

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
VIRGINIA ELECTRIC AND POWER CO. )  
 dba DOMINION VIRGINIA POWER, )  
 and OLD DOMINION ELECTRIC )  
 COOPERATIVE )  
 )  
(North Anna Power Station, Unit 3) )

Docket No. 52-017

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NRC STAFF ANSWER TO "PETITION FOR INTERVENTION AND REQUEST FOR HEARING  
BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE"

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission (NRC staff) hereby answers the "Petition for Intervention and Request for Hearing" (Petition) filed on May 9, 2008 by the Blue Ridge Environmental Defense League (BREDL) and its chapter People's Alliance for Clean Energy (PACE) (collectively, Petitioners). For the reasons set forth below, the NRC staff (Staff) does not oppose BREDL's standing, but opposes PACE's standing and opposes admission of Petitioners as parties to this proceeding, since the Staff opposes admission of all of Petitioners' proposed contentions.

BACKGROUND

On November 26, 2007, the Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion), and the Old Dominion Electric Cooperative (ODEC) (collectively Applicants) filed an application for a combined operating license (COL) for North

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<sup>1</sup> The style of this document reflects the Applicants' names identified in the notice published in the *Federal Register* on June 2, 2008. See "Virginia Electric and Power Company, d/b/a Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Hearing and Opportunity To Petition for Leave To Intervene on a Combined License for North Anna Unit 3," 73 Fed. Reg. 31,516 (June 2, 2008).

Anna Unit 3 with the NRC.<sup>2</sup> The application for a COL for North Anna Unit 3 (Application) references the application for certification of the Economic Simplified Boiling Water Reactor (ESBWR) design submitted on August 24, 2005 and the Early Site Permit (ESP) for the North Anna ESP Site, ESP-003, which the NRC issued on November 27, 2007.<sup>3</sup> Application, Rev. 0, Part 1 at 1. NUREG-1811, the final environmental impact statement (EIS) for the ESP application, documents, *inter alia*, the Staff's evaluation of many of the environmental effects of construction and operation of proposed Unit 3 at the North Anna ESP site. See NUREG-1811, "Environmental Impact Statement for an [ESP] at the North Anna ESP Site," Final Report (Dec. 2006)(NUREG-1811).

On March 10, 2008, the NRC published a notice of hearing on the Application which provided members of the public sixty days from the date of publication to file a petition for leave

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<sup>2</sup> Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power-North Anna Unit 3, 72 Fed. Reg. 70,619 (Dec. 12, 2007). The NRC docketed the application on January 28, 2008. Dominion Virginia Power; Acceptance for Docketing of an Application for Combined License for North Anna Unit 3, 73 Fed. Reg. 6528 (Feb. 4, 2008).

<sup>3</sup> The Application states that "[t]his COL application also references Revision 9 of the Early Site Permit (ESP) application for the North Anna ESP site, and will reference that ESP upon issuance." Application, Part 1 at 1. Since the NRC issued ESP-003 on November 27, 2007, the Application should be deemed to reference ESP-003. The North Anna ESP application was submitted on September 25, 2003, and the NRC published a notice of hearing on the ESP application on November 25, 2003. See "Dominion Nuclear North Anna, LLC; Opportunity to Petition for Leave to Intervene" (Early Site Permit for the North Anna ESP Site), 68 Fed. Reg. 67,489 (Dec. 2, 2003). BREDL, together with other organizations, petitioned to intervene in the proceeding on the ESP application, and the ESP ASLB granted BREDL party status. See *Dominion Nuclear North Anna, LLC* (North Anna ESP Site), LBP-04-18, 60 NRC 253, 262 (2004). The Atomic Safety and Licensing Board presiding over the proceeding on the North Anna ESP application (ESP Board) admitted two contentions, one of which was settled, and the other dismissed on summary disposition. See *Dominion Nuclear North Anna, LLC* (North Anna ESP Site), LBP-07-09, 65 NRC 539, 550 (2007). The ESP Board also conducted a mandatory hearing on the uncontested portion of the ESP application. See *id.* at 552. The ESP Board determined that the ESP should be issued after conducting a thorough, probing inquiry into the facts and logic supporting the Staff's conclusions in the NRC Staff review documents on the ESP application, NUREG-1811, "Environmental Impact Statement for an [ESP] at the North Anna ESP Site," Final Report (Dec. 2006), NUREG-1835, "Safety Evaluation Report for an [ESP] at the North Anna ESP Site," Final Report (Sept. 2005), and Supplement 1 to NUREG-1835 (Nov. 2006). See *id.* at 552-54; 562-639 (Judge Karlin's dissenting opinion is at 631-639), *aff'd*, CLI-07-27, 66 NRC 215. The North Anna ESP is available in the Agencywide Document Management System (ADAMS) at accession number ML073180440.

to intervene in this proceeding. Dominion Virginia Power; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760, 12,760-61 (Mar. 10, 2008) (Notice of Hearing).<sup>4</sup> In response to the Notice of Hearing, Petitioners submitted their Petition through which they seek to intervene in this proceeding.

### DISCUSSION

In its Petition, Petitioners assert that they have standing based on their representation of several of their members and propose eight contentions. The eight proposed contentions are: (1) Dominion lacks realistic low-level radioactive waste plans (Petition at 5); (2) Unit 3 would be built on top of a seismic fault (*id.* at 7); (3) the Unit 3 cooling system will not meet Clean Water Act<sup>5</sup> (CWA) requirements and the water supply will not be sufficient for plant cooling systems (*id.* at 11); (4) Unit 3 will not meet national emission standards for radionuclides to the atmosphere (*id.* at 13); (5) the assumption and assertion that uranium fuel is a reliable source of energy is not supported in the COL application submitted by the Applicants (*id.* at 14); (6) the NRC fails to execute constitutional due process and equal protection (*id.* at 17); (7) the application fails to evaluate whether and in what time frame spent fuel generated by Unit 3 can be safely disposed of (*id.* at 21); and (8) even if the waste confidence decision applies to this proceeding, it should be reconsidered (*id.* at 27). The NRC staff, as explained below, does not oppose BREDL's standing, but does oppose PACE's standing and opposes admission of all of Petitioners' proposed contentions.

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<sup>4</sup> On April 18, 2008, the NRC issued a supplement to the Notice of Hearing. Dominion Virginia Power; Supplement to Notice of Hearing and Opportunity to Petition for Leave To Intervene on a Combined License for North Anna Unit 3; Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguard Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation, 73 Fed. Reg. 21,162 (Apr. 18, 2008).

<sup>5</sup> Federal Water Pollution Control Act of 1972, as amended, 33 U.S.C. §§ 1251 *et seq.*, commonly referred to as the Clean Water Act.

I. LEGAL STANDARDS

A. Standing to Intervene

In accordance with the Commission's Rules of Practice:<sup>6</sup>

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions that the person seeks to have litigated in the hearing.

10 C.F.R. § 2.309(a). The regulations further provide that the Licensing Board:

will grant the [petition] if it determines that the [petitioner] has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)]. *Id.*

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene 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 [Atomic Energy Act of 1954, as amended (Act)] 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).

As the Commission has observed:

[a]t the heart of the standing inquiry is whether the petitioner has 'alleged such a personal stake in the outcome of the controversy' as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.

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<sup>6</sup> See "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 C.F.R. Part 2.

*Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994), citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

To demonstrate such a 'personal stake,' the Commission applies contemporaneous judicial concepts of standing. Accordingly, petitioner must (1) allege an 'injury in fact' that is (2) 'fairly traceable to the challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.

*Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72, citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). See also *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

In reactor license proceedings, licensing boards have typically applied a "proximity" presumption to persons "who reside in or frequent the area within a 50-mile radius" of the plant in question. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001).<sup>7</sup> The Commission noted this practice with approval, stating that:

We have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto[.] See, e.g. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). . . . [T]hose cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment[.] See, e.g., *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 [sic, 7] AEC 222, 226 (1974).

*Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redressability. *Turkey Point*, LBP-01-6, 53 NRC at 150.

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<sup>7</sup> The *Turkey Point* decision summarizes the development of this doctrine. See *Turkey Point*, LBP-01-6, 53 NRC at 147-48.

The Staff submits that since a COL application is an application for a construction permit combined with an operating license (see 10 C.F.R. § 52.1(a)), the proximity presumption would appear, in general, to apply to such applications.

An organization may establish its standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding), or representational standing (based on the standing of its members). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding, it must identify that member by name and address and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." See, e.g., *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006), citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Further, for the organization to establish representational standing, the member seeking representation must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Palisades*, CLI-07-18, 65 NRC at 409; *PFS*, CLI-99-10, 49 NRC at 323, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

B. Legal Requirements for Contentions

1. General Requirements

The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)).<sup>8</sup>

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows: An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (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 findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.<sup>9</sup> See 10 C.F.R. § 2.309(f)(2008).

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<sup>8</sup> The Commission recodified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in § 2.309 in 2004. See "Changes to Adjudicatory Process" (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), *as corrected*, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the recodified provisions of § 2.309. See 69 Fed. Reg. at 2202. Accordingly, Commission and Appeal Board decisions on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

<sup>9</sup> Section 2.309(f) states the following requirements for contentions:

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each  
(continued. . .)



Sound legal and policy considerations underlie the Commission's contention requirements. The purpose of the contention rule is to, "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by

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(. . .continued)

contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
  - (ii) Provide a brief explanation of the basis for the contention;
  - (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; and
  - (vi) Provide 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.
- (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report[.]

10 C.F.R. § 2.309(f)(1)-(2).

design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; see also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). “Mere ‘notice pleading’ does not suffice.”<sup>10</sup> *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

Finally, it is well established that the purpose for the basis requirements is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); *Arizona Public Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991). The *Peach Bottom* decision requires that a contention be rejected if:

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<sup>10</sup> See also *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991) These requirements are intended, inter alia, to ensure that a petitioner reviews the application and supporting documentation prior to filing contentions; that the contention is supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute between the petitioner and the applicant before a contention is admitted for litigation -- so as to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery. See, e.g., *Shoreham*, 34 NRC at 167-68.

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

*Peach Bottom, supra*, 8 AEC at 20-21.

These rules focus the hearing process on real disputes susceptible of resolution in an adjudication. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies. *Id.* Specifically, NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co., and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007), citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001).

## 2. Scope of Combined License Application Proceedings

The petitions for leave to intervene in the proceeding on the Application are the first such petitions to be referred to the Atomic Safety and Licensing Board Panel. While a COL application should generally be treated as one of broad scope, the Dominion application references ESP-003, which resolves certain issues that would otherwise have been within the scope of this proceeding, as explained below. In addition, long-standing Commission precedent establishes that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of former § 2.714(b) (subsequently restated in § 2.309(f)) and applicable

Commission case law. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). Accordingly, in this case of first impression, the Staff sets forth below the regulatory framework governing the scope of a COL proceeding in which the COL application references an ESP.

Under the Commission's regulations, the matters resolved in a proceeding on an ESP application are considered resolved in subsequent proceedings in which the application references the ESP, with specified exceptions.<sup>11</sup> See 10 C.F.R. § 52.39(a)(2) (2008).

Section 52.39(a)(2) states:

(2) In making the findings required for issuance of a . . . combined license, . . . if the application for the . . . combined license references an early site permit, the Commission shall treat as resolved those matters resolved in the proceeding on the application for issuance . . . of the early site permit, except as provided in paragraphs (b), (c), and (d) of this section.

. . . .

(c) *Hearings and petitions.* (1) In any proceeding for the issuance of a . . . combined license referencing an early site permit, contentions on the following matters may be litigated in the same manner as other issues material to the proceeding:

(i) The nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit;

(ii) One or more of the terms and conditions of the early site permit have not been met;

(iii) A variance requested under paragraph (d) of this section is unwarranted or should be modified;

(iv) New or additional information is provided in the [COL] application that substantially alters the bases for a previous NRC conclusion or constitutes a sufficient basis for the Commission to

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<sup>11</sup> 10 C.F.R. §§ 52.39(a)(2)(i) and (ii) apply to emergency plans approved in an ESP, and are not pertinent to consideration of the Petition. Similarly, § 52.39(b) applies to updates of emergency planning information supplied in an ESP application, and is not pertinent here. In addition, § 52.39(d) governs variances from an ESP sought by an applicant, and is not relevant to this discussion. The provision relevant to litigation of variances from an ESP is found in § 52.39(c)(1)(iii), which is set forth below.

modify or impose new terms and conditions related to emergency preparedness; or

(v) Any significant environmental issue that was not resolved in the early site permit proceeding, or any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which significant new information has been identified.<sup>12</sup>

10 C.F.R. § 52.39 (2008).

In the environmental context, the contents of the final EIS bounds the reach of both issue preclusion and Staff inquiry into new and significant information in a future construction permit or COL proceeding referencing an ESP. *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 259 (2007).

The Statements of Consideration (SOC) for Part 52, as revised in 2007, further explains § 52.39.<sup>13</sup> See “Licenses, Certifications, and Approvals for Nuclear Power Plants” (Final Rule), 72 Fed. Reg. 49,352 (Aug. 28, 2007). The SOC describes the issues that may be raised with respect to an ESP referenced in a COL application as falling in one of three categories: (1) questions regarding whether the site characteristics, design parameters, or terms and conditions specified in the early site permit have been met; (2) questions regarding whether the early site permit should be modified, suspended, or revoked; or (3) significant new emergency preparedness or environmental information not considered on the early site permit. See SOC, 72 Fed. Reg. at 49,377 (additional discussion is available there at 49, 377-79). In addition, the SOC explains the limited scope of environmental contentions that may be litigated pursuant to

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<sup>12</sup> Section 52.39(c)(2) provides for the filing of petitions requesting that the site characteristics, design parameters, or terms and conditions of an ESP be modified, or that the permit be suspended or revoked. No such petition has been filed regarding ESP-003.

<sup>13</sup> The revised rule became effective on September 27, 2007. 72 Fed. Reg. at 49,352. Since the Applicants filed the application on November 27, 2007, the revised requirements apply to it.

§ 52.39(c)(1)(v) in a COL proceeding in which the application references an ESP. See SOC, 72 Fed. Reg. at 48,441-42.<sup>14</sup>

The provisions of § 52.39 reflect the Commission's policy for implementing, in the context of 10 C.F.R. Part 52, the requirement in Section 189 of the Act that the Commission grant a hearing in a proceeding on an operating license or construction permit application to any person whose interest may be affected. The Commission's policy for implementing this Section 189 requirement under Part 52 is that members of the public should be afforded an opportunity for hearing on each genuine issue in dispute that is material to the particular agency action subject to adjudication, but by the same token, applicants for a license should not have to litigate each such issue more than once. See *Statement of Policy on Conduct of New Reactor Licensing Proceedings*, CLI-08-07, 67 NRC \_\_\_\_, 73 Fed. Reg. 20,963, 20,969 (Apr. 17, 2008). The Commission requirements for the contents of COL applications that reference ESPs reflect this policy, as set forth below.

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<sup>14</sup> The SOC states:

An issue related to impacts of construction and operation of the facility resolved in the early site permit proceeding is afforded finality at the combined license stage provided that there is no "new and significant" information on the issue. If an environmental issue was not resolved at the early site permit stage, either because information was not sufficient to resolve it or because the early site permit applicant was permitted to defer it (e.g., need for power analysis), then the combined license applicant would need to address the issue in its combined license application. The NRC, in the context of a combined license application that references an early site permit, has defined the term "new" in the phrase "new and significant information" as any information that was both (1) not considered in preparing the ESP environmental report or EIS (as may be evidenced by references in the document, applicant responses to NRC requests for additional information, comment letters, etc.) and (2) not generally known or publicly available during the preparation of the EIS (such as information in reports, studies and treatises). This new information may or may not be significant. For an issue to be significant, it must be material to the issue being considered, i.e., it must have the potential to affect the NRC staff's evaluation of the issue. The COL applicant need only provide information about a previously resolved environmental issue if it is both new and significant.

The requirements for the contents of a COL application are set forth in 10 C.F.R. §§ 52.79 and 52.80. Section 52.79(b) governs the contents of a safety analysis report (SAR) submitted as part of a COL application that references an ESP. In short, the COL application need not contain safety information already submitted to the Commission in the ESP application, but must demonstrate that the design of the chosen reactor falls within the site characteristics and design parameters in the ESP, and identify any necessary variances from the ESP.<sup>15</sup> 10 C.F.R. § 53.79(b)(1). The provisions governing the contents of the environmental report for a COL application that references an ESP are similar to those governing the safety information, and are set forth in 10 C.F.R. § 51.50(c)(1). That section provides that a COL application that references an ESP need not contain environmental information resolved in connection with the ESP application, but must demonstrate that the design of the chosen reactor falls within the site characteristics and design parameters in the ESP, and must include any new and significant environmental information.<sup>16</sup> 10 C.F.R. § 51.50(c)(1).

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<sup>15</sup> As pertinent here, § 52.79(b) states:

(b) If the combined license application references an early site permit, then the following requirements apply:

(1) The final safety analysis report need not contain information or analyses submitted to the Commission in connection with the early site permit, *provided, however*, that the final safety analysis report must either include or incorporate by reference the early site permit site safety analysis report and must contain, in addition to the information and analyses otherwise required, information sufficient to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the early site permit.

(2) If the final safety analysis report does not demonstrate that [the] design of the facility falls within the site characteristics and design parameters, the application shall include a request for a variance that complies with the requirements of §§ 52.39 and 52.93.

Section 52.79(b)(3) relates to treatment of terms and conditions of an ESP, and §§ 52.79(b)(4) and (5) govern emergency planning matters specified in the ESP.

<sup>16</sup> As pertinent here, § 51.50(c)(1) provides:  
(continued. . .)

In view of the foregoing, the finality provisions of § 52.39 and the application standards of §§ 51.50(c), 52.79(b) and 52.80(b) should be read together with the contention standards of § 2.309 as follows: Issues resolved in an ESP proceeding shall be treated as resolved, with certain specified exceptions, in a COL proceeding in which the ESP is referenced. 10 C.F.R. § 52.39(a)(2). The COL application need not contain information previously submitted to the Commission in the ESP application or resolved in the ESP EIS. 10 C.F.R. §§ 52.79(b), 51.50(c)(1). Proposed contentions must identify a dispute with the application. 10 C.F.R. § 2.309(f)(iv). Accordingly, a proposed contention that asserts the omission of information from a COL application must be rejected if the omission is permitted by §§ 52.79(b) and 51.50(c)(1).

The only safety contentions arising from matters resolved in an ESP proceeding that are within the scope of a COL proceeding in which the ESP is referenced in the COL application are those pertaining to whether the site characteristics and design parameters specified in the ESP have been met (§ 52.39(c)(i)), whether a term or condition in the ESP has been met

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(. . .continued)

(1) *Application referencing an early site permit.* If the combined license application references an early site permit, then the “Applicant’s Environmental Report—Combined License Stage” need not contain information or analyses submitted to the Commission in “Applicant’s Environmental Report—Early Site Permit Stage,” or resolved in the Commission’s early site permit environmental impact statement, but must contain, in addition to the environmental information and analyses otherwise required:

(i) Information to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the early site permit;

(ii) Information to resolve any significant environmental issue that was not resolved in the early site permit proceeding;

(iii) Any new and significant information for issues related to the impacts of construction and operation of the facility that were resolved in early site permit proceeding[.]

Section 51.50(c)(1)(iv) requires a description of the applicant’s process for identifying new and significant information, and § 51.50(c)(1)(v) governs treatment of environmental terms and conditions of the ESP.



(§ 52.39(c)(ii)), whether a variance from the ESP requested by the COL applicant is unwarranted or should be modified (§ 52.39(c)(iii)), or whether emergency planning matters resolved in the ESP should be revisited (§ 52.38(c)(iv)). Similarly, the only environmental contentions arising from matters resolved in an ESP proceeding that are within the scope of a COL proceeding in which the ESP is referenced in the COL application are those pertaining to whether there is new and significant information on the matters resolved in the ESP proceeding. 10 C.F.R. § 52.39(c)(v).<sup>17</sup>

Section 52.39 provides for finality of matters resolved in an ESP proceeding beyond that provided by the doctrines of *res judicata* and *collateral estoppel*. While those judicial doctrines preclude relitigation of matters only if they were actually litigated in an earlier proceeding (see *e.g.*, *Safety Light Corporation, et al.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995) (citing cases), § 52.39 includes no such limitation. Rather, for a COL application that references an ESP, § 52.39 precludes consideration of all matters resolved in the ESP proceeding, including determinations on any subject necessary to form the basis for the NRC staff conclusions documented in the Staff safety evaluation report on the ESP application and the environmental impact statement prepared in connection with the ESP application.

## II. STANDING

BREDL asserts representational standing to intervene in this proceeding by demonstrating an injury in fact to eight of its members who have authorized BREDL to represent them in this proceeding. Petition at 3-5. These individuals are: Jeffrey A. Adams, John A. Cruickshank, Donal Day, Elena B. Day, Jason Halbert, Vanthi Nguyen, Nathan Van Hooser, and Barbara White (collectively, Declarants). *Id.* at 3-4. BREDL states that these members reside

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<sup>17</sup> Environmental matters not resolved in an ESP proceeding would of course be considered in a COL proceeding in which the COL application references the ESP. See 10 C.F.R. § 52.39(c)(v).

within 50 miles of the proposed site (*id.* at 3) and have standing due to their proximity to the site (*id.* at 4).

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. See *Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, BREDL satisfies the representational standing requirement. Each of the eight individuals named in the Petition have provided virtually identical declarations, which are attached to the Petition, in support of BREDL's standing. See "Declaration of Nathan Van Hooser" (May 8, 2008); "Declaration of Donal Day" (May 8, 2008); "Declaration of Jeffery A. Adams" (May 7, 2008); "Declaration of Barbara White" (May 8, 2008); "Declaration of Vanthi Nguyen" (May 9, 2008); "Declaration of John Cruikshank" (May 8, 2008); "Declaration of Jason Halbert" (May 7, 2008); and "Declaration of Elena B. Day" (May 8, 2008) (collectively, Declarations). Each of the Declarants states that he or she is a member of BREDL and authorized BREDL to represent him or her in this proceeding. See Declarations at 1. Further, the claims contained in all of the declarations are identical in substance – each individual asserts that he or she lives within fifty miles of the site and that nuclear facilities in close proximity to his or her home "could pose a grave risk to my health and safety." *Id.*

In view of the foregoing, each of BREDL's eight members has established standing to intervene in his or her own right. Further, all eight members have authorized BREDL to represent their interests in the instant proceeding. Accordingly, BREDL has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to BREDL's representational standing to intervene.

PACE, however, has not established standing. None of the Declarations even mention PACE; not one Declarant states that he or she is a member of PACE, nor does any Declarant authorize PACE to represent him or her in this proceeding. See Declarations at 1. Accordingly, the Petition does not establish PACE's standing under the standards enunciated in *Palisades*,

and the Staff objects to PACE's being granted standing in this proceeding.

### III. PETITIONERS' PROPOSED CONTENTIONS

The Petitioners submitted eight proposed contentions which are discussed below. As explained below, the Staff opposes admission of all of Petitioners' proposed contentions. The Staff discusses the proposed contentions *seriatim* as they appear in Petitioners' filing.

#### A. PROPOSED CONTENTION 1: Dominion Lacks Realistic Low-level Radioactive Waste Plan. (Petition at 5.)

Petitioners further specify proposed Contention 1 by stating that:

[t]he applicant fails to offer a viable plan for how to dispose of Class B, C and Greater than-C so-called "low-level" radioactive waste generated in the course of operations, closure and postclosure of North Anna Unit 3.

[T]he applicant fails to address how NRC regulations for the disposal of so-called "low-level" radioactive waste will be met in the absence of a disposal facility (dump). . . . If perpetual or extended on-site storage of these wastes is to be the "fall back," then this must be addressed in the COL application and is not.

*Id.* Petitioners indicate that the proposed contention is directed toward "safety and security" and "potential environmental impact." *Id.* at 6. In essence, the proposed contention asserts that the Commission should not have confidence that the identified low-level wastes can be disposed since "there is not currently a site licensed to take the full range of wastes that North Anna 3 will generate[.]" *Id.* at 7. Whether considered as an environmental contention or a safety contention, the Staff opposes admission of proposed Contention 1, as set forth below.

Staff Response: Proposed Contention 1 is inadmissible for the following four reasons, all of which are further discussed below. First, insofar as proposed Contention 1 relates to environmental matters, it is a matter that must be considered resolved pursuant to 10 C.F.R. § 52.39. Second, proposed Contention 1, as it relates to environmental matters, is an impermissible attack on the Commission regulations (namely, Table S-3 of 10 C.F.R. § 51.51), and Petitioners have not requested a waiver or exception to permit them to raise the contention in this proceeding. Third, insofar as proposed Contention 1 relates to safety and security

matters, it is inadmissible because it contains two errors of law, namely: it mistakenly presumes that the Application must demonstrate how the Applicants will dispose of low-level radioactive waste (Petition at 5); and, it mistakenly presumes that the Applicants, in the asserted absence of an offsite disposal option, must obtain a license pursuant to 10 C.F.R. Part 61 to dispose of the waste on the site of proposed Unit 3 (*id.* at 6.). Fourth, whether the proposed contention is considered as a safety contention or an environmental contention, Petitioners fail to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(iv) and (v). Specifically, Petitioners fail to demonstrate that proposed Contention 1 is material to this proceeding, nor do they provide any expert opinion or references to specific sources and documents on which they intend to rely to support their position.

1. The environmental aspects of proposed Contention 1 must be considered resolved in this proceeding.

As set forth in detail above, 10 C.F.R. § 52.39 requires that a matter resolved in a proceeding on an ESP application be considered as resolved in a subsequent COL proceeding in which the application references the ESP. 10 C.F.R. § 52.39(a)(2); see pp. 11-16, *supra*. The inability to dispose of low-level waste by land burial, as asserted in proposed Contention 1, should be considered a matter resolved in the proceeding on the application for ESP-003, the ESP for the North Anna ESP site, based on the following: The NRC staff prepared an EIS, NUREG-1811, in connection with its review of the ESP application. NUREG-1811 documents the Staff evaluation of the impacts of land burial of low-level waste based on Table S-3, as required by 10 C.F.R. § 51.51(a), and states that the environmental impacts of such disposal are small.<sup>18</sup> See NUREG-1811 at 6-13, 6-14. In making the conclusion that the amount of low-level radioactive waste identified in Table S-3 will result in “no significant effluent to the

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<sup>18</sup> Table S-3 is normalized for a 1000 MWe reactor. See 10 C.F.R. § 51.51(b), Table S-3. The Staff, as documented in NUREG-1811, appropriately scaled the results in Table S-3 to match the size of the reactor evaluated in NUREG-1811. NUREG-1811, § 6.1.1.9 at 6-15.

environment” (10 C.F.R. § 51.51(b), Table S-3), Table S-3 presumes shallow land disposal of such waste (*id.*). Accordingly, the matter of low-level radioactive waste disposal was resolved in the proceeding that ended in the issuance of ESP-003.

While the Staff disagrees with Petitioners’ implicit assumption that the terms of Table S-3, including the presumption of shallow land burial of low-level radioactive waste, may be challenged in a Commission adjudication, as set forth below, Petitioners’ opportunity to do so came and went in the ESP proceeding. Petitioners cannot now complain in this proceeding that the Table S-3 presumption of burial of low-level waste is somehow invalid. Indeed, BREDL intervened in the proceeding on the ESP application. *See North Anna ESP Site*, LBP-07-09, 65 NRC at 551. BREDL chose not to propose its contention in that proceeding, and the opportunity to do so is past.

Contentions in a COL proceeding in which the application references an ESP are permitted on an environmental matter resolved in the proceeding on the ESP application only if new and significant information is identified with respect to that matter. *See* 10 C.F.R. § 52.39(c)(v). Petitioners make no attempt to identify any new and significant information with respect to the disposal of low-level radioactive waste, which is the subject of proposed Contention 1. Accordingly, proposed Contention 1 is not admissible under § 52.39(c)(v).

2. Proposed Contention 1 is an unauthorized attack on the Commission's regulations.

The Commission's regulations prohibit an attack on generic NRC requirements in an adjudication. 10 C.F.R. § 2.335(a); *Oconee*, CLI-99-11, 49 NRC at 334. As stated above, the Commission's determination of the environmental effects of low-level waste disposal documented in Table S-3 is predicated on shallow land burial of those wastes. 10 C.F.R. § 51.51(b), Table S-3. Since proposed Contention 1 asserts that land burial of such waste is not now possible, it constitutes an attack on Table S-3. Accordingly, proposed Contention 1 is barred from admission in the proceeding by the provisions of 10 C.F.R. § 2.335(a).

The only circumstance in which a contention challenging a Commission regulation may be admitted in an adjudication is that the application of the rule would not serve the purposes for which it was adopted with respect to the subject matter of the particular proceeding. 10 C.F.R. § 2.335(b). In such a proceeding, a petitioner must request a waiver or exception to § 2.335(a) and provide an affidavit describing the special circumstances justifying the request. *Id.* In this proceeding, the Petition is devoid of the required request for a waiver or exception to the provisions of § 2.335(a) with respect to proposed Contention 1, and Petitioners did not provide the requisite affidavit. Accordingly, proposed Contention 1 cannot be admitted pursuant to a waiver or exception under § 2.335(b).

3. Petitioners mistakenly presume that the Application must demonstrate how the disposal of low-level radioactive waste will meet NRC regulations and that Applicants must obtain a Part 61 waste disposal license.

The standards for the contents of COL applications do not require a COL applicant to describe how it plans to dispose of waste of any kind. See 10 C.F.R. §§ 52.79, 52.80. In its bases for proposed Contention 1, Petitioners point to no other NRC requirement for such a description and mistakenly presume that the Application must contain one. Petition at 5. This mistaken presumption cannot form part of an acceptable basis for proposed Contention 1 in accordance with 10 C.F.R. § 2.309(f)(ii).

Similarly, Petitioners mistakenly suggest that the Application may need to contain a request for a license issued pursuant to 10 C.F.R. Part 61. Petition at 6. The Applicants, however, have requested a license under 10 C.F.R. Part 30, which would authorize them to possess and store the low-level radioactive waste that is the subject of proposed Contention 1 if the Application is ultimately granted. Application, Part 1, at 1. The material would be stored in accordance with the requirements of 10 C.F.R. Part 20. See, e.g., 10 C.F.R. §§ 20.1801, 1802. Accordingly, Petitioners mistaken suggestion that Applicants may need to obtain a Part 61 license cannot form part of an acceptable basis for proposed Contention 1 in accordance with 10 C.F.R. § 2.309(f)(ii).

4. Petitioners fail to satisfy § 2.309(f)(iv) and (v) with respect to proposed Contention 1.

Section 2.309 requires Petitioners to demonstrate that their proposed contentions are material to the findings the NRC must make in this proceeding. See 10 C.F.R. § 2.309(f)(iv). Petitioners do not even identify any applicable requirement pertaining to the storage and disposal of low-level radioactive waste, much less how such a requirement might be material to the findings the NRC must make regarding the Application. Accordingly, the Petition fails to satisfy § 2.309(f)(iv) with respect to proposed Contention 1, and it is inadmissible.

Section 2.309 requires Petitioners to provide a concise statement of asserted facts or expert opinion on which they intend to rely at hearing, together with references to the specific sources and documents on which they intend to rely to support their position. See 10 C.F.R. § 2.309(f)(v). While the Petition does assert certain facts (e.g. regarding the asserted imminent lack of a low-level radioactive waste disposal site, see Petition at 5), it contains only one reference to documentary material (*id.* at 6, n.1). The Petition offers this reference only to assert the dose that might result from exposure to unshielded waste that is the subject of

proposed Contention 1.<sup>19</sup> *Id.* Similarly, the Petition does not offer any expert opinion in any form to support proposed Contention 1. Since the Petition omits expert opinion and references to specific sources and documents to support its proposed contention, it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(v).

While the Petition in proposed Contention 1 disputes the Application in its assertion that the Application omits discussion of “perpetual or extended on-site storage” of Class B, Class C, and Greater than Class C wastes (see Petition at 5-6), such a dispute is merely one step in satisfying § 2.309(f)(iv). Petitioners must meet all the requirements of § 2.309, and they do not. Accordingly, proposed Contention 1 does not meet the Commission’s standards for admission into this proceeding.

B. PROPOSED CONTENTION 2: Unit 3 Would be Built on Top of a Seismic Fault. (Petition at 7).

In an attempt to state a basis for proposed Contention 2, Petitioners recite the Applicant’s request for a variance from the horizontal and vertical spectral acceleration values in ESP-003 and the requirements of 10 C.F.R. § 100.23(d)(1). Petition at 8. Petitioners go on to assert that Dominion’s Unit 3, if approved, would be the only nuclear plant in the nation licensed by the NRC and located on top of a geologic fault. *Id.* The Petition then includes a lengthy description of Petitioners’ views of the discovery of a fault under the current North Anna Power Station (NAPS) units and the NRC enforcement action taken in connection with that discovery.<sup>20</sup>

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<sup>19</sup> The Petition cites to the Environmental Report (ER), § 3.5 at 3.5-1 (Petition at 6), and the Final Safety Analysis Report (FSAR), § 11.4.5 (*id.* at 7). ER § 3.5, however, appears on page 3-55, not page 3.5-1, and the quotation attributed to the ER in that section does not appear there. Similarly, FSAR § 11.4.5 simply does not exist in the Application. It is not clear to what documents Petitioners intend to refer.

<sup>20</sup> Petitioners request that the NRC “include and consider all documents in the case filed by North Anna Environmental Coalition during their extensive litigation of this matter and all documents in the NRC’s records regarding the construction permits for North Anna Units 1 and 2.” Petition at 10-11. It is not entirely clear what Petitioners are requesting. To the extent that Petitioners are requesting the Staff to produce these documents in discovery, such document production is now replaced by the mandatory (continued. . .)



*Id.* at 8-10. Petitioners conclude by stating that “[t]he proposed construction of a third reactor in close proximity to two existing nuclear reactors in an active earthquake zone must not be permitted.” *Id.* at 11.

Staff Response: Proposed Contention 2 does not meet the requirements of § 2.309(f) for three reasons. First, Petitioners do not controvert any issue of law or fact, as required by § 2.309(f)(i). In this regard, Petitioners do not identify any error or failing in the Application. Second, Petitioners’ bare assertion that proposed North Anna Unit 3 would be built in “an active earthquake zone” is unsupported by expert opinion, documents or other sources and does not satisfy § 2.309(f)(v). Third, having failed to raise any dispute with the application, as required by § 2.309(f)(vi), Petitioners are *per force* unable to satisfy the remaining requirements of § 2.309(f).<sup>21</sup> Accordingly, Petitioners fail to meet the requirements of § 2.309(f) with respect to proposed Contention 2.

C. PROPOSED CONTENTION 3: Cooling System Will Not Meet Clean Water Act (CWA) Requirements and Water Supply Will Not be Sufficient for Plant Cooling Systems. (Petition at 11).

BASIS: As a basis for proposed Contention 3, the Petition states:

Unit 3 will not [meet] the requirements of the US Clean Water Act. The Commonwealth of Virginia has continually granted variances to Dominion under Section 316 of the CWA which allow excessive amounts of thermal pollution to be discharged into water of the United States.

*Id.*

The Petition then describes Virginia Administrative Code provisions in 9 VAC 25-780 that require local governments to develop water control plans, which Petitioners assert were promulgated in response to “prolonged periods of drought” in the last decade. *Id.* at 11-12. The

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(. . .continued)

disclosure requirements of 10 C.F.R. § 2.336, and the requested production is prohibited under § 2.336(f).

<sup>21</sup> Part or all of the bases supporting this proposed contention concern the NAPS Units 1 and 2 licensing proceeding, which is outside the scope of this proceeding. See 10 C.F.R. § 2.309(f)(iii).

Petitioners assert that the Application omits 9 VAC 25-780 from Table 1.2-1 of the Environmental Report (ER) that is part of the Application. *Id.* at 12. Petitioners then state what they believe to be amounts of water that the existing NAPS and Surry Power Station use and that the proposed North Anna Unit will use. *Id.* at 12-13. Finally, Petitioners assert that streamflows in the York River basin have not returned to normal and assert that the Commission must answer the question of whether proposed Unit 3 will, “operate in compliance with federal, state and local water regulations during the expected operating life of Unit 3 of 40 years?” *Id.* at 13.

*Staff Response:*

The NRC staff opposes the admission of proposed Contention 3 for three reasons. First, as explained below, the issues it raises were resolved in the ESP proceeding and, pursuant to 10 C.F.R. § 52.39, may not be relitigated in this proceeding. Second, the issue of compliance with CWA requirements is outside the scope of the proceeding. Third, proposed Contention 3 does not satisfy the other requirements of § 2.309(f).

1. Proposed Contention 3 was resolved in the ESP proceeding and may not be relitigated in the proceeding.

Section 52.39(a)(2) requires that matters resolved in the proceeding on an application for an ESP shall be treated as resolved in a COL proceeding in which the COL application references the ESP. The Application references ESP-003, and the proceeding on the application for ESP-003 resolved the matters involving the operation of the proposed Unit 3 cooling system raised in proposed Contention 3. Specifically, in the EIS prepared in connection with the ESP application, the Staff evaluated the environmental effects of the operation of a third unit at the North Anna ESP site on Lake Anna, from which cooling water would be drawn. NUREG-1811, § 5.3, at 5-4 through 5-13. Accordingly, those matters must be treated as

resolved in this proceeding.<sup>22</sup> See *Early Site Permit for the North Anna ESP Site*, CLI-07-27, 66 NRC at 259.

2. To the extent Petitioners seek a determination on whether operation of proposed Unit 3 will comply with the CWA, that matter is beyond the scope of this proceeding.

A proceeding's scope is identified in the Commission's Notice of Hearing and referral order delegating the Licensing Board the authority to conduct the proceeding. See *Florida Power & Light Co.* (Turkey Point Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001). Petitioners fail to demonstrate that proposed Contention 3 is within the scope of this proceeding, as follows.

Although Petitioners refer to and do not dispute the Applicant's stated intent to comply with state permit laws, they generally complain that Unit 3 operations will result in non-compliance with the CWA and the state water regulations. Petition at 11, 12. The Commission, however, has made it clear that matters concerning permits not issued by the NRC are outside its regulatory jurisdiction. In this regard, the Commission stated that:

[w]hether non-NRC permits are required is the responsibility of bodies that issue such permits[.] ... [T]o find otherwise would result in duplicate regulation[.]...[S]uch a regulatory scheme runs the risk of Commission interference or oversight in areas outside of its domain.

*In the Matter of Hydro Resources, Inc.* (292 Coors Road, Suite 101, Albuquerque, M 87120), CLI-98-16, 48 NRC 119, 120 (1998)(*Hydro Resources*).

In *Hydro Resources*, the Commission succinctly explained why it has no jurisdiction to regulate non-NRC permits. In short, the issuance of an NRC license would not relieve the Applicant from the need to obtain all other applicable federal, state or local licenses for operation of the Unit 3 cooling system or relieve the Applicant of the need to comply with other

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<sup>22</sup> Petitioners make no attempt to assert the existence of any new and significant information regarding this matter, as permitted under 10 C.F.R. § 52.39(c)(v).

regulations. See *Hydro Resources*, CLI-98-16, 48 NRC at 121. Interestingly, Petitioners complain that the regulatory agency with authority over CWA matters in Virginia “continually granted variances” under the CWA with respect to Dominion. Petition at 11. If the Petitioners are concerned that there would be non-compliance with the CWA or state or local regulations, the issue should be directed to those regulating agencies. Inasmuch as the proposed contention pertains to matters outside NRC jurisdiction, Petitioners fail to demonstrate that it is within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

3. Petitioners fail to state an adequate basis for proposed Contention 3.

Petitioners’ citation to the “Status of Virginia’s Water Resources” and data from a United States Geological Survey website only provide certain water use and streamflow information respectively—they do not demonstrate any violation of the CWA. Further, Petitioners fail to provide any expert opinion and other documents or sources to support their assertion that operation of the proposed Unit 3 cooling system will not meet CWA requirements. Accordingly, proposed Contention 3 does not satisfy 10 C.F.R. § 2.309(f)(v).<sup>23</sup>

Petitioners also fail to demonstrate that proposed Contention 3 is material to this proceeding. Petitioners do not claim that any regulatory requirement would not be met in connection with proposed Contention 3, nor do they explain what effect the proposed contention, if proven, might have on this proceeding. Accordingly, Petitioners fail to satisfy § 2.309(f)(iii) with respect to proposed Contention 3.

In the bases for the contention, Petitioners state only one dispute with the Application - that the ER “omits 9 VAC 25-780 ‘Local and Regional Water Supply Planning’ from Table 1.2-1.” Petition at 12. The ER, however, states as follows:

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<sup>23</sup> Insofar as Petitioners intend to raise a safety issue, viz., that “water supply will not be sufficient for plant cooling systems,” proposed Contention 3 is completely lacking in support. This matter was also resolved in the ESP proceeding. See NUREG-1835, § 2.4 at 2-58 through 2-67; NUREG-1835, Supp. 1, § 2.4 at 2-4 through 2-7.

Numerous reviews, approvals, and consultations will be required for the construction and operation of new Unit 3. Table 1.2-1 provides a list of the environmental-related authorizations, permits, and certifications required by federal, state, regional, and local agencies for activities related to the construction and operation of Unit 3 at the NAPS site.

Application, Part 3, § 1.2 at 1-6 (emphasis added). In light of ER § 1.2, the Petition in proposed Contention 3 seemingly implies that 9 VAC 25-780 requires the Applicants to obtain some sort of permit in connection with their Application.

Petitioners, however, do not identify any particular provision of 9 VAC 25-780 that requires the Applicants to apply for some such permit. Indeed, 9 VAC 25-780-20, which states the purpose of the rule, does not refer to any sort of required permit. That provision states:

The purpose of this chapter is to establish a comprehensive water supply planning process for the development of local, regional, and state water supply plans. This process shall be designed to (i) ensure that adequate and safe drinking water is available to all citizens of the Commonwealth; (ii) encourage, promote, and protect all other beneficial uses of the Commonwealth's water resources; and (iii) encourage, promote, and develop incentives for alternative water sources, including but not limited to desalinization. This chapter establishes the required planning process and criteria that local governments shall use in the development of the local and regional plans.

9 VAC 25-780-20 (2008). The Petitioners do not provide a basis to conclude that any permit is required pursuant to 9 VAC 25-780 and that ER Table 1-2.1 is incomplete in some fashion. Moreover, even if such a permit or license were required, Petitioners have not demonstrated how this issue would be germane to this proceeding. Accordingly, Petitioners do not provide sufficient information in the bases for the proposed contention regarding the purported omission from Table 1-2.1 to show that a genuine dispute exists with the Applicants on a material issue of law or fact. In this regard, Petitioners fail to satisfy § 2.309(f)(vi) with respect to proposed Contention 3.

- D. PROPOSED CONTENTION 4: Unit 3 will not meet national emission standards for radionuclides in the atmosphere. (Petition at 13.)

As a basis for this contention, Petitioners claim that no “maximum achievable control

technology (MACT)” has been issued for radionuclides; and therefore, the NRC must determine the control technology before issuing an operating license. *Id.* at 14.

Staff Response: The Staff opposes admission of proposed Contention 4 for two reasons. First, the Clean Air Act does not require the establishment of a National Emission Standard for Hazardous Air Pollutants (NESHAPs) for nuclear power reactors under conditions that have been satisfied so that contrary to the proposed contention, there is no such standard with which proposed North Anna Unit 3 must comply. Second, the proposed contention fails to satisfy § 2.309(f) since it does not dispute anything in the Application and is completely lacking in basis.

1. The NESHAPs for nuclear power reactors has been rescinded, and the NRC need not establish any similar standard.

In 1990, Congress amended section 112(d)(9) of the Clean Air Act (CAA) to provide as follows:

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the [NRC] . . . is required to be promulgated under this section if the Administrator [of the Environmental Protection Agency (EPA)] determines, by rule, and after consultation with the [NRC] that the regulatory program established by the [NRC] pursuant to the Atomic Energy Act for such category or subcategory provides an ample margin of safety to protect the public health.

CAA, § 112(d)(9), 42 U.S.C. § 7412(d)(9)(2000).

On September 5, 1995, the EPA administrator found that “the NRC regulatory program for licensed commercial nuclear power reactors provides an ample margin of safety to protect public health” and so rescinded the NESHAPs for nuclear power reactors licensed by the NRC. See “National Emission Standards for Radionuclide Emissions From Facilities Licensed by the [NRC] and Federal Facilities not Covered by Subpart H” (Final Rule), 60 Fed. Reg. 46,206, 46,210 (Sept. 5, 1995). Neither § 112 of the CAA nor the EPA rule requires the NRC to take any action or set any emission standard in addition to those radiation protection standards in 10 C.F.R. Part 20. Accordingly, proposed Contention 4 is legally incorrect in supposing the

existence of a “national emission standard for radionuclides to the atmosphere” for nuclear power reactors in addition to the standards in 10 C.F.R. Part 20 or supposing that the NRC must set some standard for “control technology” for air emissions of radioactivity.

2. Proposed Contention 4 fails to meet the requirements of § 2.309(f).

In order for a contention to be admissible, there must be sufficient factual information to establish the existence of a genuine dispute with the Applicant on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi); see *Georgia Power Company* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991). There must be a reasonably specific factual or legal basis for a petitioner’s allegations. See *Private Fuel Storage, Inc.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004), citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). Proposed Contention 4 and its bases are devoid of this information. Accordingly, Petitioners fail to satisfy the requirements of §§ 2.309(f)(ii) and (iv).<sup>24</sup>

- E. PROPOSED CONTENTION 5: The assumption and assertion that uranium fuel is a reliable source of energy is not supported in the combined operating license application submitted by Dominion Virginia Power (the applicant) to the U.S. Nuclear Regulatory Commission. (Petition at 14).

BASIS:

Worldwide uranium consumption (about 67,000 tonnes per year) [(World Nuclear Association backgrounder on Uranium Supply posted at: <http://www.world-Nuclear.org/info/inf75.html?terms=uranium+supply>)] has exceeded worldwide uranium production for some time. Only about 60% of consumption is currently supplied by annual production; [(*id.*, the production of uranium from mines [is] 40,251 tonnes for 2004; 41,702 tonnes for 2005 and 39,429 tonnes for 2006. This leaves a shortfall of uranium to fuel the existing reactors of about 26,000 tonnes. This shortage is being made up by consuming former stockpiles, reprocessing of nuclear weapons uranium, longer reactor cycles and more efficient enrichment processes. The former stockpiles and weapons

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<sup>24</sup> In view of these failures, the Staff submits that proposed Contention 4 fails to meet any of the requirements of § 2.309(f).

reprocessing are short term stopgaps and are failing fast.] further, actual production of uranium has been effectively level for the last twenty years, as can be seen in the graph below from the World Nuclear Association. While there are various short-term supplies of uranium such as down-blending from nuclear weapons inventories, none of these are projected to last indefinitely. It is incumbent upon the applicant to address these issues and to support the statements cited below which imply that uranium availability will be sufficient to service the existing worldwide fleet of nuclear power reactors over the current periods of license, and in addition, the proposed North Anna 3.

If there is a plan to address the failure of uranium supply during the license period for North Anna 3 with a substitution of plutonium fuel (MOX or mixed-oxide), this information is also missing from the COL application as filed by the applicant.

*Id.* at 14-15 (footnotes incorporated into text or omitted; graph omitted). The Petition then refers to statements in the ER and technical specification bases with which it disagrees.

*Id.* at 16. The Petition concludes that “[n]owhere in the COL [application] does the applicant support these assertions.” *Id.*

*Staff Response:* The Petition provides specific references to statements in the ER with which it disagrees.<sup>25</sup> The Staff nonetheless opposes proposed Contention 5 because the Petition fails to demonstrate that the issue of uranium supply is material to the findings the NRC must make in this proceeding. Specifically, the Petition does not identify any requirement for the submission of this information, much less how any finding the NRC must make in this proceeding might be affected by the substance of this information or its omission. Accordingly, the Petition fails to satisfy § 2.309(f)(iv) with respect to proposed Contention 5.

In addition, a document put forth by a petitioner as the basis for a contention is subject to scrutiny both for what it does and does not show. *See Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 90 (1996), *rev'd on other grounds* CLI-96-7,

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<sup>25</sup> The Petitioners' asserted dispute with the technical specification bases is vague and is not a specific statement of an issue of law or fact to be controverted. Accordingly, this asserted dispute fails to satisfy the requirements of § 2.309(f)(i).



43 NRC 235, 269 n.39 (subject of Board holding not raised for review). With respect to proposed Contention 5, Petitioners cite a website for the proposition that more uranium is being consumed than produced and conclude that stopgaps to make up the difference are failing fast.

Petition at 14-15, n. 3. That very website also states the following:

Without . . . estimates of uranium resource replenishment through exploration cycles, long-term supply-demand analyses will tend to have a built-in pessimistic bias (i.e. towards scarcity and higher prices), that will not reflect reality. Not only will these forecasts tend to overestimate the price required to meet long-term demand, but the opponents of nuclear power use them to bolster arguments that nuclear power is unsustainable even in the short term.

World Nuclear Association, "Supply of Uranium" (Mar. 2007). <http://www.world-nuclear.org/info/inf75.html?terms=Uranium+supply>. (Accessed on May 29, 2008). Petitioners have done precisely what the article they cite predicts: They have used an analysis that does not "reflect reality" to argue that nuclear power is unsustainable in the short term. Accordingly, Petitioners have failed to provide expert opinion, documents or other sources to support their position on proposed Contention 5 and fail to satisfy § 2.309(f)(v).

In addition, Petitioners make the curious claim that, "If there is a plan to address the failure of uranium supply during the license period for North Anna 3 with a substitution of plutonium fuel (MOX or mixed-oxide), this information is missing from the [Application]." Petition at 15. Petitioners give not a scintilla of documentary or other support for the proposition that the Applicants may be planning to use mixed-oxide fuel and, therefore, fail to satisfy § 2.309(f)(v) with respect to this aspect of proposed Contention 5. Petitioners do not even affirmatively assert that mixed-oxide fuel might be used at proposed North Anna Unit 3 and thus fail to provide any basis whatsoever for their claim that the Applicants have improperly omitted information regarding such use from the Application. Accordingly, Petitioners' claim that the Application somehow improperly omits information regarding mixed-oxide fuel lacks the basis required by § 2.309(f)(ii).

In view of the above, Petitioners have not provided sufficient information to show that a genuine dispute exists with the Applicants on a material issue of law or fact and have not met the requirements of § 2.309(f)(vi) with respect to proposed Contention 5.

- F. PROPOSED CONTENTION 6: The NRC Fails to Execute Constitutional Due Process and Equal Protection. (Petition at 17).

BASIS:

The Fifth Amendment to the US Constitution states, “No person shall...be deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment adds that the States may not, “deny to any person within its jurisdiction the equal protection of the laws.” In addition to the Atomic Energy Act, the National Environmental Policy Act and other statutes, the Nuclear Regulatory Commission must certainly abide by the highest law in the land. However, the agency has violated these rights by applying inequitable standards of protection by treating different people differently and depriving them of Constitutional guarantees. *Id.*

Among other things, the Petition claims that, “There would be a very large increase in the thyroid dose outside the plant . . . from Unit 3[.]” compared to the existing NAPS units. *Id.* at 17-18. Petitioners’ equal protection argument is that, “Radioactive exposure standards do not protect all members of the public fairly.” *Id.* at 18. Petitioners base their argument on the assertion that children have a significantly higher risk of developing cancer from radiation than adults do, and women have a higher risk of radiation-induced cancer than men do. *Id.* In their due process argument, Petitioners challenge the Price-Anderson Act (Section 170 of the Act, 42 U.S.C. § 2210), and the decision of the U.S. Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). *Id.* at 19-20.

Staff Response: The Staff opposes the equal protection portion of proposed Contention 6 for two reasons. First, it is an impermissible attack on the Commission’s regulations in 10 C.F.R. Part 20. Second, it does not satisfy the requirements of 10 C.F.R. § 2.309(f) since it does not identify a dispute with the application and does not demonstrate that the proposed contention is within the scope of this proceeding or is material to the findings the

Commission must make in this proceeding. The Staff opposes the due process portion of proposed Contention 6 because it is outside the scope of this proceeding and does not show that a genuine dispute exists with the applicant on a material issue of fact or law.

1. Proposed Contention 6 impermissibly attacks the Commission's regulations.

It is well settled that a petitioner in an individual adjudication cannot challenge generic decisions that the Commission has made in rulemaking. 10 C.F.R. § 2.335; *Vermont Yankee Nuclear Power Corp. and Amergen Vermont LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151,166 (2000). The Petitioners' assertions use the form of a contention but in actuality are an attack on Commission regulations and policies. Specifically, Petitioners complain that the radiation protection requirements of 10 C.F.R. Part 20 do not provide "equal protection" to children as compared to adults, and women as compared to men. The Petitioners, however, may not attack the Commission's regulations by raising a contention in a proceeding on an application. 10 C.F.R. § 2.335.

2. The equal protection portion of Proposed Contention 6 fails to satisfy the requirements of 10 C.F.R. § 2.309(f).

Proposed Contention 6 does not identify any dispute with the Application, and therefore, does not satisfy § 2.309(f)(vi). Further, while the Petition compares doses projected for proposed Unit 3 with doses from the existing NAPS units, the Petitioners make no attempt to demonstrate that this information is somehow material to a finding the Commission must make in this proceeding. Accordingly, this portion of proposed Contention 6 fails to meet the standards of § 2.309(f)(iv). Similarly, Petitioners make no attempt to demonstrate that their quarrel with the NRC radiation protection standards in Part 20 is somehow within the scope of this proceeding. Proposed Contention 6 fails to meet § 2.309(f)(ii) in this regard.

3. The due process portion of proposed Contention 6 fails to meet § 2.309(f).

As described above, the "due process" portion of this contention challenges a Supreme Court decision dating from 1978. The Petition is devoid of any information to show how this

portion of the contention raises any dispute with the Application, how it could be within the scope of this proceeding or how it might somehow be material to any finding the Commission must make in this proceeding. Accordingly, the “due process” portion of proposed Contention 6 fails to provide sufficient information to show that a genuine dispute exists with the Applicants on a material issue of fact or law, as required by § 2.309(f)(vi), and also fails to meet the standards of §§ 2.309(f)(iii) and (iv).

G. PROPOSED CONTENTION 7: Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Unit 3 Can Be Safely Disposed Of. (Petition at 21).

BASIS:

The Environmental Report for the Applicant’s COLA is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e. spent) fuel that will be generated by the proposed reactors if built and operated. . . . The ER for the proposed new reactors does not contain any discussion of the environmental implications of the lack of options for permanent disposal of the irradiated fuel to be generated at the North Anna site. Therefore, it is fatally deficient.

*Id.*

Petitioners indicate that the proposed contention is directed towards the environmental impacts of the proposed new reactors. *Id.* Petitioners argue that the Waste Confidence decision applies only to plants which are currently operating, not new plants. *Id.* at 22. Petitioners further assert that the Commission has given no indication that it has confidence that repository space will be available for high level radioactive waste from new reactors licensed after December 1999. *Id.* at 23. Petitioners also claim that the Commission no longer has confidence in the likelihood that more than one repository will be licensed. *Id.* Petitioners argue further that the capacity of the proposed repository at Yucca Mountain, Nevada (63,000 metric tons of high-level waste and irradiated nuclear fuel) is too small to accommodate even the waste generated by currently operating reactors and cannot accommodate the waste that would be generated at new reactors. *Id.* at 23-26. Petitioners state that spent fuel may sit at the proposed reactor site for an indefinite period of time. *Id.* at 26-27. Finally, Petitioners restate

proposed Contention 7 as follows: “The environmental impacts of . . . indefinite [spent fuel] storage must be evaluated before a Combined Operating License can be granted.” *Id.* at 27.

Staff Response: The Staff opposes admission of proposed Contention 7 for the same reason the ESP Board rejected it in the ESP proceeding: Proposed Contention 7 is an impermissible attack on the Commission’s regulations. See 10 C.F.R. § 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364; *Dominion Nuclear North Anna, LLC* ([ESP] for the North Anna ESP site), LBP-04-18, 60 NRC 253, 262, 268 (2004).<sup>26</sup> The matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

[T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors. See 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) (“The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors’ [operating licenses]. The same would be true of the spent fuel

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<sup>26</sup> Proposed Contention 7 and Environmental Contention 3.2.1 proposed in the ESP proceeding are virtually identical. See “Contentions Of Blue Ridge Environmental Defense League, Nuclear Information And Resource Service, And Public Citizen Regarding Early Site Permit Application For Site Of North Anna Nuclear Power Plant” at 15-20 (May 3, 2004)(BREDL Joint ESP Contentions). The Petitioners’ statements in support of proposed Contention 7 are virtually identical to BREDL’s statements in support of EC 3.2.1 in the ESP proceeding. *Id.*

discharged from any new generation of reactor designs.”); see *also id.* at 38,501-04.

Accordingly, proposed Contention 7 impermissibly attacks the Commission’s regulations and is inadmissible. See *ESP for North Anna ESP Site*, LBP-04-18, 60 NRC at 269.

- H. PROPOSED CONTENTION 8: Even if the Waste Confidence Decision Applies to This Proceeding, It Should Be Reconsidered. (Petition at 27).

**BASIS:**

Even if the Waste Confidence Decision applies to this proceeding, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, *i.e.*, the increased threat of terrorist attacks against U.S. facilities. *Id.*

Staff Response: The Staff opposes admission of proposed Contention 8 for the same reason the ESP Board rejected it in the ESP proceeding: Proposed Contention 8 is not within the scope of this proceeding and is an impermissible attack on the Commission’s regulations. See 10 C.F.R. § 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364; *North Anna ESP Site*, LBP-04-18, 60 NRC at 269.<sup>27</sup> The Commission’s rules provide as follows:

[W]ithin the scope of the generic determination in [§ 51.23(a)], no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the . . . reactor combined license . . . for which application is made, is required in any environmental report [or] environmental impact statement. . . prepared in connection with the issuance . . . of a combined license for a nuclear power reactor under [part 52].

10 C.F.R. § 51.23(b). Since no discussion of this matter is required in this proceeding pursuant to § 51.23(b), proposed Contention 8 is not within the scope of this proceeding, and Petitioners fail to satisfy the contention standards of § 2.309(f)(iii).

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<sup>27</sup> Proposed Contention 8 is identical to a contention that BREDL joined in proposing in the proceeding on the North Anna ESP application, namely Environmental Contention (EC) 3.2.2. See *ESP for the North Anna ESP Site*, LBP-04-18, 60 NRC at 262, 269. The Petitioners’ statements in support of proposed Contention 8 are virtually identical to BREDL’s statements in support of EC 3.2.2 in the ESP proceeding. See BREDL Joint ESP Contentions at 20-23.

The Commission has provided litigants in an adjudicatory proceeding subject to 10 C.F.R. Part 2 the opportunity to request that a Commission rule or regulation “be waived or an exception made for the particular proceeding.” 10 C.F.R. § 2.335(b). The Commission has specified that “[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.” *Id.* The Commission requires that any request for such waiver or exception “be accompanied by an affidavit that identifies . . . the subject matter of the proceeding as to which application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.” *Id.* Additionally, “[t]he affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.” *Id.*

The Petitioners have failed to establish that they meet any of the requirements imposed by the Commission on litigants wishing that a rule be waived or an exception be granted. See Petition at 27-31. They have failed to establish that application of the Waste Confidence Rule in this particular proceeding would not serve the purpose for which the rule was adopted. To the contrary, 10 C.F.R. § 51.23 reflects, on its face, that the rule was designed to dispense with the need for NRC adjudications to address the impacts associated with the ultimate disposal of spent fuel and high-level waste.

In view of the foregoing, the contention and its supporting bases raise a matter that is not within the scope of the proceeding and impermissibly seek to challenge a Commission regulatory requirement. See 10 C.F.R. §§ 2.309(f)(iii), 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364. Absent a showing of “special circumstances” under 10 C.F.R. § 2.335(b), which the Petitioners have not made, this matter must be addressed through Commission rulemaking. See *ESP for North Anna ESP Site*, LBP-04-18, 60 NRC at 269-270.

CONCLUSION

In view of the foregoing, the Staff submits that the Petition should be denied.

Respectfully submitted,

**/signed (electronically) by/**

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Dated at Rockville, Maryland  
this 3<sup>rd</sup> day of June, 2008



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC AND SAFETY LICENSING BOARD

In the Matter of )  
)  
VIRGINIA ELECTRIC AND POWER CO. )  
dba DOMINION VIRGINIA POWER, )  
and OLD DOMINION ELECTRIC ) Docket No. 52-017  
COOPERATIVE )  
)  
(North Anna Power Station, Unit 3) )

CERTIFICATE OF SERVICE

I hereby certify that a copy of "NRC STAFF ANSWER TO 'PETITION FOR INTERVENTION AND REQUEST FOR HEARING BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'" has been served upon the following persons by Electronic Information Exchange this 3<sup>rd</sup> day of June, 2008:

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