implemented. There is no suggestion that this resolution of TEAM's admitted one-time violation will jeopardize the public health and safety in any way. And no other interested parties have sought to participate in this enforcement proceeding or likely could establish standing to do so.¹⁴

Finally, with some variations occasioned by the terms of the parties' settlement, the Board finds the Settlement Agreement to be in substantial compliance with the NRC's regulatory provisions concerning form and content.¹⁵

III. ORDER

The parties' Joint Motion is *granted*, and their Settlement Agreement is *approved*. The terms of the Settlement Agreement are embodied in this Memorandum and Order and shall have the same force and effect as an order made after full hearing.

This proceeding is *terminated*. Settlements approved by a Licensing Board are subject to the Commission's review in accordance with 10 C.F.R. § 2.341.

¹³ *Id.* at 209.

¹⁴ *See, e.g., Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

¹⁵ *See* 10 C.F.R. § 2.338(g)-(h). In future proceedings involving settlements, however, it would be preferable for counsel to expressly address these provisions.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

William J. Froehlich
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 21, 2020

Attachment 1

**SETTLEMENT AGREEMENT BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION
STAFF AND TEAM INDUSTRIAL SERVICES, INC.**

On September 20, 2019, the Staff of the U.S. Nuclear Regulatory Commission (NRC) issued an Order imposing a civil monetary penalty of \$14,500 to TEAM Industrial Services, Inc. (TEAM) for a Severity Level III violation involving moving a radiographic exposure device prior to ensuring that the device was in the fully locked position.¹ On December 12, 2019, Team Industrial Services, Inc. (TEAM) filed a request for hearing.² The NRC Staff moved to suspend the issuance of a discovery schedule so that the parties could engage in preliminary settlement discussions,³ and the Atomic Safety and Licensing Board granted the motion.⁴

The parties subsequently engaged in settlement negotiations. As a result of those discussions, the parties agree to the following terms and conditions:

TEAM will implement the following corrective actions:

- (1) TEAM will develop and implement a computer-based training module on NRC regulations, including the NRC's prohibition of deliberate misconduct, consequences for violating NRC regulations, the incident underlying NRC Enforcement Action (EA-18-124), and lessons learned from the incident.
 - a. For purposes of assessing the effectiveness of the training, the training module will include a quiz immediately following an individual's completion of the training. A passing grade will be required for the training to be deemed effective.
 - b. All TEAM US radiographic personnel, including radiographic supervisors and managers (over 1,000 individuals) are required to complete the computer-based training module.
 - c. The computer-based training module will require approximately one hour of time to complete.
 - d. Within 6 months of the NRC's review of the training module in accordance with Paragraph (2) below, TEAM will complete such training (with appropriate exceptions for personnel unable to take the training, e.g., medical leave).
 - e. Team will retain a record of all personnel taking the initial training, including the quiz scores, for five years.
- (2) Within three months of issuance of an order from the Board approving the settlement, TEAM will submit the computer training module for NRC review to the Director, Division of Nuclear Materials Safety, Region IV, 1600 E. Lamar Blvd., Arlington, Texas 76011. The NRC will provide any comments to TEAM on the training within 30 days from the date of the submittal of the computer training module. TEAM will consider the NRC's suggestions on the training content and incorporate those suggestions that TEAM agrees are appropriate and that do not extend the length of the module beyond one hour of time to complete.

¹ Order Imposing Civil Monetary Penalty - \$14,500, EA-18-124 (Sep. 20, 2019) (ML19263E598).

² Team Industrial Services, Inc.'s Answer and Request for Hearing (Dec. 12, 2019) (ML19346H509).

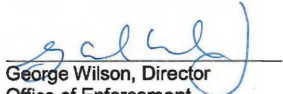
³ NRC Staff Answer to Request for a Hearing at 1 (Jan. 6, 2020) (ML20006G100).

⁴ Order (Granting Unopposed Motion to Suspend Discovery) at 1 (Jan. 7, 2020) (ML20007E675).

- (3) For three years following issuance of an order from the Board approving the settlement, TEAM will require all US radiographic personnel, including supervisors and managers, to take an annual refresher training program, which will include a quiz immediately following an individual's completion of the training. TEAM may use the same program described in Paragraph (1) above to fulfill the refresher training requirement described in this paragraph. TEAM will retain a record of all personnel taking the annual refresher training, including the quiz scores, for five years.
- (4) In addition to training already required under NRC regulations, TEAM will require that new US radiographic personnel, including supervisors and managers, who join TEAM within three years of issuance of an order from the Board approving of the settlement, take the computer-based training module described in Paragraph (1) above. Such new radiographic personnel (including supervisors and managers) will be required to take the training within three months of joining TEAM. Team will retain a record of all personnel taking this training, including the quiz scores, for five years. After three years, new US radiographic personnel, including supervisors and managers, will continue to receive all training required under NRC regulations.
- (5) Within two months of issuance of an order from the Board approving the settlement, TEAM will issue a one-time, company-wide safety bulletin to all of TEAM's US personnel then currently employed by TEAM, from a TEAM senior executive, emphasizing the importance of following procedures, maintaining compliance with regulatory programs, care when working with/around hazardous materials (including radioactive sources), and attention to detail. All of TEAM's US radiographic personnel, including supervisors and managers, will be required to acknowledge that they have reviewed the safety bulletin. Such acknowledgement can be electronic. TEAM will retain a record of the radiographic personnel acknowledgements for a period of five years.
- (6) TEAM agrees that the commitments made herein will transfer to any subsequent owner of TEAM, or relevant portion of TEAM's businesses.

In return for these commitments, the NRC will withdraw the prior Severity Level III Notice of Violation and Civil Penalty and reissue the violation as not greater than Severity Level IV with no deliberate misconduct or willful finding.

The Regional Administrator, Region IV, may, in writing, relax or rescind any of the above conditions upon demonstration by TEAM of good cause.


 George Wilson, Director
 Office of Enforcement
 U.S. Nuclear Regulatory Commission

2/12/2020
 Date


 Andre C. Bouchard
 Executive Vice President & Chief Legal Officer
 TEAM Industrial Services, Inc.

2-11-2020
 Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

Docket No. 40-8943-MLA-2

CROW BUTTE RESOURCES, INC.
(Marsland Expansion Area)

April 13, 2020

EVIDENCE: BURDEN OF PROOF

A dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the Board is entitled to deference. *See, e.g., Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 254-55 (2016); *David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010).

EVIDENCE: BURDEN OF PROOF

Board did not shift the burden of proof when it found that intervenors had not provided sufficient evidence to support the need for additional tests. The Board considered evidence from all parties and found the applicant's and Staff's evidence more persuasive. The intervenor's argument that the board had shifted the burden of proof was in reality a challenge to how the Board weighed the evidence, a matter in which the Commission defers to the Board.

ISSUANCE OF LICENSE PRIOR TO BOARD HEARING

In a materials licensing case, the Staff is expected to issue the license amendment promptly upon finishing its review of the application. The Board does not issue or authorize issuance of the license.

ABUSE OF DISCRETION

Board did not abuse its discretion in dismissing contention that had become moot after issuance of Staff document (a partial environmental assessment) that contained information differing significantly from the information in the application.

UNTIMELY CONTENTIONS

Where the relevant information in the final environmental impact statement (FEIS) did not vary materially from the information in the draft environmental impact statement (DEIS), the Board properly found that a contention filed after the FEIS was released was untimely.

FORT LARAMIE TREATY

The Board properly held that the 1868 Fort Laramie Treaty is no longer in effect. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

NATIVE AMERICAN TRIBES

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 NEPA. The Tribe is not entitled to greater rights than it would otherwise have under those statutes as an interested party. *See, e.g., Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997).

MEMORANDUM AND ORDER

The Oglala Sioux Tribe has petitioned for review of the Atomic Safety and Licensing Board's Initial Decision and two interlocutory orders in this proceeding.¹ The NRC Staff and licensee, Crow Butte Resources, Inc. (Crow Butte),

¹ Intervenor Oglala Sioux Tribe Petition for Review (Mar. 25, 2019) (Petition); *see also* LBP-19-2, 89 NRC 18 (2019); LBP-18-3, 88 NRC 13 (2018); Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1) (Oct. 22, 2014) (unpublished) (Summary Disposition Order).

oppose the petition.² For the reasons described below, we deny the petition for review.

I. BACKGROUND

A. Crow Butte's Application

In May 2012, Crow Butte filed an application to amend its *in situ* uranium recovery (ISR) license to authorize the construction and operation of a satellite facility in the Marsland Expansion Area (MEA).³ The proposed MEA is in Dawes, Nebraska, approximately eleven miles southeast of Crow Butte's existing ISR facility in Crawford, Nebraska.

The uranium-bearing sandstone that Crow Butte mines at its existing facility and intends to mine in the MEA is known as the Basal Chadron/Chamberlain Pass Formation.⁴ It underlies (starting from the surface) the alluvium, the Arikaree Group, the Brule Formation, and the Upper and Middle Chadron Formations.⁵ The Basal Chadron overlies the Pierre Shale.⁶

B. The Contested Rulings

The Tribe sought intervention and was granted a hearing on two contentions.⁷ As admitted by the Board, the contentions were as follows:

1. *OST Contention 1: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources*

The [a]pplication fails to meet the requirements of 10 C.F.R. §§ 51.60 and 51.45, the National Environmental Policy Act, the National Historic Preservation Act, and the relevant portions of NRC guidance included at NUREG-1569 section 2.4[], in that it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources.

² See NRC Staff's Answer Opposing the Oglala Sioux Tribes Petition for Review of LBP-19-2, LBP-18-3, and Memorandum and Order Dismissing Contention 1 (Apr. 19, 2019) (Staff Answer); Crow Butte Response to OST Petition for Review (Apr. 19, 2019); Oglala Sioux Tribes Reply in Support of Its Petition for Review (Apr. 29, 2019) (Tribe Reply).

³ See Letter from John Leftwich, Cameco, to Keith McConnell, NRC (May 16, 2012) (ADAMS accession no. ML12160A512).

⁴ See LBP-19-2, 89 NRC at 44.

⁵ *Id.* at 43-44.

⁶ *Id.* at 44.

⁷ LBP-13-6, 77 NRC 253 (2013), *affid.*, CLI-14-2, 79 NRC 11 (2014).

2. *OST Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration*

The application fails to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f); 10 C.F.R. § 51.45; 10 C.F.R. § 51.60; 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2); the National Environmental Policy Act; and NUREG-1569 section 2.6. The application similarly fails to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by 10 C.F.R. § 51.45, NUREG-1569 section 2.7, and the National Environmental Policy Act.⁸

NRC regulations require that potential intervenors must base contentions arising under the National Environmental Policy Act (NEPA) on the applicant's environmental report (ER).⁹ Later, if necessary, an intervenor may update the contentions when the information in the Staff's draft or final environmental documents differs materially from the information in the ER.¹⁰ If the information is unchanged, the Board will "migrate" the contention to apply to the Staff's environmental documents.

Contention 1 was based on Crow Butte's ER, which stated that Crow Butte's contractor had conducted a three-month-long survey of the MEA site and discovered no Native American cultural resources at the site.¹¹ After the ER was submitted, however, a survey performed by representatives of the Santee Sioux Nation and the Crow Nation of Montana found twelve places of potential religious or cultural significance to Native Americans.¹² The Staff's contractor further investigated the sites in light of this additional information. The Staff incorporated findings from the Santee Sioux Survey and its contractor's investigation, as well as information concerning its consultation with affected Native American Tribes, into a draft of the cultural resources section of its environmental assessment, which it released in June of 2014.¹³ The Staff concluded in

⁸ LBP-13-6, 77 NRC at 306.

⁹ 10 C.F.R. § 2.309(f)(2).

¹⁰ *Id.*

¹¹ See Ex. CBR005A-R, Application for Amendment of USNRC Source Materials License SUA-1534, Marsland Expansion Area, Crawford, Nebraska, Vol. I, Environmental Report (May 2012), at 3-80 to 3-81 (ML18306A698).

¹² See Santee Sioux Nation, Tribal Historic Preservation Office, "Crow Butte Project, Dawes County, Crawford Nebraska" (ML13093A123) (Santee Sioux Survey).

¹³ See Crow Butte Resources Proposed Marsland Expansion Area NRC Documentation of NHPA Section 106 Review (Draft Cultural Resources Sections of Environmental Assessment), at 12 (ML-14176B129) (Draft Cultural Resources Assessment).

the Draft Cultural Resources Assessment that the impacts from the proposed operation on the cultural resources found at the site would be small.¹⁴

The Tribe did not update Contention 1 to contest the information in the Draft Cultural Resources Assessment. The Staff moved for summary disposition of the contention, and the Tribe did not respond.¹⁵ The Board found that the information in the Draft Cultural Resources Assessment differed significantly from the information in the ER and “the issues raised in the original contention no longer frame[d] a dispute material to this proceeding.”¹⁶ The Board therefore granted the Staff’s motion, resolving Contention 1 in the Staff’s favor.¹⁷ The Tribe now challenges the Board’s 2014 summary disposition order, arguing that it was without counsel at the time the Draft Cultural Resources Assessment was issued and that dismissal of Contention 1 “failed to safeguard the Tribe’s demonstrated interest in identifying and protecting its cultural resources.”¹⁸

Contention 2 was a hybrid contention that raised both environmental and safety issues related to the site hydrogeology and Crow Butte’s ability to contain fluid migration.¹⁹ To the extent that the Tribe raised environmental issues in Contention 2, it based them on the ER.

In December 2017, the Staff published its draft Environmental Assessment (Draft EA) (which included the cultural resources section that it made publicly available in 2014).²⁰ When the Tribe did not file new or amended contentions based on the Draft EA, the Staff moved to “deny migration” of Contention 2 to the extent that it raised environmental issues.²¹ But the Board found that, for the most part, the information in the Draft EA did not differ significantly from the previously available information.²² Therefore, the Board found that Contention 2 was moot only to the extent that it had argued that information was absent from the ER and the Draft EA cured the omission; the remainder of Contention 2 would migrate.²³

The Staff issued the final Environmental Assessment (Final EA) in April

¹⁴ *Id.* at 14.

¹⁵ NRC Staff’s Motion for Summary Disposition of Contention 1 (Aug. 6, 2014).

¹⁶ Summary Disposition Order at 13.

¹⁷ *Id.* at 13-14.

¹⁸ Petition at 16-17.

¹⁹ *See* LBP-13-6, 77 NRC at 289-95.

²⁰ Draft Environmental Assessment for the Marsland Expansion Area License Amendment Application (Dec. 2017) (ML17334A870).

²¹ NRC Staff’s Motion to Deny Migration of Environmental Portion of Contention 2 (Jan. 26, 2018). Because the contention raised both safety and environmental issues, the Staff’s motion did not argue that the contention was wholly mooted by the Draft EA.

²² LBP-18-2, 87 NRC 21, 33-35 (2018).

²³ *Id.* at 35-36.

2018 and the amended license in May 2018.²⁴ In response, the Tribe submitted a “migration declaration,” in which it argued that Contention 2 should be deemed to challenge the Final EA.²⁵ It also submitted fourteen “new and renewed” contentions.²⁶ The Board found that Contention 2 would migrate, but it denied admission of the “new and renewed” contentions as untimely and for other reasons.²⁷ The Tribe argues in its petition for review that the Board erroneously excluded six of these contentions.²⁸

Starting on October 30, 2018, the Board held a three-day evidentiary hearing on Contention 2 in Crawford, Nebraska.²⁹ In LBP-19-2, the Board resolved Contention 2 in favor of Crow Butte and the Staff. The Tribe challenges the merits decision by arguing that the Board shifted the burden of proof in several respects and assumed facts that were not in evidence.³⁰

II. DISCUSSION

A. Standard of Review

The Tribe primarily raises issues with the Board’s merits decision in LBP-19-2. But because our rules of practice disfavor interlocutory review, the Tribe now also has appropriately requested our review of interlocutory Board decisions. We have discretion to take review, giving due weight to whether a petitioner raises a “substantial question” with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;

²⁴ Ex. NRC006, Final Environmental Assessment (April 2018) (ML18102A145); Ex. NRC009, NRC Materials License SUA-1534, Amendment 3 (with License Condition Reference Sheet) (May 23, 2018) (ML18306A686) (License).

²⁵ The Oglala Sioux Tribe’s Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions (May 30, 2018) (Tribe Final EA Contentions).

²⁶ *Id.*

²⁷ LBP-18-3, 88 NRC at 24-25, 29-52.

²⁸ Petition at 10-16.

²⁹ See Memorandum and Order (Adopting Transcript Corrections, Providing Final Exhibit List, and Closing Evidentiary Record) (Nov. 26, 2018) (unpublished).

³⁰ Petition at 5-9.

- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.³¹

We review questions of law *de novo*.³² We defer to the Board’s fact finding unless the standard of “clear error” is met. The standard for finding “clear error” of fact is high; “clear error” requires a showing that the ruling is “‘not even plausible’ in light of the record as a whole.”³³ Similarly, we defer to the Board on whether a contention has sufficient factual support to be admitted and review contention admissibility decisions only where there is an error of law or abuse of discretion.³⁴ We generally do not review disputes over how a Board weighed evidence in a merits decision.³⁵

B. The Tribe Has Not Raised a Substantial Question of Board Error

1. Initial Decision LBP-19-2

The Tribe argues that in its merits decision, the Board erred by shifting the burden of proof to the Tribe with respect to various aspects of Contention 2.³⁶ The Tribe asserts that its only burden was to provide sufficient facts to meet the contention admissibility standards.³⁷ However, under our regulations each party has the responsibility to ensure that the record contains sufficient evidence to support their positions.³⁸ The proponent of a contention has a responsibility to put forth evidence of its claim:

[W]here . . . one of the other parties contends that, for a specific reason . . . the permit or license should be denied, that party has the *burden of going forward* with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a *prima facie* case, the burden shifts to the applicant, who, as part of

³¹ 10 C.F.R. § 2.341(b)(4).

³² See, e.g., *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566, 573 (2016).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Petition at 5.

³⁷ See *id.*

³⁸ See Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2213 (Jan. 14, 2004) (“[E]ach party must bear its burden by going forward with affirmative evidentiary presentations and testimony”).

his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.³⁹

With that in mind, we consider each argument with respect to the Board's merits decision, LBP-19-2.

a. Baseline Restoration Wells

On appeal, the Tribe questions the Board's findings concerning when Crow Butte must gather background water quality data to be used to set the ground-water protection values for restoration.⁴⁰ The Tribe argued at the hearing that baseline monitoring wells should be installed and sampled throughout the site before mining is conducted anywhere in the MEA.⁴¹ But the Staff and Crow Butte argued — and the Board agreed — that it is acceptable for baseline values to be developed for each mining unit just prior to mining in that unit.⁴² In its petition for review, the Tribe argues that the Board shifted the burden of proof to the Tribe to show that the wells should be installed first, rather than keeping the burden on Crow Butte to show that restoration wells can be deferred until later.⁴³

Crow Butte intends to operate up to eleven mining units in the MEA, but it does not plan to develop all mining units at the same time.⁴⁴ Therefore, when a new mining unit is developed, an adjacent mining unit may be in mid-operation or undergoing restoration.⁴⁵ After extraction operations cease at each mining unit, the restoration process begins with the goal of restoring the water quality in the ore zone to background, meaning that which existed prior to operations.⁴⁶ Conditions in Crow Butte's amended license require background water quality data for the ore zone and overlying aquifers to be established prior to injection of lixiviant for each mining unit.⁴⁷ In order to establish background water protection standards, a minimum of six baseline restoration wells will be installed per

³⁹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009) (quoting *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983)) (second and third alterations in original).

⁴⁰ Petition at 5-8.

⁴¹ See LBP-19-2, 89 NRC at 125.

⁴² *Id.* at 123-27.

⁴³ Petition at 5-6.

⁴⁴ See Ex. CBR006, Crow Butte Resources Technical Report Marsland Expansion Area, at 1-6 (ML18306A614) (Technical Report).

⁴⁵ *Id.* at 1-11.

⁴⁶ See *id.*

⁴⁷ See Ex. NRC009, License at 14 (License Condition 11.1.3).

mining unit, and each well will be sampled four times at least fourteen days apart.⁴⁸

The Tribe's witness for this subject was Michael Wireman, a hydrogeologist with thirty years' experience.⁴⁹ In his pre-filed written testimony, Mr. Wireman alleged that the site has not been adequately characterized to ensure fluid containment and to conduct groundwater restoration because all restoration wells throughout the site have not been installed and sampled.⁵⁰ At the hearing, Mr. Wireman testified that a "baseline" value must be conducted before any mining operations take place and that operations in one mining unit would affect the chemistry in the adjacent mining units.⁵¹ Mr. Wireman testified that "as soon as you've moved water from a mined unit that's been impacted by the mining, downgradient into an unmined unit, you've altered that chemistry and it's no longer baseline."⁵²

During the hearing, the Staff's witness, Dr. Elise Striz, testified that each operating mine unit maintains an inward hydraulic pressure gradient that would prevent hazardous constituents from moving to an adjacent area.⁵³ In addition, Dr. Striz testified that each mine unit has perimeter monitoring wells, which are sampled every two weeks to detect excursions.⁵⁴

The Board found that "[Crow Butte] and the Staff have proffered sufficient evidence to support their position that it is suitable to wait to install and sample these restoration wells as each [mining unit] is developed."⁵⁵ It also found that "Mr. Wireman failed to provide any evidence justifying the installation of such restoration wells at this time."⁵⁶ Citing Dr. Striz, the Board concluded that "movement of production fluids between the developed and undeveloped [mining units] is not plausible due to the required inward hydraulic gradients."⁵⁷

We disagree that the Board improperly shifted the burden of proof to the Tribe. The pertinent issue was whether the levels for various hazardous constituents would be changed for areas outside a mining unit once mining begins

⁴⁸ See Ex. CBR006, Technical Report, at 6-5.

⁴⁹ See Ex. OST002, Michael Wireman Curriculum Vitae (ML18306A690).

⁵⁰ Ex. OST004-R, Mike Wireman August 16, 2018 Opinion (Revised October 3, 2018), at 2-3 (ML18306A714) (Wireman Initial Testimony).

⁵¹ See Tr. at 661-62 (Mr. Wireman).

⁵² *Id.* at 662 (Mr. Wireman).

⁵³ See Tr. at 665-67 (Dr. Striz); see also Ex. NRC004, Statement of Professional Qualifications of Elise Striz (Aug. 17, 2018) (ML18306A679).

⁵⁴ Tr. at 666 (Dr. Striz), 656 (Mr. Nelson); see Ex. NRC009, License at 14 (License Condition 11.1.3).

⁵⁵ LBP-19-2, 89 NRC at 126.

⁵⁶ *Id.*

⁵⁷ *Id.* at 127 (citing Tr. at 666-67).

anywhere in the MEA.⁵⁸ The Staff and Crow Butte explained with specificity why they believe diffusion of oxidizing lixiviant — and the hazardous constituents that would be mobilized by the lixiviant — against the inward hydraulic gradient maintained during operation is not plausible. While Mr. Wireman testified that he had a “hard time” believing this, he did not directly contradict the testimony presented by the Staff and Crow Butte about the inward hydraulic gradient.⁵⁹ In short, the Tribe disputes how the Board weighed the evidence. A dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the Board is entitled to deference.⁶⁰ Given that the Board discussed and considered the evidence on both sides, we will not disturb its decision.⁶¹

The Tribe argues that the Board “created a new standard” for baseline water quality when it found that it was not necessary for Crow Butte to obtain water quality data for all mining units before it begins mining at any of them.⁶² The Tribe argues that the Board erred because Mr. Wireman testified that once operations have begun anywhere in the MEA, “oxidation levels” will have been altered throughout the MEA.⁶³

We disagree that the Board created a new standard for baseline when it stated that it was “questionable that water quality data should be obtained before [*in situ* recovery] operations begin.”⁶⁴ The Board does not state that it is acceptable to use baseline water quality data after it has been altered by operations in another area. Rather, the Board found that, given the measures employed to

⁵⁸ The license calls for analyzing for ammonia, arsenic, barium, cadmium, calcium, chloride, copper, fluoride, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, nitrate, pH, potassium, radium-226, selenium, sodium, sulfate, total carbonate, total dissolved solids, uranium, vanadium, zinc and gross alpha. See Ex. NRC009, License at 14 (License Condition 11.1.3).

⁵⁹ See Tr. at 662 (“[I]t’s really hard for me to imagine a scenario where the mine unit that’s already been mined and water quality has been altered, that none of that water gets into the next mine unit. I just have a real hard time with that.” (Mr. Wireman)).

⁶⁰ See, e.g., *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 254-55 (2016); *David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010).

⁶¹ See, e.g., *Strata*, CLI-16-13, 83 NRC at 584 (“When considering challenges to how the Board weighed the evidence, we defer to the Board’s expertise as the fact finder and decline to substitute the judgment [of an Intervenor’s expert] for that of the Board.”) (quoting *Oyster Creek*, CLI-09-7, 69 NRC at 266).

⁶² Petition at 7-8 (citing LBP-19-2, 89 NRC at 126).

⁶³ *Id.* at 8. The Tribe does not point to where Mr. Wireman testified to this, in either his pre-filed written testimony, rebuttal testimony, or during the hearing. When Judge Wardwell asked Mr. Wireman about oxidation during the hearing, Mr. Wireman stated that mining in one unit could “lower the water levels and expos[e] previously-saturated materials to an unsaturated condition” [in an adjacent area]. See Tr. at 663. But this discussion does not explain how an unsaturated condition would mobilize hazardous constituents in the unmined area. See *id.* at 661-64.

⁶⁴ See Petition at 7-8 (quoting LBP-19-2, 89 NRC at 126).

ensure containment, it was not plausible that water quality in adjacent areas would be altered by operations in an active mining unit.

The Tribe argues that the Board misinterpreted our 2016 decision in *Strata*, but that decision does not support the Tribe's view.⁶⁵ In *Strata*, the issue before us was whether the extensive sampling required to establish baseline restoration values under our regulations was required to properly characterize the site under NEPA.⁶⁶ The *Strata* Board found that such testing was not required under NEPA (and therefore not required before final agency action on the license), and we found no error in its ruling.⁶⁷ Here, in contrast, the Board is considering whether Crow Butte's plan to conduct baseline water quality testing for each mining unit as it goes along is consistent with our safety regulations promulgated under the Atomic Energy Act of 1954, as amended (AEA). The Board did not misinterpret *Strata*; rather, it was pointing out that Crow Butte's plan is similar to the one implicitly approved in *Strata*.⁶⁸ The *Strata* decision does not hold that baseline restoration values must be established for all potential mining units before operations begin at any of them.

b. Fractures and Faulting

The Tribe argues that the Board erred in finding that there were no known faults in the MEA because the area has not been subject to fracture testing.⁶⁹ The Tribe argues that Crow Butte did not test or look for faults, and, therefore, the fact that no faults are "known" is not evidence that no faults exist at the site.⁷⁰ The Tribe asserts that "the only way to state with scientific confidence that there are no fractures is to do fracture analysis."⁷¹ Relatedly, the Tribe argues that the Board "provided its own evidence . . . that was not in the record" when it "assumed" that there were no fractures in the MEA that were sufficiently transmissive to conduct contaminants between the aquifers.⁷²

⁶⁵ *Id.* (citing *Strata*, CLI-16-13, 83 NRC at 583-84).

⁶⁶ See 10 C.F.R. Part 40, app. A, Criteria 5, 7A.

⁶⁷ *Strata*, CLI-16-13, 83 NRC at 582-84.

⁶⁸ *Strata* Energy also intends to develop the mining units at its Ross facility sequentially, and its license contains a similar license condition regarding the establishment of baseline restoration values "prior to injection of lixiviant for each min[ing] unit." See License Number SUA-1601, *Strata Energy Inc.*, at 12 (ML14069A335).

⁶⁹ See Petition at 7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Petition at 9 (citing LBP-19-2, 89 NRC at 101). The Tribe does not cite to portions of the record where its witnesses testified about fracture testing or describe what other evidence it presented

(Continued)

The Board found that the essential issue was not whether fractures exist in the MEA, but whether, even assuming that these fractures exist, it is reasonably likely that any fractures in the MEA *could* transmit contaminants to the overlying aquifers.⁷³ With regard to faulting and fracturing, the Board observed that “all the parties agreed to a greater or lesser degree that in assessing a facility such as the MEA, it is not the mere presence of a fracture that is important but its transmissivity.”⁷⁴ In discussing possible contaminant pathways, the Board noted Crow Butte’s experts’ testimony that there is “no evidence of a fault or fracture in the MEA that is sufficiently transmissive to serve as a conduit for potential contaminant migration.”⁷⁵ The Board pointed to Crow Butte’s pre-filed rebuttal testimony explaining that (1) “based on undisputed evidence of confinement of the [mined] Basal Chadron aquifer, it is highly unlikely that the MEA contains a fault or a connected pathway . . . capable of transmitting contaminants,” (2) even if minor fractures were to develop in the MEA, they would “close up quickly (i.e., be essentially self-sealing) as a result of overburden pressure from the weight of overlying strata,” and (3) the strong downward hydraulic gradient would preclude contaminants in the mined aquifer moving upward into the surficial aquifers.⁷⁶ Considering all the evidence, the Board found that there was no evidence of a fracture or fault with “sufficient transmissivity to serve as a potential contaminant pathway.”⁷⁷

We therefore disagree that the Board either assumed that there were no faults or fractures in the MEA or shifted the burden of proof to the Tribe to show the existence of transmissive faults there.

regarding the necessity for fracture testing. It does not explain the significance of the presence or absence of faults or fractures to the Board’s findings. In this respect its brief is inadequate, and we would be justified in rejecting the argument on this basis alone. See *Strata*, CLI-16-13, 83 NRC at 592; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991); *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

⁷³ The Board found that “while there is likely some degree of structural fracturing of the geologic strata underlying the MEA, the mere presence of fractures is not the issue. Instead, the transmissivity of the strata is the critical factor.” LBP-19-2, 89 NRC at 80.

⁷⁴ *Id.* at 221-22.

⁷⁵ *Id.* at 99-100 (citing Ex. CBR033, Written Testimony of Crow Butte Witnesses Robert Lewis, Walter Nelson, Douglas Pavlick, and James Striver on Contention 2 (Sept. 7, 2018), at 23 (ML18306-A706) (Crow Butte Rebuttal Testimony); Ex. CBR012, Technical Report app. AA-3, Letter from Robert Lewis, AquiferTek, to Doug Pavlick and Larry Teahon, Cameco Resources (Dec. 17, 2014) (ML18306A619)).

⁷⁶ See Crow Butte Rebuttal Testimony at 23.

⁷⁷ LBP-19-2, 89 NRC at 99-100.

c. *MEA Coverage from a Single Pumping Test*

The Tribe also argues that the Board improperly shifted the burden of proof to the Tribe with respect to whether pumping tests must be conducted covering the entire MEA prior to licensing.⁷⁸ The Tribe points out that the hydraulic pumping test submitted with the application would only cover four mining units out of the eleven mining units planned in the MEA.⁷⁹ The Tribe refers to the Board's statement that "OST has not provided sufficient evidence to establish the need during the pre-licensing phase to place the large financial and time burden on [Crow Butte] to perform the pumping tests for all 11 of the MEA [mining units]."⁸⁰

Between May 16 and May 20, 2011, Crow Butte conducted a pumping test to determine, among other things, the degree of hydrologic confinement between the production zone of the mined (Basal Chadron) aquifer and the overlying (Brule Formation) aquifer.⁸¹ The test utilized one pumping well in the Basal Chadron, nine observation wells in the Basal Chadron, and three observation wells in the Brule Formation.⁸² The radius of influence of the test was 8800 feet (approximately 1.6 miles).⁸³ In pre-filed written testimony, two of the Tribe's witnesses testified that a single pumping test across less than half of the MEA is insufficient to assess hydraulic conditions.⁸⁴ The Board concluded, however, that the pumping test covered "almost half" of the MEA.⁸⁵

Testimony offered by the Staff and Crow Butte indicated that conducting pumping tests across the entire MEA prior to licensing was unnecessary to confirm confinement of the aquifer. In pre-filed rebuttal testimony, Crow Butte's witnesses stated that the pumping test was intended only to cover the first four mining units that Crow Butte plans to develop and this is a common industry practice that is allowed by NRC guidance.⁸⁶ For the other mining units, License

⁷⁸ Petition at 7 (citing LBP-19-2, 89 NRC at 158).

⁷⁹ *Id.*; see Ex. CBR016, Technical Report, app. F, Aqui-Ver, Inc., Marsland Hydrologic Testing Report — Test #8 (revised Oct. 28, 2015) (Marsland Testing Report).

⁸⁰ LBP-19-2, 89 NRC at 158.

⁸¹ See Ex. CBR016, app. F, Marsland Testing Report. The test ran continuously for 103 hours. *Id.* at 8.

⁸² *Id.* at 1.

⁸³ See *id.*

⁸⁴ See Ex. OST003, Expert Opinion Testimony of David K. Kremer, at 2 (Aug. 16, 2018) (ML19306A692); Ex. OST004-R, Wireman Initial Testimony, at 4.

⁸⁵ See LBP-19-2, 89 NRC at 157-58.

⁸⁶ See Ex. CBR033, Crow Butte Rebuttal Testimony, at 7-8 (witnesses Mr. Lewis, Mr. Nelson, Mr. Pavlick) (citing Ex. NRC010, "Standard Review Plan for *In Situ* Leach Uranium Extraction License Applications" (Final Report) NUREG-1569 (June 2003), at 2-24 (ML18306A659) (Standard Review Plan)).

Condition 11.3.4 requires additional site-specific pumping tests for each mining unit as it is developed.⁸⁷ The Staff pointed to multiple lines of evidence supporting hydraulic isolation between the mined and overlying aquifers within the MEA:

(1) hydrologic characteristics of the upper and lower confining units; (2) aquifer pumping test results; (3) the potentiometric surface of the Basal Chadron Sandstone aquifer; (4) differences in potentiometric surfaces between the Basal Chadron Sandstone aquifer and the overlying Brule aquifer; (5) water quality differences between the Basal Chadron Sandstone aquifer and the overlying Brule aquifer; and (6) isotopic age differences between water in the Brule and Basal Chadron Sandstone.⁸⁸

The Board questioned the witnesses closely on this subject during the evidentiary hearing.⁸⁹ Staff witness David Back testified that there is a great deal of data taken throughout the MEA, including borehole data, geophysical logs, and field water-level measurements, which confirm that site conditions supporting adequate containment are consistent throughout the site.⁹⁰

The Board found that the pumping test was only one piece of evidence used to establish confinement and that there were “multiple lines of evidence supporting containment across the MEA site, independent of the pumping test results.”⁹¹ The Board cited evidence including “geological cross-sections and hydrogeologic isopach, structural contour, and potentiometric contour mapping based on the stratigraphic cuttings and geophysical logging of over 1600 boreholes drilled within the MEA.”⁹² It further pointed out that if the pre-operational tests discover any “previously undetected hydrogeologic anomaly,” License Condition 9.4 would require Crow Butte to “develop a plan for safe operations in those conditions, and submit a license amendment” application.⁹³

We do not agree that the Board shifted the burden of proof to the Tribe when it found that the Tribe had not provided sufficient evidence that additional pumping tests were needed. Crow Butte had the burden of proof with respect to its license application, and here, it had the burden specifically with respect to whether there is hydrologic isolation between the Basal Chadron and

⁸⁷ See Ex. NRC009, License, at 19.

⁸⁸ Ex. NRC001, Testimony of David Back, Thomas Lancaster, Elise Striz, and Jean Trefethen (Aug. 17, 2018), at 28 (ML18306A658).

⁸⁹ See Tr. at 434-44.

⁹⁰ Tr. at 442.

⁹¹ LBP-19-2, 89 NRC at 158.

⁹² *Id.*

⁹³ *Id.* at 158-59.

the overlying Brule and Arikaree aquifers. Crow Butte and the Staff provided evidence of isolation between the aquifers within the MEA. In our view, the Board considered all of the evidence and found Crow Butte's and the Staff's evidence to be persuasive. The Tribe's burden-shifting argument, "[a]lthough couched in legal terms, . . . is[,] at bottom a factual challenge to the way the [Board] weighed and balanced the conflicting evidence."⁹⁴ We therefore decline to review the Board's ruling.

In conclusion, we find that the Tribe has not shown a substantial question of Board error in LBP-19-2.

2. Issuance of License Amendment Prior to Final Decision

The Tribe additionally argues that the Board erred when it "upheld" the Staff's decision to issue the license amendment prior to the evidentiary hearing. According to the Tribe, this violates NEPA's dictate to ensure that environmental information is available to the decision maker before actions are taken.⁹⁵ We disagree.

As an initial matter, no particular Board decision upheld the Staff's decision to issue the license. Our regulations state that the Staff is expected to issue the license or amendment when it has completed its review of the materials application regardless of the pendency of an adjudication.⁹⁶ The Staff must notify the Board and other parties and explain how the public health and safety are protected despite the pendency of the adjudication, but the Staff does not require the Board's permission before issuing the license.⁹⁷ Therefore, the Tribe's petition neither points to any Board ruling allowing the license to issue prior to the hearing nor any Board error.

We are not persuaded by the Tribe's argument that our regulation allowing the pre-hearing issuance of a license on its face violates NEPA. Our rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver, which the Tribe has not sought.⁹⁸ Rather, in general, petitioners should bring challenges to agency rules through the petition for rulemaking process.⁹⁹

Even if we considered the Tribe's argument that our regulations are inconsistent with NEPA, the federal court decisions relied on by the Tribe, are dis-

⁹⁴ *David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010).

⁹⁵ Petition at 9-10.

⁹⁶ 10 C.F.R. § 2.1202(a).

⁹⁷ *Id.*

⁹⁸ In general, an individual adjudication is not the proper forum for challenging an agency rule. See 10 C.F.R. § 2.335(a).

⁹⁹ 10 C.F.R. § 2.802.

tinguishable from the situation here.¹⁰⁰ Both of those matters, in contrast to the instant case, involved situations where the Board found a deficiency in the Staff's NEPA document, and neither concluded that in the absence of such a deficiency our practice of issuing a license as soon as the Staff completes its review contravenes NEPA.¹⁰¹ In *Natural Resources Defense Council v. NRC*, the U.S. Court of Appeals for the D.C. Circuit rejected an intervenor's argument that because the Board found the environmental impact statement (EIS) deficient in one respect, the license should be revoked until the Staff had formally supplemented the EIS.¹⁰² That Board found that although the EIS had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS.¹⁰³ The appeals court upheld the agency decision because the Board "came to the same decision [as the Staff] after it had considered the supplemental information" and the adjudicatory record had remedied the NEPA deficiency.¹⁰⁴ Six months later, the same appeals court considered a different set of facts, involving a board decision that denied a motion to suspend a license absent a showing of irreparable harm even after finding that the underlying EIS suffered from a deficiency that had not been remedied through the adjudicatory process itself.¹⁰⁵ The appeals court found that "once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm."¹⁰⁶

These appeals court decisions do not support the Tribe's position. The question in each was whether the license should be suspended after the Board found a deficiency in the Staff's environmental review document. But here, after considering the extensive evidence provided by all parties, the Board found that the Staff's environmental analysis was sufficient. Thus, we conclude that the

¹⁰⁰ *NRDC v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) (both proceedings involved ISR uranium projects).

¹⁰¹ If any environmental or safety hazards come to light in a hearing, the license could be appropriately conditioned or revoked. 10 C.F.R. § 2.340(e)(2); see, e.g., *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-15-3, 81 NRC 65, 142-44, 153-54 (2015) (Board decision revised license condition to require licensee to locate and properly abandon historic boreholes); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 679, 709 (2015) (Board decision imposed license condition to require licensee to locate and properly abandon historic boreholes).

¹⁰² See *NRDC*, 879 F.3d at 1209-13.

¹⁰³ See *Strata*, LBP-15-3, 81 NRC at 153-54.

¹⁰⁴ *NRDC*, 879 F.3d at 1210-11.

¹⁰⁵ *Oglala Sioux Tribe*, 896 F.3d at 527-39.

¹⁰⁶ *Id.* at 538.

Tribe has not shown that the issuance of the license prior to completion of the adjudicatory hearing provides a sufficient basis for Commission review.

3. 2014 Summary Disposition Order

The Tribe argues that the Board should not have dismissed its cultural resources contention, Contention 1, because the Tribe was without counsel during that time and because the Staff was well aware of the Tribe's interest in preserving cultural resources.¹⁰⁷ The Tribe points out that its Tribal Historic Preservation Office and Tribal Council were participating in five licensing actions pending before the NRC at the same time and asserted cultural resources concerns in those proceedings. But the Tribe identifies no Board error.

We find unpersuasive the Tribe's argument that summary disposition was inappropriate because it "should have been clear to both the NRC Staff and Board" that the Tribe was without counsel when the Draft Cultural Resources Assessment was issued.¹⁰⁸ We are aware that the Tribe was relying on *pro bono* counsel for participation in this matter. But the Tribe had counsel of record when it filed its contentions, and that attorney did not file a notice of withdrawal as counsel. We therefore do not agree that it should have been obvious to the Board and Staff that the Tribe was without counsel. It was not the Board's responsibility to ensure the Tribe had representation: "[I]t is the responsibility of the party itself not merely to decide whether it wishes to have counsel, but, in addition, to take the necessary steps to implement its decision."¹⁰⁹ Moreover, the Tribe did not offer a new contention based on the Draft Cultural Resources Assessment, nor did it ask for reconsideration of the Summary Disposition Order after it retained counsel shortly following the Board's ruling.¹¹⁰

Moreover, the Board's Summary Disposition Order was not based on the Tribe's failure to respond to the Staff's motion. In its analysis, the Board observed that our rules of procedure do not "direct that an unopposed motion for summary disposition must automatically be granted."¹¹¹ Instead, the Board examined the Tribe's original contention vis-à-vis the information in the Draft

¹⁰⁷ Petition at 16-18.

¹⁰⁸ *Id.* at 16.

¹⁰⁹ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985).

¹¹⁰ The Tribe obtained new counsel on October 27, 2014. See Tribe's Motion for Extension of Time to Respond to Show Cause Order, and Response of the Oglala Sioux Tribe to Show Cause Order (Dec. 4, 2014) at 1. In its motion, the Tribe appeared to concede that it had waived prosecution of Contention 1. See *id.* at 3.

¹¹¹ Summary Disposition Order at 5 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)).

Cultural Resources Assessment to determine whether the contention could “migrate,” that is, be deemed to apply to the Draft Cultural Resources Assessment the same as to Crow Butte’s ER.¹¹²

The Board found that the information contained in the Draft Cultural Resources Assessment differed significantly from that in the ER.¹¹³ The ER described a three-month survey that found no Native American cultural resources on the site. The Draft Cultural Resources Assessment, in contrast, included a description of the results of the Santee Sioux Survey (which discovered twelve places of religious or cultural significance), the field survey study by a cultural resources expert hired by the Staff, and a description of the tribal consultation process.¹¹⁴ Thus, the Board reasonably held that Contention 1 could not migrate to apply to the Draft Cultural Resources Assessment.¹¹⁵

We therefore find no Board error in dismissing Contention 1. Given the Staff’s efforts to consult with the interested tribes and to characterize traditional cultural properties at the site, as well as the lack of an updated cultural resources contention, the Board had every reason to find Contention 1 moot. There was no reason for the Board to assume that, despite all the new information in the Draft Cultural Resources Assessment, the Tribe would still find it lacking. And it would be improper for the Board to keep Contention 1 in the proceeding as a generalized attack on the Staff’s work, with the details to be filled in later. We do not allow the admission of vague, unparticularized, or open-ended contentions in our proceedings.¹¹⁶ In addition, the Board had no authority to raise issues *sua sponte* without prior Commission permission¹¹⁷ or to rewrite the contention to supply bases that the Tribe had not articulated itself.¹¹⁸ Therefore, the Board did not err in granting summary disposition of Contention 1.

¹¹² Although the Board’s Summary Disposition order refers to the “Draft EA,” the Board was in fact referring to the Draft Cultural Resources Assessment, intended for incorporation into the larger Draft EA published in 2017.

¹¹³ Summary Disposition Order at 12. The Tribe concedes that the dismissal was “in accordance with NRC regulations and rules of practice.” Petition at 17.

¹¹⁴ See Draft Cultural Resources Assessment at 8-12.

¹¹⁵ Summary Disposition Order at 13.

¹¹⁶ See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001).

¹¹⁷ 10 C.F.R. § 2.340(a).

¹¹⁸ See *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009); *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006).

4. LBP-18-3: Denial of New and Renewed Contentions

The Tribe challenges the Board's ruling denying admission of several late-filed contentions after the Staff issued the Final EA in 2018.

a. Untimeliness

The Board found several of the Tribe's proposed contentions untimely because the analysis in the Final EA was substantially unchanged from what was in the Draft EA.¹¹⁹ The Tribe challenges the Board's timeliness ruling with respect to its proposed Contentions L, M, and N.¹²⁰ Contentions L and M related to the concerns that had been dismissed four years earlier with Contention 1. The Tribe argued in Contention L that the Final EA failed to take a "hard look" at the historic, cultural, and spiritual resources at the MEA.¹²¹ In Contention M, the Tribe argued that the Staff failed to adequately consult with the Tribe.¹²² And in Contention N, the Tribe claimed that the Staff's environmental justice analysis was inadequate.¹²³

The Tribe argues that it was not required to submit these contentions prior to the release of the Final EA and that any contentions submitted on the basis of the Draft EA would suffer from a lack of "ripeness."¹²⁴ The Tribe further suggests that its comments on the draft EA were sufficient to raise its concerns to the Staff.¹²⁵ It does not provide support for this legal argument, which is contrary to our regulations.

Our regulations provide that a new or amended environmental contention may be filed based on new information in the Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information.¹²⁶ A contention must be filed at its earliest opportunity. Therefore, a petitioner who waits until the issuance of a final document to raise a contention risks the possibility that there will not be a material difference between the draft and final document.¹²⁷

As described above, the Board found that the Tribe's original cultural resources contention (Contention 1) was mooted when the information in the

¹¹⁹ See LBP-18-3, 88 NRC at 48-51.

¹²⁰ Petition at 14-16.

¹²¹ Tribe Final EA Contentions at 56-65.

¹²² *Id.* at 65-79.

¹²³ *Id.* at 79-84.

¹²⁴ Petition at 15.

¹²⁵ *Id.*

¹²⁶ 10 C.F.R. § 2.309(c), (f)(2).

¹²⁷ *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7-8 (2015).

Draft Cultural Resources Assessment differed substantially from the information in Crow Butte's ER.¹²⁸ Had the cultural resources information in the Final EA been materially different from that available in the Draft EA (Draft Cultural Resources Assessment), then the Tribe would have had the opportunity to submit a new contention challenging that information.¹²⁹ But the Board found that the cultural resources information on which each contention was based was not changed between the Draft EA and the Final EA.¹³⁰ Therefore, the Board's ruling that the contentions were untimely was not in error.

We are not swayed by the Tribe's arguments that the Board failed to safeguard the Tribe's interests.¹³¹ "[A] person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation[, and] it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding."¹³² Thus, our rules do not require a Board to take extraordinary measures to ensure that parties are fully aware of relevant factual details in a proceeding, such as the release of new or updated reports. Nonetheless, the Board made every effort to ensure the Tribe was aware of our procedural regulations and not taken by surprise by the release of the Draft Cultural Resources Assessment. As is customary in our adjudicatory proceedings, the Board directed the Staff to provide updates on the schedule for the expected release of its draft and final review documents.¹³³ Well in advance of the release of the Draft Cultural Resources Assessment, the Board issued a series of schedules for the conduct of the proceeding which included a timeline for a motion for new or amended cultural resource contentions within one month following the release of that draft.¹³⁴ Although these measures are not out of the ordinary for our boards, they show that the Tribe had more than a fair opportunity to participate in our hearing process.

¹²⁸ See Summary Disposition Order at 10-13.

¹²⁹ See 10 C.F.R. § 2.309(c)(ii).

¹³⁰ See LBP-18-3, 88 NRC at 48-51.

¹³¹ See Petition at 17.

¹³² *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

¹³³ See Memorandum and Order (Initial Prehearing Order), at 3 (Feb. 8, 2014) (unpublished); see also Memorandum and Order (Initial Prehearing Conference and Scheduling Order), at 12 (June 14, 2013) (unpublished) (Initial Prehearing Conference Order).

¹³⁴ See Memorandum and Order (Revised General Schedule) (April 30, 2014) (unpublished). The Board issued similar orders on October 30, 2013, March 11, 2014, and March 20, 2014. See also Initial Prehearing Conference Order, at 5-7, app. A.

b. *Federal Jurisdiction over the Marsland Expansion Area*

The Tribe reiterates its proposed Contentions J and K, in which it argued that the MEA is located on land belonging by treaty to the Tribe.¹³⁵ In Contention J, the Tribe observed that the 1868 Fort Laramie Treaty recognized the land on which the MEA sits as part of the Great Sioux Reservation. The Tribe therefore claimed that the proposed expansion site is owned by the Tribe and that neither the federal government, nor the NRC through it, has jurisdiction over the MEA.¹³⁶ Similarly, in Contention K, the Tribe argued that the 1868 Fort Laramie Treaty as well as international law require the Tribe's consent to enter the MEA.¹³⁷ According to the Tribe, the treaty specifically provided that no persons would be authorized to "pass over, settle upon, or reside in the territory described" in the treaty as part of the reservation without the Tribe's permission.¹³⁸

The Board rejected these contentions both because they were not timely filed and were outside the scope of the proceeding. The Board observed that, according to U.S. Supreme Court precedent, the 1868 Fort Laramie Treaty is no longer in effect.¹³⁹ With regard to timeliness, the Board noted that the facts on which the contentions were based were known to the Tribe from the outset of the proceeding and that, therefore, the Tribe could not show good cause for waiting to file them.¹⁴⁰

The Tribe cites two federal cases to support its position, but neither case holds, as the Tribe suggests, that a tribe has jurisdiction to exclude activities from its former territory. In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, the U.S. Court of Appeals for the Ninth Circuit held that a tribal court had jurisdiction to adjudicate tribal claims against a non-member former employee.¹⁴¹ And the U.S. Supreme Court case the Tribe cites in fact limits tribal jurisdiction over reservation land. In *Montana v. United States*, the Court held that a tribe could not prohibit hunting and fishing by a non-member who held title in fee to property located within the reservation.¹⁴² Neither case holds that a tribe's sovereignty extends to former treaty lands such as the MEA.

We find that the Board correctly relied on Supreme Court precedent in re-

¹³⁵ Petition at 10-12.

¹³⁶ See Tribe Final EA Contentions at 38-53.

¹³⁷ *Id.* at 53-56.

¹³⁸ *Id.* at 53.

¹³⁹ LBP-18-3, 88 NRC at 45-46 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)).

¹⁴⁰ *Id.* at 45, 47 (citing 10 C.F.R. § 2.309(c)(1)(i)).

¹⁴¹ 913 F.3d 660, *withdrawn and superseded on reh'g*, 2019 WL 1781404 (2019).

¹⁴² 450 U.S. 544, 564 (1981).

jecting the argument that the Tribe and not the United States has jurisdiction over this license proceeding.¹⁴³ We see no error in the Board’s decision, and we deny review.

c. Significance of Board Rulings in Other Proceedings

The Tribe argues that the Board erred in dismissing Contentions D, L, and M, all of which concern Native American cultural resources in the MEA.¹⁴⁴ The Tribe argues that rulings by other boards (namely, the Board in the *Crow Butte* license renewal proceeding and the Board for the *Powertech* ISR license proceeding) found that the Staff’s efforts to characterize the cultural resources at those sites under NEPA were inadequate in some respects.¹⁴⁵ The Tribe argues that the Staff used “identical methodology” to characterize cultural resources in the other proceedings as it did here; therefore, the cultural resource analysis in this proceeding should also be deemed insufficient to satisfy NEPA.

We have the discretion to exercise review where a board finding of fact is “in conflict with a finding as to the same fact in a different proceeding.”¹⁴⁶ But the Board here made no factual finding that is in conflict with the findings of the other boards.

Rather, the Board rejected these contentions on timeliness. Contentions L and M sought to reassert the cultural resources claims that were initially raised in Contention 1 and dismissed after the issuance of the Draft Cultural Resources Assessment. Moreover, the fact that other boards found environmental analyses deficient in other proceedings is of limited probative value in this one.

The Tribe offers no argument specific to Contention D, and we find no error in the Board’s ruling. Contention D pointed to an apparent agreement reached in March 2018 between the Staff, the Tribe, and a different applicant in another ISR license proceeding, to conduct a cultural resources survey at the Dewey-Burdock site that is the subject of the *Powertech* proceedings.¹⁴⁷ The Tribe argued that the Final EA should include a statement “whether [the Staff] would employ the same approach at the Marsland site.”¹⁴⁸ The Board rejected proposed Contention D as lacking factual support because the March 2018 agreement for

¹⁴³ We have had occasion to consider this issue previously. *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 337 (2009).

¹⁴⁴ Petition at 12-18; *see* Tribe Final EA Contentions at 23-25, 56-79.

¹⁴⁵ Petition at 13.

¹⁴⁶ 10 C.F.R. § 2.341(b)(4)(i).

¹⁴⁷ *See* Tribe Final EA Contentions at 23-25, Ex. A, Letter from Cinthya I. Román, NRC, to Trina Lone Hill, Oglala Sioux Tribe (Mar. 16, 2018) (regarding approach to identifying historic, cultural, and religious sites at the Dewey-Burdock ISR site in Fall River and Custer County, South Dakota).

¹⁴⁸ Tribe Final EA Contentions at 24.

a survey at the Dewey-Burdock site was never carried out: “Given the stated factual underpinning for this contention is no longer accurate, the contention lacks a sufficient basis.”¹⁴⁹ The Tribe does not offer a reason why this ruling was in error, and we discern none.

d. Status of Tribe as a Sovereign Nation and NRC’s Trust Responsibility

The Tribe repeatedly asserts that our “unquestionably Byzantine” procedures should not be applied to it because of its status as a Native American Tribe.¹⁵⁰ It argues that its concerns deserve higher deference than it would if it were “a concerned individual, an interested property owner, an environmental group, or a corporation.”¹⁵¹ It also claims that the NRC bears a “trust responsibility in its dealings with tribal nations.”¹⁵²

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.¹⁵³ 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 NEPA.¹⁵⁴ The Tribe is not entitled to greater rights than it would otherwise have under those statutes as an interested party.¹⁵⁵

The Tribe has not shown that the Board denied it a fair process or that the Staff failed in its duties under the AEA or NEPA. The Tribe does not raise a substantial question for our review with respect to its rejection of its “new and renewed” contentions.

¹⁴⁹ LBP-18-3, 88 NRC at 37.

¹⁵⁰ See Petition at 4, 16-17; Tribe Reply.

¹⁵¹ Tribe Reply at 3.

¹⁵² Petition at 16.

¹⁵³ See, e.g., *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997).

¹⁵⁴ See *Morongo Band*, 161 F.3d at 574; *Skokomish Indian Tribe*, 121 F.3d at 1308-09.

¹⁵⁵ See *Skokomish Indian Tribe*, 121 F.3d at 1308-09.

III. CONCLUSION

For the foregoing reasons, we deny review of the Board's decisions in LBP-19-2, LBP-18-3, and the Summary Disposition Order.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of April 2020.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

Docket No. 11006361
(License No. XSNM3810)

DEPARTMENT OF ENERGY
(Export of 93.35% Enriched Uranium)

April 13, 2020

HEARING REQUESTS

The public participation procedures in 10 C.F.R. Part 110 prescribe the permissible types of pre-hearing filings — written comments, hearing requests and intervention petitions, and answers and replies to hearing requests and intervention petitions — and the Commission will not ordinarily entertain other pre-hearing filings in export and import license proceedings.

HEARING REQUESTS

Under the Atomic Energy Act and Nuclear Non-Proliferation Act, the Commission is responsible for making a decision on an export license application based on the applicable statutory requirements, regardless of whether an applicant chooses to file a response to a hearing request or petition for leave to intervene. The public participation procedures in 10 C.F.R. Part 110 permit, but do not require, an applicant to answer a hearing request or intervention petition.

HEARING REQUESTS

The public participation procedures in 10 C.F.R. Part 110 expressly invite submission of written comments from members of the public on export license applications. The provisions of 10 C.F.R. Part 2, including the prohibition on

ex parte communications in 10 C.F.R. § 2.347, do not apply to Part 110 hearing requests.

HEARING REQUESTS

To obtain a hearing in a nuclear export licensing proceeding, the Commission must find that such a hearing will be in the public interest and will assist in making the statutory determinations required by the Atomic Energy Act. Hearing requests must, at minimum, explain how these standards are satisfied and set forth the issues sought to be raised. Those seeking a hearing may also assert that their interests may be affected by the issuance of the license, in which case the Commission will consider the nature of the alleged interest, how that issue relates to the issuance or denial, and the possible effect of any order on that interest, including whether the relief requested is within the Commission's authority.

HEARING REQUEST

Persons with an affected interest are more likely to demonstrate that a hearing will be in the public interest and assist the Commission in making the requisite statutory determinations. The Commission looks for such petitioners to demonstrate how a hearing would bring new information to light.

HEARING REQUEST

Simply asserting an institutional interest in providing information to the public is insufficient to show an interest that may be affected by an export license proceeding.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

The definition of "can be used" in Atomic Energy Act § 134 refers to the "large majority" of planned "medical isotope production" *generally* produced; it does not refer to the "large majority" of medical isotope production broken down by individual isotopes or otherwise indicate that the NRC must apply the "large majority" criterion isotope to isotope.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

The Commission does not construe AEA § 134(a)(1) as requiring us to determine whether alternative targets exist for each isotope the producer plans to

collect. Rather, when determining whether an alternative target “can be used,” the Commission finds that the best interpretation of § 134(a)(1) is to look at the planned medical isotope production in its entirety and then to determine whether the ultimate consignee could produce a large majority of those isotopes with an alternative target.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

Under AEA § 134(a)(1), a target “can be used” if its use “will permit the large majority of ongoing and planned . . . medical isotope production to be conducted in the reactor.” A key phrase in the definition is “planned . . . medical isotope production.” The question is not simply whether an alternative target exists that the reactor operators can place in the reactor that will still allow safe operation during the irradiation process. Rather, the question is whether an alternative target exists that the reactor operators can safely place in the reactor *and* from which the medical isotope producer can collect medical isotopes.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

An active program satisfies AEA § 134(a)(3) if it leads to the development of an LEU target that can be used to produce medical isotopes.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

To issue an export license, the Commission must determine under § 57c.(2) of the AEA that the proposed export, in addition to meeting the other export requirements, will not be “inimical to the common defense and security” of the United States. In the absence of “unusual circumstances,” if a proposed export satisfies the NNPA’s non-proliferation criteria, then it would likewise satisfy the common defense and security standard.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

When determining whether any “unusual circumstances” exist with respect to a proposed export, the Commission gives great weight to the Executive Branch’s judgments.

MEMORANDUM AND ORDER

The U.S. Department of Energy, National Nuclear Security Administration

(DOE/NNSA) seeks to export 4.455 kilograms of uranium-235 in 4.772 kilograms of uranium with a maximum enrichment of 93.35%. This highly enriched uranium (HEU) would be exported to Belgium — specifically to the Institute for Radioelements (IRE) — over a period ending in 2022. NorthStar Medical Radioisotopes, LLC (NorthStar), Nuclear Threat Initiative (NTI), Curium US LLC (Curium), and Dr. Alan J. Kuperman (Dr. Kuperman) (all four collectively, Petitioners) request leave to intervene and a hearing on the export license application filed by DOE/NNSA.¹ For the reasons discussed below, we deny the Petitioners’ requests for hearing and direct issuance of the requested license.

I. BACKGROUND

In August 2019, DOE/NNSA submitted to the NRC a license application to export HEU to IRE for the production of medical isotopes.² The HEU first would be sent to Framatome in France to fabricate targets for medical isotope production. The application states that these targets will then be irradiated in the High Flux Research Reactor (HFR) in the Netherlands, the Belgian Reactor 2 (BR-2) Research Reactor, the LVR-15 Research Reactor in Czechia, and the MARIA Research Reactor in Poland. The irradiated targets would be transferred to IRE, which will extract molybdenum-99 (Mo-99) and iodine-131 (I-131). IRE will use the extracted Mo-99 and I-131 to produce radiopharmaceuticals that it sells globally, including for patient use in the United States.

The original application provided a target timeframe for shipment dates between October 2019 and March 2020, and it included a cover letter stating that the application covered the total estimated quantity of HEU “required by IRE to sustain Mo-99 and I-131 production” from the fourth quarter of calendar year 2020 through the projected completion of IRE’s conversion to a low-enriched uranium (LEU) program in the second quarter of calendar year 2022. In September 2019, DOE/NNSA amended its application with a new proposed expiration date of December 31, 2021, to reflect that actual shipment dates would be determined on a rolling basis based on market conditions.³

¹ See NorthStar Medical Radioisotopes, LLC Request for Hearing (Aug. 26, 2019) (ADAMS accession no. ML19241A501) (NorthStar Request); Petition to Intervene and Request for Hearing of Nuclear Threat Initiative (Sept. 11, 2019) (ML19254C538) (NTI Petition); Petition to Intervene and Request for Hearing of Curium US LLC (Sept. 13, 2019) (ML19256E839) (Curium Petition); Petition of Alan J. Kuperman for Leave to Intervene and Request for Hearing (Sept. 19, 2019) (ML19262G478) (Kuperman Petition).

² Export License Application from U.S. Department of Energy National Nuclear Security Administration, XSNM3810 (Aug. 5, 2019) (ML19213A204).

³ Export License Application from U.S. Department of Energy National Nuclear Security Administration, XSNM3810 (Sept. 3, 2019) (ML19246A247) (Amended Application).

Consistent with the Atomic Energy Act of 1954, as amended (AEA), and our regulations, the NRC staff forwarded the application to the Department of State to receive the views of the Executive Branch.⁴ The NRC completed its consultation with the Executive Branch concerning this export license application on February 11, 2020.⁵

Our regulations provide any person with the opportunity to request a hearing or submit a petition for leave to intervene on an export license application within 30 days of NRC notice of the application.⁶ All four Petitioners timely submitted their requests.⁷ DOE/NNSA did not file an answer to these requests. The NRC also received four letters providing views on the export license application; these letters were placed in the adjudicatory docket and served on the litigants.⁸ NorthStar, Curium, and NTI filed a combined response to the letter from IRE.⁹ Curium also filed a motion asking the Commission to order DOE/NNSA to show cause as to why its application should not be terminated for lack of participation in the hearing process (or, in the alternative, to admit the unopposed petitions to intervene).¹⁰

As discussed below, we deny the requests for a hearing. We first address Curium's motion to show cause and clarify the status of the four letters received by the NRC on the application. We then consider the standards in 10 C.F.R.

⁴ See 42 U.S.C. § 2155; 10 C.F.R. § 110.41.

⁵ Where permitted, this order includes pertinent information derived from the NRC's consultation with the Executive Branch. However, because this consultation process included the exchange of proprietary information, these documents are not publicly available, pursuant to 10 C.F.R. § 110.72.

⁶ 10 C.F.R. § 110.82(c).

⁷ Throughout this decision, we will typically refer to the Petitioners collectively in addressing their arguments, except where an argument is made by only one petitioner.

⁸ Letter from Denise McGovern, Acting Secretary, NRC, to Mary Anne Heino, Lantheus Medical Imaging (Sept. 20, 2019) (ML19263E194) (Lantheus Letter); Letter from Annette Vietti-Cook, Secretary, NRC, to Erich Kollegger, National Institute of Radioelements (Oct. 4, 2019) (ML19277D318) (IRE Letter); Letter from Annette Vietti-Cook, Secretary, NRC, to Senator Roy Blunt and Congresswoman Ann Wagner (Oct. 7, 2019) (ML19280C599); Letter from Annette Vietti-Cook, Secretary, NRC, to Sven Van den Berghe and Eric van Walle, Belgian Nuclear Research Centre (Oct. 17, 2019) (ML19290H611). As discussed further, *infra*, NRC regulations encourage members of the public to submit written comments regarding export and import license applications. See 10 C.F.R. § 110.81.

⁹ Response to Institute for Radioelements September 26, 2019 Letter to the Commission (Oct. 10, 2019) (ML19283D150).

¹⁰ Curium U.S. LLC Motion for Order to Show Cause as to Why the License Application Should Not Be Terminated (Nov. 6, 2019) (ML19310E574) (Curium Motion). DOE/NNSA responded, asking us to strike or deny Curium's motion. Motion to Strike or in the Alternative to Deny Curium's Motion for Order to Show Cause (Nov. 15, 2019) (ML19319A988). Curium requested that we deny DOE's motion. Curium Response to DOE's Motion to Strike or in the Alternative to Deny Curium's Motion for Order to Show Cause (Nov. 20, 2019) (ML19324G862).

§ 110.84 to determine whether any of the four hearing requests should be granted and conclude that a hearing is not in the public interest and would not assist us in making the requisite statutory determinations in this proceeding. Finally, we find the requisite statutory criteria in the AEA satisfied based on the existing record and direct the issuance of the license.

To provide context for our discussion of the application and the various issues raised, we briefly summarize the provisions of the American Medical Isotopes Production Act of 2012 (AMIPA), which the Petitioners cite. AMIPA amended § 134 of the AEA to include a sunset provision prohibiting the issuance of a license to export HEU for the purposes of medical isotope production after January 2, 2020.¹¹ However, AMIPA permits the Secretary of Energy to delay the sunset provision by up to six years, by certifying that there is an insufficient global supply of Mo-99 produced without the use of HEU available to satisfy the domestic market and that the export of U.S.-origin HEU is the most effective temporary means to increase the supply of Mo-99 to the domestic market.¹² On January 2, 2020, the Secretary of Energy made this certification, thereby delaying AMIPA's sunset provision by no more than two years.¹³ Thus, AMIPA does not currently preclude the NRC from issuing this export license.

II. CURIUM'S MOTION TO SHOW CAUSE

Curium has filed a motion requesting that we either order DOE/NNSA to show cause why its license application should not be terminated, or in the alternative, grant the petitions to intervene in this proceeding.¹⁴ Curium argues that the lack of a response by DOE/NNSA to the hearing requests amounts to a "choice to not participate" in this proceeding or an "abandon[ment]" of the license application, precluding development of an administrative record.¹⁵ As a result, Curium asserts the only support for the application comes in the form of *ex parte* communications on which the Commission may not rely.¹⁶

¹¹ 42 U.S.C. § 2160d(e)-(h).

¹² *Id.* § 2160d(d).

¹³ Exports of U.S.-Origin Highly Enriched Uranium for Medical Isotope Production: Certification of Insufficient Supplies of Non-Highly Enriched Uranium (HEU)-Based Molybdenum-99 for United States Domestic Demand, 85 Fed. Reg. 3362 (Jan. 21, 2020) (Certification of Insufficient Supplies). At the time we received the hearing requests, the certification delaying AMIPA's sunset provision had not yet been issued.

¹⁴ Curium Motion at 1.

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 3-5. The asserted *ex parte* communications referenced in the Curium Motion are three of the four letters received by the NRC regarding this export license application, including letters from:

(Continued)

The public participation procedures in Part 110 provide for three types of pre-hearing filings — written comments under § 110.81; hearing requests and intervention petitions under § 110.82; and answers and replies to hearing requests and intervention petitions under § 110.83.¹⁷ Part 110 does not contemplate pre-hearing motions, and Curium has not provided a convincing reason for us to entertain one here.¹⁸ Consequently, we take no action on the Curium Motion (or the subsequent responses prompted by that motion).

On Curium’s specific points, DOE/NNSA’s choice not to respond to the petitions has no effect on the status of the license application, our review of that application, or our consideration of the petitions. Under the AEA and the Nuclear Non-Proliferation Act of 1978 (NNPA), we are responsible for making a decision on an export license application based upon the applicable statutory requirements, regardless of whether an applicant chooses to file a response to a hearing request or petition for leave to intervene.¹⁹ While the AEA requires that we establish public participation procedures in export license proceedings, our regulations provide an applicant, such as DOE, the opportunity to answer a hearing request or intervention petition but do not require that an answer be submitted.²⁰

With respect to Curium’s arguments that 10 C.F.R. § 2.347 and associated NRC case law bar us from considering the letters commenting on the export application, the provisions of 10 C.F.R. Part 2, including § 2.347, do not apply to Part 110 hearing requests.²¹ And Part 110 expressly invites submission of

(1) Lantheus Medical Imaging, Inc., expressing support for approval of the license application; (2) IRE, stating that the requests for a hearing filed by NorthStar, Curium, and NTI “are either not in accordance with the facts, or misinterpreting IRE’s intentions”; and (3) SCK-CEN, the Belgian Nuclear Research Centre that operates the BR-2 research reactor identified as an intermediary in the license application, responding to an alleged “false statement” in Curium’s hearing request. Prior to the receipt of SCK-CEN’s letter, Curium had filed a correction on the docket for this statement. *See* Curium Correction to Declaration of Roy W. Brown (Oct. 1, 2019) (ML19274B999); *see also* Curium Motion at 4 n.11. Curium’s motion does not refer to the letter received from Senator Blunt and Representative Wagner, which expressed support for Curium’s request for a public hearing.

¹⁷ “Procedural requests,” such as the request for an extension of time to file a hearing request that Curium submitted and obtained in this proceeding, are also permitted. 10 C.F.R. § 110.88; Request for Extension of Time to File a Hearing Request (Aug. 28, 2019) (ML19240B461).

¹⁸ Curium’s response to DOE’s motion to strike Curium’s motion references 10 C.F.R. § 110.109, “Motions and requests,” but this section only applies *after* we have granted a hearing in a Part 110 proceeding. 10 C.F.R. pt. 110, subpt. I, “Hearings.”

¹⁹ *See* 42 U.S.C. § 2155(b)(1); 10 C.F.R. § 110.45(a).

²⁰ 42 U.S.C. § 2155a(b); 10 C.F.R. § 110.83(a).

²¹ *See* 10 C.F.R. § 110.80 (“The procedures in this part [i.e., Part 110] will constitute the exclusive basis for hearings on export and import license applications.”); *id.* § 2.1 (“This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110.”).

written comments from members of the public on export applications.²² We consider all four letters received as written comments submitted properly under 10 C.F.R. § 110.81(b). We also consider the collective response to IRE’s letter as a written comment.²³ These comments have been considered in the course of this decision and, as appropriate, this order responds to the comments.²⁴

III. HEARING REQUESTS

A. Standards

We allow for public hearings in nuclear export licensing proceedings when we find that such a hearing will be in the public interest and will assist us in making the statutory determinations required by the AEA.²⁵ Hearing requests and intervention petitions must, at minimum, explain how these standards are satisfied and set forth the issues sought to be raised.²⁶ Those seeking a hearing may also assert that their interests may be affected by the issuance of the license and, if doing so, must specify “both the facts pertaining to [the] interest and how it may be affected.”²⁷ If a petitioner does assert an interest that may be affected, when taking action on that petition the Commission will consider the nature of the alleged interest; how that issue relates to the issuance or denial; and the possible effect of any order on that interest, including whether the relief requested is within the Commission’s authority and, if so, whether granting relief would redress the alleged injury.²⁸

As we have previously explained, nothing in the AEA or NNPA “suggests that the Commission must hold a hearing if a member of the public requesting a hearing has standing — or as AEA § 189 puts it, ‘an interest which may be

²² See 10 C.F.R. § 110.81. Specifically, our regulations state that written comments should be submitted within thirty days after public notice of receipt of the application and addressed to the Secretary. *Id.* § 110.81(b). Here, because DOE/NNSA submitted its amended application on September 3, 2019, written comments submitted on or before October 3, 2019, fell within this thirty-day time period. Each of the four letters in question was timely received.

²³ Curium argues that NRC regulations do not provide a means for hearing requestors to respond to comments (Curium Motion at 4). We note that nothing in § 110.81 precludes the submission of a comment in response to another comment (as the Petitioners have done in this case, in response to IRE’s letter), and we retain the discretion to consider such comments, as appropriate, even if filed after the 30-day deadline in § 110.81(b).

²⁴ 10 C.F.R. § 110.81(a).

²⁵ *Id.* § 110.84(a); see also *Edlow International Co.* (Export of 93.20% Enriched Uranium), CLI-17-3, 85 NRC 44, 48 (2017).

²⁶ 10 C.F.R. § 110.82(b).

²⁷ *Id.* § 110.82(b)(4).

²⁸ *Id.* § 110.84(b).

affected.”²⁹ However, we have found that entities with an affected interest are more likely “to contribute to our decisionmaking, show that a hearing would be in the public interest, and assist us in making the statutory determinations.”³⁰ When considering whether a petitioner could assist in making these determinations, we look for the petitioner to show “how a hearing would bring new information to light” and analyze whether any of the Petitioners has sufficiently asserted or established an interest that may be affected by the issuance of the license as set forth in § 110.84(b).³¹

B. Hearing Requests Asserting an Interest That May Be Affected

Three of the Petitioners — NorthStar, Curium, and Dr. Kuperman — expressly assert that they have an interest that will be affected by this proceeding.³² NorthStar states that it is a nuclear medicine technology company that produces Mo-99 without the use of HEU — “the first domestic producer of this critical radioisotope in the United States in almost 30 years” and “the first success under [AMIPA].”³³ NorthStar also states that it is similar to other market participants that have converted from HEU Mo-99 production at “great expense, time and effort” and that, like other similarly situated market participants, it has “direct financial interests that have been undermined by IRE’s failure to convert” from HEU to LEU or non-uranium processes.³⁴ NorthStar seeks a hearing because it believes that IRE benefits from an “unfair and unbalanced market,” given that other producers of medical isotopes have incurred expense to convert their operations in furtherance of U.S. non-proliferation goals.³⁵

Curium similarly asserts an interest as an economic competitor of IRE. Curium states that it and its affiliate companies “constitute the world’s largest supplier of [technetium-99m] generators and the largest producer and user of

²⁹ *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 367 (2004).

³⁰ *Edlow International Co.*, CLI-17-3, 85 NRC at 48 n.10 (citing *U.S. Department of Energy*, CLI-04-17, 59 NRC at 367).

³¹ *Diversified Scientific Services, Inc.* (Export of Low-Level Waste), CLI-19-2, 89 NRC 229, 232-33 (2019) (citing *U.S. Department of Energy* (Export of 93.20% Enriched Uranium), CLI-16-15, 84 NRC 53, 58 n.25 (2016)).

³² Although NTI asserts that it has “standing to request a hearing” (NTI Petition at 2), the petition itself does not assert an interest that may be affected by the issuance of the license or reference the factors in § 110.84(b). Rather, NTI generally argues that its experience and expertise in matters of non-proliferation make it uniquely qualified to contribute to our decision-making. *Id.* at 2-4. As such, we do not analyze NTI’s petition under § 110.84(b).

³³ NorthStar Request at 2-3.

³⁴ *Id.* at 3.

³⁵ *Id.* at 3-4.

Mo-99.”³⁶ Similar to NorthStar, Curium asserts that through “great expense, time and effort,” it has converted from HEU to LEU targets for medical isotope production, despite “incurring significant commercial impacts.” Curium states that approval of this export license “will effectively be punishing Curium and other world suppliers” who have similarly done so in furtherance of U.S. non-proliferation policy.³⁷

Lastly, Dr. Kuperman asserts an interest as a Coordinator of the Nuclear Proliferation Prevention Project (NPPP), editor, author, and former staffer in the U.S. Congress with significant professional experience in nuclear non-proliferation policy, including the minimization of the use and export of HEU.³⁸ Dr. Kuperman states that he has “important institutional interests that would be directly affected by the outcome of this proceeding.” Namely, he states that given his active involvement in “public information and education programs” on topics such as nuclear terrorism, non-proliferation, and the use of HEU, his “ability to carry out these functions would be significantly and adversely impaired by the absence of a full, open, and independent review” by the Commission of this license application.³⁹

With respect to Dr. Kuperman’s request for a hearing, simply asserting an “institutional interest in providing information to the public” is insufficient to show an affected interest.⁴⁰ Although we acknowledge Dr. Kuperman’s extensive knowledge and professional experience in this area, this interest is not one that may be affected by this proceeding.

NorthStar and Curium articulate the nature of their respective interests as direct economic competitors of IRE who, through significant efforts, do not use HEU to produce medical radioisotopes. Both assert that IRE is the last market participant to fully do so and should not continue to enjoy this economic advantage over its competitors.⁴¹

We look to the factors in § 110.84(b) when considering whether the affected interests asserted by NorthStar and Curium sufficiently demonstrate an interest within the meaning of that section.⁴² As to “whether the relief requested is within

³⁶ Curium Petition at 10.

³⁷ *Id.* at 2, 11.

³⁸ Kuperman Petition at 2-3. Dr. Kuperman also notes that he has been a frequent participant in NRC export license proceedings dating back to 2001. *Id.* at 3-4.

³⁹ *Id.* at 4-5.

⁴⁰ *See, e.g., Edlow International Co.*, CLI-17-3, 85 NRC at 49 n.15 (citing *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994)); *U.S. Department of Energy*, CLI-16-15, 84 NRC at 58.

⁴¹ NorthStar Request at 4; Curium Petition at 12.

⁴² At the outset, we note that the “nature of the alleged interest” (10 C.F.R. § 110.84(b)(1)) —
(Continued)

the Commission’s authority,”⁴³ we do not have the authority to make *market-based* determinations on whether to foreclose U.S.-origin HEU exports for the purposes of medical isotope production. Rather, through AMIPA Congress gave authority to the Secretaries of Energy and Health and Human Services (HHS) — not the NRC — to make that determination.⁴⁴ Our role in the licensing of such exports is to ensure that all applicable statutory criteria governing the export — none of which include consideration of economic or market-based interests — are satisfied. Further, AMIPA’s now-extended sunset provision does not preclude issuance of this license.⁴⁵ We therefore conclude that NorthStar and Curium, as direct economic competitors of IRE, do not demonstrate an interest within the meaning of § 110.84(b).

C. Whether a Hearing Would Be in the Public Interest or Assist in Making Statutory Determinations

Even if the Petitioners had demonstrated an interest under the standards in § 110.84(b), we would only order a hearing on this export application if the Petitioners had sufficiently demonstrated that a hearing would be in the public interest and would assist in making the statutory determinations required by the AEA.⁴⁶ All the Petitioners have raised substantive arguments that either directly or implicitly assert the application fails to meet certain statutory requirements. Given the number of petitions and overlap in these arguments, and for the sake of simplicity, we address the Petitioners’ arguments in section IV of this order in conjunction with analyzing each statutory criterion. Before doing so,

unfair competitive disadvantage through IRE’s continued use of HEU — is addressed by AMIPA itself. Since its passage, AMIPA has included a provision allowing for the Secretary of Energy to extend its sunset provision. While we recognize the efforts of those who have converted from the use of HEU, the plain language of the statute has always contemplated that the AMIPA sunset date on HEU exports could be extended. But as we previously acknowledged, we note that both petitions were filed well before it was clear that the Secretary of Energy would extend AMIPA’s sunset provision.

⁴³ 10 C.F.R. § 110.84(b)(3).

⁴⁴ See 42 U.S.C. § 2160d(f) (authorizing the Secretaries of Energy and HHS to jointly certify that there is a sufficient supply of Mo-99 to meet the needs of U.S. patients without the export of U.S.-origin HEU, thereby causing the AMIPA sunset provision to go into effect).

⁴⁵ To the extent that NorthStar and Curium (and other Petitioners) argue that the export of HEU is *unnecessary or excessive*, and therefore “inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public” (42 U.S.C. § 2077(c)(2)), we address such arguments in section IV.D. when making the required statutory finding.

⁴⁶ See *U.S. Department of Energy*, CLI-04-17, 59 NRC at 366 (“Even if the Petitioners had shown standing, we would not order a hearing on this export application.”).

however, we clarify the lens through which we view these hearing requests in this proceeding.

First, our regulations require that we determine whether a hearing would be in the public interest.⁴⁷ We note that this particular license application has been filed against the backdrop of a certification by the Secretary of Energy that there is currently an insufficient global supply of Mo-99 produced without the use of HEU available to satisfy the needs of the U.S. market. The Executive Branch also has provided its view that there is currently considerable risk and uncertainty in this supply chain and that IRE is a critical supplier to the U.S. market for medical isotopes. In export proceedings, we must be persuaded by the Petitioners that holding a hearing would result in the acquisition of new information that will assist in making statutory determinations concerning this application that we otherwise could not make based on the existing record.

Each Petitioner has claimed, to varying degrees, that they have made this demonstration. NorthStar argues that its oral and written testimony in a hearing would allow us to be “fully briefed” on its concerns and “permit an open dialogue” although it provides no specifics on what information it would offer that is not already included in its hearing request.⁴⁸ Dr. Kuperman emphasizes his “broad experience and expertise in technical and policy matters” directly relevant to the application and argues that he would bring “perspectives that are presently lacking and are pivotal to an understanding” of its factual and legal issues.⁴⁹ But he similarly does not specify what new information he would provide at a hearing that is not already raised in his petition.⁵⁰

NTI argues that it is uniquely qualified, as a “leading global authority on nuclear non-proliferation,” to provide us with information on the proliferation risks associated with civilian HEU exports.⁵¹ NTI further asserts that through its staff (which consists of “former leaders of U.S. government nuclear policy”), it can “make available to the Commission centuries of collective experience” and an “unprecedented amount of understanding” on the global non-proliferation environment.⁵² Curium similarly argues that it can “uniquely contribute” to our decisionmaking in this proceeding because it can provide “specific technical and business information” in “significant detail” (including expressing a willingness to provide us with proprietary, non-public information, as appropriate) in support of the alleged deficiencies with the application.⁵³

⁴⁷ 10 C.F.R. § 110.84(a)(1).

⁴⁸ NorthStar Request at 12.

⁴⁹ Kuperman Petition at 20.

⁵⁰ *Id.*

⁵¹ NTI Petition at 2, 4.

⁵² *Id.* at 4.

⁵³ Curium Petition at 24-26.

In our view these latter two petitioners express more fully and with greater particularity the kinds of information each petitioner is capable of elucidating, and we acknowledge their expertise in this field and willingness to do so. However, these petitioners have already provided robust discussion and detailed analyses, and we have ample information in the existing record to assess the merits of the issues they have raised in making our licensing determination.

Therefore, having reviewed all four petitions and the record before us, we conclude that granting a hearing in this proceeding would not be in the public interest or assist in our statutory decisionmaking. Holding a hearing to acquire additional information beyond what has been already provided thus far is unnecessary. As discussed in greater detail below, we find that the application satisfies all applicable statutory criteria based on the existing record. We therefore deny all four hearing requests and address their substantive arguments in conjunction with our analysis of the requisite statutory and regulatory determinations.

IV. STATUTORY AND REGULATORY DETERMINATIONS

In accordance with AEA § 126,⁵⁴ the NRC requested the views of the Executive Branch on the export application. The Executive Branch communicated its judgment that the proposed export satisfies all applicable statutory requirements and would not be inimical to the common defense and security of the United States. The Executive Branch confirmed that the proposed export to France and subsequent use in Belgium, Czechia, the Netherlands, and Poland would take place pursuant to the U.S.–Euratom Agreement for Cooperation in the Peaceful Uses of Nuclear Energy. It recommended that the NRC make the requisite statutory findings and issue the requested license with the understanding that the actual shipments of HEU will be limited to what is needed by IRE year-by-year.

With Executive Branch views in hand, we must determine whether the statutory requirements are met. In order to grant an export license for HEU, we must find that the proposed export satisfies the following statutory provisions:

- The non-proliferation criteria in AEA § 127;⁵⁵
- The additional non-proliferation criteria in AEA § 128, if the export includes a non-nuclear weapons state (here, Belgium, the Netherlands, Poland, and Czechia);⁵⁶
- The further restrictions on exports of HEU to be used as a fuel or target in

⁵⁴ 42 U.S.C. § 2155.

⁵⁵ *Id.* § 2156; *see also* 10 C.F.R. § 110.42(a)(1)–(5).

⁵⁶ 42 U.S.C. § 2157; *see also* 10 C.F.R. § 110.42(a)(6).

a nuclear research or test reactor, codified in AEA § 134 (the “Schumer Amendment”);⁵⁷ and

- The requirement, under AEA § 57c(2), that the proposed export will not be “inimical to the common defense and security” of the United States.⁵⁸

We address each in turn.

A. Section 127 Criteria

Section 127 of the AEA lists five applicable nonproliferation criteria that govern exports of special nuclear material.⁵⁹ None of these criteria are the subject of any of the petitions or comments. We have reviewed the Executive Branch’s views, which contain assurances that the five criteria of section 127 will be met. Based on these views and our review of the application, we find that these non-proliferation criteria are satisfied.

B. Section 128 Criterion

Section 128 of the AEA requires that any recipient of special nuclear material that is a non-nuclear weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) must have full-scope International Atomic Energy

⁵⁷ 42 U.S.C. § 2160d; *see also* 10 C.F.R. § 110.42(a)(9).

⁵⁸ 42 U.S.C. § 2077(c)(2); *see also* 10 C.F.R. § 110.42(a)(8). Additionally, the export must be under the terms of an agreement for cooperation (a “123 agreement”). *See* AEA § 123, 42 U.S.C. § 2153; 10 C.F.R. § 110.42(a)(7). As confirmed by the Executive Branch, this proposed export would take place in accordance with the terms of the U.S.–Euratom Agreement for Cooperation in the Peaceful Uses of Nuclear Energy.

⁵⁹ 42 U.S.C. § 2156; *see also* 10 C.F.R. § 110.42(a)(1)–(5). In abbreviated form, the five criteria relevant to DOE/NNSA’s export application are as follows:

- (1) [International Atomic Energy Agency] safeguards will be applied with respect to any such material proposed to be exported.
- (2) No material proposed to be exported will be used for any nuclear explosive device or for research on or development of any nuclear explosive device;
- (3) Adequate physical security measures will be maintained with respect to such material proposed to be exported and to any special nuclear material used in or produced through the use thereof;
- (4) No material proposed to be exported will be re-transferred to jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such re-transfer;
- (5) No material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained.

Agency (IAEA) safeguards with respect to all peaceful nuclear activities carried out in that state.⁶⁰ Belgium, Czechia, the Netherlands, and Poland have placed all of their peaceful nuclear activities under IAEA safeguards.⁶¹ We therefore find that this additional non-proliferation criterion is satisfied.

C. Section 134 Criteria

Section 134(a) of the AEA requires the NRC to make the following additional findings before authorizing an application to export HEU:

- (1) there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in the reactor;
- (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium; and
- (3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor.⁶²

According to the Executive Branch, Argonne National Laboratory (ANL) has confirmed that no currently available LEU target exists that IRE can use in its production facility for all proposed isotope production, and IRE intends to convert its production facility once such a target can be used. ANL has similarly confirmed that no alternative target currently exists that IRE can use for medical isotope production at the BR-2, LVR-15, HFR, or MARIA research reactors and that once such a target can be used, the relevant parties will use it. DOE/NNSA is cooperating with IRE to convert IRE's facility to use LEU targets. The Executive Branch communicated that, based on current estimates, IRE should finish converting its facility to use LEU targets by June 2022, at which point it will be able to use LEU targets.

The petitions and comments primarily focus on § 134(a)'s first criterion but raise points about the third criterion as well.

⁶⁰ 42 U.S.C. § 2157; *see also* 10 C.F.R. § 110.42(a)(6).

⁶¹ Section 128's additional criteria do not apply to France because it is a nuclear-weapon state party to the NPT.

⁶² 42 U.S.C. § 2160d; *see also* 10 C.F.R. § 110.42(a)(9).

1. There Is No Alternative Nuclear Reactor Fuel or Target Enriched in the Isotope 235 to a Lesser Percent Than the Proposed Export, That Can Be Used in the Reactor

Pursuant to § 134(h)(3) and our implementing regulations, a target “can be used” in a nuclear research or test reactor if —

- (A) The . . . target has been qualified by the Reduced Enrichment Research and Test Reactor Program of [DOE]; and
- (B) use of the . . . target will permit the large majority of ongoing and planned experiments and medical isotope production to be conducted in the reactor without a large percentage increase in the total cost of operating the reactor.⁶³

The Petitioners have raised several arguments about this criterion to the effect that the NRC cannot make this finding because an alternative target exists that can be used in either IRE’s facility or the various reactors. As explained below, however, we do not agree that there are “alternative targets” that “can be used,” as that term is understood, at the IRE facility.

a. Individual Isotopes

IRE intends to use the requested HEU to produce Mo-99 and I-131. According to IRE’s written comment, its conversion for Mo-99 production should be complete by the end of 2020, but IRE will not have finished converting to LEU targets for I-131 production until the second quarter of calendar year 2022.⁶⁴ The Executive Branch views have confirmed these statements. Thus, during the period covered by this application, IRE could produce one of the medical isotopes with LEU targets but not the other.

The Petitioners maintain that we cannot find § 134(a)(1) to be satisfied because IRE will have completed the conversion of its facility to the use of LEU targets for Mo-99 production prior to using the HEU exported from this application.⁶⁵ They note that at a July 2019 Organisation for Economic Co-operation and Development (OECD)-Nuclear Energy Agency presentation, IRE publicly stated that it “expects to complete the conversion” from HEU to LEU targets for its Mo-99 production process “by the third quarter of calendar year 2020.”⁶⁶

⁶³ 42 U.S.C. § 2160d(h)(3); *see also* 10 C.F.R. § 110.42(a)(9)(iii).

⁶⁴ IRE Letter at 2. The IRE Letter states that this 2022 date is based on obtaining regulatory approvals for the radiopharmaceuticals derived from the I-131. *Id.*

⁶⁵ NorthStar Request at 9-10; Kuperman Petition at 16-18.

⁶⁶ Kuperman Petition at 16; NorthStar Request at 9-10.

The Petitioners argue that during the proposed export license term, an alternative lesser-enriched target will exist that can be used within the meaning of § 134(a)(1).

Dr. Kuperman notes that the application requests HEU to produce Mo-99 and I-131 from the fourth quarter of 2020 through the second quarter of calendar year 2022.⁶⁷ Dr. Kuperman argues that if IRE is able to convert to LEU targets for Mo-99 production by the third quarter of 2020, it would be able to “produce Mo-99 continuously [using only LEU targets thereafter] without further export of HEU.”⁶⁸ Thus, Dr. Kuperman asserts, beginning in the fourth quarter of 2020, an alternative LEU target will exist and criterion one cannot be satisfied. NorthStar likewise argues that an alternative target that IRE can use in its production process exists because IRE will run two production lines — one dedicated to HEU targets and one dedicated to LEU targets — during the time period this application covers.⁶⁹

Both NorthStar and Dr. Kuperman essentially claim that if IRE can produce any amount of Mo-99 with LEU targets, an alternative target exists for Mo-99 production and thus we could then only find the § 134(a)(1) criterion to be met with regard to HEU for I-131 production but not for Mo-99 production.

The Petitioners’ arguments conflict with the § 134 definition of the phrase “can be used.” A target “can be used” if use of the target will permit the “*large majority* of ongoing and planned . . . *medical isotope* production to be conducted.”⁷⁰ The definition of “can be used” in § 134 refers to the “large majority” of planned “medical isotope production” *generally* produced; it does not refer to the “large majority” of medical isotope production broken down by individual isotopes or otherwise indicate that we must apply the “large majority” criterion isotope to isotope.

This construction not only is supported by the text but also is reasonable from a technical perspective. Medical radioisotopes are produced through irradiation of a target. The irradiation process naturally produces not just one radioisotope but a wide variety of radioisotopes, including both Mo-99 and I-131. Thus, if a producer irradiates an HEU target to produce I-131, post-irradiation that target will also contain Mo-99. Applying § 134 on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with an HEU target (i.e., in this case, I-131) and discard the others produced with that

⁶⁷ Kuperman Petition at 16; *see also* Letter from Becky G. Eddy, National Nuclear Security Administration, to David Skeen, NRC (July 31, 2019) (ML19213A204). Based on the information submitted, the requested HEU will not support medical isotope production before the fourth quarter of 2020. *See id.*

⁶⁸ Kuperman Petition at 16.

⁶⁹ NorthStar Request at 10.

⁷⁰ 42 U.S.C. § 2160d(h)(3)(B) (emphasis added); 10 C.F.R. § 110.42(a)(9)(iii)(B).

same target (i.e., Mo-99). This result is not reasonable, given both the language of § 134 as well as congressional intent reflected in the statutory framework to ensure an adequate supply of medical isotopes.

The technical realities of medical isotope production are clearly illustrated by the proposed HEU export. We are informed through Executive Branch views that any HEU used would produce both Mo-99 and I-131. According to IRE timeline estimates that are regularly monitored by DOE/NNSA, all of IRE's global Mo-99 regulatory validations will be completed by mid-2020 (and the first LEU-based Mo-99 from IRE could be shipped to U.S. customers as early as March or April 2020). However, the transition to LEU-produced Mo-99 to meet 100 percent of the production planned to satisfy supply is dependent on regulatory approval timelines for LEU-produced I-131. The regulatory approvals for LEU-produced I-131 are expected to be complete by June 2022. For these reasons, IRE will need to maintain operations of one HEU production line to produce I-131, which also will result in Mo-99, until all LEU I-131 validations are complete. IRE will therefore continue to run one LEU and one HEU production line during the transition to 100 percent LEU-based production for both isotopes.

The language "large majority of . . . medical isotope production" likewise does not call for parsing the relative amounts of the two medical isotopes IRE produces. If a producer plans to produce multiple medical isotopes to meet demand but cannot use an alternative target to produce one of those medical isotopes, then an essential part of the planned production as a whole is disrupted at the production facility. Thus, by definition, the producer will be unable to produce a "large majority" of the planned medical isotopes. In sum, we find that IRE's ability to use LEU targets for only Mo-99 production does not mean that an alternative target currently exists that "can be used," as § 134 defines that phrase, in IRE's production facility.

We therefore do not construe § 134(a)(1) as requiring us to determine whether alternative targets exist for each isotope the producer plans to collect. Rather, when determining whether an alternative target "can be used," we find that the best interpretation of § 134(a)(1) is to look at the planned medical isotope production in its entirety and then to determine whether the ultimate consignee could produce a large majority of those isotopes with an alternative target.

b. Tellurium

The Petitioners also note that other producers "use non-uranium-target based methodologies to produce I-131," in particular "neutron capture on a [t]ellurium

[(Te)] target.”⁷¹ The Executive Branch views confirm that IRE cannot use Te targets as an alternative for HEU targets for I-131 production. While I-131 can be produced in different ways, there is no practical way IRE could produce I-131 without uranium targets (e.g., neutron capture with a Te target) within a timeframe that would support patient demand and supply. These alternative methods would require IRE to develop an entirely new technology, as well as apply for and receive the requisite regulatory approvals. Therefore, qualifying I-131 produced from a new neutron-capture target process would require a much longer transition period than completing the current LEU-based I-131 regulatory approval schedule.

c. Reactors

Curium and NTI together assert that alternative targets can be used within the meaning of § 134(a)(1) in the irradiating reactors — that is, the MARIA, HFR, BR-2, and LVR-15 research reactors.⁷² Curium points to its own use of LEU targets in these reactors and argues that its targets “meet the ‘can be used’ requirement,”⁷³ and NTI, similarly, points to the routine use of LEU targets in the relevant reactors.⁷⁴ Both Petitioners argue that, because of the use of LEU targets in those reactors, we cannot make the finding that there is no alternative target.⁷⁵

As previously noted, a target “can be used” if its use “will permit the large majority of ongoing and planned . . . medical isotope production to be conducted in the reactor.”⁷⁶ To properly interpret the statute, a key phrase in the definition is “planned . . . medical isotope production.” That language refers to the medical isotopes the ultimate end user plans to produce with the requested material. To be able to produce medical isotopes, however, that producer must be able to use the relevant targets in its production facility. Thus, the question is not simply whether an alternative target exists that the reactor operators can place in the reactor that will still allow safe operation during the irradiation process. Rather, the question is whether an alternative target exists that the reactor operators can safely place in the reactor *and* from which the medical isotope producer can collect medical isotopes.

⁷¹ Curium Petition at 18; Brown Declaration at 13; NorthStar Request at 8.

⁷² Curium Petition at 22; Brown Declaration at 13; NTI Petition at 8.

⁷³ Curium Petition at 22 (“The MARIA reactor in Poland can and does use ‘alternative’ LEU targets. Curium knows this because it itself uses LEU targets in that reactor.”); Brown Declaration at 13 (“Curium has been using LEU targets in these reactors since 2017.”).

⁷⁴ NTI Petition at 8.

⁷⁵ Curium Petition at 21-23; NTI Petition at 8.

⁷⁶ 42 U.S.C. § 2160d(h)(3)(B); 10 C.F.R. § 110.42(a)(9)(iii)(B).

Here, IRE will carry out the planned medical isotope production. While Curium and other producers may have LEU targets that they can safely place in the MARIA Research Reactor, the HFR, and the BR-2 Research Reactor, those targets cannot be used in this instance, as § 134 defines that phrase, because IRE cannot use them. Because the LEU targets mentioned by Curium and NTI cannot be used by IRE, they are not alternatives that prevent § 134(a)(1) from being met.

Curium essentially argues that, because Curium itself has an LEU target that Curium can use in these reactors to produce medical isotopes, we cannot find § 134(a)(1) satisfied for another producer such as IRE. This interpretation seemingly could jeopardize the supply of medical isotopes and undermine the statutory objective of maintaining a reliable supply of medical isotopes during the LEU conversion process. And section 134(a)(1) has not previously been construed in this manner.⁷⁷ Thus, Curium's reading is not supported by the statute, policy, or our past practice.

In sum, none of the arguments raised by the Petitioners with respect to the existence of an alternative target that can be used in either IRE's facility or the various reactors demonstrate that the criterion in § 134(a)(1) is not met for this proposed export. Consequently, based on the administrative record before us, including the Executive Branch views, we find that consistent with § 134(a)(1), there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in the reactor.

2. The Proposed Recipient of That Uranium Has Provided Assurances That, Whenever an Alternative Nuclear Reactor Fuel or Target Can Be Used in That Reactor, It Will Use the Alternative in Lieu of Highly Enriched Uranium

No concerns were raised by the Petitioners about this criterion. The Executive Branch confirmed that the requisite assurances have been received from all recipients regarding this criterion. Based on the Executive Branch views, we find this criterion satisfied.

3. The United States Government Is Actively Developing an Alternative Nuclear Reactor Fuel or Target That Can Be Used in That Reactor

The Petitioners contend that DOE/NNSA failed to demonstrate the existence

⁷⁷ See, e.g., XSNM3795 at 3-4 (Oct. 31, 2018) (ML18285A367) (permitting the export of HEU for medical isotope production and permitting IRE to irradiate the HEU targets in the MARIA Research Reactor, the HRF, and the BR-2 Research Reactor in 2018, one year after Curium says it began using LEU targets in the MARIA Research Reactor, the HFR, and the BR-2 Research Reactor).

of a program “actively developing an alternative LEU target for use by IRE in” the irradiating reactors.⁷⁸ Curium argues that while DOE controls these efforts, its focus has been on converting reactor *fuel* rather than targets for these reactors.⁷⁹ NTI likewise states that neither Poland nor Czechia “is part of a U.S. government program to develop an alternative nuclear reactor fuel or target for those reactors.”⁸⁰

An active program satisfies § 134(a)(3) if it leads to the development of an LEU target that can be used to produce medical isotopes. From a technical perspective, the reactors that irradiate targets, such as the LVR-15 and MARIA Research Reactors, can irradiate LEU and HEU targets interchangeably. In other words, targets do not need to be specifically designed to work in each reactor (for irradiation purposes), and they generally work in all reactors.

This is not the case for medical isotope producers such as IRE, which, without conversion, could not accommodate the use of LEU targets if they were originally designed to use HEU targets to produce medical isotopes. Each medical isotope producer uses a unique target design that is specific to its production and chemical processing. The specific shape and cladding specifications of targets are two attributes that vary significantly among different medical isotope producers. These attributes are closely connected to the required chemical processing of the targets following irradiation so that a pure, medically-qualified product is achieved at the end of a series of processing steps. In general, therefore, targets are not interchangeable among different chemical processing configurations, and such configurations are not easily changed without extensive re-design work, testing, and subsequent regulatory approval.

Curium argues that our prior decision in *Transnuclear, Inc.*⁸¹ demonstrates that the active program must be “geared to developing LEU targets for . . . specific reactors.”⁸² Although our discussion of § 134(a)(3) in *Transnuclear* did variously refer to “the development of LEU targets for use in the [MAPLE] reactors,” the issue in that case was not whether an active LEU conversion program must focus on specific reactors. Rather, the issue before us in *Transnuclear* was whether, at that time, there existed an active program at all for developing LEU targets for production of medical isotopes by the planned MAPLE project, including the MAPLE reactors (for irradiating the targets) and associated pro-

⁷⁸ Curium Petition at 23; Brown Declaration at 14; NTI Petition at 8-9.

⁷⁹ Curium Petition at 23.

⁸⁰ NTI Petition at 9.

⁸¹ *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469 (1999).

⁸² Curium Petition at 23.

cessing facility (for extracting the targets).⁸³ Thus, the issue presented in this proceeding was not before us in *Transnuclear*.

In sum, to satisfy the § 134(a)(3) criterion for a particular export, DOE must have an active program to develop an LEU target that can be used for medical isotope production. In its views on the application, the Executive Branch confirmed that DOE has an active program to work closely with IRE for conversion of Mo-99 and I-131 production. Accordingly, we find the § 134(a)(3) criterion to be met for the proposed export.

D. Section 57 — Noninimicality Finding

To issue a license, we must determine under § 57c.(2) of the AEA that the proposed export, in addition to meeting the other export requirements, will not be “inimical to the common defense and security” of the United States.⁸⁴ Here, the Petitioners raise several arguments that can be grouped in three main categories of inimicality concerns with this proposed export. First, the Petitioners argue that this export is not needed and that other medical isotope producers can meet international Mo-99 and I-131 demand.⁸⁵ Second, the Petitioners assert that DOE/NNSA has requested too much HEU in the application.⁸⁶ Finally, the Petitioners argue that the proposed shipment is an attempt to circumvent AMIPA’s statutory prohibition on the export of HEU.⁸⁷

The AEA’s inimicality test pre-dates the enactment of the NNPA. As explained in the NNPA’s legislative history, the addition of specific licensing criteria, discussed above, did not replace or render obsolete the pre-existing inimicality test.⁸⁸ Yet the NNPA’s drafters noted that “in the absence of unusual circumstances,” if a proposed export satisfied the NNPA’s non-proliferation criteria, then it would likewise satisfy “the common defense and security standard.”⁸⁹ In

⁸³ See *Transnuclear, Inc.*, CLI-99-20, 49 NRC at 475 (“The participants’ written responses to these questions, as well as presentations made at the June 16 public meeting, furnished new information and evidence of a currently active program at ANL for the development of LEU targets for use in the MAPLE *project*.” (emphasis added)).

⁸⁴ 42 U.S.C. § 2077(c)(2); see also 10 C.F.R. § 110.42(a)(8).

⁸⁵ NorthStar Request at 7-8; NTI Petition at 7; Curium Petition at 16-18; Brown Declaration at 11-13.

⁸⁶ NorthStar Request at 8-10; Curium Petition at 18-21; Brown Declaration at 9-11; Kuperman Petition at 16-18. We note that unnecessary HEU exports (e.g., if demand can be met by other producers using alternative material or if too much HEU is requested) pose an increased risk of diversion and weapons proliferation that would not exist but for the export, which in turn raises inimicality concerns for the U.S. common defense and security.

⁸⁷ NTI Petition at 7; Curium Petition at 21; Brown Declaration at 7-9.

⁸⁸ H.R. Rep. No. 95-587, at 21 (1977).

⁸⁹ *Id.*

Natural Resources Defense Council, Inc. v. NRC, the Court of Appeals for the District of Columbia Circuit noted this legislative history and explained that we generally “need not look beyond the non-proliferation safeguards in determining whether the common defense and security standard is met.”⁹⁰ When determining whether any “unusual circumstances” exist with respect to a proposed export, we give “great weight” to the Executive Branch’s judgments.⁹¹ This approach is woven into the fabric of the NNPA itself, which requires various Executive Branch departments to be closely involved in the export licensing process.⁹² The NNPA and NRC regulations also require the NRC to make an independent technical finding that the export meets all applicable requirements.⁹³ With this background in mind, we turn to the Petitioners’ three inimicality concerns, which some of the Petitioners argue constitute “unusual circumstances.”

1. Medical Isotope Supply

The Petitioners argue that actors besides IRE can meet international demand for Mo-99 and I-131 without using HEU, making this proposed export inimical to the common defense and security.⁹⁴ Noting the inherent risks of exporting HEU,⁹⁵ Curium and NTI argue that Commission policy requires us to apply a strict balancing test weighing the risk posed by the export against “significant need.”⁹⁶ Curium and NorthStar also assert that the proposed export is unnecessary to meet international demand based on internal market projections and an OECD report.⁹⁷

In the view of the Executive Branch, however, approval of this export license is necessary to meet demand. Moreover, Lantheus and IRE dispute Curium’s,

⁹⁰ 647 F.2d 1345, 1363 (D.C. Cir. 1981); *see also U.S. Department of Energy*, CLI-04-17, 59 NRC at 374.

⁹¹ *See U.S. Department of Energy*, CLI-04-17, 59 NRC at 376.

⁹² 42 U.S.C. § 2155.

⁹³ *Id.*; 10 C.F.R. § 110.45.

⁹⁴ Curium Petition at 16-18; Brown Declaration at 11-13; NorthStar Request at 7-8; and NTI Petition at 7.

⁹⁵ Curium Petition at 16-17; NTI Petition at 6.

⁹⁶ Curium Petition at 17 (“Therefore, the export of HEU creates an unequivocal national security risk, which must be offset at least by a significant need for the export, one that outweighs the risk associated with exporting weapons-grade uranium to many destinations across Europe.” (emphasis removed)); NTI Petition at 6-7 (same).

⁹⁷ Curium Petition at 17-18; Brown Declaration at 11-13; NorthStar Request at 7-8. NTI also asserts, without citation, that it is well understood that medical isotope supplies can be fully met by current LEU or non-uranium-based methods. NTI Petition at 7.

NorthStar's, and NTI's statements that others could meet demand if we were to deny this license.⁹⁸

The Petitioners have presented us with a variety of arguments that other producers can meet medical isotope demand by using non-HEU targets if this license is denied and that this export is therefore unnecessary. However, the Secretary of Energy has certified, pursuant to AMIPA, that additional HEU exports are necessary at this time to satisfy domestic patient needs for Mo-99. We will not second-guess findings concerning medical isotope demand and supply that have been made by DOE pursuant to express statutory authority.⁹⁹ Consistent with our statutory role, we defer to the judgment of the Secretary of Energy that there is currently an insufficient supply of Mo-99 to satisfy U.S. demand.

While AMIPA's focus is on Mo-99, the radiopharmaceutical that is most widely in demand in the U.S., AMIPA also provides joint certification authority to the Secretaries of Energy and HHS that is not limited to Mo-99 — specifically, the authority to jointly certify that it is *not* necessary to export U.S.-origin HEU “for the purposes of medical isotope production in order to meet United States patient needs.”¹⁰⁰ AMIPA defines “medical isotope” to include Mo-99 as well as “[I-131], xenon-133, and other radioactive materials used to produce a radiopharmaceutical for diagnostic or therapeutic procedures.”¹⁰¹ This joint certification under AEA § 134(f)(1)(B) was one of the statutory prerequisites for the HEU export license ban to take effect. In light of DOE's January 2 certification, the Secretaries did not make the joint certification that U.S.-origin HEU exports are unnecessary for production of medical isotopes (including I-131) to meet U.S. patient needs.

Additionally, the NRC received views from the Executive Branch on the global availability and stability of I-131 supply for the time period covered by this export license application, including impacts if the application were denied. The Executive Branch observed that the I-131 supply chain is volatile and adequate domestic and global supplies of I-131 would be at risk if IRE were unable to maintain its current production or if IRE's supply was interrupted

⁹⁸ IRE Letter at 4; Lantheus Letter at 2.

⁹⁹ As required by statute (42 U.S.C. § 2160d(e)), DOE sought public comment prior to making this certification. Exports of U.S-Origin Highly Enriched Uranium for Medical Isotope Production: Sufficient or Insufficient Supplies of Non-HEU-based Molybdenum-99 for United States Domestic Demand; Request for Public Comment, 84 Fed. Reg. 65,378 (Nov. 27, 2019). Its certification has been made based on submissions received, “other publicly available healthcare data,” and in coordination with the U.S. Food and Drug Administration. Certification of Insufficient Supplies, 85 Fed. Reg. at 3363.

¹⁰⁰ 42 U.S.C. § 2160d(f)(1)(B).

¹⁰¹ *Id.* § 2160d(h)(4).

until its conversion to LEU is complete. Thus, we disagree that the export is unnecessary because an adequate supply of Mo-99 and I-131 already exists.

2. *More HEU than Necessary*

Based on the same premise underlying the arguments we addressed in section C.1.a. above — that export of HEU for use in Mo-99 production is unnecessary after the date IRE is able to produce Mo-99 using LEU targets — the Petitioners claim that the application requests more HEU than is needed for I-131 production.¹⁰² The Petitioners calculate that based on IRE’s current production level, it should only need approximately 0.5 kilograms to support I-131 production during the period covered by this application.¹⁰³ IRE disagrees with this figure.¹⁰⁴ The Petitioners assert that this leaves IRE with an excess of four kilograms of HEU over what IRE will need for I-131 production.¹⁰⁵ Curium maintains that this indicates that IRE intends to stockpile HEU for future use, and “incentivize[s] IRE to continue delaying its Mo-99 LEU target conversion.”¹⁰⁶ Similarly, NorthStar argues that “it is unclear why [IRE] needs an additional 4 kilograms to sustain I-131 production through [quarter two] of 2022.”¹⁰⁷ Dr. Kuperman also argues that the maximum amount of HEU we may authorize for export is significantly smaller than the amount requested because the HEU can only permissibly be used for I-131 production after IRE converts to LEU targets for Mo-99.¹⁰⁸

As we discussed above, the production processes for Mo-99 and I-131 production are inseparable. We find that the total amount of HEU requested for export is sufficiently supported by the application and Executive Branch views. The total amount of HEU requested for export is approximately the same as the amount of HEU the Petitioners estimate would go toward supporting the production of Mo-99 once IRE begins producing Mo-99 using LEU targets (i.e., approximately 4 kilograms) combined with the amount of HEU that the Petitioners estimated would be needed for I-131 production after that transition period.

Specifically, the Executive Branch confirmed that ANL has conducted calculations that assumed that IRE will continue production of 3,000 6-day Curie (Ci)/week (above IRE’s normal production of 2,200 6-day Ci/week) to satisfy

¹⁰² Curium Petition at 18-21; Brown Declaration at 9-11; NorthStar Request at 8-10.

¹⁰³ Curium Petition at 19-20; Brown Declaration at 9-10; NorthStar Request at 8-9.

¹⁰⁴ IRE Letter at 2.

¹⁰⁵ Curium Petition at 19-21; NorthStar Request at 8-10.

¹⁰⁶ Curium Petition 20-21; Brown Declaration at 11.

¹⁰⁷ NorthStar Request at 10.

¹⁰⁸ Kuperman Petition at 17-18.

global demand. The increased production rate at IRE is warranted in order to supplement the shortfall resulting from South Africa's NTP Radioisotopes producing at only 40% of its normal isotope production rates.¹⁰⁹

The 4.772 kilograms of HEU requested will allow planned isotope production until full conversion to LEU targets by the end of June 2022. ANL verified this data by considering the weight in grams of each target, manufacturing efficiency, variances due to broken pieces (the form in which HEU is shipped), and IRE's proposed decrease of HEU targets and increase of LEU targets during the final transition to LEU. And the Executive Branch has stated that the 4.772-kilogram amount is considered to be a bounding amount that will be re-evaluated and adjusted by DOE/NNSA to account for current market conditions prior to any shipment(s) occurring. DOE/NNSA's amended license application contains a statement to this effect.¹¹⁰ Accordingly, we direct the NRC staff to authorize an initial shipment of up to 2.0 kilograms of HEU, subject to monitoring of quantities and timing of subsequent shipments based on IRE's efforts to convert to LEU targets coupled with associated analyses of the demand for and supply of medical isotopes. We also direct the NRC staff to include a license condition requiring the licensee, by January 4, 2021, to submit a status report documenting the quantities of uranium shipped during the previous calendar year, including both the element and isotope weights for each shipment made. This report shall also provide projections and supporting rationale for any uranium shipments that may be scheduled during the remaining license term, including estimates of both the element and isotope weights. This will provide further assurance that HEU shipment amounts are sufficiently justified — particularly in the latter half of the license term, as IRE moves closer to full LEU conversion and the now-extended AMIPA sunset provision draws nearer.

In sum, we find that the Petitioners' arguments regarding the use of HEU exclusively for I-131 do not call into question our finding that the proposed export would not be inimical to the common defense and security.

3. *One-Year Limit*

Dr. Kuperman argues that our recent practice and the intent of AMIPA's HEU export license ban prohibit us from issuing a license allowing the export

¹⁰⁹ Both IRE and Lantheus also refer to production challenges at South Africa's NTP Radioisotopes in support of the application. IRE Letter at 3; Lantheus Letter at 2.

¹¹⁰ See *supra* note 3 and accompanying text (stating that actual shipment amounts "will be determined on a rolling basis based off of market conditions in support of IRE inventory and operational requirements during the transition to LEU targets").

of more than one year's worth of HEU for medical isotope production.¹¹¹ Dr. Kuperman points to our issuance of HEU export licenses for a single year's worth of HEU for medical isotope production since 2012, as well as a statement we made in a 2017 decision that "export licenses for targets for medical isotope production tend to be for only a year."¹¹²

We find that granting this license for more than one year's worth of HEU does not undermine the intent of AMIPA's HEU export license ban. The Secretary of Energy has made the certification necessary to delay AMIPA's HEU export license ban (at most) through January 2, 2022.¹¹³ IRE currently plans to finish its conversion by June 2022. Given that there is necessarily a several month lead time between our approval of an application and IRE's use of that material to produce medical isotopes, all the material IRE requires pre-conversion will likely be exported prior to that January 2, 2022, sunset date regardless of whether we approve the export now or in a year. Thus, granting this application would not evade compliance with AMIPA.

We have previously rejected Dr. Kuperman's argument that the amount of HEU should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel.¹¹⁴ No statutory or regulatory requirement limits HEU export licenses to one year's worth of HEU. Additionally, while we have indicated that "export licenses for targets for medical isotope production tend to be for only a year," we have not adopted a one-year limit. Rather, supply terms have been appropriately specific to the circumstances surrounding each particular HEU export application.

The particular circumstances of this HEU export application support issuance of a license authorizing the export of enough HEU for multiple years' worth of medical isotope production. Due to the potential for complications as well as the volatility in the medical isotope market, significant uncertainty currently exists surrounding IRE's precise conversion schedule and HEU needs. It is reasonable for the amount of the proposed export to account for that uncertainty.

Moreover, due to the much lower quantity of material that would be exported (4.772 kilograms), the proliferation and security risks, both in transportation and

¹¹¹ Kuperman Petition 14-15 ("The applicant apparently aims to evade U.S. law, which . . . is expected to prohibit approval of HEU export licenses for medical isotope production after January 2, 2020.").

¹¹² *Id.* (quoting *Edlow International Co.*, CLI-17-3, 85 NRC at 57).

¹¹³ Certification of Insufficient Supplies, 85 Fed. Reg. at 3363.

¹¹⁴ *Edlow International Co.*, CLI-17-3, 85 NRC at 57; *U.S. Department of Energy*, CLI-16-15, 84 NRC at 63-64.

end use, posed by the proposed export are much smaller than the recent prior exports that were limited to one-year supply.¹¹⁵

In addition, DOE plans to conduct a market analysis of global Mo-99 supplies every six months and to re-evaluate and adjust (if required) the amount of material in each shipment, which could potentially result in shipping smaller quantities after the first partial shipment. As part of DOE's standard processes, DOE will use qualified nuclear shipment specialists, who will conduct thorough security reviews and risk evaluations prior to any shipment made. The Executive Branch notes that these processes are intended to meet the dual goals of HEU minimization and meeting the needs of patients.

4. AMIPA's Deadline

The Petitioners also argue that the proposed export raises inimicality concerns because it authorizes HEU exports for use entirely after the date on which AMIPA would have ended our authority to issue HEU export licenses, in the absence of the Secretary of Energy's January 2, 2020, certification to delay the ban on issuance of HEU export licenses.¹¹⁶ This argument is moot in light of the Secretary of Energy's certification.

For these reasons, we find that the proposed export would not be inimical to the common defense and security of the United States.

E. Additional NorthStar Argument

NorthStar argues that "[t]he proposed exports would be inconsistent with [DOE's] ongoing efforts to establish a reliable domestic source of non-HEU Mo-99."¹¹⁷ NorthStar also asserts that the United States' clear intent "was not to continually foster the ability of foreign companies to undermine both [U.S.] companies who have found new means of producing non-uranium Mo-99 or have duly complied with conversion to non-HEU production."¹¹⁸

Our review of export license applications must necessarily stay within the confines of the AEA's export licensing requirements. NorthStar does not ground its argument in any of these licensing requirements. While AEA § 134 contains provisions intended to maintain reliable domestic supplies of medical isotopes, our regulatory responsibilities in licensing and overseeing HEU exports are to-

¹¹⁵ See, e.g., *U.S. Department of Energy*, CLI-16-15, 84 NRC 53 (involving export quantities of ~130 kilograms).

¹¹⁶ See Curium Petition at 21; Brown Declaration at 8-9; NTI Petition at 7; Kuperman Petition at 15.

¹¹⁷ NorthStar Request at 11.

¹¹⁸ *Id.*

tally independent of U.S. domestic endeavors to develop a non-HEU medical isotope supply.¹¹⁹

V. CONCLUSION

For the reasons stated above, we find that a hearing in this matter would not be in the public interest and would not assist us in making the required statutory and regulatory determinations. We further determine that the proposed export satisfies all applicable export-licensing criteria and that issuing this export license would not be inimical to the common defense and security of the United States. Accordingly, we *deny* the Petitioners' requests for hearing and petitions to intervene and *direct* the Office of International Programs (OIP) to issue License No. XSNM3810 to DOE/NNSA for the export of up to 4.772 kilograms of HEU.

In light of the particular circumstances of this export, the license shall authorize an initial shipment of up to 2.0 kilograms of HEU, and the licensee shall determine quantities and timing of subsequent shipments by monitoring IRE's efforts to convert to LEU targets coupled with associated analyses of the demand for and supply of medical isotopes. In addition, as a condition of the license, the licensee shall submit by January 4, 2021, a status report documenting the quantities of uranium shipped during the previous calendar year including both the element and isotope weights for each shipment made. The report shall also provide projections and supporting rationale for any uranium shipments that may be scheduled during the remaining license term, including estimates of both the element and isotope weights.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of April 2020.

¹¹⁹ To the extent that general concerns have been raised that issuance of a license for export of HEU results in competitive harm to a certain segment of producers, these concerns reflect congressional policy considerations underlying AEA § 134, including AMIPA, and do not bear on our decision under the AEA to issue an export license. *See* Comment from Senator Blunt and Congresswoman Wagner Regarding Export License Application of U.S. Department of Energy, National Nuclear Security Administration (XSNM3810) (Sep. 27, 2019) (ML19337C978).

Additional Views of Commissioner Baran

While I agree that it is not necessary to hold a hearing on this matter, I write separately because I do not subscribe to the “affected interest” analysis in the Commission’s decision. In my view, it is time for the Commission to reconsider our use of the affected interest analysis in export cases. The current approach suffers from two major problems.

First, the determination of whether a petitioner has an affected interest in a proposed export has no material impact on the overall legal analysis of whether to hold a hearing. Regardless of whether an entity demonstrates that it has an affected interest, the same legal test applies: would a hearing be in the public interest and would it assist the Commission in making the statutory determinations under the Atomic Energy Act.¹ As a practical matter, the inquiry into whether a petitioner has demonstrated an affected interest serves no useful purpose.

Second, under the Commission’s affected interest jurisprudence, it is seemingly impossible for a petitioner to demonstrate an affected interest. The Commission has found that a person residing within 1.5 miles of a bridge that would serve as the exit point for the export of low-level waste did not have an affected interest in that export.² Even living within an eighth of a mile of a port through which an export would travel was not enough to demonstrate an affected interest.³ The Commission also decided that living near the ultimate destination of an exported reactor could not qualify as an affected interest.⁴ Here, the Commission has found that economic competitors do not meet the test either. In fact, over the course of many years, in cases similar to this one and in cases that were very different, no petitioner has ever been able to successfully demonstrate that it had an affected interest in a proposed export.

Given the unimpressive track record of the “affected interest” inquiry, I believe the Commission should take a new approach. In future export cases, we would be better off focusing our decisions on the central question of whether a hearing is in the public interest and would assist the Commission in making the statutory determinations under the Atomic Energy Act.

¹ 42 U.S.C. 2155a(b).

² *Diversified Scientific Services, Inc.* (Export of Low-Level Waste), CLI-19-2, 89 NRC 229 (2019).

³ *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004).

⁴ *Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-14, 11 NRC 631 (1980).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

**Docket Nos. 50-250-SLR
50-251-SLR**

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

April 23, 2020

REGULATIONS, INTERPRETATION

As the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation.

REGULATIONS, INTERPRETATION

In construing a regulation's meaning, it is necessary to examine the agency's entire regulatory scheme.

**REGULATIONS, INTERPRETATION; SUBSEQUENT LICENSE
RENEWAL**

A holistic reading of Part 51 supports the conclusion that section 51.53(c)(3) covers all applicants for license renewal, including subsequent license renewal applicants.

SUBSEQUENT LICENSE RENEWAL; GENERIC ENVIRONMENTAL IMPACT STATEMENT

The Generic Environmental Impact Statement for License Renewal (2013) assesses the environmental impacts associated with a twenty-year renewal period, regardless of whether this period follows the original license or a current renewed license.

WAIVER OF RULE; GENERIC ENVIRONMENTAL IMPACT STATEMENT

With regard to a specific facility, members of the public who believe they have “new and significant” information regarding an issue designated as Category 1 in the Generic Environmental Impact Statement for License Renewal may seek a waiver of our regulations to challenge that analysis.

MEMORANDUM AND ORDER

Today we address the referred ruling that interpreted 10 C.F.R. § 51.53(c)(3) as applying to a subsequent license renewal applicant’s preparation of an environmental report. We accept the referral from the Atomic Safety and Licensing Board, uphold the ruling, and hold that the NRC Staff may rely on the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS) and 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (Table B-1) to evaluate environmental impacts of Category 1 issues.

I. BACKGROUND

The Board ruled on multiple petitions to intervene and requests for hearing in LBP-19-3 related to the application from Florida Power & Light Company (FPL) to permit an additional twenty years of operation for two nuclear power reactors, Turkey Point Nuclear Generating Units 3 and 4.¹ The Board granted the petition to intervene of Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (collectively, Petitioners), which challenged the environmental report that FPL submitted as part of its subsequent license renewal application. Petitioners submitted five contentions challenging the environmen-

¹ LBP-19-3, 89 NRC 245 (2019); *see* Letter from William D. Maher, FPL, to NRC Document Control Desk (Apr. 10, 2018) (ADAMS accession no. ML18113A132 (package) and ML18102A521 (transmitting a revised subsequent license renewal application)).

tal report, and the Board admitted two in part.² Contention 1-E, as admitted, claims that FPL should have considered mechanical draft cooling towers as a reasonable alternative to the cooling canal system in light of the adverse impact of the system on the threatened American crocodile and its critical seagrass habitat.³ Contention 5-E, as admitted, relates to the impact of ammonia releases on endangered and threatened species and their critical habitat during the renewal period.⁴ As relevant here, the Board did not admit the other contentions, or any portions thereof, because of its interpretation that section 51.53(c)(3) applies to subsequent license renewal.⁵ The Board also referred its ruling on the scope of 10 C.F.R. § 51.53(c)(3) pursuant to 10 C.F.R. § 2.323(f)(1).⁶

The Board found that Contentions 1-E and 5-E migrated to become challenges to the Draft Supplemental Environmental Impact Statement (Draft SEIS) after its publication.⁷ But it also dismissed these contentions because they were admitted as contentions of omission, and the Draft SEIS addressed the omissions.⁸ Petitioners moved to submit amended and new contentions based on the Draft SEIS, in which they sought to either migrate or amend Contentions 1-E and 5-E and admit four new contentions challenging the adequacy of the Draft SEIS.⁹ The Board found these contentions inadmissible and terminated the proceeding.¹⁰

² LBP-19-3, 89 NRC at 285-95. The Board also admitted similar contentions filed by Southern Alliance for Clean Energy (SACE), but SACE withdrew from the proceeding. *Id.* at 301; Southern Alliance for Clean Energy's Notice of Withdrawal (Apr. 9, 2019). We therefore only address the contentions submitted by the Petitioners in this decision.

³ LBP-19-3, 89 NRC at 287.

⁴ *Id.* at 293-94.

⁵ The Board based its determination on the admissibility of the contentions proffered on our contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(i)-(vi). LBP-19-3, 89 NRC at 286-95.

⁶ *Id.* at 273 n.46. Judge Abreu filed a separate opinion, in which she outlined her bases for disagreeing with the majority's conclusion that section 51.53(c)(3) applies to subsequent license renewal.

⁷ LBP-19-6, 90 NRC 17, 20 (2019).

⁸ *Id.* at 21, 23-24.

⁹ Natural Resources Defense Council's, Friends of the Earth's, and Miami Waterkeeper's Amended Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement (revised June 28, 2019), at 1-2 (Motion to Migrate and Admit Amended and New Contentions).

¹⁰ LBP-19-8, 90 NRC 139 (2019).

FPL appealed the decision¹¹ and later notified us that its appeal was moot.¹² As discussed below, we dismiss the appeal as moot, and we accept the Board’s referral and uphold the Board’s ruling on the interpretation of 10 C.F.R. § 51.53.

II. DISCUSSION

A. FPL’s Appeal

In its appeal, FPL argued that the Board should not have admitted Contention 1-E and Contention 5-E.¹³ Following the Staff’s issuance of the Draft SEIS, FPL asked the Board to dismiss those contentions as moot based on new information in the Draft SEIS.¹⁴ The Board concluded that the new information in the Draft SEIS cured the omissions identified in the contentions and granted FPL’s motion to dismiss.¹⁵ FPL then notified us that its appeal of LBP-19-3 was moot.¹⁶ We agree and therefore dismiss FPL’s appeal.

B. Interpretation of Section 51.53

1. Background

This proceeding presents our first review of a subsequent license renewal application, but our safety regulations in Part 54 have long contemplated the possibility.¹⁷ Our license renewal regulations recognize that after accounting for the effects of aging, our existing “regulatory process [in Part 50] is adequate to ensure that the licensing bases of all currently operating plants provide[] and maintain[] an acceptable level of safety so that operation will not be inimical to [the] public health and safety or [the] common defense and security.”¹⁸ Apart

¹¹ Florida Power & Light Company’s Notice of Appeal of LBP-19-3 (Apr. 1, 2019). Petitioners and the Staff opposed the appeal. Opposition of Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper to Florida Power & Light Company’s Appeal of the Atomic Safety and Licensing Board’s Ruling in LBP-19-3 (Apr. 26, 2019); NRC Staff’s Brief in Response to Florida Power & Light Company’s Appeal of LBP-19-3 (Apr. 26, 2019).

¹² Notice Regarding Dismissal of Contentions (July 15, 2019) (FPL Notice).

¹³ Brief in Support of Florida Power & Light Company’s Appeal of LBP-19-3 (Apr. 1, 2019), at 3.

¹⁴ FPL’s Motion to Dismiss Joint Petitioners’ Contention 1-E as Moot (May 20, 2019); FPL’s Motion to Dismiss Joint Petitioners’ Contention 5-E as Moot (May 20, 2019).

¹⁵ LBP-19-6, 90 NRC at 19.

¹⁶ FPL Notice at 1-2.

¹⁷ Nuclear Power Plant License Renewal, Revisions, 60 Fed. Reg. 22,461, 22,494 (May 8, 1995) (License Renewal Revisions); 10 C.F.R. § 54.31(d).

¹⁸ License Renewal Revisions, 60 Fed. Reg. at 22,464.

from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that our existing oversight processes are adequate to ensure safety.¹⁹

In addition to a safety review, the renewal of a nuclear power plant operating license requires the preparation of an environmental impact statement (EIS) to comply with the National Environmental Policy Act (NEPA).²⁰ The EIS includes the Staff's analysis that considers and weighs the environmental effects of the proposed action. To support the preparation of EISs for license renewal, the NRC Staff issued the GEIS in 1996.²¹ The 1996 GEIS for license renewal assessed the environmental impacts associated with the continued operation of nuclear power plants during the license renewal term. The NRC also promulgated a rule that codified the findings of the 1996 GEIS into its regulations in Table B-1.²² The intent of the GEIS was to improve the efficiency of license renewal by determining which environmental impacts would result in essentially the same impact at all nuclear power plants (i.e., generic or Category 1 issues) and which ones could result in different levels of impacts at different plants and would require a plant-specific analysis to determine the impacts.²³ In developing the GEIS, we relied on the following factors:

- (1) License renewal will involve nuclear power plants for which the environmental impacts of operation are well understood as a result of lessons learned and knowledge gained from operating experience and completed license renewals.
- (2) Activities associated with license renewal are expected to be within this range of operating experience; thus, environmental impacts can be reasonably predicted.
- (3) Changes in the environment around nuclear power plants are gradual and predictable.²⁴

For the issues that could not be generically addressed, also known as Category

¹⁹ See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 491 (2010).

²⁰ See, e.g., 10 C.F.R. § 51.20(b)(2).

²¹ "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (Final Report), NUREG-1437, vols. 1-2 (May 1996) (ML040690705, ML040690738) (1996 GEIS).

²² See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 61 Fed. Reg. 28,467 (June 5, 1996) (1996 Final Rule).

²³ See "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (Final Report), NUREG-1437, rev. 1, vols. 1-3 (June 2013), at S-1 (ML13106A241, ML13106A242, ML13106A244) (2013 GEIS).

²⁴ *Id.* at 1-2.

2 issues, the Staff prepares plant-specific supplements to the GEIS (i.e., a plant-specific supplemental EIS (SEIS)).²⁵

While the agency is responsible for complying with NEPA, the process of creating an EIS begins with the license renewal applicant. Pursuant to sections 51.45(a) and 51.53(c)(1), license renewal applicants must submit an environmental report to the NRC “to aid the Commission in complying with section 102(2) of NEPA.”²⁶ The Staff reviews the environmental report submitted by the applicant and uses it to draft the plant-specific SEIS.

As stated in the 1996 final rule that incorporated the findings of the GEIS into Table B-1, the NRC recognized that environmental impact issues may change over time and that additional issues may require consideration.²⁷ The NRC indicated that it intended to review the material in Table B-1 on a ten-year cycle.²⁸ In 2013, the NRC issued a revision to the GEIS and updated the corresponding regulations.²⁹ The 2013 GEIS noted that plant-specific environmental reviews had been completed for approximately forty nuclear plant sites (seventy reactor units) since the publication of the original GEIS in 1996.³⁰ The 2013 GEIS revision “intended to incorporate lessons learned and knowledge gained from these plant-specific environmental reviews, as well as changes to Federal laws and new information and research published since the 1996 GEIS.”³¹ The Staff noted that the purpose of the review for the 2013 GEIS was to determine if the findings presented in the 1996 GEIS remained valid.³²

In the 1996 GEIS, the Staff analyzed the impact of license renewal on ninety-two environmental issues organized by power plant systems and activities, of which sixty-eight were determined to be generic, or Category 1 issues.³³ The 1996 GEIS discussed these Category 1 issues, and therefore, these issues did not require a plant-specific assessment unless there was new and significant information that would change the conclusions in the GEIS.³⁴ The 2013 GEIS

²⁵ *Id.*

²⁶ 10 C.F.R. § 51.14(a).

²⁷ *See* 2013 GEIS at S-2.

²⁸ *Id.*; 10 C.F.R. pt. 51, subpt. A, app. B.

²⁹ The NRC began its ten-year cycle review in 2003. The final rule and GEIS were published in 2013. Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 78 Fed. Reg. 37,282, 37,284 (June 20, 2013) (2013 Final Rule).

³⁰ 2013 GEIS at S-2.

³¹ *Id.*

³² *Id.* at 1-7.

³³ 1996 GEIS at xxxv; 2013 GEIS at 1-5.

³⁴ 1996 GEIS at xxxv; 2013 GEIS at 1-7; *see Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).

carried forward seventy-eight environmental impact issues for consideration and arranged them by resource area.³⁵

2. *Referred Ruling*

In determining the admissibility of the Petitioners' contentions, the Board found it necessary to determine the scope of section 51.53(c)(3), and, specifically, whether it may be applied to a subsequent license renewal applicant.³⁶ If so, the Board reasoned, then FPL and other subsequent license renewal applicants may rely on the GEIS and Appendix B and thereby exclude consideration of Category 1 issues from their environmental reports unless there is new and significant information that would change the conclusions in the GEIS.³⁷ Further, if section 51.53(c)(3) applies here, Petitioners would have been obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues.³⁸

Section 51.53(c), "Operating license renewal stage," requires an "applicant for renewal of a license to operate a nuclear power plant" to submit an environmental report with its application.³⁹ Section 51.53(c)(3) states:

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

- (i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.
- (ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part
- (iii) The report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues

³⁵ 2013 GEIS at 1-5, 1-7.

³⁶ LBP-19-3, 89 NRC at 263.

³⁷ See 2013 GEIS at 1-4.

³⁸ See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 387 (2012).

³⁹ 10 C.F.R. § 51.53(c)(1).

in appendix B to subpart A of this part. No such consideration is required for Category 1 issues in appendix B to subpart A of this part.

- (iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.⁴⁰

The Board found that the plain regulatory language does not resolve whether section 51.53(c)(3) can be applied to subsequent license renewal applicants; “it neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.”⁴¹ Because the Board found the regulations silent as to subsequent license renewal applicants, the Board looked to regulatory language and structure; regulatory purpose and history; the agency’s interpretative rules; and administrative efficiency, logic, and practicality.⁴² Based on its analysis, the Board concluded that the Commission intended section 51.53(c)(3) to apply to all license renewal applicants, including those for subsequent license renewal.⁴³ Therefore, the Board concluded that FPL’s environmental report did not need to consider Category 1 issues on a site-specific basis but could rely on the Category 1 findings in the GEIS and Table B-1.⁴⁴ The Board assessed Petitioners’ contentions under this interpretation of the regulation.⁴⁵

The Board noted that the referred ruling is a significant legal issue of first impression, and it is likely to recur in other proceedings until resolved by the Commission.⁴⁶ We agree and address it now.

As noted above, the Board found that the plain regulatory language does not provide clear direction for subsequent license renewal applicants.⁴⁷ Therefore, the Board was “guided by the Supreme Court’s approach in *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008), where in [determining] the scope of a regulatory provision in the face of regulatory silence, the Court conducted a

⁴⁰ *Id.* § 51.53(c)(3).

⁴¹ LBP-19-3, 89 NRC at 265.

⁴² *Id.* at 265, 272.

⁴³ *Id.*

⁴⁴ *Id.* at 272-73.

⁴⁵ *Id.* at 273.

⁴⁶ *Id.* at 273 n.46; *see also* 10 C.F.R. § 2.323(f)(1). The Board noted that the issue was pending before a licensing board in another subsequent license renewal proceeding, *Peach Bottom*, LBP-19-3, 89 NRC at 273 n.46. In light of the impact of our decision on this referred ruling to the *Peach Bottom* parties, we reviewed and considered the pleadings and arguments related to section 51.53(c)(3) in that case before reaching our decision here.

⁴⁷ LBP-19-3, 89 NRC at 265.

holistic analysis.”⁴⁸ The Board likewise conducted a holistic analysis of section 51.53(c)(3) to determine the Commission’s intent.⁴⁹ This holistic approach is consistent with our observation that “[i]n construing a regulation’s meaning, it is necessary to examine the agency’s entire regulatory scheme.”⁵⁰ In the similar context of statutory interpretation, the Supreme Court has explained that

[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.⁵¹

We agree with the Board that the regulatory language is ambiguous because it “neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.”⁵² We concur that a holistic reading of Part 51 supports the conclusion that section 51.53(c)(3) covers all applicants for license renewal, including subsequent license renewal applicants.

The Board examined Petitioners’ proposed reading of section 51.53(c)(3) in the broader context of Part 51. We agree with the Board’s well-reasoned determination that application of section 51.53(c)(3) to only initial license renewal applicants would render that provision incompatible with the other license renewal provisions in Part 51.⁵³ The Board noted that while the environmental report assists the agency, the NRC has the ultimate responsibility to comply with NEPA by preparing a SEIS in license renewal proceedings.⁵⁴ In preparing a SEIS for a license renewal, the Staff must follow the provisions of sections 51.71(d) and 51.95(c), which in turn refer to Table B-1. As explained below, the plain text of those regulations cannot be reconciled with Petitioners’ reading of section 51.53(c).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3)*, CLI-01-10, 53 NRC 353, 366 (2001).

⁵¹ *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

⁵² LBP-19-3, 89 NRC at 265.

⁵³ *Id.* at 274 (noting that “the dissent does not dispute that its restrictive reading of section 51.53(c) places that regulation in irreconcilable tension with ‘sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B’”).

⁵⁴ *Id.* at 263.

a. *Context and Structure of Part 51*

(1) SECTION 51.95

Section 51.95, “Postconstruction Environmental Impact Statements,” provides the requirement for the NRC to prepare an EIS at the initial operating license stage, license renewal stage, and the post-operating license stage. Section 51.95(c) provides, “[i]n connection with the renewal of an operating license or combined license for a nuclear power plant under 10 [C.F.R.] parts 52 or 54 of this chapter, the Commission shall prepare an environmental impact statement, which is a supplement to” the 2013 GEIS. With regard to Category 1 issues, the regulation sets forth the following requirement:

[i]n order to make recommendations and reach a final decision on the proposed action, the NRC [S]taff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information.⁵⁵

Unlike section 51.53(c), section 51.95 does not refer to initial license renewals. Rather, by its terms it does not differentiate between initial and subsequent license renewals. And by its terms, the NRC must “integrate the conclusions in the generic environmental impact statement for issues designated as Category 1” into the agency’s final SEIS.⁵⁶ This requirement is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 GEIS for Category 1 issues.

Like the Board, we find section 51.95(c)(4)’s reference to section 51.53(c)(3)(ii) particularly instructive.⁵⁷ For all license renewal proceedings, including subsequent license renewals, section 51.95(c)(4) requires the NRC to rely on the information developed for Category 2 issues “applicable to the plant

⁵⁵ 10 C.F.R. § 51.95(c)(4). The reference to “new and significant information” reflects our ongoing obligation to supplement any final EIS prior to undertaking an agency action upon discovering information that provides a seriously different picture of the environmental consequences. *See Marsh*, 490 U.S. at 374; 10 C.F.R. § 51.92. Because the 2013 GEIS already resolves the Category 1 issues and the GEIS for Continued Storage of Spent Nuclear Fuel already evaluates storage of nuclear waste after the licensing term, this language reflects the agency’s obligation to consider whether there is any new information with respect to those issues before taking final action. *See* “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel” (Final Report), NUREG-2157, vols. 1-2 (Sept. 2014) (ML14196A105, ML14196A107). Section 51.53(c)(3)(iv) is our only regulatory provision that implements the requirements for license renewal applicants to provide new and significant information in the environmental report, which further supports our reading that all license renewal applicants should reference section 51.53(c)(3).

⁵⁶ 10 C.F.R. § 51.95(c)(4).

⁵⁷ *See* LBP-19-3, 89 NRC at 267.

under § 51.53(c)(3)(ii).” As the Board observed, this language strongly suggests that the Commission did not intend to restrict section 51.53(c)(3) to initial license renewal applicants.⁵⁸ We agree with the Board that Petitioners’ interpretation, read in the broader context of Part 51, would not further the regulatory purpose of Part 51.

(2) SECTION 51.71

Similarly, Petitioners’ interpretation of section 51.53(c)(3) is inconsistent with section 51.71, “Draft Environmental Impact Statement — Contents.” Specifically, section 51.71(d) states that

[t]he draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in [Table B-1 and] must contain an analysis of those issues identified as Category 2 in [Table B-1].

Again, section 51.71(d) on its face does not differentiate between initial and subsequent license renewals. And like section 51.95(c), section 51.71(d) directs the agency to analyze Category 2 issues in the Draft SEIS, but to rely on the 2013 GEIS for Category 1 issues. Here too, Petitioners’ reading of section 51.53(c)(3) is inconsistent with other provisions in our regulations as it would require an applicant to provide analyses of Category 1 issues that the agency may not use in preparing the Draft SEIS because section 51.71(d) already requires the agency to consider the codified conclusions in Table B-1 for Category 1 issues.⁵⁹

Further, those codified conclusions, located in Table B-1, apply to all license renewals. Appendix B to Part 51 states that “[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995.” The appendix further specifies that “Table B-1 summarizes the Commission’s findings on the scope and magnitude of environmental impacts of renewing the operating license for a nuclear power plant.” Table B-1 “represents the analysis of the environmental impacts associated with the renewal of *any* operating license and is to be used in accordance with § 51.95(c).”⁶⁰ Once more, a plain reading of Appendix B demonstrates that Petitioners’ interpretation of section 51.53(c)(3) is not compatible with other

⁵⁸ *Id.*

⁵⁹ While some portion of this analysis would address whether new and significant information impacts any Category 1 issues, most of the analysis would simply reconsider information that the 2013 GEIS already thoroughly addressed.

⁶⁰ 10 C.F.R. pt. 51, subpt. A, app. B (emphasis added).

Part 51 provisions on license renewal. Those provisions require the NRC to rely on the Category 1 findings in the 2013 GEIS when preparing the Draft and Final SEIS for any license renewal. Petitioners' interpretation would require subsequent license renewal applicants to prepare additional analysis of these same issues that the agency could not consider when preparing its own environmental analysis.

The dissenting Board opinion suggests that one way to address this infirmity in Petitioners' interpretation could be to read the word "initial" into sections 51.71(d) and 51.95(c) as well as Appendix B.⁶¹ But this solution would have us read more into other regulations than the Petitioners assert the Staff's and Applicant's interpretations read out of section 51.53(c)(3). Moreover, this solution limits the applicability of these provisions to initial license renewal, contrary to the intent and context of Part 51 discussed below.

(3) SECTION 51.53

Additionally, we have previously stated that regulatory interpretation should be informed by "the language and structure of the provision itself."⁶² The language and structure of section 51.53(c)(3) further supports the Board's non-restrictive reading. As noted above, the body of section 51.53(c)(3) states that applicants for initial license renewals must address its four subsections. Subsection (c)(3)(i) excuses applicants from analyzing Category 1 issues, subsection (c)(3)(ii) identifies Category 2 issues that applicants must analyze for specific plant designs, subsection (c)(3)(iii) directs applicants to evaluate mitigation for Category 2 issues, and subsection (c)(3)(iv) requires the applicants to consider new and significant information related to license renewal.

While the parties strongly disagree over whether subsequent license renewal applications generally should address Category 1 issues, the parties agree that all license renewal applicants, subsequent and initial, must address Category 2 issues.⁶³ But, the discussion on Category 2 issues in subsection (c)(3)(ii) notes that applicants for certain plants need only analyze certain issues based on plant design. For example, subsection (c)(3)(ii)(A) reads,

If the applicant's plant utilizes cooling towers or cooling ponds and withdraws

⁶¹ LBP-19-3, 89 NRC at 308-09 (Abreu, J., concurring in part and dissenting in part).

⁶² *Millstone*, CLI-01-10, 53 NRC at 361.

⁶³ Compare Reply in Support of Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Sept. 10, 2018), at 4-5 (Reply), with Applicant's Surreply to New Arguments Raised in Reply Pleadings (Sept. 20, 2018), at 4 (FPL Surreply), and NRC Staff's Response to the Applicant's Surreply and the Petitioners' Response, Regarding the Applicability of 10 C.F.R. § 51.53(c)(3) to Subsequent License Renewal Applications (Nov. 2, 2018) at 5-6 (Staff Response).

makeup water from a river, an assessment of the impact of the proposed action on water availability and competing water demands, the flow of the river, and related impacts on stream (aquatic) and riparian (terrestrial) ecological communities must be provided. The applicant shall also provide an assessment of the impacts of the withdrawal of water from the river on alluvial aquifers during low flow.

Thus, this subsection reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them. In contrast, other subsections in (c)(3)(ii) indicate that all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources.⁶⁴ In this manner, subsection (c)(3)(ii) provides an essential roadmap for both initial and subsequent license renewal applicants with respect to which Category 2 issues should be analyzed based on the design of the plant. Indeed, before the Board, Petitioners argued that the applicant was required to meet the terms of section 51.53(c)(3)(ii) and (iii).⁶⁵ But, Petitioners have not explained how the word “initial” in section 51.53(c)(3) would restrict the applicability of subsection (i) to subsequent license renewals but not subsections (ii) and (iii), and we are unable to do so. As a result, the regulatory language and structure of section 51.53(c)(3) itself further supports the Board’s holistic reading.⁶⁶

b. Regulatory History

(1) REGULATORY UPDATE FROM 2013

On balance, the regulatory history of Part 51 also supports our conclusion that applicants for a subsequent license renewal may utilize section 51.53(c)(3) and the GEIS. The regulatory history also confirms that the NRC considered subsequent license renewal in its analysis of Category 1 issues in the 2013 updates to the GEIS and provided the public with notice and an opportunity to comment.

Section 51.53(c)(3) directs license renewal applicants to analyze Category 2 issues, and it states that applicants are not required to analyze Category 1 issues, which are analyzed in the GEIS. As noted above, the agency most recently updated the GEIS and correspondingly amended its regulations in 2013.⁶⁷ Con-

⁶⁴ *E.g.*, 10 C.F.R. § 51.53(c)(3)(ii)(K).

⁶⁵ Reply at 14, 17, 19, 21, 40-41 n.148, 41 n.152, 52 n.194.

⁶⁶ See *Millstone*, CLI-01-10, 53 NRC at 361.

⁶⁷ See generally 2013 Final Rule.

sequently, the 2013 GEIS and its accompanying rulemaking documents are the most current and reliable sources for interpreting the meaning of the regulations.

Among other things, the 2013 rulemaking reorganized, consolidated, and reclassified certain Category 1 and 2 issues.⁶⁸ There, the agency set forth the requirement for an applicant and the Staff to perform site-specific environmental analyses of Category 2 issues “[f]or *each* license renewal application.”⁶⁹ This statement does not differentiate between initial and subsequent license renewals; instead, it directs such analysis for every license renewal.

Additionally, the text of the 2013 GEIS update also supports our determination that the GEIS covers the generic environmental impacts of all license renewals. Section 7 of the 2013 GEIS provides a glossary, which defines key words and phrases used in the document. The GEIS defines “License renewal term” as “[t]hat period of time past *the original or current license term* for which the renewed license is in force.”⁷⁰ We agree with the Board that in light of this statement, the 2013 GEIS “explicitly purports to assess the environmental impacts associated with a [twenty-year] renewal period, regardless of whether this period follows the original license or a current renewed license.”⁷¹ A plain reading of the 2013 GEIS shows that the agency understood the subject of the GEIS — environmental impacts during a license renewal term — to include both impacts from an initial license renewal or a subsequent license renewal.⁷² The Staff solicited extensive public comments on the 2013 GEIS by, among other methods, issuing notice in the *Federal Register*; holding public meetings; extending the comment period; and distributing the draft revised GEIS to stakeholders including environmental groups, representatives of American Indian Tribes, and various government agencies.⁷³

Moreover, the documentation supporting the 2013 GEIS also supports a conclusion that the NRC intended to consider the impacts of subsequent license renewal in that document. Consistent with Executive Order 12,866, “Regulatory Planning and Review,” the Staff prepared a Regulatory Analysis and provided it for Commission approval for the GEIS update and associated revision to Part 51 to reflect the revised GEIS.⁷⁴ That Regulatory Analysis compared the costs

⁶⁸ *See id.* at 37,282-83.

⁶⁹ *Id.* at 37,282 (emphasis added).

⁷⁰ 2013 GEIS at 7-27 (emphasis added).

⁷¹ LBP-19-3, 89 NRC at 270.

⁷² *E.g.*, 2013 GEIS at 7-27, 1-2 (“The GEIS for license renewal of nuclear power plants assesses the environmental impacts that could be associated with license renewal and an additional [twenty] years of power plant operation.”).

⁷³ 2013 GEIS, app. A § A.2.

⁷⁴ *See* “Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant
(Continued)

of the rulemaking with the expected benefits and concluded that the action was cost-justified.⁷⁵ The 2009 *Federal Register* notice providing the draft GEIS for public comment contained a specific request for public comment on the draft Regulatory Analysis.⁷⁶ The draft Regulatory Analysis evaluated the costs of both initial and subsequent license renewal.⁷⁷ That evaluation carried forward to the Regulatory Analysis of the final GEIS, in which the Staff estimated “that a total of [thirty] license renewal applications (including applications for a second license renewal) will be received in the [ten-year] cycle following the effective date of the rule.”⁷⁸ Therefore, the Staff’s cost-justification recommendation — and the Commission’s approval of that recommendation — was based on an understanding that the 2013 GEIS would cover all license renewal applications, both initial and subsequent.

Petitioners have identified select portions of the 2013 GEIS that appear to consider only one license renewal term in the “discussion of specific types of environmental impacts.”⁷⁹ But the 2013 GEIS is hundreds of pages long and analyzed seventy-eight issues; and as the Board noted, the 2013 GEIS generally used terminology that could apply to either an initial or subsequent license

Operating Licenses,” Commission Paper SECY-12-0063 (Apr. 20, 2012) (ML110760045 (package)), Encl. 2 (ML110760321) (Regulatory Analysis); *see also* Exec. Order No. 12,866, 3 C.F.R. 1993 Comp. at 638-49 (1994).

⁷⁵ Regulatory Analysis at 68.

⁷⁶ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,132 (July 31, 2009).

⁷⁷ “Proposed Rulemaking — Environmental Protection Regarding the Update of the 1996 Generic Environmental Impact Statement for Nuclear Power Plant License Renewal,” Commissioner Paper SECY-09-0034 (Mar. 3, 2009) (ML091050197 (package)), Encl. 2, at 15 (ML083460087) (“Some plants will become eligible for a second 20-year license extension after FY 2013. While the NRC understands that the possibility exists for license holders to submit a second 20-year license renewal application, no letters of intent have been received as of the issuance date of this document. The NRC conservatively estimates receiving 4 applications per year from FY 2014 through FY 2020.”).

⁷⁸ *Id.* at 25.

⁷⁹ Petitioners’ Response to Applicant’s Surreply (Oct. 1, 2018), at 7-8. *See* 2013 GEIS at 4-138 to 4-139 (“If the reactor operates for [sixty] years, the cumulative increase in fatal cancer to an individual worker is estimated to be 3.6×10^{-3} (a [fifty] percent increase over the baseline of [forty] years of operations.”); *id.* at 4-145 (“If the reactor operates for [sixty] years, it is estimated that the increase in fatal cancer risk to the [Maximumly Exposed Individual (MEI)] would range from 6×10^{-7} to 4.6×10^{-4} (a [fifty] percent increase over the baseline of [forty] years of operation); *id.* at 4-217 (“As discussed in the 1996 GEIS, the dose to the public from long-lived radionuclides after [forty] years of plant operation is expected to be negligible, and the increase in quantities of long-lived radionuclides after an additional [twenty] years would result in a negligible dose (less than 0.1 person-rem.”). Similarly, the dissenting opinion notes that the analysis of the impacts of severe accidents in the 2013 GEIS “expressly states that ‘the revision only covers one initial license renewal period for each plant (as did the 1996 GEIS).’” LBP-19-3, 89 NRC at 308 (Abreu, J., concurring in part and dissenting in part) (quoting 2013 GEIS, app. E, at E-2).

renewal.⁸⁰ Therefore, in determining the scope of the 2013 GEIS, the general definition of license renewal term (supported by the discussion in the Regulatory Analysis) provides the most accurate insight into the agency’s understanding.

Additionally, we agree with the Staff that the Petitioners’ arguments do not render the analysis in the GEIS inapplicable to subsequent license renewal. The Staff argues that instead, “the analyses in the GEIS concern the *incremental* effects of an additional [twenty] years of operation — regardless of whether the plant had operated for [forty] years or [sixty] years prior to the requested license renewal.”⁸¹ The Staff’s insight is correct: the 2013 GEIS is not predicated on any particular feature of operation between years forty and sixty that would differ from years sixty to eighty. Moreover, in anticipation of the first subsequent license renewal applications, the Staff prepared an assessment of the agency’s readiness to review the applications and provided a policy paper to the Commission.⁸² That paper notes that the 2013 GEIS “is adequate for a future subsequent license renewal application.”⁸³ Thus, the Staff, to whom we have delegated the responsibility to conduct environmental reviews for license renewal proceedings, has informed us on three separate occasions that the 2013 GEIS covers subsequent license renewals.⁸⁴

(2) THE 1991 PROPOSED RULE AND THE 1996 FINAL RULE

The Board and the dissent disagreed over the meaning of the regulatory history supporting prior versions of the rule, given that some language in the regulatory history suggests that at one time the Commission may have intended to limit the applicability of the earlier version of the GEIS to initial license renewals.⁸⁵ We have previously observed that “[a]s the latest expression of the rulemakers’ intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation.”⁸⁶ Because the regulations at issue codify the 2013 GEIS, the prior regulatory history is a less reliable guide than that accom-

⁸⁰ LBP-19-3, 89 NRC at 265-66.

⁸¹ Staff Response at 14-15.

⁸² “Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal,” Commission Paper SECY-14-0016 (Jan. 31, 2014), at 1 (ML14050A306).

⁸³ *Id.* at 3.

⁸⁴ *Id.*; Staff Response at 14-15; Regulatory Analysis at 25. As noted previously, the Staff sought and received public comment on the rulemaking documents, including the 2013 GEIS. *See, e.g.*, 2013 GEIS, app. A § A.2.

⁸⁵ *Compare* LBP-19-3, 89 NRC at 265-66, *with id.* at 305-07 (Abreu, J., concurring in part and dissenting in part).

⁸⁶ *Millstone*, CLI-01-10, 53 NRC at 367 (*citing* 2B Sutherland, Statutory Construction § 51.02 (1992)).

panying the 2013 rulemaking, which is the “latest expression of the rulemakers’ intent.”⁸⁷

Nevertheless, some features of that rulemaking process provide additional insight into the agency’s intent. The Board noted that while certain language *accompanying* the 1991 proposed rule purported to limit the application of the rule “to one renewal of the initial license for up to [twenty] years beyond the expiration of the initial license,” *the language in the proposed rule itself* did not include such a restriction to an initial license renewal.⁸⁸ The Board observed that neither the 1996 final rule nor any accompanying language included the restrictive phrase.⁸⁹ The Board determined that the omission of the limiting language supported a conclusion that the agency did not intend to limit the applicability of section 51.53(c)(3) to initial license renewal applications when it was promulgated.⁹⁰

We note that certain aspects of the regulatory history support the Board’s determination. For example, while the final rule was “consistent with the generic approach and scope” of the proposed rule, it also featured “several significant modifications.”⁹¹ Significantly, the proposed rule contained a generic “favorable cost-benefit balance for license renewal” found in proposed Appendix B.⁹² In support of this finding, Appendix B in the proposed rule determined, “[l]icense renewal of an individual nuclear power plant is found to be preferable to replacement of the generating capacity with a new facility to the year 2020.”⁹³ However, the final rule abandoned this approach. Instead, it introduced a “new standard that will require a determination of whether or not the adverse environmental impacts of license renewal are so great, compared with the set of alternatives, that preserving the option of license renewal for future decisionmakers would

⁸⁷ *See id.* While the rulemaking accompanying the 2013 GEIS did not remove the word “initial” from section 51.53(c)(3), this does not necessarily contradict our determination to consider both subsequent and initial license renewals in the 2013 GEIS. Rather, the word “initial” reflects the possibility that while all initial license renewal applicants must address the conditions and considerations in section 51.53(c)(3), some subsequent license renewal applicants may take a different approach or use the same approach required for initial license renewal applicants. *See* 10 C.F.R. § 51.53(a). And ultimately the more significant determination, from a NEPA standpoint, is preparation of the Draft SEIS and Final SEIS pursuant to Table B-1, for which agency regulations do not distinguish between subsequent and initial renewals.

⁸⁸ LBP-19-3, 89 NRC at 265 (citing Environmental Review for Renewal of Operating Licenses; Proposed Rule, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (1991 Proposed Rule)).

⁸⁹ *Id.* (citing 1996 Final Rule, 61 Fed. Reg. at 28,467).

⁹⁰ *Id.*

⁹¹ 1996 Final Rule, 61 Fed. Reg. at 28,468.

⁹² 1991 Proposed Rule, 56 Fed. Reg. at 47,018.

⁹³ *Id.* at 47,030.

be unreasonable.”⁹⁴ The final rule explained, “[c]onsideration of and decisions regarding alternatives will occur at the site-specific stage.”⁹⁵ Therefore, the proposed rule could only have applied to initial license renewals because it relied on a generic finding that no alternative to license renewal would be preferable through 2020 and most facilities would be unable to apply for subsequent license renewal until after that point in time.⁹⁶

Further, the Board found that a regulatory purpose of Part 51 revisions was “to promote efficiency in the environmental review process for license renewal applications.”⁹⁷ It noted that requiring subsequent license renewal applicants to analyze Category 1 issues (already covered by the GEIS and codified in Table B-1), on a site-specific basis would negate the regulatory purpose behind these Part 51 revisions.⁹⁸ We agree with the Board that Petitioners’ interpretation of section 51.53(c)(3) as inapplicable to subsequent license renewal applicants is inconsistent with an “explicitly stated regulatory purpose” of Part 51 — the promotion of efficient environmental reviews for license renewal applications.

c. Agency Guidance

In reaching its conclusion on section 51.53(c)(3), the Board also relied on agency guidance, which it appropriately accorded “special weight.”⁹⁹ The Board noted that “[t]he Supreme Court has stated that an agency’s interpretive statements ‘reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance’” and that “as such, they are entitled to a measure of respect.”¹⁰⁰ The Board pointed to Supplement 1 to Regulatory Guide 4.2, which provides instructions for license renewal applicants for preparation of environmental reports.¹⁰¹ The Board noted that Reg. Guide 4.2 “does *not* distinguish between initial and subsequent license renewal applicants” and that it “repeatedly states that issues ‘identified as Category 1 issues in the GEIS

⁹⁴ 1996 Final Rule, 61 Fed. Reg. at 28,468.

⁹⁵ *Id.* at 28,484.

⁹⁶ 10 C.F.R. § 54.17(c) (“An application for a renewed license may not be submitted to the Commission earlier than [twenty] years before the expiration of the operating license or combined license currently in effect.”).

⁹⁷ *Id.* at 266 (citing 1996 Final Rule, 61 Fed. Reg. at 28,467).

⁹⁸ *Id.*

⁹⁹ *Id.* at 271 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 356 (2015) (noting that guidance documents developed to assist in compliance with applicable regulations are entitled to special weight)).

¹⁰⁰ *Id.* at 271 n.41 (quoting *Holowecki*, 552 U.S. at 399).

¹⁰¹ *Id.* (citing “Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications,” Regulatory Guide 4.2, supp. 1, rev. 1 (June 2013) (ML13067A354) (Reg. Guide 4.2)).

. . . are adequately addressed for *all* applicable nuclear plants.”¹⁰² The Staff sought and received public comment on this Regulatory Guide as part of the revisions to the regulations in 2013.¹⁰³ We agree that our guidance supports the Board’s interpretation of section 51.53(c)(3).

d. Future GEIS Updates

The Board pointed to the periodic reviews and updates to the GEIS mandated by Part 51 as further support for its interpretation of section 51.53(c)(3).¹⁰⁴ In the Board’s view, periodic reviews and updates to the GEIS would not be necessary unless the Commission intended for all license renewal applicants going forward, as well as the Staff, to rely on the GEIS’s generic findings rather than performing site-specific analyses of Category 1, as well as Category 2, issues.¹⁰⁵ We agree with the Board’s conclusion and note that since the majority of initial license renewals occurred between 2000 and 2010, an ongoing obligation to update the GEIS every ten years would not promote the principles of economy and efficiency that the GEIS was supposed to further if it only applied to initial license renewals.

e. Licensing Experience

As discussed above, “[t]he NRC’s review of a license renewal application proceeds along two independent regulatory tracks: one for safety issues and another for environmental issues.”¹⁰⁶ We have made clear that “license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight” and that “operational matters . . . are appropriately addressed under the Staff’s ongoing regulatory oversight process.”¹⁰⁷ Our safety review of license renewal applications is based on detailed information that an applicant provides “to confirm whether the design assumptions used for the original licensing basis will continue to be valid throughout the period of extended operation.”¹⁰⁸

¹⁰² *Id.* (quoting Reg. Guide 4.2 at 25).

¹⁰³ See NRC Response to Public Comments Related to Draft Regulatory Guide DG-4015 (Proposed Revision 1 of Regulatory Guide 4.2, Supplement 1), Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications (June 20, 2013) (ML13067A355).

¹⁰⁴ LBP-19-3, 89 NRC at 267-68.

¹⁰⁵ *Id.* at 268.

¹⁰⁶ 2013 Final Rule, 78 Fed. Reg. at 37,282.

¹⁰⁷ *Prairie Island*, CLI-10-27, 72 NRC at 490-91 (quoting Nuclear Power Plant License Renewal; Final Rule, 56 Fed. Reg. 64,943, 64,952) (Dec. 13, 1991)).

¹⁰⁸ 2013 Final Rule, 78 Fed. Reg. at 37,282.

Similarly, our environmental analysis of license renewal is based on licensees' operating experience and our understanding of environmental impacts of operation. As noted previously, we based the framework of the environmental analysis for license renewal on the following factors: data from operating experience, the fact that environmental impacts of license renewal are expected to be bounded by data from operating experience given that license renewal is twenty additional years of continued operation, and our understanding that changes in the environment around nuclear plants are gradual and predictable.¹⁰⁹ For these reasons, the NRC has concluded that the environmental impacts from operation during a license renewal term would be similar to those during the current license term¹¹⁰ and our site-specific environmental analysis of license renewal applications is limited to Category 2 issues — that is, those issues that would not “essentially be the same at all nuclear power plants.”¹¹¹ In fact, this lengthy history of plant operation enabled us to make Category 1 findings in the first place.¹¹² Given that we and our licensees have amassed decades more operating experience since we first promulgated our 1996 Final Rule and that experience has been consistent with the assumptions underlying license renewal, we see no reason why subsequent license renewal should not be treated similarly. All of these factors support our understanding that the 2013 GEIS considered both initial and subsequent license renewal terms.

It should not be suggested that this approach allows the Staff to abrogate its responsibility to take a “hard look” at new and significant information.¹¹³ The Staff retains its ongoing responsibility to analyze and incorporate into the SEIS any new and significant information regarding both Category 1 and Category 2 issues.¹¹⁴ Licensees, petitioners, or other members of the public may also have information that would modify the analysis of a Category 1 issue for a subsequent license renewal in the 2013 GEIS either with respect to a specific facility or generically. Consequently, NRC regulations provide several mechanisms for the public to inform us of such information. Specifically, for general information, any person may file a petition for rulemaking to appropriately amend the codification of Category 1 issues in the 2013 GEIS.¹¹⁵ With regard to a specific facility, members of the public may seek a waiver of our regulations to

¹⁰⁹ 1996 Final Rule, 61 Fed. Reg. at 28,467-68.

¹¹⁰ 2013 GEIS at 1-2.

¹¹¹ 2013 Final Rule, 78 Fed. Reg. at 37,282.

¹¹² *Id.*

¹¹³ *See Marsh*, 490 U.S. at 374.

¹¹⁴ *See id.*

¹¹⁵ 10 C.F.R. § 2.802.

challenge the analysis in the 2013 GEIS on a Category 1 issue.¹¹⁶ And perhaps most significantly, the Staff must update the GEIS on a ten-year cycle.¹¹⁷ The agency has already begun pre-rulemaking activities to support this update, and the public will have an opportunity to comment as part of that rulemaking.¹¹⁸ But, litigation in adjudicatory proceedings without a waiver is simply not one such mechanism; rather, “[a]djudicating category 1 issues site-by-site . . . would defeat the purpose of resolving generic issues in a GEIS.”¹¹⁹

f. Response to the Dissenting Opinion

Commissioner Baran raises two challenges to this decision. First, he contends that the majority adopts “an unreasonable interpretation of 10 C.F.R. § 51.53(c)(3).”¹²⁰ Commissioner Baran would uphold the Petitioners’ interpretation of 10 C.F.R. § 51.53(c)(3) because in his view “the plain and unambiguous language of the regulation limits its applicability to *initial* license renewal.”¹²¹ But we find the text of the regulation less clear. Section 51.53(c)(3) states that “[f]or those applicants seeking an initial renewed license . . . the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations.”¹²² We agree that the plain language of section 51.53(c) requires environmental reports for an initial license renewal to address the provisions of subsection (c)(2) subject to the “conditions and considerations” in subsection (c)(3). But we do not agree that the regulation prevents subsequent license renewal applicants from doing the same. The regulation does not explicitly prohibit other license renewal applicants from also subjecting their environmental reports to those terms and conditions. Therefore, a literal reading of subsection (c)(3) does not bar applicants for subsequent license renewal from subjecting their environmental reports to the conditions and considerations in that subsection.

In contrast, the interpretation of section 51.53(c)(3) advanced by Commissioner Baran would require us to read more into the regulation than we find in

¹¹⁶ 10 C.F.R. § 2.335; *see also* 1996 Final Rule, 61 Fed. Reg. at 28,470 (noting that if the Staff receives information calling into question the validity of a Category 1 finding, either generically or with respect to a specific site, it will seek Commission approval to waive the rule as appropriate).

¹¹⁷ 10 C.F.R. pt. 51, subpt. A, app. B.

¹¹⁸ Planned Rulemaking Activities — Rules, <https://www.nrc.gov/reading-rm/doc-collections/rule-making-ruleforum/active/RuleIndex.html> (last visited March 10, 2020).

¹¹⁹ *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 21 (2007).

¹²⁰ Commissioner Baran, Dissenting, at p. 158.

¹²¹ *Id.* at p. 159.

¹²² 10 C.F.R. § 51.53(c)(3).

its plain text. He claims, “[t]he explicit language of the regulation states that the provisions of 51.53(c)(1) and (c)(2) apply to all license renewal applicants, including those for subsequent license renewal, while section 51.53(c)(3) applies only to initial license renewal applicants.”¹²³ But Commissioner Baran’s analysis inserts the word “only” into section 51.53(c)(3). Therefore, we agree with the Board that a reasonable reading of the regulation is that it neither explicitly includes nor excludes subsequent license renewal applicants.¹²⁴

Commissioner Baran’s re-write of Part 51 would not stop at section 51.53(c). Rather than try to reconcile his reading of section 51.53(c)(3) with the rest of Part 51, he observes that “[t]he regulatory direction to rely on the GEIS can only apply to the extent that the GEIS actually evaluated the environmental impacts of subsequent license renewal. I find that it did not.”¹²⁵ Thus, the dissent concludes that “the Category 1 findings in Table B-1 do not apply to subsequent license renewal applications.”¹²⁶ However, this reading of Part 51 would similarly re-write Part 51 to limit Table B-1 to initial license renewals. Further, this interpretation also impacts sections 51.95(c) and 51.71(d), which build on Table B-1’s incorporation of the findings in the 2013 GEIS. Consequently, we disagree with our colleague’s interpretation of section 51.53(c)(3) because we conclude that it does not reconcile the regulation with the other provisions in Part 51.

Second, Commissioner Baran claims that the majority “mischaracterizes the scope of the GEIS.”¹²⁷ Commissioner Baran asserts that “[n]either the original GEIS nor the 2013 GEIS revision analyzed the environmental impacts of subsequent license renewal periods.”¹²⁸ He rejects the Board’s conclusion that the 2013 GEIS applies to subsequent license renewals because he claims the Board relied “on some ambiguous statements in the text of the 2013 GEIS.”¹²⁹ Again, we disagree. In reaching its conclusion, the Board cited the glossary in the 2013 GEIS.¹³⁰ The glossary defines “License renewal term” as “[t]hat period of time past *the original or current license term* for which the renewed license is in

¹²³ Commissioner Baran, Dissenting, at p. 159.

¹²⁴ While Commissioner Baran invokes the doctrine of *expressio unius est exclusio alterius* to support his reading of section 51.53(c)(3), *id.*, we agree with the Board’s observation that this principle is not an “inflexible rule of law” but a starting point in regulatory construction, LBP-19-3, 89 NRC at 273.

¹²⁵ Commissioner Baran, Dissenting, at p. 161.

¹²⁶ *Id.* at p. 164.

¹²⁷ *Id.* at p. 158.

¹²⁸ *Id.* at p. 161.

¹²⁹ *Id.* at pp. 163-64.

¹³⁰ LBP-19-3, 89 NRC at 270.

force.”¹³¹ This statement indicates that the agency intended for the 2013 GEIS to cover initial and subsequent license renewals.

Commissioner Baran points to several other quotations from the 2013 GEIS and 1996 GEIS and supporting rulemaking documents for support.¹³² We address much of this material above and acknowledge that some of it supports Petitioners’ interpretation. Ultimately, like the Board, we find the definition of “License renewal term” in the 2013 GEIS itself is a more probative guide into understanding what license renewal terms the 2013 GEIS considered.

Finally, Commissioner Baran states that “[i]t would be a violation of NEPA for the agency to attempt to retroactively expand the scope of an environmental review completed seven years ago.”¹³³ Because our interpretation of the 2013 GEIS rests on our review of contemporaneous statements regarding its scope, it is not a retroactive expansion. As a result, we disagree with our colleague that the agency’s environmental review was inadequate for this license renewal.

For the reasons discussed above, we find that the regulatory history supporting Part 51 indicates that the NRC intended for the analysis of Category 1 issues in the 2013 GEIS to apply to subsequent license renewals. Because the primary purpose of section 51.53(c)(3)(i) is to enable applicants for license renewal to rely exclusively on the GEIS for Category 1 issues, our conclusion supports the proposition that section 51.53(c)(3) applies to subsequent license renewals. Thus, in response to the referred question, we agree with the Board that subsequent license renewal applicants may rely on the GEIS and thereby exclude consideration of Category 1 issues from their environmental reports, absent new and significant information that would change the conclusions in the GEIS.¹³⁴ Therefore, any challenge to Category 1 issues in this or any other subsequent license renewal proceeding would need to be accompanied by a rule waiver petition.¹³⁵

III. CONCLUSION

For the foregoing reasons, we *dismiss* FPL’s appeal; *accept* the Board’s referral under section 2.323(f)(1) and *affirm* its ruling on the interpretation of section 51.53.

¹³¹ 2013 GEIS at 7-27 (emphasis added).

¹³² Commissioner Baran, Dissenting, at pp. 162-64.

¹³³ *Id.* at p. 164.

¹³⁴ *See* 2013 GEIS at 1-4.

¹³⁵ *See* 10 C.F.R. § 2.335.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of April 2020.

Additional Views of Chairman Svinicki and Commissioner Caputo

We fully join the majority's response to the referred question, whether the agency "intend[ed] to restrict section 51.53(c)(3) to initial license renewals."¹ Given the procedural posture of this case when the issue arose, litigating contention admissibility based on the analysis in the environmental report, the parties and Board's focus on this issue is understandable.² However, we write separately to emphasize that when considered in the larger context of our regulations, the answer to this referral does not resolve the more significant question of whether parties may litigate Category 1 issues in a subsequent license renewal proceeding without filing a waiver petition.

Petitioners presume that if section 51.53(c)(3) does not apply to subsequent license renewal applicants, then they may not rely on Category 1 issues in the 2013 GEIS. The above analysis assumes that Petitioners' premise is true and concludes that this position would lead to untenable results. But, fundamentally, Petitioners' premise is flawed. As explained below, even if section 51.53(c)(3) did not apply to subsequent license renewal applicants, our regulations would still allow subsequent license renewal applicants to rely on the 2013 GEIS's analysis of Category 1 issues and would prohibit challenges to those findings in adjudicatory proceedings absent a waiver.

Section 51.53(a) provides that "[a]ny environmental report prepared under the provisions of this section may incorporate by reference any information contained in a . . . final environmental document previously prepared by the NRC staff that relates to the production or utilization facility or site." That section specifically includes "NRC staff-prepared final generic environmental impact statements," such as the 2013 GEIS, in the list of documents that applicants may incorporate by reference into their environmental reports. Significantly, "incorporate by reference" is identical language to the phrase the Commission used to describe the effect of section 51.53(c)(3) on Category 1 issues when it was promulgated: "the analyses for certain impacts codified by this rulemaking need only be *incorporated by reference* in an applicant's environmental report for license renewal."³ Consequently, regardless of the scope of 51.53(c)(3), our regulations already allow applicants for subsequent license renewal to rely on Category 1 findings in preparing their environmental reports.

Additionally, in reviewing subsequent license renewal environmental reports, the Staff will be guided by Table B-1 in Appendix B. Table B-1 applies to all license renewal proceedings through sections 51.71(d) and 51.95(c). As the United States Court of Appeals for the First Circuit has observed, "[b]ecause

¹ LBP-19-3, 89 NRC at 272-73 & n.46.

² *Id.* at 269.

³ 1996 Final Rule, 61 Fed. Reg. at 28,482 (emphasis added).

Category 1 issues have already been addressed globally by 10 C.F.R. pt. 51, subpt. A, app. B, they cannot be litigated in individual adjudications, such as license renewal proceedings for individual plants.”⁴ In other words, the codification of Category 1 issues rests in a different section of Part 51 than section 51.53(c). Therefore, even if section 51.53(c)(3) did not apply to subsequent license renewal applicants, a contention regarding a Category 1 issue in a license renewal proceeding would still be a challenge to section 51.71(d), section 51.95(c), and Table B-1 and hence inadmissible without a waiver.⁵

⁴ *Massachusetts v. NRC*, 522 F.3d 115, 120 (2008).

⁵ See 10 C.F.R. § 2.335.

Commissioner Baran, dissenting

I respectfully dissent from the majority opinion because it adopts an unreasonable interpretation of 10 C.F.R. § 51.53(c)(3) and mischaracterizes the scope of the agency’s Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS). Contrary to the majority’s assertions, section 51.53(c)(3) does not apply to subsequent license renewal, and the GEIS did not evaluate the environmental impacts of subsequent license renewal. I would reverse the Board’s ruling and hold that subsequent license renewal applicants and the NRC Staff may not exclusively rely on the GEIS and 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 to evaluate environmental impacts of Category 1 issues.

I. INTERPRETATION OF SECTION 51.53(c)(3)

Section 51.53(c) requires an “applicant for renewal of a license to operate a nuclear power plant” to submit an environmental report with its application.¹ Section 51.53(c)(3) provides:

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

- (i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.
- (ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part
- (iii) The report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues in appendix B to subpart A of this part. No such consideration is required for Category 1 issues in appendix B to subpart A of this part.
- (iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.²

¹ 10 C.F.R. § 51.53(c)(1).

² 10 C.F.R. § 51.53(c)(3).

The Board majority found that this regulatory text does not answer the question of whether section 51.53(c)(3) can be applied to subsequent license renewal applicants, stating that “it neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.”³ In the Board’s judgment, the Commission intended section 51.53(c)(3) to apply to all license renewal applicants, including those for subsequent license renewal.⁴ According to the Board, FPL’s environmental report did not need to consider Category 1 issues on a site-specific basis because it could rely on the Category 1 findings in the GEIS and Table B-1.⁵

I disagree with the Board’s interpretation of section 51.53(c)(3) and would hold that the provision applies only to applicants for initial license renewal. The plain and unambiguous language of the regulation limits its applicability to *initial* license renewal. Statements in subsequent NRC documents that were not part of the notice and comment rulemaking process cannot change the explicit language of the regulation.⁶

Section 51.53(c)(1) applies to “[e]ach applicant for renewal of a license to operate a nuclear power plant under part 54,” and section 51.53(c)(2) contains requirements for the environmental report that must be submitted by any such applicant.⁷ By contrast, section 51.53(c)(3) narrows the scope of license renewal applicants to which it applies and speaks only of “those applicants seeking an *initial* renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995.”⁸ Contrary to the Board’s assertion, the regulation is not silent as to whether subsequent license renewal applicants can take advantage of the provisions of section 51.53(c)(3).⁹ The explicit language of the regulation states that the provisions of 51.53(c)(1) and (c)(2) apply to all license renewal applicants, including those for subsequent license renewal, while section 51.53(c)(3) applies only to initial license renewal applicants. A basic canon of statutory construction is that the express mention of one thing excludes all others (*expressio unius est exclusio alterius*). When the regulatory text of section 51.53(c)(3) specifically addresses “those applicants seeking an

³ LBP-19-3, 89 NRC 245, 265.

⁴ *Id.*

⁵ *Id.* at 272-73.

⁶ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009) (describing the Administrative Procedure Act’s “mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

⁷ 10 C.F.R. § 51.53(c)(1)-(2).

⁸ *Id.* § 51.53(c)(3) (emphasis added).

⁹ See LBP-19-3, 89 NRC at 265.

initial renewed license,” it is properly read as not addressing applicants seeking other license renewal terms.

The history of the rule provides additional support for the conclusion that section 51.53(c)(3) applies only to initial renewal applicants. In 1991, the NRC initiated the revisions to Part 51 that promulgated section 51.53. In the Statements of Consideration (SOC) for the proposed rule, the Commission explained that “the part 51 amendments apply to one renewal of the initial license for up to 20 years beyond the expiration of the initial license.”¹⁰ The final rule summarized the changes to the rule — none of which affect the scope stated in the proposed rule’s SOC.¹¹ In fact, the SOC for the final rule, issued in 1996, stated that the final rule “is consistent with the generic approach and scope of the proposed” rule.¹² Moreover, the final rule (as well as a subsequent 2007 version of the rule) retained the restriction that only “applicants seeking an *initial* renewal license” need not consider alternatives for reducing adverse environmental impacts for Category 1 issues in Table B-1.¹³

Later revisions to section 51.53, which were proposed in 2009 and finalized in 2013, did not remove the word “initial” in section 51.53(c)(3), despite making other changes to the subsection.¹⁴ In fact, the SOC for the 2013 final rule revisions noted that the Atomic Energy Act authorizes the NRC to issue operating licenses for up to forty years and that the NRC regulations allow for renewal of these licenses for up to an additional twenty years.¹⁵ Neither the proposed rule nor final rule SOC mentioned subsequent license renewal periods.

Thus, the plain language of the regulation is clear that it applies only to applications for initial license renewal. However, FPL and the Staff argue that we may reject the plain meaning if it would produce an “absurd” result.”¹⁶ They

¹⁰ Environmental Review for Renewal of Operating Licenses; Proposed Rule, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (1991 Proposed Rule).

¹¹ See 1996 Final Rule, 61 Fed. Reg. at 28,468-69.

¹² See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 61 Fed. Reg. 28,467, 28,468 (June 5, 1996).

¹³ *Id.* at 28,487 (emphasis added). When section 51.53 was modified in 2007 to clarify its applicability to combined license applications, there was also a slight phrasing change from “those applicants seeking an initial *renewal* license” to “those applicants seeking an initial *renewed* license.” Compare *id. with* Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 49,352, 49,513 (Aug. 28, 2007) (emphasis added). The 2007 amendments further support the plain language interpretation of the rule — if “initial” was not intended to be a restriction, the NRC had an opportunity to remove it while it was already revising the same phrase in 51.53(c)(3).

¹⁴ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Proposed Rule, 74 Fed. Reg. 38,117, 38,117 (July 31, 2009).

¹⁵ 2013 Revisions, 78 Fed. Reg. at 37,282.

¹⁶ Applicant’s Surreply to New Arguments Raised in Reply Pleadings (Sept. 20, 2018) at 4 (FPL)
(Continued)

contend that this exception to a basic canon of statutory construction applies because the NRC intended for the substantial efficiencies gained by the GEIS and codified in Table B-1 to apply to plants seeking subsequent license renewal.¹⁷ I find this argument unpersuasive. As I discuss below, the GEIS did not address the environmental impacts of subsequent license renewal. Moreover, the GEIS still serves an important function for subsequent license renewal because the Staff may use the GEIS, through tiering and incorporation by reference, in its development of subsequent license renewal NEPA documents.

Similarly, the Board majority opined that it would be “nonsensical” to conclude that Part 51 authorizes the Staff to rely on the GEIS when preparing an SEIS but prohibits a subsequent license renewal applicant from doing so when preparing an environmental report.¹⁸ The Board stated that Petitioners’ interpretation of section 51.53(c)(3) is “incompatible with the purpose of an [environmental report], which is designed to aid the NRC Staff in preparing a draft SEIS,” and “unambiguous regulations require [the Staff] to apply the GEIS to Category 1 issues” when the Staff drafts an SEIS for subsequent license renewal.¹⁹ Specifically, the Board cited to sections 51.95(c)(4) and 51.71(d), and to Subpart A, Appendix B to Part 51 — regulatory language directing staff to integrate conclusions from, and rely on information found in, the GEIS. But the Board’s conclusion rests on the inaccurate premise that the Staff could rely exclusively on the GEIS and Table B-1 when preparing an SEIS for subsequent license renewal. The regulatory direction to rely on the GEIS can only apply to the extent that the GEIS actually evaluated the environmental impacts of subsequent license renewal. I find that it did not.

II. SCOPE OF THE GEIS

Neither the original GEIS nor the 2013 GEIS revision analyzed the environmental impacts of subsequent license renewal periods. The SOC for the 1991 proposed rule was very clear, stating that the GEIS would “characterize the nature and magnitude of impacts and other issues that will result from the refurbishments necessary for license renewal and the potential environmental impacts of operating plants for 20 years beyond their current 40-year licensing limit.”²⁰ Additionally, in Appendix E — the appendix devoted to postulated

Surreply); NRC Staff’s Response to the Applicant’s Surreply and the Petitioners’ Response, Regarding the Applicability of 10 C.F.R. § 51.53(c)(3) to Subsequent License Renewal Applications (Nov. 2, 2018), at 15-21 (Staff Response to FPL Surreply).

¹⁷ FPL Surreply at 4; Staff Response to FPL Surreply at 19 & n.73.

¹⁸ LBP-19-3, 89 NRC at 274.

¹⁹ LBP-19-3, 89 NRC at 267 & n.35.

²⁰ *Id.* at 47,020.

accidents — the 2013 GEIS definitively states that its scope is limited to an initial period of license renewal:

Since the NRC’s understanding of severe accident risk has evolved since issuance of the 1996 GEIS, this appendix assesses more recent information on severe accidents that might alter the conclusions in Chapter 5 of the 1996 GEIS. This revision considers how these developments would affect the conclusions in the 1996 GEIS and provides comparative data where appropriate. This revision does not attempt to provide new quantitative estimates of severe accident impacts. In addition, *the revision only covers one initial license renewal period for each plant (as did the 1996 GEIS)*. Thus, the population projections, meteorology, and exposure indices used in the 1996 GEIS are assumed to remain unchanged for purposes of this analysis.²¹

The 1996 GEIS also stated that it “examines how [the currently operating commercial nuclear power] plants and their interactions with the environment would change if such plants were allowed to operate (under the proposed license renewal regulation 10 C.F.R. Part 54) for a maximum of 20 years past the term of the original plant license of 40 years.”²² In addition, the 1996 GEIS contained an illustrative license renewal schedule, which contemplates an initial license and a single, renewed license: “The new license would go into effect at that point, covering the balance of the original 40-year term, as well as the additional 20-year term.”²³ There was no mention of a potential subsequent license renewal term. Furthermore, in response to a comment on the draft rule related to decommissioning, the Commission stated that “[t]he analysis in the GEIS for license renewal examines the physical requirements and attendant effects of decommissioning after a 20-year license renewal compared with decommissioning at the end of 40 years of operation and finds little difference in effects.”²⁴

The 2013 GEIS also stated that it “documents the results of the systematic approach NRC used to evaluate the environmental consequences of renewing the licenses of commercial nuclear power plants and operating the plants for an additional 20 years beyond the current license term.”²⁵ This statement of scope said nothing about subsequent license renewal terms. Similarly, in the section “Decisions to Be Supported by the GEIS,” the 2013 GEIS focused solely on whether to renew operating licenses “for an additional 20 years.”²⁶ Furthermore,

²¹ 2013 GEIS, app. E, at E-2 (emphasis added).

²² 1996 GEIS at 2-1.

²³ *Id.* at 2-36. This sixty-year schedule is supported by additional information in Appendix B to the GEIS, where the Staff also assumed a total plant life of sixty years. *Id.* at B-52.

²⁴ 1996 Final Rule, 61 Fed. Reg. at 28,482.

²⁵ 2013 GEIS at S-4.

²⁶ *Id.* at 1-7 to 1-8.

in the discussion of the impacts of termination of operations and decommissioning with respect to land use, the 2013 GEIS stated, “[t]here would be no difference in offsite land use impacts whether decommissioning occurred at the end of its current 40-year operating license or following a 20-year license renewal term.”²⁷

FPL argues that the NRC’s intent to review and update the GEIS and Table B-1 on a ten-year cycle does not make sense if their applicability was limited to initial license renewals.²⁸ I disagree. It made sense to prepare for applications for initial license renewal submitted ten years or more after the Part 51 revisions were finalized in 1996. In fact, plants at thirty-three sites applied for initial license renewal in 2006 or later, with the most recent application submitted in 2017.²⁹ Therefore, updating the GEIS and Table B-1 served the important purpose of ensuring that the agency was relying on current information when preparing SEISs for initial license renewal applications that were submitted in 2006 or later.³⁰ Moreover, Table B-1 is a codification of the GEIS’s findings, and its scope cannot be broader than the scope of the GEIS.

FPL and the Staff point to the regulatory cost-benefit analysis accompanying the 2013 GEIS to support their interpretation of the rule.³¹ In that document, the Staff described prospective subsequent license renewal applicants as “affected licensees.”³² But the regulatory analysis is neither the rule nor the agency’s NEPA environmental review. It cannot change the meaning of NRC’s regulations or expand the scope of a NEPA review conducted by the Staff.

The Board relies on some ambiguous statements in the text of the 2013 GEIS to conclude that the GEIS analyzed the environmental impacts of subsequent

²⁷ *Id.* at 4-202.

²⁸ FPL Surreply at 6.

²⁹ NRC, Status of Initial License Renewal Applications and Industry Initiatives, <https://www.nrc.gov/reactors/operating/licensing/renewal/applications.html> (last visited Oct. 4, 2019).

³⁰ The preamble to Table B-1 states “[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995.” See 10 C.F.R. pt. 51, subpt. A, app. B. FPL argues that this language does not include the word “initial” before “renewed operating license,” and that, therefore, it should be interpreted as applying to either initial or subsequent renewed operating licenses. See FPL Surreply at 3 n.9, 8. But in 1996, no applications for subsequent license renewal had been submitted or were even on the horizon. Twenty-two years later, FPL’s application for Turkey Point was the first subsequent license renewal application. There was no need to specify in the appendix that Table B-1 only applied to “initial” license renewals because initial license renewals were the only type of renewal facing the agency in the foreseeable future.

³¹ FPL Surreply at 11-12 (citing Regulatory Analysis at 25); Staff Response to FPL Surreply at 8-9, 11-12.

³² Regulatory Analysis at 25.

license renewal. But these isolated cases of ambiguous text are clearly outweighed by the numerous definitive statements in the GEIS that the document only examined the environmental impacts of a single, twenty-year license renewal. Even if the Staff had intended to address subsequent license renewal in the 2013 GEIS, the occasional ambiguous phrasing could not possibly put the public on notice of such an intention.³³ It is not reasonable to place the burden on the public to detect and divine the meaning of any ambiguities buried in the staff's NEPA document.

In sum, the 2013 GEIS did not evaluate the environmental impacts of subsequent license renewal. Referencing or building on this document could assist the Staff in preparing an EIS for Turkey Point's subsequent license renewal application, but the 2013 GEIS alone does not provide the required environmental review for operating a reactor beyond the initial twenty-year license renewal period. It would be a violation of NEPA for the agency to attempt to retroactively expand the scope of an environmental review completed seven years ago.

To be clear, the majority's retroactive expansion of the scope of the GEIS is essentially unlimited. The natural conclusion of the majority's flawed chain-of-reasoning is that "the GEIS covers the generic environmental impacts of all license renewals." If that were the case, the GEIS could be referenced to definitively address every Category 1 issue for a license renewal from 80 to 100 years, from 100 to 120 years, or even from 200 to 220 years. Yet, there is no basis to conclude that the Staff actually evaluated the environmental impacts of every potential future twenty-year license renewal term in the GEIS.

Because the plain language of section 51.53(c) applies only to applications for initial license renewal and neither the original license renewal GEIS nor the 2013 GEIS revision evaluated the environmental impacts of subsequent license renewal, the Category 1 findings in Table B-1 do not apply to subsequent license renewal applications. As a result, Petitioners wishing to submit contentions related to topics addressed in Table B-1 should not need to submit petitions for rule waivers, even if the applicant or Staff incorporates the GEIS by reference.

³³ NEPA obligates an agency "to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). See also 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."); *id.* § 1502.1 ("[The EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.").

III. THE BOARD'S CONTENTION ADMISSIBILITY DETERMINATIONS

Some of the Board's admissibility determinations in LBP-19-3 and LBP-19-8 turned on whether section 51.53(c)(3) applies to subsequent license renewal applications. With respect to any contentions, or portions thereof, that the Board excluded solely based on its interpretation of this regulation, the Commission should find those determinations to be in error. The Commission should remand this proceeding to the Board to consider any of the dismissed contentions, or portions thereof, that were dismissed for reasons related to the interpretation of section 51.53(c)(3).

IV. DIRECTION TO STAFF

Because the Staff cannot rely exclusively on Table B-1 to address the Category 1 environmental impacts of subsequent license renewal, the Commission should direct the Staff to ensure that the Final SEIS for the subsequent license renewal of Turkey Point meets the requirements of NEPA by adequately addressing the impacts of subsequent license renewal.

V. CONCLUSION

For these reasons, I respectfully dissent. I would *reverse* the Board's ruling on the interpretation of section 51.53(c); *remand* Petitioners' contentions to the Board for further consideration consistent with this decision; and *direct* the Staff to ensure that the Turkey Point SEIS complies with NEPA.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

Docket No. 72-1051-ISFSI

HOLTEC INTERNATIONAL
(HI-STORE Consolidated Interim
Storage Facility)

April 23, 2020

NUCLEAR WASTE POLICY ACT

The Nuclear Waste Policy Act (NWPA) § 302 provides that the Department of Energy (DOE) will take title to commercial spent fuel “following commencement of operation of a repository.” Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101-10270 (2012). And a “repository” is defined in the NWPA as a system intended for “permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel.” The NWPA prevents DOE from taking title to spent nuclear fuel before a permanent repository is operational and therefore (except for a relatively small quantity of waste it already owns) DOE could not be a CISF customer.

NUCLEAR WASTE POLICY ACT

The mere possibility that a licensee could enter a contract with an entity that is barred by law from entering such a contract does not make the proposed facility unlawful or illegal. The license applicant’s hope that Congress will change the law to allow the DOE to be a customer in the proposed consolidated interim storage facility does not make the proposed facility unlawful. Nor is a license authorizing the applicant to store spent nuclear fuel “unlawful” simply because

one potential customer (the DOE) is legally barred from using the facility to store spent nuclear fuel.

ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), does not prohibit the NRC from granting a license simply because the licensed facility could theoretically or possibly be used in an unlawful way.

STANDING

Although in matters involving construction or operation of a nuclear power reactor we allow a “proximity presumption” of standing to persons living within fifty miles of the proposed site, in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner’s proximity to the site in addition to other factors. This “proximity-plus” standard takes into account both the nature of the proposed activity and significance of the radioactive source. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 71 NRC 111, 116-17 (1995).

STANDING

The Commission defers to Board’s finding of standing where organizational petitioner’s declarant or member lived within ten miles of the facility and worked daily within three miles of spent fuel storage facility (non-reactor facility). The Board found that these distances were well within the limits found to confer standing in proceedings involving facilities with much lower radioactive source terms.

STANDING

The Commission rejected the argument that a petitioner must explain with specificity how radiation could reach or affect petitioner when petitioner lived and worked near facility involving enormous amounts of radioactivity.

NEPA: WORST CASE SCENARIO

The Commission deferred to Board decision to reject a contention that argued for an environmental analysis of a worst case scenario.

APPEALS

An appeal must point to Board error; it is not enough for an appellant merely to reiterate the arguments it made before the Board. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

DECOMMISSIONING FUNDING

Applicants were not required to provide decommissioning funding assurance for future planned or possible expansions of planned spent fuel storage facility (CISF). Additional decommissioning funding assurance would be required if and when an expansion of the project is sought.

CHALLENGES TO CONTINUED STORAGE RULE

RULE WAIVER

Commission deferred to Board's finding that proposed contention was inadmissible because it challenged the continued storage rule without requesting a rule waiver.

CONTENTION ADMISSIBILITY

The certified design of approved spent fuel storage canisters and casks addresses a variety of leak scenarios; therefore a contention based on radioactive material leaking from a storage cask must give the Board a reason to believe that contamination could find its way outside a cask in order to raise a genuine dispute.

CONTENTION ADMISSIBILITY

NEPA: DESCRIPTION OF AFFECTED ENVIRONMENT

An adequate site characterization is necessary in order to assess environmental impacts of a proposed facility.

CONTENTION ADMISSIBILITY

The Board did not err in rejecting a contention arguing that license applicants had made a "willful misrepresentation" or a "material false statement" in application because the license applicants intend to lobby to change the law affecting the facility they propose to build. The material issue in the license proceeding

is whether the license applicant can demonstrate that it can safely operate the facility, not its future political activity or business intentions.

REOPENING A CLOSED RECORD

After all contentions before the Board are dismissed, the record closed. Jurisdiction to consider any motion to reopen passes to the Commission. Even where the Commission reopens the record following a successful appeal, the record is only open for the limited purpose as determined by the Commission's order and the record remains closed for any other purpose. *See, e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC 65, 76 (2011), *review denied*, CLI-12-10, 75 NRC 479 (2012). Any motion for a new contention proposed after the record has closed must also meet the reopening requirements. *See, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-700 (2012); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-09-5, 69 NRC 115, 124 (2009).

REOPENING A CLOSED RECORD

Even where jurisdiction to consider reopening has passed to the Commission, the Commission frequently remands such motions to the Board to consider the reopening standards in conjunction with contention admissibility, where appropriate. *North Anna*, CLI-12-14, 75 NRC at 702.

ENVIRONMENTAL JUSTICE

No Board error was shown in its rejection of contention that argued that “environmental justice” analysis must compare the population surrounding the selected site with the population of the country as a whole.

ENVIRONMENTAL JUSTICE

Board did not err in rejecting “environmental justice” contention arguing that license applicants must include members of local minority population in the decision making regarding site selection.

ENVIRONMENTAL JUSTICE

Board did not err in rejecting “environmental justice” contention arguing that there is no community support for project.

CONTENTION ADMISSIBILITY

Board did not err in rejecting contention arguing that license applicants could not rely on the generic environmental impact statement for continued storage (Continued Storage GEIS) for an analysis of environmental impacts of spent fuel storage. The Board rejected the argument that the generic facility considered in the GEIS differed from the proposed facility because the proposed facility would not have a dry transfer station (DTS) for repackaging spent fuel.

CONTENTION ADMISSIBILITY

Accidental breach of an NRC-certified spent fuel canister design during transport is not a credible scenario.

NEPA

The use of representative routes in an environmental-impacts analysis to address the uncertainty of actual, future spent fuel transportation routes is a well-established regulatory approach under NEPA.

MEMORANDUM AND ORDER

Today we address five separate appeals of the Atomic Safety and Licensing Board’s denial of requests to intervene in the proceeding regarding Holtec International’s application to construct and operate a consolidated interim storage facility (CISF) in Lea County, New Mexico.¹ For the reasons described below, we affirm the Board in part and reverse and remand in part. We also remand to the Board two contentions filed after the deadline.

¹ See LBP-19-4, 89 NRC 353 (2019).

I. BACKGROUND

Holtec submitted its license application in March 2017.² The proposed license would allow Holtec to store up to 8680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.³ Holtec's safety analysis currently encompasses only the canisters and contents approved under the generic docket 72-1040 for the HI-STORM UMAX canister storage system.⁴ According to its application, Holtec plans up to nineteen subsequent expansion phases over the course of twenty years, with each expansion requiring a license amendment.⁵ Holtec's environmental report (ER) anticipates operation of its proposed facility for up to 120 years (a forty-year initial licensing period plus eighty years of potential renewal periods) with up to 100,000 MTUs stored after all expansions.⁶

The Staff published a notice of opportunity to request a hearing on Holtec's application in July 2018.⁷ Petitions to intervene were filed by Sierra Club; Beyond Nuclear, Inc. (Beyond Nuclear); Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Studies Group (together, Joint Petitioners); Alliance for Environmental Strategies (AFES); and NAC International Inc. (NAC). The Board heard oral argument on January 23 and 24, 2019.

The Board rejected all the hearing requests for either lack of standing, failure to offer an admissible contention, or both. The Board found that three petitioners — Beyond Nuclear, Sierra Club, and Fasken — had demonstrated standing

² See Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). By the time the Board ruled, Holtec had updated its application documents. The application revisions referenced in the Board's decision are: Environmental Report on the Holtec International HI-STORE CIS Facility, rev. 5 (Mar. 2019) (ML19095B800) (ER); and Holtec, Licensing Report on the HI-STORE CIS Facility, rev. 0F (Jan. 31, 2019) (ML19052A379) (SAR). References in this decision refer to the same revisions unless otherwise noted.

³ See Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

⁴ SAR § 1.0 at 1-2; see 10 C.F.R. § 72.214 (list of approved spent fuel storage casks).

⁵ See ER § 1.0.

⁶ *Id.*

⁷ See Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

but had not offered an admissible contention.⁸ The Board concluded that Joint Petitioners and NAC had neither demonstrated standing nor offered an admissible contention.⁹ The Board did not rule on AFES's standing — which it found to be a close call — but rejected AFES's petition because the organization had not proposed an admissible contention.¹⁰

All petitioners except for NAC have appealed. The Staff and Holtec oppose the appeals, as described below.

II. DISCUSSION

A. Standard of Review

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.¹¹ We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.¹² Similarly, we generally defer to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.¹³

B. Beyond Nuclear/Sierra Club Contention 1/Fasken

Beyond Nuclear and Fasken each proposed a single contention, and Sierra Club proposed its Contention 1, all questioning whether it is lawful to issue the proposed license at all.¹⁴ These petitioners contend that the application must

⁸ See LBP-19-4, 89 NRC at 358.

⁹ *Id.*

¹⁰ *Id.* at 358, 370-71.

¹¹ 10 C.F.R. § 2.311(c).

¹² See, e.g., *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608-13 (2012).

¹³ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte*, CLI-14-2, 79 NRC at 13-14.

¹⁴ See Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018), at 10-17 (Sierra Club Petition). Fasken entered this proceeding through a motion “to dismiss the licensing proceeding” filed directly before us relating to this facility and another CISF proposed in Texas. See Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018). Beyond Nuclear filed a similar motion, which it attached as an exhibit to its hearing request and petition to intervene. See Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene (Sept. 14, 2018) (Beyond Nuclear Petition); Beyond

(Continued)

be rejected outright because it contemplates storage contracts with the U.S. Department of Energy (DOE) and such contracts would be illegal under the Nuclear Waste Policy Act (NWPA).¹⁵ Holtec envisions that its customers will either be nuclear plant operators or DOE, depending on which entity holds title to the spent nuclear fuel.¹⁶

Beyond Nuclear, Fasken, and Sierra Club all argued that it would violate the NWPA for DOE to take title to spent nuclear fuel before it builds a permanent geological repository. Section 123 of the NWPA provides that DOE will take title to the spent fuel when the Secretary of Energy accepts delivery of it.¹⁷ Section 302 of the NWPA provides that the Secretary of Energy will enter contracts with the spent fuel generators (nuclear power plant owners) that “shall provide that” the Secretary will take title to the spent fuel “following commencement of operation of a repository.”¹⁸ And a “repository” is defined in the NWPA as a system intended for “permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel.”¹⁹

During oral argument on the petitions, Holtec’s counsel acknowledged that the NWPA would prevent DOE from taking title to spent nuclear fuel and therefore (except for a relatively small quantity of waste it already owns) DOE could not be a CISF customer.²⁰ Holtec also acknowledged that it hopes Congress will change the law to allow DOE to enter into temporary storage contracts with Holtec.²¹ But Holtec argued that because the application also contemplates that nuclear plant owners might be potential customers, the petitioners have not raised a litigable contention.

Nuclear, Inc.’s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018). Beyond Nuclear also submitted a letter after filing its appeal. *See* Letter from Mindy Goldstein and Dianne Curran, Counsel for Beyond Nuclear, to the Commissioners (Apr. 7, 2020). The letter does not affect our analysis below.

¹⁵ *See* Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101-10270 (2012). Because our regulations do not provide for a “motion to dismiss” an application, the Secretary of the Commission referred Beyond Nuclear’s and Fasken’s motions to be considered as hearing requests and as proposed contentions in each licensing proceeding. *See* Order of the Secretary (Oct. 29, 2018) (unpublished) (issued in this proceeding and in *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility)).

¹⁶ *See, e.g.*, Proposed License at 2, ¶17 (“[T]he construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel ([DOE] and/or a nuclear plant owner).”).

¹⁷ 42 U.S.C. § 10143.

¹⁸ *Id.* § 10222(a)(5)(A).

¹⁹ *Id.* § 10101(18).

²⁰ Tr. at 249-50.

²¹ Tr. at 248, 250.

The Board rejected the argument that the “mere mention of DOE renders Holtec’s license application unlawful.”²² The Board observed that Holtec “is committed to going forward with the project” by contracting directly with the plant owners.²³ The Board held that whether that option is “commercially viable” was not an issue before the Board.²⁴ And it noted that Holtec had committed not to “contract unlawfully” with DOE.²⁵ The Board further pointed to DOE’s publicly taken position that it cannot lawfully provide interim storage before a repository is operational.²⁶ The Board found that the NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a “presumption of regularity” that they will “act properly in the absence of evidence to the contrary.”²⁷ The Board concluded that Holtec “seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future.”²⁸

Beyond Nuclear argues that the NRC cannot issue the proposed license because the Administrative Procedure Act prohibits agency action that is “not in accordance with the law” or “in excess of statutory jurisdiction, authority, or limitation.”²⁹ Beyond Nuclear frames the question as whether the NRC “may approve a license application containing provisions that would violate NWPA if implemented.”³⁰ Similarly, Sierra Club argues that “the Holtec project cannot be licensed if there is a possibility that the financial arrangements would be illegal.”³¹ Fasken argues that Holtec’s license application is “outside of the ASLB’s

²² LBP-19-4, 89 NRC at 381.

²³ *Id.*

²⁴ *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001)). In *Hydro*, we observed that the NRC “is not in the business of regulating the market strategies of licensees.” *Hydro*, CLI-01-4, 53 NRC at 48-49. In *Louisiana Energy Services*, we denied review of the Board’s decision to reject a portion of a contention that questioned the commercial viability of the proposed project, and we held that the license applicant did not have to “demonstrate the potential profitability of the proposed facility.” *Louisiana Energy Services*, CLI-05-28, 62 NRC at 725.

²⁵ See LBP-19-4, 89 NRC at 381.

²⁶ *Id.* at 382.

²⁷ *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)); see also *FCC v. Schrieber*, 381 U.S. 279, 296 (1965).

²⁸ LBP-19-4, 89 NRC at 382.

²⁹ Beyond Nuclear’s Brief on Appeal of LBP-19-04 (June 3, 2019), at 7 (Beyond Nuclear Appeal) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)).

³⁰ *Id.*

³¹ Sierra Club’s Petition for Review of Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in Licensing Proceeding (June 3, 2019), at 5 (Sierra Club Appeal).

and the NRC’s subject-matter jurisdiction” because approval would authorize a facility that violates the NWPA.³² The Staff and Holtec oppose the appeals.³³

The three appellants’ characterization largely restates arguments already advanced to the Board.³⁴ As the Board observed, “Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future.”³⁵ The proposed license would authorize Holtec to take possession of the spent nuclear fuel in its CISF; the license itself would not violate the NWPA by transferring the title to the fuel, nor would it authorize Holtec or DOE to enter into storage contracts.³⁶ Holtec and DOE acknowledge that it would be illegal under NWPA for DOE to take title to the spent nuclear fuel at this time, although Holtec states that it hopes that Congress will amend the NWPA in the future.³⁷ We disagree with the assertions that the license would violate the NWPA.³⁸ The NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity. We therefore affirm the Board’s decision to reject this contention.

³² Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019), at 3-4 (Fasken Appeal).

³³ See NRC Staff Answer in Opposition to Beyond Nuclear’s Appeal of LBP-19-4 (June 28, 2019); Holtec International’s Brief in Opposition to Beyond Nuclear’s Appeal of LBP-19-4 (June 28, 2019); NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners’ Appeal of LBP-19-4 (June 28, 2019); Holtec International’s Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners’ Appeal of LBP-19-4 (June 28, 2019) (Holtec Opposition to Fasken Appeal); NRC Staff’s Answer in Opposition to the Sierra Club’s Appeal of LBP-19-4 (June 28, 2019), at 5-7 (Staff Opposition to Sierra Club Appeal); Holtec International’s Brief in Opposition to Sierra Club’s Appeal of LBP-19-4 (June 28, 2019), at 6-9 (Holtec Opposition to Sierra Club Appeal).

³⁴ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (rejecting an appeal that only restated arguments previously raised before the board).

³⁵ LBP-19-4, 89 NRC at 382.

³⁶ See Proposed License at 2, ¶ 17.

³⁷ See LBP-19-4, 89 NRC at 381-82.

³⁸ To the extent Sierra Club argues that we should grant its appeal on Contention 1 because Holtec will use the license as “leverage to encourage Congress to change the law,” we also reject that line of argument for the reasons discussed below in response to Sierra Club’s appeal of Contention 26 and the Joint Petitioners’ appeal of their Contention 14. Sierra Club Appeal at 9. Fasken suggests that the Secretary of the Commission improvidently referred its motion to dismiss to the Board for consideration as a legal contention. Fasken Appeal at 1-4. But our regulations do not provide for a motion to dismiss, and Fasken has not demonstrated how consideration of its arguments under our contention admissibility standards negatively impacted its position. In any event, the Board’s finding that Holtec’s application does not violate the NWPA addressed the gravamen of Fasken’s motion to dismiss.

C. Sierra Club Appeal

The Board found that Sierra Club had shown standing but that none of its twenty-nine proposed contentions were admissible. Sierra Club has now appealed with respect to ten of those contentions in addition to its Contention 1 discussed above.³⁹ On October 23, 2019, Sierra Club also moved to admit a new contention concerning transportation risks.⁴⁰

1. Sierra Club Standing

As an initial matter, Holtec challenges the Board's finding that Sierra Club has standing in this proceeding.⁴¹ Although in matters involving construction or operation of a nuclear power reactor we allow a "proximity presumption" of standing to persons living within fifty miles of the proposed site, in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors.⁴² This "proximity-plus" standard takes into account both the nature of the proposed activity and significance of the radioactive source.⁴³

Sierra Club based its standing on declarations of its members who live and work near the proposed site.⁴⁴ The Board observed that one of Sierra Club's declarants, Daniel Berry, lives less than ten miles from the site and owns and operates a ranch just three miles away from the site.⁴⁵ Mr. Berry stated that he, his wife, and his ranch hands spend time every day traversing the ranch on foot, horseback, and ATV, while managing their cattle.⁴⁶

³⁹ Sierra Club Appeal at 5-7.

⁴⁰ Sierra Club's Motion to File a New Late-Filed Contention (Oct. 23, 2019), (Sierra Club Motion for New Contention 30); Attach., Contention 30 (Sierra Club Contention 30).

⁴¹ Holtec Opposition to Sierra Club Appeal at 27-30.

⁴² *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 71 NRC 111, 116-17 (1995).

⁴³ *Id.*

⁴⁴ Sierra Club Petition at 6.

⁴⁵ LBP-19-4, 89 NRC at 12-13. Mr. Berry submitted two declarations in this proceeding, one authorizing Sierra Club and the other authorizing Beyond Nuclear to represent his interest in this proceeding. Although the declaration submitted with the Sierra Club Petition stated that his home and ranch lie "less than 10 miles from the site," the declaration submitted with Beyond Nuclear's Petition was more detailed. In that declaration, Mr. Berry explained that his ranch, the T Over V ranch, consists of privately owned land and leased land, and he provided a map showing that a portion of the ranch lies about 3.2 miles away from the proposed CISF site. *See* Beyond Nuclear Petition, Attach. Ex. 2, Declaration of Daniel C. Berry III (Sept. 11, 2018) (Berry Beyond Nuclear Declaration).

⁴⁶ Berry Beyond Nuclear Declaration ¶¶ 4-5.

The Board found that Sierra Club had established standing based on the proximity of its member Mr. Berry. It observed that the distances of his home and activities are “well within the limits that have been found to confer standing to challenge much smaller storage facilities.”⁴⁷ It rejected Holtec’s argument that an individual “who lives sufficiently close to a potentially massive facility for storing much of the nation’s spent nuclear fuel must first demonstrate with specificity how radiation might reach them.”⁴⁸

On appeal, Holtec claims that the Board erred by granting Sierra Club standing even though its “pleadings lacked meaningful explanation as to how the activities at the CISF might lead to a release which could affect any of their members.”⁴⁹ Our standing precedents require petitioners “to show a specific and plausible means” for how the licensed activities will affect them in the absence of “‘obvious’ potential for offsite harm.”⁵⁰ We generally defer to a Board’s ruling on standing in the absence of clear error or an abuse of discretion.⁵¹ In this case, the Board’s finding of standing is reasonable given the size of the facility and Mr. Berry’s activities in close proximity to that facility. We therefore reject Holtec’s argument that Sierra Club failed to establish standing.

2. Sierra Club Contention 4 (Transportation Risks)

Sierra Club asserted in Contention 4 that section 4.9 of the ER inadequately addressed risks associated with transporting radioactive waste from the reactor sites to the CISF.⁵² It argued that the ER fails to account for severe rail accidents that could release radiation. In support of its argument, Sierra Club relied on an analysis performed by its expert, Dr. Marvin Resnikoff, of the radiological consequences of a spent fuel canister subject to the conditions of a rail tunnel fire similar to one that took place in the Howard Street Tunnel in Baltimore in 2001 (Baltimore Tunnel Analysis).⁵³ The Baltimore Tunnel Analysis concluded that in a similar accident, a spent fuel cask would fail and the fuel rods would

⁴⁷ LBP-19-4, 89 NRC at 366.

⁴⁸ *Id.* at 367.

⁴⁹ Holtec Opposition to Sierra Club at 28.

⁵⁰ *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

⁵¹ *See, e.g., Strata Energy*, CLI-12-12, 75 NRC at 608-13 (2012) (deferring to board’s finding of standing based on dust from project employees driving near petitioner’s house).

⁵² Sierra Club Petition at 22-27.

⁵³ Matthew Lamb & Marvin Resnikoff, *Radiological Consequences of Severe Rail Accidents Involving Spent Nuclear Fuel Shipments to Yucca Mountain: Hypothetical Baltimore Rail Tunnel Fire Involving SNF* (Sept. 2001), available at <http://www.state.nv.us/nucwaste/news2001/nn11459.htm> (last visited Nov. 7, 2019). According to the report, the Baltimore Tunnel Fire burned for three days or more at temperatures of at least 1500°F. *Id.* at 9.

burst within eleven hours.⁵⁴ The study also provided estimates for the population exposed and latent cancer fatalities.⁵⁵ According to Sierra Club, Dr. Resnikoff has updated his 2001 Baltimore Analysis and now estimates that a major rail accident could release 20 million person-rem, 1250 times Holtec's estimate.⁵⁶ Sierra Club also claimed that Holtec underestimates the likelihood of a severe rail accident because Holtec relies on the Department of Energy's 2008 Yucca Mountain Final Supplemental Environmental Impact Statement (FSEIS), which Sierra Club claims is outdated and does not account for recent information about increased rail traffic, derailments, and fires.⁵⁷

Holtec argued in its answer and at oral argument that because its ER incorporated specific portions of the DOE 2008 Yucca Mountain FSEIS, Sierra Club must specifically dispute the analysis in the DOE Supplemental Environmental Impact Statement (SEIS) in order to show a genuine dispute.⁵⁸ Holtec's ER accident analysis "tiered from" section 6.3.3.2 of the Yucca Mountain FSEIS.⁵⁹ In that section DOE responded to a 2001 study by Matthew Lamb and Dr. Resnikoff that claimed that the latent cancer fatalities resulting from a severe accident in an urban area of Nevada could be between 13 and 40,868 (Nevada Accident Analysis).⁶⁰ DOE stated that this estimate was unrealistic because Mr. Lamb and Dr. Resnikoff had used conservative or bounding values for multiple parameters in their computer analysis, resulting in "unrealistically high yields."⁶¹

The Board rejected the contention on various grounds. The Board agreed with Holtec and found that Sierra Club had not shown a genuine dispute with the application because it had "not address[ed] or disput[ed]" the criticisms of the Lamb and Resnikoff Study contained in the Yucca Mountain FSEIS on which Holtec's ER had relied.⁶² The Board further found that the contention posed a

⁵⁴ *Id.* at 8-9.

⁵⁵ *Id.* at 13; Sierra Club Petition at 24-25.

⁵⁶ Sierra Club Petition at 25.

⁵⁷ *Id.* at 25-26; see U.S. Department of Energy, Office of Civilian Radioactive Waste Management, "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" (June 2008), vol. 1, § 6.3.3 (ML081750191 (package)) (Yucca Mountain FSEIS).

⁵⁸ See Holtec International's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018), at 28-29 (Holtec Answer to Sierra Club); Tr. at 258 ("The DOE analysis specifically addressed the higher estimates provided by Lamb and Resnikoff.").

⁵⁹ See ER § 4.9.3.2 (transportation accident impacts).

⁶⁰ Matthew Lamb et al., *Worst Case Credible Nuclear Transportation Accidents: Analysis for Urban and Rural Nevada* (Aug. 2001). The Yucca Mountain FSEIS refers to this document as DIRS 181756.

⁶¹ Yucca Mountain FSEIS at 6-23.

⁶² LBP-19-4, 89 NRC at 387.

“worst case scenario,” the consequences of which need not be discussed under NEPA.⁶³ The Board observed that the intensity of the Baltimore Tunnel Fire was caused by the flammable contents of the railcars, and, according to statements by Holtec’s counsel during oral argument, shipments to the CISF will be in dedicated trains without such contents.⁶⁴ It concluded that a scenario similar to the Baltimore Tunnel Fire would be “extraordinarily unlikely.”⁶⁵ It further found that Sierra Club had offered no facts or expert opinion to support its argument that Holtec failed to account for recent information about increased rail traffic and oil tanker rail cars.⁶⁶

On appeal, Sierra Club reasserts its claim that the application has underestimated the consequences of an accident and argues that the Baltimore Tunnel Analysis was sufficient to raise a factual dispute.⁶⁷ It does not reassert its arguments about the likelihood of a rail accident. Nor does it address the Board’s conclusion that the proposed contention sought an analysis of an “extraordinarily unlikely” worst case analysis.

We conclude that Sierra Club identifies no Board error in rejecting the contention. The Board is correct that NEPA does not require a “worst case” analysis for potential accident consequences.⁶⁸ In addition, the Board correctly found that Sierra Club offered no expert opinion or documentary support for its assertions about increased rail traffic or railroad fires. And although Sierra Club argues that the Yucca Mountain FSEIS is out of date, the Baltimore Tunnel Analysis, on which Sierra Club relies, predates the Yucca Mountain FSEIS by several years.⁶⁹ Moreover, the NRC has studied what would happen to various spent fuel transportation packages if they were subjected to the conditions of the Baltimore Tunnel Fire and concluded that the potential consequences are negligible.⁷⁰ And contrary to the assertions in Sierra Club’s contention, Dr. Resnikoff’s declaration provided no updated information on the subject except for a general statement that he “reviewed” and endorsed the claims in Sierra Club’s contentions.⁷¹ This

⁶³ *Id.* at 387-88 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002)).

⁶⁴ *Id.* (citing Tr. at 256-57).

⁶⁵ *Id.* at 388.

⁶⁶ *Id.* (citing Sierra Club Petition at 25-26).

⁶⁷ Sierra Club Appeal at 9-11.

⁶⁸ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989).

⁶⁹ See Yucca Mountain FSEIS vol. 1, § 6.3.3.2.

⁷⁰ See “Spent Fuel Transportation Package Risk Assessment” (Final Report), NUREG-2125, at 127 (Jan. 2014) (ML14031A323); “Spent Fuel Transportation Package Response to the Baltimore Tunnel Fire Scenario” NUREG/CR-6886, rev. 2, § 8.3 (Feb. 2009) (ML090570742).

⁷¹ Sierra Club Petition, Attach., Declaration of Marvin Resnikoff (Sept. 13, 2018).

is insufficient factual support for a contention. We therefore affirm the Board's decision to reject the contention.

3. *Sierra Club Contention 8 (Decommissioning Funds)*

Sierra Club argued in Contention 8 that Holtec's application does not set forth a plan to provide adequate funds for decommissioning.⁷² Sierra Club argued that the amount that Holtec intends to set aside for decommissioning the site is "completely inadequate" to cover Holtec's \$23 million estimated decommissioning costs.⁷³ In addition, Sierra Club argued that Holtec's decommissioning cost estimate only covers the first phase of the project and the application should explain how Holtec will fund decommissioning the site following the ensuing twenty phases.⁷⁴

According to its application, Holtec plans to provide financial assurance for decommissioning by establishing a sinking fund coupled with a surety, insurance, or other guarantee as described in 10 C.F.R. § 72.30(e)(3). Specifically, Holtec intends to set aside \$840 per MTU stored at the facility and counts on a 3% rate of return.⁷⁵ In its answer to Sierra Club's hearing request, Holtec argued that Sierra Club's calculations were incorrect for two reasons. First, Sierra Club had assumed that Holtec would only accept up to 5000 MTU in its initial phase and therefore set aside only \$4,200,000 for future decommissioning. But Holtec's application is for a license to store up to 8680 MTU, which would require Holtec to provide up to \$7,291,200 for future decommissioning.⁷⁶ Second, Holtec claimed that Sierra Club did not account for the 3% rate of return Holtec expects to earn on the funds set aside.⁷⁷ Holtec also pointed out that its decommissioning funding plan will have to be updated and resubmitted every three years.⁷⁸ Further, it argued, "even if there were some shortfall in Holtec's calculation of the amount of funds needing to be set aside (which there is not), it would be covered by the surety" and therefore the contention raised no genuine material dispute with the application.⁷⁹

⁷² See Sierra Club Petition at 35-37.

⁷³ *Id.* at 36 (citing Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF — Financial Assurance & Project Life Cycle Cost Estimates, Holtec Report No. HI-2177593 (undated), at 6 (ML18345A143) (Decommissioning Cost Estimate)).

⁷⁴ *Id.*

⁷⁵ Decommissioning Cost Estimate § 2.2.

⁷⁶ Holtec Answer to Sierra Club at 44.

⁷⁷ *Id.* at 44-45; see Decommissioning Cost Estimate § 2.2.

⁷⁸ Holtec Answer to Sierra Club. at 45-46; see 10 C.F.R. § 72.30(c).

⁷⁹ Holtec Answer to Sierra Club at 46.

Sierra Club responded to Holtec by questioning its reliance on compound interest.⁸⁰ Sierra Club pointed out that if Holtec's fund were to earn only a 2% rate of return rather than the 3% upon which it relies, it would have only \$10,941,921 after forty years, "far below" the \$23 million estimate in the Decommissioning Funding Plan.⁸¹ It further argued that it was "doubtful" that any surety company would issue a bond for Holtec's facility.⁸² Holtec responded with a motion to strike the arguments concerning the rate of return and its ability to obtain a surety bond because these arguments were raised for the first time in the reply and therefore unjustifiably late.⁸³

The Board found that Sierra Club's proposed Contention 8 had not raised a genuine dispute with the application. The Board rejected the argument that Holtec's decommissioning plan must show how it would fund decommissioning of all future expansions of the project because the application only covers the first phase and Holtec will have to update its plan for any future expansions.⁸⁴ The Board further rejected Sierra Club's arguments that Holtec could not rely on a "reasonable rate of return" of 3% and that a surety bond is "doubtful" because those arguments were impermissibly late and factually unsupported.⁸⁵

In its appeal, Sierra Club reiterates that the plan must provide for decommissioning all twenty phases of the project without identifying an error in the Board's analysis.⁸⁶ The Board correctly explained that any future expansion of the facility will require a license amendment and an update to the decommissioning plan. Because Sierra Club does not point to a Board error, there is no basis for us to reverse the Board; it is not sufficient for an appellant merely to repeat the arguments it made before the Board.⁸⁷ Sierra Club also reasserts its argument that Holtec provided no assurance that it will earn a 3% rate of return on the funds set aside for decommissioning.⁸⁸ Sierra Club does not address the Board's finding that the argument was impermissibly late. The 3% figure was included in Holtec's Decommissioning Cost Estimate at the time Sierra Club filed its contentions, and therefore Sierra Club could have challenged it then.⁸⁹

⁸⁰ Sierra Club's Reply to Answers Filed by Holtec International and NRC Staff (Oct. 16, 2019), at 28 (Sierra Club Reply).

⁸¹ *Id.*

⁸² *Id.* at 29-30.

⁸³ Holtec International's Motion to Strike Portions of Replies of Alliance for Environmental Strategies, Don't Waste Michigan et al., NAC International Inc., and Sierra Club (Oct. 26, 2018), at 10-11.

⁸⁴ LBP-19-4, 89 NRC at 393.

⁸⁵ *Id.* at 393-94.

⁸⁶ Sierra Club Appeal at 12-13.

⁸⁷ *Turkey Point*, CLI-17-12, 86 NRC at 219.

⁸⁸ Sierra Club Appeal at 12-13.

⁸⁹ *See* Decommissioning Cost Estimate § 2.2.

Moreover, Sierra Club does not counter the Board's finding that its argument was unsupported. In short, Sierra Club points to no Board error in rejecting this contention, and we affirm the Board.

4. *Sierra Club Contention 9 (Impacts from Beyond Design Life and Service Life of Storage Containers)*

Sierra Club argued in Contention 9 that the application must consider the risk that the storage canisters will be left on the CISF beyond their design life of 60 years and expected service life of 100 years.⁹⁰ Sierra Club pointed out that the HI-STORE UMAX canisters designated to be used at the site have only a 60-year design life and 100-year service life, whereas the ER states that the CISF may operate up to 120 years until a permanent repository is available to take the waste.⁹¹ Moreover, Sierra Club argued that the ER should consider the possibility that a permanent repository never becomes available, making the Holtec site a *de facto* permanent repository.⁹² Sierra Club further argued that the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Continued Storage GEIS) is not applicable to the proposed Holtec facility.⁹³ Sierra Club argued that the analysis in the Continued Storage GEIS assumes that an away-from-reactor spent fuel storage facility will have a dry transfer system (DTS) to repackage damaged or leaking canisters whereas the Holtec facility will have no DTS.⁹⁴ Therefore, Sierra Club argued, the proposed Holtec facility is not like the hypothetical facility discussed in the Continued Storage GEIS.

The Board found that the contention presented both environmental and safety aspects, neither of which was admissible. It found that the environmental aspect of this contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because Sierra Club did not seek a rule waiver.⁹⁵ To the extent that proposed Contention 9 raised safety issues, the Board found that

⁹⁰ See Sierra Club Petition at 38-42.

⁹¹ *Id.* at 38-39 (citing ER § 1.0).

⁹² *Id.* at 40.

⁹³ *Id.* at 40-41.

⁹⁴ *Id.*; see "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vol. 1, ch. 5 (Sept. 2014) (ML14196A105) (Continued Storage GEIS).

⁹⁵ LBP-19-4, 89 NRC at 395; see 10 C.F.R. § 51.23 (Continued Storage Rule); 10 C.F.R. § 2.335 (no Commission regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted).

it did not raise a genuine dispute with the application because it “ignore[d] the SAR’s discussion of retrievability, inspection, and maintenance activities.”⁹⁶

Sierra Club’s appeal essentially reasserts its arguments before the Board without confronting the Board’s findings. The Continued Storage Rule provides that long term environmental effects associated with spent fuel storage are set forth in the Continued Storage GEIS and need not be reiterated in individual license proceedings. On appeal, Sierra Club does not address the Board’s finding that it must request a rule waiver in order to argue that the Continued Storage Rule should not apply in this proceeding.⁹⁷ Additionally, Sierra Club repeats the argument that the Continued Storage Rule does not apply to the proposed Holtec facility because the Continued Storage GEIS assumes the presence of a DTS.⁹⁸ However, its factual premise is mistaken. The Continued Storage GEIS assumes that a DTS would be built in the “long-term storage” and indefinite timeframes.⁹⁹ The Continued Storage GEIS assumes that a DTS will not be present initially and that is consistent with Holtec’s proposed facility. The application therefore does not need to discuss the effects of a DTS (or the consequences of not having a DTS). If Holtec receives a license and decides to build a DTS, then it would need to seek an amendment to its license.

Next, Sierra Club argues that the Board relied on Holtec’s “unsupported conclusory statement that it will somehow monitor and retrieve the waste in the future” and reasserts its claim that “once a crack starts in a canister, it can break through and cause a leak in [sixteen] years.”¹⁰⁰ But Holtec’s statements are not unsupported or conclusory — its SAR discusses plans for inspection, mainte-

⁹⁶ LBP-19-4, 89 NRC at 395 (citing provisions of the SAR relating to monitoring, maintenance, and aging management).

⁹⁷ See 10 C.F.R. § 2.335(b).

⁹⁸ Sierra Club Appeal at 13-14.

⁹⁹ Continued Storage GEIS § 1.8.2 at 1-14, § 5.0 at 5-2.

¹⁰⁰ Sierra Club Appeal at 14. Sierra Club points to a YouTube video which it claims depicts Holtec’s President Krishna Singh acknowledging that Holtec canisters “cannot be inspected, repaired or repackaged.” *Id.*; see also Sierra Club Petition at 41. But Dr. Singh does not say that the canisters cannot be inspected or repackaged. The video clip appears to show Dr. Singh at an October 14, 2014 meeting, in which he stated that should a canister develop a through-wall hole, it would not be practical to repair it, and the solution would be to isolate the canister in a cask. See www.youtube.com/watch?v=euaFZt0YPi4 (last visited Oct. 21, 2019). In its petition, Sierra Club cited an NRC Staff meeting summary where this statement was made, but it does not acknowledge that this discussion pertained to the specific phenomenon of chloride-induced stress corrosion cracking. See Sierra Club Petition at 41 (citing Memorandum from Kristina Banovac, Office of Nuclear Material Safety and Safeguards, to Anthony Hsia, Office of Nuclear Material Safety and Safeguards, “Summary of August 5, 2014, Public Meeting with Nuclear Energy Institute on Chloride Induced Stress Corrosion Cracking Regulatory Issue Resolution Protocol” (Sept. 9, 2014) (ML14258A081)).

nance, retrieval, and aging management.¹⁰¹ The SAR specifically discusses the issue of stress corrosion cracking and concludes that, due to the low halide content of the air at the proposed CISF site, chloride-induced stress corrosion cracking is a remote possibility.¹⁰² The SAR also describes how it will monitor the canisters to detect any stress corrosion cracking in its aging management program.¹⁰³

The Board found that Sierra Club Contention 9 did not acknowledge or discuss these sections of the SAR or challenge the application's conclusion.¹⁰⁴ On appeal, Sierra Club does not address the Board's finding that it had failed to dispute relevant portions of the SAR.

We agree with the Board's conclusion that Sierra Club's petition did not challenge these discussions in the SAR.

We therefore conclude that Sierra Club's appeal does not identify Board error in rejecting its proposed Contention 9, and we affirm the Board.

5. *Sierra Club Contention 11 (Earthquakes)*

Sierra Club argued in Contention 11 that the ER and SAR had inadequately discussed earthquake risks to the facility, including seismic activity induced by oil and gas recovery operations.¹⁰⁵ Sierra Club asserted that the information in Holtec's SAR and in its ER used "historical data that does not take into account the recent increase in drilling for oil and natural gas that creates induced earthquakes."¹⁰⁶ It attached to its petition a 2018 scientific study (the "Stanford Report"), which it claimed "documented the existence of prior earthquakes in southeast New Mexico" and "the existence of numerous faults in the area in and around the proposed Holtec site."¹⁰⁷ It also claimed that "the oil and gas industry" is concerned that the Holtec facility would impact oil and gas operations in the area and cited the scoping comments that Fasken Oil and Ranch, Ltd. and PBLRO Coalition submitted to NRC with respect to the Holtec application.¹⁰⁸

¹⁰¹ See, e.g., SAR §§ 3.1.4.1 (inspection of incoming casks), 3.1.4.4 (surveillance during storage), 5.4.1.2 (the HI-STORM UMAX cask system allows retrieval "under all conditions of storage"); see generally, *id.* ch. 18, Aging Management Program.

¹⁰² See SAR §§ 17.11, 18.3.

¹⁰³ See SAR §§ 18.3, 18.5.

¹⁰⁴ LBP-19-4, 89 NRC at 395.

¹⁰⁵ See Sierra Club Petition at 44-48.

¹⁰⁶ *Id.* at 45-46; see also ER § 3.3.2; SAR § 2.6.

¹⁰⁷ Sierra Club Petition at 44-45 (citing Jens-Erik Lund Snee and Mark D. Zobbeck, *State of Stress in the Permian Basin, Texas and New Mexico: Implications for Induced Seismicity*, The Leading Edge, Feb. 2018, at 127-32 (Stanford Report)).

¹⁰⁸ *Id.* at 47-48, Ex. 7, Letter from Tommy E. Taylor, Fasken Oil and Ranch, Ltd. to Michael Layton, NRC (July 30, 2018).

The Board rejected Sierra Club's contention because it presented no genuine dispute with the application.¹⁰⁹ The Board observed that the ER and SAR both used data from the 2016 U.S. Geological Survey, the latest available at the time of its 2017 application.¹¹⁰ It found that Sierra Club had not provided evidence of any "significant seismic events around the proposed project site" since 2016 and therefore rejected the claim that the application was outdated.¹¹¹ The Board observed that both the ER and the SAR specifically discuss the effects of "fracking."¹¹² Finally, the Board found that there was "no dispute between the Stanford Report and the SAR's seismic analyses" and noted that the illustrations provided in the report appeared to confirm the SAR's claim that the closest Quaternary fault (active within the last 1.6 million years) is approximately seventy-five miles away and the nearest fault of any kind is forty miles from the site.¹¹³

On appeal, Sierra Club reasserts its claims that Holtec's information is out of date and that the Stanford Report contradicts information in the application. But the Sierra Club adds a new claim with respect to the Stanford Report — that the report "document[s] that due to increased fracking for oil and gas, new geologic faults are being induced, coming nearer to the Holtec site."¹¹⁴

We deny the appeal for many of the same reasons outlined by the Board. First, we agree with the Board that Holtec's use of 2016 USGS data was not "out of date" and Sierra Club provided no evidence of recent seismic activity near the site. The Board reasonably concluded that the maps included in the Stanford Report seemed to confirm, rather than contradict, the SAR's statements that there were no Quaternary faults within the immediate area of the Holtec site.¹¹⁵ And although the Stanford Report discusses earthquakes occurring "since 2017," there is no indication that these are stronger earthquakes than previously seen or that they occurred particularly near the site of the proposed Holtec facility.¹¹⁶

¹⁰⁹ LBP-19-4, 89 NRC at 398.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* Holtec's ER and SAR discuss fluid injection and induced seismicity from the oil and gas industry. See SAR § 2.6.2; ER § 3.3.2.1. The Stanford Report does not use the term "fracking," but it discusses fluid or wastewater injection. See, e.g., Stanford Report at 127 (noting that "[f]luid injection and hydrocarbon production have been suspected as the triggering mechanisms for numerous earthquakes that have occurred in the Permian Basin since the 1960s").

¹¹³ LBP-19-4, 89 NRC at 398-99; see SAR § 2.6.2 at 2-108.

¹¹⁴ Sierra Club Appeal at 15.

¹¹⁵ LBP-19-4, 89 NRC at 398-99.

¹¹⁶ See Stanford Report at 127. The report mentions that since January 2017, "at least three groups of earthquakes, surrounded by more diffusely located events, have occurred in the southern Delaware Basin, near Pecos, Texas. A fourth group of events occurred mostly in mid-November

(Continued)

We are not persuaded by Sierra Club's argument that the Stanford Report shows that oil and gas activities are inducing "new geologic faults . . . coming nearer to the Holtec site."¹¹⁷ This argument is new on appeal; the original contention did not claim that fracking is causing new faults to form near the Holtec site.¹¹⁸ The claim also appears to be unsupported by the Stanford Report, which does not indicate that new faults or earthquakes are getting closer to the Holtec site.¹¹⁹

We therefore find no error in the Board's determination that Sierra Club had not raised a genuine dispute with the application in Contention 11.

6. *Sierra Club Contentions 15-19 (Groundwater Impacts)*

Sierra Club's Contentions 15-19 all concerned potential impacts to groundwater from the CISF.¹²⁰ Contention 15 argued that the ER had not adequately determined whether there is shallow groundwater at the site and therefore could not adequately assess the impact of a radioactive leak from the site.¹²¹ Contention 16 argued that the ER had not considered whether brine from a previous underground brine disposal operation was still present on the site and whether that brine could corrode the UMAX waste containers.¹²² Contention 17 argued that the ER and SAR did not consider the presence and effects of fractured rock beneath the site, which could allow radioactive leaks into groundwater from the cask or allow the aforementioned brine to enter the casks and corrode the canisters.¹²³ Contention 18 argued that the ER had not discussed the possibility that "waste-contaminated groundwater" could reach the nearby Santa Rosa For-

2017, farther to the west in northeastern Jeff Davis County [Texas]. In addition, a group of mostly small ($M_L < 2$) earthquakes occurred between Midland [Texas] and Odessa [Texas], in the Midland Basin." *Id.* The Holtec site is in the northern Delaware Basin.

¹¹⁷ Sierra Club Appeal at 15.

¹¹⁸ We do not consider on appeal new arguments or new evidence that the Board had no opportunity to consider. *See USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 458 (2006).

¹¹⁹ The Stanford Report is generally about new measurements of stress orientation and how that information might be used to predict and prevent slip on mapped faults due to fluid injection or extraction. Stanford Report at 127. Sierra Club did not point out where the document provided information in support of its claim. A board is expected to examine the documents provided in support of a proposed contention to verify that the material says what a party claims it does, but we do not expect a board to search through a document for support for a party's claims. *USEC Inc.*, CLI-06-10, 63 NRC at 457.

¹²⁰ *See* Sierra Club Petition at 60-67.

¹²¹ *Id.* at 60-62.

¹²² *Id.* at 62-63.

¹²³ *Id.* at 63-65.

mation aquifer, which is an important source of drinking water.¹²⁴ Contention 19 argued that Holtec may have improperly conducted tests for hydraulic conductivity between the site and the Santa Rosa Formation.¹²⁵

a. Groundwater Contentions as Challenge to Certified Design

The Board rejected all the groundwater contentions. It found that they failed to dispute the application's conclusion that there is no potential for groundwater contamination because spent nuclear fuel contains no liquid component to leak out, and it is not credible that groundwater could leak into the canisters.¹²⁶ The Board observed that the canisters are contained within a steel cavity enclosure container that has no penetrations or openings on the bottom, thereby preventing outside liquids from contacting the canisters or the spent nuclear fuel within them.¹²⁷ The Board further found that Sierra Club had failed to dispute Holtec's conclusion that the canisters would not be breached during normal operations or any "credible off-normal event" or accident.¹²⁸ The Board cited our holding in *Private Fuel Storage* that "[t]o show a genuine material dispute, [a petitioner's] contention would have to give the Board reason to believe that contamination from a defective canister could find its way outside a cask."¹²⁹

The Board rejected Sierra Club's argument that the material Sierra Club supplied in connection with its proposed Contentions 9, 14, 20, and 23 showed various mechanisms through which a canister could be breached. In doing so, the Board held that those contentions did not adequately support the groundwater contentions because they were also inadmissible.¹³⁰

On appeal, Sierra Club argues that in rejecting its Contentions 9, 14, 20, and 23, the Board did not "conclusively" find that the information supporting them was "incorrect."¹³¹ Therefore, Sierra Club argues, its petition to intervene did controvert Holtec's "assertion that the containers are impervious to leaking."¹³²

While it is true that in rejecting these contentions, the Board did not make a factual finding that the claims in them were "incorrect", Contentions 9, 14, 20, and 23 were not rejected on mere pleading technicalities, as Sierra Club appears

¹²⁴ *Id.* at 65-66.

¹²⁵ *Id.* at 66-67.

¹²⁶ LBP-19-4, 89 NRC at 404-05 (citing ER § 1.3 at 1-8).

¹²⁷ *Id.* at 407.

¹²⁸ *Id.* at 404, 408; *see* ER § 4.13 (off-normal operations and accidents).

¹²⁹ LBP-19-4, 89 NRC at 405 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138-39 (2004)).

¹³⁰ *Id.* at 404.

¹³¹ Sierra Club Appeal at 18.

¹³² *Id.* at 17.

to suggest. The Board found that each of those contentions was inadmissible because (among other reasons) they challenged the certified design of the HI-STORM UMAX system. Because certified designs are incorporated into our regulations, they may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver.¹³³

A contention cannot attack a certified design without a rule waiver because this would challenge matters already fully considered and resolved in the design certification review. For example, Sierra Club Contention 14 argued that the HI-STORM UMAX casks are susceptible to overheating because the air intake and exhaust vents are both located at the top of the cask and that overheating could cause cladding degradation and corrosion.¹³⁴ The Board noted that the SAR “fully incorporates by reference the HI-STORM UMAX design and thermal analysis conducted in the HI-STORM UMAX’s own Final Safety Analysis Report” and that therefore, “any challenge to the HI-STORM UMAX system design characteristics that are already deemed compliant with Part 72, including those Sierra Club designates in Contention 14 . . . are barred in this proceeding by sections 2.335 and 72.46(e).”¹³⁵ We agree with the Board’s conclusion that Sierra Club’s disagreement with the HI-STORM UMAX certified design cannot be used to support its claim that the CISF might leak.

To the extent that the groundwater contentions seek to raise design issues with the HI-STORM UMAX canister system, the Board correctly found that they challenged our regulations without seeking a waiver and are not admissible. Therefore, to the extent that the groundwater contentions are predicated on the argument that the system could leak, we affirm the Board’s ruling that Sierra Club had not presented a sufficient factual basis for that claim and the contentions are not admissible.

b. Groundwater Contentions as Challenges to Site Characterization

Sierra Club next argues that its groundwater contentions challenge the ER’s characterization of the affected environment, which the ER must provide regard-

¹³³ 10 C.F.R. § 2.335.

¹³⁴ Sierra Club Petition at 56-60.

¹³⁵ LBP-19-4, 89 NRC at 402. Similarly, Sierra Club Contention 20 argued that the canisters stored at the facility would likely contain high burnup fuel, which, according to Sierra Club, can lead to thinned, embrittled or damaged cladding. Sierra Club Petition at 67-70. Sierra Club Contention 23 argued that high burnup fuel could damage the spent fuel cladding during transportation or storage and that damaged fuel would not be accepted at a permanent repository. *Id.* at 73-75. But the Board rejected the contentions because the HI-STORM UMAX canister storage system is approved for storage of high burnup fuel, and therefore, the contentions are barred by regulation. *See* LBP-19-4, 89 NRC at 412, 416-17.

less of whether the canisters could leak.¹³⁶ The Staff acknowledges that the ER must characterize the site, but it argues that impacts need “only be discussed in proportion to their significance.”¹³⁷ Similarly, relying on the same passage in *Private Fuel Storage* quoted by the Board, Holtec argues that Sierra Club’s claims about groundwater characterization are not “material” to the outcome of this proceeding because Sierra Club has not shown that radionuclides could make their way outside the cask.¹³⁸

Of the five groundwater contentions, only Contention 18 was based entirely on the premise that leaks from the facility would contaminate the groundwater. The other contentions all raised specific arguments about the adequacy of the hydrogeological site characterization, were supported by expert opinion, and identified the portions of the application in question. In proposed Contention 15, Sierra Club questioned Holtec’s claim that there is no shallow groundwater at the site and argued that Holtec relies on data from a single well in the 1040-acre site, which has apparently not been checked since 2007.¹³⁹ According to the declaration of Sierra Club’s expert, George Rice, there are various reasons why a saturated condition may not have been encountered during drilling even though the “materials are saturated.”¹⁴⁰ In Contention 16, Sierra Club argued that Holtec should determine whether brine in the groundwater could contact the facility and what effect brine could have on its structures. It pointed to ER § 3.5.2.1, which acknowledges that as of 2007 “saturations of shallow groundwater brine” have been created in the region due to brine disposal.¹⁴¹ And in support of Sierra Club Contention 19, Mr. Rice identified three specific flaws that he claims undermine the reliability of Holtec’s hydraulic conductivity tests.¹⁴²

Our regulations require an admissible contention to show a “genuine dispute exists with the applicant/licensee on a material issue of law or fact.”¹⁴³ A “dispute at issue is ‘material’ if its resolution would ‘make a difference in the outcome of the licensing proceeding.’”¹⁴⁴ Moreover, in the NEPA context we

¹³⁶ Sierra Club Appeal at 17.

¹³⁷ Staff Opposition to Sierra Club Appeal at 18 (quoting 10 C.F.R. § 51.45(b)(1)).

¹³⁸ Holtec Opposition to Sierra Club Appeal at 24 (quoting *Private Fuel Storage*, CLI-04-22, 60 NRC at 138-39).

¹³⁹ See Sierra Club Standing Declarations and Expert Declarations, Declaration of George Rice (Sept. 10, 2018), at 2 (ML18257A226 (package)) (Rice Declaration).

¹⁴⁰ *Id.* at 3.

¹⁴¹ Sierra Club Petition at 62.

¹⁴² According to Mr. Rice, the report from Holtec’s contractor did not confirm that it cleaned the well holes prior to the tests, used clean water, or took three or more readings at five-minute intervals as recommended by the U.S. Bureau of Reclamation’s field manual. See Rice Declaration at 8.

¹⁴³ 10 C.F.R. § 2.309(f)(1)(vi).

¹⁴⁴ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, (Continued)

have warned, “[o]ne can always flyspeck an [Environmental Impact Statement (EIS)] to come up with more specifics and more areas of discussion that could have been included.”¹⁴⁵

The Supreme Court has explained that to fulfill NEPA’s mandate, for certain major Federal actions such as this one, an agency must prepare an EIS, which “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts” and that such information will be available to the public.¹⁴⁶ It is possible that, to the extent Sierra Club’s groundwater contentions are purely site-characterization disputes, they fail to show a material dispute with the application because they do not indicate how Sierra Club’s groundwater concerns would affect the ultimate discussion of environmental impacts.¹⁴⁷

But initial determinations of contention admissibility rest with the Board, and the Board did not discuss whether any of the groundwater contentions contained a genuine issue *apart* from the claims that radioactive leaks from the canisters could contaminate the groundwater. Within the context of the need to determine whether the groundwater concerns would affect the ultimate discussion of environmental impacts, we remand Contentions 15, 16, 17, and 19 to the Board for further consideration of their admissibility with respect to the site characterization.

7. *Sierra Club Contention 26 (Material False Statement); Joint Petitioners’ Contention 14 (Material False Statement)*

Sierra Club submitted its new Contention 26, and Joint Petitioners their Contention 14, after Holtec amended its license application to provide that its clients

333-34 (1999) (quoting Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,172 (1989)).

¹⁴⁵ *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001).

¹⁴⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁴⁷ While not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why the site characterization was necessary to fully understand the impacts of the proposed action. *E.g.*, *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 89-92 (2015) (responding to a site characterization claim by noting, “[a]t the crux of this contention is the issue of whether, to comply with NEPA’s requirement to make an adequate precicensing assessment of environmental impacts, more extensive monitoring . . . is required”); *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 47-51 (2013) (allowing site characterization issues to migrate “to the extent” they challenged applicant’s demonstration of aquifer confinement and impacts to groundwater).

would *either* be the DOE or nuclear plant owners.¹⁴⁸ As the Board observed, the two contentions are “substantially identical.”¹⁴⁹ Sierra Club and Joint Petitioners argued that even though Holtec’s application represents that nuclear plant owners may be its future customers, in reality Holtec still intends to go forward with the project only if it is able to secure a contract with DOE. They argued that various public statements by Holtec officials “show that Holtec’s intention has always been to rely on DOE, not the nuclear plant owners, taking title to the waste.”¹⁵⁰ For proof, Sierra Club and Joint Petitioners cited a Holtec public email that stated that deployment of the CISF “will ultimately depend on the DOE and the U.S. Congress.”¹⁵¹

Sierra Club and Joint Petitioners argued that this email shows that representations in the application that nuclear plant owners may be Holtec’s future customers are therefore “materially false.” They argue that this “material false statement” should be reason enough to deny an application because the Atomic Energy Act of 1954, section 186, expressly provides that a license may be revoked over a “material false statement.”¹⁵²

The Board found the contentions inadmissible because the statements in the email did not indicate that there was a “willful misrepresentation” in Holtec’s application.¹⁵³ The Board found that Holtec “readily acknowledges that it hopes Congress will change the law” to allow DOE to contract directly with Holtec and that Holtec itself pointed out that the need for the project could be reduced or eliminated if DOE were to build a permanent waste repository.¹⁵⁴ In short, the Board determined that Holtec has been transparent that deployment of this project may depend to some extent on actions of DOE and Congress as well as on the NRC’s licensing decision.

Moreover, the Board found that whether Holtec would use its license if Congress does not change the law is not an issue material to the license pro-

¹⁴⁸ See Sierra Club’s Motion to File a New Late-Filed Contention (Jan. 19, 2019) (Sierra Club Motion for Late Contention); Attach., Contention 26 (Jan. 19, 2019) (Sierra Club Contention 26); Motion by Petitioners Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group for Leave to File a New Contention (Jan 17, 2019) (Joint Petitioners Motion for Late Contention); DWM’s Contention 14 (Jan. 17, 2019) (Joint Petitioners’ Contention 14).

¹⁴⁹ LBP-19-4, 89 NRC at 451.

¹⁵⁰ Sierra Club Contention 26 at 3 (unnumbered); Joint Petitioners Contention 14 at 2 (unnumbered).

¹⁵¹ See Sierra Club Motion for Late Contention, Exhibit 11, Holtec Highlights, Holtec Reprising 2018 (Jan. 2, 2019) (also attached to Joint Petitioners Contention 14 as Ex. 1).

¹⁵² See Sierra Club Contention 26; Joint Petitioners Contention 14; 42 U.S.C. §§ 2011, 2236.

¹⁵³ LBP-19-4, 89 NRC at 421, 452.

¹⁵⁴ *Id.* at 421.

ceeding: “[T]he business decision of whether to use a license has no bearing on a licensee’s ability to safely conduct the activities the license authorizes.”¹⁵⁵

On appeal, Sierra Club and Joint Petitioners principally repeat the arguments the Board rejected. But Sierra Club further argues that “Holtec is attempting to obtain a license on the false premise that nuclear plant owners will retain title to the waste. Then, once Holtec obtains the license, it will use that fact as leverage to persuade Congress to change the law to allow DOE to hold title to the waste.”¹⁵⁶ Even assuming Sierra Club’s characterization of Holtec’s intent were accurate, we agree with the Board that the statements in the application are not false. We further agree that the material issue in this license proceeding is whether Holtec has shown that it can safely operate the facility, not its future political activity or business intentions. We therefore affirm the Board with respect to Sierra Club Contention 26 and Joint Petitioners Contention 14.

8. Sierra Club Contention 30

Sierra Club filed its new proposed Contention 30 in response to a report by the Nuclear Waste Technical Review Board (NWTRB) that discusses technical issues presented by transportation of nuclear waste and spent nuclear fuel.¹⁵⁷ Sierra Club argues that the NWTRB report shows that various assumptions in the ER are invalid and that there are “barriers to the implementation of the Holtec CIS project” that must be discussed in the ER.¹⁵⁸

Sierra Club filed this contention after the Board’s jurisdiction terminated — that is, after all contentions had been dismissed, the record closed and jurisdiction to consider the motion passed to the Commission. Although we have reopened the record for the limited purpose of determining the admissibility of Sierra Club’s groundwater contentions, the record remains closed for any other purpose.¹⁵⁹ Therefore, Sierra Club’s motion for a new contention must also meet the standards for reopening a closed record.¹⁶⁰

¹⁵⁵ *Id.* at 422.

¹⁵⁶ Sierra Club Appeal at 20-21.

¹⁵⁷ See Sierra Club Motion for New Contention 30, Attach., Nuclear Waste Technical Review Board, Preparing for Nuclear Waste Transportation — Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste (Sept. 2019); see also Holtec International’s Answer Opposing Sierra Club New Contention 30 (Nov. 18, 2019); NRC Staff Opposition to Sierra Club New Contention 30 (Nov. 18, 2019).

¹⁵⁸ Sierra Club Contention 30, at 1 (unnumbered).

¹⁵⁹ See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC 65, 76 (2011), *review denied*, CLI-12-10, 75 NRC 479 (2012).

¹⁶⁰ See, e.g., *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, (Continued)

Even where jurisdiction to consider reopening has passed to the Commission, however, we frequently remand such motions to the Board to consider the reopening standards in conjunction with contention admissibility, where appropriate.¹⁶¹ We find this action appropriate here. Therefore, we remand Sierra Club’s proposed Contention 30, including the issue of whether the reopening standards are met, to the Board.

D. AFES Appeal

Alliance for Environmental Strategies (AFES) is an environmental group with members located near the proposed Holtec storage site in Lea and Eddy County.¹⁶² It proposed three contentions, all dealing with environmental justice concerns.¹⁶³ The Board rejected all three contentions, and AFES has appealed.¹⁶⁴

1. AFES Contention 1: Environmental Justice Analysis Includes Insufficient Consideration of Alternative Sites

AFES’ proposed Contention 1 raised environmental justice concerns with Holtec’s site alternatives analysis. It claimed that Holtec, “as a matter of law,” had not investigated enough sites “to support a finding by the Nuclear Regulatory Commission that the selected site will not have a disparate impact on the minority population of Lea and Eddy County.”¹⁶⁵ Accordingly, proposed Contention 1 called for a new ER “that both studies and addresses alternative sites nationwide, why such sites are rejected, and what impact the selected site will have on minority and low-income local populations.”¹⁶⁶

The Board ruled proposed Contention 1 inadmissible because Holtec’s ER complied with applicable NRC guidance on environmental justice evaluations in licensing actions.¹⁶⁷ The Board found that Holtec’s ER “describes the social

75 NRC 692, 699-700 (2012); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-09-5, 69 NRC 115, 124 (2009).

¹⁶¹ *North Anna*, CLI-12-14, 75 NRC at 702.

¹⁶² Petition to Intervene and Request for Hearing (Sept. 12, 2018), at 1 (AFES Petition).

¹⁶³ *Id.* at 11-24.

¹⁶⁴ Petition for Review by Alliance for Environmental Strategies (May 31, 2019) (AFES Appeal).

¹⁶⁵ AFES Petition at 11.

¹⁶⁶ *Id.* at 21.

¹⁶⁷ See Final Report, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748 at 6-25 (Aug. 2003) (NUREG-1748); see also Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

and economic characteristics of the 50-mile region of influence (ROI) around Holtec’s proposed facility” and “identifies percentages of minority and low-income communities within the Holtec facility’s ROI” that would be subject to the impacts of the facility, as recommended by NRC guidance.¹⁶⁸ The Board observed that according to applicable guidance, a difference of twenty percent or more in the percentage of minority or low-income population, when compared to the rest of the county and state, is a significant difference requiring further investigation.¹⁶⁹ But the Board found that Holtec did not identify differences greater than twenty percent and therefore did not discuss environmental justice concerns any further.¹⁷⁰ The Board also found that the ER “contains an analysis of location alternatives” including “six other potential sites that were analyzed and considered for suitability of the Holtec HI-STORE consolidated interim storage facility’s characteristics.”¹⁷¹ The Board declined to admit proposed Contention 1 because “AFES has not shown any legal requirement for Holtec to conduct a more in-depth inquiry into alternatives to the proposed action (i.e., the siting of the facility) or environmental justice analyses in its Environmental Report”; therefore, the contention failed to show a genuine dispute with the application regarding a material issue of law or fact.¹⁷²

On appeal, AFES argues that Holtec’s environmental justice evaluation was insufficient because it failed to compare the population near the proposed site to the population of the United States as a whole.¹⁷³ AFES argues the Board was wrong “as a matter of law” to credit the ER’s discussion of alternative sites because “Holtec merely re-hashed a prior investigation by a third party, with regard to a previously abandoned site for a different facility” that includes “no discussion of *any* environmental justice concerns,” resulting in a “precipitous narrowing of potential alternatives to a single site in southeastern New Mexico . . . directly contrary to the NRC’s Policy Statements.”¹⁷⁴

By way of background, Holtec acknowledges that it relied on a previous study by the Eddy-Lea Energy Alliance (ELEA) for much of the environmental information in its ER. The ER explains that in 2006, DOE sought bids for locating a spent fuel recycling center and developed a set of criteria for an ideal site.¹⁷⁵ Eddy, New Mexico and Lea, New Mexico formed the ELEA to

¹⁶⁸ LBP-19-4, 89 NRC at 455.

¹⁶⁹ *Id.* (citing NUREG-1748 at C-5).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (internal citations omitted).

¹⁷³ AFES Appeal at 17.

¹⁷⁴ *Id.* at 5, 13-15.

¹⁷⁵ ER § 2.3.

find a site within their jurisdiction and propose it to DOE.¹⁷⁶ The ELEA 2007 report analyzed six sites within the two counties with emphasis on the DOE's site selection criteria, which included low population density in the surrounding area, adequate size, low flood risk, and seismic stability. These factors also correspond to Holtec's needs for a waste storage facility.¹⁷⁷ Holtec states that it reviewed ELEA's analysis and determined that the selected site is the best for its own project.¹⁷⁸

The pertinent NRC Policy Statement in this case is the NRC's Environmental Justice Policy Statement.¹⁷⁹ That Policy Statement provides that NRC will identify minority and low-income populations near proposed nuclear sites so that it can determine whether the environmental impacts associated with a given site will be different for those populations when compared to the general population of the surrounding area, not the country as a whole.¹⁸⁰ An objective of the Policy Statement is that minority and low-income communities "affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities."¹⁸¹

The Board found that Holtec provided information about the impacts to minority and low-income populations within the geographic region of the proposed action, that the demographics did not show a disproportionate number of minorities or low-income people in the vicinity of the site, and that AFES had not disputed the information provided.¹⁸² But on appeal, AFES argues that other sites "[o]utside of these isolated, low-income communities" need to be analyzed, including sites "outside of New Mexico," because "the targeting of rural, impoverished, low-income communities in a border state is precisely the sort of *de facto* result of the institutional racism embedded in prevailing dump site

¹⁷⁶ *Id.* See Letter from Johnny Cope, Chairman, ELEA, to Debbie Swichkow, DOE (Apr. 28, 2007), Encl. "GNEP Final Detailed Siting Report for the Consolidated Fuel Treatment Center and Advanced Recycling Reactor" (ML17310A225, ML17310A227, ML17310A230) (ELEA 2007).

¹⁷⁷ ER § 2.3.

¹⁷⁸ *Id.* at 2-16.

¹⁷⁹ See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

¹⁸⁰ See *id.* at 52,048.

¹⁸¹ See *id.*

¹⁸² AFES repeatedly asserts that Holtec's evaluation of alternative sites is deficient because it relies on information developed by third parties. See, e.g., AFES Appeal at 5, 8. AFES does not point out any factual error or omission in the third-party information relied upon, however, and reliance on prior studies is commonplace in environmental impact analysis. The Board was therefore correct in its conclusion that AFES presented no genuine factual or legal dispute with this argument.

selection processes nationwide that was decried over thirty years ago . . . by the Licensing Board in [*Claiborne*].”¹⁸³

However, we reversed on appeal the board decision in *Claiborne*, upon which AFES relies, which admitted a contention claiming racial bias in the applicant’s site-selection process.¹⁸⁴ In doing so, we explicitly rejected the idea that NEPA requires “an elaborate comparative site study” to explore whether an applicant’s siting criteria “might perpetuate institutional racism.”¹⁸⁵ The Board’s rejection of AFES’s proposed Contention 1 in this case accords with our stated environmental justice policy. We therefore affirm the Board’s holding that environmental justice does not require consideration of a wider range of alternative sites.¹⁸⁶

2. AFES Contention 2: Disparate Impacts of Siting Process

In proposed Contention 2, AFES asserted that “New Mexico has been targeted for the dumping of nuclear waste, resulting in a *per se* discriminatory impact on New Mexico’s minority population, in comparison with the rest of the country.”¹⁸⁷ It included an affidavit of Professor Myrriah Gomez entitled, “Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project.”¹⁸⁸ According to AFES, “[t]his *de facto* discrimination is exacerbated by both the historical failure to include members of the minority population in decision making regarding the location of nuclear sites in New Mexico, and the specific failure . . . to include members of the local Lea and

¹⁸³ *Id.* at 15-16 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367 (1997)).

¹⁸⁴ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 36 (1998) (cautioning the Licensing Board that a contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking “a broad NRC inquiry into questions of motivation and social equity in siting” would “lay outside NEPA’s purview.”).

¹⁸⁵ *Louisiana Energy Services*, CLI-98-3, 47 NRC at 104.

¹⁸⁶ Our guidance for NEPA reviews of materials license applications provides limited guidance regarding how wide an area should be examined in identifying potential alternative sites for a proposed project. See NUREG-1748 § 5.2. Although Holtec elected to limit its evaluation to six sites in two counties within the same state, the Staff is not limited to considering only those sites proposed by Holtec in its environmental impact statement. See, e.g., Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (Dec. 2001), at 7-1 to 7-6 (ML020150217) (site selection process entailed evaluation of thirty-eight potential sites across fifteen states) (Private Fuel Storage EIS).

¹⁸⁷ AFES Petition at 22.

¹⁸⁸ *Id.*

Eddy County minority population in decision making” regarding the siting of Holtec’s proposed CISF.¹⁸⁹

The Board found proposed Contention 2 inadmissible because it did not show a genuine dispute with the application on a material issue of law or fact: “Holtec addressed environmental justice matters to the depth recommended by NRC guidance, and neither AFES’s petition nor Dr. Gomez’s affidavit challenge the information in Holtec’s Environmental Report.”¹⁹⁰

On appeal, AFES does not challenge the Board’s finding that Holtec’s ER comports with NRC policy and guidance on environmental justice evaluations. AFES reiterates its position that Holtec’s environmental justice analysis was insufficient because it did not include “an effective scoping process and an independent review of the impact — including the cumulative impact — of the site on minority and low-income populations along the border.”¹⁹¹ But AFES provides no further information in support of that position, which the Board rejected. This is insufficient to sustain an appeal, and we find no error in the Board’s decision to deny the admission of proposed Contention 2.

3. AFES Contention 3: Community Support

AFES’s proposed Contention 3 claimed that there is no factual basis for Holtec’s assertions in its ER that there is community support for the project.¹⁹² Although AFES conceded that community support is not normally material to the findings NRC must make to issue a license, it argued that it should nevertheless be considered material in this case because Holtec had referred to community support in its siting analysis.

The Board ruled the contention inadmissible “because the issue of public support for the proposed facility is not material to the findings the NRC must make in this licensing proceeding,” and “[a]ssertion of community support or opposition in a license application does not lend any weight to the environmental justice analysis to be conducted by the applicant.”¹⁹³

On appeal, AFES argues that proposed Contention 1 and proposed Contention 3 are linked, such that if the latter is inadmissible, the former must be admitted.¹⁹⁴ It argues that if community support was an adequate reason to narrow Holtec’s site selection to only the Eddy-Lea county area, then Holtec should have to show that community support actually exists. We disagree. Holtec

¹⁸⁹ *Id.*

¹⁹⁰ LBP-19-4, 89 NRC at 456.

¹⁹¹ AFES Appeal at 18.

¹⁹² AFES Petition at 23.

¹⁹³ LBP-19-4, 89 NRC at 457.

¹⁹⁴ AFES Appeal at 18-19.

explained that community support was but one of many siting factors — including seismic stability, low population density, and low flooding risk — that it used in its site selection process.¹⁹⁵ Holtec did not discuss community support in its environmental justice analysis — nor did it “substitute” community support for an environmental justice analysis, as AFES claims.¹⁹⁶ The Board reasonably evaluated the proposed contentions against the admissibility standards in our regulations, and its decisions on each were, in our view, clear, well-reasoned, and with ample support in the record and in accordance with our established precedents.

E. Joint Petitioners Appeal

The Board rejected the Joint Petitioners’ hearing request on both standing and contention admissibility grounds. It found that the Joint Petitioners based their standing not on their individual members’ proximity to the proposed facility but on the members’ proximity to transportation routes, which, it held, is too remote and speculative an interest to confer standing.¹⁹⁷ Moreover, it examined each of Joint Petitioners’ fourteen proposed contentions (except two) and found them inadmissible.¹⁹⁸ Joint Petitioners have appealed the Board’s rulings with respect to standing as well as the admissibility of eight of its proposed contentions.¹⁹⁹ As explained below, the Board correctly found that none of those eight contentions were admissible. Therefore, we need not reach the issue of Joint Petitioners’ standing.

¹⁹⁵ ER §§ 2.3, 2.4.2; see Holtec International’s Brief in Opposition to Alliance for Environmental Strategies’ Appeal of LBP-19-4 (June 25, 2019), at 10-11.

¹⁹⁶ See ER § 3.8.5.

¹⁹⁷ See Petition of Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternative to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) (Joint Petitioners Petition); LBP-19-4, 89 NRC at 367 (citing *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004); *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-2, 73 NRC 613, 623 (2011); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)).

¹⁹⁸ See LBP-19-4, 89 NRC at 426-52. Joint Petitioners’ proposed Contention 8 was withdrawn and its proposed Contention 13 was a motion to adopt Sierra Club’s contentions, which the Board rejected because a petitioner must establish standing and sponsor its own admissible contention before it can adopt another party’s contentions. *Id.* at 451.

¹⁹⁹ Notice of Appeal of LBP-19-4 by Petitioners Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group, and Brief in Support of Appeal (June 3, 2019) (Joint Petitioners Appeal).

1. Joint Petitioners Contention 1: Redaction of Historic and Cultural Properties Precludes Public Consultation and Participation

Joint Petitioners argued in their proposed Contention 1 that Holtec violated section 106 of the National Historic Preservation Act (NHPA) by redacting 144 pages of the ER that contain information about two historic or cultural properties that will be destroyed to make way for the proposed CISF.²⁰⁰ The Board found that Holtec did *not* redact its ER. The Board explained that the Staff, having reached a preliminary conclusion that disclosure of Appendix C to the ER might risk harm to a potential historic resource, temporarily redacted it to comply with the NHPA, which requires withholding information from the public where public disclosure could risk such harm.²⁰¹

On appeal, Joint Petitioners do not dispute the Board's findings that the Staff "redacted Appendix C in accordance with the NHPA," or that the Staff would, after completing consultation with the Keeper of the National Register of Historic Places, "make available to the public any information that would not harm any potential historic properties."²⁰² Rather, Joint Petitioners explain why they did not request access to the sensitive information in Appendix C even though they had the opportunity to do so.²⁰³ That explanation has no bearing on whether the Board abused its discretion or otherwise committed an error in denying the contention. We therefore see no basis to disturb the Board's ruling that proposed Contention 1 was inadmissible.

2. Joint Petitioners Contention 2: Insufficient Assurance of Financing

Joint Petitioners argued in proposed Contention 2 that Holtec cannot provide reasonable assurance that it has or will obtain the necessary funds to build, operate, and decommission the CISF.²⁰⁴ Joint Petitioners argued that Holtec's application "states that it will solely finance the CISF from internal resources, but inconsistently states at the same time that it must have definite contractual arrangements with the U.S. DOE and the outside funding that would come with those arrangements in order to undertake the CISF."²⁰⁵ Therefore, Joint

²⁰⁰ See Joint Petitioners Petition at 27-31.

²⁰¹ LBP-19-4, 89 NRC at 427; see also 54 U.S.C. § 307103(a) (requiring an agency to withhold information that may cause harm to a historic place).

²⁰² LBP-19-4, 89 NRC at 427.

²⁰³ See Joint Petitioners Appeal at 20-21; LBP-19-4, 89 NRC at 427.

²⁰⁴ See Joint Petitioners Petition at 31-36.

²⁰⁵ *Id.* at 32.

Petitioners argued, Holtec’s financial assurance depends on contracts that are not lawful.²⁰⁶

Joint Petitioners moved to amend their contention twice. The first amendment responded to Holtec’s revision of the application to provide that nuclear power plant owners might be its customers and argued that the application is unlawful until all references to DOE are stricken from it.²⁰⁷ The Board allowed the first amendment but rejected the substance of the claim.²⁰⁸ Joint Petitioners do not appeal that ruling.

Joint Petitioners attempted to amend the contention a second time after Holtec’s counsel conceded at oral argument on January 24, 2019, that DOE cannot currently contract with Holtec to store nuclear power companies’ spent fuel.²⁰⁹ The Board denied Joint Petitioners’ second requested amendment because it sought to add arguments that could have been submitted with the original petition.²¹⁰ The Board found the second requested amendment was therefore not based upon new information.²¹¹ Accordingly, the Board denied the amendment request because it did not satisfy the requirements for contentions filed after the deadline set forth in 10 C.F.R. § 2.309(c)(1).

The Board turned next to the timely aspects of proposed Contention 2, which claimed that Holtec would not have sufficient funds to build, operate, and decommission the CISF because its funding plans depended on illegal contracts with DOE. The Board found that while Holtec would prefer that Congress change the law to permit a contract with DOE, Holtec would attempt to negotiate storage contracts with nuclear power plant owners.²¹² The Board also found that Holtec would not begin construction until it has sufficient contracts established.²¹³ The Board determined that an evidentiary hearing on Holtec’s

²⁰⁶ *Id.* at 32-33.

²⁰⁷ Motion by [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019) at 8.

²⁰⁸ LBP-19-4, 89 NRC at 428-29.

²⁰⁹ *See* Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec’s Proposed Means of Financing the Consolidated Interim Storage Facility (Feb. 25, 2019) (Joint Petitioners Second Motion to Amend).

²¹⁰ LBP-19-4, 89 NRC at 429-432.

²¹¹ *Id.* at 430. The Board reached its decision after analyzing the sworn declaration of Joint Petitioners’ expert, which was submitted in support of the motion to amend proposed Contention 2. *See id.* at 429-32. The Board found the declaration “fails to analyze any specific provision in Holtec’s application” and included “virtually nothing that purports to relate directly to Holtec counsel’s January 24, 2019 concession.” *Id.* at 430.

²¹² *Id.* at 433.

²¹³ *Id.*

intent would not be useful and found Joint Petitioners' proposed Contention 2 inadmissible for failure to raise a genuine dispute with the application.²¹⁴

The Board further rejected Joint Petitioners' argument that Holtec must provide financial assurance for periods beyond the license term. Joint Petitioners argued that 10 C.F.R. § 72.22(e) requires that Holtec "must possess the necessary funds, have reasonable assurance of obtaining the necessary funds, or by a combination of the two, have the funds to undertake the CISF as a 20-year storage-construction program, *and to operate it securely for 100 years total.*"²¹⁵ The claim appeared again in Joint Petitioners' second motion to amend proposed Contention 2, which cited the AEA and our financial assurance regulations at 10 C.F.R. § 72.22(e) for the argument that "Holtec has not adequately estimated the operating costs over the planned life of the CISF."²¹⁶ The Board rejected the claim and noted that "Joint Petitioners' claims about financial assurances for later phases or for storage beyond the license term are . . . outside the scope of this proceeding" and thus, inadmissible.²¹⁷

On appeal, Joint Petitioners argue that this ruling improperly "dispense[d] with full and thorough consideration of all aspects of the Holtec CISF plan under NEPA to a later time."²¹⁸ This NEPA argument is raised for the first time on appeal and is therefore untimely.²¹⁹ In addition, Joint Petitioners do not provide legal or factual support for this argument. Joint Petitioners cite no regulation, case, or other legal authority suggesting NEPA requires Holtec to provide more financial assurance information than it did nor do they point to any part of Holtec's ER as inadequate. In fact, Holtec's ER includes an analysis of the environmental effects expected from all twenty phases of its planned CISF activities, which undercuts Joint Petitioners' argument that dismissal of proposed Contention 2 improperly avoids consideration of reasonably foreseeable environmental impacts associated with potential future phases of the CISF project.²²⁰

Our Part 72 regulations govern the financial assurance information Holtec must include in its CISF application. Holtec must provide "information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out . . . the activities for which the license is sought."²²¹ The

²¹⁴ *Id.*

²¹⁵ Joint Petitioners Petition at 34 (emphasis added).

²¹⁶ Joint Petitioners Second Motion to Amend, Encl. at 10-11.

²¹⁷ LBP-19-4, 89 NRC at 432.

²¹⁸ Joint Petitioners Appeal at 22.

²¹⁹ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996).

²²⁰ See ER §§ 1.0, 4.0.

²²¹ 10 C.F.R. § 72.22(e).

Board found that Holtec had provided financial assurance information for the first phase of the CISF project — the phase involving “activities for which the license is sought” — and that the information was not genuinely disputed by proposed Contention 2.²²²

While Holtec anticipates that there may be future, additional phases of its project, each phase would require a license amendment. Any application to amend the license to expand the capacity or extend the term of the license would in turn require updated financial assurance information. We therefore affirm the Board’s dismissal of proposed Contention 2.

3. *Joint Petitioners Contention 3: Underestimation of Low-Level Radioactive Waste Volume*

Joint Petitioners’ proposed Contention 3 asserted that Holtec’s ER provides “a seriously inaccurate picture of the true costs of constructing, operating, and decommissioning” the proposed CISF because it grossly underestimates the amount of low-level radioactive waste (LLRW) that the project will generate.²²³ Specifically, proposed Contention 3 alleged the ER was deficient because it does not consider that the tons of concrete used at the site for foundations and casks will become “radioactively activated” and that “replacement of the canisters themselves during the operational life of the CISF” will generate LLRW.²²⁴

In response to proposed Contention 3, both the Staff and Holtec argued that Joint Petitioners had not offered any specific facts or expert opinion to support the contention. Holtec explained that the storage casks and pads are not expected to have any residual radioactive contamination because (a) the spent nuclear fuel canisters will remain sealed while in the CISF; (b) the canisters will be surveyed at the originating reactor and again when they arrive at the CISF to ensure that there is no radiological contamination; and (c) the neutron flux levels generated by the spent nuclear fuel would be so low that any activation of the storage casks and pads would produce negligible radioactivity.²²⁵ The Staff argued that the Joint Petitioners had offered no facts or expert opinion to support their “claims

²²² *Id.*

²²³ Joint Petitioners Petition at 36-37.

²²⁴ *Id.* at 36.

²²⁵ Holtec International’s Answer Opposing the Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International’s HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018), at 41 (Holtec Answer to Joint Petitioners) (citing ER § 4.12.2).

that millions of tons of material will be activated” and become LLRW.²²⁶ With respect to the canisters, Holtec pointed out that the packaged canisters will be delivered to Holtec’s site, ready for storage, and that fuel will be transported off-site in the same canister when a repository becomes available, such that no canisters would be opened at the facility.²²⁷ The Board agreed with Holtec and the Staff and rejected proposed Contention 3 because Joint Petitioners had not met their burden in proffering facts or expert opinion supporting their claims.²²⁸

The Board also found that Holtec had addressed the impacts from spent fuel repackaging and cask disposal by appropriately relying on the description of those impacts contained in the Continued Storage GEIS, which is incorporated by reference into 10 C.F.R. § 51.23.²²⁹ Holtec referred to the Continued Storage GEIS in its discussion of environmental impacts of decontamination and decommissioning.²³⁰ The Continued Storage GEIS found that the potential environmental impacts from LLRW from decommissioning a large scale ISFSI after long term storage would be “small.”²³¹ The Board therefore found that aspects of proposed Contention 3 dealing with “the topics of repackaging of spent fuel and disposal of the spent fuel casks after repackaging” were an impermissible attack on the NRC’s regulations under 10 C.F.R. § 2.335, because they challenged the adequacy of ISFSI decommissioning analyses contained in the Continued Storage GEIS.²³²

On appeal, Joint Petitioners assert there exists “evidence of significant volumes of unremediable concrete, soil and canisters,” but do not point to any specific evidence.²³³ Joint Petitioners claim that during oral argument on contention admissibility the Board unreasonably “required [Joint Petitioners] to explain why [the concrete] cannot all be decontaminated.”²³⁴ But it does not appear to us that the Board imposed an undue burden on the Joint Petitioners. Rather, the Board asked whether Joint Petitioners had any factual support for their assertions that concrete at the CISF would become activated or that concrete decontamination would not be possible.²³⁵ In response, counsel for Joint Petitioners offered only

²²⁶ Staff Consolidated Response at 36.

²²⁷ Holtec Answer to Joint Petitioners at 41 (citing ER § 4.12.2). *See also* ER § 4.12.4 (stating that all canisters of SNF would be removed and transported to a permanent repository prior to decontamination and decommissioning of the facility).

²²⁸ LBP-19-4, 89 NRC at 434.

²²⁹ *Id.* at 435 (citing Continued Storage GEIS at 5-48).

²³⁰ *See* ER § 4.9.5.

²³¹ *See* Continued Storage GEIS at 5-48.

²³² LBP-19-4, 89 NRC at 435.

²³³ Joint Petitioners Appeal at 23.

²³⁴ *Id.*

²³⁵ Tr. at 161-62; *see* 10 C.F.R. § 2.309(f)(5).

“common sense” as an explanation for how concrete would become radioactive and took no position on whether decontamination of concrete would be possible.²³⁶ The Board reasonably found that these unsupported assertions were insufficient to support an admissible contention.

Joint Petitioners further argue that the Board erred in relying on the Continued Storage Rule because the rule “does not alter any requirements to consider environmental impacts of spent fuel storage during the term . . . of a license for an ISFSI in an ISFSI licensing proceeding.”²³⁷ However, with respect to the environmental effects during the life of the CISF, the Board found that Joint Petitioners had not proffered any evidentiary support for their claim that the concrete pads and casks will become contaminated or for their claim that the canisters will need to be replaced during the operating life of the facility.²³⁸ The portion of the Continued Storage GEIS that the Board discusses refers to the expected consequences of temporary storage in an large scale ISFSI — a facility like the proposed facility — and found that the expected consequences of replacing concrete pads, casks, canisters and the DTS would be small.²³⁹ Therefore, even assuming these materials did need to be replaced during the life of the proposed facility, the impacts have been studied and set forth in the Continued Storage GEIS, which are codified in the Continued Storage Rule. Joint Petitioners’ appeal provides no basis to overturn those Board findings.

In short, the Board found proposed Contention 3 failed to include support for its assertions of inadequacy regarding Holtec’s evaluation of LLRW impacts. Joint Petitioners’ appeal does not dispute the Board’s finding that the contention lacked evidentiary support. Accordingly, we affirm the Board’s rejection of proposed Contention 3.

4. Joint Petitioners Contention 4: Holtec Does Not Qualify for Continued Storage GEIS Presumptions

Joint Petitioners argued in proposed Contention 4 that Holtec cannot rely on the Continued Storage GEIS’s generic environmental analysis of transportation and operational accidents because the proposed CISF differs from the type of facilities contemplated by the Continued Storage GEIS, particularly with respect

²³⁶ Tr. at 161-62. In answering the Board’s questions, counsel for Joint Petitioners stated that it is arguing that “the initial quantification [of LLRW] is tremendously off base,” but provided no factual or expert support for that assertion. *Id.*

²³⁷ Joint Petitioners Appeal at 24.

²³⁸ LBP-19-4, 89 NRC at 434.

²³⁹ *Id.* at 435 (citing Continued Storage GEIS at 5-48).

to its lack of a DTS.²⁴⁰ The Board dismissed proposed Contention 4, ruling that Holtec’s ER does not rely on the Continued Storage GEIS to avoid discussion of site-specific accidents but rather “contains a site-specific impact analysis for the period of the proposed activity” as the GEIS anticipates.²⁴¹ The Board further found that “[n]either the Continued Storage GEIS nor NRC regulations require an analysis of a [DTS] at this time”; therefore, proposed Contention 4 failed to raise a genuine dispute with the application on a material issue of law or fact.²⁴²

On appeal, Joint Petitioners do not dispute the Board’s finding that Holtec’s ER addresses site-specific environmental effects (including effects from transportation and operational accidents) during the period of expected facility construction and operation; rather, they continue to argue that the CISF must have a DTS during the current license period. Joint Petitioners argue that “Holtec cannot consider the probability of leaking or contaminated canisters or casks arriving at the CISF to be zero; it cannot discount the need for a DTS well before the end of the first 100 years of operations for emergencies, remediation and repackaging.”²⁴³ Joint Petitioners assert the Board’s dismissal of proposed Contention 4 was wrong because “the ASLB may not segment consideration of environmental effects,” and “Holtec may not avoid NEPA or AEA . . . scrutiny of its decision to not have a [DTS] available before the end of the first 100 years of operation because of the Continued Storage GEIS.”²⁴⁴

The Continued Storage GEIS generically analyzes the environmental impacts of spent fuel storage after the operational life of a reactor or ISFSI in the short-term (60 years after cessation of operations), long-term (60 to 100 years), and indefinite timeframes.²⁴⁵ It generically assumes that a DTS would be built “in the long-term and indefinite timeframes,” which occur beyond the initial 40-year license term for the Holtec CISF, so that “the environmental impacts of constructing a reference DTS” can be considered, thus providing a “complete picture of the environmental impacts of continued storage.”²⁴⁶ But as the Board correctly held, this assumption does not impose a requirement that any particular facility build a DTS.

²⁴⁰ Joint Petitioners Petition at 46-49. Joint Petitioners provided three other bases for Contention 4, each of which the Board addressed in denying its admission. See LBP-19-4, 89 NRC at 437. Joint Petitioners raise none of those three bases on appeal. See Joint Petitioners Appeal at 24-25.

²⁴¹ LBP-19-4, 89 NRC at 437.

²⁴² *Id.*

²⁴³ Joint Petitioners Appeal at 25.

²⁴⁴ Joint Petitioners Appeal at 24. Joint Petitioners’ argument regarding NEPA segmentation is new on appeal and will not, therefore, be considered. See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 458 (2006).

²⁴⁵ Continued Storage GEIS § 1.8.2.

²⁴⁶ *Id.* § 2.1.4.

We agree with the Board that if the proposed CISF is licensed, built, and operated and Holtec later decides to construct and operate a DTS, a separate licensing action would be required, which would entail additional environmental review.²⁴⁷ For now, Holtec has evaluated the site-specific environmental effects associated with the construction and operation of the proposed CISF (as required by the Continued Storage Rule). Joint Petitioners do not challenge that facility- and site-specific evaluation of the effects of transportation and operational accidents.²⁴⁸ We thus find no error in the Board's conclusion that proposed Contention 4 stated no genuine dispute with the application and was therefore inadmissible.

5. *Joint Petitioners Contention 7: Holtec's "Start Clean/Stay Clean" Policy Is Unlawful and Directly Causes a Public Health Threat*

In their proposed Contention 7, Joint Petitioners argued that Holtec's "start clean/stay clean" policy is illegal and unsafe because "leaky and/or contaminated canisters" might arrive at the proposed CISF, which Holtec "intends to return . . . to their points of origin," thus risking "immediate danger to the corridor communities through which they would travel back to their nuclear power plant or site of origin, likely violating numerous additional NRC and DOT regulations."²⁴⁹

Holtec's answer explained that its "start clean/stay clean" plan would mean that a defective canister would be shipped back in an approved transportation cask, which is lawful as long as applicable radiation standards are met.²⁵⁰ Holtec also pointed to our decision in *Private Fuel Storage*, wherein we noted that a similar contention's "assertion that shipping [a defective] canister back inside the approved transportation casks is not safe can be seen as an impermissible attack on NRC regulations and rulemaking-related generic determinations that the transportation cask is sufficient to prevent the leakage of any radioactive material."²⁵¹

The Board found the contention lacked factual or expert support, specifically finding that Joint Petitioners had not shown:

²⁴⁷ LBP-19-4, 89 NRC at 437.

²⁴⁸ See ER §§ 4.9.3.2, 4.13.2. Holtec assumes for purposes of its environmental analysis that "[spent nuclear fuel] could be stored at the CIS Facility for approximately 120 years (40 years for initial licensing plus 80 years for life extensions)," which "could be reduced if a final geologic repository is licensed and operated . . .". ER § 1.0.

²⁴⁹ Joint Petitioners Petition at 61.

²⁵⁰ Holtec Answer to Joint Petitioners at 63-64 (citing 10 C.F.R. § 71.47).

²⁵¹ *Id.* at 63 (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 138 n.53).

(1) how the spent fuel, when packaged at the reactor site, would leave the site leaking or damaged notwithstanding NRC-approved quality assurance programs; (2) how the spent fuel canister, within its transport overpack cask, would become credibly damaged in an accident scenario that results in an exceedance of dose rates while in transit; and (3) how the sequestration sleeve, as outlined in Holtec's SAR at the time the petitions were due in this proceeding, is an inadequate remedy should the cask and canister somehow become damaged.²⁵²

The Board agreed that our decision in *Private Fuel Storage* would require the proponent of a similar contention to posit a credible scenario where a canister is breached in transport.²⁵³

On appeal, Joint Petitioners attempt to distinguish *Private Fuel Storage* by suggesting that accidental canister breaches should be considered credible in this case because Holtec's "start clean/stay clean" policy necessarily supposes some breaches will occur.²⁵⁴ The Board already considered and rejected that argument, however, noting that *Private Fuel Storage* (like this case) also involved a policy "to ship back a leaking or defective canister to its point of origin," and that the petitioner in that case (like this case) had failed to contest "those very programs that provide that a transportation accident or breach of canister is not credible."²⁵⁵

We find that the Board appropriately relied on *Private Fuel Storage* in finding this contention inadmissible. Mere existence of Holtec's "start clean/stay clean" policy is not sufficient to undermine the requirements and safety analyses that have generically established the integrity of approved spent fuel canister designs.

6. *Joint Petitioners Contention 9: Incomplete and Inadequate Disclosure of Transportation Routes*

Joint Petitioners argued in proposed Contention 9 that Holtec should disclose the transportation routes for the thousands of cask deliveries that are anticipated over the first twenty years of Holtec's proposed license.²⁵⁶ According to Joint Petitioners, the application only shows two probable routes, one from the site of the former Maine Yankee plant and another from the former San Onofre Nuclear Generating Station in California.²⁵⁷ Joint Petitioners argued that complete transportation information is necessary for their own participation in the NEPA

²⁵² LBP-19-4, 89 NRC at 444.

²⁵³ *Id.* (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 136-37).

²⁵⁴ Joint Petitioners Appeal at 26.

²⁵⁵ LBP-19-4, 89 NRC at 444.

²⁵⁶ Joint Petitioners Petition at 66-68.

²⁵⁷ *Id.* at 66.

process as well as for emergency response officials to understand the scope of Holtec's proposal.²⁵⁸

The Board found that Joint Petitioners failed to raise a genuine dispute with the application because they did not demonstrate that either NEPA or our regulations require a specific assessment of possible transportation routes.²⁵⁹ The Board found that Holtec's ER evaluated three representative routes — one from San Onofre to the proposed CISF, one from Maine Yankee to the proposed CISF, and one from the proposed CISF to Yucca Mountain — and that “the use of representative routes is in keeping with past NRC practice to evaluate transportation impacts.”²⁶⁰ The Board further found Joint Petitioners' concerns that emergency response officials would need disclosure of transportation routes to be outside the scope of this licensing proceeding. The Board explained that the NRC reviews and approves spent nuclear fuel transportation routes separately, in conjunction with the Department of Transportation, including consultation with applicable States or Tribes, and coordination with local law enforcement and emergency responders.²⁶¹

On appeal, Joint Petitioners largely repeat their arguments before the Board.²⁶² However, the Board correctly found that determining exact transportation routes is an issue outside the scope of this licensing proceeding. Furthermore, the use of representative routes in an environmental-impacts analysis to address the uncertainty of actual, future spent fuel transportation routes is a well-established regulatory approach, the foundations of which Joint Petitioners have not challenged.²⁶³ Therefore, we affirm the Board's decision to deny admission of proposed Contention 9.

²⁵⁸ *Id.* at 67.

²⁵⁹ LBP-19-4, 89 NRC at 445.

²⁶⁰ *Id.* at 446 (citing Continued Storage GEIS at 5-49 to 5-54; Private Fuel Storage EIS at 5-39; 10 C.F.R. § 51.52, tbl. S-4).

²⁶¹ *Id.*; *see also* 10 C.F.R. §§ 71.97, 73.37 (requiring advanced planning and coordination of spent fuel shipments with State and Tribal officials).

²⁶² Joint Petitioners Appeal at 27. Joint Petitioners also raise a new argument on appeal that the Board's ruling effectively “segments a single project into smaller projects” by “[s]eparating consideration of the transportation component from the storage component,” and thus “defies effective analysis and public understanding as required by NEPA.” *Id.* That argument, which does not account for the evaluation of transportation impacts contained in ER section 4.9, is raised for the first time on appeal and therefore will not be considered. *See South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 5 (2010).

²⁶³ *See, e.g.,* Continued Storage GEIS § 5.16 (evaluating impacts of spent fuel transportation to an away-from-reactor ISFSI based on shipments over a representative route); Private Fuel Storage EIS § 5.7.2 (selecting one of the longest possible routes passing through some of the most populated regions of the country).

7. Joint Petitioners Contention 11: NEPA Requires Significant Security Risk Analysis

Joint Petitioners asserted in proposed Contention 11 that Holtec’s application should include an analysis of the environmental impacts resulting from a terrorist attack on the proposed CISF and on spent nuclear fuel shipments to the CISF.²⁶⁴ The Board found the contention inadmissible based on the policy decision we expressed in *AmerGen Energy*, which was upheld by the United States Court of Appeals for the Third Circuit.²⁶⁵ In *AmerGen Energy*, we held that terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding.²⁶⁶ In *AmerGen Energy*, we specifically declined to follow a contrary ruling from the United States Court of Appeals for the Ninth Circuit for any facility located outside that Circuit.²⁶⁷

The Board found that because the proposed CISF would be in New Mexico, which is not within the Ninth Circuit, no terrorist analysis under NEPA is required.²⁶⁸

On appeal, Joint Petitioners reassert that “the ER should contain an analysis of terrorist attacks as an environmental impact” and cite the Ninth Circuit’s decision that we declined to follow in *AmerGen Energy*.²⁶⁹ But Joint Petitioners do not articulate a reason for us to reconsider our policy here. The Board correctly applied our prior rulings, and we affirm its decision to deny admission of proposed Contention 11.

F. Fasken Motion to Admit New Contention

On August 1, 2019, Fasken filed a motion for leave to file a new contention claiming that Holtec does not control mineral rights beneath the proposed site as represented in its application.²⁷⁰ Fasken bases its contention on a June 19,

²⁶⁴ Joint Petitioners Petition at 70-88. Proposed Contention 11 included twenty-eight “sub-contentions” that the Board found “[fell] short of the Commission’s contention admissibility standards.” LBP-19-4, 89 NRC 448-49. Joint Petitioners did not appeal that ruling.

²⁶⁵ LBP-19-4, 89 NRC 448; see *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *review denied*, *N.J. Dep’t of Env’tl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

²⁶⁶ *AmerGen Energy*, CLI-07-8, 65 NRC at 129.

²⁶⁷ *Id.* at 128-29 (declining to follow *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)).

²⁶⁸ LBP-19-4, 89 NRC at 448 (observing that New Mexico is in the Tenth Circuit).

²⁶⁹ Joint Petitioners Appeal at 28.

²⁷⁰ Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention (Aug. 1, 2019) (Fasken Motion for New Contention).

2019, letter from the State of New Mexico Commissioner of Public Lands to Krishna Singh, President and CEO of Holtec, a copy of which was sent to NRC and served on the parties in this proceeding on July 2, 2019.²⁷¹ Both the Staff and Holtec opposed the motion on various grounds, including that Fasken had failed to file a motion to reopen the proceeding or address the standards for doing so.²⁷² Thereafter, Fasken filed a motion to reopen, but it subsequently withdrew that motion without withdrawing its initial motion for leave to admit a new contention.²⁷³

Although we could determine the admissibility of Fasken's new proposed contention ourselves, we decline to do so in this instance. The Board is the agency's expert in contention admissibility, and typically, the parties have the opportunity for oral argument before the Board on matters of contention admissibility. We therefore remand the contention to the Board for consideration of the contention's admissibility, timeliness, and capacity to meet the reopening standards.

III. CONCLUSION

For the foregoing reasons, we *affirm in part* and *reverse and remand in part* the Board's ruling denying the petitions. We further *remand* to the Board Fasken's new proposed contention and Sierra Club Contention 30 for determination of their admissibility.

²⁷¹ Letter from Stephanie Richard, New Mexico Public Lands Commissioner, to Krishna Singh, President of Holtec International (June 19, 2019) (ML19183A429) (attached to Fasken Motion for New Contention as Ex. 5) (New Mexico Letter).

²⁷² See NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File New Contention (Aug. 26, 2019), at 9-10 (Staff New Contention Response); Holtec International's Answer Opposing Fasken's Late-Filed Motion to File a New Contention (Aug. 26, 2019), at 12-13 (Holtec New Contention Response).

²⁷³ See Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019); Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019); Holtec International's Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 13, 2019).

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of April 2020.

Chairman Svinicki, Dissenting in Part

I join my colleagues' disposition of the many appeals in this proceeding with one exception: the majority's decision to remand portions of Sierra Club's Contentions 15, 16, 17, and 19 (the "groundwater contentions"). Generally, these contentions asserted that Holtec inadequately characterized groundwater on site and therefore the environmental impacts could be greater than acknowledged should the storage canisters become compromised and contaminate the groundwater.¹ However, the Board concluded that challenges to the integrity of the storage canisters effectively sought to litigate our regulations certifying the designs of those canisters and were therefore outside the scope of this proceeding.² The majority does not disturb this finding, but instead remands the limited question of whether these contentions could stand as challenges to Holtec's site groundwater characterization on their own.³

In my view, the Board correctly dismissed the entirety of the groundwater contentions upon concluding that Sierra Club's claim that the canisters could leak was inadmissible. Without that component, the groundwater contentions no longer challenge the discussion of environmental impacts in the application and therefore fail to raise a material, genuine dispute with the application.⁴ While I would certainly disagree with an open-ended remand to the Board on this issue, here the majority has instead focused this remand on the material (although in my view already resolved) issue of whether the challenges to groundwater characterization could impact the analysis of environmental impacts in this proceeding. On balance, however, I find even this narrow remand to be an exercise in elevating form over substance.

¹ Sierra Club Petition at 60-67.

² LBP-19-4, 89 NRC at 404-05.

³ Order at 29.

⁴ 10 C.F.R. § 2.309(f)(1)(iv), (vi).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

**Docket Nos. 50-334-LT
50-412-LT
50-346-LT
50-440-LT**

**FIRSTENERGY NUCLEAR OPERATING
COMPANY and FIRSTENERGY
NUCLEAR GENERATION, LLC
(Beaver Valley Power Station,
Units 1 and 2; Davis-Besse Nuclear
Power Station, Unit 1; Perry
Nuclear Power Plant, Unit 1)**

April 23, 2020

STANDING TO INTERVENE

To intervene as of right in any NRC licensing proceeding, a petitioner must demonstrate standing (i.e., that its “interest may be affected by” the proceeding).

STANDING TO INTERVENE

In assessing whether a petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding, the Commission has long applied judicial concepts of standing. Thus, to demonstrate traditional standing in a license transfer proceeding, a petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or

threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

STANDING TO INTERVENE, ORGANIZATIONAL

An organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene.

STANDING TO INTERVENE, ORGANIZATIONAL

To establish organizational standing, an organization must show that the licensing action would constitute a threat to its organizational interests.

STANDING TO INTERVENE, ORGANIZATIONAL

We do not recognize standing for an organization that seeks to act as a “private attorney general” in order to raise environmental or safety matters that are of general concern.

STANDING TO INTERVENE, ORGANIZATIONAL

A mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to establish that an organization would be harmed by a licensing action.

STANDING TO INTERVENE, REPRESENTATIONAL

To demonstrate representational standing, the organization must show that at least one of its members may be affected by the Commission’s approval of the transfer (such as by the member’s domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf.

STANDING TO INTERVENE, REPRESENTATIONAL

The member of an organization seeking representational standing must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its purpose; and neither the

asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.

STANDING TO INTERVENE, REPRESENTATIONAL

An organization's failure to provide evidence of authorization to represent any of its members' interests in a proceeding is a sufficient basis to reject its bid for representational standing.

INTERVENTION, DISCRETIONARY

We may consider a request for discretionary intervention when at least one petitioner has established standing and at least one admissible contention has been admitted. Where no party has satisfied these conditions, discretionary intervention is not available.

MEMORANDUM AND ORDER

This license transfer proceeding concerns an application filed by FirstEnergy Nuclear Operating Company (FENOC) on behalf of itself and FirstEnergy Nuclear Generation, LLC (FENGen) (collectively, the Applicants).¹ The Applicants seek NRC approval of direct and indirect transfers of the renewed facility operating licenses for Beaver Valley Power Station, Units 1 and 2, and Davis-Besse Nuclear Power Station, Unit 1; the facility operating license for Perry Nuclear Power Plant, Unit 1; and the general licenses for the independent spent fuel storage installations (ISFSIs) associated with each of these plants (collectively, the Facilities).

We consider today the petition for leave to intervene and request for a hearing submitted by the Environmental Law and Policy Center (ELPC). For the reasons

¹ See Application for Order Consenting to Transfer of Licenses (Application), attached to Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Apr. 26, 2019) (Cover Letter). The cover letter, Application, and associated enclosures (referred to in the Application as "Exhibits") can be found at ADAMS accession number ML19116A087. FENOC submitted supplements to the Application on May 31, 2019 (ML19151A531); August 2, 2019 (ML19214A099 (package)); August 29, 2019 (ML19241A461 (package)); September 25, 2019 (two submissions: ML19268A053 and ML19268B132 (package)); and October 17, 2019 (ML19290D432).

discussed below, we find that ELPC has not established standing to intervene. We therefore deny the petition and terminate this proceeding.²

I. BACKGROUND

At the time the Application was filed, FENOC and FENGen were, respectively, the operator and owner of the Facilities. FENGen sold the entire power output of the Facilities to FirstEnergy Solutions Corp. (FES), the parent company of FENOC and FENGen. FES, in turn, sold power to retail and wholesale customers. All three entities — FENOC, FENGen, and FES — were wholly-owned subsidiaries of FirstEnergy Corporation (FE Corp).³

On March 31, 2018, FES, together with FENOC, FENGen, and FES's other subsidiaries, filed voluntary petitions for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Ohio, Eastern Division (Bankruptcy Court).⁴ Shortly thereafter, FES submitted a certification of permanent cessation of operations to the NRC and stated its intention to deactivate all four plants between May 2020 and October 2021.⁵ In July 2019, while the Application was pending, FES reversed its decision to cease operations at Davis-Besse and Perry and withdrew the certification of permanent cessation of operations for those units.⁶ In March 2020, the successor to FES withdrew the certification of permanent cessation of operations for Beaver Valley Power Station, Units 1 and 2.⁷

As described in the Application and supplements, FENOC and FENGen would emerge from bankruptcy as “OpCo” and “OwnerCo,” respectively, which would be wholly-owned subsidiaries of a newly-formed, privately-held com-

² Because of this finding, we need not reach the question of whether ELPC has submitted at least one admissible contention. *See* 10 C.F.R. § 2.309(a) (requiring intervenors to demonstrate standing and submit an admissible contention).

³ Application, Exhibit B.

⁴ Letter from Donald A. Moul, President and Chief Nuclear Officer, FES, to NRC Regional Administrators for Regions I and III (Apr. 2, 2018), at 1-2 (ML18094A661) (April 2018 Letter); Application at 4. FE Corp did not file for Chapter 11 bankruptcy protection. *See* April 2018 Letter at 1-2; Application at 4 (naming entities filing for bankruptcy).

⁵ Letter from Donald A. Moul, President and Chief Nuclear Officer, FES, to NRC Document Control Desk (Apr. 25, 2018), at 1 (ML18115A007). According to this letter, FES intended to permanently cease operations at Davis-Besse by May 31, 2020; at Beaver Valley Unit 1 and Perry by May 31, 2021; and at Beaver Valley Unit 2 by October 31, 2021. *Id.*

⁶ Letter from John W. Judge, President and Chief Executive Officer, FES, to NRC Document Control Desk (July 26, 2019), at 1 (ML19207A097).

⁷ Letter from Darin M. Benyak, Vice President, Energy Harbor Nuclear Corp., to NRC Document Control Desk (Mar. 13, 2020), at 1 (ML20073N415).

pany, “NewHoldCo.”⁸ NewHoldCo would be a legally separate entity from the current parent company, FE Corp.⁹ To effectuate this restructuring, FENOC and FENGen have requested a direct transfer of operating authority for the Facilities from FENOC to OpCo; a direct transfer of ownership of the Facilities from FENGen to OwnerCo; and an indirect transfer of ownership of the Facilities from FE Corp to NewHoldCo.¹⁰ The proposed transfers of control would not result in any physical changes to the Facilities or significant changes to their day-to-day operations.¹¹ In addition, the senior managers at the Facilities and the onsite organizational structures would not be affected by the transfers.¹²

In October 2019, the Bankruptcy Court issued an order confirming the debtors’ reorganization plan, which includes the restructuring and transfers described above.¹³ FENOC and FENGen must obtain NRC approval of the requested license transfers for the reorganization plan to become effective.¹⁴ In December 2019, the NRC Staff issued an order approving the requested transfers and conforming license amendments.¹⁵ The Staff order specifically states that the approval of the license transfers is “subject to the Commission’s authority to rescind, modify, or condition the approved transfers based on the outcome of any post-effectiveness hearing on the license transfer application.”¹⁶

⁸ Application at 5-6; Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Oct. 17, 2019), at 2 (ML19290D432) (October 2019 Letter). The names OpCo, OwnerCo, and NewHoldCo were placeholders for as-yet unnamed companies. Application at 4, 7. The Applicants requested approval of the transfer using these generic names and stated that they would provide updated conforming license pages reflecting the final names when known. October 2019 Letter at 2-3.

⁹ October 2019 Letter at 2.

¹⁰ Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Aug. 2, 2019), Attach. 1 at 1 (ML19214A100).

¹¹ Application at 12.

¹² *Id.*

¹³ Order Confirming the Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (Oct. 16, 2019) (Confirmation Order), attached to October 2019 Letter. The Eighth Amended Joint Plan of Reorganization (Reorganization Plan) is Exhibit A of the Confirmation Order.

¹⁴ Reorganization Plan at 105-06.

¹⁵ FirstEnergy Nuclear Operating Co.; Beaver Valley Power Station, Unit Nos. 1 and 2, and Independent Fuel Storage Installation (ISFSI); Davis-Besse Nuclear Power Station, Unit No. 1 and ISFSI; and Perry Nuclear Power Plant, Unit No. 1 and ISFSI; Direct and Indirect Transfer of Licenses; Order, 84 Fed. Reg. 66,936, 66,937-38 (Dec. 6, 2019) (Staff Order). Under our regulations, the Staff is “expected to promptly issue approval or denial of license transfer requests” even if a hearing has been requested. *See* 10 C.F.R. § 2.1316.

¹⁶ Staff Order, 84 Fed. Reg. at 66,938.

On February 27, 2020, the Applicants emerged from Chapter 11 bankruptcy and implemented the approved plan of reorganization.¹⁷

II. DISCUSSION

A. Standards for Standing

To intervene as of right in any NRC licensing proceeding, a petitioner must demonstrate standing (i.e., that its “interest may be affected by” the proceeding).¹⁸ In assessing whether a petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding, the Commission has long applied judicial concepts of standing.¹⁹ Thus, to demonstrate traditional standing in a license transfer proceeding, a petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.²⁰ The petitioner must specify the facts pertaining to that interest.²¹

An organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene.²² In addressing the

¹⁷ Applicants’ Notification of Emergence from Chapter 11 Bankruptcy (Feb. 27, 2020). On the same day, in accordance with its order approving the license transfer, the Staff issued conforming amendments reflecting that the final legal entity names of New HoldCo, OwnerCo, and OpCo would become Energy Harbor Corp., Energy Harbor Nuclear Generation LLC, and Energy Harbor Nuclear Corp., respectively. See Letter from Bhalchandra K. Vaidya, NRC, to David B. Hamilton, Energy Harbor Nuclear Corp. (Feb. 27, 2020) (ML20030A440) (enclosing conforming amendments); Staff Order, 84 Fed. Reg. at 66,938 (approving conforming amendments).

¹⁸ See Atomic Energy Act of 1954, as amended (AEA), § 189a., 42 U.S.C. § 2239(a); 10 C.F.R. § 2.309(d)(1).

¹⁹ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *accord Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015); *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 322-23 (1999).

²⁰ *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 (2008); *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09 (2007). We have also required petitioners to show that the alleged injury lies arguably within the “zone of interests” protected by the governing statute — here, the AEA. See *Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 408-09; *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 26 (2003).

²¹ *Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 408-09; *Diablo Canyon*, CLI-03-2, 57 NRC at 26.

²² *Palisades*, CLI-07-18, 65 NRC at 411.

injury requirement, the organization must show that the licensing action would constitute “a threat to its organizational interests.”²³ We do not recognize standing for an organization that seeks to act as a “private attorney general” in order to raise environmental or safety matters that are of general concern.²⁴

Alternatively, an organization may obtain standing as a representative of one or more of its individual members.²⁵ To demonstrate representational standing, the organization must show that at least one of its members may be affected by the Commission’s approval of the transfer (such as by the member’s domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf.²⁶ The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action.²⁷

B. Finding on Standing

1. Representational Standing

ELPC has not met the requirements for representational standing. ELPC states that it “has at least one member who qualifies for standing in his or her own right” and makes general assertions concerning injuries its Ohio members would suffer from the license transfer and why such injuries are traceable to the challenged action.²⁸ However, contrary to our long-established requirements, ELPC has neither identified any such member by name nor addressed how a particular member would be affected by the Commission’s approval of the license transfer. In addition, ELPC has provided no evidence, such as a supporting

²³ *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014); *Georgia Tech*, CLI-95-12, 42 NRC at 115; *see also International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

²⁴ *See Palisades*, CLI-08-19, 68 NRC at 269-70; *Palisades*, CLI-07-18, 65 NRC at 411-12; *see also Curators of the University of Missouri (TRUMP-S Project)*, LBP-90-30, 32 NRC 95, 103 (1990) (“[I]ntervenors may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly.”).

²⁵ *Crow Butte*, CLI-14-2, 79 NRC at 18; *see Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 409.

²⁶ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409.

²⁷ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409; *see Private Fuel Storage*, CLI-99-10, 49 NRC at 323.

²⁸ The Environmental Law & Policy Center Petition to Intervene and Hearing Request (July 17, 2019), at 4-5 (Petition).

affidavit, demonstrating that ELPC has been authorized to represent any of its members' interests in this proceeding.²⁹ Our case law on representational standing is clear regarding the need to demonstrate authorization, and ELPC's failure to provide evidence of authorization is on its own a sufficient basis to reject its bid for representational standing.³⁰ In sum, because ELPC has neither identified the members it purports to represent nor provided proof of authorization to represent them, we find that ELPC has not demonstrated representational standing.

2. *Organizational Standing*

ELPC also seeks to intervene in its own right, based on its organizational purposes.³¹ ELPC is a non-profit legal advocacy organization with the mission of "improv[ing] environmental quality and protect[ing] natural resources in the Midwest," including "protecting the Great Lakes and access to safe, clean water" through its work to "avoid risks and injuries to public health, clean water, clean air and landscapes in ways that are good for the environment and good for the economy."³² ELPC also states that it is concerned with protecting public health and safety with respect to nuclear plant operation and decommissioning in the Midwest/Great Lakes region.³³ ELPC explains that it "has been engaged in both nuclear power plant safety and nuclear plant economic issues in many cases over the past 25 years" and points to its involvement in the shutdown and decommissioning of Zion Units 1 and 2.³⁴ These interests, however, are "broad interests shared with many others" and are no different from the "general

²⁹ In support of its Petition, ELPC submitted the Expert Report of Peter A. Bradford. Petition at 6 & Attach. 1 (Bradford Report); The Environmental Law & Policy Center's Reply to Applicant's Answer (Aug. 16, 2019), at 6 (Reply). This report, initially submitted by ELPC in the Applicants' bankruptcy proceeding, is offered solely for the purpose of "provid[ing] context and information on the potential harms to ELPC's interests." Reply at 6. The Bradford Report does not purport to authorize ELPC to act on behalf of its members nor does it supply the essential information we find lacking regarding injuries to any of ELPC's individual members that may be traceable to granting this license transfer application.

³⁰ See *Palisades*, CLI-07-18, 65 NRC at 409-10 ("If an organization does not identify the members it purportedly represents, we cannot 'determine whether the organization actually does represent members who consider that they will be affected by [the licensing action] . . . or rather, [i]s simply seeking the 'vindication of its own value preference.'") (quoting *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-90 (1979)).

³¹ Reply at 1-4.

³² Petition at 4; Reply at 2.

³³ Petition at 4; Reply at 2.

³⁴ Petition at 4; Reply at 2.

environmental and policy interests” we have repeatedly found insufficient to establish standing.³⁵

Acknowledging that “not all proposed nuclear license transfers affect ELPC’s interests,” ELPC asserts that in this case it will suffer a “specific, concrete harm” if the license transfer application is granted.³⁶ ELPC identifies this injury as the potential for radiological harm stemming from the risk of inadequate decommissioning of the Facilities, two of which are located on the shores of Lake Erie, due to the indirect and direct transfers of control the Applicants seek through the license transfer application.³⁷ ELPC specifies that the “increased radiological risk” is attributable to “inadequate decommissioning funding and a failure by the proposed licensee to establish appropriate financial qualifications” as a result of transferring the license from FENOC to a newly formed entity with no financial history, “where decommissioning trust funds continue to remain below NRC requirements.”³⁸ ELPC argues that the potential increase in radiological risk from this licensing action would, in turn, affect ELPC as an organization by “injur[ing] the gains made by ELPC in advancing its interests” in other proceedings in which ELPC participates.³⁹ ELPC points to its contemporaneous participation as a plaintiff in a federal court proceeding in Ohio regarding “remedies to phosphorus pollution causing toxic algae blooms in western Lake Erie.”⁴⁰

These arguments are not sufficient to establish that this license transfer constitutes a “threat to [ELPC’s] organizational interests.”⁴¹ First, to the extent that ELPC claims a direct radiological injury to itself from the license transfer, ELPC has not explained how the license transfer would be expected to threaten a Chicago-based organization.⁴² Second, ELPC has not shown how the posited radiological harm from the license transfer would concretely injure its interests in the phosphorus case or any other proceedings in which it is involved or how it would prevent ELPC from protecting its members’ interests in these other forums. Other than underscoring ELPC’s stated general interest in protecting

³⁵ *Palisades*, CLI-07-18, 65 NRC at 411-12.

³⁶ Reply at 2.

³⁷ *Id.* at 2-3. ELPC also appears to express a concern about radiological harm from the Applicants’ “intention to defer the timing of decommission for about 60 years after shut down by adopting the SAF[]STOR approach.” *Id.* at 3. This latter concern, which is not otherwise referenced in ELPC’s Petition or Reply, is outside the scope of this license transfer proceeding.

³⁸ Petition at 4.

³⁹ Reply at 3.

⁴⁰ *Id.* at 3-4.

⁴¹ *Crow Butte*, CLI-14-2, 79 NRC at 18.

⁴² See Petition at 12 (providing ELPC’s location as Chicago, Illinois); see also *Palisades*, CLI-07-18, 65 NRC at 410 (statement that some of organization’s members live, work, or engage in recreation “adjacent” to or “near” an NRC-licensed facility insufficient for proximity-based standing).

the Great Lakes environment, ELPC has not explained how its involvement in these other proceedings distinguishes its interest in this license transfer proceeding from that of a “private attorney general” raising issues that are of concern to it but that do not affect it directly.⁴³ In short, ELPC has not established that the license transfer at issue in this proceeding would cause harm to itself as an organization.⁴⁴ “[A] mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself” to establish that ELPC would be harmed by the license transfer.⁴⁵

3. *Discretionary Intervention*

ELPC requests that it be granted discretionary intervention because its participation in the associated bankruptcy proceeding and its familiarity with the proposed plan of reorganization would assist the Commission in developing a sound record in this proceeding.⁴⁶ We may consider a request for discretionary intervention when at least one petitioner has established standing and at least one admissible contention has been admitted.⁴⁷ Because no party has satisfied these conditions, discretionary intervention is not available. Therefore, we decline to grant ELPC’s request for discretionary intervention.

⁴³ See *Palisades*, CLI-07-18, 65 NRC at 411. See also *Exelon Generation Co., LLC, and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005) (“It is well-established that mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing”).

⁴⁴ ELPC also argues that “the NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety.” Reply at 3 (citing *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 58 (2005)). But ELPC refers to an Atomic Safety and Licensing Board decision that concerned the Staff’s issuance of an immediately effective order suspending a license for willful failure to make required scheduled payments into a decommissioning trust fund. Such a circumstance is not present here.

⁴⁵ *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). ELPC asserts that the Bradford Report provides context and information on the potential harms it may incur from the licensing action, but it does not cite to any portion of that report to support its claims. Reply at 4. And ELPC does not relate the concerns raised in the report, which was prepared for and submitted in the bankruptcy proceeding, to the injuries it claims to its organizational interests from this license transfer. ELPC has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing. Cf. *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003). We decline to “sift through the parties’ pleadings to uncover and resolve arguments not advanced by the litigants themselves.” *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002) (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)).

⁴⁶ Petition at 6 (citing 10 C.F.R. § 2.309(e)).

⁴⁷ 10 C.F.R. § 2.309(e).

III. CONCLUSION

For the reasons outlined in this decision, we *deny* ELPC's request for hearing and petition to intervene and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of April 2020.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright
Christopher T. Hanson

In the Matter of

Docket No. 52-025

**SOUTHERN NUCLEAR OPERATING
COMPANY, INC.**
**(Vogtle Electric Generating Plant,
Unit 3)**

June 15, 2020

ADJUDICATORY PROCEEDINGS

Petitioners may not use the hearing process to challenge NRC regulations or express generalized grievances with NRC policies.

CONTENTIONS, ADMISSIBILITY; ITAAC HEARING

The contention standards for an ITAAC hearing under 10 C.F.R. § 52.103(b) are based on the NRC's rules of practice in 10 C.F.R. Part 2, primarily Subpart C, with modifications to account for the expedited schedule and specialized nature of hearings on ITAAC.

CONTENTIONS, ADMISSIBILITY; ITAAC HEARING

In an ITAAC hearing, the petitioner is required to contend and support with a *prima facie* showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational

consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

PLEADINGS; PRO SE LITIGANTS

The Commission holds *pro se* litigants to less rigid pleading standards than parties who are represented by counsel so that parties with a clear, but imperfectly stated, interest in the proceeding are not excluded. But *pro se* petitioners are still expected to comply with procedural rules.

STANDING TO INTERVENE

Petitioners have the burden of demonstrating that standing requirements are met, and they must address the requirements in their intervention petitions.

MEMORANDUM AND ORDER

Today we address the petition to intervene and request for a hearing submitted by Nuclear Watch South regarding the conformance of Southern Nuclear Operating Company, Inc. (Southern) with the acceptance criteria in the combined license for Vogtle Electric Generating Plant, Unit 3.¹ For the reasons discussed below, we deny the petition to intervene and request for hearing.

I. BACKGROUND

The NRC issued a combined license to Southern for the construction and operation of Vogtle Unit 3, a Westinghouse Advanced Passive 1000 (AP1000) pressurized water reactor, in 2012.² Combined licenses include inspections, tests, analyses, and acceptance criteria (ITAAC) to verify that the facility has been constructed and will be operated consistent with the license; the Atomic Energy Act of 1954, as amended (AEA); and NRC rules and regulations.³ The inspections, tests, and analyses are the means of verification and the acceptance

¹ Nuclear Watch South Petition for Public Hearing (Apr. 20, 2020) (Petition).

² Combined License Vogtle Electric Generating Plant Unit 3, Southern Nuclear Operating Company, Inc., License No. NPF-91 (Feb. 10, 2012) (ADAMS accession no. ML14100A106).

³ Final Procedures for Conducting Hearings on Conformance With the Acceptance Criteria in Combined Licenses, 81 Fed. Reg. 43,266, 42,267 (July 1, 2016) (Final Procedures for ITAAC Hearings); 10 C.F.R. § 52.80(a).

criteria are the standards that must be satisfied.⁴ Before operation may begin, the NRC must find that all acceptance criteria in the ITAAC are satisfied.⁵ This finding will be based on NRC review of licensee ITAAC notifications and NRC inspections. After the NRC finds that the acceptance criteria are met, the ITAAC no longer constitute regulatory requirements for the licensee.⁶

For every ITAAC, the licensee must submit an ITAAC closure notification to the NRC explaining the basis for concluding that the inspections, tests, and analyses have been performed and the acceptance criteria have been met.⁷ If an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue.⁸ Licensees must also submit an uncompleted ITAAC notification to the NRC at least 225 days before scheduled initial fuel load.⁹ Based on its early submission of individual uncompleted ITAAC notifications, Southern submitted the notification for all uncompleted ITAAC, required under section 52.99(c)(3), 315 days prior to scheduled fuel load for Vogtle Unit 3.¹⁰ This notification describes the licensee's plans to complete the ITAAC that are still incomplete.¹¹ When these ITAAC are completed, the licensee must submit an ITAAC closure notification.¹²

In January 2020, Southern informed the NRC that its scheduled date for initial fuel load into the reactor for Vogtle Unit 3 is November 23, 2020.¹³ The NRC published in the *Federal Register* a notice of intended operation and opportunity for hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.¹⁴ In response, Nuclear

⁴ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 42,267.

⁵ AEA § 185b.; 10 C.F.R. § 52.103(g).

⁶ 10 C.F.R. § 52.103(h); Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,278.

⁷ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,267.

⁸ *Id.*; 10 C.F.R. § 52.99(c)(2).

⁹ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,267; 10 C.F.R. § 52.99(c)(3).

¹⁰ Letter from Michael J. Yox, Southern, to NRC Document Control Desk (Jan. 13, 2020) (ML-20013F132). This notice listed the 280 ITAAC that had not been closed as of the submittal date with references to the previously submitted uncompleted ITAAC notification for each. Licensees' Answer to Nuclear Watch South's Petition for Public Hearing (May 15, 2020), at 6 (Southern Answer).

¹¹ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,267; 10 C.F.R. § 52.99(c)(3).

¹² Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,267; 10 C.F.R. § 52.99(c)(1), (c)(4).

¹³ Vogtle Electric Generating Plant, Unit 3; Hearing Opportunity Associated with Inspections, Tests, Analyses, and Acceptance Criteria, 85 Fed. Reg. 8030, 8030 (Feb. 12, 2020) (Hearing Opportunity).

¹⁴ *Id.* at 8031.

Watch South submitted a hearing request on April 20, 2020.¹⁵ The Staff and Southern filed answers opposing the request.¹⁶

II. DISCUSSION

A. ITAAC Hearing Procedures

The contention standards for an ITAAC hearing under 10 C.F.R. § 52.103(b) are based on the NRC's rules of practice in 10 C.F.R. Part 2, primarily Subpart C, with modifications to account for the expedited schedule and specialized nature of hearings on ITAAC.¹⁷ Contentions must meet the requirements of 10 C.F.R. § 2.309(f)(1)(i) through (v) and 10 C.F.R. § 2.309(f)(1)(vii).¹⁸ These requirements are strict by design and intended to ensure that adjudicatory proceedings address substantive issues that are rooted in a "reasonably specific factual or legal basis."¹⁹ They require a petitioner to explain the basis for each contention and provide supporting facts or expert opinion on which the petitioner intends to rely. To be admissible, each contention must also fall within the scope of the proceeding and be material to the findings that the NRC must make.

In an ITAAC hearing, the petitioner is required to contend and support with a *prima facie* showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable

¹⁵ Nuclear Watch South received an extension of the time to file a hearing request. Order of the Secretary (Apr. 9, 2020) (unpublished). Along with the petition, Nuclear Watch South filed a declaration from a member, Susan Bloomfield; a declaration from its expert, Arthur Frank Higley; and a curriculum vitae for Mr. Higley.

¹⁶ NRC Staff Answer to Petition for Public Hearing from Nuclear Watch South (May 14, 2020) (Staff Answer). Southern filed an answer on behalf of the licensed owners, Georgia Power Company; Oglethorpe Power Corporation; MEAG Power SPVM, LLC; MEAG Power SPVJ, LLC; MEAG Power SPVP, LLC; and the City of Dalton, Georgia. Southern Answer at 2.

¹⁷ Hearing Opportunity, 85 Fed. Reg. at 8036, Attach., Order Imposing Additional Procedures for ITAAC Hearings Before a Commission Ruling on the Hearing Request, 85 Fed. Reg. at 8037 (Additional Procedures Order).

¹⁸ *Id.* The requirements of 10 C.F.R. § 2.309(f)(1)(vi) do not apply to this proceeding. *Id.*

¹⁹ See *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 504 (2015) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (citation omitted)). The NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. § 52.103(g) that the acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues. Hearing Opportunity, 85 Fed. Reg. at 8033 & n.6 (citing 10 C.F.R. § 51.108).

assurance of adequate protection of the public health and safety.²⁰ Petitioners must also identify the specific portion of the section 52.99(c) report that they believe is inaccurate, incorrect, or incomplete.²¹ Contentions that challenge the sufficiency of the ITAAC themselves are not admissible because the ITAAC have already been approved by the NRC in connection with the issuance of the combined license.²²

The procedures contemplate the possibility that the licensee's section 52.99(c) notification is incomplete and precludes the petitioner from making the necessary *prima facie* showing with respect to one or more of the applicable requirements of 10 C.F.R. § 2.309(f)(1). In such a case, before submitting a claim of incompleteness, the petitioner must consult with the licensee regarding access to the purportedly missing information.²³ Consultation must be initiated within twenty-one days of the publication of the notice of intended operation for publicly available ITAAC notifications.²⁴ The petitioner must submit a certification by its attorney or representative that the petitioner complied with the timeliness requirements for consultation and made a sincere effort to meaningfully engage in consultation with the licensee on access to the purportedly missing information prior to filing the claim of incompleteness.²⁵

Any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness in accordance with 10 C.F.R. § 2.304(d).²⁶ If declarations are not signed, they will be considered but not given the weight of an eyewitness or expert witness with respect to satisfying the *prima facie* showing required by 10 C.F.R. § 2.309(f)(1)(vii).²⁷ This provision ensures that a position that is purportedly

²⁰ 10 C.F.R. § 2.309(f)(1)(i), (vii); *see also* AEA § 189a.(1)(B); Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,277. The NRC's definition of "*prima facie*" is consistent with other legal authorities: "[*prima facie*] evidence must be legally sufficient to establish a fact or case unless disproved." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981) (public version of ALAB-653 released as an attachment to *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-19, 16 NRC 53 (1982)).

²¹ 10 C.F.R. § 2.309(f)(1)(vii).

²² Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,367 n.3 (Aug. 28, 2007) (2007 Part 52 Rule). Challenges to the ITAAC may be raised through other means, such as petitions under 10 C.F.R. §§ 2.206, 2.802, or 52.103(f).

²³ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,283.

²⁴ Additional Procedures Order, 85 Fed. Reg. at 8037.

²⁵ *Id.* at 8038.

²⁶ *Id.* at 8037.

²⁷ *Id.*

supported by an eyewitness or expert witness is actually supported by that witness.²⁸

B. Nuclear Watch South Petition

To be granted a hearing, Nuclear Watch South must demonstrate standing and include an admissible contention in its hearing request. Nuclear Watch South's petition does not specifically address the regulatory standards for contention admissibility or standing. Given that it is a *pro se* petitioner, we hold Nuclear Watch South to less rigid pleading standards than parties who are represented by counsel so that parties with a clear, but imperfectly stated, interest in the proceeding are not excluded.²⁹ Nevertheless, *pro se* petitioners are still expected to comply with our procedural rules.³⁰

As an initial matter, we note that in its petition Nuclear Watch South includes a "Background" section addressing asserted construction and ITAAC program problems at Vogtle.³¹ For the most part, Nuclear Watch South does not tie the assertions in this section to its contention or either of the ITAAC mentioned in its contention.³² Nuclear Watch South offers this background to support its position that there must be "rigorous review of Southern Nuclear's Notice of Intended Operation of Vogtle Unit 3," and we will consider it in that manner.³³

Nuclear Watch South characterizes its contention as one of omission and argues that Southern's uncompleted ITAAC notification "is grossly incomplete."³⁴ Nuclear Watch South argues that the notification "does not contain sufficient detail for the NRC to find that the acceptance criteria in the [combined license] are, or will be, met."³⁵ The contention specifically challenges two ITAAC: (1) No. 3.3.00.02a.ia.a, Index No. 760, which addresses aspects of the nuclear island, including the concrete walls; and (2) No. 3.3.00.02a.i.b, Index No. 761,

²⁸ *Id.*

²⁹ See *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 192 (2010).

³⁰ *South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010).

³¹ Petition at 2-5.

³² ITAAC Index No. 760 is mentioned once in this section. Nuclear Watch South claims that the last civil engineer was laid off in 2018, and that it is unclear how ITAAC related to concrete were completed after that departure. Petition at 4. Nuclear Watch South further asserts, without support, that "[j]udging by the information deficiencies in ITAAC #760, [Southern has] been unable to properly address the concrete ITAAC for the nuclear island." *Id.* at 4.

³³ Petition at 5.

³⁴ *Id.* at 1.

³⁵ *Id.* at 5 (citing 10 C.F.R. § 52.99(c)(3)).

which addresses the shield building.³⁶ These ITAAC generally serve to ensure that the as-built containment internal structures and shield building conform to the specified design, codes, and standards.³⁷ Because we are not certain whether Nuclear Watch South — a *pro se* petitioner — intended its filing to be treated as a claim of incompleteness or a freestanding contention, we assess whether the filing meets the standards for either below.

1. *Claim of Incompleteness*

Southern submitted the uncompleted ITAAC notifications for ITAAC 760 and 761 in November 2019.³⁸ Under our rules, “If a requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.”³⁹ “In determining whether a claim of incompleteness is valid, the Commission will consider all of the information available to the petitioner . . . [and] whether the participants have discharged their consultation obligations in good faith.”⁴⁰ Claims of incompleteness must include a demonstration that the allegedly missing information is reasonably calculated to support a *prima facie* showing.⁴¹ Petitioners must provide an adequately supported showing that the section 52.99(c) report fails to include information required by that section.⁴²

Nuclear Watch South has not demonstrated that it consulted with Southern before filing its petition.⁴³ Additionally, Nuclear Watch South does not show that the purportedly missing information is required by section 52.99(c) or indicate how that information is reasonably calculated to support a *prima facie* showing. Further, Nuclear Watch South was required to satisfy the other applicable elements of 10 C.F.R. § 2.309(f)(1).⁴⁴ As discussed below, the Petition does not

³⁶ *Id.* at 7, 9.

³⁷ Southern Answer at 7.

³⁸ Letter from Michael J. Yox, Southern, to NRC Document Control Desk (Nov. 22, 2019) (ML-19326C865) (Uncompleted ITAAC Notification (UIN) for Index No. 760); Letter from Michael J. Yox, Southern, to NRC Document Control Desk (Nov. 22, 2019) (ML19326B992) (UIN for Index No. 761).

³⁹ 10 C.F.R. § 2.309(f)(1)(vii).

⁴⁰ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,270.

⁴¹ *Id.* at 43,271.

⁴² *Id.*

⁴³ Nuclear Watch South does not discuss the consultation requirement in its Petition, and Southern certified that Nuclear Watch South did not contact Southern in relation to its Petition. Southern Answer, Attach., Certification Regarding Consultation.

⁴⁴ Hearing Opportunity, 85 Fed. Reg. at 8033.

satisfy the contention admissibility requirements or address how Nuclear Watch South's claim of incompleteness prevents it from making the required showings. Therefore, Nuclear Watch South does not raise a valid claim of incompleteness.

2. *Contention of Omission*

Uncompleted ITAAC notifications must include a description of the specific procedures and analytical methods that will be used for performing the prescribed inspections, tests, and analyses and determining that the prescribed acceptance criteria are met.⁴⁵ In the Final Procedures for ITAAC Hearings, we stated that we “expect[] that any contentions submitted by prospective parties regarding uncompleted ITAAC would focus on any inadequacies of the specific procedures and analytical methods described by the licensee” in its uncompleted ITAAC notification.⁴⁶ Nuclear Watch South has not focused on the specific procedures and analytical methods described in the uncompleted ITAAC notifications.

The overarching theme of Nuclear Watch South's contention is that Southern has not provided “sufficient detail for the NRC to find that the acceptance criteria in the [combined license] are, or will be, met.”⁴⁷ While we acknowledged that “a purported incompleteness in the [section] 52.99(c) notification might be the basis for a petitioner's *prima facie* showing,” the petitioner must still make that *prima facie* showing.⁴⁸ Nuclear Watch South did not address the specific portion of the notification that it believes is incomplete or the specific operational consequences of the claimed nonconformance with acceptance criteria.⁴⁹ Therefore, the Petition fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vii). For this reason, Nuclear Watch South's hearing request should not be granted. Nevertheless, we consider its claims in more detail below and conclude that none of the claims, either separately or taken together, satisfy the 10 C.F.R. § 2.309(f)(1) admissibility criteria applicable to this proceeding.

a. *Impermissible Challenges to NRC Rules and Procedures*

Nuclear Watch South claims that Southern submitted “flagrantly incomplete” uncompleted ITAAC notifications instead of ITAAC closure notifications.⁵⁰ This

⁴⁵ 10 C.F.R. § 52.99(c)(3).

⁴⁶ Final Procedures for ITAAC Hearings, 81 Fed. Reg. at 43,267 (quoting 2007 Part 52 Rule, 72 Fed. Reg. at 49,367).

⁴⁷ Petition at 5.

⁴⁸ Hearing Opportunity, 85 Fed. Reg. at 8033 n.7.

⁴⁹ *Id.* at 8033.

⁵⁰ Petition at 6.

claim essentially challenges the rules allowing submission of uncompleted ITAAC notifications; therefore, it is outside the scope of this proceeding.⁵¹ Section 52.99(c)(3) specifically provides for the filing of uncompleted ITAAC notifications; sections 52.103 and 2.309(f)(1) contemplate hearings on a facility under construction; and the Hearing Opportunity and Additional Procedures Order for this proceeding address uncompleted ITAAC notifications. Petitioners may not use our hearing process to challenge NRC regulations or express generalized grievances with NRC policies.⁵²

To the extent that Nuclear Watch South's claim about Southern's failure to conduct nondestructive testing challenges specific procedures and analytical methods established by the ITAAC, it is a challenge to the approved ITAAC itself and should have been raised earlier.⁵³ The sections of the Vogtle licensing basis that describe the construction inspection activities for the containment internal structures and shield building were reviewed and approved by the NRC in issuing the AP1000 Design Control Document and incorporated by reference into the Vogtle combined license.⁵⁴ The activities described therein are resolved with finality and are not subject to challenge in an ITAAC closure proceeding.⁵⁵

With respect to the level of detail, the uncompleted ITAAC notifications for ITAAC 760 and 761 follow the generic guidance of what constitutes sufficient information as well as the organization of the templates in NEI 08-01, which the Staff endorsed in Regulatory Guide 1.215.⁵⁶ Like the NEI 08-01 templates, the notifications for ITAAC 760 and 761 quote the design commitment and ITAAC, provide an ITAAC completion description, list and address the status of ITAAC findings, provide a list of references that will be available for NRC review at the site, and attach tables referenced by the ITAAC.⁵⁷ In particular, the ITAAC completion descriptions state the relevant design basis loads, describe the basic

⁵¹ 10 C.F.R. § 2.309(f)(1)(iii).

⁵² 10 C.F.R. § 2.335; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001).

⁵³ Petition at 8-9.

⁵⁴ Southern Answer at 11 (citing "Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design," (Initial Report), NUREG-1793 (Sept. 2004), §§ 3.7 and 3.8; "Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design," NUREG-1793, Supplement 2 (Sept. 2011), §§ 3.7 and 3.8; "Final Safety Evaluation Report for Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4," NUREG-2124 (Aug. 2011), §§ 3.7 and 3.8).

⁵⁵ See 10 C.F.R. §§ 2.335, 52.63, 52.98, 52.103(f); *id.* pt. 52, app. D, § VI.B; Final ITAAC Procedures, 81 Fed. Reg. at 43,277 n.10.

⁵⁶ Nuclear Energy Institute, "Industry Guideline for the ITAAC Closure Process Under 10 CFR Part 52," NEI 08-01, rev. 5 (corrected) (June 2014), at 29-31, app. D, app. E (ML14182A160) (NEI 08-01); "Guidance for ITAAC Closure Under 10 CFR Part 52," Regulatory Guide 1.215, rev. 2 (July 2015), at 2 (ML15105A447) (Regulatory Guide 1.215).

⁵⁷ Compare UIN 760, Encl.; UIN 761, Encl. with NEI 08-01, app. E-2.

completion steps, and reference specific sections of the Updated Final Safety Analysis Report for procedures, analyses methods, and criteria for completion of the ITAAC.⁵⁸

NEI 08-01 has a specific example for the ITAAC completion notification for ITAAC 760, and Southern's notification mirrors the template.⁵⁹ In Regulatory Guide 1.215, the Staff noted that NEI 08-01 had been revised to update the format of uncompleted ITAAC notifications to better match the format of ITAAC closure notifications, which makes it easier for readers to compare an uncompleted ITAAC notification with a later ITAAC closure notification on the same ITAAC.⁶⁰ The Staff "accepted NEI's proposal to use ITAAC closure notification examples to inform the content expectations for uncompleted ITAAC notifications because the revised and improved ITAAC closure notification examples meet the 'specific procedures and analytical methods' standard for uncompleted ITAAC notifications."⁶¹

Nuclear Watch South claims that the principal closure documents such as test reports, completed procedures, and completed analyses are missing from the notification.⁶² As explained in NEI 08-01, principal closure documents are cited in the ITAAC Determination Basis, which is part of the ITAAC closure notification and directly support the conclusion that acceptance criteria are met.⁶³ Accordingly, we would not expect the uncompleted ITAAC notifications for ITAAC 760 and 761 to include principal closure documents. Further, when these documents are complete, licensees are not required to submit them to the NRC; rather, licensees must submit "sufficient information" to support closure of the ITAAC.⁶⁴ NEI 08-01 provides that the principal closure documents should be available for NRC inspection at the site.⁶⁵

b. Failure to Meet Section 2.309(f)(1) Requirements

Section 2.309(f)(1)(v) requires petitioners to state the alleged facts or expert

⁵⁸ UIN 760, Encl. at 2-3; UIN 761, Encl. at 2-3.

⁵⁹ Compare UIN 760, Encl. with NEI 08-01, app. D-9. There is a difference in scope in that Southern also discusses radiation shielding. In addition, there is a difference in headings; in lieu of "ITAAC Determination Basis," Southern uses "ITAAC Completion Description" to reflect the difference between an ITAAC closure notification and an uncompleted ITAAC notification.

⁶⁰ Regulatory Guide 1.215 at 2.

⁶¹ *Id.* at 3.

⁶² Petition at 6.

⁶³ NEI 08-01 at 5.

⁶⁴ 2007 Part 52 Rule, 72 Fed. Reg. at 49,450 (stating that the "sufficient information" requirement for uncompleted ITAAC notifications "requires, at a minimum, a summary description of the bases for the licensee's conclusion" that the ITAAC will be successfully completed).

⁶⁵ NEI 08-01 at 27-28.

opinions supporting its position with references to the specific sources and documents on which the petitioner intends to rely to support its position. Instead of referencing a detailed affidavit of an expert, the Petition references Mr. Higley's affidavit, which states that he assisted Nuclear Watch South in the preparation of the contentions, that the factual statements in the Petition are true and correct to the best of his knowledge, and that the opinions in the Petition are based on his professional judgment.⁶⁶ We have no reason to doubt Mr. Higley's involvement in or endorsement of the statements in the Petition. However, an expert opinion that states a conclusion without providing a reasoned basis or explanation for that conclusion does not allow us to assess the merits of that opinion.⁶⁷ Mr. Higley's work on the Vogtle project did not begin until October 2016. The Petition discusses events that occurred before that time, but neither the Petition nor the affidavit contains details as to the bases of the assertions in the Petition.⁶⁸ As such, we find that the section 2.309(f)(1)(v) requirement is not met.

With respect to the *prima facie* showing required by 10 C.F.R. § 2.309(f)(1)(vii), the Petition discusses potential problems during concrete placement that might lead to nonconformance with ITAAC and assertions that Vogtle Unit 3 is "risky" and that "[f]ailure to prove that the structure is built according to the design may result in catastrophic radiological exposure to the environment and public."⁶⁹ However, these are conclusory and speculative claims that are insufficient to make the required *prima facie* showing related to "specific operational consequences of nonconformance [that] would be contrary to providing reasonable assurance of adequate protection of the public health and safety."⁷⁰

In addition, Nuclear Watch South argues that Southern's notifications are confusing because they include information about Unit 4.⁷¹ As Nuclear Watch South has not offered any specific reason why this practice would be potentially confusing, we find that this claim does not support contention admissibility. Further, because the uncompleted ITAAC notifications for ITAAC 760 and 761 address the same requirements for AP1000 structures described by the Updated Final Safety Analysis Report common to Units 3 and 4, we find nothing im-

⁶⁶ Petition, Attach., Declaration of Arthur Frank Higley.

⁶⁷ *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181 (1998)).

⁶⁸ *See id.* (rejecting the view that conclusory statements by an expert support contention admissibility).

⁶⁹ Petition at 2, 8-10.

⁷⁰ 10 C.F.R. § 2.309(f)(1)(vii).

⁷¹ Petition at 7, 9.

permissible with Southern's decision to consolidate the uncompleted ITAAC notifications for Units 3 and 4.

With respect to the lack of references to inspection reports or historical licensing documents in the uncompleted ITAAC notifications, Nuclear Watch South has not explained why the lack of such references is a violation of a requirement or reveals a problem with Southern's closure methodology. For example, Nuclear Watch South points out that the findings for ITAAC 760 listed in Southern's notification and in the Staff's ITAAC Review Status Report do not match.⁷² As a general matter, the ITAAC Review Status Report lists construction and vendor inspection reports and does not separately list ITAAC findings.⁷³ If an NRC inspection does not result in an issue with a finding, then the inspection report will not document an ITAAC finding.⁷⁴ Southern's notifications list, on the other hand, documents closing ITAAC findings, not the original inspection reports identifying the issue. Thus, it is not unexpected that the ITAAC Review Status Report would list more inspection reports than the number of documents under the ITAAC findings section in Southern's notifications.⁷⁵ In light of the differences between what the Staff's report and Southern's notifications are designed to show and the failure to connect any inconsistencies between these documents to a deficiency with Southern's closure methodology, Nuclear Watch South's argument does support contention admissibility.⁷⁶

Nuclear Watch South further takes issue with the references to "numerous large documents without specificity as to page number" and "reports that do not exist."⁷⁷ With respect to the lack of page numbers, Nuclear Watch South has not pointed to specific documents or cited any specific consequences. The "reports that do not exist" appear to be references to "As-Built Summary Report[s]," which, according to the Staff, would not be finalized until the relevant ITAAC are completed.⁷⁸ As with the principal closure documents discussed earlier, there is no requirement for the licensee to submit these documents with the ITAAC

⁷² *Id.* at 7.

⁷³ Staff Answer at 22. "An ITAAC finding is an NRC inspection finding 'that is associated with a specific ITAAC and is material to the ITAAC acceptance criteria.'" *Id.* (citing NRC Inspection Manual Chapter 2506: Construction Reactor Oversight Process General Guidance and Basis Document, at 11 (Feb. 19, 2020) (ML20029E947)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ The Staff inadvertently failed to include several documents closing ITAAC findings in the Staff's ITAAC Review Status Report. Staff Answer at 23 & n.94. The Staff has since updated its report to include the missing documents. *Id.* at 23 n.94. Nevertheless, Southern's notification addressed these findings, and proposed contentions must focus on the licensee's ITAAC notifications. Any deficiencies in the Staff's review are outside the scope of the proceeding.

⁷⁷ Petition at 7, 9.

⁷⁸ Staff Answer at 20.

completion notification. The relevant regulatory requirement is that the notification “must provide sufficient information to demonstrate that the prescribed inspections, tests, or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met.”⁷⁹ We see no reason to believe that this standard has not been satisfied.

Nuclear Watch South also claims that LAR-19-005R1 should have been included.⁸⁰ The Staff granted this license amendment request when issuing license amendment numbers 167 and 165 for Vogtle Units 3 and 4, respectively.⁸¹ These license amendments were approved before the uncompleted ITAAC notifications were submitted and are reflected in those notifications.⁸² Nuclear Watch South has not shown how the failure to include the license amendment request is material to the findings that the NRC must make or how it demonstrates that the acceptance criteria will not be met.

In summary, Nuclear Watch South asserts that Southern’s uncompleted ITAAC notifications lack sufficient detail for a petitioner or the NRC to meaningfully review them. But the Petition does not point to any required information that is missing or assert any inadequacies of the specific procedures and analytical methods described by the licensee. While the Petition includes an affidavit from an expert, we do not know the bases for the conclusory statements made in the Petition. Thus, the Petition does not make the required *prima facie* showing that an acceptance criterion will not be met and result in specific operational consequences that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

3. *Standing of Nuclear Watch South*

Nuclear Watch South also would need to demonstrate standing to be granted a hearing. However, Nuclear Watch South does not address standing in its Petition. Under section 2.309(d)(1) and the Additional Procedures Order, the hearing request must state (1) the name, address, and telephone number of the petitioner; (2) the nature of the petitioner’s right under the AEA 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 of

⁷⁹ 10 C.F.R. § 52.99(c)(3).

⁸⁰ Petition at 8-9.

⁸¹ Staff Answer at 21 n.87 (citing Letter from William Gleaves, NRC, to Brian H. Whitley, Southern (Nov. 15, 2019) (ML19164A264)).

⁸² Southern Answer at 14 n.54; UIN 760, Encl. at 4; UIN 761, Encl. at 4. Our regulations allow combined license applicants to reference information previously filed with the NRC if the references are clear and specific. 10 C.F.R. § 52.8(b). Nuclear Watch South does not raise any reason, and we do not see any, that this practice should not be acceptable for ITAAC notifications.

any decision or order that may be issued in the proceeding on the petitioner's interest. In addition, an organization seeking to represent its members must show that at least one member has standing and has authorized the organization to represent her and to request a hearing on her behalf. Further, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action.

While we will construe the hearing request in the petitioner's favor, the petitioner has the burden of demonstrating that the standing requirements are met.⁸³ We find that Nuclear Watch South has not met its burden here, as it does not address standing in its Petition.

III. CONCLUSION

For the reasons discussed above, we *deny* Nuclear Watch South's request for a hearing and petition to intervene and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of June 2020.

⁸³ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of

Docket No. 72-1051-ISFSI
(ASLBP No. 18-958-01-ISFSI-BD01)

HOLTEC INTERNATIONAL
(HI-STORE Consolidated Interim
Storage Facility)

June 18, 2020

This proceeding concerns requests for a hearing on a license application by Holtec International to construct and operate a consolidated interim storage facility for spent nuclear fuel in Lea County, New Mexico. The Commission substantially affirmed the Board's rulings in LBP-19-4, but remanded for further consideration four contentions (Sierra Club Contentions 15, 16, 17, and 19) and two contentions that were proffered after the Board terminated this proceeding (Sierra Club Contention 30 and Fasken Land and Minerals Ltd. and Permian Basin Land and Royalty Owners (Fasken) Contention 2). The Board determined that Sierra Club Contentions 15, 16, 17, and 19 are not admissible. The Board denied Sierra Club's motion to reopen the record. The Board also denied Fasken's motion for leave to file Fasken Contention 2 as originally submitted.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL)

In its Environmental Report, the petitioner must describe the affected environment and discuss environmental impacts in proportion to their significance.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

Merely asking questions does not raise a genuine dispute with a license application.

RULES OF PRACTICE: REOPENING OF RECORD

To reopen a closed record, a petitioner must file a motion demonstrating that its new contention (1) is timely; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The petitioner must attach an affidavit that separately addresses each of these criteria, with a specific explanation of why each criterion has been satisfied.

RULES OF PRACTICE: MOTIONS TO REOPEN THE RECORD

The Commission considers reopening a closed record to be an extraordinary action, and places an intentionally heavy burden on parties seeking to reopen the record.

RULES OF PRACTICE: AMENDMENT OF CONTENTIONS

A petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so. To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and (3) the contention has been submitted in a timely fashion after the new information on which it is based becomes available.

MEMORANDUM AND ORDER
(Ruling on Remanded Contentions and Denying Motion to Reopen)

This proceeding concerns requests for a hearing on a license application by Holtec International (Holtec) to construct and operate a consolidated interim storage facility for spent nuclear fuel in Lea County, New Mexico. The factual background and prior proceedings before this Licensing Board are set forth in

our Memorandum and Order of May 7, 2019, in which the Board denied all hearing requests.¹

On April 23, 2020, in response to petitioners' appeals, the Commission substantially affirmed the Board's rulings in LBP-19-4, but reversed in part and remanded for further consideration four contentions (Sierra Club Contentions 15, 16, 17, and 19).² Also, the Commission remanded, for the Board's ruling on admissibility, two contentions that were proffered several months after we had initially terminated this proceeding at the Licensing Board level (Sierra Club Contention 30 and Fasken Land and Minerals Ltd. and Permian Basin Land and Royalty Owners (Fasken) Contention 2).³

On May 4, 2020, Sierra Club moved to reopen the record to allow consideration of its Contention 30.⁴ Sierra Club asserts that, in CLI-20-4, the Commission "implicitly rejected" arguments that it should have moved to reopen the record when it initially proffered Sierra Club Contention 30 in October 2019.⁵

On May 11, 2020, Fasken moved to reopen the record to allow consideration of an amended version of Fasken Contention 2 that is based on the NRC Staff's March 2020 Draft Environmental Impact Statement.⁶

In this Order, on further consideration, the Board determines that Sierra Club Contentions 15, 16, 17, and 19 are not admissible. We deny Sierra Club's motion to reopen the record, and we also deny Sierra Club's motion to late-file Sierra Club Contention 30 for separate and independent reasons. We deny Fasken's motion for leave to file Fasken Contention 2 as originally submitted.

The Board will address Fasken's motion to amend Fasken Contention 2, and the associated motion to reopen the record, in a subsequent Order.

I. SIERRA CLUB CONTENTIONS 15, 16, 17, AND 19

In CLI-20-4, the Commission determined that Sierra Club Contentions 15, 16, 17, and 19 all appear to raise claims about the hydrogeologic characterization of the site for Holtec's proposed facility that are independent of Sierra Club's claim that leaks from the facility would contaminate groundwater.⁷ (The Commission agreed that concerns about leaks from spent fuel storage containers that are

¹ LBP-19-4, 89 NRC 353, 358 (2019).

² CLI-20-4, 91 NRC 167, 187-91 (2020).

³ *Id.* at 172-73, 210-11.

⁴ Sierra Club's Motion to Reopen the Record (May 4, 2020) at 1-2.

⁵ *Id.* at 3.

⁶ Fasken Motion to Reopen the Record (May 11, 2020) at 1; Fasken Motion for Leave to File Amended Contention No. 2 (May 11, 2020) at 1.

⁷ CLI-20-4, 91 NRC at 190.

separately approved and licensed by the NRC may not be adjudicated in this proceeding.⁸) The Commission therefore remanded these four contentions for the Board’s further consideration of their admissibility “[w]ithin the context of the need to determine whether the groundwater concerns would affect the ultimate discussion of environmental impacts.”⁹

Under 10 C.F.R. § 51.45(b), Holtec’s Environmental Report must describe the affected environment and discuss environmental impacts “in proportion to their significance.”¹⁰ As explained *infra*, we conclude that Sierra Club’s contentions do not set forth any admissible challenge to Holtec’s site characterization. Moreover, in light of the required assumption that Holtec’s NRC-approved storage containers will not leak, Sierra Club fails to show why Holtec’s Environmental Report must address hydrogeologic issues in any more detail.

A. Sierra Club Contention 15

Sierra Club Contention 15 stated:

The [Environmental Report] fails to adequately determine whether shallow groundwater exists at the site of the proposed [consolidated interim storage] facility. It is important to make this determination in order to assess the impact of a radioactive leak from the [consolidated interim storage] facility on the groundwater.¹¹

Insofar as Sierra Club Contention 15 purports to challenge Holtec’s site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec’s ultimate discussion of environmental impacts.

As Holtec points out,¹² Sierra Club Contention 15 and the accompanying declaration of George Rice fail to set forth an admissible claim that Holtec’s discussion of groundwater is inadequate. As explained in Holtec’s Environmental Report, pursuant to Holtec’s Radiological Environmental Monitoring Program samples of media and effluents, including gases and vapor, air particulates, soil,

⁸ *Id.* at 207.

⁹ *Id.* at 191.

¹⁰ 10 C.F.R. § 51.45(b)(1).

¹¹ Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) at 60 [hereinafter Sierra Club Pet.].

¹² Holtec International’s Answer Opposing Sierra Club’s Petition to Intervene and Request for Adjudicatory Hearing on Holtec International’s HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018) at 80-81 [hereinafter Holtec’s Answer Opposing Sierra Club’s Petition to Intervene].

sediment, fauna, vegetation, surface water, waste waters, and groundwater, are and will continue to be collected and analyzed.¹³ None of this is controverted.

What Sierra Club does challenge is the conclusion in Holtec's Environmental Report that, "[b]ased upon information obtained from the onsite drilling, shallow alluvium is likely non-water bearing at the Site."¹⁴ However, Sierra Club neither acknowledges nor disputes the information in Holtec's license application that supports this conclusion.

Sierra Club posits that Holtec's conclusion is based entirely on the absence of water in a single monitoring well observed in 2007. Mr. Rice claims that more recent wells installed at the site "are completed entirely in the Dockum" and "[t]hus, they cannot be used to determine whether [any] groundwater exists at the alluvium/Dockum interface."¹⁵

But that is not correct. Mr. Rice overlooks the Work Plan in Holtec's 2017 Geotechnical Data Report.¹⁶

Holtec drilled five groundwater monitoring wells.¹⁷ Although wells were only *completed* below the alluvium, in fact as wells were drilled the borings were regularly monitored to determine the appropriate depth.¹⁸ As explained in Holtec's Work Plan, it was expected that the actual depth of wells would "be adjusted in the field based on the soil, rock, and groundwater conditions encountered."¹⁹ The Work Plan provided that "[if] groundwater is not encountered in a boring planned for monitoring well installation, the borehole may be backfilled with cement-bentonite grout with no monitoring well installed."²⁰

Thus, as reflected in Holtec's Work Plan, the personnel performing the geotechnical exploration were regularly monitoring for groundwater conditions encountered during drilling. The boring logs for Holtec's drilling in 2017 contain

¹³ Holtec International's Environmental Report on the HI-STORE CIS Facility (rev. 6 May 2019) at 40-50 (ADAMS Accession No. ML19163A146) [hereinafter ER]. Generally, the Board cites to the versions of Holtec's application documents that were available at the time contentions were proffered.

¹⁴ ER at 3-40.

¹⁵ Declaration of George Rice, Comments on Proposed Facility (Sept. 6, 2018) at 3 [hereinafter Rice Decl.].

¹⁶ GEI Consultants, Geotechnical Data Report, HI-STORE CISF Phase 1 Site Characterization (Dec. 2017) (ADAMS Accession No. ML18023A958) [hereinafter Geotechnical Data Report].

¹⁷ Holtec's Answer Opposing Sierra Club's Petition to Intervene at 84-85.

¹⁸ *Id.* at 9, 88.

¹⁹ Letter from Kimberly Manzione, Holtec Licensing Manager, to Jose Cuadrado, Project Manager, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards (NMSS) (Dec. 21, 2017) (ADAMS Accession No. ML17362A093), attach. 5 Geotechnical Data Report, attach. A at 53 (GEI Consultants, GEI Work Plan 1, HI-STORE CISF Site Characterization — Phase 1 (rev. 3 Nov. 2017) [hereinafter GEI Work Plan]).

²⁰ GEI Work Plan at 53.

extensive data and observations supporting its conclusion concerning the absence of groundwater in the shallow alluvium.²¹ Sierra Club fails to address this information.

Contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi), Sierra Club Contention 15 fails to raise a genuine dispute with Holtec's license application. Therefore Sierra Club Contention 15 is not admitted.

B. Sierra Club Contention 16

Sierra Club Contention 16, as considered by the Board,²² stated:

The [Environmental Report] does not contain any information as to whether brine continues to flow in the subsurface under the Holtec site.²³

Insofar as Sierra Club Contention 16 purports to challenge Holtec's site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec's ultimate discussion of environmental impacts and thus is not material.

Sierra Club Contention 16 does not set forth an admissible claim that brine might be present in shallow groundwater below Holtec's proposed facility. The supporting declaration of Mr. Rice relies solely on a 2007 Eddy Lea Siting Study.²⁴ As the Siting Study shows in Figure 2.11.3-2, the seeps and springs in which brine was located are on the eastern side of the site, near the Laguna Gatuna,²⁵ where multiple facilities discharged brine produced from oil and gas production.²⁶ As both Holtec's Environmental Report and the Siting Study ac-

²¹ See, e.g., Geotechnical Data Report, attach. C at 72-73 (Final Boring Log for Boring No. B-101); *id.* at 88-89 (Final Boring Log for Boring No. B-101A (specifically noting "groundwater not encountered" at the interface of the residual soil and the Chinle)); *id.* at 95 (Final Boring Log for Boring No. B-102 (observing that the sample at the interface of the residual soil and the Chinle was "dry")); *id.* at 102 (Final Boring Log for Boring No. B-105, p. 2, observing that the sample at the interface was dry); *id.* at 110 (Final Boring Log for Boring No. B-105A, p. 2, specifically noting "groundwater not encountered" at the interface of the residual soil and the Chinle); *id.* at 128 (Final Boring Log for Boring No. B-109 (observing that the sample at the interface of the residual soil and the Chinle was "dry"))).

²² As explained in LBP-19-4, 89 NRC at 407-10, the Board denied Sierra Club's motion to amend Contention 16 for failure to demonstrate good cause.

²³ Sierra Club Pet. at 62.

²⁴ Rice Decl. at 6 & nn.29-31.

²⁵ Eddy Lea Energy Alliance, LLC, Final Detailed Siting Report and Final Communications Report (Apr. 28, 2007) at 2.11-5 (Fig. 2.11.3-2) (ADAMS Accession No. ML102440738) [hereinafter ELS].

²⁶ ER at 3-40; ELS at 2.4-3.

knowledge, “saturations of shallow groundwater brine have been created in a number of areas associated with the playa lakes.”²⁷ The proposed storage facility, however, is located on the western side of the site, away and upgradient from the Laguna Gatuna.²⁸

Rather than providing factual support for concluding that brine might exist below the proposed facility, Mr. Rice’s declaration merely asks questions (e.g., do the seeps and springs continue to flow, could brine come in contact with the canisters?). Merely asking questions, however, does not raise a genuine dispute with a license application.²⁹ Contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), Sierra Club Contention 16 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec’s license application. Therefore Sierra Club Contention 16 is not admitted.

C. Sierra Club Contention 17

Sierra Club Contention 17 stated:

The [Environmental Report] and [Safety Analysis Report] do not discuss the presence and implications of fractured rock beneath the Holtec site. These fractures could allow radioactive leaks from the [consolidated interim storage] facility to enter groundwater or for the brine described in Contention 16 to corrode the containers contain[ing] the radioactive material.³⁰

Insofar as Sierra Club Contention 17 purports to challenge Holtec’s site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec’s ultimate discussion of environmental impacts.

Sierra Club Contention 17 claims that Holtec’s Environmental Report and Safety Analysis Report (SAR) fail to note the presence of fractured rock. But that is not correct. Both documents acknowledge that the water-bearing zone measured in well ELEA-2 consists of either fractures or tight sandy loams between the depths of 85 and 100 feet, and reference the 2007 Eddy Lea Siting Study.³¹ As Mr. Rice acknowledges, fractures are also reported in the logs of the monitoring well drillings for the 2007 Siting Study and the 2017 Geotechnical

²⁷ ER at 3-41; ELS at 2.4-3.

²⁸ See Holtec International’s HI-STORE CIS Facility Safety Analysis Report at 81 (Fig. 2.1.6(a)) and 146 (Fig. 2.4.7) (rev. 0F Jan. 2019) (ADAMS Accession No. ML19052A379) [hereinafter SAR].

²⁹ *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007) (referencing the standard under 10 C.F.R. § 2.309(f)(1)(vi)).

³⁰ Sierra Club Pet. at 63-64.

³¹ ER at 3-40; SAR at 151.

Data Report.³² Apart from Sierra Club's inadmissible concerns about leaks from the proposed facility, Sierra Club Contention 17 sets forth no significant dispute regarding the presence of fractured rock.

Contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), Sierra Club Contention 17 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec's license application.³³ Therefore Sierra Club Contention 17 is not admitted.

D. Sierra Club Contention 19

Sierra Club Contention 19 stated:

Holtec performed two sets of packer tests in the Santa Rosa Formation to estimate the hydraulic conductivity (permeability) of the formation. These tests were conducted in conjunction with the preparation of the [Environmental Report]. It does not appear from the report of Holtec's consultant that these tests were conducted properly. Therefore, the [Environmental Report] has not presented an adequate evaluation of the affected environment.³⁴

Insofar as Sierra Club Contention 19 purports to challenge Holtec's site characterization, independent of concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec's ultimate discussion of environmental impacts.

Sierra Club Contention 19, which alleges that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly,³⁵ is inadmissible. Although Mr. Rice claims, citing the Geotechnical Data Report, that the test hole does not appear to have been cleaned before conducting the packer tests,³⁶ in fact the Geotechnical Data Report is silent on this point and thus does not provide grounds to assume that the test was performed improperly.³⁷

³² See Rice Decl. at 6 & nn.34-35.

³³ In addition to challenging whether the description of fractured rock in Holtec's Environmental Report satisfies 10 C.F.R. § 51.45(b), Sierra Club raises a safety challenge under 10 C.F.R. § 72.103 to Holtec's analysis of geologic characteristics of the site. This claim fails for the same reasons.

³⁴ Sierra Club Pet. at 66.

³⁵ *Id.*

³⁶ See Rice Decl. at 8 & n.49.

³⁷ Indeed, Holtec expressly denies that the test was performed improperly, although at this stage of the proceeding we do not rely on Holtec's denial. See Holtec's Answer Opposing Sierra Club's Petition to Intervene at 90. As Holtec explained in its answer, although the page of the Geotechnical Data Report cited by Mr. Rice (Rice Decl. at 8 n.48 (citing 2017 Geotechnical Data Report at 12))

(Continued)

Moreover, the 2017 geotechnical work was performed under a nuclear quality assurance program,³⁸ and the design of the field and laboratory program was based on NRC guidance.³⁹ Mr. Rice's mere speculation that acceptable procedures may not have been followed raises no genuine dispute. Similarly, while Mr. Rice states that there is no description of the water used in the tests,⁴⁰ that does not show that the tests were improperly performed.

Contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi), Sierra Club Contention 19 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec's license application. Therefore Sierra Club Contention 19 is not admitted.

II. SIERRA CLUB CONTENTION 30

Sierra Club proffered its Contention 30, together with a motion to file a late-filed contention, on October 23, 2019 — more than five months after we issued LBP-19-4, which initially terminated this proceeding before the Board. Holtec and the NRC Staff both opposed,⁴¹ and Sierra Club did not file a reply.

Sierra Club Contention 30 states:

The [Environmental Report] submitted by a license applicant must evaluate the potential impact on the environment of the transportation of the nuclear waste. A report issued by the Department of Energy's Nuclear Waste Technical Review Board (NWTRB) identifies 18 technical issues regarding transportation of nuclear waste. These issues remain unresolved and pose barriers to the implementation of the Holtec [consolidated interim storage] project. The issues identified in the NWTRB report are not discussed in Holtec's [Environmental Report]. The [Environmental Report] therefore does not adequately evaluate the environmental impact of the transportation of the nuclear waste from various reactor sites to the proposed [consolidated interim storage] facility.⁴²

Sierra Club Contention 30 is similar to a contention (Sustainable Energy and

does not discuss whether the hole was cleaned, GEI's procedures for the packer tests do require the borehole to be flushed with clean water for at least 2 minutes and until return water is visually clear. According to Holtec, this is simply detail beyond that discussed in the report.

³⁸ Geotechnical Data Report at 5-6.

³⁹ *Id.* at 49.

⁴⁰ Rice Decl. at 8.

⁴¹ Holtec International's Answer Opposing Sierra Club's Motion to File Late-Filed Contention 30 (Nov. 18, 2019) at 1 [hereinafter Holtec's Answer Opposing Contention 30]; NRC Staff Answer in Opposition to Sierra Club New Contention 30 (Nov. 18, 2019) at 1 [hereinafter NRC Staff's Answer].

⁴² Sierra Club's Motion to File a New Late-Filed Contention (Oct. 23, 2019) at 5 [hereinafter Sierra Club Motion].

Economic Development Coalition (SEED) Contention 17) that was proffered in an adjudication concerning another application for a license to construct an interim storage facility (the Interim Storage Partners LLC (ISP) proceeding).⁴³ The two contentions were filed the same day. Each was accompanied by a motion to file a late-filed contention. Each was based on the same NWTRB Report.⁴⁴ Each was supported by the same expert’s declaration. Indeed, Sierra Club mistakenly submitted the substantively identical declaration of Robert Alvarez in this proceeding under the caption of the ISP proceeding.⁴⁵

As explained *infra*, we deny Sierra Club’s motion to late-file Contention 30 for substantially the same reasons that the ISP Board rejected SEED Contention 17 in that proceeding.⁴⁶ But here we deny Sierra Club’s motion for an additional reason. Because Sierra Club submitted Contention 30 after this proceeding had already been terminated, as directed by the Commission⁴⁷ we must first consider whether Sierra Club has satisfied the requirements for reopening a closed record. It has not.

A. Reopening a Closed Record

To reopen a closed record, a petitioner must file a motion demonstrating that its new contention (1) is timely; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.⁴⁸ The petitioner must attach an affidavit that separately addresses each of these criteria, with a specific explanation of why each criterion has been satisfied.⁴⁹

The Commission considers “reopening the record for any reason to be ‘an

⁴³ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC 358, 359-60 (2019).

⁴⁴ U.S. Nuclear Waste Technical Review Board, “Preparing for Nuclear Waste Transportation: Technical Issues That Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste,” (Sept. 23, 2019) (ADAMS Accession No. ML19297D146) [hereinafter NWTRB Report].

⁴⁵ Declaration of Robert Alvarez in Support of Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention (Oct. 23, 2019) at 1 [hereinafter Alvarez Decl.].

⁴⁶ LBP-19-11, 90 NRC at 359-60.

⁴⁷ CLI-20-4, 91 NRC at 194 (2020).

⁴⁸ 10 C.F.R. § 2.326(a)(1)-(3). However, an “exceptionally grave” issue may be considered in the discretion of the presiding officer even if the contention is found untimely. *Id.* § 2.326(a)(1).

⁴⁹ *Id.* § 2.326(b).

extraordinary’ action,”⁵⁰ and places “an intentionally heavy burden on parties seeking to reopen the record.”⁵¹ The Commission does not favor never-ending adjudications. On the contrary, the Commission has cautioned that “[o]bviously, ‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen hearings.”⁵²

When it proffered Contention 30 in October 2019, Sierra Club did not address, much less satisfy, the requirements for reopening a closed record. Nor did Sierra Club submit the necessary affidavit demonstrating compliance. This alone is sufficient reason not to reopen the record.⁵³

Like the NRC Staff and Holtec,⁵⁴ the Board does not read CLI-20-4 as inviting Sierra Club to submit, in May 2020, a motion to reopen the record that should have accompanied its motion to late-file Contention 30 in October 2019.⁵⁵ If that were the Commission’s intent, given the Commission’s position that reopening a closed record should be “an extraordinary action,” we assume the Commission would have said so explicitly.

Rather, the Commission’s language suggests just the opposite. In remanding Sierra Club Contention 30 for the Board’s initial ruling on admissibility, the Commission clarified that “Sierra Club’s motion for a new contention” must “meet the standards for reopening a closed record.”⁵⁶ We interpret the Commission’s remand as a direction to make that determination based on the existing record. Sierra Club clearly fails, because it did not even mention, much less satisfy, the reopening standards when it moved to late-file Contention 30 in October 2019.

⁵⁰ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015).

⁵¹ *Id.* at 155.

⁵² *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 555 (1978)).

⁵³ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009) (“Even had [petitioner’s] contentions passed muster under 10 C.F.R. § 2.309(f)(1), its motion would still fail for failing to address, let alone meet, our reopening standards.”)

⁵⁴ NRC Staff Answer in Opposition to Sierra Club’s Motion to Reopen the Record (May 13, 2020) at 3-4; Holtec International’s Answer Opposing Sierra Club’s Motion to Reopen the Record (May 14, 2020) at 4-5.

⁵⁵ In reaching this conclusion, the Board has considered the unauthorized reply that Sierra Club submitted on May 18, 2020. Sierra Club’s Joint Reply to Holtec’s and NRC Staff’s Answer to Sierra Club’s Motion to Reopen the Record (May 18, 2020) at 1. Under 10 C.F.R. § 2.323(c), replies in support of most motions (including motions to reopen a closed record) may not be filed as of right, but only by leave upon a demonstration of “compelling circumstances.” We have nonetheless reviewed Sierra Club’s reply and find it unpersuasive.

⁵⁶ CLI-20-4, 91 NRC at 193.

Moreover, as discussed below, even if it were the Commission's intent to allow Sierra Club to move to reopen the record at this late date, we would necessarily deny the motion in any event. Sierra Club's recent motion to reopen fails for the same reasons that Sierra Club's original motion failed to demonstrate good cause for filing out of time. Additionally, we conclude that Sierra Club Contention 30 is not admissible.

B. New or Amended Contentions

In addition to meeting the requirements for reopening a closed record (where applicable), a petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so.⁵⁷ To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and (3) the contention has been submitted in a timely fashion after the new information on which it is based becomes available.⁵⁸

Sierra Club satisfied the third requirement by proffering Contention 30 within thirty days of publication of the NWTRB Report on which Contention 30 relies.⁵⁹ Both Holtec and the NRC Staff have argued, however, that the information in the NWTRB Report was either previously available or not materially different from information that was previously available.⁶⁰ We agree.

The NWTRB Report does not purport to document any new scientific or engineering research. Rather, as required by the Nuclear Waste Policy Amendments Act of 1987,⁶¹ the purpose of the NWTRB Report is to review the DOE's preparedness to transport spent nuclear fuel and high-level radioactive waste.⁶²

In undertaking this review, the NWTRB Report relies on and cites approximately 150 earlier references.⁶³ Indeed, the report explicitly acknowledges that, in identifying the issues that its recommendations address, the NWTRB drew upon these earlier sources. These included both issues that the NWTRB itself had previously identified "during past Board public meetings, technical workshops, and Board reports" (spanning 2012-2018) and "[a]dditional relevant tech-

⁵⁷ 10 C.F.R. § 2.309(c)(1).

⁵⁸ *Id.* § 2.309(c)(1)(i)-(iii).

⁵⁹ NWTRB Report at 107-17.

⁶⁰ Holtec's Answer Opposing Contention 30 at 23; NRC Staff's Answer at 5-7.

⁶¹ Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 5051, 101 Stat. 1330-248 (1987), 2 U.S.C. §§ 10261-10270.

⁶² NWTRB Report at xxi.

⁶³ *Id.* at 107-17.

nical issues” that had been previously “identified and documented” in reports and presentations by DOE, the United States nuclear industry, and researchers in other countries.⁶⁴ All or virtually all of these original sources were publicly available before the report’s issuance in September 2019.⁶⁵

Sierra Club’s Contention 30 also claims that Holtec’s Environmental Report is deficient because it does not include the issues regarding transportation of nuclear waste that were presented in the NWTRB Report.⁶⁶ For example, the Environmental Report states that 100,000 metric tons of uranium (MTU) will be transported to and stored at the proposed facility in the first 20 years after a license is issued.⁶⁷ Sierra Club states that the NWTRB concluded that there are technical issues that will “make the transportation of nuclear waste to a proposed facility in the 20-year time frame infeasible.”⁶⁸

As the NWTRB Report acknowledges, however, these same conclusions were first presented at an NWTRB public workshop in 2013.⁶⁹ Because this information was publicly available years ago, Sierra Club fails to show good cause for failing to raise this aspect of Contention 30 earlier.

For the most part, the Declaration of Sierra Club’s expert, Mr. Alvarez, merely repeats conclusions in the NWTRB Report. But his Declaration also demonstrates that Sierra Club Contention 30 is based on facts and theories that were available long before the contention was filed. For example, Mr. Alvarez states that the NWTRB “concluded in 2016 that the Nuclear Regulatory Commission and the Energy Department lack a technical basis in support of the safe transport of high burnup [spent nuclear fuel].”⁷⁰ Indeed, Mr. Alvarez cites his own work in 2013 for the proposition that “[h]igh burnup fuel temperatures make the used fuel more vulnerable to damage from handling.”⁷¹

⁶⁴ *Id.* at 23.

⁶⁵ *See id.* at 107-17.

⁶⁶ Sierra Club Motion at 6.

⁶⁷ ER at 4-49. The petitioners’ originally-filed contentions in this proceeding are based on the earlier version of Holtec’s Environmental Report. *See* Holtec International’s Environmental Report on HI-STORE CIS Facility Environmental Report (rev. 1 Dec. 2017) (ADAMS Accession No. ML18023A904).

⁶⁸ ER at 4-49.

⁶⁹ NWTRB Report at 77. The Report cites as authority a November 2013 presentation at a public NWTRB technical workshop by Jeffrey Williams, the director of DOE’s Nuclear Fuels Storage and Transportation Planning Project. Mr. Williams’ discussion of the time frame for transporting all spent nuclear fuel from reactor sites appears at page 54 of the workshop transcript, which is publicly available at <https://www.nwtrb.gov/docs/defaultsource/meetings/2013/november/13nov18.pdf?sfvrsn=9>.

⁷⁰ Alvarez Decl. at 1.

⁷¹ *Id.* at 6 n.26.

Sierra Club fails to demonstrate that Contention 30 is based on new and materially different information, as required by 10 C.F.R. § 2.309(c)(1).

C. Contention Admissibility

Even if Sierra Club had demonstrated good cause for proffering Contention 30 after the initial deadline for filing a hearing petition, Contention 30 would also have to satisfy the NRC's requirements for contention admissibility.⁷²

Among other things, an admissible contention must (1) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes; and (2) state the alleged facts or expert opinions that support the petitioner's position.⁷³ Moreover, a contention must raise an issue that is within the scope of the proceeding.⁷⁴

Sierra Club fails to raise a genuine dispute with Holtec's application, as required by 10 C.F.R. § 2.309(f)(1)(vi). Contrary to Sierra Club's claims, the findings of the NWTRB Report do not contradict Holtec's plans.

While the NWTRB concludes that some technical issues must be resolved "before the nation's entire inventory of waste can be transported,"⁷⁵ it agrees that not all such issues "must be resolved before the first of the waste can be transported."⁷⁶ Contrary to 10 C.F.R. § 2.309(f)(1)(v), therefore, the NWTRB Report does not support Sierra Club's suggestion that 100,000 MTU could not possibly be moved to Holtec's facility within the first 20 years of operation. It most certainly does not support the conclusion that 8,680 MTU could not be moved during the term of the license Holtec is initially requesting.⁷⁷

As we stated in LBP-19-4, the NRC in any event is not concerned with the commercial viability of the facilities it licenses because the business decision whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes.⁷⁸ Sierra Club claims that the NWTRB Report identified issues that could affect the availability of spent fuel for storage at Holtec's facility.⁷⁹ But the NWTRB has no role in the NRC's licensing process.

As explained *supra*, the NWTRB's responsibility under the Nuclear Waste Policy Amendments Act of 1987 is to "evaluate the technical and scientific

⁷² See 10 C.F.R. § 2.309(f)(1).

⁷³ *Id.* § 2.309(f)(1)(v)-(vi).

⁷⁴ *Id.* § 2.309(f)(1)(iii).

⁷⁵ NWTRB Report at xxiii.

⁷⁶ *Id.*

⁷⁷ See ER at 14. Holtec seeks to store 8,680 MTU in two different models of Holtec canisters, up to 500 canisters in total, for a license period of 40 years.

⁷⁸ See LBP-19-4, 89 NRC at 386.

⁷⁹ Sierra Club Motion at 1-2.

validity of activities undertaken by the Secretary [of Energy] . . . including activities relating to the packaging or transportation of high-level radioactive waste or spent nuclear fuel.”⁸⁰ The NWTRB does not license private spent fuel transportation systems; the NRC does. The NWTRB has no ability to revise the scope of Holtec’s project or of this adjudication.

Holtec’s Environmental Report states that spent nuclear fuel will be transported to Holtec’s proposed facility only in transportation packages that are approved and certified as safe by the NRC under 10 C.F.R. Part 71.⁸¹ Holtec’s license application lists the specific, currently approved packages it proposes to accept for storage.⁸² Holtec’s application, however, is for a storage facility under Part 72, not for a transportation system under Part 71. A challenge to the safety of NRC-approved transportation packages is outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), as the ISP Board ruled in LBP-19-11.⁸³

As we ruled in LBP-19-4, although 10 C.F.R. § 72.108 requires consideration of transportation impacts in Holtec’s Environmental Report, section 72.108 “does not require that the environmental report prove the safety of transportation packages,” because 10 C.F.R. Part 71 separately addresses these issues.⁸⁴ Sierra Club fails to address, much less challenge, the parts of Holtec’s Environmental Report that do, in fact, analyze the potential environmental impacts associated with transportation of spent nuclear fuel.⁸⁵ Likewise, Sierra Club fails to acknowledge or dispute any safety analyses, aging management plans or quality assurance programs described in Holtec’s application.

Sierra Club instead claims that such safety-related transportation issues as moving high burnup spent nuclear fuel and when to require “repackaging to [different] sized canisters”⁸⁶ must be addressed in the Environmental Report for a consolidated interim storage facility under Part 72.⁸⁷ Sierra Club makes such claims even though Holtec has committed to accepting at its facility only transportation packages that have been approved by the NRC and licensed under Part 71. Such claims would improperly expand a Part 72 application process into a dispute over the adequacy of the NRC’s Part 71 requirements. Plainly, these

⁸⁰ NWTRB Report at 1.

⁸¹ ER at 1-8.

⁸² See Letter from Kimberly Manzione, Holtec Licensing Manager, to Michael Layton, Director, Division of Spent Fuel Management, NMSS (Mar. 30, 2017) (ADAMS Accession No. ML17362-A093).

⁸³ LBP-19-11, 90 NRC at 367.

⁸⁴ LBP-19-4, 89 NRC at 415.

⁸⁵ ER 4-49.

⁸⁶ Sierra Club Motion at 1.

⁸⁷ *Id.* at 6, 9.

claims are outside the scope of this Part 72 proceeding, in contravention of 10 C.F.R. §§ 2.309(f)(1)(iii). And, insofar as they attack Commission regulations without seeking a waiver, Sierra Club's claims violate 10 C.F.R. § 2.335 as well. Sierra Club Contention 30 is not admitted.

III. FASKEN CONTENTION 2

Fasken submitted Fasken Contention 2, together with a motion for leave to file, on August 1, 2019⁸⁸ — more than twelve weeks after we issued LBP-19-4, terminating this proceeding at the Licensing Board level.

Fasken Contention 2 states:

Statements in Holtec's SAR and Facility Environmental Report (FER) regarding "control" over mineral rights below the site are "materially different" and inaccurate. Reliance on these statements nullifies Holtec's ability to satisfy the NRC's siting evaluation factors.⁸⁹

Fasken submitted Contention 2 in response to a June 19, 2019 letter from Stephanie Garcia Richard, State of New Mexico, Commissioner of Public Lands, to Krishna P. Singh, President and CEO of Holtec International.⁹⁰ In that letter, Ms. Richard expresses concern that Holtec has characterized the site of its proposed facility as under Holtec's control. In fact, Ms. Richard states, although Holtec may control the surface estate, "the State of New Mexico, through the New Mexico State Land Office, owns the mineral estate."⁹¹ She asserts that "in its filings with the NRC, Holtec appears to have entirely disregarded the State Land Office's authority over the Site's mineral estate."⁹²

On August 26, 2019, both the NRC Staff and Holtec opposed Fasken's motion.⁹³ On September 3, 2019 — apparently in response to the Staff's and Holtec's arguments that it failed to submit a timely motion to reopen the record —

⁸⁸ Fasken Motion for Leave to File a New Contention (Aug. 1, 2019) [hereinafter Fasken Motion].

⁸⁹ *Id.* at 2.

⁹⁰ See Fasken Motion, ex. 5 (Letter from NRC Acting Secretary Denise McGovern to Stephanie Garcia Richard, Commissioner of Public Lands, State of New Mexico, unnumbered attach. (July 2, 2019) (Letter from Stephanie Garcia Richard, Commissioner of Public Lands, State of New Mexico, to Krishna P. Singh, Holtec President and CEO (June 19, 2019) (ADAMS Accession No. ML19183A429) [hereinafter Richard Letter]).

⁹¹ Richard Letter at 2.

⁹² *Id.*

⁹³ NRC Staff Answer in Opposition to Fasken's Motion to File a New Contention (Aug. 26, 2019); Holtec International's Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention (Aug. 26, 2019).

Fasken did so belatedly.⁹⁴ On September 12, 2019, however, without explanation Fasken abruptly withdrew its motion to reopen the record.⁹⁵

Although Fasken withdrew its motion to reopen, and did not reply to the NRC Staff's and Holtec's oppositions, it never withdrew its initial motion for leave to file Fasken Contention 2. We therefore address that motion and deny it.

First, as explained *supra*, Fasken's failure to address the reopening requirements and to submit the necessary affidavit is, by itself, sufficient grounds not to reopen a closed record.⁹⁶ Here, we confront the extraordinary situation of a petitioner who not only failed to move to reopen, as required by the NRC's regulations, but has actually refused to do so.

Second, Fasken fails to show that Contention 2 satisfies the requirements for late filing. As discussed *supra*, any petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so.⁹⁷ To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and (3) the contention has been submitted in a timely fashion after the new information on which it is based becomes available.⁹⁸

The creation of a document that collects, summarizes, and places into context previously available information does not make that information new or materially different.⁹⁹ Fasken fails to satisfy 10 C.F.R. § 2.309(c)(1)(i) because the information on which Contention 2 is based was previously available in Holtec's Environmental Report and in its responses to the NRC Staff's requests for additional information (RAIs).

Pointing to Ms. Richard's letter, Fasken claims that Holtec failed to disclose to the NRC the New Mexico State Land Office's authority over mineral rights at the proposed site.¹⁰⁰ But that is not so. Holtec's Environmental Report has always acknowledged that "the subsurface mineral rights are owned by the State

⁹⁴ Fasken Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019).

⁹⁵ Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019).

⁹⁶ *Millstone*, CLI-09-5, 69 NRC at 120.

⁹⁷ See 10 C.F.R. § 2.309(c)(1).

⁹⁸ See *id.* § 2.309(c)(1)(i)-(iii).

⁹⁹ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

¹⁰⁰ Fasken Motion at 4 n.7 (citing Richard Letter at 2).

of New Mexico.”¹⁰¹ More recently (but months before Fasken proffered Contention 2), Holtec clarified in an RAI response that “[t]he mineral rights for Section 13 [the proposed site] and certain adjacent areas are held in trust by the New Mexico Commissioner of State Lands.”¹⁰² Fasken Contention 2 is based on information that was available in Holtec’s application materials long before Fasken moved for leave to file it.

Fasken therefore did not meet the requirements for reopening the record and late filing Contention 2 when it was submitted. For that reason (and also because Fasken has recently proffered a substantially amended version of Contention 2), we do not address its admissibility under 10 C.F.R. § 2.309(f)(1).

IV. ORDER

For the reasons stated:

- A. On further consideration, as directed by the Commission, Sierra Club Contentions 15, 16, 17, and 19 are *not admitted*.
- B. Sierra Club’s motion to reopen the record is *denied*.
- C. Sierra Club’s motion to late-file Sierra Club Contention 30 is *denied*. Sierra Club Contention 30 is *not admitted*.
- D. There being no admitted Sierra Club contention pending, Sierra Club’s petition is again *dismissed*.
- E. Fasken’s motion for leave to file Fasken Contention 2 (as originally submitted) is *denied*. Fasken Contention 2 (as originally submitted) is *not admitted*.
- F. Briefing having only recently been completed on Fasken’s May 11, 2020 motion for leave to file an amended Fasken Contention 2 and associated motion to reopen the record,¹⁰³ those motions will be addressed in a subsequent Order.

¹⁰¹ ER at 58 (Fig. 3-2).

¹⁰² Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) at 1.

¹⁰³ See *supra* note 6. The NRC Staff and Holtec filed answers opposing those motions on June 4 and 5, 2020, respectively, and Fasken filed a reply on June 11, 2020. See NRC Staff Answer in Opposition to Fasken’s Motions to Amend Contention 2 and Reopen the Record (June 4, 2020) at 1; Holtec International’s Answer Opposing Fasken Motion to Reopen the Record and Motion for Leave to File Amended Contention No. 2 (June 5, 2020) at 3-4; Fasken’s Combined Reply to NRC Staff’s and Holtec International’s Oppositions to Motion for Leave to File Amended Contention and Motion to Reopen the Record (June 11, 2020) at 1-2.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 18, 2020

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- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 404 (2004)
absent injury attributable to confirmatory order, petitioner does not have standing; LBP-20-4, 91 NRC
51, 67 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 404, 406 (2004)
absent injury attributable to the confirmatory order, petitioner does not have standing; LBP-20-3, 91
NRC 51 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 405 (2004)
contentions are outside the scope of the proceeding because petitioner speculates that other remedies
would be more effective than those in the confirmatory order; LBP-20-4, 91 NRC 68 (2020)
request to impose either different or additional enforcement measures in contravention of *Bellotti*
doctrine renders a contention inadmissible; LBP-20-3, 91 NRC 51 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 406 (2004)
contention challenging a confirmatory order must be rejected as outside the scope of the proceeding
unless it claims that the CO is unwarranted and, accordingly, its terms should be relaxed or the CO
should be rescinded as opposed to supplemented because it is affirmatively detrimental to public
health and safety; LBP-20-3, 91 NRC 52 (2020); LBP-20-4, 91 NRC 69 (2020)
petitioner lacks standing to challenge a confirmatory order that improves licensee's health and safety
conditions because petitioner is not adversely affected by a CO that improves the safety situation
over what it was in the absence of the order; LBP-20-4, 91 NRC 68 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 406 n.28 (2004)
it is unlikely that petitioners will often obtain hearings on confirmatory orders because such orders
presumably enhance rather than diminish public safety; LBP-20-4, 91 NRC 68 n.14 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License),
CLI-04-26, 60 NRC 399, 407 (2004)
NRC Staff has broad discretion in enforcement matters, and NRC's adjudicatory process is not an
appropriate forum for petitioners to second-guess enforcement decisions on resource allocations,
policy priorities, or the likelihood of success at hearings; LBP-20-3, 91 NRC 52 n.13 (2020)
NRC's charter does not include providing a personal remedy to an individual who has suffered
discrimination for reporting safety concerns; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70
(2020)
NRC's enforcement role is to procure corrective action for the licensee's program, and by example,
other licensees' programs; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70 (2020)
purpose of mediation is not to resolve factual disputes and establish a factual record but rather for
parties to reach agreement on forward-looking actions that enhance safety and security; LBP-20-4, 91
NRC 69 n.17 (2020)

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- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 407 & n.35 (2004)
additional NRC enforcement action to remedy employee discrimination could be sought by filing a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70 (2020)
avenue for seeking a personal remedy for alleged wrongful termination is through the U.S. Department of Labor; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408 (2004)
dispositive inquiry under *Bellotti* doctrine for a third-party challenge to a confirmatory order is whether the CO improves the licensee's health and safety conditions, and if it does, no hearing is appropriate; LBP-20-3, 91 NRC 49 (2020)
when licensee in an enforcement action has agreed to the terms of a confirmatory order, a challenge to the facts themselves by a third party is not cognizable; LBP-20-3, 91 NRC 52 (2020); LBP-20-4, 91 NRC 69 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408, 409 (2004)
allowing a third party to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around the *Bellotti*, doctrine and would also undercut NRC policy favoring enforcement settlements; LBP-20-3, 91 NRC 52, 53 (2020); LBP-20-4, 91 NRC 69-70 (2020)
- Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), LBP-04-16, 60 NRC 99, 117 (2004)
contention that impermissibly sought to strengthen the relief in the confirmatory order, contrary to the *Bellotti* doctrine was rejected; LBP-20-3, 91 NRC 51 n.11 (2020); LBP-20-4, 91 NRC 67 n.13 (2020)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006)
contention admissibility standard is strict by design; LBP-20-3, 91 NRC 48 (2020)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007)
Commission specifically declines to follow a contrary ruling on consideration of terrorist attacks from the U.S. Court of Appeals for the 9th Circuit for any facility located outside the 9th Circuit; CLI-20-4, 91 NRC 210 (2020)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), *review denied*, *N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009)
terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding; CLI-20-4, 91 NRC 210 (2020)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 266 (2009)
when considering challenges to how the board weighed evidence, Commission defers to a board's expertise as the fact finder and declines to substitute the judgment of an intervenor's expert for that of the board; CLI-20-1, 91 NRC 88 n.61 (2020)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009)
if proponent of contention has introduced sufficient evidence to establish a prima facie case, the burden shifts to applicant, who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license; CLI-20-1, 91 NRC 85-86 (2020)
proponent of a contention has a responsibility to put forth evidence of its claim; CLI-20-1, 91 NRC 85-86 (2020)
- AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 573-74 (2005)
prior participation in other NRC proceedings does not, a priori, grant petitioner standing in another case; LBP-20-2, 91 NRC 29 (2020)

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- AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574 (2005)
petitioner provides an address in the hearing petition, but makes no specific showing regarding where he lives relative to the facility, although in a 2005 proceeding he indicated that he lives and operates a business 12 miles from the nuclear facility; LBP-20-2, 91 NRC 29 n.32 (2020)
- AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574-76 (2005)
prior proceeding concerning facility ownership cited by petitioner as establishing his right to intervene as an individual resulted in a determination that he lacked standing; LBP-20-2, 91 NRC 29 (2020)
- Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006)
board has no authority to rewrite contentions to supply bases that petitioner had not articulated itself; CLI-20-1, 91 NRC 96 (2020)
- Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)
NEPA obligates an agency to consider every significant aspect of the environmental impact of a proposed action, and to inform the public that it has indeed considered environmental concerns in its decisionmaking process; CLI-20-3, 91 NRC 165 n.33 (2020)
- Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
doctrine impacts standing and contention admissibility analyses in the context of enforcement proceedings; LBP-20-3, 91 NRC 47 (2020)
intervention petitioner on confirmatory order must demonstrate standing, proffer an admissible contention, and satisfy the *Bellotti* doctrine; LBP-20-3, 91 NRC 47 (2020); LBP-20-4, 91 NRC 63 (2020)
- Bellotti v. NRC*, 725 F.2d 1380, 1381-82 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
challenge to adequacy of enforcement order is outside the scope of the proceeding and failed to assert injuries traceable to the order and thus failed to establish standing; LBP-20-3, 91 NRC 49 n.9 (2020); LBP-20-4, 91 NRC 65 n.10 (2020)
- Bellotti v. NRC*, 725 F.2d 1380, 1382 & n.2 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
argument that enforcement order should be strengthened by adding corrective actions is inadmissible; LBP-20-3, 91 NRC 49 n.9 (2020); LBP-20-4, 91 NRC 65 n.10 (2020)
enforcement order limits the scope of any challenge brought by a third party to the issue of whether the order should be sustained; LBP-20-3, 91 NRC 49 n.9 (2020); LBP-20-4, 91 NRC 65 n.10 (2020)
- Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45-46 & n.* (1982)
challenge to adequacy of enforcement order is outside the scope of the proceeding and failed to assert injuries traceable to the order and thus failed to establish standing; LBP-20-3, 91 NRC 49 n.9 (2020); LBP-20-4, 91 NRC 65 n.10 (2020)
- 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)
petitioner must demonstrate a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute; LBP-20-2, 91 NRC 26 n.23 (2020)
- 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, 915-16 (2009)
petitioner may use the proximity presumption if petitioner lives within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 27 (2020)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001)
no petition or other request for review of or hearing on NRC Staff's no significant hazards consideration determination will be entertained by the Commission; LBP-20-2, 91 NRC 39-40 n.53 (2020)

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- Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986)
failure to explain significance of the presence or absence of faults or fractures to need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 90 n.72 (2020)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)
petitioner must demonstrate a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute; LBP-20-2, 91 NRC 26 (2020)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993)
petitioner may use the proximity presumption if petitioner otherwise has frequent contacts within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 27 (2020)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)
unopposed motion for summary disposition is not automatically granted; CLI-20-1, 91 NRC 95 (2020)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985)
it is the responsibility of the party itself not merely to decide whether it wishes to have counsel, but, in addition, to take the necessary steps to implement its decision; CLI-20-1, 91 NRC 95 (2020)
- Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981)
scope of any hearing should include proposed reactor decommissioning license amendments and any health, safety or environmental issues fairly raised by them; LBP-20-2, 91 NRC 34 n.40 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980)
hearing notice generally determines the scope of the hearing and may include any health, safety, or environmental issues fairly raised by the proposed licensing action; LBP-20-2, 91 NRC 34 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999), *aff'g* LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom. Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
general objections that are not associated with the challenged license amendment are insufficient to establish standing; LBP-20-2, 91 NRC 27, 31 (2020)
petitioner must establish a plausible nexus between the challenged license amendments and petitioner's asserted harm; LBP-20-2, 91 NRC 27 (2020)
when proximity presumption does not apply, board's analysis turns to a traditional standing inquiry and whether petitioner has demonstrated an injury-in-fact associated with the challenged licensing action; LBP-20-2, 91 NRC 30 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999), *aff'g*, LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom., Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 35 (2020)
petitioner must indicate how the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products; LBP-20-2, 91 NRC 27 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 190 (1999), *aff'g*, LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom., Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity; LBP-20-2, 91 NRC 36 n.46 (2020)

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- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191 (1999), *aff'g*, LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom., Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
given the shutdown and defueled status of the units, license amendments do not on their face present any obvious potential for offsite radiological consequences so as to support invocation of the proximity presumption; LBP-20-2, 91 NRC 30 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999), *aff'g*, LBP-98-27, 48 NRC 271 (1998), *petition for review denied sub nom., Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
affidavits fail to show any obvious potential for offsite radiological consequences, fail to allege a particularized injury-in-fact stemming from the license amendment request, and otherwise fail to demonstrate some scenario suggesting how this particular LAR would result in a distinct new harm or threat to these members; LBP-20-2, 91 NRC 32 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)
Commission declines to sift through parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves; CLI-20-5, 91 NRC 223 n.45 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 276 (1998)
proximity presumption in license amendment cases applies only if the challenged license amendments present an obvious potential for offsite radiological consequences; LBP-20-2, 91 NRC 28 (2020)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 277 (1998), *petition for review denied sub nom., Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
there is nothing to suggest that altering emergency planning measures by reducing the scope of offsite and onsite emergency planning commensurate with the facility's permanently defueled condition would negatively implicate decommissioning funding, countering any assertion of a particularized injury; LBP-20-2, 91 NRC 31 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09 (2007)
to demonstrate traditional standing in a license transfer proceeding, petitioners must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-20-5, 91 NRC 219 (2020)
to demonstrate traditional standing in a license transfer proceeding, petitioners must show that the alleged injury lies arguably within the zone of interests protected by the Atomic Energy Act; CLI-20-5, 91 NRC 219 n.20 (2020)
to demonstrate traditional standing in a license transfer proceeding, petitioners must specify the facts pertaining to their interest; CLI-20-5, 91 NRC 219 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)
member seeking representation must qualify for standing in his or her own right and interests that the representative organization seeks to protect must be germane to its purpose and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-20-5, 91 NRC 220 (2020)
organization may obtain standing as a representative of one or more of its individual members; CLI-20-5, 91 NRC 220 (2020)
to demonstrate representational standing, organizations must show that at least one of its members may be affected by approval of the license transfer (such as by the member's domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her; CLI-20-5, 91 NRC 220 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409-10 (2007)
failure to provide evidence of authorization is a sufficient basis to reject a bid for representational standing; CLI-20-5, 91 NRC 221 n.30 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007)
fact-specific standing allegations are required, not conclusory assertions, such as general assertions of proximity to establish the proximity presumption; LBP-20-2, 91 NRC 27 n.28 (2020)

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- petitioner must specify contacts with the affected area in the intervention petition; LBP-20-2, 91 NRC 27 n.28 (2020)
- statement that some of organization's members live, work, or engage in recreation adjacent to or near an NRC-licensed facility is insufficient for proximity-based standing; CLI-20-5, 91 NRC 222 n.42 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007)
- organization fails to explain how its involvement in other cited proceedings distinguishes its interest in this license transfer proceeding from that of a private attorney general raising issues that are of concern to it but that do not affect it directly; CLI-20-5, 91 NRC 223 (2020)
- organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene; CLI-20-5, 91 NRC 219 (2020)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411-12 (2007)
- broad interests shared with many others are no different from the general environmental and policy interests that are insufficient to establish standing; CLI-20-5, 91 NRC 221-22 (2020)
- standing for an organization that seeks to act as a private attorney general in order to raise environmental or safety matters that are of general concern will not be considered; CLI-20-5, 91 NRC 220 (2020)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974)
- narrow exception may exist for petitioner who establishes standing in one case to employ that standing determination in another proceeding that is merely another round in a continuing controversy; LBP-20-2, 91 NRC 29 (2020)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 337 (2009)
- tribe does not have jurisdiction over a licensing proceeding; CLI-20-1, 91 NRC 100 n.143 (2020)
- Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)
- Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 173 (2020)
- Commission on appeal generally defers to the board on questions pertaining to the sufficiency of factual support for the admission of a contention; CLI-20-4, 91 NRC 173 (2020)
- Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014)
- claim of direct radiological injury to itself from license transfer fails to explain how the license transfer would be expected to threaten an organization based in another state; CLI-20-5, 91 NRC 222 (2020)
- in addressing injury requirement, organization seeking to intervene must show that the licensing action would constitute a threat to its organizational interests; CLI-20-5, 91 NRC 220 (2020)
- organization may obtain standing as a representative of one or more of its individual members; CLI-20-5, 91 NRC 220 (2020)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009)
- board has no authority to rewrite contentions to supply bases that petitioner had not articulated itself; CLI-20-1, 91 NRC 96 (2020)
- Curators of the University of Missouri* (TRUMP-S Project), LBP-90-30, 32 NRC 95, 103 (1990)
- intervenor may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly; CLI-20-5, 91 NRC 220 n.24 (2020)
- David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010)
- dispute with how a board weighed evidence is a factual dispute, not a legal one, and therefore the board is entitled to deference; CLI-20-1, 91 NRC 88 (2020)
- intervenor's burden-shifting argument, although couched in legal terms, is at bottom a factual challenge to the way the board weighed and balanced conflicting evidence; CLI-20-1, 91 NRC 93 (2020)
- Diversified Scientific Services, Inc.* (Export of Low-Level Waste), CLI-19-2, 89 NRC 229 (2019)
- person residing within 1.5 miles of a bridge that would serve as the exit point for export of low-level waste does not have an affected interest in that export; CLI-20-2, 91 NRC 132 (2020)

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- Diversified Scientific Services, Inc.* (Export of Low-Level Waste), CLI-19-2, 89 NRC 229, 232-33 (2019)
petitioner in export license proceeding should show how a hearing would bring new information to light and assert or establish an interest that may be affected by issuance of the license; CLI-20-2, 91 NRC 111 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-09-5, 69 NRC 115, 124 (2009)
motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 193-94 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)
contention pleading requirements are strict by design and intended to ensure that adjudicatory proceedings address substantive issues that are rooted in a reasonably specific factual or legal basis; CLI-20-6, 91 NRC 228 n.19 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009)
failure to address the reopening requirements and to submit the necessary affidavit is, by itself, sufficient grounds not to reopen a closed record; LBP-20-6, 91 NRC 254 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009)
even had petitioner's contentions passed muster under 10 C.F.R. 2.309(f)(1), its motion would still be inadmissible for failing to address, let alone meet, reopening standards; LBP-20-6, 91 NRC 249 n.53 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
contention admissibility standard is strict by design; LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 64 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001)
vague, unparticularized, or open-ended contentions are not admissible in NRC proceedings; CLI-20-1, 91 NRC 96 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001)
petitioners may not use NRC hearing process to challenge NRC regulations or express generalized grievances with NRC policies; CLI-20-6, 91 NRC 233 (2020)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001)
direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 35 (2020)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7-8 (2015)
petitioner who waits until issuance of a final environmental document to raise a contention risks the possibility that there will not be a material difference between the draft and final document; CLI-20-1, 91 NRC 97 (2020)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999)
dispute at issue is material if its resolution would make a difference in the outcome of the licensing proceeding; CLI-20-4, 91 NRC 190-91 (2020)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983)
person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation, and it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding; CLI-20-1, 91 NRC 98 (2020)
- Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977)
good cause for consolidation can be established by showing that the relevant proceedings involve common questions of law or fact such that consolidation would avoid unnecessary costs or delay; LBP-20-4, 91 NRC 63 (2020)

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- licensing board has discretion to grant consolidation on its own initiative if such action will be conducive to the proper dispatch of its business and to the ends of justice; LBP-20-1, 91 NRC 7 (2020)
- only a party to a proceeding has a right to a formal consolidation; LBP-20-1, 91 NRC 7 (2020)
- petitioner who currently is not a party to either proceeding has no right to a formal consolidation; LBP-20-1, 91 NRC 8 (2020)
- Edlow International Co.* (Export of 93.20% Enriched Uranium), CLI-17-3, 85 NRC 44, 48 (2017)
- public hearings in nuclear export licensing proceedings are allowed if such a hearing is found to be in the public interest and will assist the Commission in making the statutory determinations; CLI-20-2, 91 NRC 110 (2020)
- Edlow International Co.* (Export of 93.20% Enriched Uranium), CLI-17-3, 85 NRC 44, 48 n.10 (2017)
- entities with an affected interest in an export license application are more likely to contribute to Commission decisionmaking, show that a hearing would be in the public interest, and assist in making the statutory determinations; CLI-20-2, 91 NRC 111 (2020)
- Edlow International Co.* (Export of 93.20% Enriched Uranium), CLI-17-3, 85 NRC 44, 49 n.15 (2017)
- institutional interest in providing information to the public is insufficient to show an affected interest; CLI-20-2, 91 NRC 112 (2020)
- Edlow International Co.* (Export of 93.20% Enriched Uranium), CLI-17-3, 85 NRC 44, 57 (2017)
- argument that amount of high enriched uranium should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel, has been rejected; CLI-20-2, 91 NRC 129 (2020)
- export licenses for targets for medical isotope production tend to be for only a year; CLI-20-2, 91 NRC 129 (2020)
- EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-2, 73 NRC 613, 623 (2011)
- proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 199 n.197 (2020)
- EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011)
- NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 219 (2020)
- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010)
- vague, unparticularized, or open-ended contentions are not admissible in NRC proceedings; CLI-20-1, 91 NRC 96 (2020)
- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012)
- motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 193-94 (2020)
- Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016)
- failure to comply with any admissibility requirement renders a contention inadmissible; LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 64 (2020)
- Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 144 (2016)
- petitioner may challenge invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 38 (2020)
- Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 144-45 (2016)
- petitioners fail to challenge license amendment request's categorical exclusion either by seeking to establish special circumstances or by controverting the 10 C.F.R. 51.22(c)(9) and (25) factors; LBP-20-2, 91 NRC 38 (2020)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 356 (2015)
- guidance documents developed to assist in compliance with applicable regulations are entitled to special weight; CLI-20-3, 91 NRC 150 (2020)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015)
- petitioner bears the burden to satisfy each of the criteria in 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-20-2, 91 NRC 33 n.38 (2020)

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- Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 (2008)
- to demonstrate traditional standing in a license transfer proceeding, organization may obtain standing as a representative of one or more of its individual members; CLI-20-5, 91 NRC 220 (2020)
 - to demonstrate traditional standing in a license transfer proceeding, petitioners must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-20-5, 91 NRC 219 (2020)
 - to demonstrate traditional standing in a license transfer proceeding, petitioners must show that the alleged injury lies arguably within the zone of interests protected by the Atomic Energy Act; CLI-20-5, 91 NRC 219 n.20 (2020)
 - to demonstrate traditional standing in a license transfer proceeding, petitioners must specify the facts pertaining to their interest; CLI-20-5, 91 NRC 219 (2020)
- Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258-59 (2008)
- member seeking representation must qualify for standing in his or her own right and interests that the representative organization seeks to protect must be germane to its purpose and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-20-5, 91 NRC 220 (2020)
 - to demonstrate representational standing, organizations must show that at least one of its members may be affected by approval of the license transfer (such as by the member's domicile, work, or activities on or near the site), identify that member by name, and demonstrate that the member has authorized the organization to represent him or her; CLI-20-5, 91 NRC 220 (2020)
- Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269-70 (2008)
- standing for an organization that seeks to act as a private attorney general in order to raise environmental or safety matters that are of general concern will not be considered; CLI-20-5, 91 NRC 220 (2020)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 21 (2007)
- adjudicating category 1 issues site-by-site would defeat the purpose of resolving generic issues in a generic environmental impact statement; CLI-20-3, 91 NRC 153 (2020)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549-54 (2016)
- emergency planning exemption request that would be implemented by a requested license amendment to reflect reactor facility's permanently shutdown and defueled status is within the scope of the proceeding; LBP-20-2, 91 NRC 24 n.20 (2020)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 387 (2012)
- if section 51.53(c)(3) applies, petitioners are obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues; CLI-20-3, 91 NRC 139 (2020)
- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 476 (2019)
- NRC performs onsite inspections of decommissioning activities; LBP-20-2, 91 NRC 36 n.47 (2020)
- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 477 & n.62 (2019)
- direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 35 (2020)
- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 479-80 (2019)
- contention asserting further NEPA analysis is needed for a decommissioning-related license transfer application is inadmissible because of petitioner's failure to address license application section referencing and relying on categorical exclusion; LBP-20-2, 91 NRC 38 n.48 (2020)

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- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579 (2005)
petitioner failed to adequately address the standing requirement that the proposed licensing action would injure his financial, property, or other interests
to establish standing, petitioner have some direct interest in the outcome of a proceeding; LBP-20-2, 91 NRC 26 (2020)
- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579, 580 (2005)
intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing; LBP-20-2, 91 NRC 31 (2020)
- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579-80 (2005)
petitioner fails to squarely address the injury requirement for standing; LBP-20-2, 91 NRC 31 n.37 (2020)
- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005)
mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing; CLI-20-5, 91 NRC 223 n.43 (2020)
proximity presumption is determined on a case-by-case basis in proceedings other than for issuance or renewal of a reactor construction permit/operating license or early site permit/combined license; LBP-20-2, 91 NRC 27 (2020)
- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)
petitioner's location and the nature of the proposed action and the significance of the radioactive source are considered for proximity-based standing; LBP-20-2, 91 NRC 28 (2020)
- Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005)
obvious potential for offsite radiological consequences depends on the kind of action at issue, when considered in light of the radioactive sources at the plant; LBP-20-2, 91 NRC 28 (2020)
petitioner must specify contacts with the affected area in the petition; LBP-20-2, 91 NRC 27 n.28 (2020)
- Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003)
petitioner has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing; CLI-20-5, 91 NRC 223 n.45 (2020)
- FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)
agencies must use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance; CLI-20-3, 91 NRC 160 n.6 (2020)
- FCC v. Schrieber*, 381 U.S. 279, 296 (1965)
NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a presumption of regularity that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 175 (2020)
- Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008)
in determining the scope of a regulatory provision in the face of regulatory silence, the Court conducted a holistic analysis; CLI-20-3, 91 NRC 140 (2020)
- Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)
agency's interpretive statements reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance and, as such, are entitled to a measure of respect; CLI-20-3, 91 NRC 150 (2020)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004)
threshold question in enforcement proceeding, intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the confirmatory order should be sustained; LBP-20-3, 91 NRC 49 (2020); LBP-20-4, 91 NRC 65 (2020)

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- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004)
contention challenging a confirmatory order must be rejected as outside the scope of the proceeding unless it claims that the CO is unwarranted and, accordingly, its terms should be relaxed or the CO should be rescinded as opposed to supplemented because it is affirmatively detrimental to public health and safety; LBP-20-3, 91 NRC 52 (2020); LBP-20-4, 91 NRC 65, 69 (2020)
injury alleged to have resulted from failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order because such an assertion fails to establish harm that is traceable to the CO; LBP-20-3, 91 NRC 49 (2020); LBP-20-4, 91 NRC 65 (2020)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004)
contention challenging a confirmatory order will be rejected as outside the scope of the proceeding unless it opposes issuance of the order as unwarranted, so as to require relaxation, or as affirmatively detrimental to the public health and safety, so as to require rescission as opposed to supplementation; LBP-20-3, 91 NRC 49 (2020); LBP-20-4, 91 NRC 65 (2020)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
petitioner may use the proximity presumption if petitioner lives within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 27 (2020)
proximity presumption generally applied in proceedings for reactor construction permits, operating licenses, or significant amendments thereto relieves a petitioner of the need to satisfy traditional elements of standing; LBP-20-2, 91 NRC 27 (2020)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)
absent situations involving obvious potential for offsite consequences, petitioner must allege some specific injury in fact that will result from the action taken; LBP-20-2, 91 NRC 27 n.24 (2020)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)
although hearing requests are construed in petitioner's favor, petitioner has the burden of demonstrating that the standing requirements are met; CLI-20-6, 91 NRC 238 (2020)
hearing petition generally is construed in favor of petitioner seeking to demonstrate standing, and a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 26 (2020)
NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 219 (2020)
petitioner bears the burden of establishing its standing whether pro se or otherwise; LBP-20-2, 91 NRC 26 (2020)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 468, *aff'd*, CLI-15-25, 82 NRC 389, 394 (2015)
hearing petition generally is construed in favor of petitioner as it seeks to demonstrate standing, while a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 26 (2020)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017)
appeal that only restates arguments previously raised before the board will be rejected; CLI-20-4, 91 NRC 176, 182 (2020)
failure to point to a board error means that there is no basis to reverse the board; CLI-20-4, 91 NRC 182 (2020)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
hearing petition generally is construed in favor of petitioner as it seeks to demonstrate standing, while a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 25-26 (2020)

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- in addressing injury requirement, organization seeking to intervene must show that the licensing action would constitute a threat to its organizational interests; CLI-20-5, 91 NRC 220 (2020)
- NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 219 (2020)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)
- in non-power reactor cases, standing is examined on a case-by-case basis considering petitioner's proximity to the site in addition to other factors; CLI-20-4, 91 NRC 177 (2020)
- petitioner's location and the nature of the proposed action and the significance of the radioactive source are considered for proximity-based standing; LBP-20-2, 91 NRC 28 (2020)
- proximity-plus standard takes into account both the nature of the proposed activity and significance of the radioactive source; CLI-20-4, 91 NRC 177 (2020)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993)
- direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 35 (2020)
- every agency licensing action does not throw open an opportunity to engage in a free-ranging inquiry into the character of the licensee; LBP-20-2, 91 NRC 35 (2020)
- Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013)
- relationship between applicant's amendment request and its exemption request is such that hearing rights extend to both, and the scope of the proceeding should be construed to include both; LBP-20-2, 91 NRC 24 n.20 (2020)
- Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-90 (1979)
- if an organization does not identify the members it purportedly represents, NRC cannot determine whether the organization actually does represent members who consider that they will be affected by the licensing action or rather, is simply seeking the vindication of its own value preference; CLI-20-5, 91 NRC 221 n.30 (2020)
- Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979))
- technical perfection is not required in pleadings; LBP-20-2, 91 NRC 39 (2020)
- Hunt v. Wash. State Apple Advert. Comm'n.*, 432 U.S. 333, 343 (1977)
- to establish representational standing, an organization must demonstrate that its members would otherwise have standing to sue in their own right, interests that the organization seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; LBP-20-2, 91 NRC 28 (2020)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001)
- NRC is not in the business of regulating the market strategies of licensees; CLI-20-4, 91 NRC 175 n.24 (2020)
- whether an option for disposal of spent nuclear fuel is commercially viable is not an issue before the board; CLI-20-4, 91 NRC 175 n.24 (2020)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001)
- one can always flyspeck an environmental impact statement to come up with more specifics and more areas of discussion that could have been included; CLI-20-4, 91 NRC 191 (2020)
- Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC 358, 359-60 (2019)
- late-filed contention that environmental report must evaluate the potential impact on the environment of transportation of nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 247-48 (2020)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001)
- to establish standing, an organization must demonstrate how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-20-2, 91 NRC 28 (2020)

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- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)
in addressing injury requirement, organization seeking to intervene must show that the licensing action would constitute a threat to its organizational interests; CLI-20-5, 91 NRC 220 (2020)
- Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 913 F.3d 660, *withdrawn and superseded on reh'g*, 2019 WL 1781404 (2019)
tribal court has jurisdiction to adjudicate tribal claims against a non-member former employee;
CLI-20-1, 91 NRC 99 (2020)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)
contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 197 n.184 (2020)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998)
NEPA does not require an elaborate comparative site study to explore whether applicant's siting criteria might perpetuate institutional racism; CLI-20-4, 91 NRC 197 (2020)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367 (1997)
targeting of rural, impoverished, low-income communities in a border state is the sort of de facto result of institutional racism embedded in prevailing dump site selection processes nationwide;
CLI-20-4, 91 NRC 196-97 (2020)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 725 (2005)
license applicant does not have to demonstrate potential profitability of proposed independent spent fuel storage facility; CLI-20-4, 91 NRC 175 n.24 (2020)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)
whether an option for disposal of spent nuclear fuel is commercially viable is not an issue before the board; CLI-20-4, 91 NRC 175 n.24 (2020)
- Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983)
if contention proponent has introduced sufficient evidence to establish a prima facie case, the burden shifts to the applicant, who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license;
CLI-20-1, 91 NRC 85-86 (2020)
proponent of a contention has a responsibility to put forth evidence of its claim; CLI-20-1, 91 NRC 85-86 (2020)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004)
contemporaneous judicial concepts of standing applied in NRC hearings require petitioner to show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 64 (2020)
- Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989)
Generic Environmental Impact Statement discussed Category 1 issues, and therefore, these issues did not require a plant-specific assessment unless there was new and significant information that would change the conclusions in the GEIS; CLI-20-3, 91 NRC 138 (2020)
"new and significant information" reflects NRC's ongoing obligation to supplement any final EIS prior to undertaking an agency action upon discovering information that provides a seriously different picture of the environmental consequences; CLI-20-3, 91 NRC 142 n.55 (2020)
NRC Staff may not abrogate its responsibility to take a hard look at new and significant information;
CLI-20-3, 91 NRC 152 (2020)
- Massachusetts v. NRC*, 522 F.3d 115, 120 (2008)
Category 1 issues have already been addressed globally by 10 C.F.R. pt. 51, subpt. A, app. B, and cannot be litigated in individual adjudications, such as license renewal proceedings for individual plants; CLI-20-3, 91 NRC 157-58 (2020)
- Molycorp, Inc.* (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 172 (2000)
board declined to consolidate two separately noticed materials license amendment proceedings, because each proceeding authorized its own discrete activities; LBP-20-1, 91 NRC 9 (2020)

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- Montana v. United States*, 450 U.S. 544, 564 (1981)
tribe cannot prohibit hunting and fishing by a non-member who holds title in fee to property located within the reservation; CLI-20-1, 91 NRC 99 (2020)
- Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998)
as an agency of the federal government, NRC owes a fiduciary duty to the Native American tribes affected by its decisions; CLI-20-1, 91 NRC 101 (2020)
- Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)
unless there is a specific duty that has been placed on NRC with respect to Native American tribes, NRC discharges this duty by compliance with the AEA and NEPA; CLI-20-1, 91 NRC 101 (2020)
- Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1363 (D.C. Cir. 1981)
NRC generally need not look beyond the non-proliferation safeguards in determining whether the common defense and security standard is met; CLI-20-2, 91 NRC 124-25 (2020)
- Natural Resources Defense Council, Inc. v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018)
issuance of a license as soon as NRC Staff completes its review does not contravene NEPA; CLI-20-1, 91 NRC 93-94 (2020)
- Natural Resources Defense Council, Inc. v. NRC*, 879 F.3d 1202, 1209-13 (D.C. Cir. 2018)
intervenor's argument that because the board found the environmental impact statement deficient in one respect, the license should be revoked until NRC Staff had formally supplemented the EIS was rejected; CLI-20-1, 91 NRC 94 (2020)
- Natural Resources Defense Council, Inc. v. NRC*, 879 F.3d 1202, 1210-11 (D.C. Cir. 2018)
supplemental information and adjudicatory record remedied deficiency in environmental impact statement; CLI-20-1, 91 NRC 94 (2020)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 312 (2012)
petitioners have an ironclad obligation to review applicants document thoroughly and to base their challenges on its contents; LBP-20-2, 91 NRC 38 (2020)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-18-4, 87 NRC 89, 96-97 (2018)
board may consider readily apparent legal implications of a pro se petitioner's arguments, even if not expressly stated in the petition but this authority is limited in that petitioner, not the board, must provide the information required to satisfy contention admissibility standards; LBP-20-2, 91 NRC 33 (2020)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 8 (2019)
petitioner's request to review an NRC Staff no significant hazards consideration finding is inconsistent with 10 C.F.R. 50.58(b)(6); LBP-20-2, 91 NRC 39 n.53 (2020)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001)
regulatory interpretation should be informed by the language and structure of the provision itself; CLI-20-3, 91 NRC 144, 145 (2020)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001)
in construing a regulation's meaning, it is necessary to examine the agency's entire regulatory scheme; CLI-20-3, 91 NRC 141 (2020)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367 (2001)
as the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation; CLI-20-3, 91 NRC 148 (2020)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 490-91 (2010)
license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to ongoing compliance oversight activity appropriately addressed by NRC Staff; CLI-20-3, 91 NRC 151 (2020)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 491 (2010)
apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that existing oversight processes are adequate to ensure safety; CLI-20-3, 91 NRC 136-37 (2020)

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- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)
creation of a document that collects, summarizes, and places into context previously available information does not make that information new or materially different; LBP-20-6, 91 NRC 255 (2020)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-15-30, 82 NRC 339, 344 n.25 (2015)
board has authority to approve settlement agreements; LBP-20-5, 91 NRC 74 n.9 (2020)
- Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004)
petitioners must show a specific and plausible means for how licensed activities will affect them in the absence of obvious potential for offsite harm; CLI-20-4, 91 NRC 178 (2020)
- Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018)
issuance of a license as soon as NRC Staff completes its review does not contravene NEPA; CLI-20-1, 91 NRC 93-94 (2020)
- Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 538 (D.C. Cir. 2018)
once NRC determines that there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm; CLI-20-1, 91 NRC 94 (2020)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)
prima facie evidence must be legally sufficient to establish a fact or case unless disproved; CLI-20-6, 91 NRC 229 n.20 (2020)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002)
Commission declines to sift through parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves; CLI-20-5, 91 NRC 223 n.45 (2020)
- Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 26 (2003)
to demonstrate traditional standing in a license transfer proceeding, petitioners must show that the alleged injury lies arguably within the zone of interests protected by the Atomic Energy Act; CLI-20-5, 91 NRC 219 n.20 (2020)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 482 (2016)
Commission on appeal generally defers to the board on questions pertaining to the sufficiency of factual support for the admission of a contention; CLI-20-4, 91 NRC 173 (2020)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)
proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 199 n.197 (2020)
- Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015)
agencies must use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance; CLI-20-3, 91 NRC 160 n.6 (2020)
- Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 254-55 (2016)
dispute with how a board weighed evidence is a factual dispute, not a legal one, and therefore the board is entitled to deference; CLI-20-1, 91 NRC 88 (2020)
- Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 47-51 (2013)
site characterization issues have been allowed to migrate to the extent they challenged applicant's demonstration of aquifer confinement and impacts to groundwater; CLI-20-4, 91 NRC 191 n.147 (2020)
- Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 679, 709 (2015)
board decision imposed license condition to require licensee to locate and properly abandon historic boreholes; CLI-20-1, 91 NRC 94 n.101 (2020)

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- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 & n.26 (2010)
petitioner generally must make a fresh standing demonstration in each proceeding in which intervention is sought because a petitioner's circumstances may change from one proceeding to the next; LBP-20-2, 91 NRC 28 (2020)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010)
failure by petitioner to include crucial proximity information constitutes grounds for denying standing; LBP-20-2, 91 NRC 27 (2020)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 140 (2010)
intervention petitioner's claim that he is on the board of directors of two organizations with interests within 50 miles of the site is insufficiently specific to articulate the requisite pattern of regular contacts with the area; LBP-20-2, 91 NRC 30 n.36 (2020)
- PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 504 (2015)
contention pleading requirements are strict by design and intended to ensure that adjudicatory proceedings address substantive issues that are rooted in a reasonably specific factual or legal basis; CLI-20-6, 91 NRC 228 n.19 (2020)
- PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007)
merely asking questions does not raise a genuine dispute with a license application; LBP-20-6, 91 NRC 245 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 36 (1998)
contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 197 n.184 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 322-23 (1999)
NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 219 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)
member seeking representation must qualify for standing in his or her own right and interests that the representative organization seeks to protect must be germane to its purpose and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-20-5, 91 NRC 220 (2020)
petitioner failed to satisfy the first requirement of representational standing, namely, that its members would otherwise have standing to sue in their own right; LBP-20-2, 91 NRC 32 (2020)
to establish representational standing, an organization must demonstrate that its members would otherwise have standing to sue in their own right, interests that the organization seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; LBP-20-2, 91 NRC 28 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
failure by petitioner to include crucial proximity information constitutes grounds for denying standing; LBP-20-2, 91 NRC 27 (2020)
failure to comply with any of the standing requirements constitutes grounds for rejecting a proposed contention; LBP-20-2, 91 NRC 33 n.39 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002)
worst-case scenarios need not be discussed under NEPA; CLI-20-4, 91 NRC 179-80 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 136-37 (2004)
contention that a spent fuel canister is breached in transport must posit a credible scenario; CLI-20-4, 91 NRC 208 (2020)

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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138 n.53 (2004)
contention asserting that shipping a defective canister back inside approved transportation casks is not safe can be seen as an impermissible attack on NRC regulations and rulemaking-related generic determinations that the transportation cask is sufficient to prevent the leakage of any radioactive material; CLI-20-4, 91 NRC 207 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138-39 (2004)
claims about groundwater characterization are not material to the outcome of this proceeding because petitioner has not shown that radionuclides could make their way outside the cask; CLI-20-4, 91 NRC 190 (2020)
to show a genuine material dispute, petitioner's contention would have to give the board reason to believe that contamination from a defective canister could find its way outside a cask; CLI-20-4, 91 NRC 188 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005)
there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen hearings; LBP-20-6, 91 NRC 249 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)
expert opinion that states a conclusion without providing a reasoned basis or explanation for that conclusion does not allow assessment of the merits of that opinion; CLI-20-6, 91 NRC 235 (2020)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001)
technical perfection is not required in pleadings; LBP-20-2, 91 NRC 39 (2020)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991)
failure to explain significance of the presence or absence of faults or fractures to the need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 90 n.72 (2020)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)
for certain major federal actions, an agency must prepare an EIS, which ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts and that such information will be available to the public; CLI-20-4, 91 NRC 191 (2020)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989)
NEPA does not require a worst-case analysis for potential accident consequences; CLI-20-4, 91 NRC 180 (2020)
- Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 58 (2005)
argument that NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety is insufficient to establish standing; CLI-20-5, 91 NRC 223 n.44 (2020)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)
Commission specifically declines to follow a contrary ruling from the 9th Circuit on consideration of terrorist attacks for any facility located outside the 9th Circuit; CLI-20-4, 91 NRC 210 (2020)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209 (1997)
considerations for approving settlements are discussed; LBP-20-5, 91 NRC 74 (2020)
- Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999)
technical perfection is not required in pleadings, particularly in the case of a pro se petitioner; LBP-20-2, 91 NRC 39 (2020)
- Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)
mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to establish harm from a license transfer; CLI-20-5, 91 NRC 223 (2020)

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- Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997)
as an agency of the federal government, NRC owes a fiduciary duty to the Native American tribes affected by its decisions; CLI-20-1, 91 NRC 101 (2020)
- Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997)
Native American tribe is not entitled to greater rights than it would otherwise have as an interested party; CLI-20-1, 91 NRC 101 (2020)
- South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 5 (2010)
argument raised for the first time on appeal will not be considered; CLI-20-4, 91 NRC 209 n.262 (2020)
- South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010)
pro se petitioners are still expected to comply with procedural rules; CLI-20-6, 91 NRC 230 (2020)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)
petitioner is responsible, not the board, for formulating contentions and providing necessary information to satisfy the basis requirement for admission; LBP-20-2, 91 NRC 33 n.38 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608-13 (2012)
Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 173, 178 n.51 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 573 (2016)
Commission defers to board's fact finding unless the standard of clear error is met; CLI-20-1, 91 NRC 85 (2020)
Commission defers to the board on whether a contention has sufficient factual support to be admitted and reviews contention admissibility decisions only where there is an error of law or abuse of discretion; CLI-20-1, 91 NRC 85 (2020)
Commission generally does not review disputes over how a board weighed evidence in a merits decision; CLI-20-1, 91 NRC 85 (2020)
questions of law are reviewed de novo; CLI-20-1, 91 NRC 85 (2020)
standard for finding clear error of fact is high, requiring a showing that the ruling is not even plausible in light of the record as a whole; CLI-20-1, 91 NRC 85 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 582-84 (2016)
extensive sampling to establish baseline restoration values was required under NEPA to properly characterize the site; CLI-20-1, 91 NRC 89 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 584 (2016)
when considering challenges to how the board weighed evidence, Commission defers to a board's expertise as the fact finder and declines to substitute the judgment of an intervenor's expert for that of the board; CLI-20-1, 91 NRC 88 n.61 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 592 (2016)
failure to explain significance of the presence or absence of faults or fractures to the need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 90 n.72 (2020)
- Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 177, *aff'd*, CLI-12-12, 75 NRC 603 (2012)
organization can show standing by establishing either a cognizable injury to its organizational interests or, alternatively, harm to the interests of its members; LBP-20-2, 91 NRC 28 (2020)
- Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 89-92 (2015)
although not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why the site characterization was necessary to fully understand the impacts of the proposed action; CLI-20-4, 91 NRC 191 n.147 (2020)

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- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-15-3, 81 NRC 65, 142-44, 153-54 (2015)
board decision revised license condition to require licensee to locate and properly abandon historic boreholes; CLI-20-1, 91 NRC 94 n.101 (2020)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-15-3, 81 NRC 65, 153-54 (2015)
although environmental impact statement had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the environmental impact statement; CLI-20-1, 91 NRC 94 (2020)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 155 (2015)
intentionally heavy burden is placed on parties seeking to reopen the record; LBP-20-6, 91 NRC 249 (2020)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015)
reopening the record for any reason is considered to be an extraordinary action; LBP-20-6, 91 NRC 248-49 (2020)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)
petitioner generally must make a fresh standing demonstration in each proceeding in which intervention is sought because a petitioner's circumstances may change from one proceeding to the next; LBP-20-2, 91 NRC 28 (2020)
- Thomas B. Saunders* (Confirmatory Order), LBP-20-1, 91 NRC 1, 8 n.13 (2020)
third-party claim based on a notice of violation is not ripe and therefore not litigable; LBP-20-4, 91 NRC 66 (2020)
- Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994)
institutional interest in providing information to the public is insufficient to show an affected interest; CLI-20-2, 91 NRC 112 (2020)
- Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 475 (1999)
issue was whether there existed an active program at all for developing low enriched uranium targets for production of medical isotopes by the planned MAPLE project, including the MAPLE reactors (for irradiating the targets) and associated processing facility; CLI-20-2, 91 NRC 123-23 n.83 (2020)
- U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 192 (2010)
pro se petitioner is held to less rigid pleading standards than parties who are represented by counsel so that parties with a clear, but imperfectly stated, interest in the proceeding are not excluded; CLI-20-6, 91 NRC 230 (2020)
- U.S. Department of Energy* (Export of 93.20% Enriched Uranium), CLI-16-15, 84 NRC 53 (2016)
proliferation and security risks in transportation and end use posed by the lower quantity of material exported are much smaller than the recent prior exports that were limited to one-year supply; CLI-20-2, 91 NRC 129-30 (2020)
- U.S. Department of Energy* (Export of 93.20% Enriched Uranium), CLI-16-15, 84 NRC 53, 58 (2016)
institutional interest in providing information to the public is insufficient to show an affected interest; CLI-20-2, 91 NRC 112 (2020)
- U.S. Department of Energy* (Export of 93.20% Enriched Uranium), CLI-16-15, 84 NRC 53, 58 n.25 (2016)
petitioner in export license proceeding should show how a hearing would bring new information to light and assert or establish an interest that may be affected by issuance of the license; CLI-20-2, 91 NRC 111 (2020)
- U.S. Department of Energy* (Export of 93.20% Enriched Uranium), CLI-16-15, 84 NRC 53, 63-64 (2016)
argument that amount of high enriched uranium should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel has been rejected; CLI-20-2, 91 NRC 129 (2020)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004)
living within an eighth of a mile of a port through which a high enriched uranium export would travel is not enough to demonstrate an affected interest; CLI-20-2, 91 NRC 132 (2020)
proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 199 n.197 (2020)

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- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 366 (2004)
even if petitioners had demonstrated standing, Commission would only order a hearing on export application if petitioners had sufficiently demonstrated that a hearing would be in the public interest and would assist in making the statutory determinations required by the Atomic Energy Act; CLI-20-2, 91 NRC 113 n.46 (2020)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 367 (2004)
entities with an affected interest in an export license application are more likely to contribute to Commission decisionmaking, show that a hearing would be in the public interest, and assist in making the statutory determinations; CLI-20-2, 91 NRC 111 (2020)
nothing in the AEA or NNPA suggests that the Commission must hold a hearing if a member of the public requesting a hearing has standing or an interest that may be affected; CLI-20-2, 91 NRC 111 (2020)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 374 (2004)
NRC generally need not look beyond the non-proliferation safeguards in determining whether the common defense and security standard is met; CLI-20-2, 91 NRC 124-25 (2020)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 376 (2004)
when determining whether any unusual circumstances exist with respect to a proposed export, great weight is given to the Executive Branch's judgments; CLI-20-2, 91 NRC 125 (2020)
- United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)
statutory construction is a holistic endeavor; CLI-20-3, 91 NRC 141 (2020)
- United States v. Armstrong*, 517 U.S. 456, 464 (1996)
NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a presumption of regularity that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 175 (2020)
- United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)
NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a presumption of regularity that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 175 (2020)
- United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)
Fort Laramie Treaty of 1868 is no longer in effect; CLI-20-1, 91 NRC 99 (2020)
- USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 314 (2005)
petitioner may use the proximity presumption if petitioner has a significant property interest within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 27 n.26 (2020)
standing is granted based on petitioner's holding title to a house near a nuclear facility; LBP-20-2, 91 NRC 27 n.26 (2020)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)
board is expected to examine documents provided in support of a proposed contention to verify that the material says what a party claims it does, but is not expected to search through a document for support for a party's claims; CLI-20-4, 91 NRC 187 n.119 (2020)
contention must make clear why cited references provide a basis for a contention; LBP-20-2, 91 NRC 39 n.50 (2020)
it is insufficient for petitioner to point to an Internet website or article and expect the board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why; LBP-20-2, 91 NRC 39 n.50 (2020)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)
new arguments or new evidence that the board had no opportunity to consider will not be addressed on appeal; CLI-20-4, 91 NRC 187 (2020)
petitioners' new argument on appeal regarding NEPA segmentation will not be considered; CLI-20-4, 91 NRC 206 n.244 (2020)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)
conclusory statements by an expert do not support contention admissibility; CLI-20-6, 91 NRC 235 (2020)
expert opinion that states a conclusion without providing a reasoned basis or explanation for that conclusion does not allow assessment of the merits of that opinion; CLI-20-6, 91 NRC 235 (2020)

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- Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 555 (1978)
there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen hearings; LBP-20-6, 91 NRC 249 (2020)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-700 (2012)
motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 193-94 (2020)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 702 (2012)
where jurisdiction to consider reopening has passed to the Commission, it frequently remands such motions to the board to consider the reopening standards in conjunction with contention admissibility, where appropriate; CLI-20-4, 91 NRC 194 (2020)
- Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-14, 11 NRC 631 (1980)
living near the ultimate destination of an exported reactor could not qualify as an affected interest; CLI-20-2, 91 NRC 132 (2020)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)
petitioner may establish traditional standing using contemporaneous judicial standing concepts by showing an injury-in-fact within the zones of interest protected by the statutes that govern agency proceedings, causation, and redressability; LBP-20-2, 91 NRC 26 (2020)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996)
NEPA argument raised for the first time on appeal is untimely; CLI-20-4, 91 NRC 202 (2020)

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- 10 C.F.R. 2.1
procedures in Part 2 govern conduct of all proceedings other than export and import licensing proceedings described in Part 110; CLI-20-2, 91 NRC 109 n.21 (2020)
- 10 C.F.R. 2.4
participant is defined as an individual who has petitioned to intervene in a proceeding or requested a hearing but has not yet been granted party status; LBP-20-1, 91 NRC 7 n.12 (2020)
party to a proceeding is distinguished from a participant in NRC administrative adjudications; LBP-20-1, 91 NRC 7 n.12 (2020)
- 10 C.F.R. 2.202(d)
confirmatory order is an enforcement order issued by NRC Staff whereby licensee consents to an order and waives its right to challenge the order; LBP-20-4, 91 NRC 60 n.2 (2020)
- 10 C.F.R. 2.206
additional NRC enforcement action to remedy employee discrimination could be sought by filing a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70 (2020)
challenges to the ITAAC closure may be raised as petitions under this regulation; CLI-20-6, 91 NRC 229 n.22 (2020)
- 10 C.F.R. 2.206(a)
any person may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-20-4, 91 NRC 70 (2020)
- 10 C.F.R. 2.304(d)
any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness; CLI-20-6, 91 NRC 229 (2020)
- 10 C.F.R. 2.309(a)
intervenor must demonstrate standing and submit an admissible contention; CLI-20-5, 91 NRC 217 n.2 (2020); LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 63-64 (2020)
pleadings requesting to intervene are characterized as petitions to intervene, not motions; LBP-20-3, 91 NRC 45 n.1 (2020); LBP-20-4, 91 NRC 60 n.1 (2020)
- 10 C.F.R. 2.309(c)
new or amended environmental contention may be filed based on new information in NRC Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information; CLI-20-1, 91 NRC 97 (2020)
- 10 C.F.R. 2.309(c)(1)
contention amendment request denied for failure to satisfy the requirements for contentions filed after the deadline; CLI-20-4, 91 NRC 201 (2020)
in addition to meeting the requirements for reopening a closed record, petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so; LBP-20-6, 91 NRC 250, 255 (2020)
- 10 C.F.R. 2.309(c)(1)(i)
creation of a document that collects, summarizes, and places into context previously available information does not make that information new or materially different; LBP-20-6, 91 NRC 255 (2020)
where facts on which contentions were based were known to petitioner from the outset of the proceeding, good cause for waiting to file them does not exist; CLI-20-1, 91 NRC 99 (2020)

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- 10 C.F.R. 2.309(c)(1)(i)-(iii)
to establish good cause for new or amended contention, petitioner must satisfy three conditions; LBP-20-6, 91 NRC 250, 255 (2020)
- 10 C.F.R. 2.309(c)(ii)
had the cultural resources information in the final environmental assessment been materially different from that available in the draft EA, then petitioner would have had the opportunity to submit a new contention challenging that information; CLI-20-1, 91 NRC 98 (2020)
- 10 C.F.R. 2.309(d)
petitioner failed to adequately address the standing requirement that the proposed licensing action would injure his financial, property, or other interests; LBP-20-2, 91 NRC 31 (2020)
petitioners fail to demonstrate standing to intervene either as a matter of right or as a matter of discretion; LBP-20-2, 91 NRC 24 (2020)
- 10 C.F.R. 2.309(d)(1)
to intervene as of right in any NRC licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-20-5, 91 NRC 219 (2020)
- 10 C.F.R. 2.309(d)(1)(i)-(iv)
hearing request must state name, address, and telephone number of petitioner, nature of petitioner's right under relevant statute to be made a party, nature and extent of petitioner's property, financial or other interest in the proceeding, and possible effect of any decision or order that may be issued in the proceeding on petitioner's interest; LBP-20-3, 91 NRC 48 n.8 (2020); LBP-20-4, 91 NRC 64 n.9 (2020)
- 10 C.F.R. 2.309(e)
licensing board may grant discretionary standing; LBP-20-2, 91 NRC 26 (2020)
petitioner can request that the presiding officer consider granting discretionary standing when the petitioner cannot establish its standing as of right under one of the regulatory standards; LBP-20-2, 91 NRC 28 (2020)
petitioner may use one of several approaches to establish standing, such as traditional judicial standing, the proximity presumption, and organizational or representational standing; LBP-20-2, 91 NRC 26 (2020)
petitioner's request for discretionary standing can be considered only if another petitioner has established standing and at least one contention has been admitted so that a hearing will be held; CLI-20-5, 91 NRC 223 (2020); LBP-20-2, 91 NRC 28 (2020)
petitioners fail to demonstrate standing to intervene either as a matter of right or as a matter of discretion; LBP-20-2, 91 NRC 24 (2020)
- 10 C.F.R. 2.309(f)(1)
before submitting a claim of ITAAC incompleteness, petitioner must consult with licensee regarding access to the purportedly missing information; CLI-20-6, 91 NRC 229 (2020)
in addition to demonstrating good cause for proffering contention after the initial deadline for filing a hearing petition, contention would also have to satisfy requirements for contention admissibility; LBP-20-6, 91 NRC 252 (2020)
- 10 C.F.R. 2.309(f)(1)(i)
petitioner in an ITAAC hearing is required to contend and support with a prima facie showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 228-29 (2020)
- 10 C.F.R. 2.309(f)(1)(i)-(v)
contentions in ITAAC proceedings must meet the requirements of this section; CLI-20-6, 91 NRC 228 (2020)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)
contentions must satisfy a six-factor standard for admissibility; LBP-20-2, 91 NRC 32-33, 39 (2020); LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 64 (2020)
- 10 C.F.R. 2.309(f)(1)(iii)
challenge to the safety of NRC-approved transportation packages is outside the scope of an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 253 (2020)
claim that essentially challenges the rules allowing submission of uncompleted ITAAC notifications is outside the scope of the proceeding; CLI-20-6, 91 NRC 233 (2020)

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- claims that such safety-related transportation issues as moving high-burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over adequacy of NRC's Part 71 requirements; LBP-20-6, 91 NRC 253-54 (2020)
- contention challenging a confirmatory order must be rejected as outside the scope of the proceeding unless it claims that the CO is unwarranted and, accordingly, its terms should be relaxed or the CO should be rescinded as opposed to supplemented because it is affirmatively detrimental to public health and safety; LBP-20-3, 91 NRC 52 (2020)
- contention must raise an issue that is within the scope of the proceeding; LBP-20-6, 91 NRC 252 (2020)
- contention that license amendment request doesn't provide financial assurance of decommissioning funding is inadmissible because it is beyond the scope of the proceeding; LBP-20-2, 91 NRC 36 (2020)
- issue statement fails to fulfill the element of contention admissibility; LBP-20-2, 91 NRC 34 (2020)
- petitioners' assertion that NRC Staff performed a cookie cutter analysis in its no significant hazards consideration determination that was fatally flawed, limited in scope, and produced technically deficient conclusions is beyond the scope of the proceeding; 91 NRC 39-40 (2020)
- 10 C.F.R. 2.309(f)(1)(v)
- claims postulating spent-fuel-pool-related accidents might be seen as challenging license amendment request's technical basis and lack support sufficient to establish the basis for an admissible contention; LBP-20-2, 91 NRC 35 n.43 (2020)
- conclusory statements by an expert do not support contention admissibility; CLI-20-6, 91 NRC 235 (2020)
- contention alleging that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly is inadmissible; LBP-20-6, 91 NRC 247 (2020)
- contention that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 246 (2020)
- contention that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 245 (2020)
- unsupported allegations render a contention inadmissible; LBP-20-2, 91 NRC 39 (2020); LBP-20-4, 91 NRC 70 n.18 (2020)
- 10 C.F.R. 2.309(f)(1)(v)-(vi)
- admissible contention must show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes and state the alleged facts or expert opinions that support petitioner's position; LBP-20-6, 91 NRC 252 (2020)
- 10 C.F.R. 2.309(f)(1)(vi)
- admissible contention must show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact; CLI-20-4, 91 NRC 190 (2020)
- claims postulating spent-fuel-pool-related accidents might be seen as challenging license amendment request's technical basis and lack support sufficient to establish the basis for an admissible contention; LBP-20-2, 91 NRC 35 n.43 (2020)
- contention alleging that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly is inadmissible; LBP-20-6, 91 NRC 247 (2020)
- contention asserting further NEPA analysis is needed for a decommissioning-related license transfer application is inadmissible because of petitioner's failure to address license application section referencing and relying on categorical exclusion; LBP-20-2, 91 NRC 38 (2020)
- contention that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 246 (2020)
- contention that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 245 (2020)
- contention that environmental report fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 244 (2020)

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- contention that environmental report is required for license amendment request is inadmissible for failure to show that a genuine dispute exists with the license amendment request on a material issue of law or fact and fails to include references to specific portions of the LAR; LBP-20-2, 91 NRC 37 (2020)
- contention that findings of the NWTRB Report on technical issues regarding transportation of nuclear waste contradict applicant's plans is inadmissible; LBP-20-6, 91 NRC 252 (2020)
- contentions are inadmissible for failure to provide adequate supporting facts; LBP-20-4, 91 NRC 70 n.18 (2020)
- contentions are inadmissible for failure to show a genuine dispute exists on a material issue of law or fact; LBP-20-4, 91 NRC 70 n.18 (2020)
- merely asking questions does not raise a genuine dispute with a license application; LBP-20-6, 91 NRC 245 (2020)
- petitioners failed to acknowledge applicant's analysis of the matter, thus failing to fulfill their ironclad obligation to review the license amendment request thoroughly and to base their challenges on its contents; LBP-20-2, 91 NRC 38 (2020)
- requirements of this subsection do not apply to ITAAC proceedings; CLI-20-6, 91 NRC 228 (2020)
- unsupported allegations render a contention inadmissible; LBP-20-2, 91 NRC 39 (2020)
- 10 C.F.R. 2.309(f)(1)(vii)
- conclusory and speculative claims about potential problems during concrete placement are insufficient to make the required prima facie showing related to specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 235 (2020)
- contentions in ITAAC proceedings must meet the requirements of this subsection; CLI-20-6, 91 NRC 228 (2020)
- if eyewitnesses' or expert witnesses' declarations are not signed, they will be considered but not given the weight of an eyewitness or expert witness with respect to satisfying the prima facie showing; CLI-20-6, 91 NRC 229 (2020)
- if petitioner identifies a specific portion of the § 52.99(c) report as incomplete and contends that the incomplete portion prevents it from making the necessary prima facie showing, then petitioner must explain why this deficiency prevents that showing; CLI-20-6, 91 NRC 230 (2020)
- petitioner in an ITAAC hearing is required to contend and support with a prima facie showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 228-29 (2020)
- petitioners in ITAAC proceedings must identify the specific portion of the section 52.99(c) report that they believe is inaccurate, incorrect, or incomplete; CLI-20-6, 91 NRC 229 n.20 (2020)
- 10 C.F.R. 2.309(f)(2)
- intervenor may update environmental contentions based on applicant's environmental report when information in NRC Staff's draft or final environmental documents differs materially from the information in the ER; CLI-20-1, 91 NRC 82 (2020)
- new or amended environmental contention may be filed based on new information in NRC Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information; CLI-20-1, 91 NRC 97 (2020)
- potential intervenors must base contentions arising under the National Environmental Policy Act on applicant's environmental report; CLI-20-1, 91 NRC 82 (2020)
- 10 C.F.R. 2.309(f)(5)
- lack of factual support for contention's assertions that concrete at the CISF would become activated or that concrete decontamination would not be possible render it inadmissible; CLI-20-4, 91 NRC 204 (2020)
- 10 C.F.R. 2.311(c)
- petitioner whose hearing request has been wholly denied has a right to appeal; CLI-20-4, 91 NRC 173 (2020)
- 10 C.F.R. 2.317(b)
- board has discretion to consider consolidation on its own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice; LBP-20-1, 91 NRC 8, 9 (2020)

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- Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings on motion and for good cause shown or on its own initiative; LBP-20-1, 91 NRC 7 (2020)
- licensing board has discretion to grant consolidation on its own initiative if such action will be conducive to the proper dispatch of its business and to the ends of justice; LBP-20-1, 91 NRC 7 (2020); LBP-20-4, 91 NRC 63 (2020)
- movant must demonstrate good cause for a consolidation request to be granted; LBP-20-1, 91 NRC 3 (2020)
- 10 C.F.R. 2.323(b)
motion to consolidate must include certification by movant's attorney that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that movant's efforts have been unsuccessful; LBP-20-1, 91 NRC 8 (2020); LBP-20-4, 91 NRC 66 n.12 (2020)
- 10 C.F.R. 2.323(c)
replies in support of most motions (including motions to reopen a closed record) may not be filed as of right, but only by leave upon a demonstration of compelling circumstances; LBP-20-6, 91 NRC 249 n.55 (2020)
- 10 C.F.R. 2.323(f)(1)
ruling is referred if it addresses a significant legal issue of first impression that is likely to recur in other proceedings until resolved by the Commission; CLI-20-3, 91 NRC 140 (2020)
- 10 C.F.R. 2.326(a)(1)
exceptionally grave issue may be considered in the discretion of the presiding officer even if the contention is found untimely; LBP-20-6, 91 NRC 248 n.48 (2020)
- 10 C.F.R. 2.326(a)(1)-(3)
to reopen a closed record, petitioner must file a motion demonstrating that its new contention is timely, addresses a significant safety or environmental issue, and demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; LBP-20-6, 91 NRC 248 (2020)
- 10 C.F.R. 2.326(b)
petitioner must attach an affidavit that separately addresses each of these criteria with a specific explanation of why each criterion has been satisfied; LBP-20-6, 91 NRC 248 (2020)
- 10 C.F.R. 2.335
activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 233 (2020)
- certified cask designs are incorporated into NRC regulations and may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver; CLI-20-4, 91 NRC 189 (2020)
- challenge to Category 1 issues in this or any other subsequent license renewal proceeding would need to be accompanied by a rule waiver petition; CLI-20-3, 91 NRC 155, 158 (2020)
- claims that such safety-related transportation issues as moving high-burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements are an attack on NRC regulations; LBP-20-6, 91 NRC 253-54 (2020)
- contention dealing with repackaging of spent fuel and disposal of the spent fuel casks after repackaging are an impermissible attack on NRC's regulations; CLI-20-4, 91 NRC 204 (2020)
- members of the public may seek a waiver of NRC regulations to challenge the analysis in the 2013 Generic Environmental Impact Statement on a Category 1 issue for a specific facility; CLI-20-3, 91 NRC 152-53 (2020)
- no NRC regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted; CLI-20-4, 91 NRC 183 n.95 (2020)
- petitioner's assertion that NRC Staff performed a cookie cutter analysis in its no significant hazards consideration determination that was fatally flawed, limited in scope, and produced technically deficient conclusions is an impermissible challenge to NRC regulations; LBP-20-2, 91 NRC 40 (2020)
- petitioners may not use NRC hearing process to challenge NRC regulations or express generalized grievances with NRC policies; CLI-20-6, 91 NRC 233 (2020)

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- 10 C.F.R. 2.335(a)
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- 10 C.F.R. 2.335(b)
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- 10 C.F.R. 2.338
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- 10 C.F.R. 2.338(g)-(h)
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- 10 C.F.R. 2.338(i)
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boards shall accord due weight to the position of NRC Staff when reviewing the settlement; LBP-20-5, 91 NRC 74 (2020)
- 10 C.F.R. 2.340(a)
board has no authority to raise issues sua sponte without prior Commission permission; CLI-20-1, 91 NRC 96 (2020)
- 10 C.F.R. 2.340(e)(2)
if any environmental or safety hazards come to light in a hearing, the license could be appropriately conditioned or revoked; CLI-20-1, 91 NRC 94 n.101 (2020)
- 10 C.F.R. 2.341(b)(4)
Commission has discretion to take review, giving due weight to whether a petitioner raises a substantial question with respect to considerations in this regulation; CLI-20-1, 91 NRC 84-85 (2020)
- 10 C.F.R. 2.341(b)(4)(i)
Commission has discretion to exercise review where a board finding of fact is in conflict with a finding as to the same fact in a different proceeding; CLI-20-1, 91 NRC 100 (2020)
- 10 C.F.R. 2.347
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- 10 C.F.R. 2.802
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- 10 C.F.R. 2.1202(a)
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NRC Staff is expected to issue the license or amendment when it has completed its review of the materials application regardless of the pendency of an adjudication; CLI-20-1, 91 NRC 93 (2020)
- 10 C.F.R. 2.1316
NRC Staff is expected to promptly issue approval or denial of license transfer requests even if a hearing has been requested; CLI-20-5, 91 NRC 218 n.15 (2020)
- 10 C.F.R. 40.31(f)
contention that application failed to meet applicable legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 82 (2020)
- 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2)
contention that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 82 (2020)
- 10 C.F.R. Part 40, Appendix A, Criteria 5, 7A
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- 10 C.F.R. Part 50
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- 10 C.F.R. 50.47(b)
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- 10 C.F.R. 50.47(c)(2)
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- 10 C.F.R. 50.58(b)(6)
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- 10 C.F.R. 50.74(b)
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- 10 C.F.R. 50.75(h)(1)(iv)
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- 10 C.F.R. 50.82(a)(1)(ii)
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- 10 C.F.R. 50.82(a)(2)
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- 10 C.F.R. 50.82(a)(5)
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- 10 C.F.R. 50.82(a)(8)(i)(A)
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- 10 C.F.R. 50.90
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- 10 C.F.R. 50.91(a)(4)
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- 10 C.F.R. 50.92(c)
upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 23 n.19 (2020)
- 10 C.F.R. Part 50, Appendix E
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- 10 C.F.R. Part 50, Appendix E, Section IV
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- 10 C.F.R. 51.14(a)
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- 10 C.F.R. 51.20(b)(2)
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- 10 C.F.R. 51.22(b)
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- 10 C.F.R. 51.22(c)(9)(i)-(iii)
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- 10 C.F.R. 51.22(c)(25)(iv)-(v), (vi)(I)
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- 10 C.F.R. 51.23
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- 10 C.F.R. 51.45
contention that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 82 (2020)
contention that application failed to meet legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 81 (2020)
contention that application failed to provide sufficient information to establish potential effects of the project on the adjacent surface and groundwater resources is denied; CLI-20-1, 91 NRC 82 (2020)
- 10 C.F.R. 51.45(a)
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- 10 C.F.R. 51.45(b)
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- 10 C.F.R. 51.45(b)(1)
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- 10 C.F.R. 51.52, tbl. S-4
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- 10 C.F.R. 51.53(a)
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regulation includes NRC Staff-prepared final generic environmental impact statements, such as the 2013 GEIS, in the list of documents that applicants may incorporate by reference into their environmental reports; CLI-20-3, 91 NRC 157 (2020)
- 10 C.F.R. 51.53(c)
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- 10 C.F.R. 51.53(c)(1)
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- 10 C.F.R. 51.53(c)(3)
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Commission upholds ruling applying to NRC Staff reliance on Generic Environmental Impact Statement for a subsequent license renewal; CLI-20-3, 91 NRC 134, 135, 136-55 (2020)
license renewal applicants must analyze Category 2 issues but are not required to analyze Category 1 issues, which are analyzed in the Generic Environmental Impact Statement; CLI-20-3, 91 NRC 145 (2020)
petitioners' interpretation of the regulation as inapplicable to subsequent license renewal applicants is inconsistent with an explicitly stated regulatory purpose of Part 51 to promote efficient environmental reviews for license renewal applications; CLI-20-3, 91 NRC 150 (2020)
plain language of regulation neither directs the Commission to apply this section to subsequent license renewal applicants, nor does it forbid it; CLI-20-3, 91 NRC 140, 153 (2020)
regulatory language and structure of section itself further supports the board's holistic reading; CLI-20-3, 91 NRC 145 (2020)
required content of environmental report for operating license renewal is provided; CLI-20-3, 91 NRC 139-40, 159 (2020)
- 10 C.F.R. 51.53(c)(3)(i)
applicants are excused from analyzing Category 1 issues; CLI-20-3, 91 NRC 144, 154 (2020)
- 10 C.F.R. 51.53(c)(3)(ii)
applicants must analyze Category 2 issues for specific plant designs; CLI-20-3, 91 NRC 144 (2020)
- 10 C.F.R. 51.53(c)(3)(ii)(A)
subsection reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them; CLI-20-3, 91 NRC 144-45 (2020)
- 10 C.F.R. 51.53(c)(3)(ii)(K)
all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources; CLI-20-3, 91 NRC 145 (2020)
- 10 C.F.R. 51.53(c)(3)(iii)
applicants must evaluate mitigation for Category 2 issues; CLI-20-3, 91 NRC 144 (2020)
- 10 C.F.R. 51.53(c)(3)(iv)
applicants must consider new and significant information related to license renewal; CLI-20-3, 91 NRC 144 (2020)
regulation is the only one that implements the requirements for license renewal applicants to provide new and significant information in the environmental report; CLI-20-3, 91 NRC 142 n.55 (2020)
- 10 C.F.R. 51.53(d)
contention that environmental report is required for license amendment request is inadmissible; LBP-20-2, 91 NRC 36 (2020)
- 10 C.F.R. 51.60
contention that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 82 (2020)
contention that application failed to meet legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 81 (2020)
- 10 C.F.R. 51.71(d)
draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) must rely on conclusions as amplified by the supporting information in the generic environmental impact statement for issues designated as Category 1 and must contain an analysis of those issues identified as Category 2; CLI-20-3, 91 NRC 143 (2020)
regulation does not differentiate between initial and subsequent license renewals; CLI-20-3, 91 NRC 143 (2020)

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- 10 C.F.R. 51.92
“new and significant information” reflects NRC’s ongoing obligation to supplement any final environmental impact statement prior to undertaking an agency action upon discovering information that provides a seriously different picture of environmental consequences; CLI-20-3, 91 NRC 142 n.55 (2020)
- 10 C.F.R. 51.95
NRC must prepare an environmental impact statement at the initial operating license stage, license renewal stage, and the post-operating license stage; CLI-20-3, 91 NRC 142 (2020)
regulation does not differentiate between initial and subsequent license renewals; CLI-20-3, 91 NRC 142 (2020)
- 10 C.F.R. 51.95(c)
Commission shall prepare an environmental impact statement, which is a supplement to the 2013 Generic EIS, in connection with renewal of an operating license or combined license for a nuclear power plant; CLI-20-3, 91 NRC 142 (2020)
- 10 C.F.R. 51.95(c)(4)
for all license renewal proceedings, including subsequent license renewals, NRC must rely on information developed for Category 2 issues applicable to the plant under § 51.53(c)(3)(ii); CLI-20-3, 91 NRC 142-43 (2020)
NRC must integrate conclusions in the generic environmental impact statement for issues designated as Category 1 into the agency’s final Supplemental EIS; CLI-20-3, 91 NRC 142 (2020)
NRC Staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information; CLI-20-3, 91 NRC 142 (2020)
requirement in this section is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 Generic Environmental Impact Statement for Category 1 issues; CLI-20-3, 91 NRC 142 (2020)
- 10 C.F.R. 51.108
NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. 52.103(g) that the acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 228 n.19 (2020)
- 10 C.F.R. Part 51, Subpart A, Appendix B
recognizing that environmental impact issues may change over time and that additional issues may require consideration, NRC reviews material in Table B-1 on a 10-year cycle; CLI-20-3, 91 NRC 138, 153 (2020)
- 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1
NRC Staff may rely on the Generic Environmental Impact Statement to evaluate environmental impacts of Category 1 issues for subsequent license renewals; CLI-20-3, 91 NRC 134 (2020)
table represents the analysis of the environmental impacts associated with the renewal of any operating license and is to be used in accordance with § 51.95(c); CLI-20-3, 91 NRC 143 (2020)
table summarizes NRC findings on scope and magnitude of environmental impacts of renewing the operating license for a nuclear power plant; CLI-20-3, 91 NRC 143 (2020)
- 10 C.F.R. Part 52
upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 23 n.19 (2020)
- 10 C.F.R. 52.5
confirmatory order is issued to an individual who has acknowledged a violation of the NRC’s Employee Protection regulation; LBP-20-1, 91 NRC 8 (2020)
workforce must be free to raise safety concerns without fear of reprisal, in compliance with the NRC’s requirements for Employee Protections; LBP-20-3, 91 NRC 50 (2020)
- 10 C.F.R. 52.5(a)
discrimination against an employee for engaging in certain protected activities is prohibited; LBP-20-3, 91 NRC 46 n.3 (2020); LBP-20-4, 91 NRC 60 n.4 (2020)

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- 10 C.F.R. 52.5(a)(1)(i)
protected activities include raising safety-related concerns associated with the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974; LBP-20-1, 91 NRC 3-4 n.5 (2020); LBP-20-3, 91 NRC 46 n.3 (2020); LBP-20-4, 91 NRC 60 n.4 (2020)
- 10 C.F.R. 52.5(b)
employee who believes he or she was discharged or otherwise discriminated against for engaging in protected activities may seek a remedy from the Department of Labor; LBP-20-3, 91 NRC 53 (2020); LBP-20-4, 91 NRC 70 (2020)
- 10 C.F.R. 52.8(b)
combined license applicants may reference information previously filed with NRC if the references are clear and specific; CLI-20-6, 91 NRC 237 n.82 (2020)
- 10 C.F.R. 52.63, 52.98
activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 233 (2020)
- 10 C.F.R. 52.99(c)
petitioners must provide an adequately supported showing that the ITAAC report fails to include information required by this section; CLI-20-6, 91 NRC 230 (2020)
- 10 C.F.R. 52.99(c)(1)
when ITAAC are completed, licensee must submit an ITAAC closure notification; CLI-20-6, 91 NRC 227 (2020)
- 10 C.F.R. 52.99(c)(2)
if an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue; CLI-20-6, 91 NRC 227 (2020)
- 10 C.F.R. 52.99(c)(3)
ITAAC completion notification must provide sufficient information to demonstrate that the prescribed inspections, tests, or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met; CLI-20-6, 91 NRC 237 (2020)
licensee's notification of uncompleted ITAAC must describe the licensee's plans to complete the ITAAC that are still incomplete; CLI-20-6, 91 NRC 227 (2020)
prior to fuel load, combined license holder must notify NRC of all uncompleted ITAAC; CLI-20-6, 91 NRC 227 (2020)
regulation specifically provides for the filing of uncompleted ITAAC notifications; CLI-20-6, 91 NRC 233 (2020)
uncompleted ITAAC notifications must include a description of the specific procedures and analytical methods that will be used for performing the prescribed inspections, tests, and analyses and determining that the prescribed acceptance criteria are met; CLI-20-6, 91 NRC 232 (2020)
- 10 C.F.R. 52.99(c)(4)
when ITAAC are completed, licensee must submit an ITAAC closure notification; CLI-20-6, 91 NRC 227 (2020)
- 10 C.F.R. 52.103(b)
contention standards for an ITAAC hearing are based on 10 C.F.R. Part 2, Subpart C, with modifications to account for the expedited schedule and specialized nature of hearings on ITAAC; CLI-20-6, 91 NRC 228 (2020)
- 10 C.F.R. 52.103(f)
activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 233 (2020)
challenges to the ITAAC may be raised as petitions under this regulation; CLI-20-6, 91 NRC 229 n.22 (2020)
- 10 C.F.R. 52.103(g)
before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 227 (2020)
NRC need not draw any conclusion about environmental impacts in connection with a finding under this regulation that the acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 228 n.19 (2020)

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- 10 C.F.R. 52.103(h)
after NRC finds that acceptance criteria are met, the ITAAC no longer constitute regulatory requirements for the licensee; CLI-20-6, 91 NRC 227 (2020)
- 10 C.F.R. Part 52, Appendix D, § VLB
activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 233 (2020)
- 10 C.F.R. 54.17(c)
license renewal application may not be submitted to the Commission earlier than 20 years before the expiration of the operating license or combined license currently in effect; CLI-20-3, 91 NRC 150 n.96 (2020)
- 10 C.F.R. 54.31(d)
safety regulations in Part 54 have long contemplated the possibility of subsequent license renewal; CLI-20-3, 91 NRC 136 (2020)
- 10 C.F.R. 71.47
“start clean/stay clean” plan that a defective canister would be shipped back in an approved transportation cask is lawful as long as applicable radiation standards are met; CLI-20-4, 91 NRC 207 (2020)
- 10 C.F.R. 71.97
advanced planning and coordination of spent fuel shipments with State and tribal officials is required; CLI-20-4, 91 NRC 209 (2020)
- 10 C.F.R. 72.22(e)
claims about financial assurances for later phases or for storage beyond the license term are outside the scope of the proceeding; CLI-20-4, 91 NRC 202 (2020)
independent spent fuel storage installation applicant must provide information sufficient to demonstrate financial qualification of the applicant to carry out the activities for which the license is sought; CLI-20-4, 91 NRC 202 (2020)
- 10 C.F.R. 72.30(c)
decommissioning funding plan must be updated and resubmitted every 3 years; CLI-20-4, 91 NRC 181 (2020)
- 10 C.F.R. 73.37
advanced planning and coordination of spent fuel shipments with state and tribal officials is required; CLI-20-4, 91 NRC 209 (2020)
- 10 C.F.R. 72.103
contention that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 246 n.33 (2020)
- 10 C.F.R. 72.108
transportation impacts must be considered in applicant’s environmental report, but the ER need not prove the safety of transportation packages because 10 C.F.R. Part 71 separately addresses these issues; LBP-20-6, 91 NRC 253 (2020)
- 10 C.F.R. 72.214
generically approved spent fuel storage casks are listed; CLI-20-4, 91 NRC 172 n.4 (2020)
- 10 C.F.R. 110.41
NRC Staff must consult with the State Department to receive views of the Executive Branch on high enriched uranium export applications; CLI-20-2, 91 NRC 107 (2020)
- 10 C.F.R. 110.42(a)(1)
International Atomic Energy Agency safeguards will be applied with respect to any high enriched uranium material proposed to be exported; CLI-20-2, 91 NRC 116 n.59 (2020)
- 10 C.F.R. 110.42(a)(1)-(5)
high enriched uranium export must satisfy non-proliferation criteria; CLI-20-2, 91 NRC 115, 116 (2020)
- 10 C.F.R. 110.42(a)(2)
no high enriched uranium material proposed to be exported can be used for any nuclear explosive device or for research on or development of any nuclear explosive device; CLI-20-2, 91 NRC 116 n.59 (2020)

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- 10 C.F.R. 110.42(a)(3)
adequate physical security measures must be maintained with respect to high enriched uranium material proposed to be exported and to any special nuclear material used in or produced through the use thereof; CLI-20-2, 91 NRC 116 n.59 (2020)
- 10 C.F.R. 110.42(a)(4)
no high enriched uranium material proposed to be exported may be re-transferred to jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such re-transfer; CLI-20-2, 91 NRC 116 n.59 (2020)
- 10 C.F.R. 110.42(a)(5)
no high enriched uranium material proposed to be exported and no special nuclear material produced through use of such material may be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained; CLI-20-2, 91 NRC 116 n.59 (2020)
- 10 C.F.R. 110.42(a)(6)
high enriched uranium export must satisfy additional non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 115, 116-17 (2020)
- 10 C.F.R. 110.42(a)(8)
exports of high enriched uranium must not be inimical to the common defense and security of the United States; CLI-20-2, 91 NRC 116, 124 (2020)
- 10 C.F.R. 110.42(a)(9)
exports of high enriched uranium to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 116 (2020)
NRC must find that proposed recipient of uranium export has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of high enriched uranium; CLI-20-2, 91 NRC 117 (2020)
NRC must find that the U.S. government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor to authorize an export license; CLI-20-2, 91 NRC 117 (2020)
NRC must find that there is no alternative nuclear reactor fuel or target enriched in isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize an export license; CLI-20-2, 91 NRC 117 (2020)
- 10 C.F.R. 110.42(a)(9)(iii)
conditions under which a target can be used in a nuclear research or test reactor are described; CLI-20-2, 91 NRC 118 (2020)
- 10 C.F.R. 110.42(a)(9)(iii)(B)
target “can be used” if its use will permit the large majority of ongoing and planned medical isotope production to be conducted; CLI-20-2, 91 NRC 119, 121 (2020)
- 10 C.F.R. 110.45
NRC must make an independent technical finding that the export meets all applicable requirements; CLI-20-2, 91 NRC 125 (2020)
- 10 C.F.R. 110.45(a)
Commission must make a decision on an export license application based on statutory requirements, regardless of whether applicant chooses to file a response to a hearing request or petition for leave to intervene; CLI-20-2, 91 NRC 109 (2020)
- 10 C.F.R. 110.72
where consultation process with State Department on HEU export applications includes exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 107 (2020)
- 10 C.F.R. 110.80
procedures in Part 110 constitute the exclusive basis for hearings on export and import license applications; CLI-20-2, 91 NRC 109 n.21 (2020)
- 10 C.F.R. 110.81
public participation procedures on export license applications provide for written comments; CLI-20-2, 91 NRC 109, 110 n.23 (2020)
- 10 C.F.R. 110.81(b)
Commission retains discretion to consider comments on export license applications even if filed after the 30-day deadline; CLI-20-2, 91 NRC 110 (2020)

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- submission of a comment in response to another comment is not precluded; CLI-20-2, 91 NRC 110 (2020)
- written comments on export and import license applications should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary; CLI-20-2, 91 NRC 110 n.23 (2020)
- 10 C.F.R. 110.82
public participation procedures on export license applications provide for hearing requests and intervention petitions; CLI-20-2, 91 NRC 109 (2020)
- 10 C.F.R. 110.82(b)
hearing requests and intervention petitions must, at minimum, explain how these standards are satisfied and set forth the issues sought to be raised; CLI-20-2, 91 NRC 110 (2020)
- 10 C.F.R. 110.82(b)(4)
hearing requests on export license applications may assert that petitioner's interests may be affected by issuance of the license and, if doing so, must specify both the facts pertaining to the interest and how it may be affected; CLI-20-2, 91 NRC 110 (2020)
- 10 C.F.R. 110.82(c)
any person may request a hearing or submit a petition for leave to intervene on an export license application within 30 days of NRC notice of the application; CLI-20-2, 91 NRC 107 (2020)
- 10 C.F.R. 110.83
public participation procedures on export license applications provide for answers and replies to hearing requests and intervention petitions; CLI-20-2, 91 NRC 109 (2020)
- 10 C.F.R. 110.83(a)
export license applicant may answer a hearing request or intervention petition but is not required to do so; CLI-20-2, 91 NRC 109 (2020)
- 10 C.F.R. 110.84
Commission determines that hearing requests on export license application should not be granted and concludes that a hearing is not in the public interest and would not assist it in making the requisite statutory determinations; CLI-20-2, 91 NRC 107-08 (2020)
- 10 C.F.R. 110.84(a)
public hearings on nuclear export licensing proceedings are allowed if found to be in the public interest and will assist the Commission in making the statutory determinations; CLI-20-2, 91 NRC 110 (2020)
- 10 C.F.R. 110.84(a)(1)
Commission must determine whether a hearing on an export license application would be in the public interest; CLI-20-2, 91 NRC 114 (2020)
- 10 C.F.R. 110.84(b)
direct economic competitors do not demonstrate an interest within the meaning of this section; CLI-20-2, 91 NRC 113 (2020)
- experience and expertise in matters of non-proliferation do not make petitioner uniquely qualified to contribute to decision-making on export license application; CLI-20-2, 91 NRC 111 n.32 (2020)
- petitioner in export license proceeding should show how a hearing would bring new information to light and assert or establish an interest that may be affected by issuance of the license; CLI-20-2, 91 NRC 111 (2020)
- when acting on a petition the Commission will consider nature of the alleged interest, how that issue relates to issuance or denial, and possible effect of any order on that interest, including whether relief requested is within the Commission's authority and, if so, whether granting relief would redress the alleged injury; CLI-20-2, 91 NRC 110 (2020)
- 10 C.F.R. 110.84(b)(1)
Commission looks at whether competitive disadvantage through applicant's continued use of high enriched uranium is addressed by AMIPA; CLI-20-2, 91 NRC 112-13 n.42 (2020)
- 10 C.F.R. 110.84(b)(3)
Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin high enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 113 (2020)

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- 10 C.F.R. 110.88
procedural requests, such as for an extension of time to file a hearing request on export license applications, are permitted; CLI-20-2, 91 NRC 109 n.17 (2020)
- 10 C.F.R. 110.109
pre-hearing motions on export license applications are not contemplated under this section; CLI-20-2, 91 NRC 109 n.18 (2020)
- 40 C.F.R. 1500.1(b)
NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken; CLI-20-3, 91 NRC 165 n.33 (2020)
- 40 C.F.R. 1502.1
environmental impact statement shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment; CLI-20-3, 91 NRC 165 n.33 (2020)

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- Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)
agency action that is not in accordance with the law or is in excess of statutory jurisdiction, authority, or limitation is prohibited; CLI-20-4, 91 NRC 175 (2020)
- Atomic Energy Act, 57c(2), 42 U.S.C. § 2077(c)(2)
Commission determines whether export of high-enriched uranium is unnecessary or excessive, and therefore inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public; CLI-20-2, 91 NRC 113 n.45 (2020)
exports of high-enriched uranium must not be inimical to the common defense and security of the United States; CLI-20-2, 91 NRC 116 n.58, 124 (2020)
- Atomic Energy Act, 123, 42 U.S.C. § 2153
high-enriched uranium export must be under the terms of an agreement for cooperation; CLI-20-2, 91 NRC 116 n.58 (2020)
- Atomic Energy Act, 126, 42 U.S.C. § 2155
NRC must request views of the Executive Branch on high-enriched uranium export applications; CLI-20-2, 91 NRC 107, 115, 125 (2020)
- Atomic Energy Act, 42 U.S.C. § 2155a(b)
export license applicant may answer a hearing request or intervention petition but is not required to do so; CLI-20-2, 91 NRC 109 (2020)
regardless of whether an entity demonstrates that it has an affected interest in an export license application, the same legal test applies; CLI-20-2, 91 NRC 132 (2020)
- Atomic Energy Act, 42 U.S.C. § 2155(b)(1)
Commission must make a decision on an export license application based on applicable statutory requirements, regardless of whether applicant chooses to file a response to a hearing request or petition for leave to intervene; CLI-20-2, 91 NRC 109 (2020)
- Atomic Energy Act, 127, 42 U.S.C. § 2156
high-enriched uranium export must satisfy non-proliferation criteria; CLI-20-2, 91 NRC 115 (2020)
- Atomic Energy Act, 128, 42 U.S.C. § 2157
high-enriched uranium export must satisfy additional non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 115, 116-17 (2020)
- Atomic Energy Act, 134, 42 U.S.C. § 2160d
definition of “can be used” refers to the large majority of planned medical isotope production generally produced, not to the large majority of medical isotope production broken down by individual isotopes; CLI-20-2, 91 NRC 119 (2020)
exports of high-enriched uranium to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 115-16 (2020)
Secretary of Energy may delay the sunset provision by up to 6 years by certifying that there is an insufficient global supply of Mo-99 produced without the use of high-enriched uranium available to satisfy the domestic market; CLI-20-2, 91 NRC 108 (2020)
- Atomic Energy Act, 134, 42 U.S.C. § 2160d(c)-(h)
issuance of a license to export high-enriched uranium for purposes of medical isotope production is prohibited after January 2, 2020; CLI-20-2, 91 NRC 108 (2020)

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- Atomic Energy Act, 42 U.S.C. 2160d(f)
Secretaries of Energy and Health and Human Services, not NRC, have authority to make market-based determinations on whether to foreclose U.S.-origin high-enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 113 n.44 (2020)
- Atomic Energy Act, 134, 42 U.S.C. § 2160d(h)(3)(B)
“planned” medical isotope production refers to what the ultimate end user plans to produce with the requested material; CLI-20-2, 91 NRC 121 (2020)
- Atomic Energy Act, 134(a)(1), 42 U.S.C. § 2160d
applying this section on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with a high-enriched uranium target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 119 (2020)
NRC must find that there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize an export license; CLI-20-2, 91 NRC 117 (2020)
- Atomic Energy Act, 134(a)(2), 42 U.S.C. § 2160d
NRC must find that proposed recipient of uranium export has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of high-enriched uranium; CLI-20-2, 91 NRC 117 (2020)
- Atomic Energy Act, 134(a)(3), 42 U.S.C. § 2160d
an active program satisfies the statute if it leads to development of a low-enriched uranium target that can be used to produce medical isotopes; CLI-20-2, 91 NRC 123 (2020)
NRC must find that the U.S. government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor to authorize an export license; CLI-20-2, 91 NRC 117 (2020)
- Atomic Energy Act, 42 U.S.C. § 2160d(f)(1)(B)
joint certification authority is provided to the Secretaries of Energy and HHS that is not limited to Mo-99; CLI-20-2, 91 NRC 126 (2020)
- Atomic Energy Act, 134(h)(3), 42 U.S.C. § 2160d(h)(3)
conditions under which a target can be used in a nuclear research or test reactor are described; CLI-20-2, 91 NRC 118 (2020)
- Atomic Energy Act, 134(h)(3)(B), 42 U.S.C. § 2160d(h)(3)(B)
target “can be used” if its use will permit the large majority of ongoing and planned medical isotope production to be conducted; CLI-20-2, 91 NRC 119, 121 (2020)
- Atomic Energy Act, 42 U.S.C. § 2160d(h)(4)
“medical isotope” includes Mo-99 as well as I-131, xenon-133, and other radioactive materials used to produce a radiopharmaceutical for diagnostic or therapeutic procedures; CLI-20-2, 91 NRC 126 (2020)
- Atomic Energy Act, 185b
before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 227 (2020)
- Atomic Energy Act, 186, 42 U.S.C. § 2236
license may be revoked over a material false statement; CLI-20-4, 91 NRC 192 (2020)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)
to intervene as of right in any NRC licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-20-5, 91 NRC 219 (2020)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)(1)(A)
NRC is required to grant a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-20-3, 91 NRC 48 (2020); LBP-20-4, 91 NRC 64 n.9 (2020)
- Atomic Energy Act, 189a(1)(B)
petitioner in an ITAAC hearing is required to contend and support with a prima facie showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 228-29 (2020)
- Atomic Energy Act, 189a(2)(A), 42 U.S.C. § 2239(a)(2)(A)
upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 23 n.19 (2020)

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- National Historic Preservation Act, 54 U.S.C. § 307103(a)
agency must withhold information that may cause harm to a historic place; CLI-20-4, 91 NRC 200 (2020)
- Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101(18)
“repository” is defined as a system intended for permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel; CLI-20-4, 91 NRC 174 (2020)
- Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101-10270 (2012)
storage contracts with the U.S. Department of Energy are illegal; CLI-20-4, 91 NRC 174 (2020)
- Nuclear Waste Policy Act of 1982, as amended, 123, 42 U.S.C. § 10143
DOE will take title to spent fuel when the Secretary of Energy accepts delivery of it; CLI-20-4, 91 NRC 174 (2020)
- Nuclear Waste Policy Act of 1982, as amended, 302, 42 U.S.C. § 10222(a)(5)(A)
Secretary of Energy will enter contracts with spent fuel generators (nuclear power plant owners) that shall provide that the Secretary will take title to the spent fuel following commencement of operation of a repository; CLI-20-4, 91 NRC 174 (2020)
- Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 5051, 101 Stat. 1330-248 (1987), 2 U.S.C. §§ 10261-10270
purpose of the NWTRB Report is to review the DOE’s preparedness to transport spent nuclear fuel and high-level radioactive waste; LBP-20-6, 91 NRC 250 (2020)

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- Fed. R. Civ. P. 42(a)(3) (1966)
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- H.R. Rep. No. 95-587, at 21 (1977)
absent unusual circumstances, if a proposed export satisfies the Nuclear Non-proliferation Act's non-proliferation criteria, then it would likewise satisfy the common defense and security standard; CLI-20-2, 91 NRC 124 (2020)
- addition of specific export licensing criteria did not replace or render obsolete the pre-existing inimicality test; CLI-20-2, 91 NRC 124 (2020)
- 2B Sutherland, Statutory Construction § 51.02 (1992)
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claims postulating spent-fuel-pool-related accidents might be seen as challenging license amendment request's technical basis and lack support sufficient to establish basis for an admissible contention; LBP-20-2, 91 NRC 10 (2020)

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See also Consolidation of Proceedings; Enforcement Proceedings; Evidentiary Hearings; Export License Proceedings; Hearing Denials; Hearing Rights; License Amendment Proceedings; Materials License Amendment Proceedings; Materials License Proceedings; Notice of Hearing

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failure to address reopening requirements and to submit necessary affidavit is sufficient grounds not to reopen a closed record; LBP-20-6, 91 NRC 239 (2020)

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apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that existing oversight processes are adequate to ensure safety; CLI-20-3, 91 NRC 133 (2020)

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confirmatory orders create a legally binding agreement between NRC and licensee to take specified corrective actions; LBP-20-4, 91 NRC 55 (2020); LBP-20-4, 91 NRC 55 (2020)

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contention amendment request denied for failure to satisfy the requirements for contentions filed after the deadline; CLI-20-4, 91 NRC 167 (2020)

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Commission looks at whether competitive disadvantage through applicant's continued use of high-enriched uranium is addressed by AMIPA; CLI-20-2, 91 NRC 103 (2020)

issuance of a license to export high-enriched uranium for purposes of medical isotope production is prohibited after January 2, 2020; CLI-20-2, 91 NRC 103 (2020)

Secretary of Energy may delay the sunset provision by up to 6 years by certifying that there is an insufficient global supply of Mo-99 produced without the use of high-enriched uranium available to satisfy the domestic market; CLI-20-2, 91 NRC 103 (2020)

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Commission declines to sift through parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves; CLI-20-5, 91 NRC 214 (2020)

Commission defers to board's fact finding unless the standard of clear error is met; CLI-20-1, 91 NRC 79 (2020)

Commission defers to the board on whether a contention has sufficient factual support to be admitted and reviews contention admissibility decisions only where there is an error of law or abuse of discretion; CLI-20-1, 91 NRC 79 (2020); CLI-20-4, 91 NRC 167 (2020)

Commission generally does not review disputes over how a board weighed evidence in a merits decision; CLI-20-1, 91 NRC 79 (2020)

Commission has discretion to exercise review where a board finding of fact is in conflict with a finding as to the same fact in a different proceeding; CLI-20-1, 91 NRC 79 (2020)

Commission has discretion to take review, giving due weight to whether a petitioner raises a substantial question with respect to considerations in 10 C.F.R. 2.341(b)(4); CLI-20-1, 91 NRC 79 (2020)

Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 167 (2020)

dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the board is entitled to deference; CLI-20-1, 91 NRC 79 (2020)

failure to point to a board error means that there is no basis for to reverse the board; CLI-20-4, 91 NRC 167 (2020)

new arguments or new evidence that the board had no opportunity to consider will not be addressed on appeal; CLI-20-4, 91 NRC 167 (2020)

questions of law are reviewed de novo; CLI-20-1, 91 NRC 79 (2020)

standard for finding clear error of fact is high, requiring a showing that the ruling is not even plausible in light of the record as a whole; CLI-20-1, 91 NRC 79 (2020)

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export license applicant may answer a hearing request or intervention petition but is not required to do so; CLI-20-2, 91 NRC 103 (2020)

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ATOMIC ENERGY ACT

an active program satisfies the statute if it leads to development of a low enriched uranium target that can be used to produce medical isotopes; CLI-20-2, 91 NRC 103 (2020)

applying section 134(a)(1) on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with a high-enriched uranium target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 103 (2020)

before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)

Commission determines whether export of high-enriched uranium is unnecessary or excessive, and therefore inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public; CLI-20-2, 91 NRC 103 (2020)

conditions under which a target can be used in a nuclear research or test reactor are described; CLI-20-2, 91 NRC 103 (2020)

definition of "can be used" in § 134 refers to the large majority of planned medical isotopes produced, not to the large majority of medical isotope production broken down by individual isotopes; CLI-20-2, 91 NRC 103 (2020)

high-enriched uranium export must satisfy non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 103 (2020)

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"medical isotope" includes Mo-99 as well as I-131, xenon-133, and other radioactive materials used to produce a radiopharmaceutical for diagnostic or therapeutic procedures; CLI-20-2, 91 NRC 103 (2020)

nothing in the act suggests that the Commission must hold a hearing on an export application if a member of the public requesting a hearing has standing or an interest that may be affected; CLI-20-2, 91 NRC 103 (2020)

NRC is required to grant a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

NRC must find that there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize an export license; CLI-20-2, 91 NRC 103 (2020)

NRC Staff must consult with the State Department to receive views of the Executive Branch on high-enriched uranium export applications; CLI-20-2, 91 NRC 103 (2020)

target "can be used" if its use will permit the large majority of ongoing and planned medical isotope production to be conducted; CLI-20-2, 91 NRC 103 (2020)

to intervene as of right in any NRC licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-20-5, 91 NRC 214 (2020)

upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 10 (2020)

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new arguments or new evidence that the board had no opportunity to consider will not be addressed on appeal; CLI-20-4, 91 NRC 167 (2020)

restatement of arguments previously raised before the board will be rejected; CLI-20-4, 91 NRC 167 (2020)

BURDEN OF PERSUASION

petitioner bears the burden of establishing its standing whether pro se or otherwise; LBP-20-2, 91 NRC 10 (2020)

BURDEN OF PROOF

if proponent of contention has introduced sufficient evidence to establish a prima facie case, the burden shifts to applicant, who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license; CLI-20-1, 91 NRC 79 (2020)

intervenor's burden-shifting argument, although couched in legal terms, is at bottom a factual challenge to the way the board weighed and balanced conflicting evidence; CLI-20-1, 91 NRC 79 (2020)

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licensing board has discretion to grant consolidation on its own initiative if such action will be conducive to the proper dispatch of its business and to the ends of justice; LBP-20-1, 91 NRC 1 (2020)
licensing board is not required to take extraordinary measures to ensure that parties are fully aware of relevant factual details in a proceeding, such as the release of new or updated reports; CLI-20-1, 91 NRC 79 (2020)

CATEGORICAL EXCLUSION

absent special circumstances, an environmental assessment or environmental impact statement is not required for any action within a category of actions included in the list of categorical exclusions in 10 C.F.R. 51.22(c); LBP-20-2, 91 NRC 10 (2020)
license amendments are excluded from the environmental review requirement if three specified criteria are satisfied; LBP-20-2, 91 NRC 10 (2020)
petitioner may challenge the invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 10 (2020)
petitioners fail to challenge license amendment request's categorical exclusion either by seeking to establish special circumstances or by controverting the 10 C.F.R. 51.22(c)(9) and (25) factors; LBP-20-2, 91 NRC 10 (2020)

CERTIFICATION

applicant must certify to NRC that it has permanently removed all fuel and placed the fuel in the spent fuel pool; LBP-20-2, 91 NRC 10 (2020)
motion must include a certification by attorney of movant that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful; LBP-20-1, 91 NRC 1 (2020); LBP-20-4, 91 NRC 55 (2020)

See also Design Certification

COMBINED LICENSE APPLICATION

applicants may reference information previously filed with NRC if the references are clear and specific; CLI-20-6, 91 NRC 225 (2020)

COMBINED LICENSES

after NRC finds that acceptance criteria are met, the ITAAC no longer constitute regulatory requirements for licensee; CLI-20-6, 91 NRC 225 (2020)
before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)
Commission shall prepare an environmental impact statement, which is a supplement to the 2013 GEIS, in connection with renewal of an operating license or combined license for a nuclear power plant; CLI-20-3, 91 NRC 133 (2020)
if an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue; CLI-20-6, 91 NRC 225 (2020)
prior to fuel load, combined license holder must notify NRC of all uncompleted ITAAC; CLI-20-6, 91 NRC 225 (2020)

COMMON DEFENSE AND SECURITY

absent unusual circumstances, if a proposed export satisfies the Nuclear Non-proliferation Act's non-proliferation criteria, then it would likewise satisfy the common defense and security standard; CLI-20-2, 91 NRC 103 (2020)
addition of specific export licensing criteria did not replace or render obsolete the pre-existing inimicality test; CLI-20-2, 91 NRC 103 (2020)
use of high-enriched uranium exclusively for I-131 would not be inimical to the common defense and security; CLI-20-2, 91 NRC 103 (2020)

COMPETITIVE INJURY

Commission looks at whether competitive disadvantage through applicant's continued use of high-enriched uranium is addressed by the American Medical Isotopes Production Act; CLI-20-2, 91 NRC 103 (2020)

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conclusory and speculative claims about potential problems during concrete placement are insufficient to make the required prima facie showing related to specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 225 (2020)

lack of factual support for contention's assertions that concrete at consolidated interim storage facility would become activated or that concrete decontamination would not be possible render it inadmissible; CLI-20-4, 91 NRC 167 (2020)

CONFIRMATORY ORDER

allowing a third party to attack a CO under guise of a factual dispute would effectively permit an end run around the *Bellotti* doctrine and undercut NRC policy favoring enforcement settlements; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

contention challenging a CO will be rejected as outside the scope of the proceeding unless it opposes issuance of the CO as unwarranted, so as to require relaxation, or as affirmatively detrimental to the public health and safety, so as to require rescission as opposed to supplementation; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

dispositive inquiry under *Bellotti* doctrine for a third-party challenge to a CO is whether the CO improves licensee's health and safety conditions, and if it does, no hearing is appropriate; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

enforcement order limits the scope of any challenge brought by a third party to the issue of whether the order should be sustained; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

individual who has acknowledged a violation of the NRC's Employee Protection regulation is issued a CO; LBP-20-1, 91 NRC 1 (2020)

injury alleged to have resulted from failure to grant more extensive relief is not cognizable in a proceeding on a CO because such an assertion fails to establish harm that is traceable to the CO; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

intervention request, to be granted, must demonstrate standing, proffer an admissible contention, and satisfy the *Bellotti* doctrine; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

it is unlikely that petitioners will often obtain hearings on confirmatory orders because such orders presumably enhance rather than diminish public safety; LBP-20-4, 91 NRC 55 (2020)

legally binding agreement between NRC and licensee to take specified corrective actions is created in a confirmatory order; LBP-20-4, 91 NRC 55 (2020); LBP-20-4, 91 NRC 55 (2020)

CONSIDERATION OF ALTERNATIVES

NRC must find that there is no alternative nuclear reactor fuel or target enriched in isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize an export license; CLI-20-2, 91 NRC 103 (2020)

CONSOLIDATION OF PROCEEDINGS

actions involving common questions of law or fact may be consolidated if consolidation would avoid unnecessary costs or delay; LBP-20-1, 91 NRC 1 (2020)

board declined to consolidate two separately noticed materials license amendment proceedings, because each proceeding authorized its own discrete activities; LBP-20-1, 91 NRC 1 (2020)

board has discretion to grant consolidation on its own initiative if such action will be conducive to the proper dispatch of its business and to the ends of justice; LBP-20-1, 91 NRC 1 (2020)

Commission or presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings on motion and for good cause shown or on its own initiative; LBP-20-1, 91 NRC 1 (2020)

good cause for consolidation can be established by showing that the relevant proceedings involve common questions of law or fact such that consolidation would avoid unnecessary costs or delay; LBP-20-4, 91 NRC 55 (2020)

movant must demonstrate good cause for a consolidation request to be granted; LBP-20-1, 91 NRC 1 (2020); LBP-20-4, 91 NRC 55 (2020)

petitioner who currently is not a party to either proceeding has no right to a formal consolidation; LBP-20-1, 91 NRC 1 (2020)

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CONSTRUCTION OF MEANING

although hearing requests are construed in petitioner's favor, petitioner has the burden of demonstrating that the standing requirements are met; CLI-20-6, 91 NRC 225 (2020)
hearing petition generally is construed in favor of petitioner seeking to demonstrate standing, and a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 10 (2020)

CONSTRUCTION OF TERMS

"can be used" in Atomic Energy Act § 134 refers to the large majority of planned medical isotopes produced, not to the large majority of medical isotope production broken down by individual isotopes; CLI-20-2, 91 NRC 103 (2020)
"new and significant information" reflects NRC's ongoing obligation to supplement any final environmental impact statement prior to undertaking an agency action upon discovering information that provides a seriously different picture of the environmental consequences; CLI-20-3, 91 NRC 133 (2020)

CONSULTATION DUTY

before submitting a claim of ITAAC incompleteness, petitioner must consult with licensee regarding access to the purportedly missing information; CLI-20-6, 91 NRC 225 (2020)
motion must include a certification by attorney of movant that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful; LBP-20-1, 91 NRC 1 (2020); LBP-20-4, 91 NRC 55 (2020)
NRC Staff must consult with the State Department to receive views of the Executive Branch on high-enriched uranium export applications; CLI-20-2, 91 NRC 103 (2020)
where consultation process with State Department on high-enriched uranium export applications include exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 103 (2020)

CONTENTIONS

board has no authority to rewrite contentions to supply bases that petitioner had not articulated itself; CLI-20-1, 91 NRC 79 (2020)
potential intervenors must base contentions arising under the National Environmental Policy Act on applicant's environmental report; CLI-20-1, 91 NRC 79 (2020)
See also Amendment of Contentions

CONTENTIONS, ADMISSIBILITY

activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 225 (2020)
allowing a third party to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around the *Bellotti* doctrine and would also undercut NRC policy favoring enforcement settlements; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness; CLI-20-6, 91 NRC 225 (2020)
argument that enforcement order should be strengthened by adding corrective actions is inadmissible; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
assertion that NEPA analysis is needed for a decommissioning-related license transfer application is inadmissible for failure to address license application section referencing and relying on categorical exclusion; LBP-20-2, 91 NRC 10 (2020)
assertion that NRC Staff performed a cookie cutter analysis in its no significant hazards consideration determination that was fatally flawed, limited in scope, and produced technically deficient conclusions is an impermissible challenge to NRC regulations; LBP-20-2, 91 NRC 10 (2020)
before submitting a claim of ITAAC incompleteness, petitioner must consult with licensee regarding access to the purportedly missing information; CLI-20-6, 91 NRC 225 (2020)
board is expected to examine documents provided in support of a proposed contention to verify that the material says what a party claims it does, but is not expected to search through a document for support for a party's claims; CLI-20-4, 91 NRC 167 (2020)
board may consider readily apparent legal implications of a pro se petitioner's arguments, even if not expressly stated in the petition; LBP-20-2, 91 NRC 10 (2020)

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certified cask designs are incorporated into NRC regulations and may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver; CLI-20-4, 91 NRC 167 (2020)

challenge to a confirmatory order will be rejected as outside the scope of the proceeding unless it opposes issuance of the order as unwarranted, so as to require relaxation, or as affirmatively detrimental to the public health and safety, so as to require rescission as opposed to supplementation; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

challenge to applicant's request to revise site emergency plan and emergency action level scheme to reflect permanently defueled condition of reactors is denied; LBP-20-2, 91 NRC 10 (2020)

challenge to the safety of NRC-approved transportation packages is outside the scope of an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

claim that a spent fuel canister is breached in transport must posit a credible scenario; CLI-20-4, 91 NRC 167 (2020)

claim that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 79 (2020)

claim that application failed to meet legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 79 (2020)

claim that application fails to provide sufficient information to establish potential effects of the project on the adjacent surface and groundwater resources is denied; CLI-20-1, 91 NRC 79 (2020)

claim that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

claim that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

claim that environmental report fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 239 (2020)

claim that essentially challenges the rules allowing submission of uncompleted ITAAC notifications is outside the scope of the proceeding; CLI-20-6, 91 NRC 225 (2020)

claim that findings of the NWTRB Report on technical issues regarding transportation of nuclear waste contradict applicant's plans is inadmissible; LBP-20-6, 91 NRC 239 (2020)

claim that shipping a defective canister back inside the approved transportation casks is not safe is an impermissible attack on NRC regulations; CLI-20-4, 91 NRC 167 (2020)

claim that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly is inadmissible; LBP-20-6, 91 NRC 239 (2020)

claims about financial assurances for later phases or for storage beyond the license term are outside the scope of the proceeding; CLI-20-4, 91 NRC 167 (2020)

claims about groundwater characterization are not material to the outcome of the proceeding because petitioner has not shown that radionuclides could make their way outside of a storage cask; CLI-20-4, 91 NRC 167 (2020)

claims postulating spent-fuel-pool-related accidents might be seen as challenging license amendment request's technical basis and lack support sufficient to establish the basis for an admissible contention; LBP-20-2, 91 NRC 10 (2020)

claims that such safety-related transportation issues as moving high-burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements; LBP-20-6, 91 NRC 239 (2020)

Commission defers to the board on whether a contention has sufficient factual support to be admitted and reviews contention admissibility decisions only where there is an error of law or abuse of discretion; CLI-20-1, 91 NRC 79 (2020)

Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 167 (2020)

Commission on appeal generally defers to the board on questions pertaining to the sufficiency of factual support for the admission of a contention; CLI-20-4, 91 NRC 167 (2020)

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concerns about leaks from spent fuel storage containers that are separately approved and licensed by the NRC may not be adjudicated in an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

conclusory and speculative claims about potential problems during concrete placement are insufficient to make the required prima facie showing related to specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of public health and safety; CLI-20-6, 91 NRC 225 (2020)

conclusory statements by an expert do not support contention admissibility; CLI-20-6, 91 NRC 225 (2020)

contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 167 (2020)

contention that environmental report is required for license amendment request is inadmissible; LBP-20-2, 91 NRC 10 (2020)

contention that license amendment request doesn't provide financial assurance of decommissioning funding is inadmissible as beyond the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)

contentions in ITAAC proceedings must meet the requirements of 10 C.F.R. 2.309(f)(1)(i)-(v); CLI-20-6, 91 NRC 225 (2020)

contentions must satisfy a six-factor standard; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

contentions that challenge the sufficiency of the ITAAC themselves are not admissible because the ITAAC have already been approved by the NRC in connection with issuance of the combined license; CLI-20-6, 91 NRC 225 (2020)

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direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 10 (2020)

dispute at issue is material if its resolution would make a difference in the outcome of the licensing proceeding; CLI-20-4, 91 NRC 167 (2020)

enforcement order limits the scope of any challenge brought by a third party to the issue of whether the order should be sustained; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

environmental aspect of contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because petitioner did not seek a rule waiver; CLI-20-4, 91 NRC 167 (2020)

even had petitioner's contentions passed muster under 10 C.F.R. 2.309(f)(1), its motion would still fail because it did not address, let alone meet, reopening standards; LBP-20-6, 91 NRC 239 (2020)

every agency licensing action does not throw open an opportunity to engage in a free-ranging inquiry into the character of the licensee; LBP-20-2, 91 NRC 10 (2020)

exceptionally grave issue may be considered in the discretion of the presiding officer even if the contention is found untimely; LBP-20-6, 91 NRC 239 (2020)

failure to comply with any of the standing requirements constitutes grounds for rejecting a proposed contention; LBP-20-2, 91 NRC 10 (2020)

failure to comply with any pleading requirement renders a contention inadmissible; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

failure to explain significance of the presence or absence of faults or fractures to the need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 79 (2020)

had the cultural resources information in the final environmental assessment been materially different from that available in the draft EA, then petitioner would have had the opportunity to submit a new contention challenging that information; CLI-20-1, 91 NRC 79 (2020)

hearing notice generally determines the scope of the hearing and may include any health, safety, or environmental issues fairly raised by the proposed licensing action; LBP-20-2, 91 NRC 10 (2020)

if eyewitnesses' or expert witnesses' declarations are not signed, they will be considered but not given the weight of an eyewitness or expert witness with respect to satisfying the prima facie showing; CLI-20-6, 91 NRC 225 (2020)

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if petitioner identifies a specific portion of the § 52.99(c) report as incomplete and contends that the incomplete portion prevents it from making the necessary prima facie showing, then petitioner must explain why this deficiency prevents that showing; CLI-20-6, 91 NRC 225 (2020)

in addition to demonstrating good cause for proffering contention after the initial deadline for filing a hearing petition, contention would also have to satisfy requirements for admissibility; LBP-20-6, 91 NRC 239 (2020)

in addition to meeting the requirements for reopening a closed record, petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so; LBP-20-6, 91 NRC 239 (2020)

intervenor may update environmental contentions based on applicant's environmental report when information in NRC Staff's draft or final environmental documents differs materially from information in the ER; CLI-20-1, 91 NRC 79 (2020)

intervenor may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly; CLI-20-5, 91 NRC 214 (2020)

issue statement fails to fulfill the element of contention admissibility; LBP-20-2, 91 NRC 10 (2020)

it is insufficient for petitioner to point to an Internet website or article and expect the board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why; LBP-20-2, 91 NRC 10 (2020)

lack of factual support for contention's assertions that concrete at the consolidated interim storage facility would become activated or that concrete decontamination would not be possible render it inadmissible; CLI-20-4, 91 NRC 167 (2020)

late-filed contention that environmental report must evaluate the potential impact on the environment of transportation of nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 239 (2020)

merely asking questions does not raise a genuine dispute with a license application; LBP-20-6, 91 NRC 239 (2020)

motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 167 (2020)

new or amended environmental contention may be filed based on new information in NRC Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information; CLI-20-1, 91 NRC 79 (2020)

no NRC regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted; CLI-20-4, 91 NRC 167 (2020)

NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. 52.103(g) that acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 225 (2020)

one can always flyspeck an environmental impact statement to come up with more specifics and more areas of discussion that could have been included; CLI-20-4, 91 NRC 167 (2020)

petitioner bears the burden to satisfy each of the criteria in 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-20-2, 91 NRC 10 (2020)

petitioner in an ITAAC hearing is required to contend and support with a prima facie showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 225 (2020)

petitioner is responsible, not the board, for formulating contentions and providing necessary information to satisfy the basis requirement for admission; LBP-20-2, 91 NRC 10 (2020)

petitioner may challenge the invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 10 (2020)

petitioner must make clear why cited references provide a basis for a contention; LBP-20-2, 91 NRC 10 (2020)

petitioner must raise an issue that is within the scope of the proceeding; LBP-20-6, 91 NRC 239 (2020)

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petitioner must show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that petitioner disputes and state the alleged facts or expert opinions that support petitioner's position; CLI-20-4, 91 NRC 167 (2020); LBP-20-6, 91 NRC 239 (2020)

petitioners fail to challenge license amendment request's categorical exclusion either by seeking to establish special circumstances or by controverting the 10 C.F.R. 51.22(c)(9) and (25) factors; LBP-20-2, 91 NRC 10 (2020)

petitioners have an ironclad obligation to review applicants' document thoroughly and to base their challenges on their contents; LBP-20-2, 91 NRC 10 (2020)

petitioners in ITAAC proceedings must identify the specific portion of the section 52.99(c) report that they believe is inaccurate, incorrect, or incomplete; CLI-20-6, 91 NRC 225 (2020)

petitioners may not use NRC hearing process to challenge NRC regulations or express generalized grievances with NRC policies; CLI-20-6, 91 NRC 225 (2020)

petitioners must provide an adequately supported showing that the ITAAC report fails to include information required by 10 C.F.R. 52.99(c); CLI-20-6, 91 NRC 225 (2020)

petitioners' new argument on appeal regarding NEPA segmentation will not be considered; CLI-20-4, 91 NRC 167 (2020)

post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity; LBP-20-2, 91 NRC 10 (2020)

pleading requirements are strict by design and intended to ensure that adjudicatory proceedings address substantive issues that are rooted in a reasonably specific factual or legal basis; CLI-20-6, 91 NRC 225 (2020)

proponent of a contention has a responsibility to put forth evidence of its claim; CLI-20-1, 91 NRC 79 (2020)

requirements of 10 C.F.R. 2.309(f)(1)(vi) do not apply to ITAAC proceedings; CLI-20-6, 91 NRC 225 (2020)

site characterization issues have been allowed to migrate to the extent they challenged applicant's demonstration of aquifer confinement and impacts to groundwater; CLI-20-4, 91 NRC 167 (2020)

standard is strict by design; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

standards for an ITAAC hearing are based on 10 C.F.R. Part 2, Subpart C, with modifications to account for the expedited schedule and specialized nature of hearings on ITAAC; CLI-20-6, 91 NRC 225 (2020)

technical perfections is not required in pleadings, particularly in the case of a pro se petitioner; LBP-20-2, 91 NRC 10 (2020)

terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding; CLI-20-4, 91 NRC 167 (2020)

third-party claim based on a notice of violation is not ripe and therefore not litigable; LBP-20-4, 91 NRC 55 (2020)

to show a genuine material dispute, petitioner's contention would have to give the board reason to believe that contamination from a defective canister could find its way outside a cask; CLI-20-4, 91 NRC 167 (2020)

vague, unparticularized, or open-ended contentions are not admissible in NRC proceedings; CLI-20-1, 91 NRC 79 (2020)

when respondent in an enforcement action has agreed to terms of a confirmatory order, a challenge to the facts themselves by a third party is not cognizable; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

whether an option for disposal of spent nuclear fuel is commercially viable is not an issue before the board; CLI-20-4, 91 NRC 167 (2020)

CONTENTIONS, LATE-FILED

claim that environmental report must evaluate the potential environmental impact of transportation of the nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 239 (2020)

creation of a document that collects, summarizes, and places into context previously available information does not make that information new or materially different; LBP-20-6, 91 NRC 239 (2020)

even had petitioner's contentions passed muster under 10 C.F.R. 2.309(f)(1), its motion would still fail for not addressing, let alone meeting, reopening standards; LBP-20-6, 91 NRC 239 (2020)

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- in addition to demonstrating good cause for proffering contention after the initial deadline for filing a hearing petition, contention would also have to satisfy requirements for admissibility; LBP-20-6, 91 NRC 239 (2020)
- in addition to meeting the requirements for reopening a closed record, petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so; LBP-20-6, 91 NRC 239 (2020)
- motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 167 (2020)
- NEPA argument raised for the first time on appeal is untimely; CLI-20-4, 91 NRC 167 (2020)
- petitioner who waits until issuance of a final environmental document to raise a contention risks the possibility that there will not be a material difference between the draft and final document; CLI-20-1, 91 NRC 79 (2020)
- to establish good cause for new or amended contention, petitioner must satisfy three conditions; LBP-20-6, 91 NRC 239 (2020)
- where facts on which contentions were based were known to petitioner from the outset of the proceeding, good cause for waiting to file them does not exist; CLI-20-1, 91 NRC 79 (2020)
- CONTINUED STORAGE RULE**
- environmental aspect of contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because petitioner did not seek a rule waiver; CLI-20-4, 91 NRC 167 (2020)
- impacts from spent fuel repackaging and cask disposal are appropriately addressed by relying on the description of those impacts contained in the Continued Storage GEIS, which is incorporated by reference into 10 C.F.R. 51.23; CLI-20-4, 91 NRC 167 (2020)
- CONTRACTS**
- NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a presumption of regularity that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 167 (2020)
- radioactive waste storage contracts with the U.S. Department of Energy are illegal; CLI-20-4, 91 NRC 167 (2020)
- COSTS**
- actions involving common questions of law or fact may be consolidated if that would avoid unnecessary costs or delay; LBP-20-1, 91 NRC 1 (2020)
- COUNSEL**
- it is the responsibility of the party itself not merely to decide whether it wishes to have counsel, but, in addition, to take the necessary steps to implement its decision; CLI-20-1, 91 NRC 79 (2020)
- CULTURAL RESOURCES**
- all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources; CLI-20-3, 91 NRC 133 (2020)
- contention that application failed to meet legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 79 (2020)
- DEADLINES**
- written comments on export and import license applications should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary; CLI-20-2, 91 NRC 103 (2020)
- DECISION ON THE MERITS**
- Commission generally does not review disputes over how a board weighed evidence in a merits decision; CLI-20-1, 91 NRC 79 (2020)
- Commission must make a decision on an export license application based on applicable statutory requirements, regardless of whether applicant chooses to file a response to a hearing request or petition for leave to intervene; CLI-20-2, 91 NRC 103 (2020)
- expert opinion that states a conclusion without providing a reasoned basis or explanation for that conclusion does not allow assessment of the merits of that opinion; CLI-20-6, 91 NRC 225 (2020)
- See also Licensing Board Decisions; Record of Decision
- DECLARATIONS**
- any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness; CLI-20-6, 91 NRC 225 (2020)

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- if eyewitnesses' or expert witnesses' declarations are not signed, they will be considered but not given the weight of an eyewitness or expert witness with respect to satisfying the prima facie showing; CLI-20-6, 91 NRC 225 (2020)
- DECOMMISSIONING
- license no longer authorizes placement or retention of fuel in the reactor vessel or reactor operation; LBP-20-2, 91 NRC 10 (2020)
- licensee must submit a post-shutdown activities report to the Commission and cannot perform major activities until 90 days after a PSDAR is submitted, but a PSDAR is not subject to NRC approval; LBP-20-2, 91 NRC 10 (2020)
- NRC must prepare an environmental impact statement at the initial operating license stage, license renewal stage, and the post-operating license stage; CLI-20-3, 91 NRC 133 (2020)
- NRC performs onsite inspections of activities; LBP-20-2, 91 NRC 10 (2020)
- DECOMMISSIONING FUND DISBURSEMENTS
- exemption is requested to permit use of decommissioning trust funds for spent fuel management activities and to make those withdrawals without prior NRC notification; LBP-20-2, 91 NRC 10 (2020)
- DECOMMISSIONING FUNDING
- contention that license amendment request doesn't provide financial assurance of decommissioning funding is inadmissible because it is beyond the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)
- there is nothing to suggest that reducing the scope of offsite and onsite emergency planning commensurate with facility's permanently defueled status would negatively implicate decommissioning funding, countering any assertion of a particularized injury; LBP-20-2, 91 NRC 10 (2020)
- DECOMMISSIONING FUNDING PLANS
- licensee must update and resubmit plans every 3 years; CLI-20-4, 91 NRC 167 (2020)
- DECONTAMINATION
- lack of factual support for contention's assertions that concrete at the consolidated interim storage facility would become activated or that concrete decontamination would not be possible render it inadmissible; CLI-20-4, 91 NRC 167 (2020)
- DEFICIENCIES
- although environmental impact statement had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS; CLI-20-1, 91 NRC 79 (2020)
- intervenor's argument that because the board found the environmental impact statement deficient in one respect, the license should be revoked until NRC Staff had formally supplemented the EIS was rejected; CLI-20-1, 91 NRC 79 (2020)
- once NRC determines that there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm; CLI-20-1, 91 NRC 79 (2020)
- DEFINITIONS
- participant is an individual who has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status; LBP-20-1, 91 NRC 1 (2020)
- party in NRC administrative adjudications is distinguished from a participant; LBP-20-1, 91 NRC 1 (2020)
- "repository" is a system intended for permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel; CLI-20-4, 91 NRC 167 (2020)
- DEFUELED REACTORS
- challenge to applicant's request to revise site emergency plan and emergency action level scheme to reflect permanently defueled condition of reactors is denied; LBP-20-2, 91 NRC 10 (2020)
- exemptions from requirements for plume exposure and ingestion pathway emergency planning zones for nuclear power plants for defueled reactor are discussed; LBP-20-2, 91 NRC 10 (2020)
- exemptions from standards for onsite and offsite emergency response plans for defueled reactor are discussed; LBP-20-2, 91 NRC 10 (2020)
- DELAY OF PROCEEDING
- actions involving common questions of law or fact may be consolidated if consolidation would avoid unnecessary costs or delay; LBP-20-1, 91 NRC 1 (2020)

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DENIAL OF LICENSE

NRC Staff is expected to promptly issue approval or denial of license transfer requests even if a hearing has been requested; CLI-20-5, 91 NRC 214 (2020)

DEPARTMENT OF ENERGY

DOE will take title to spent fuel when the Secretary of Energy accepts delivery of it following commencement of operation of a repository; CLI-20-4, 91 NRC 167 (2020)

NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a presumption of regularity that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 167 (2020)

purpose of the NWTRB Report is to review the DOE's preparedness to transport spent nuclear fuel and high-level radioactive waste; LBP-20-6, 91 NRC 239 (2020)

radioactive waste storage contracts with the U.S. Department of Energy are illegal; CLI-20-4, 91 NRC 167 (2020)

DESIGN CERTIFICATION

certified cask designs are incorporated into NRC regulations and may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver; CLI-20-4, 91 NRC 167 (2020)

DISCLOSURE

agency must withhold information that may cause harm to a historic place; CLI-20-4, 91 NRC 167 (2020)

DISCRIMINATION

action against an employee for engaging in certain protected activities is prohibited; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

additional NRC enforcement action to remedy employee discrimination could be sought by filing a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

targeting of rural, impoverished, low-income communities in a border state is the sort of de facto result of institutional racism embedded in prevailing dump site selection processes nationwide; CLI-20-4, 91 NRC 167 (2020)

DRAFT ENVIRONMENTAL IMPACT STATEMENT

for license renewal prepared under § 51.95(c), DSEIS must rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 and must contain an analysis of those issues identified as Category 2; CLI-20-3, 91 NRC 133 (2020)

ECONOMIC INTERESTS

direct economic competitors do not demonstrate an interest within the meaning of 10 C.F.R. 110.84(b); CLI-20-2, 91 NRC 103 (2020)

NRC is not in the business of regulating the market strategies of licensees; CLI-20-4, 91 NRC 167 (2020)

whether an option for disposal of spent nuclear fuel is commercially viable is not an issue before the board; CLI-20-4, 91 NRC 167 (2020)

EMERGENCY ACTION LEVELS

challenge to applicant's request to revise site emergency plan and emergency action level scheme to reflect permanently defueled condition of reactors is denied; LBP-20-2, 91 NRC 10 (2020)

EMERGENCY PLANNING

exemption request that would be implemented by a requested license amendment to reflect reactor's permanently shut down and defueled status is within the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)

there is nothing to suggest that reducing the scope of offsite and onsite emergency planning commensurate with the reactor's permanently defueled condition would negatively implicate decommissioning funding, countering any assertion of a particularized injury; LBP-20-2, 91 NRC 10 (2020)

EMERGENCY PLANNING ZONES

exemptions from requirements for plume exposure and ingestion pathway emergency planning zones for nuclear power plants for defueled reactor are discussed; LBP-20-2, 91 NRC 10 (2020)

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EMERGENCY PLANS

challenge to applicant's request to revise site emergency plan and emergency action level scheme to reflect permanently defueled condition of reactors is denied; LBP-20-2, 91 NRC 10 (2020)

EMERGENCY RESPONSE PLANS

exemptions from standards for onsite and offsite emergency response plans for defueled reactor are discussed; LBP-20-2, 91 NRC 10 (2020)

EMPLOYEE PROTECTION

confirmatory order is issued to an individual who has acknowledged a violation of the NRC's Employee Protection regulation; LBP-20-1, 91 NRC 1 (2020)

ENFORCEMENT ACTIONS

NRC Staff has broad discretion in enforcement matters, and NRC's adjudicatory process is not an appropriate forum for petitioners to second-guess enforcement decisions on resource allocations, policy priorities, or the likelihood of success at hearings; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

ENFORCEMENT ORDERS

argument that order should be strengthened by adding corrective actions is inadmissible; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

when respondent in an enforcement action has agreed to terms of a confirmatory order, a challenge to the facts themselves by a third party is not cognizable; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

ENFORCEMENT PROCEEDINGS

contention challenging a confirmatory order will be rejected as outside the scope of the proceeding unless it opposes issuance of the order as unwarranted, so as to require relaxation, or as affirmatively detrimental to the public health and safety, so as to require rescission as opposed to supplementation; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

intervention request on a confirmatory order, to be granted, must demonstrate standing, proffer an admissible contention, and satisfy the *Bellotti* doctrine; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

ENVIRONMENTAL ANALYSIS

terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding; CLI-20-4, 91 NRC 167 (2020)

ENVIRONMENTAL ASSESSMENT

absent special circumstances, an EA is not required for any action within a category of actions included in the list of categorical exclusions set out in 10 C.F.R. 51.22(c); LBP-20-2, 91 NRC 10 (2020)

had the cultural resources information in the final EA been materially different from that available in the draft EA, then petitioner would have had the opportunity to submit a new contention challenging that information; CLI-20-1, 91 NRC 79 (2020)

ENVIRONMENTAL EFFECTS

NEPA does not require a worst-case analysis for potential accident consequences; CLI-20-4, 91 NRC 167 (2020)

NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. 52.103(g) that acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 225 (2020)

ENVIRONMENTAL IMPACT STATEMENT

absent special circumstances, an EIS is not required for any action within a category of actions included in the list of categorical exclusions set out in 10 C.F.R. 51.22(c); LBP-20-2, 91 NRC 10 (2020)

although EIS had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS; CLI-20-1, 91 NRC 79 (2020)

Commission shall prepare an EIS, which is a supplement to the 2013 Generic EIS, in connection with renewal of an operating license or combined license for a nuclear power plant; CLI-20-3, 91 NRC 133 (2020)

for certain major federal actions, an agency must prepare an EIS, which ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning

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significant environmental impacts and that such information will be available to the public; CLI-20-4, 91 NRC 167 (2020)

full and fair discussion of significant environmental impacts shall be provided by the agency and decisionmakers and the public informed of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment; CLI-20-3, 91 NRC 133 (2020)

intervenor's argument that because the board found the environmental impact statement deficient in one respect, the license should be revoked until NRC Staff had formally supplemented the EIS was rejected; CLI-20-1, 91 NRC 79 (2020)

NRC must prepare an EIS at the initial operating license stage, license renewal stage, and the post-operating license stage; CLI-20-3, 91 NRC 133 (2020)

NRC Staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic EIS for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information; CLI-20-3, 91 NRC 133 (2020)

once NRC determines that there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm; CLI-20-1, 91 NRC 79 (2020)

one can always flyspeck an EIS to come up with more specifics and more areas of discussion that could have been included; CLI-20-4, 91 NRC 167 (2020)

petitioner who waits until issuance of a final environmental document to raise a contention risks the possibility that there will not be a material difference between the draft and final document; CLI-20-1, 91 NRC 79 (2020)

renewal of a nuclear power plant operating license requires preparation of an EIS to comply with the National Environmental Policy Act; CLI-20-3, 91 NRC 133 (2020)

See also Draft Environmental Impact Statement; Final Environmental Impact Statement; Generic Environmental Impact Statement; Supplemental Environmental Impact Statement

ENVIRONMENTAL ISSUES

NEPA argument raised for the first time on appeal is untimely; CLI-20-4, 91 NRC 167 (2020)

new or amended environmental contention may be filed based on new information in NRC Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information; CLI-20-1, 91 NRC 79 (2020)

potential intervenors must base contentions arising under the National Environmental Policy Act on applicant's environmental report; CLI-20-1, 91 NRC 79 (2020)

ENVIRONMENTAL JUSTICE

contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 167 (2020)

targeting of rural, impoverished, low-income communities in a border state is the sort of de facto result of institutional racism embedded in prevailing dump site selection processes nationwide; CLI-20-4, 91 NRC 167 (2020)

ENVIRONMENTAL REPORT

all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources; CLI-20-3, 91 NRC 133 (2020)

applicant must describe the affected environment and discuss environmental impacts in proportion to their significance; LBP-20-6, 91 NRC 239 (2020)

applicants must evaluate mitigation for Category 2 issues; CLI-20-3, 91 NRC 133 (2020)

contention that ER and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

contention that ER does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

contention that ER fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 239 (2020)

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- contention that ER is required for license amendment request is inadmissible; LBP-20-2, 91 NRC 10 (2020)
- late-filed contention that ER must evaluate the potential impact on the environment of the transportation of the nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 239 (2020)
- license renewal applicants must submit an ER to NRC to aid the Commission in complying with section 102(2) of NEPA; CLI-20-3, 91 NRC 133 (2020)
- NRC Staff-prepared final generic environmental impact statements may be incorporated by reference in applicants' ERs; CLI-20-3, 91 NRC 133 (2020)
- potential intervenors must base contentions arising under the National Environmental Policy Act on applicant's ER; CLI-20-1, 91 NRC 79 (2020)
- required content of ER for operating license renewal is provided in 10 C.F.R. 51.53(c)(3); CLI-20-3, 91 NRC 133 (2020)
- subsection 51.53(c)(3)(ii)(A) reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them; CLI-20-3, 91 NRC 133 (2020)
- subsection 51.53(c)(3)(iv) is the only regulation that implements the requirements for license renewal applicants to provide new and significant information in the ER; CLI-20-3, 91 NRC 133 (2020)
- transportation impacts must be considered in applicant's ER, but the ER need not prove the safety of transportation packages because 10 C.F.R. Part 71 separately addresses these issues; LBP-20-6, 91 NRC 239 (2020)
- ENVIRONMENTAL REVIEW**
- contention asserting further NEPA analysis is needed for a decommissioning-related license transfer application is inadmissible for failure to address license application section referencing and relying on categorical exclusion; LBP-20-2, 91 NRC 10 (2020)
- license amendments are excluded from the environmental review requirement if three specified criteria are satisfied; LBP-20-2, 91 NRC 10 (2020)
- NEPA obligates an agency to consider every significant aspect of the environmental impact of a proposed action, and to inform the public that it has indeed considered environmental concerns in its decisionmaking process; CLI-20-3, 91 NRC 133 (2020)
- NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken; CLI-20-3, 91 NRC 133 (2020)
- NRC Staff may not abrogate its responsibility to take a hard look at new and significant information; CLI-20-3, 91 NRC 133 (2020)
- recognizing that environmental impact issues may change over time and that additional issues may require consideration, NRC reviews material in Table B-1 on a 10-year cycle; CLI-20-3, 91 NRC 133 (2020)
- EQUITY**
- contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 167 (2020)
- ERROR**
- Commission defers to board's fact finding unless the standard of clear error is met; CLI-20-1, 91 NRC 79 (2020)
- failure to point to a board error means that there is no basis for to reverse the board; CLI-20-4, 91 NRC 167 (2020)
- standard for finding clear error of fact is high, requiring a showing that the ruling is not even plausible in light of the record as a whole; CLI-20-1, 91 NRC 79 (2020)
- EVIDENCE**
- if proponent of contention has introduced sufficient evidence to establish a prima facie case, the burden shifts to applicant, who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license; CLI-20-1, 91 NRC 79 (2020)
- prima facie evidence must be legally sufficient to establish a fact or case unless disproved; CLI-20-6, 91 NRC 225 (2020)

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proponent of a contention has a responsibility to put forth evidence of its claim; CLI-20-1, 91 NRC 79 (2020)

EVIDENTIARY HEARINGS

dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the board is entitled to deference; CLI-20-1, 91 NRC 79 (2020)

EXCEPTIONS

narrow exception may exist for petitioner who establishes standing in one case to employ that standing determination in another proceeding that is merely another round in a continuing controversy; LBP-20-2, 91 NRC 10 (2020)

EXECUTIVE BRANCH

joint certification authority is provided to the Secretaries of Energy and Health and Human Services that is not limited to Mo-99; CLI-20-2, 91 NRC 103 (2020)

NRC Staff must consult with the State Department to receive views of the Executive Branch on high-enriched uranium export applications; CLI-20-2, 91 NRC 103 (2020)

Secretaries of Energy and Health and Human Services, not NRC, have authority to make market-based determinations on whether to foreclose U.S.-origin high-enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)

when determining whether any unusual circumstances exist with respect to a proposed export, great weight is given to the Executive Branch's judgments; CLI-20-2, 91 NRC 103 (2020)

where consultation process with State Department on high-enriched uranium export applications include exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 103 (2020)

EXEMPTIONS

applicant requests exemption to permit use of decommissioning trust funds for spent fuel management activities and to make those withdrawals without prior NRC notification; LBP-20-2, 91 NRC 10 (2020)

emergency planning exemption request that would be implemented by a requested license amendment to reflect reactor's permanently shut down and defueled status is within the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)

plume exposure and ingestion pathway emergency planning zone requirements for defueled nuclear power plants are discussed; LBP-20-2, 91 NRC 10 (2020)

relationship between applicant's amendment request and its exemption request is such that hearing rights extend to both, and the scope of the proceeding should be construed to include both; LBP-20-2, 91 NRC 10 (2020)

standards for onsite and offsite emergency response plans for defueled reactor are discussed; LBP-20-2, 91 NRC 10 (2020)

EXPORT APPLICATION

any person may request a hearing or submit a petition for leave to intervene on an export license application within 30 days of NRC notice of the application; CLI-20-2, 91 NRC 103 (2020)

applicant may answer a hearing request or intervention petition but is not required to do so; CLI-20-2, 91 NRC 103 (2020)

bar on considering letters commenting on an export application does not apply to Part 110 hearing requests; CLI-20-2, 91 NRC 103 (2020)

Commission determines whether export of high-enriched uranium is unnecessary or excessive, and therefore inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public; CLI-20-2, 91 NRC 103 (2020)

Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin high-enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)

Commission must make a decision on an export license application based on applicable statutory requirements, regardless of whether applicant chooses to file a response to a hearing request or petition for leave to intervene; CLI-20-2, 91 NRC 103 (2020)

Commission retains discretion to consider comments on export license applications even if filed after the 30-day deadline; CLI-20-2, 91 NRC 103 (2020)

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entities with an affected interest in an export license application are more likely to contribute to Commission decisionmaking, show that a hearing would be in the public interest, and assist in making the statutory determinations; CLI-20-2, 91 NRC 103 (2020)

nothing in the Atomic Energy Act or Nuclear Non-Proliferation Act suggests that the Commission must hold a hearing on an export application if a member of the public requesting a hearing has standing or an interest that may be affected; CLI-20-2, 91 NRC 103 (2020)

NRC Staff must consult with the State Department to receive views of the Executive Branch on high-enriched uranium export applications; CLI-20-2, 91 NRC 103 (2020)

pre-hearing motions on export license applications are not contemplated under 10 C.F.R. 110.109; CLI-20-2, 91 NRC 103 (2020)

public participation procedures on export license applications provide for written comments, hearing requests, and intervention petitions; CLI-20-2, 91 NRC 103 (2020)

submission of a comment in response to another comment is not precluded; CLI-20-2, 91 NRC 103 (2020)

where consultation process with State Department on high-enriched uranium export applications include exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 103 (2020)

written comments on export and import license applications should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary; CLI-20-2, 91 NRC 103 (2020)

EXPORT LICENSE PROCEEDINGS

Commission determines that hearing requests on applications should not be granted and concludes that a hearing is not in the public interest and would not assist it in making the requisite statutory determinations; CLI-20-2, 91 NRC 103 (2020)

direct economic competitors do not demonstrate an interest within the meaning of 10 C.F.R. 110.84(b); CLI-20-2, 91 NRC 103 (2020)

experience and expertise in matters of non-proliferation do not make petitioner uniquely qualified to contribute to decision-making on export license application; CLI-20-2, 91 NRC 103 (2020)

hearing requests and intervention petitions must, at minimum, explain how 10 C.F.R. 110.82(b) standards are satisfied and set forth the issues sought to be raised; CLI-20-2, 91 NRC 103 (2020)

hearing requests may assert that petitioner's interests may be affected by issuance of the license and, if doing so, must specify both the facts pertaining to the interest and how it may be affected; CLI-20-2, 91 NRC 103 (2020)

institutional interest in providing information to the public is insufficient to show an affected interest; CLI-20-2, 91 NRC 103 (2020)

living near the ultimate destination of an exported reactor does not qualify as an affected interest; CLI-20-2, 91 NRC 103 (2020)

living within an eighth of a mile of a port through which a high-enriched uranium export would travel is not enough to demonstrate an affected interest; CLI-20-2, 91 NRC 103 (2020)

NRC must make an independent technical finding that the export meets all applicable requirements; CLI-20-2, 91 NRC 103 (2020)

person residing within 1.5 miles of a bridge that would serve as the exit point for the export of low-level waste does not have an affected interest in that export; CLI-20-2, 91 NRC 103 (2020)

petitioner should show how a hearing would bring new information to light and assert or establish an interest that may be affected by issuance of the license; CLI-20-2, 91 NRC 103 (2020)

procedural requests, such as for an extension of time to file a hearing request on export license applications, are permitted; CLI-20-2, 91 NRC 103 (2020)

procedures in Part 110 constitute the exclusive basis for hearings on export and import license applications; CLI-20-2, 91 NRC 103 (2020)

procedures in Part 2 govern conduct of all proceedings other than export and import licensing proceedings described in Part 110; CLI-20-2, 91 NRC 103 (2020)

public hearings are allowed if found to be in the public interest and will assist the Commission in making the statutory determinations; CLI-20-2, 91 NRC 103 (2020)

public participation procedures on export license applications provide for answers and replies to hearing requests and intervention petitions; CLI-20-2, 91 NRC 103 (2020)

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regardless of whether an entity demonstrates that it has an affected interest in an export license application, the same legal test applies; CLI-20-2, 91 NRC 103 (2020)
when acting on a petition the Commission will consider nature of the alleged interest, how that issue relates to issuance or denial, and possible effect of any order on that interest, including whether relief requested is within the Commission's authority and, if so, whether granting relief would redress the alleged injury; CLI-20-2, 91 NRC 103 (2020)

EXPORT LICENSES

absent unusual circumstances, if a proposed export satisfies the Nuclear Non-proliferation Act's non-proliferation criteria, then it would likewise satisfy the common defense and security standard; CLI-20-2, 91 NRC 103 (2020)
addition of specific export licensing criteria did not replace or render obsolete the pre-existing inimicality test; CLI-20-2, 91 NRC 103 (2020)
applying AEA § 134(a)(1) on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with a high-enriched uranium target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 103 (2020)
argument that amount of high-enriched uranium should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel has been rejected; CLI-20-2, 91 NRC 103 (2020)
issuance of a license to export high-enriched uranium for purposes of medical isotope production is prohibited after January 2, 2020; CLI-20-2, 91 NRC 103 (2020)
joint certification authority is provided to the Secretaries of Energy and HHS that is not limited to Mo-99; CLI-20-2, 91 NRC 103 (2020)
licenses for targets for medical isotope production tend to be for only a year; CLI-20-2, 91 NRC 103 (2020)
NRC must find that proposed recipient of uranium export has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of high-enriched uranium; CLI-20-2, 91 NRC 103 (2020)
NRC must find that the U.S. government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor to authorize an export license; CLI-20-2, 91 NRC 103 (2020)
NRC must find that there is no alternative nuclear reactor fuel or target enriched in isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize a license; CLI-20-2, 91 NRC 103 (2020)
Secretary of Energy may delay the sunset provision by up to 6 years by certifying that there is an insufficient global supply of Mo-99 produced without the use of high-enriched uranium available to satisfy the domestic market; CLI-20-2, 91 NRC 103 (2020)
when determining whether any unusual circumstances exist with respect to a proposed export, great weight is given to the Executive Branch's judgments; CLI-20-2, 91 NRC 103 (2020)

EXPORTS

adequate physical security measures must be maintained with respect to high-enriched uranium material proposed to be exported and to any special nuclear material used in or produced through the use thereof; CLI-20-2, 91 NRC 103 (2020)
exports of high-enriched uranium to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 103 (2020)
high-enriched uranium export must be under the terms of an agreement for cooperation; CLI-20-2, 91 NRC 103 (2020)
high-enriched uranium export must satisfy non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 103 (2020)
International Atomic Energy Agency safeguards will be applied with respect to any high-enriched uranium material proposed to be exported; CLI-20-2, 91 NRC 103 (2020)
no high-enriched uranium material proposed to be exported can be used for any nuclear explosive device or for research on or development of any nuclear explosive device; CLI-20-2, 91 NRC 103 (2020)
no high-enriched uranium material proposed to be exported may be re-transferred to jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such re-transfer; CLI-20-2, 91 NRC 103 (2020)

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- proliferation and security risks in transportation and end use posed by the lower quantity of material exported are much smaller than the recent prior exports that were limited to one-year supply; CLI-20-2, 91 NRC 103 (2020)
- EXTENSION OF TIME
- procedural requests, such as for an extension of time to file a hearing request on export license applications, are permitted; CLI-20-2, 91 NRC 103 (2020)
- FAIRNESS
- given NRC policy of encouraging settlements, absence of any reason to suspect that either party was at a relative disadvantage in their negotiations, board can conclude that settlement agreement is fair and reasonable; LBP-20-5, 91 NRC 72 (2020)
- FINAL ENVIRONMENTAL IMPACT STATEMENT
- intervenor may update environmental contentions based on applicant's environmental report when information in the Staff's draft or final environmental documents differs materially from the information in the ER; CLI-20-1, 91 NRC 79 (2020)
- FINAL SAFETY EVALUATION REPORT
- activities described in the FSER are resolved with finality and are not subject to challenge in an ITAAC closure proceeding; CLI-20-6, 91 NRC 225 (2020)
- FINANCIAL ASSURANCE
- argument that NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety is insufficient to establish standing; CLI-20-5, 91 NRC 214 (2020)
- claims about financial assurances for later phases or for storage beyond the license term are outside the scope of the proceeding; CLI-20-4, 91 NRC 167 (2020)
- contention that license amendment request doesn't provide financial assurance of decommissioning funding is inadmissible because it is beyond the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)
- FINANCIAL QUALIFICATIONS
- independent spent fuel storage installation applicant must provide information sufficient to demonstrate the financial qualification of the applicant to carry out the activities for which the license is sought; CLI-20-4, 91 NRC 167 (2020)
- FINDINGS OF FACT
- Commission has discretion to exercise review where a board finding of fact is in conflict with a finding as to the same fact in a different proceeding; CLI-20-1, 91 NRC 79 (2020)
- intervenor's burden-shifting argument, although couched in legal terms, is at bottom a factual challenge to the way the board weighed and balanced conflicting evidence; CLI-20-1, 91 NRC 79 (2020)
- when considering challenges to how the board weighed evidence, Commission defers to a board's expertise as the fact finder and declines to substitute the judgment of an intervenor's expert for that of the board; CLI-20-1, 91 NRC 79 (2020)
- FUEL
- exports of high-enriched uranium to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 103 (2020)
- FUEL LOADING
- prior to fuel load, combined license holder must notify NRC of all uncompleted ITAAC; CLI-20-6, 91 NRC 225 (2020)
- FUEL REMOVAL
- applicant must certify to NRC that it has permanently removed all fuel and placed the fuel in the spent fuel pool; LBP-20-2, 91 NRC 10 (2020)
- there is nothing to suggest that reducing the scope of offsite and onsite emergency planning commensurate with the facility's permanently defueled condition would negatively implicate decommissioning funding, countering any assertion of a particularized injury; LBP-20-2, 91 NRC 10 (2020)
- GENERIC ENVIRONMENTAL IMPACT STATEMENT
- any person may file a petition for rulemaking to appropriately amend the codification of Category 1 issues in the 2013 GEIS; CLI-20-3, 91 NRC 133 (2020)

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Category 1 issues are discussed, and therefore, these issues do not require a plant-specific assessment unless there is new and significant information that would change conclusions in the GEIS; CLI-20-3, 91 NRC 133 (2020)

Commission shall prepare an environmental impact statement, which is a supplement to the 2013 GEIS, in connection with renewal of an operating license or combined license for a nuclear power plant; CLI-20-3, 91 NRC 133 (2020)

environmental aspect of contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because petitioner did not seek a rule waiver; CLI-20-4, 91 NRC 167 (2020)

members of the public may seek a waiver of NRC regulations to challenge the analysis in the 2013 GEIS on a Category 1 issue for a specific facility; CLI-20-3, 91 NRC 133 (2020)

NRC Staff may rely on GEIS to evaluate environmental impacts of Category 1 issues for a subsequent license renewal; CLI-20-3, 91 NRC 133 (2020)

petitioners are obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

recognizing that environmental impact issues may change over time and that additional issues may require consideration, NRC reviews material in Table B-1 on a 10-year cycle; CLI-20-3, 91 NRC 133 (2020)

requirement in section 51.95(c)(4) is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 GEIS for Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

GEOLOGIC CONDITIONS

contention that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

failure to explain significance of the presence or absence of faults or fractures to the need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 79 (2020)

GEOLOGIC REPOSITORIES

"repository" is defined as a system intended for permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel; CLI-20-4, 91 NRC 167 (2020)

Secretary of Energy will enter contracts with spent fuel generators (nuclear power plant owners) that shall provide that the Secretary will take title to the spent fuel following commencement of operation of a repository; CLI-20-4, 91 NRC 167 (2020)

GOOD CAUSE

consolidation can be established by showing that the relevant proceedings involve common questions of law or fact such that consolidation would avoid unnecessary costs or delay; LBP-20-4, 91 NRC 55 (2020)

in addition to meeting the requirements for reopening a closed record, petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so; LBP-20-6, 91 NRC 239 (2020)

movant must demonstrate good cause for a consolidation request to be granted; LBP-20-1, 91 NRC 1 (2020)

to establish good cause for new or amended contention, petitioner must satisfy three conditions; LBP-20-6, 91 NRC 239 (2020)

where facts on which contentions were based were known to petitioner from the outset of the proceeding, good cause for waiting to file them does not exist; CLI-20-1, 91 NRC 79 (2020)

GROUNDWATER

contention that application fails to provide sufficient information to establish potential effects of the project on the adjacent surface and groundwater resources is denied; CLI-20-1, 91 NRC 79 (2020)

contention that environmental report fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 239 (2020)

GROUNDWATER CONTAMINATION

claims about groundwater characterization are not material to the outcome of this proceeding because petitioner has not shown that radionuclides could make their way outside the cask; CLI-20-4, 91 NRC 167 (2020)

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to show a genuine material dispute, petitioner's contention would have to give the board reason to believe that contamination from a defective canister could find its way outside a cask; CLI-20-4, 91 NRC 167 (2020)

HEALTH AND SAFETY

argument that NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety is insufficient to establish standing; CLI-20-5, 91 NRC 214 (2020)

HEARING DENIALS

dispositive inquiry under *Bellotti* doctrine for a third-party challenge to a confirmatory order is whether the CO improves the licensee's health and safety conditions, and if it does, no hearing is appropriate; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

HEARING REQUESTS

although hearing requests are construed in petitioner's favor, petitioner has the burden of demonstrating that the standing requirements are met; CLI-20-6, 91 NRC 225 (2020)

bar on considering letters commenting on an export application does not apply to Part 110 hearing requests; CLI-20-2, 91 NRC 103 (2020)

motion to dismiss an application is referred to be considered as hearing request and proposed contentions; CLI-20-4, 91 NRC 167 (2020)

on export license applications petitioner may assert that its interests may be affected by issuance of the license and, if doing so, must specify both the facts pertaining to the interest and how it may be affected; CLI-20-2, 91 NRC 103 (2020)

HEARING RIGHTS

any person may request a hearing or submit a petition for leave to intervene on an export license application within 30 days of NRC notice of the application; CLI-20-2, 91 NRC 103 (2020)

nothing in the AEA or NNPA suggests that the Commission must hold a hearing on an export application if a member of the public requesting a hearing has standing or an interest that may be affected; CLI-20-2, 91 NRC 103 (2020)

NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 214 (2020)

NRC is required to grant a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

public participation procedures on export license applications provide for hearing requests and intervention petitions; CLI-20-2, 91 NRC 103 (2020)

relationship between applicant's amendment request and its exemption request is such that hearing rights extend to both, and the scope of the proceeding should be construed to include both; LBP-20-2, 91 NRC 10 (2020)

HIGH-ENRICHED URANIUM

adequate physical security measures must be maintained with respect to HEU material proposed to be exported and to any special nuclear material used in or produced through the use thereof; CLI-20-2, 91 NRC 103 (2020)

applying AEA § 134(a)(1) on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with an HEU target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 103 (2020)

argument that amount of HEU should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel has been rejected; CLI-20-2, 91 NRC 103 (2020)

Commission determines whether export of HEU is unnecessary or excessive, and therefore inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public; CLI-20-2, 91 NRC 103 (2020)

Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin HEU exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)

Commission looks at whether competitive disadvantage through applicant's continued use of HEU is addressed by the American Medical Isotopes Production Act; CLI-20-2, 91 NRC 103 (2020)

export must be under the terms of an agreement for cooperation; CLI-20-2, 91 NRC 103 (2020)

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- exports of HEU to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 103 (2020)
- feasibility of using tellurium targets as an alternative for HEU targets for I-131 production is discussed; CLI-20-2, 91 NRC 103 (2020)
- HEU export must satisfy non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 103 (2020)
- International Atomic Energy Agency safeguards will be applied with respect to any HEU material proposed to be exported; CLI-20-2, 91 NRC 103 (2020)
- issuance of a license to export HEU for purposes of medical isotope production is prohibited after January 2, 2020; CLI-20-2, 91 NRC 103 (2020)
- no HEU material proposed to be exported and no special nuclear material produced through use of such material may be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless prior approval of the United States is obtained; CLI-20-2, 91 NRC 103 (2020)
- no HEU material proposed to be exported can be used for any nuclear explosive device or for research on or development of any nuclear explosive device; CLI-20-2, 91 NRC 103 (2020)
- no HEU material proposed to be exported may be re-transferred to jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such re-transfer; CLI-20-2, 91 NRC 103 (2020)
- NRC must find that proposed recipient of uranium export has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of HEU; CLI-20-2, 91 NRC 103 (2020)
- NRC must find that there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in the reactor to authorize an export license; CLI-20-2, 91 NRC 103 (2020)
- NRC Staff must consult with the State Department to receive views of the Executive Branch on HEU export applications; CLI-20-2, 91 NRC 103 (2020)
- Secretary of Energy may delay the sunset provision by up to 6 years by certifying that there is an insufficient global supply of Mo-99 produced without the use of HEU available to satisfy the domestic market; CLI-20-2, 91 NRC 103 (2020)
- use of HEU exclusively for I-131 would not be inimical to the common defense and security; CLI-20-2, 91 NRC 103 (2020)
- where consultation process with State Department on HEU export applications includes exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 103 (2020)
- HISTORIC SITES**
- agency must withhold information that may cause harm to a historic place; CLI-20-4, 91 NRC 167 (2020)
- contention that application failed to meet legal requirements regarding protection of historical and cultural resources is denied; CLI-20-1, 91 NRC 79 (2020)
- HYDRODYNAMICS**
- contention that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 79 (2020)
- HYDROGEOLOGY**
- contention that application failed to include adequate hydrogeological information to demonstrate ability to contain fluid migration is denied; CLI-20-1, 91 NRC 79 (2020)
- IMMEDIATE EFFECTIVENESS**
- upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 10 (2020)
- INCORPORATION BY REFERENCE**
- combined license applicants may reference information previously filed with NRC if the references are clear and specific; CLI-20-6, 91 NRC 225 (2020)
- NRC Staff-prepared final generic environmental impact statements may be incorporated by reference in applicants' environmental reports; CLI-20-3, 91 NRC 133 (2020)

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INDEPENDENT SPENT FUEL STORAGE INSTALLATION

applicant must provide information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out the activities for which the license is sought; CLI-20-4, 91 NRC 167 (2020)

license applicant does not have to demonstrate the potential profitability of the proposed facility; CLI-20-4, 91 NRC 167 (2020)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION PROCEEDINGS

challenge to the safety of NRC-approved transportation packages is outside the scope of the proceeding; LBP-20-6, 91 NRC 239 (2020)

claims about financial assurances for later phases or for storage beyond the license term are outside the scope of the proceeding; CLI-20-4, 91 NRC 167 (2020)

claims about groundwater characterization are not material to the outcome of the proceeding because petitioner has not shown that radionuclides could make their way outside the cask; CLI-20-4, 91 NRC 167 (2020)

claims that such safety-related transportation issues as moving high-burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements; LBP-20-6, 91 NRC 239 (2020)

concerns about leaks from spent fuel storage containers that are separately approved and licensed by the NRC may not be adjudicated in an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

contention that environmental report and safety analysis report do not discuss the presence and implications of fractured rock beneath the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

contention that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

contention that environmental report fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 239 (2020)

petitioners must show a specific and plausible means for how licensed activities will affect them in the absence of obvious potential for offsite harm; CLI-20-4, 91 NRC 167 (2020)

standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors; CLI-20-4, 91 NRC 167 (2020)

whether an option for disposal of spent nuclear fuel is commercially viable is not an issue before the board; CLI-20-4, 91 NRC 167 (2020)

INJURY IN FACT

absent situations involving obvious potential for offsite consequences, petitioner must allege some specific injury in fact that will result from the action taken; LBP-20-2, 91 NRC 10 (2020)

in addressing injury requirement, organization seeking to intervene must show that the licensing action would constitute a threat to its organizational interests; CLI-20-5, 91 NRC 214 (2020)

injury alleged to have resulted from failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order because such an assertion fails to establish harm that is traceable to the CO; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

petitioner fails to squarely address the injury requirement for standing; LBP-20-2, 91 NRC 10 (2020)

petitioner must demonstrate a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute; LBP-20-2, 91 NRC 10 (2020)

petitioner must establish a plausible nexus between the challenged license amendments and petitioner's asserted harm; LBP-20-2, 91 NRC 10 (2020)

there is nothing to suggest that reducing the scope of offsite and onsite emergency planning commensurate with the facility's permanently defueled condition would negatively implicate decommissioning funding, countering any assertion of a particularized injury; LBP-20-2, 91 NRC 10 (2020)

See also Competitive Injury

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INSPECTION

before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)

INTEREST

entities with an affected interest in an export license application are more likely to contribute to Commission decisionmaking, show that a hearing would be in the public interest, and assist in making the statutory determinations; CLI-20-2, 91 NRC 103 (2020)

intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing; LBP-20-2, 91 NRC 10 (2020)

living near the ultimate destination of an exported reactor could not qualify as an affected interest; CLI-20-2, 91 NRC 103 (2020)

regardless of whether an entity demonstrates that it has an affected interest in an export license application, the same legal test applies; CLI-20-2, 91 NRC 103 (2020)

to demonstrate traditional standing in a license transfer proceeding, petitioners must specify the facts pertaining to their interest; CLI-20-5, 91 NRC 214 (2020)

to establish standing, petitioner have some direct interest in the outcome of a proceeding; LBP-20-2, 91 NRC 10 (2020)

to intervene as of right in any NRC licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-20-5, 91 NRC 214 (2020)

INTERNATIONAL ATOMIC ENERGY AGENCY

IAEA safeguards will be applied with respect to any high-enriched uranium material proposed to be exported; CLI-20-2, 91 NRC 103 (2020)

INTERVENORS

person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation, and it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding; CLI-20-1, 91 NRC 79 (2020)

INTERVENTION

it is unlikely that petitioners will often obtain hearings on confirmatory orders because such orders presumably enhance rather than diminish public safety; LBP-20-4, 91 NRC 55 (2020)

to intervene as of right in any NRC licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-20-5, 91 NRC 214 (2020)

INTERVENTION, DISCRETIONARY

Commission may consider a request for discretionary intervention when at least one petitioner has established standing and at least one admissible contention has been admitted; CLI-20-5, 91 NRC 214 (2020)

INTERVENTION PETITIONS

board has discretion to consider consolidation on its own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice; LBP-20-1, 91 NRC 1 (2020)

hearing request must state name, address, and telephone number of petitioner, nature of petitioner's right under relevant statute to be made a party, nature and extent of petitioner's property, financial or other interest in the proceeding, and possible effect of any decision or order that may be issued in the proceeding on petitioner's interest; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

hearing request on a confirmatory order, to be granted, must demonstrate standing, proffer an admissible contention, and satisfy the *Bellotti* doctrine; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

petition to intervene must meet six pleading requirements; LBP-20-2, 91 NRC 10 (2020)

petitioner has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing; CLI-20-5, 91 NRC 214 (2020)

petitioner in export license proceeding should show how a hearing would bring new information to light and assert or establish an interest that may be affected by issuance of the license; CLI-20-2, 91 NRC 103 (2020)

petitioners must at minimum explain how 10 C.F.R. 110.82(b) standards are satisfied and set forth the issues sought to be raised; CLI-20-2, 91 NRC 103 (2020)

petitioners must demonstrate standing and submit an admissible contention; CLI-20-5, 91 NRC 214 (2020)

SUBJECT INDEX

pleadings requesting to intervene are characterized as petitions to intervene, not motions; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
public participation procedures on export license applications provide for hearing requests and intervention petitions; CLI-20-2, 91 NRC 103 (2020)

INTERVENTION RULINGS

Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 167 (2020)
Commission will consider nature of alleged interest, how that issue relates to issuance or denial, and possible effect of any order on that interest, including whether relief requested is within the Commission's authority and, if so, whether granting relief would redress the alleged injury; CLI-20-2, 91 NRC 103 (2020)

IODINE-131

feasibility of using tellurium targets as an alternative for high-enriched uranium targets for I-131 production is discussed; CLI-20-2, 91 NRC 103 (2020)
use of high-enriched uranium exclusively for I-131 would not be inimical to the common defense and security; CLI-20-2, 91 NRC 103 (2020)

ISSUANCE OF LICENSE

issuance of a license as soon as NRC Staff completes its review does not contravene NEPA; CLI-20-1, 91 NRC 79 (2020)
NRC Staff is expected to issue the license or amendment when it has completed its review of the materials application regardless of the pendency of an adjudication; CLI-20-1, 91 NRC 79 (2020)

ITAAC

before submitting a claim of ITAAC incompleteness, petitioner must consult with licensee regarding access to the purportedly missing information; CLI-20-6, 91 NRC 225 (2020)
challenges to the ITAAC may be raised as petitions under 10 C.F.R. 2.206, 2.802, or 52.103(f); CLI-20-6, 91 NRC 225 (2020)
completion notification must provide sufficient information to demonstrate that the prescribed inspections, tests, or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met; CLI-20-6, 91 NRC 225 (2020)
contentions that challenge the sufficiency of the ITAAC themselves are not admissible because the ITAAC have already been approved by the NRC in connection with issuance of the combined license; CLI-20-6, 91 NRC 225 (2020)
if an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue; CLI-20-6, 91 NRC 225 (2020)
licensee's notification of uncompleted ITAAC must describe the licensee's plans to complete the ITAAC that are still incomplete; CLI-20-6, 91 NRC 225 (2020)
prior to fuel load, combined license holder must notify NRC of all uncompleted ITAAC; CLI-20-6, 91 NRC 225 (2020)
uncompleted ITAAC notifications must include a description of the specific procedures and analytical methods that will be used for performing the prescribed inspections, tests, and analyses and determining that the prescribed acceptance criteria are met; CLI-20-6, 91 NRC 225 (2020)

ITAAC PROCEEDINGS

activities described in the Final Safety Evaluation Report are resolved with finality and are not subject to challenge; CLI-20-6, 91 NRC 225 (2020)
before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)
claim that essentially challenges the rules allowing submission of uncompleted ITAAC notifications is outside the scope of the proceeding; CLI-20-6, 91 NRC 225 (2020)
contention standards for an ITAAC hearing are based on 10 C.F.R. Part 2, Subpart C, with modifications to account for the expedited schedule and specialized nature of hearings on ITAAC; CLI-20-6, 91 NRC 225 (2020)
contentions in ITAAC proceedings must meet the requirements of 10 C.F.R. 2.309(f)(1)(i)-(v); CLI-20-6, 91 NRC 225 (2020)

SUBJECT INDEX

if petitioner identifies a specific portion of the § 52.99(c) report as incomplete and contends that the incomplete portion prevents it from making the necessary prima facie showing, then petitioner must explain why this deficiency prevents that showing; CLI-20-6, 91 NRC 225 (2020)

NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. 52.103(g) that acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 225 (2020)

petitioner in an ITAAC hearing is required to contend and support with a prima facie showing that one or more of the acceptance criteria in the combined license have not been, or will not be, met and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 225 (2020)

petitioners must identify the specific portion of the section 52.99(c) report that they believe is inaccurate, incorrect, or incomplete; CLI-20-6, 91 NRC 225 (2020)

petitioners must provide an adequately supported showing that the ITAAC report fails to include information required by 10 C.F.R. 52.99(c); CLI-20-6, 91 NRC 225 (2020)

requirements of 10 C.F.R. 2.309(f)(1)(vi) do not apply to ITAAC proceedings; CLI-20-6, 91 NRC 225 (2020)

JURISDICTION

tribal court has jurisdiction to adjudicate tribal claims against a non-member former employee; CLI-20-1, 91 NRC 79 (2020)

tribe cannot prohibit hunting and fishing by a non-member who holds title in fee to property located within the reservation; CLI-20-1, 91 NRC 79 (2020)

tribe does not have jurisdiction over a licensing proceeding; CLI-20-1, 91 NRC 79 (2020)

where jurisdiction to consider reopening has passed to the Commission, it frequently remands such motions to the board to consider the reopening standards in conjunction with contention admissibility, where appropriate; CLI-20-4, 91 NRC 167 (2020)

LABOR ISSUES

avenue for seeking a personal remedy for alleged wrongful termination is through the U.S. Department of Labor; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

NRC's charter does not include providing a personal remedy to an individual who has suffered discrimination for reporting safety concerns; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

LEAKAGE

concerns about leaks from spent fuel storage containers that are separately approved and licensed by the NRC may not be adjudicated in an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

to show a genuine material dispute, petitioner's contention would have to give the board reason to believe that contamination from a defective canister could find its way outside a cask; CLI-20-4, 91 NRC 167 (2020)

LICENSE AMENDMENT PROCEEDINGS

contention that amendment request doesn't provide financial assurance of decommissioning funding is inadmissible because it is beyond the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)

emergency planning exemption request that would be implemented by a requested license amendment to reflect reactor facility's permanently shut down and defueled status is within the scope of the proceeding; LBP-20-2, 91 NRC 10 (2020)

given the shutdown and defueled status of the units, license amendments do not on their face present any obvious potential for offsite radiological consequences so as to support invocation of the proximity presumption; LBP-20-2, 91 NRC 10 (2020)

intervention petitioner in a license amendment proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the facility; LBP-20-2, 91 NRC 10 (2020)

petitioner must establish a plausible nexus between the challenged license amendments and petitioner's asserted harm; LBP-20-2, 91 NRC 10 (2020)

petitioner must indicate how the license amendments at issue would increase the risk of an offsite release of radioactive fission products; LBP-20-2, 91 NRC 10 (2020)

SUBJECT INDEX

petitioners fail to demonstrate standing to intervene either as a matter of right or as a matter of discretion; LBP-20-2, 91 NRC 10 (2020)

relationship between applicant's amendment request and its exemption request is such that hearing rights extend to both, and the scope of the proceeding should be construed to include both; LBP-20-2, 91 NRC 10 (2020)

scope of any hearing should include proposed reactor decommissioning license amendments and any health, safety or environmental issues fairly raised by them; LBP-20-2, 91 NRC 10 (2020)

See also Materials License Amendment Proceedings

LICENSE AMENDMENTS

amendments are excluded from the environmental review requirement if three specified criteria are satisfied; LBP-20-2, 91 NRC 10 (2020)

contention that environmental report is required for license amendment request is inadmissible; LBP-20-2, 91 NRC 10 (2020)

petitioner may challenge invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 10 (2020)

relationship between applicant's amendment request and its exemption request is such that hearing rights extend to both, and the scope of the proceeding should be construed to include both; LBP-20-2, 91 NRC 10 (2020)

upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 10 (2020)

LICENSE APPLICATIONS

See Combined License Application; Export Application; License Renewal Applications; License Transfer Applications

LICENSE CONDITIONS

board decision revised license condition to require licensee to locate and properly abandon historic boreholes; CLI-20-1, 91 NRC 79 (2020)

if any environmental or safety hazards come to light in a hearing, the license could be appropriately conditioned or revoked; CLI-20-1, 91 NRC 79 (2020)

LICENSE RENEWAL APPLICATIONS

application may not be submitted to NRC earlier than 20 years before expiration of the operating license or combined license currently in effect; CLI-20-3, 91 NRC 133 (2020)

See also Operating License Renewal

LICENSE TRANSFER APPLICATIONS

NRC Staff is expected to promptly issue approval or denial of license transfer requests even if a hearing has been requested; CLI-20-5, 91 NRC 214 (2020)

LICENSE TRANSFER PROCEEDINGS

mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to establish harm from a license transfer; CLI-20-5, 91 NRC 214 (2020)

statement that some of organization's members live, work, or engage in recreation adjacent to or near an NRC-licensed facility is insufficient for proximity-based standing; CLI-20-5, 91 NRC 214 (2020)

to demonstrate traditional standing in a license transfer proceeding, petitioners must specify the facts pertaining to their interest; CLI-20-5, 91 NRC 214 (2020)

to demonstrate traditional standing, petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-20-5, 91 NRC 214 (2020)

to demonstrate traditional standing, petitioners must show that the alleged injury lies arguably within the zone of interests protected by the Atomic Energy Act; CLI-20-5, 91 NRC 214 (2020)

LICENSEE CHARACTER

direct and obvious relationship must exist between the licensing action and potential character issues to warrant an inquiry; LBP-20-2, 91 NRC 10 (2020)

every agency licensing action does not throw open an opportunity to engage in a free-ranging inquiry into the character of the licensee; LBP-20-2, 91 NRC 10 (2020)

SUBJECT INDEX

LICENSEE EVENT REPORTS

if an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue; CLI-20-6, 91 NRC 225 (2020)

LICENSING BOARD DECISIONS

dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the board is entitled to deference; CLI-20-1, 91 NRC 79 (2020)

LICENSING BOARDS, AUTHORITY

board has authority to approve settlement agreements; LBP-20-5, 91 NRC 72 (2020)

board has discretion to consider consolidation on its own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice; LBP-20-1, 91 NRC 1 (2020)

board has no authority to raise issues sua sponte without prior Commission permission; CLI-20-1, 91 NRC 79 (2020)

board has no authority to rewrite contentions to supply bases that the petitioner had not articulated itself; CLI-20-1, 91 NRC 79 (2020)

board is not required to take extraordinary measures to ensure that parties are fully aware of relevant factual details in a proceeding, such as the release of new or updated reports; CLI-20-1, 91 NRC 79 (2020)

discretionary standing may be granted by the board; LBP-20-2, 91 NRC 10 (2020)

LOW-ENRICHED URANIUM

an active program satisfies the Atomic Energy Act if it leads to development of an LEU target that can be used to produce medical isotopes; CLI-20-2, 91 NRC 103 (2020)

MANAGEMENT CHARACTER AND COMPETENCE

post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity; LBP-20-2, 91 NRC 10 (2020)

MARKET POWER

Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin HEU exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)

MATERIAL FALSE STATEMENTS

license may be revoked over a material false statement; CLI-20-4, 91 NRC 167 (2020)

MATERIALITY

dispute at issue is material if its resolution would make a difference in the outcome of the licensing proceeding; CLI-20-4, 91 NRC 167 (2020)

MATERIALS LICENSE AMENDMENT PROCEEDINGS

board declined to consolidate two separately noticed proceedings, because each proceeding authorized its own discrete activities; LBP-20-1, 91 NRC 1 (2020)

MATERIALS LICENSE PROCEEDINGS

tribe does not have jurisdiction over a licensing proceeding; CLI-20-1, 91 NRC 79 (2020)

MATERIALS LICENSES

board decision revised license condition to require licensee to locate and properly abandon historic boreholes; CLI-20-1, 91 NRC 79 (2020)

MEDIATION

purpose is not to resolve factual disputes and establish a factual record but rather for parties to reach agreement on forward-looking actions that enhance safety and security; LBP-20-4, 91 NRC 55 (2020)

MEDICAL ISOTOPES PRODUCTION

an active program satisfies the Atomic Energy Act if it leads to development of a low-enriched uranium target that can be used to produce medical isotopes; CLI-20-2, 91 NRC 103 (2020)

applying AEA § 134(a)(1) on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with a high-enriched uranium target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 103 (2020)

argument that amount of high-enriched uranium should be limited to that necessary to provide medical isotopes for one year, in the context of HEU exports for fuel, has been rejected; CLI-20-2, 91 NRC 103 (2020)

SUBJECT INDEX

- Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin high-enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)
- Commission looks at whether competitive disadvantage through applicant's continued use of high-enriched uranium is addressed by the American Medical Isotopes Production Act; CLI-20-2, 91 NRC 103 (2020)
- conditions under which a target can be used in a nuclear research or test reactor are described; CLI-20-2, 91 NRC 103 (2020)
- definition of "can be used" refers to the large majority of planned medical isotopes produced, not to the large majority of medical isotope production broken down by individual isotopes; CLI-20-2, 91 NRC 103 (2020)
- export licenses for targets for medical isotope production tend to be for only a year; CLI-20-2, 91 NRC 103 (2020)
- exports of high-enriched uranium to be used as a fuel or target in a nuclear research or test reactor must satisfy further restrictions; CLI-20-2, 91 NRC 103 (2020)
- feasibility of using tellurium targets as an alternative for high-enriched uranium targets for I-131 production is discussed; CLI-20-2, 91 NRC 103 (2020)
- issuance of a license to export high-enriched uranium for purposes of medical isotope production is prohibited after January 2, 2020; CLI-20-2, 91 NRC 103 (2020)
- "medical isotope" includes Mo-99 as well as I-131, xenon-133, and other radioactive materials used to produce a radiopharmaceutical for diagnostic or therapeutic procedures; CLI-20-2, 91 NRC 103 (2020)
- "planned" medical isotope production in AEA § 134 refers to what the ultimate end user plans to produce with the requested material; CLI-20-2, 91 NRC 103 (2020)
- target "can be used" if its use will permit the large majority of ongoing and planned medical isotope production to be conducted; CLI-20-2, 91 NRC 103 (2020)
- use of high-enriched uranium exclusively for I-131 would not be inimical to the common defense and security; CLI-20-2, 91 NRC 103 (2020)
- MIGRATION TENET**
- site characterization issues have been allowed to migrate to the extent they challenged applicant's demonstration of aquifer confinement and impacts to groundwater; CLI-20-4, 91 NRC 167 (2020)
- MOLYBDENUM-99**
- Secretary of Energy may delay the sunset provision by up to 6 years by certifying that there is an insufficient global supply of Mo-99 produced without the use of HEU available to satisfy the domestic market; CLI-20-2, 91 NRC 103 (2020)
- MOTIONS**
- pleadings requesting to intervene are characterized as petitions to intervene, not motions; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
- pre-hearing motions on export license applications are not contemplated under 10 C.F.R. 110.109; CLI-20-2, 91 NRC 103 (2020)
- MOTIONS TO DISMISS**
- motion to dismiss an application is referred to be considered as hearing request and proposed contentions; CLI-20-4, 91 NRC 167 (2020)
- MOTIONS TO REOPEN**
- where jurisdiction to consider reopening has passed to the Commission, it frequently remands such motions to the board to consider the reopening standards in conjunction with contention admissibility, where appropriate; CLI-20-4, 91 NRC 167 (2020)
- See also Reopening a Record
- NATIONAL ENVIRONMENTAL POLICY ACT**
- although not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why the site characterization was necessary to fully understand the impacts of the proposed action; CLI-20-4, 91 NRC 167 (2020)
- contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking a broad NRC inquiry into questions of motivation and social equity in siting would lie outside NEPA's purview; CLI-20-4, 91 NRC 167 (2020)
- elaborate comparative site study to explore whether an applicant's siting criteria might perpetuate institutional racism is not required; CLI-20-4, 91 NRC 167 (2020)

SUBJECT INDEX

extensive sampling to establish baseline restoration values was required under NEPA to properly characterize the site; CLI-20-1, 91 NRC 79 (2020)

issuance of a license as soon as NRC Staff completes its review does not contravene NEPA; CLI-20-1, 91 NRC 79 (2020)

license renewal applicants must submit an environmental report to NRC to aid the Commission in complying with section 102(2); CLI-20-3, 91 NRC 133 (2020)

renewal of a nuclear power plant operating license requires preparation of an environmental impact statement to comply with the Act; CLI-20-3, 91 NRC 133 (2020)

worst-case scenarios need not be discussed; CLI-20-4, 91 NRC 167 (2020)

NATIVE AMERICAN RESERVATIONS

tribe cannot prohibit hunting and fishing by a non-member who holds title in fee to property located within the reservation; CLI-20-1, 91 NRC 79 (2020)

NATIVE AMERICANS

advanced planning and coordination of spent fuel shipments with state and tribal officials is required; CLI-20-4, 91 NRC 167 (2020)

as an agency of the federal government, NRC owes a fiduciary duty to the Native American tribes affected by its decisions; CLI-20-1, 91 NRC 79 (2020)

Fort Laramie Treaty of 1868 is no longer in effect; CLI-20-1, 91 NRC 79 (2020)

tribal court has jurisdiction to adjudicate tribal claims against a non-member former employee; CLI-20-1, 91 NRC 79 (2020)

tribe does not have jurisdiction over a licensing proceeding; CLI-20-1, 91 NRC 79 (2020)

tribe is not entitled to greater rights than it would otherwise have as an interested party; CLI-20-1, 91 NRC 79 (2020)

unless there is a specific duty that has been placed on NRC with respect to Native American tribes, NRC discharges this duty by compliance with the AEA and NEPA; CLI-20-1, 91 NRC 79 (2020)

NO SIGNIFICANT HAZARDS DETERMINATION

assertion that NRC Staff performed a cookie cutter analysis in its no significant hazards consideration determination that was fatally flawed, limited in scope, and produced technically deficient conclusions is an impermissible challenge to NRC regulations; LBP-20-2, 91 NRC 10 (2020)

constraints on petitions or other requests for review of or hearing on NRC Staff's determination are provided in 10 C.F.R. 50.58(b)(6); LBP-20-2, 91 NRC 10 (2020)

no petition or other request for review of or hearing on NRC Staff's determination will be entertained by the Commission, and Staff's determination is final, subject only to Commission's discretion on its own initiative to review the determination; LBP-20-2, 91 NRC 10 (2020)

upon NRC Staff finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 10 (2020)

NOTICE OF HEARING

hearing notice generally determines the scope of the hearing and may include any health, safety, or environmental issues fairly raised by the proposed licensing action; LBP-20-2, 91 NRC 10 (2020)

NOTICE OF VIOLATION

third-party claim based on NOV is not ripe and therefore not litigable; LBP-20-4, 91 NRC 55 (2020)

NOTIFICATION

board is not required to take extraordinary measures to ensure that parties are fully aware of relevant factual details in a proceeding, such as the release of new or updated reports; CLI-20-1, 91 NRC 79 (2020)

exemption is requested to permit use of decommissioning trust funds for spent fuel management activities and to make those withdrawals without prior NRC notification; LBP-20-2, 91 NRC 10 (2020)

if an event occurs after submission of an ITAAC closure notification that materially alters the basis of that closure, licensees are required to submit an ITAAC post-closure notification documenting successful resolution of the issue; CLI-20-6, 91 NRC 225 (2020)

ITAAC completion notification must provide sufficient information to demonstrate that the prescribed inspections, tests, or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met; CLI-20-6, 91 NRC 225 (2020)

licensee's notification of uncompleted ITAAC must describe the licensee's plans to complete the ITAAC that are still incomplete; CLI-20-6, 91 NRC 225 (2020)

SUBJECT INDEX

uncompleted ITAAC notifications must include a description of the specific procedures and analytical methods that will be used for performing the prescribed inspections, tests, and analyses and determining that the prescribed acceptance criteria are met; CLI-20-6, 91 NRC 225 (2020)

NRC GUIDANCE DOCUMENTS

documents developed to assist in compliance with applicable regulations are entitled to special weight; CLI-20-3, 91 NRC 133 (2020)

NRC INSPECTION

NRC performs onsite inspections of decommissioning activities; LBP-20-2, 91 NRC 10 (2020)

NRC POLICY

allowing a third party to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around the *Bellotti* doctrine and would also undercut NRC policy favoring enforcement settlements; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

fair and reasonable settlement and resolution of issues proposed for litigation is encouraged; LBP-20-5, 91 NRC 72 (2020)

NRC STAFF

Staff has broad discretion in enforcement matters, and NRC's adjudicatory process is not an appropriate forum for petitioners to second-guess enforcement decisions on resource allocations, policy priorities, or the likelihood of success at hearings; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

NRC STAFF REVIEW

NRC Staff may not abrogate its responsibility to take a hard look at new and significant information; CLI-20-3, 91 NRC 133 (2020)

recognizing that environmental impact issues may change over time and that additional issues may require consideration, NRC reviews material in Table B-1 on a 10-year cycle; CLI-20-3, 91 NRC 133 (2020)

NUCLEAR NON-PROLIFERATION

experience and expertise in matters of non-proliferation do not make petitioner uniquely qualified to contribute to decision-making on export license application; CLI-20-2, 91 NRC 103 (2020)

high-enriched uranium export must satisfy non-proliferation criteria if the export includes a non-nuclear weapons state; CLI-20-2, 91 NRC 103 (2020)

no high-enriched uranium material proposed to be exported and no special nuclear material produced through use of such material may be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained; CLI-20-2, 91 NRC 103 (2020)

proliferation and security risks in transportation and end use posed by the lower quantity of material exported are much smaller than the recent prior exports that were limited to one-year supply; CLI-20-2, 91 NRC 103 (2020)

NUCLEAR NON-PROLIFERATION ACT

absent unusual circumstances, if a proposed export satisfies the Act's non-proliferation criteria, then it would likewise satisfy the common defense and security standard; CLI-20-2, 91 NRC 103 (2020)

nothing in the act suggests that the Commission must hold a hearing on an export application if a member of the public requesting a hearing has standing or an interest that may be affected; CLI-20-2, 91 NRC 103 (2020)

NUCLEAR REGULATORY COMMISSION, AUTHORITY

agency action that is not in accordance with the law or in excess of statutory jurisdiction, authority, or limitation is prohibited; CLI-20-4, 91 NRC 167 (2020)

Commission does not have authority to make market-based determinations on whether to foreclose U.S.-origin high-enriched uranium exports for the purposes of medical isotope production; CLI-20-2, 91 NRC 103 (2020)

Commission has discretion to take review, giving due weight to whether a petitioner raises a substantial question with respect to considerations in 10 C.F.R. 2.341(b)(4); CLI-20-1, 91 NRC 79 (2020)

Commission may consider a request for discretionary intervention when at least one petitioner has established standing and at least one contention has been admitted; CLI-20-5, 91 NRC 214 (2020)

Commission retains discretion to consider comments on export license applications even if filed after the 30-day deadline; CLI-20-2, 91 NRC 103 (2020)

NRC is not in the business of regulating the market strategies of licensees; CLI-20-4, 91 NRC 167 (2020)

SUBJECT INDEX

- NRC's charter does not include providing a personal remedy to an individual who has suffered discrimination for reporting safety concerns; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
- on motion and for good cause shown or on its own initiative, Commission of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings; LBP-20-1, 91 NRC 1 (2020)
- NUCLEAR REGULATORY COMMISSION, JURISDICTION**
agency action that is not in accordance with the law or in excess of statutory jurisdiction, authority, or limitation is prohibited; CLI-20-4, 91 NRC 167 (2020)
- NUCLEAR WASTE POLICY AMENDMENTS ACT**
purpose of the NWTRB Report is to review DOE's preparedness to transport spent nuclear fuel and high-level radioactive waste; LBP-20-6, 91 NRC 239 (2020)
- NUCLEAR WEAPONS PROLIFERATION**
no high-enriched uranium material proposed to be exported can be used for any nuclear explosive device or for research on or development of any nuclear explosive device; CLI-20-2, 91 NRC 103 (2020)
- OPERATING LICENSE RENEWAL**
applicants must submit an environmental report to NRC to aid the Commission in complying with section 102(2) of NEPA; CLI-20-3, 91 NRC 133 (2020)
NRC must prepare an EIS at the initial operating license stage, license renewal stage, and the post-operating license stage; CLI-20-3, 91 NRC 133 (2020)
preparation of an environmental impact statement is required to comply with the National Environmental Policy Act; CLI-20-3, 91 NRC 133 (2020)
See also Subsequent Operating License Renewal
- OPERATING LICENSES**
NRC must prepare an environmental impact statement at the initial operating license stage, license renewal stage, and the post-operating license stage; CLI-20-3, 91 NRC 133 (2020)
- OPERATIONS**
after NRC finds that acceptance criteria are met, the ITAAC no longer constitute regulatory requirements for the licensee; CLI-20-6, 91 NRC 225 (2020)
before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)
- ORDERS**
See Confirmatory Order; Enforcement Orders
- PARTIES**
it is the responsibility of the party itself not merely to decide whether it wishes to have counsel, but, in addition, to take the necessary steps to implement its decision; CLI-20-1, 91 NRC 79 (2020)
participant in NRC administrative adjudications is distinguished from a party; LBP-20-1, 91 NRC 1 (2020)
participant is defined as an individual who has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status; LBP-20-1, 91 NRC 1 (2020)
person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation, and it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding; CLI-20-1, 91 NRC 79 (2020)
right to a formal consolidation is available only to a party to a proceeding; LBP-20-1, 91 NRC 1 (2020)
- PENDENCY OF PROCEEDINGS**
NRC Staff is expected to issue the license or amendment when it has completed its review of the materials application regardless of the pendency of an adjudication; CLI-20-1, 91 NRC 79 (2020)
upon NRC Staff no significant hazards consideration finding, agency may make a requested amendment effective upon issuance despite pendency of a hearing petition; LBP-20-2, 91 NRC 10 (2020)
- PETITIONERS**
no right to a formal consolidation is available to petitioner who currently is not a party to either proceeding; LBP-20-1, 91 NRC 1 (2020)

SUBJECT INDEX

PHYSICAL SECURITY

adequate measures must be maintained with respect to high-enriched uranium material proposed to be exported and to any special nuclear material used in or produced through the use thereof; CLI-20-2, 91 NRC 103 (2020)

PLEADINGS

Commission declines to sift through parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves; CLI-20-5, 91 NRC 214 (2020)

contention pleading requirements are strict by design and intended to ensure that adjudicatory proceedings address substantive issues that are rooted in a reasonably specific factual or legal basis; CLI-20-6, 91 NRC 225 (2020)

hearing petition generally is construed in favor of petitioner seeking to demonstrate standing, and a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 10 (2020)

petitioner has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing; CLI-20-5, 91 NRC 214 (2020)

pro se petitioner is held to less rigid pleading standards than parties who are represented by counsel so that parties with a clear, but imperfectly stated, interest in the proceeding are not excluded; CLI-20-6, 91 NRC 225 (2020)

technical perfections is not required, particularly in the case of a pro se petitioner; LBP-20-2, 91 NRC 10 (2020)

PRESIDING OFFICER, AUTHORITY

exceptionally grave issue may be considered in the discretion of the presiding officer even if the contention is found untimely; LBP-20-6, 91 NRC 239 (2020)

on motion and for good cause shown or on its own initiative, presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings; LBP-20-1, 91 NRC 1 (2020)

PRESUMPTION OF REGULARITY

NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy the presumption that they will act properly in the absence of evidence to the contrary; CLI-20-4, 91 NRC 167 (2020)

PRIMA FACIE SHOWING

conclusory and speculative claims about potential problems during concrete placement are insufficient to make the required showing related to specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety; CLI-20-6, 91 NRC 225 (2020)

evidence must be legally sufficient to establish a fact or case unless disproved; CLI-20-6, 91 NRC 225 (2020)

if petitioner identifies a specific portion of the § 52.99(c) report as incomplete and contends that the incomplete portion prevents it from making the necessary showing, then petitioner must explain why this deficiency prevents that showing; CLI-20-6, 91 NRC 225 (2020)

if proponent of contention has introduced sufficient evidence to establish a case, the burden shifts to applicant, who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license; CLI-20-1, 91 NRC 79 (2020)

PRO SE LITIGANTS

hearing petition generally is construed in favor of petitioner seeking to demonstrate standing, and a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 10 (2020)

petitioner without attorney representation is held to less rigid pleading standards than parties who are represented by counsel so that parties with a clear, but imperfectly stated, interest in the proceeding are not excluded; CLI-20-6, 91 NRC 225 (2020)

petitioners without attorney representation are still expected to comply with procedural rules; CLI-20-6, 91 NRC 225 (2020)

technical perfection is not required in pleadings; LBP-20-2, 91 NRC 10 (2020)

SUBJECT INDEX

PROPRIETARY INFORMATION

where consultation process with State Department on high-enriched uranium export applications include exchange of proprietary information, these documents are not publicly available; CLI-20-2, 91 NRC 103 (2020)

PROTECTED ACTIVITY

discrimination against an employee for engaging in certain protected activities is prohibited; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

raising safety-related concerns associated with the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974 is a protected activity; LBP-20-1, 91 NRC 1 (2020); LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

workforce must be free to raise safety concerns without fear of reprisal, in compliance with the NRC's requirements for Employee Protections; LBP-20-3, 91 NRC 42 (2020)

PROXIMITY PRESUMPTION

fact-specific standing allegations are required, not conclusory assertions, such as general assertions of proximity to establish the presumption; LBP-20-2, 91 NRC 10 (2020)

failure by petitioner to include crucial proximity information constitutes grounds for denying standing; LBP-20-2, 91 NRC 10 (2020)

given the shutdown and defueled status of the units, license amendments do not on their face present any obvious potential for offsite radiological consequences so as to support invocation of the proximity presumption; LBP-20-2, 91 NRC 10 (2020)

in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors; CLI-20-4, 91 NRC 167 (2020)

living near the ultimate destination of an exported reactor could not qualify as an affected interest; CLI-20-2, 91 NRC 103 (2020)

living within an eighth of a mile of a port through which a high-enriched uranium export would travel is not enough to demonstrate an affected interest; CLI-20-2, 91 NRC 103 (2020)

person residing within 1.5 miles of a bridge that would serve as the exit point for the export of low-level waste does not have an affected interest in that export; CLI-20-2, 91 NRC 103 (2020)

petitioner may use the presumption if petitioner has a significant property interest or frequent contacts within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 10 (2020)

petitioner must specify contacts with the affected area in the intervention petition; LBP-20-2, 91 NRC 10 (2020)

presumption generally applied in proceedings for reactor construction permits, operating licenses, or significant amendments thereto relieves a petitioner of the need to satisfy traditional elements of standing; LBP-20-2, 91 NRC 10 (2020)

proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 167 (2020)

proximity-plus standard takes into account both the nature of the proposed activity and significance of the radioactive source; CLI-20-4, 91 NRC 167 (2020)

standing is determined on a case-by-case basis in proceedings other than for issuance or renewal of a reactor construction permit/operating license or early site permit/combined license; LBP-20-2, 91 NRC 10 (2020)

standing is granted based on petitioner's holding title to a house near a nuclear facility; LBP-20-2, 91 NRC 10 (2020)

statement that some of organization's members live, work, or engage in recreation adjacent to or near an NRC-licensed facility is insufficient for proximity-based standing; CLI-20-5, 91 NRC 214 (2020)

when presumption does not apply, board's analysis turns to a traditional standing inquiry and whether petitioner has demonstrated an injury-in-fact associated with the challenged license amendment; LBP-20-2, 91 NRC 10 (2020)

PUBLIC COMMENTS

bar on considering letters commenting on an export application does not apply to Part 110 hearing requests; CLI-20-2, 91 NRC 103 (2020)

Commission retains discretion to consider comments on export license applications even if filed after the 30-day deadline; CLI-20-2, 91 NRC 103 (2020)

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public participation procedures on export license applications provide for written comments; CLI-20-2, 91 NRC 103 (2020)

submission of a comment in response to another comment is not precluded; CLI-20-2, 91 NRC 103 (2020)

written comments on export and import license applications should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary of DOE; CLI-20-2, 91 NRC 103 (2020)

PUBLIC INTEREST

public hearings in nuclear export licensing proceedings are allowed if such a hearing is found to be in the public interest and will assist the Commission in making the statutory determinations; CLI-20-2, 91 NRC 103 (2020)

PUBLIC INTEREST ORGANIZATIONS

experience and expertise in matters of non-proliferation do not make petitioner uniquely qualified to contribute to decision-making on export license application; CLI-20-2, 91 NRC 103 (2020)

RACIAL DISCRIMINATION

NEPA does not require an elaborate comparative site study to explore whether an applicant's siting criteria might perpetuate institutional racism; CLI-20-4, 91 NRC 167 (2020)

RADIOACTIVE RELEASES

obvious potential for offsite radiological consequences depends on the kind of action at issue, when considered in light of radioactive sources at the plant; LBP-20-2, 91 NRC 10 (2020)

petitioner may challenge the invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 10 (2020)

petitioner must indicate how the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products; LBP-20-2, 91 NRC 10 (2020)

RADIOACTIVE WASTE STORAGE

contracts with the U.S. Department of Energy are illegal; CLI-20-4, 91 NRC 167 (2020)

RADIOLOGICAL EXPOSURE

petitioner may challenge the invocation of a categorical exclusion by showing existence of special circumstances or that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure; LBP-20-2, 91 NRC 10 (2020)

REBUTTAL

if proponent of contention has introduced sufficient evidence to establish a prima facie case, the burden shifts to applicant, who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the board that it should reject the contention as a basis for denial of the permit or license; CLI-20-1, 91 NRC 79 (2020)

RECORD OF DECISION

although environmental impact statement had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS; CLI-20-1, 91 NRC 79 (2020)

REFERRAL OF RULING

ruling is referred if it addresses a significant legal issue of first impression that is likely to recur in other proceedings until resolved by the Commission; CLI-20-3, 91 NRC 133 (2020)

REGULATIONS

individual adjudication is not the proper forum for challenging an agency rule; CLI-20-1, 91 NRC 79 (2020)

See also Amendment of Regulations

REGULATIONS, INTERPRETATION

agency's interpretive statements reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance and, as such, are entitled to a measure of respect; CLI-20-3, 91 NRC 133 (2020)

as the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation; CLI-20-3, 91 NRC 133 (2020)

doctrine of *expressio unius est exclusio alterius* (express mention of one thing excludes all others) is not an inflexible rule of law but a starting point in regulatory construction; CLI-20-3, 91 NRC 133 (2020)

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in construing a regulation's meaning, it is necessary to examine the agency's entire regulatory scheme; CLI-20-3, 91 NRC 133 (2020)

in determining the scope of a regulatory provision in the face of regulatory silence, the Court conducted a holistic analysis; CLI-20-3, 91 NRC 133 (2020)

"initial" reflects the possibility that while all initial license renewal applicants must address the conditions and considerations in section 51.53(c)(3), some subsequent license renewal applicants may take a different approach or use the same approach required for initial license renewal applicants; CLI-20-3, 91 NRC 133 (2020)

language and structure of the provision itself should inform interpretation; CLI-20-3, 91 NRC 133 (2020)

petitioners' interpretation of 10 C.F.R. 51.53(c)(3) as inapplicable to subsequent license renewal applicants is inconsistent with an explicitly stated regulatory purpose of Part 51 to promote efficient environmental reviews for license renewal applications; CLI-20-3, 91 NRC 133 (2020)

plain language of 10 C.F.R. 51.53(c)(3) neither directs the Commission to apply this section to subsequent license renewal applicants, nor does it forbid it; CLI-20-3, 91 NRC 133 (2020)

requirement in section 51.95(c)(4) is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 GEIS for Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

safety regulations in Part 54 have long contemplated the possibility of subsequent license renewal; CLI-20-3, 91 NRC 133 (2020)

sections 51.95 and 51.71(d) do not differentiate between initial and subsequent license renewals; CLI-20-3, 91 NRC 133 (2020)

REGULATORY OVERSIGHT PROCESS

apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that existing oversight processes are adequate to ensure safety; CLI-20-3, 91 NRC 133 (2020)

license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to ongoing compliance oversight activity appropriately addressed by NRC Staff; CLI-20-3, 91 NRC 133 (2020)

REMAND

where jurisdiction to consider reopening has passed to the Commission, it frequently remands such motions to the board to consider the reopening standards in conjunction with contention admissibility, where appropriate; CLI-20-4, 91 NRC 167 (2020)

REOPENING A RECORD

even had petitioner's contentions passed muster under 10 C.F.R. 2.309(f)(1), its motion would still fail for failing to address, let alone meet, reopening standards; LBP-20-6, 91 NRC 239 (2020)

failure to address the reopening requirements and to submit the necessary affidavit is, by itself, sufficient grounds not to reopen a closed record; LBP-20-6, 91 NRC 239 (2020)

intentionally heavy burden is placed on parties seeking to reopen the record; LBP-20-6, 91 NRC 239 (2020)

late-filed contention that environmental report must evaluate the potential impact on the environment of the transportation of the nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 239 (2020)

motion for a new contention must also meet the standards for reopening a closed record; CLI-20-4, 91 NRC 167 (2020)

petitioner must file a motion demonstrating that its new contention is timely, addresses a significant safety or environmental issue, and demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; LBP-20-6, 91 NRC 239 (2020)

reopening for any reason is considered to be an extraordinary action; LBP-20-6, 91 NRC 239 (2020)

there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen hearings; LBP-20-6, 91 NRC 239 (2020)

REPLY BRIEFS

public participation procedures on export license applications provide for answers and replies to hearing requests and intervention petitions; CLI-20-2, 91 NRC 103 (2020)

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replies in support of most motions (including motions to reopen a closed record) may not be filed as of right, but only by leave upon demonstration of compelling circumstances; LBP-20-6, 91 NRC 239 (2020)

REPORTING REQUIREMENTS

licensee must submit a post-shutdown decommissioning activities report to the Commission and cannot perform major decommissioning activities until 90 days after a PSDAR is submitted, but a PSDAR is not subject to NRC approval; LBP-20-2, 91 NRC 10 (2020)

REQUEST FOR ACTION

additional NRC enforcement action to remedy employee discrimination could be sought by filing a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

challenges to the ITAAC may be raised as petitions under 10 C.F.R. 2.206; CLI-20-6, 91 NRC 225 (2020)

REVIEW

See Appellate Review; Environmental Review; NRC Staff Review; Safety Review

REVIEW, DISCRETIONARY

Commission has discretion to exercise review where a board finding of fact is in conflict with a finding as to the same fact in a different proceeding; CLI-20-1, 91 NRC 79 (2020)

Commission has discretion to take review, giving due weight to whether a petitioner raises a substantial question with respect to considerations in 10 C.F.R. 2.341(b)(4); CLI-20-1, 91 NRC 79 (2020)

Commission retains discretion to consider comments on export license applications even if filed after the 30-day deadline; CLI-20-2, 91 NRC 103 (2020)

REVOCACTION OF LICENSES

if any environmental or safety hazards come to light in a hearing, the license could be appropriately conditioned or revoked; CLI-20-1, 91 NRC 79 (2020)

intervenor's argument that because the board found the environmental impact statement deficient in one respect, the license should be revoked until NRC Staff had formally supplemented the EIS was rejected; CLI-20-1, 91 NRC 79 (2020)

license may be revoked over a material false statement; CLI-20-4, 91 NRC 167 (2020)

RISKS

argument that NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety is insufficient to establish standing; CLI-20-5, 91 NRC 214 (2020)

RULEMAKING

agencies must use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance; CLI-20-3, 91 NRC 133 (2020)

any person may file a petition for rulemaking to appropriately amend the codification of Category 1 issues in the 2013 GEIS; CLI-20-3, 91 NRC 133 (2020)

challenges to the ITAAC may be raised as petitions under 10 C.F.R. 2.802; CLI-20-6, 91 NRC 225 (2020)

petitioners should bring challenges to agency rules through the petition for rulemaking process; CLI-20-1, 91 NRC 79 (2020)

RULES OF PRACTICE

admissible contention must show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact; CLI-20-4, 91 NRC 167 (2020)

board has discretion to consider consolidation on its own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice; LBP-20-1, 91 NRC 1 (2020)

contention amendment request denied for failure to satisfy the requirements for contentions filed after the deadline; CLI-20-4, 91 NRC 167 (2020)

contentions in ITAAC proceedings must meet the requirements of 10 C.F.R. 2.309(f)(1)(i)-(v); CLI-20-6, 91 NRC 225 (2020)

hearing request must state name, address, and telephone number of the petitioner, nature of petitioner's right under relevant statute to be made a party, nature and extent of petitioner's property, financial or

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other interest in the proceeding, and possible effect of any decision or order that may be issued in the proceeding on petitioner's interest; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

in addition to demonstrating good cause for proffering contention after the initial deadline for filing a hearing petition, contention would also have to satisfy requirements for contention admissibility; LBP-20-6, 91 NRC 239 (2020)

licensing board may grant discretionary standing; LBP-20-2, 91 NRC 10 (2020)

motion must include a certification by attorney of movant that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful; LBP-20-1, 91 NRC 1 (2020); LBP-20-4, 91 NRC 55 (2020)

movant must demonstrate good cause for a consolidation request to be granted; LBP-20-1, 91 NRC 1 (2020); LBP-20-4, 91 NRC 55 (2020); LBP-20-4, 91 NRC 55 (2020)

no NRC regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted; CLI-20-4, 91 NRC 167 (2020)

on motion and for good cause shown or on its own initiative, presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings; LBP-20-1, 91 NRC 1 (2020)

participant is an individual who has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status; LBP-20-1, 91 NRC 1 (2020)

party to NRC administrative adjudications is distinguished from a participant; LBP-20-1, 91 NRC 1 (2020)

petition to intervene must meet six pleading requirements; LBP-20-2, 91 NRC 10 (2020)

petitioner bears the burden to satisfy each of the criteria in 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-20-2, 91 NRC 10 (2020)

petitioner may use one of several approaches to establish standing, such as traditional judicial standing, the proximity presumption, and organizational or representational standing; LBP-20-2, 91 NRC 10 (2020)

petitioner must attach an affidavit that separately addresses each of the 10 C.F.R. 2.326(b) criteria with a specific explanation of why each criterion has been satisfied; LBP-20-6, 91 NRC 239 (2020)

petitioner whose hearing request has been wholly denied has a right to appeal; CLI-20-4, 91 NRC 167 (2020)

petitioners are obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

petitioners fail to demonstrate standing to intervene either as a matter of right or as a matter of discretion; LBP-20-2, 91 NRC 10 (2020)

petitioners have an ironclad obligation to review applicant's document thoroughly and to base their challenges on its contents; LBP-20-2, 91 NRC 10 (2020)

petitioners must demonstrate standing and submit an admissible contention; CLI-20-5, 91 NRC 214 (2020)

petitioners should bring challenges to agency rules through the petition for rulemaking process; CLI-20-1, 91 NRC 79 (2020)

pleadings requesting to intervene are characterized as petitions to intervene, not motions; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

pro se petitioners are still expected to comply with procedural rules; CLI-20-6, 91 NRC 225 (2020)

procedures in Part 2 govern conduct of all proceedings other than export and import licensing proceedings described in Part 110; CLI-20-2, 91 NRC 103 (2020)

protected activities include the raising of safety-related concerns; LBP-20-1, 91 NRC 1 (2020)

replies in support of most motions (including motions to reopen a closed record) may not be filed as of right, but only by leave upon a demonstration of compelling circumstances; LBP-20-6, 91 NRC 239 (2020)

request for discretionary standing can be considered only if another petitioner has established standing and at least one contention has been admitted so that a hearing will be held; LBP-20-2, 91 NRC 10 (2020)

requirements of 10 C.F.R. 2.309(f)(1)(vi) do not apply to ITAAC proceedings; CLI-20-6, 91 NRC 225 (2020)

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- ruling is referred if it addresses a significant legal issue of first impression that is likely to recur in other proceedings until resolved by the Commission; CLI-20-3, 91 NRC 133 (2020)
- settlement agreements must be in substantial compliance with 10 C.F.R. 2.338(g)-(h) provisions concerning form and content; LBP-20-5, 91 NRC 72 (2020)
- to reopen a closed record, petitioner must file a motion demonstrating that its new contention is timely, addresses a significant safety or environmental issue, and demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; LBP-20-6, 91 NRC 239 (2020)
- RULES OF PROCEDURE**
- pre-hearing motions on export license applications are not contemplated under 10 C.F.R. 110.109; CLI-20-2, 91 NRC 103 (2020)
- procedural requests, such as for an extension of time to file a hearing request on export license applications, are permitted; CLI-20-2, 91 NRC 103 (2020)
- procedures in Part 110 constitute the exclusive basis for hearings on export and import license applications; CLI-20-2, 91 NRC 103 (2020)
- SAFEGUARDS**
- International Atomic Energy Agency safeguards will be applied with respect to any HEU material proposed to be exported; CLI-20-2, 91 NRC 103 (2020)
- SAFETY EVALUATION REPORT**
- See Final Safety Evaluation Report
- SAFETY ISSUES**
- apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that existing oversight processes are adequate to ensure safety; CLI-20-3, 91 NRC 133 (2020)
- NRC need not draw any conclusion about environmental impacts in connection with a finding under 10 C.F.R. 52.103(g) that acceptance criteria are met, and contentions in ITAAC proceedings must relate to safety issues; CLI-20-6, 91 NRC 225 (2020)
- transportation impacts must be considered in applicant's environmental report, the ER need not prove the safety of transportation packages because 10 C.F.R. Part 71 separately addresses these issues; LBP-20-6, 91 NRC 239 (2020)
- SAFETY REVIEW**
- NRC Staff may not abrogate its responsibility to take a hard look at new and significant information; CLI-20-3, 91 NRC 133 (2020)
- SAFETY-RELATED**
- protected activities include the raising of safety-related concerns; LBP-20-1, 91 NRC 1 (2020)
- SALTWATER INTRUSION**
- contention that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)
- SECURITY**
- proliferation and security risks in transportation and end use posed by the lower quantity of material exported are much smaller than the recent prior exports that were limited to one-year supply; CLI-20-2, 91 NRC 103 (2020)
- See also Common Defense and Security; Physical Security
- SEGMENTATION**
- petitioners' new argument on appeal regarding NEPA segmentation will not be considered; CLI-20-4, 91 NRC 167 (2020)
- SETTLEMENT AGREEMENTS**
- allowing a third party to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around the *Bellotti* doctrine and would also undercut NRC policy favoring enforcement settlements; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)
- board considerations for approving settlements are discussed; LBP-20-5, 91 NRC 72 (2020)
- board has authority to approve settlement agreements; LBP-20-5, 91 NRC 72 (2020)
- boards shall accord due weight to the position of NRC Staff when reviewing the settlement agreements; LBP-20-5, 91 NRC 72 (2020)

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given NRC policy of encouraging settlements, absence of any reason to suspect that either party was at a relative disadvantage in their negotiations, board can conclude that settlement agreement is fair and reasonable; LBP-20-5, 91 NRC 72 (2020)

substantial compliance with 10 C.F.R. 2.338(g)-(h) provisions concerning form and content is required; LBP-20-5, 91 NRC 72 (2020)

SETTLEMENT NEGOTIATIONS

given NRC policy of encouraging settlements, absence of any reason to suspect that either party was at a relative disadvantage in their negotiations, board can conclude that settlement agreement is fair and reasonable; LBP-20-5, 91 NRC 72 (2020)

purpose of mediation is not to resolve factual disputes and establish a factual record but rather for parties to reach agreement on forward-looking actions that enhance safety and security; LBP-20-4, 91 NRC 55 (2020)

SHIPPING CONTAINERS

challenge to the safety of NRC-approved transportation packages is outside the scope of an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

claims that such safety-related transportation issues as moving high-burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements; LBP-20-6, 91 NRC 239 (2020)

transportation impacts must be considered in applicant's environmental report, but the ER need not prove the safety of transportation packages because 10 C.F.R. Part 71 separately addresses these issues; LBP-20-6, 91 NRC 239 (2020)

SHUTDOWN

given the shutdown and defueled status of the units, license amendments do not on their face present any obvious potential for offsite radiological consequences so as to support invocation of the proximity presumption; LBP-20-2, 91 NRC 10 (2020)

post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity; LBP-20-2, 91 NRC 10 (2020)

SITE CHARACTERIZATION

although not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why it was necessary to fully understand the impacts of the proposed action; CLI-20-4, 91 NRC 167 (2020)

contention alleging that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly is inadmissible; LBP-20-6, 91 NRC 239 (2020)

extensive sampling to establish baseline restoration values was required under NEPA to properly characterize the site; CLI-20-1, 91 NRC 79 (2020)

failure to explain significance of the presence or absence of faults or fractures to the need for fracture testing renders intervenor's brief inadequate, justifying rejection of the argument on this basis alone; CLI-20-1, 91 NRC 79 (2020)

such issues have been allowed to migrate to the extent they challenged applicant's demonstration of aquifer confinement and impacts to groundwater; CLI-20-4, 91 NRC 167 (2020)

SITE HYDROLOGY

claims about groundwater characterization are not material to the outcome of this proceeding because petitioner has not shown that radionuclides could make their way outside the cask; CLI-20-4, 91 NRC 167 (2020)

contention that environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site of the proposed consolidated interim storage facility is inadmissible; LBP-20-6, 91 NRC 239 (2020)

contention that environmental report fails to adequately determine whether shallow groundwater exists at the site of the proposed consolidated interim storage facility fails to raise a genuine dispute the license application; LBP-20-6, 91 NRC 239 (2020)

site characterization issues have been allowed to migrate to the extent they challenged applicant's demonstration of aquifer confinement and impacts to groundwater; CLI-20-4, 91 NRC 167 (2020)

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SITE SELECTION

NEPA does not require an elaborate comparative site study to explore whether an applicant's siting criteria might perpetuate institutional racism; CLI-20-4, 91 NRC 167 (2020)

SPECIAL NUCLEAR MATERIALS

adequate physical security measures must be maintained with respect to high-enriched uranium material proposed to be exported and to any special nuclear material used in or produced through the use thereof; CLI-20-2, 91 NRC 103 (2020)

no high-enriched uranium material proposed to be exported and no special nuclear material produced through use of such material may be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained; CLI-20-2, 91 NRC 103 (2020)

SPENT FUEL MANAGEMENT

exemption is requested to permit use of decommissioning trust funds for spent fuel management activities and to make those withdrawals without prior NRC notification; LBP-20-2, 91 NRC 10 (2020)

impacts from spent fuel repackaging and cask disposal are appropriately addressed by relying on the description of those impacts contained in the Continued Storage GEIS, which is incorporated by reference into 10 C.F.R. 51.23; CLI-20-4, 91 NRC 167 (2020)

SPENT FUEL POOLS

claims postulating spent-fuel-pool-related accidents might be seen as challenging license amendment request's technical basis and lack support sufficient to establish the basis for an admissible contention; LBP-20-2, 91 NRC 10 (2020)

SPENT FUEL STORAGE

contracts with the U.S. Department of Energy are illegal; CLI-20-4, 91 NRC 167 (2020)

DOE will take title to spent fuel when the Secretary of Energy accepts delivery of it following commencement of operation of a repository; CLI-20-4, 91 NRC 167 (2020)

SPENT FUEL STORAGE CASKS

certified cask designs are incorporated into NRC regulations and may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver; CLI-20-4, 91 NRC 167 (2020)

concerns about leaks from spent fuel storage containers that are separately approved and licensed by the NRC may not be adjudicated in an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)

contention asserting that shipping a defective canister back inside the approved transportation casks is not safe is an impermissible attack on NRC regulations; CLI-20-4, 91 NRC 167 (2020)

contention that a spent fuel canister is breached in transport must posit a credible scenario; CLI-20-4, 91 NRC 167 (2020)

generically approved casks are listed in 10 C.F.R. 72.214; CLI-20-4, 91 NRC 167 (2020)

to show a genuine material dispute, petitioner's contention would have to give the board reason to believe that contamination from a defective canister could find its way outside a cask; CLI-20-4, 91 NRC 167 (2020)

STANDARD OF REVIEW

Commission defers to board's fact finding unless the standard of clear error is met; CLI-20-1, 91 NRC 79 (2020)

Commission defers to the board on whether a contention has sufficient factual support to be admitted and reviews contention admissibility decisions only where there is an error of law or abuse of discretion; CLI-20-1, 91 NRC 79 (2020)

Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 167 (2020)

failure to point to a board error means that there is no basis for to reverse the board; CLI-20-4, 91 NRC 167 (2020)

questions of law are reviewed de novo; CLI-20-1, 91 NRC 79 (2020)

standard for finding clear error of fact is high, requiring a showing that the ruling is not even plausible in light of the record as a whole; CLI-20-1, 91 NRC 79 (2020)

STANDING TO INTERVENE

absent injury attributable to the confirmatory order, petitioner does not have standing; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

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argument that NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety is insufficient to establish standing; CLI-20-5, 91 NRC 214 (2020)

Commission on appeal generally defers to the board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-20-4, 91 NRC 167 (2020)

contemporaneous judicial concepts of standing applied in NRC hearings require petitioner to show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

fact-specific standing allegations are required, not conclusory assertions, such as general assertions of proximity to establish the proximity presumption; LBP-20-2, 91 NRC 10 (2020)

failure by petitioner to include crucial proximity information constitutes grounds for denying standing; LBP-20-2, 91 NRC 10 (2020)

general objections that are not associated with the challenged license amendment are insufficient to establish standing; LBP-20-2, 91 NRC 10 (2020)

given the shutdown and defueled status of the units, license amendments do not on their face present any obvious potential for offsite radiological consequences so as to support invocation of the proximity presumption; LBP-20-2, 91 NRC 10 (2020)

hearing petition generally is construed in favor of petitioner seeking to demonstrate standing, and a pro se petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-20-2, 91 NRC 10 (2020)

in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors; CLI-20-4, 91 NRC 167 (2020)

intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing; LBP-20-2, 91 NRC 10 (2020)

intervenor may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly; CLI-20-5, 91 NRC 214 (2020)

intervention petitioner in a license amendment proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the facility; LBP-20-2, 91 NRC 10 (2020)

intervention petitioner's claim that he is on the board of directors of two organizations with interests within 50 miles of the site is insufficiently specific to articulate the requisite pattern of regular contacts with the area; LBP-20-2, 91 NRC 10 (2020)

licensing board may grant discretionary standing; LBP-20-2, 91 NRC 10 (2020)

living near the ultimate destination of an exported reactor could not qualify as an affected interest; CLI-20-2, 91 NRC 103 (2020)

living within an eighth of a mile of a port through which a high-enriched uranium export would travel is not enough to demonstrate an affected interest; CLI-20-2, 91 NRC 103 (2020)

mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing; CLI-20-5, 91 NRC 214 (2020)

narrow exception may exist for petitioner who establishes standing in one case to employ that standing determination in another proceeding that is merely another round in a continuing controversy; LBP-20-2, 91 NRC 10 (2020)

NRC has long applied judicial concepts of standing in assessing whether petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding; CLI-20-5, 91 NRC 214 (2020)

person residing within 1.5 miles of a bridge that would serve as the exit point for the export of low-level waste does not have an affected interest in that export; CLI-20-2, 91 NRC 103 (2020)

petitioner bears the burden of establishing its standing whether pro se or otherwise; LBP-20-2, 91 NRC 10 (2020)

petitioner can request that the presiding officer consider granting discretionary standing when petitioner cannot establish its standing as of right under one of the regulatory standards; LBP-20-2, 91 NRC 10 (2020)

petitioner fails to squarely address the injury requirement for standing; LBP-20-2, 91 NRC 10 (2020)

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- petitioner generally must make a fresh standing demonstration in each proceeding in which intervention is sought because petitioner's circumstances may change from one proceeding to the next; LBP-20-2, 91 NRC 10 (2020)
- petitioner may establish traditional standing using contemporaneous judicial standing concepts by showing an injury-in-fact within the zones of interest protected by statutes governing NRC proceedings, causation, and redressability; LBP-20-2, 91 NRC 10 (2020)
- petitioner may use one of several approaches to establish standing, such as traditional judicial standing, the proximity presumption, and organizational or representational standing; LBP-20-2, 91 NRC 10 (2020)
- petitioner may use the proximity presumption if petitioner has a significant property interest. lives, or has frequent contacts within approximately 50 miles of a nuclear reactor; LBP-20-2, 91 NRC 10 (2020)
- petitioner must demonstrate a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute; LBP-20-2, 91 NRC 10 (2020)
- petitioner must indicate how the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products; LBP-20-2, 91 NRC 10 (2020)
- petitioner must specify contacts with the affected area in the intervention petition; LBP-20-2, 91 NRC 10 (2020)
- petitioner provides an address in the hearing petition, but makes no specific showing regarding where he lives relative to the facility, although in a 2005 proceeding he indicated that he lives and operates a business 12 miles from the nuclear facility; LBP-20-2, 91 NRC 10 (2020)
- petitioners fail to demonstrate standing to intervene either as a matter of right or as a matter of discretion; LBP-20-2, 91 NRC 10 (2020)
- petitioners must show a specific and plausible means for how licensed activities will affect them in the absence of obvious potential for offsite harm; CLI-20-4, 91 NRC 167 (2020)
- prior participation in other NRC proceedings does not, a priori, grant petitioner standing in another case; LBP-20-2, 91 NRC 10 (2020)
- proximity presumption generally applied in proceedings for reactor construction permits, operating licenses, or significant amendments thereto relieves a petitioner of the need to satisfy traditional elements of standing; LBP-20-2, 91 NRC 10 (2020)
- proximity presumption is determined on a case-by-case basis in proceedings other than for issuance or renewal of a reactor construction permit/operating license or early site permit/combined license; LBP-20-2, 91 NRC 10 (2020)
- proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 167 (2020)
- proximity-plus standard takes into account both the nature of the proposed activity and significance of the radioactive source; CLI-20-4, 91 NRC 167 (2020)
- request for discretionary standing can be considered only if another petitioner has established standing and at least one contention has been admitted so that a hearing will be held; LBP-20-2, 91 NRC 10 (2020)
- standing is granted based on petitioner's holding title to a house near a nuclear facility; LBP-20-2, 91 NRC 10 (2020)
- to demonstrate traditional standing in a license transfer proceeding, petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-20-5, 91 NRC 214 (2020)
- to demonstrate traditional standing in a license transfer proceeding, petitioners must show that the alleged injury lies arguably within the zone of interests protected by the Atomic Energy Act; CLI-20-5, 91 NRC 214 (2020)
- to demonstrate traditional standing in a license transfer proceeding, petitioners must specify the facts pertaining to their interest; CLI-20-5, 91 NRC 214 (2020)
- to establish standing, petitioner have some direct interest in the outcome of a proceeding; LBP-20-2, 91 NRC 10 (2020)
- when proximity presumption does not apply, board's analysis turns next to a traditional standing inquiry and whether petitioner has demonstrated an injury-in-fact associated with the challenged license amendment; LBP-20-2, 91 NRC 10 (2020)

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STANDING TO INTERVENE, ORGANIZATIONAL

- broad interests shared with many others are no different from the general environmental and policy interests that are insufficient to establish standing; CLI-20-5, 91 NRC 214 (2020)
- claim of direct radiological injury to itself from license transfer fails to explain how the transfer would be expected to threaten organizational interests of an organization based in another state; CLI-20-5, 91 NRC 214 (2020)
- in addressing injury requirement, organization must show that the licensing action would constitute a threat to its organizational interests; CLI-20-5, 91 NRC 214 (2020)
- institutional interest in providing information to the public is insufficient to show an affected interest; CLI-20-2, 91 NRC 103 (2020)
- mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to establish harm from a license transfer; CLI-20-5, 91 NRC 214 (2020)
- organization can show standing by establishing either a cognizable injury to its organizational interests or, alternatively, harm to the interests of its members; LBP-20-2, 91 NRC 10 (2020)
- organization fails to explain how its involvement in other cited proceedings distinguishes its interest in this license transfer proceeding from that of a private attorney general raising issues that are of concern to it but that do not affect it directly; CLI-20-5, 91 NRC 214 (2020)
- organization must demonstrate how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-20-2, 91 NRC 10 (2020)
- organization must demonstrate that its members would otherwise have standing to sue in their own right, interests that the organization seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; LBP-20-2, 91 NRC 10 (2020)
- organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene; CLI-20-5, 91 NRC 214 (2020)
- petitioner has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing; CLI-20-5, 91 NRC 214 (2020)
- standing for an organization that seeks to act as a private attorney general in order to raise environmental or safety matters that are of general concern will not be considered; CLI-20-5, 91 NRC 214 (2020)

STANDING TO INTERVENE, REPRESENTATIONAL

- failure to provide evidence of authorization is a sufficient basis to reject its bid for representational standing; CLI-20-5, 91 NRC 214 (2020)
- if an organization does not identify the members it purportedly represents, NRC cannot determine whether the organization actually does represent members who consider that they will be affected by the licensing action or rather, is simply seeking the vindication of its own value preference; CLI-20-5, 91 NRC 214 (2020)
- organization may obtain standing as a representative of one or more of its individual members; CLI-20-5, 91 NRC 214 (2020)
- organization must demonstrate how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-20-2, 91 NRC 10 (2020)
- organization must demonstrate that its members would otherwise have standing to sue in their own right, interests that the organization seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; CLI-20-5, 91 NRC 214 (2020); LBP-20-2, 91 NRC 10 (2020)
- petitioner failed to satisfy the requirement of representational standing that its members would otherwise have standing to sue in their own right; LBP-20-2, 91 NRC 10 (2020)
- statement that some of organization's members live, work, or engage in recreation adjacent to or near an NRC-licensed facility is insufficient for proximity-based standing; CLI-20-5, 91 NRC 214 (2020)
- to demonstrate representational standing, organizations must show that at least one of its members may be affected by approval of the license transfer (such as by the member's domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her; CLI-20-5, 91 NRC 214 (2020)

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STATE GOVERNMENT

advanced planning and coordination of spent fuel shipments with state and tribal officials is required; CLI-20-4, 91 NRC 167 (2020)

STATUTORY CONSTRUCTION

applying AEA § 134(a)(1) on an isotope-to-isotope basis would mean producers must isolate collection of particular radioisotopes produced with a high-enriched uranium target and discard the others produced, and is not reasonable; CLI-20-2, 91 NRC 103 (2020)

“medical isotope” includes Mo-99 as well as I-131, xenon-133, and other radioactive materials used to produce a radiopharmaceutical for diagnostic or therapeutic procedures; CLI-20-2, 91 NRC 103 (2020)

“planned” medical isotope production in AEA § 134 refers to what the ultimate end user plans to produce with the requested material; CLI-20-2, 91 NRC 103 (2020)

SUA SPONTE ISSUES

board has no authority to raise issues sua sponte without prior Commission permission; CLI-20-1, 91 NRC 79 (2020)

SUBSEQUENT OPERATING LICENSE RENEWAL

all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources; CLI-20-3, 91 NRC 133 (2020)

apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that existing oversight processes are adequate to ensure safety; CLI-20-3, 91 NRC 133 (2020)

applicants must evaluate mitigation for Category 2 issues; CLI-20-3, 91 NRC 133 (2020)

draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) must rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 and must contain an analysis of those issues identified as Category 2; CLI-20-3, 91 NRC 133 (2020)

Generic Environmental Impact Statement discusses Category 1 issues, and therefore, these issues do not require a plant-specific assessment unless there is new and significant information that would change the conclusions in the GEIS; CLI-20-3, 91 NRC 133 (2020)

“initial” reflects the possibility that while all initial license renewal applicants must address the conditions and considerations in section 51.53(c)(3), some subsequent license renewal applicants may take a different approach or use the same approach required for initial license renewal applicants; CLI-20-3, 91 NRC 133 (2020)

license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to ongoing compliance oversight activity appropriately addressed by NRC Staff; CLI-20-3, 91 NRC 133 (2020)

NRC Staff may rely on Generic Environmental Impact Statement to evaluate environmental impacts of Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

NRC Staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information; CLI-20-3, 91 NRC 133 (2020)

petitioners’ interpretation of 10 C.F.R. 51.53(c)(3) as inapplicable to subsequent license renewal applicants is inconsistent with an explicitly stated regulatory purpose of Part 51 to promote efficient environmental reviews for license renewal applications; CLI-20-3, 91 NRC 133 (2020)

plain language of 10 C.F.R. 51.53(c)(3) neither directs the Commission to apply this section to subsequent license renewal applicants, nor does it forbid it; CLI-20-3, 91 NRC 133 (2020)

required content of environmental report for operating license renewal is provided in 10 C.F.R. 51.53(c)(3); CLI-20-3, 91 NRC 133 (2020)

requirement in section 51.95(c)(4) is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 GEIS for Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

safety regulations in Part 54 have long contemplated the possibility of subsequent license renewal; CLI-20-3, 91 NRC 133 (2020)

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- section 51.53(c)(3)(iv) is the only regulation that implements the requirements for license renewal applicants to provide new and significant information in the environmental report; CLI-20-3, 91 NRC 133 (2020)
- sections 51.95 and 51.71(d) do not differentiate between initial and subsequent license renewals; CLI-20-3, 91 NRC 133 (2020)
- subsection 51.53(c)(3)(ii)(A) reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them; CLI-20-3, 91 NRC 133 (2020)
- SUMMARY DISPOSITION**
- unopposed motion is not automatically granted; CLI-20-1, 91 NRC 79 (2020)
- SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**
- although environmental impact statement had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS; CLI-20-1, 91 NRC 79 (2020)
- for license renewal prepared under § 51.95(c), DSEIS must rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 and must contain an analysis of those issues identified as Category 2; CLI-20-3, 91 NRC 133 (2020)
- “new and significant information” reflects NRC’s ongoing obligation to supplement any final EIS prior to undertaking an agency action upon discovering information that provides a seriously different picture of the environmental consequences; CLI-20-3, 91 NRC 133 (2020)
- TECHNICAL SPECIFICATIONS**
- post-shutdown technical specification changes regarding technical, administrative, and crew composition changes have no bearing on overall management structure, personnel, or culture and thus do not implicate management character or integrity; LBP-20-2, 91 NRC 10 (2020)
- TELLURIUM**
- feasibility of using tellurium targets as an alternative for high-enriched uranium targets for I-131 production is discussed; CLI-20-2, 91 NRC 103 (2020)
- TERRORISM**
- Commission specifically declines to follow a ruling from the 9th Circuit on consideration of terrorist attacks for any facility located outside the 9th Circuit; CLI-20-4, 91 NRC 167 (2020)
- terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding; CLI-20-4, 91 NRC 167 (2020)
- TESTIMONY**
- any statements of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness; CLI-20-6, 91 NRC 225 (2020)
- TESTING**
- before operation may begin, NRC must find that all acceptance criteria in the ITAAC are satisfied; CLI-20-6, 91 NRC 225 (2020)
- contention alleging that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly is inadmissible; LBP-20-6, 91 NRC 239 (2020)
- TRANSPORTATION OF RADIOACTIVE MATERIALS**
- challenge to the safety of NRC-approved transportation packages is outside the scope of an independent spent fuel storage installation proceeding; LBP-20-6, 91 NRC 239 (2020)
- contention that findings of the NWTRB Report on technical issues regarding transportation of nuclear waste contradict applicant’s plans is inadmissible; LBP-20-6, 91 NRC 239 (2020)
- living within an eighth of a mile of a port through which a high-enriched uranium export would travel is not enough to demonstrate an affected interest; CLI-20-2, 91 NRC 103 (2020)
- person residing within 1.5 miles of a bridge that would serve as the exit point for the export of low-level waste does not have an affected interest in that export; CLI-20-2, 91 NRC 103 (2020)
- proliferation and security risks in transportation and end use posed by the lower quantity of material exported are much smaller than the recent prior exports that were limited to one-year supply; CLI-20-2, 91 NRC 103 (2020)
- purpose of the NWTRB Report is to review the DOE’s preparedness to transport spent nuclear fuel and high-level radioactive waste; LBP-20-6, 91 NRC 239 (2020)

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transportation impacts must be considered in applicant's environmental report, the ER need not prove the safety of transportation packages because 10 C.F.R. Part 71 separately addresses these issues; LBP-20-6, 91 NRC 239 (2020)

TRANSPORTATION OF SPENT FUEL

advanced planning and coordination of spent fuel shipments with state and tribal officials is required; CLI-20-4, 91 NRC 167 (2020)

claims that such safety-related transportation issues as moving high burnup spent nuclear fuel and when to require repackaging to different-sized canisters improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements; LBP-20-6, 91 NRC 239 (2020)

contention asserting that shipping a defective canister back inside the approved transportation casks is not safe is an impermissible attack on NRC regulations; CLI-20-4, 91 NRC 167 (2020)

contention that a spent fuel canister is breached in transport must posit a credible scenario; CLI-20-4, 91 NRC 167 (2020)

late-filed contention that environmental report must evaluate the potential impact on the environment of the transportation of the nuclear waste is inadmissible for failure to meet requirements for reopening a closed record; LBP-20-6, 91 NRC 239 (2020)

proximity to transportation routes is too remote and speculative an interest to confer standing; CLI-20-4, 91 NRC 167 (2020)

"start clean/stay clean" plan that a defective canister would be shipped back in an approved transportation cask is lawful as long as applicable radiation standards are met; CLI-20-4, 91 NRC 167 (2020)

use of representative routes is in keeping with past NRC practice to evaluate transportation impacts; CLI-20-4, 91 NRC 167 (2020)

TREATIES

Fort Laramie Treaty of 1868 is no longer in effect; CLI-20-1, 91 NRC 79 (2020)

URANIUM

See High-Enriched Uranium; Low-Enriched Uranium

VIOLATIONS

confirmatory order is issued to an individual who has acknowledged a violation of the NRC's Employee Protection regulation; LBP-20-1, 91 NRC 1 (2020)

See also Notice of Violation

WAIVER OF RULE

certified cask designs are incorporated into NRC regulations and may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver; CLI-20-4, 91 NRC 167 (2020)

environmental aspect of contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because petitioner did not seek a rule waiver; CLI-20-4, 91 NRC 167 (2020)

members of the public may seek a waiver of NRC regulations to challenge the analysis in the 2013 GEIS on a Category 1 issue for a specific facility; CLI-20-3, 91 NRC 133 (2020)

no NRC regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted; CLI-20-4, 91 NRC 167 (2020)

petitioners are obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues; CLI-20-3, 91 NRC 133 (2020)

WATER QUALITY

contention that application fails to provide sufficient information to establish potential effects of the project on the adjacent surface and groundwater resources is denied; CLI-20-1, 91 NRC 79 (2020)

WATER SUPPLY

subsection 51.53(c)(3)(ii)(A) reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them; CLI-20-3, 91 NRC 133 (2020)

WHISTLEBLOWERS

NRC's charter does not include providing a personal remedy to an individual who has suffered discrimination for reporting safety concerns; LBP-20-3, 91 NRC 42 (2020); LBP-20-4, 91 NRC 55 (2020)

protected activities include the raising of safety-related concerns; LBP-20-1, 91 NRC 1 (2020)

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WITNESSES, EXPERT

any declarations of eyewitnesses or expert witnesses offered in support of contention admissibility must be signed by the eyewitness or expert witness; CLI-20-6, 91 NRC 225 (2020)

conclusory statements by an expert do not support contention admissibility; CLI-20-6, 91 NRC 225 (2020)

expert opinion that states a conclusion without providing a reasoned basis or explanation for that conclusion does not allow assessment of the merits of that opinion; CLI-20-6, 91 NRC 225 (2020)

if eyewitnesses' or expert witnesses' declarations are not signed, they will be considered but not given the weight of an eyewitness or expert witness with respect to satisfying the prima facie showing; CLI-20-6, 91 NRC 225 (2020)

when considering challenges to how the board weighed evidence, Commission defers to a board's expertise as the fact finder and declines to substitute the judgment of an intervenor's expert for that of the board; CLI-20-1, 91 NRC 79 (2020)

FACILITY INDEX

BEAVER VALLEY POWER STATION, Units 1 and 2; Docket Nos. 50-334-LT, 50-412-LT
LICENSE TRANSFER; April 23, 2020; MEMORANDUM AND ORDER; CLI-20-5, 91 NRC 214 (2020)

DAVIS-BESSE NUCLEAR POWER STATION, Unit 1; Docket No. 50-346-LT
LICENSE TRANSFER; April 23, 2020; MEMORANDUM AND ORDER; CLI-20-5, 91 NRC 214 (2020)

HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY; Docket No. 72-1051-ISFSI
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; April 23, 2020; MEMORANDUM AND
ORDER; CLI-20-4, 91 NRC 167 (2020)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION; June 18, 2020; MEMORANDUM AND
ORDER (Ruling on Remanded Contentions and Denying Motion to Reopen); LBP-20-6, 91 NRC 239
(2020)

MARSLAND EXPANSION AREA; Docket No. 40-8943-MLA-2
MATERIALS LICENSE AMENDMENT; April 13, 2020; MEMORANDUM AND ORDER; CLI-20-1, 91
NRC 79 (2020)

PERRY NUCLEAR POWER PLANT, Unit 1; Docket No. 50-440-LT
LICENSE TRANSFER; April 23, 2020; MEMORANDUM AND ORDER; CLI-20-5, 91 NRC 214 (2020)

THREE MILE ISLAND NUCLEAR STATION, Units 1 and 2; Docket Nos. 50-289, 50-320
LICENSE AMENDMENT; January 23, 2020; MEMORANDUM AND ORDER (Denying Intervention
Petition and Terminating Proceeding); LBP-20-2, 91 NRC 10 (2020)

TURKEY POINT NUCLEAR GENERATING Units 3 and 4; Docket Nos. 50-250-SLR, 50-251-SLR
SUBSEQUENT LICENSE RENEWAL; April 23, 2020; MEMORANDUM AND ORDER; CLI-20-3, 91
NRC 133 (2020)

VOGTLE ELECTRIC GENERATING PLANT, Unit 3; Docket No. 52-025
ITAAC; June 15, 2020; MEMORANDUM AND ORDER; CLI-20-6, 91 NRC 225 (2020)

VOGTLE ELECTRIC GENERATING PLANT, Units 3 and 4; Docket Nos. 52-025, 52-026
ENFORCEMENT; February 11, 2020; MEMORANDUM AND ORDER (Denying Intervention Request
and Motion to Consolidate, and Terminating Proceeding); LBP-20-4, 91 NRC 55 (2020)