ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1106 (consolidated with No. 12-1151)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, *et al.*,
Petitioners,
v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,

WESTINGHOUSE ELECTRIC COMPANY, LLC, *et al.*
Intervenors.

On Petition for Review of Orders by the
United States Nuclear Regulatory Commission

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Fed. R. App. P. 28 and Circuit Rule 28(a)(1), respondents United States Nuclear Regulatory Commission and the United States of America hereby certify as follows:

A. Parties, Intervenors and *Amici* in No. 12-1106 and No. 12-1151.

The petitioners in No. 12-1106 are Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Georgia Women's Action for New Directions, and Southern Alliance for Clean Energy, Citizens Allied for Safe Energy, Friends of the Earth, North Carolina Waste Awareness and Reduction Network, Nuclear Information and Resource Service and Nuclear Watch South.

The petitioners in No. 12-1151 are Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Georgia Women's Action for New Directions, and Southern Alliance for Clean Energy.

The respondents in both cases are the United States Nuclear Regulatory Commission (NRC) and the United States of America.

Intervenor-respondents are Westinghouse Electric Company, LLC in No. 12-1106, and Southern Nuclear Operating Company and City of Dalton, Georgia in No. 12-1151.

B. Rulings Under Review

The rulings under review are:

1. Memorandum and Order, CLI-12-07 (March 16, 2012)(JA19).

2. Vogtle Electric Generating Plant, Units 3 and 4, Issuance of Combined Licenses and Limited Work Authorizations and Record of Decision, 77 Fed. Reg. 12332 (Feb. 29, 2012)(JA34).

3. AP1000 Design Certification Amendment; Final Rule, 76 Fed. Reg. 82079 (Dec. 30, 2011)(JA193).

C. Related Cases

This proceeding consists of two consolidated cases: *Blue Ridge Environmental Defense League, et al. v. NRC*, No. 12-1106 and *Blue Ridge Environmental Defense League, et al. v. NRC*, No. 12-1151. In No. 12-1106, petitioners challenge NRC's compliance with the National Environmental Policy Act ("NEPA") in adopting a rule amending NRC's prior certification of the AP1000 nuclear power reactor design. In No. 12-1151, petitioners challenge NRC's compliance with NEPA in licensing the Vogtle Units 3 and 4 nuclear power reactors to be built with the AP1000 design.

The case on review was never previously before this Court or any other court. There are no related cases pending in any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Federal Register Notices

Federal Regulations

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in Respondents' brief:

AEA	Atomic Energy Act
APA	Administrative Procedure Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
SAMDA	Severe Accident Mitigation Design Alternative
Southern	Southern Nuclear Operating Company
Westinghouse	Westinghouse Electric Company, LLC

JURISDICTIONAL STATEMENT

Various environmental organizations filed petitions for review (now consolidated) of licensing orders and a related rulemaking order of the Nuclear Regulatory Commission (NRC). In No. 12-1151, petitioners challenge NRC's issuance of "combined" licenses to construct and operate new Units 3 and 4 of the Vogtle Nuclear Power Plant at the site of previously-licensed Units 1 and 2. In No. 12-1106, petitioners challenge NRC's final rule approving the amended design certification for the AP1000 reactor to be used at Vogtle.

NRC satisfied its obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.*, by preparing an Environmental Impact Statement (EIS) for Vogtle Units 3 and 4 – the licenses at issue in No. 12-1151, and by preparing an Environmental Assessment (EA) for the AP1000 design-certification rule at issue in 12-1105. Petitioners contend that NRC was required to supplement these NEPA documents with information regarding the 2011 accident at the Fukushima Dai-ichi Nuclear Power Station in Japan.

The NRC rule and orders at issue are subject to judicial review under the Hobbs Act, 28 U.S.C. § 2341 *et seq. See* 42 U.S.C. § 2239(b). All

petitions for review were timely filed within sixty days after final NRC action. *See* 28 U.S.C. § 2344.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether NRC abused its discretion in refusing to reopen the hearing record in the *Vogtle* licensing proceeding, where (a) petitioners' contention regarding NRC Task Force recommendations after the Fukushima Dai-ichi accident supplied no specific information linking those recommendations to any deficiency in Vogtle's EIS and (b) the Vogtle EIS had already analyzed the environmental consequences of severe accidents.

2. Whether NRC was required to allow petitioners to participate in NRC's "mandatory" hearing on the adequacy of the NRC Staff review, which did not include the public-at-large, where petitioners' right to a hearing was satisfied by their participation in NRC's separate adjudicatory process.

3. Whether NRC abused its discretion in approving the AP1000 reactor design where (a) the agency's Task Force on the Fukushima accident recommended completing the rulemaking "without delay" because the design already incorporated the Task Force's technical recommendations, and (b) NRC determined that it has full authority to impose any future regulatory requirements.

STATEMENT OF THE CASE

This case focuses on two features of NRC's regulatory program for licensing commercial nuclear power reactors found in 10 C.F.R. Part 52: a standard reactor design certification and a combined license (construction and operation). NRC adopted Part 52 in 1989, and revised it in 2007, "to reform the NRC's licensing process for future nuclear power plants." *See* Final Rule, 72 Fed. Reg. 49352 (Aug. 2007). *See also Nuclear Info. Res. Serv., Inc. v. NRC,* 969 F.2d 1169 (D.C. Cir. 1992) (*en banc*) (upholding Part 52). Previously, NRC rules had allowed only a two-step licensing process (a construction-permit proceeding followed by a separate operating-license proceeding).

Part 52 procedures "allow for resolving safety and environmental issues early in licensing proceedings and were intended to enhance the safety and reliability of nuclear power plants through standardization." 72 Fed. Reg. at 49352. So far, NRC has certified four nuclear power plant designs through the Part 52 design-certification rulemaking process, including the AP1000 at issue in this case. *See* 10 C.F.R. Part 52, App. D.

In 2007, Westinghouse Electric Company applied for an amendment to its already-approved AP1000 reactor design to update the design's supporting technical information and related design changes. Following

NRC review, and its consideration of approximately 200 separate comments, including those of petitioners, NRC approved the amendment. *See* 76 Fed. Reg. 82079 (2011)(JA193). The approved Westinghouse design was accompanied by an EA that considered severe accidents and their mitigation. *See* 2011 EA at 4-5 (JA223-24).

In addition to design certifications, Part 52 authorizes early site permits and combined licenses. In this case, Southern Nuclear Operating Company obtained an early site permit for Vogtle Units 3 and 4 in 2008 after a contested evidentiary hearing in which petitioners participated. In 2010, Southern then applied for combined licenses, and there was a second contested proceeding in which petitioners likewise participated. The Vogtle applications for the early site permit and the combined licenses were supported by an initial and then a separate, updated EIS that comprehensively studied the proposed actions, including the consequences of a potentially severe accident.[1]

After the close of the combined-license hearing record, petitioners sought to reopen the hearing to litigate a late-filed contention relating to the 2011 Fukushima disaster. Petitioners' new contention asserted that Vogtle's EIS violated NEPA because it did not address allegedly "new and significant

[1] For simplicity, we refer throughout to the Vogtle EIS, except when citing to either of those particular documents.

environmental implications" of recommendations by NRC's Near Term Task Force on Fukushima. NRC held that petitioners had not met NRC's contention-admissibility requirements, which require proponents of contentions to indicate with some specificity the claims they wish to litigate, and had also failed to show any environmentally significant information from the Task Force recommendations suggesting a deficiency in the Vogtle EIS.[2]

In late 2011, NRC issued its rule approving the AP1000 amended design and authorized issuance of the combined licenses.[3] Petitioners then filed the current lawsuits challenging the Vogtle licenses and the amended AP1000 rule. Petitioners unsuccessfully sought an NRC stay of the licenses pending judicial review.[4]

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[2] *See Luminant Generating Company LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-07 (Mar. 16, 2012) (JA19). *Vogtle* was one of five consolidated proceedings in which the same or similar Fukushima contention was offered. The Commission rejected the contention in a single decision under the lead *Comanche Peak* caption.

[3] *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2 (Feb. 9, 2012) (JA95).

[4] *See Vogtle*, CLI-12-11 (April 16, 2012) (JA1). Petitioners also filed a stay motion in this Court, which was denied on July 11, 2012.

STATEMENT OF THE FACTS

I. The proceedings below for the AP1000 design certification.

A. NRC procedures for reactor design certification.

Under 10 C.F.R. Part 52, Subpart B, a person may seek a "design certification" to approve a specific nuclear power reactor design by rulemaking. This generic certification enables future applicants to reference the approved design into an application to construct and operate a nuclear power plant, but is itself independent from that application. A certified design may be referenced for fifteen years and can be renewed for an additional fifteen years of referencing. 10 C.F.R. § 52.55(a). Design certification by NRC requires notice-and-comment rulemaking. After NRC concludes that the proposed design satisfies all regulatory requirements, it publishes in the *Federal Register* a proposed rule certifying the design. When adopted, this becomes a "design certification rule."

In accordance with NEPA, NRC rules distinguish between major federal actions significantly affecting the quality of the environment, which require an EIS (*see* 10 C.F.R. § 51.20), and those actions with no significant impact, for which no EIS is required and an EA suffices. *See generally* 10 C.F.R. §51.32. A "finding of no significant impact" is supported by an EA

explaining why no significant impacts are anticipated. *See* 10 C.F.R. § 51.32(a)(4).

Of course, nuclear power plants constructed and operated on the basis of a certified design *will* have impacts, which are routinely evaluated in a full EIS. *See* 10 C.F.R. §§ 50.20(b)(1)-(2). But the design certification or amended certification *itself* has no significant environmental impacts. Accordingly, NRC has categorically determined by rule that every proposed design certification or amendment will have "no significant impact." *See* 10 C.F.R. §§51.31(b)(1)(i) and 51.32(b)(1)-(2).

As a result, the environmental assessment for an original design certification need only address the costs and benefits of severe accident[5] mitigation design alternatives (SAMDAs), including, as applicable, the bases for not incorporating such alternatives into the design certification. *See* 10 C.F.R. §§51.30(d) and 51.31(b)(1)(ii).[6] For a design-certification amendment, the environmental assessment considers: (1) whether any

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[5] NRC defines "severe accidents" as those in which "substantial damage is done to the reactor core whether or not there are serious offsite consequences." *See* 50 Fed. Reg. 32138 (1985).

[6] In the SAMDA context, the "costs" are the monetary costs of the design alternative, while the "benefits" are the dollar value of the damage avoided, discounted by the probability of the severe accident that the SAMDA is designed to eliminate or mitigate. *See generally Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 290-91 (2010).

proposed design change renders any previously- rejected SAMDA cost-beneficial; and (2) whether the design change results in the identification of new SAMDAs, in which case the costs and benefits of new SAMDAs and the bases for not incorporating them in the design certification must be addressed. *See* 10 C.F.R. §51.30(d).

B. NRC certifies Westinghouse's AP1000 standard reactor design.

In 2002, Westinghouse submitted an application to certify its AP1000 design, which NRC published for comment. *See* 70 Fed. Reg. 20062 (2005) (JA903). NRC later issued its final rule certifying the AP1000 design. *See* 71 Fed. Reg. 4464 (2006)(JA847). Along with the final rule, NRC prepared an EA that analyzed severe accidents and studied seventeen potential SAMDA design alternatives, but concluded that none was cost-beneficial. 2006 EA at 8-29 (JA866).

C. NRC amends the certified AP1000 standard plant design.

In 2007, Westinghouse sought to amend its certified design, *inter alia*, to incorporate design improvements and increase standardization of the design. After completing its technical review, NRC published for comment Westinghouse's proposed amendment. *See* 76 Fed. Reg. 10269 (Feb. 24, 2011)(JA810). NRC received over 200 substantive comments on the proposed amendment. *See* 76 Fed. Reg. 82079, 82081 (Dec. 30,

2011)(JA195). Owing to their volume, NRC published a separate collection of "detailed description of comments and the NRC's response" when it issued the AP1000 final rule. *See* 76 Fed. Reg. at 82081 (JA195).

Most commenters favored delaying the AP1000 amendment rulemaking until recommendations by NRC's Task Force on Fukushima (discussed below in Section III.C), had been implemented, including any changes to the AP1000 design.[7] *Id.* But NRC declined to suspend or delay the AP1000 amended certification. NRC stressed the Task Force finding "that, by the nature of its passive design and inherent 72-hour coping capability, the AP1000 design has many of the features and attributes necessary to address the Task Force recommendations." *Id.* This led NRC to conclude "that no changes to the AP1000 [design certification rule] are required at this time." *Id.* NRC pointed out that the Task Force itself, in its recommendations, had endorsed completing the AP1000 rulemaking "without delay." *Id;* Task Force Report at 72 (JA650). Consequently, NRC adopted the proposed amendment, including the EA that had concluded that no SAMDAs were found cost-beneficial. *See* 76 Fed. Reg. 82079 (2011)(JA193); 2011 EA at 5 (JA224).

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[7] NRC extended the comment period to June 30, 2011 (more than three months after the Fukushima accident) to accommodate comments relating to Fukushima. *See* 76 Fed. Reg. 82081 (2011)(JA195).

NRC pointed out that "even if the Commission concludes at a later time that some additional action is needed for the AP1000, the NRC has ample opportunity and legal authority to modify the AP1000 [design certification] to implement NRC-required design changes, as well as to take any necessary action to ensure that holders of [combined licenses] referencing the AP1000 also make the necessary design changes." *Id.* at 82081 (JA195).

II. NRC licensing proceedings for Vogtle Units 3 and 4.

A. The Early Site Permit proceeding.

Southern applied for an early site permit for proposed Vogtle Units 3 and 4 in 2006. *See* 10 C.F.R. § 52.24.[8] Petitioners requested a hearing on the application and successfully intervened on three environmental contentions.[9] After an evidentiary hearing, the presiding Atomic Safety and Licensing Board decided the contentions against the intervenors.[10] When the

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[8] An early site permit resolves "key site-related environmental, safety, and emergency planning issues before choosing the design of a nuclear power facility for, or deciding to build such a facility on, that site." LBP-07-3, 65 NRC 237, 247 (2007).

[9] *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 246, 279 (2007).

[10] LBP-09-7, 69 NRC 613, 733-35 (2009).

Commission declined appellate review,[11] the contested portion of the early-site proceeding ended. The Board ultimately authorized the early site permit in 2009.[12]

B. The Combined-License Proceeding.

In 2008, Southern applied for combined licenses for Vogtle Units 3 and 4. As with the early site permit proceeding, NRC prepared a full EIS to support this licensing action, which considered the potential for severe accident scenarios and consequences (EIS § 5.10.2; JA807). Petitioners again sought and were granted intervention. Their only admitted contention, which concerned a safety rather than environmental issue, was decided against them in 2010, ending the contested portion of that proceeding.[13] A later proposed environmental contention (not related to Fukushima) was found inadmissible,[14] as was an additional safety contention.[15]

After Fukushima happened (in March 2011), and NRC's Task Force issued its recommendations (July 2011), petitioners sought to reopen the

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[11] CLI-10-5, 71 NRC 90 (2010).

[12] LBP-09-19, 70 NRC 433 (2009).

[13] LPB-10-8, 71 NRC 433, 436, 446-47 (2010).

[14] *See* CLI-12-02 at 4 n.12 (JA98).

[15] *Id.* at 5 n.15

closed adjudicatory hearing to litigate a new contention alleging that NRC's NEPA review was inadequate for failing to account for the Task Force recommendations. We provide the background on that issue in Part III (below).

Separate from the contested proceeding, NRC also conducted an uncontested hearing to review the adequacy of its Staff's work. Pursuant to 42 U.S.C. § 2239(a), NRC must provide "interested" persons an opportunity for a contested hearing upon request, but NRC also holds a separate, uncontested hearing, also called a mandatory hearing, before issuing combined licenses.[16] In a combined-license proceeding, the "mandatory" NRC hearing determines the adequacy of NRC Staff's review of the application. NRC practice "leaves to the expert NRC technical staff prime responsibility for technical fact-finding on uncontested matters."[17] NRC refers to this as a "sufficiency" review.[18] If any matters are contested by intervenors in the adjudicatory hearing pursuant to § 2239(a), NRC does not consider them at the mandatory hearing.

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[16] *See generally Exelon Generation Corp. LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 34-35 (2005).

[17] *Id.* at 35.

[18] *Id.* at 39.

In the *Vogtle* mandatory hearing, the Commission concluded that its Staff review adequately supported the requisite safety and environmental findings under 10 C.F.R. §§ 52.97, 51.107(a) and (d), and 50.10, subject to conditions the Commission imposed.[19] Through this mandatory-hearing oversight, the Commission in effect reviewed its Staff's work on the Vogtle combined licenses – 31,000 hours of safety and environmental review by well over 100 scientists, engineers, and technical specialists, including 60 public meetings and over 300 public comments on the draft supplements to the EIS.[20]

III. The accident at the Fukushima Dai-ichi nuclear reactors.

A. NRC begins a "lessons-learned" approach to the Fukushima accident.

On March 21, 2011, shortly after the Fukushima accident, NRC conducted a public briefing on NRC's response to the accident. NRC's Chairman pledged that NRC would "gain experience from the event and see if there are any changes we need to make to further protect public health and safety." Tr. 4 (JA789). NRC's staff director reported that the "current fleet of reactors and materials licensees continue to protect the public health and

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[19] CLI-12-02 at 2, 12-14 (JA96, 106-08). NRC similarly conducted a mandatory hearing for at the early site permit stage. *Id.* at 2.

[20] *Id.* at 18 (JA112).

safety," pointing out that "every reactor in this country is designed for natural events based upon the specific site that that reactor is located, that there are multiple fission product barriers, and that there are a wide range of diverse and redundant safety features in order to provide that public health and safety assurance." Tr. 9 (JA794). He indicated that "the designs for every single reactor in this country take into account *the specific site* that that reactor is located and [each design] does a detailed evaluation for any natural event such as earthquakes, tornadoes, hurricanes, floods, tsunami, and many others." Tr. 14 (emphasis added) (JA799).

NRC soon created a Task Force to study the Fukushima accident and to perform both short-term and longer-term tasks relating to Fukushima to assure and enhance safety.[21] Specifically, the Task Force was asked to identify "potential or preliminary near term/immediate operational or regulatory issues" as regards natural disasters, severe accident mitigation and other subjects.[22]

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[21] NRC's actions relating to Fukushima up to the completion of the Task Force report are summarized in *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-05 at 4-8 (Sept. 9, 2011)(JA359-63).

[22] *Id.* at 4-5 (JA359-60).

B. NRC has successfully used a "lessons-learned" approach to upgrade reactor safety following other historic events.

To understand NRC's perspective on the Fukushima accident and how it employed a "lessons learned" approach with the Task Force it appointed, it would be helpful to revisit significant earlier events that foreshadow the same approach. Before Fukushima, two events stood out as models of "lessons learned" that have spurred enhanced reactor design and operational safety in the United States. The first was the accident at the Three Mile Island, Unit 2 reactor on March 28, 1979. The other was the terrorist attacks on the United States on September 11, 2001.

1. The Three Mile Island Accident. After the Three Mile Island accident, NRC created a Task Force to identify and evaluate safety concerns requiring prompt licensing actions for operating reactors,[23] and then "provide a comprehensive and integrated plan for all actions necessary to correct or improve the regulation and operation of nuclear facilities."[24] NRC initially implemented Three Mile Island "lessons learned," known as the

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[23] *See* 46 Fed. Reg. 26491 (1981). A set of short-term recommendations offered by the TMI Task Force was published as NUREG-0578 in July 1979. *Id.*

[24] *Id.* These action items led NRC to issue "Requirements for New Operating Licenses," published as NUREG-0694, later superseded by NUREG-0737. *Id.*

"TMI-2 Action Plan," in guidance form and later adopted regulations to update licensing requirements. Thus, a decade after the Three Mile Island accident, NRC declared that "all regulatory changes needed to implement [the TMI-2 Action Plan] have been completed and that compliance with existing regulations and orders is a sufficient response to all applicable TMI-2 accident 'lessons learned.'"[25]

2. The 9/11 attacks. Following the 9/11 terrorist attacks NRC quickly issued interim advisories and directives upgrading security at all nuclear power plants.[26] By 2003, NRC had issued formal orders to its reactor licensees to improve security against terrorist attacks, including changes in physical barriers, security guard posts and patrols, more restrictive site access and a host of other security enhancements.[27] Upgrades included measures such "coolant sprays and makeup water systems" to mitigate fires, regardless of the triggering event.[28]

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[25] *See* 54 Fed. Reg. 7897 (1989).

[26] *See Private Fuel Storage, L.L.C.* CLI-02-25, 56 NRC 340, 343-44 (2002).

[27] These post-9/11 actions are described in the NRC's later "Design Basis Threat" rulemaking. *See* 72 Fed. Reg. 12705 (2007).

[28] *See New York v. NRC*, 589 F.3d 551, 555 (2d Cir. 2009).

Eventually, NRC enacted many of its post-9/11 improvements as formal regulations. For example, NRC upgraded the terrorist threat that licensees must defend against by issuing an enhanced "Design Basis Threat" rule.[29] NRC also enacted a new security rule codifying generically-applicable post-9/11 security requirements.[30] The measures NRC adopted in response to the 9/11 attacks have withstood judicial scrutiny.[31]

C. NRC has employed the same "lessons learned" approach in responding to the Fukushima accident.

In Congressional testimony on Fukushima, NRC's Chairman observed that it has "taken advantage of the lessons learned from previous operating experience," including, most significantly, the Three Mile Island accident in 1979, "to implement a program of continuous improvement for the U.S. reactor fleet."[32] He testified that operating experience and research programs

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[29] *See* 10 C.F.R. § 73.1; Design Basis Threat: Final Rule, 72 Fed. Reg. 12705 (2007).

[30] 74 Fed. Reg. 13926, 13927 (2009). Petitioners therefore err in asserting that the Fukushima Task Force recommendations constitute the only significant improvement to NRC's regulatory program since the TMI accident (Pet.Br.18).

[31] *See, e.g., Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004).

[32] Written Statement by Gregory B. Jaczko, Chairman, NRC to the Subcomm. on Energy and Water of the Senate Appropriations Comm. at 6 (March 30, 2011)(JA950).

have produced severe accident management guidelines for U.S. reactors to ensure that, in the event all precautions failed and a severe accident occurred, "the plant would still protect public health and safety."[33]

Improvements to reactor safety following the TMI accident and the 9/11 attacks – and the methodology by which NRC developed and implemented those improvements – illustrate how NRC has used its "lessons-learned" process to assure the continued safety and security of U.S. reactor operations.

NRC's Fukushima Task Force issued its Report in July 2011, concluding that NRC's "current regulatory approach, and more importantly, the resultant plant capabilities" demonstrate "that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases."[34] The Task Force supported completing work on the then-pending Vogtle application "without delay."[35] The Task Force pointed out that "all of the current early site

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[33] *Id.* at 6-7 (JA950-51).

[34] Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident at vii (2011)(JA575).

[35] *Id.* at 72 (JA650).

permits [*e.g.,* Vogtle Units 3 and 4] already meet the requirements of detailed recommendation 2.1, relating to the design-basis seismic and flooding analysis."[36]

Looking beyond the short term, the Task Force offered "twelve overarching recommendations for improving the safety of both new and operating nuclear reactors . . . ."[37] NRC approved these recommendations, stating that the agency "should strive to complete and implement the lessons learned from Fukushima accident within five years – by 2016."[38] NRC also provided direction on initiating certain near-term actions promptly. Later, NRC gave further guidance to Staff on prioritizing remaining Task Force recommendations, calling for a "fully developed justification" before ordering any proposed new requirement to be implemented.[39]

In March 2012, NRC implemented two Task Force recommendations by ordering power reactor licensees to strengthen spent fuel pool instrumentation, including their abilities to withstand "beyond design basis"

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[36] *Id.* at 71(JA649).

[37] CLI-11-05 at 5 (JA360).

[38] Staff Requirements Memorandum – SECY-11-0124, at 1 (Oct. 18, 2011)(JA316).

[39] Staff Requirements Memorandum –SECY-11-0137, at 1 (Dec. 15, 2011)(JA264).

events,[40] and by proposing development of a new rule to upgrade "station blackout" (concurrent loss of offsite and onsite power) requirements.[41] The new NRC actions apply to the Vogtle combined licenses. The ongoing lessons-learned process continues today, well past completion of the record in this case, and will continue years into the future.

D. Consideration of severe accident risk in the combined-license mandatory hearing.

In conducting the combined-license mandatory hearing, NRC reviewed a variety of safety and environment issues with various panels of Staff and Southern witnesses. Some of this discussion focused on severe accident risk, including Fukushima. As a result of this review,[42] NRC found that the Vogtle EIS reflects "a range of postulated severe accidents and consequences of these accidents."[43]

NRC considered the likelihood and consequences of potential severe accidents it had already analyzed "analogous to the multi-layer disaster that

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[40] *See* 77 Fed. Reg. 16082 (Mar. 19, 2012); 77 Fed. Reg. 16091 (Mar. 19, 2012)(JA931).

[41] 77 Fed. Reg. 16175 (2012)(JA922).

[42] *See* CLI-12-02 at 66-81(Feb. 9, 2012) (JA160-75).

[43] *Id.* at 75 (JA169).

occurred at Fukushima,"[44] and determined that "the risks for the Westinghouse AP1000 reactor design at the Vogtle site are expected to be *lower* than those for current generation plants."[45] NRC concluded: "Severe accidents, like the accident at Fukushima Dai-ichi, are potentially high consequence but extremely low probability accidents."[46]

The Commission underscored that no plant, including Vogtle, will be exempt from Task Force recommendations:

> All affected nuclear plants will be required to comply with NRC direction resulting from lessons learned from the Fukushima accident, regardless of the timing of issuance of the affected licenses. We therefore expect that the new Vogtle units will comply with all applicable "post-Fukushima" requirements.[47]

NRC nonetheless found it premature to order implementation of all Task Force recommendations, many of which were still in development. Considering Task Force Report recommendations not yet implemented,

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[44] *Id.* at 72 (JA166).

[45] *Id.* at 73 (emphasis added)(JA167).

[46] *Id.* at 74 (JA168).

[47] *Id.* at 82 (JA176). NRC's Chairman would have imposed an immediate license condition requiring compliance with future Fukushima-driven requirements. The Commission majority disagreed with this approach, "given the myriad of regulatory tools available to the NRC to implement Fukushima-related requirements as they emerge . . . ." *Id.*

NRC observed that it has in place "well-established regulatory processes by which to impose any new requirements or other enhancements that may be needed as a result of the Task Force recommendations implemented," but that time will be needed to "ensure that any new requirements are technically justified and implemented appropriately."[48]

F. Petitioners' motion to reopen the COL proceeding to admit a new Fukushima-related contention.

In the aftermath of Fukushima Task Force recommendations, petitioners moved to reopen the *Vogtle* contested hearing to litigate a new Fukushima-based contention. NRC procedural rules permit reopening to consider newly-arising claims that are significant, material, and timely. *See* 10 C.F.R. § 2.326; *see generally New Jersey Envtl. Fed'n v. NRC*, 645 F.3d 220, 232-35 (3d Cir. 2011); *Deukmejian v. NRC,* 751 F.2d 1287, 1316 (D.C. Cir. 1984). New contentions must also satisfy the requirements of NRC's contention-admissibility rule, 10 C.F.R. § 2.309(f), whose hallmark is a requirement of "specificity" and "support."[49]

Petitioners' proposed new contention asserted that the EIS for Vogtle failed to satisfy NEPA "because it does not address the new and significant

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[48] *Id.* at 81-82 (JA175-76).

[49] The full text of NRC's reopening and contention-admissibility rules is reproduced in an addendum to this brief.

environmental implications of the findings and recommendations" of the Task Force report.[50] Parties to four other reactor proceedings sought similar relief, resulting in consolidated consideration by a common Licensing Board.[51]

The Board denied these motions, pointing out that the Commission had earlier observed that, while the Task Force had completed its review and recommendations, NRC "continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear."[52] The Board determined that it "remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible safety or environmental implications of that event regarding such operation."[53] The Board also noted that petitioners' contention had not "pointed to any unique characteristics of the particular reactor that might make the content of the Task Force report of

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[50] Motion to Reopen the Record, Attached Contention at 4-5 (JA437-38).

[51] *See PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), LBP-11-27, (Oct. 18, 2011)(JA235).

[52] *Callaway*, CLI-11-05 at 30, *quoted in* LBP-11-27 at 12 (JA246).

[53] LBP-11-27 at 13 (JA247).

greater environmental significance to that reactor than to United States Reactors in general."[54]

Petitioners sought appellate review by the Commission, which has the final say in NRC adjudicatory cases. *See* 10 C.F .R. § 2.341. NRC upheld the Board's decision, agreeing with the Board that petitioners had "not identified environmental effects from the Fukushima Dai-ichi events that can be concretely evaluated at this time, or identified specific new information challenging the site-specific environmental assessments" for Vogtle and the other plants under review. [55] In other words, the Task Force's overarching recommendations did not themselves identify any environmentally significant information for Vogtle and petitioners did not explain how any particular recommendation relates to Vogtle in some environmentally significant way.

Thus, NRC held that under NRC's contention-admissibility rule, "reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics" of the Vogtle reactors "does not provide sufficient support

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[54] *Id.* at 13-14 (JA247-48).

[55] CLI-12-07 at 9 (JA27).

for the common contention."[56] Rather, NRC said, a valid contention must "include facts sufficient to demonstrate genuine dispute" with the license application; a contention that merely alludes to Task Force findings "is too vague . . . for litigation."[57] NRC ruled that the same lack of specificity was also fatal to petitioners' meeting NRC's "more stringent reopening rule."[58]

Acknowledging its duty to consider "new and significant" information in a supplemental EIS, NRC observed that petitioners had nowhere shown why the Task Force report raised new and significant information that presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[59] NRC held that the Task Force recommendations, standing alone, did not provide such information.[60]

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[56] *Id.* at 13 (JA31). *See also id.* at 13 n.43, *citing* 10 C.F.R. §§2.309(f)(1)(v) and (vi).

[57] *Id.* at 13-14 (JA31-32).

[58] *Id.* at 14 n.47 (JA32), *citing* 10 C.F.R § 2.326.

[59] *Id.* at 10 (JA28). The environmental impacts of postulated severe accidents are discussed extensively in Section 5.10.2 of the Vogtle EIS for both the early-site and combined-license phases (JA835-44 and 807-08),

[60] CLI-12-07 at 12-13 (JA30-31).

G. Petitioners' stay motion.

Petitioners asked NRC for a stay of the Vogtle combined licenses pending judicial review, but NRC denied the request, noting that the plant had not yet been constructed and operations are still years away. NRC reiterated that petitioners' Fukushima contention was "too vague for hearing" and that they "have not demonstrated that the Fukushima events or any regulatory response to those events would raise environmental impacts that differ significantly from the impacts that NRC has already reviewed and addressed in [the EIS] for Vogtle."[61]

SUMMARY OF THE ARGUMENT

1. Although Petitioners treat their claim as if they sought relief under the Administrative Procedure Act for violations of NEPA, this case presents a narrow procedural question concerning NRC's licensing procedures under the Atomic Energy Act. Under Section 189 of the Atomic Energy Act, interested parties may raise NEPA issues only by participating in NRC's adjudicatory licensing proceedings, such as those here for the Vogtle combined licenses. But those parties must follow NRC's own procedural regulations to do so, and under those regulations, a contention raising a

[61] CLI-12-11 at 12-13 (JA12-13).

NEPA issue (or any other issue) is not admissible unless it is specific and backed by factual or expert support.

Applying its own regulations, NRC determined that petitioners' vague contention concerning the Fukushima Task Force recommendations did not meet these admissibility requirements. It lacked specificity as well as any explanation, expert or otherwise, of a connection between the Fukushima event and the new Vogtle units. NRC did not abuse its discretion in finding that petitioners had not met threshold contention-admissibility requirements of specificity and support was not an abuse of NRC's discretion.

Apart from this threshold deficiency, even if NRC had reopened the record, NEPA did not require NRC to supplement its existing environmental analyses for Vogtle and the AP1000 certification. It is true that NEPA requires agencies to update an EIS should new and *significant* information emerge. Although the Task Force drew new insights from Fukushima concerning the improvements to reactor safety, its recommendations have not altered NRC's understanding of the environmental impacts of severe accidents. Here, NRC had already analyzed severe accidents at the Vogtle site and their consequences in depth, and found that nothing currently known about the Fukushima accident significantly changed the environmental

picture. Hence, NRC reasonably concluded that NEPA did not require a supplemental EIS simply by virtue of the Task Force recommendations.

2. NRC likewise acted reasonably in completing the rulemaking on the AP1000 design certification amendment where one of the Task Force recommendations – the sole basis for petitioners' petition for review and claim of a NEPA violation – was to complete the rulemaking "without delay." As with the Vogtle combined license, NRC had already considered severe accidents akin to the Fukushima event when approving the AP1000 design certification.

There is no suggestion in the record that Fukushima, as currently understood, required additional environmental analysis. In the rulemaking, petitioners themselves offered no suggested SAMDAs (severe accident mitigation design alternatives) arising from the Task Force recommendations (the sole basis of their NEPA claim). Similarly, they make no claim here that NRC arbitrarily rejected any SAMDA.

3. Finally, petitioners also complain to this Court of their exclusion from NRC's so-called "mandatory" hearing – a review of NRC Staff's work and the sufficiency of the license. But, for combined licenses, NRC provides two types of hearings – (a) contested hearings where petitioners have every right to participate on any material issue they choose to raise, and (b)

uncontested "mandatory" hearings that constitute a distinct safety and environmental review by NRC, prior to license issuance. Petitioners had the opportunity to participate in the contested proceeding, and they did so – even attempting to reopen that proceeding on a new Fukushima-related contention. NRC was not obliged to solicit petitioners' participation in the mandatory hearing and thus create, in effect, a second chance for petitioners to raise a contention NRC had already addressed.

STANDARD OF REVIEW

An agency rule or licensing decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), *See New Jersey Envtl. Fed'n,* 645 F.3d at 228, 233; *Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Admin.,* 429 F.3d 1136, 1144 (D.C. Cir. 2005); *see also Deukmejian v. NRC,* 751 F.2d at 1316 (relying on NRC's "high standards" for reopening and "stringency of those criteria"). Thus, NRC's decision to issue the amended AP1000 rule and its decision not to reopen the *Vogtle* proceeding are judged by the familiar "abuse of discretion" standard.

To the extent this Court considers substantive NEPA issues on supplementing the environmental assessment for the AP1000 rule or the EIS for the Vogtle licenses, those decisions cannot be set aside unless "a clear

error of judgment" is found. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 377(1989).[62] NRC "need only articulate a rational connection between the facts it has found and its conclusions" why no supplemental EIS or EA was needed. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000).

Insofar as this Court's review hinges on NRC's interpretation of its own rules – for example, its reopening and contention-admissibility rules – the agency's view "is given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *City of Idaho Falls v. FERC*, 629 F.3d 222, 228 (D.C. Cir. 2011)(internal quotation marks omitted). Similarly, if this Court examines questions related to NRC's enabling legislation – for example, the Atomic Energy Act's "hearing" provision in 42 U.S.C. § 2239(a) – NRC's view is entitled to judicial deference unless it is "precluded" by the statutory text or is "otherwise unreasonable." *See Ames Constr. Co. v. FMSHRC,* 676 F.3d 1109, 1112 (D.C. Cir. 2012), *citing Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 (1984).

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[62] Petitioners acknowledge that *Marsh* supplies the standard of review for an agency decision not to supplement its EIS (Pet.Br.36). They nonetheless suggest *de novo* review, apparently because no "facts" as such are in dispute. But this does not matter. *Marsh* holds that this Court should uphold NRC's expert decision on supplementing the agency's prior environmental review unless the agency has made a "clear error of judgment."

Each NRC decision under review here "implicates substantial [NRC] expertise" and warrants deference to the agency's "technical expertise and experience." *Friends of the Clearwater v. Dombeck*, 222 F.3d at 556 (quotations omitted). When reviewing NRC technical judgment, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983).[63] In NRC cases, courts are "particularly reluctant to second-guess agency choices involving scientific disputes that are in the agency's province of expertise." *New Jersey Envtl. Fed.*, 645 F.3d at 230, *quoting New York v. NRC,* 589 F.3d 551, 555 (2d Cir. 2009).

Given agency expertise, a reviewing court "is not to substitute its judgment for that of the agency." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (internal quotation marks omitted). Rather, the court must "defer to the wisdom of the agency," *Dillmon v. NTSB*, 588 F.3d 1085, 1089 (D.C. Cir. 2009), so long as the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Fox Television*, 556 U.S. at 513; *see also Transcon. Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 919 (D.C. Cir. 2008).

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[63] *See also Morris v. NRC*, 598 F.3d 677, 684-685 (10th Cir. 2010); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1276 (D.C. Cir. 2004); *City of Los Angeles v. DOT,* 165 F.3d 972, 977 (D.C. Cir. 1999).

ARGUMENT

I. NRC reasonably denied petitioners' motion to reopen the record to consider a new NEPA contention.

A. NRC reasonably rejected petitioners' NEPA-Fukushima contention for failure to meet NRC's requirements for contention specificity.

Even though NRC's decision denying reopening relied extensively on a lack of contention specificity and failure to meet reopening standards CLI-12-07 at 12-14 (JA30-32), petitioners give this point short shrift (Pet.Br.52-53). Their near-exclusive focus is on the merits question underlying their contention – namely, whether NRC's Fukushima Task Force recommendations amounted to environmentally "significant" information requiring a supplemental EIS (Pet.Br. 37-47). But not meeting NRC requirements for contention specificity and reopening is fatal to their claim. These requirements arise not from NEPA but from the Atomic Energy Act, which authorizes NRC to adopt reasonable standards for the conduct of its hearings. NRC acted well within its discretion in holding that petitioners did not meet the standards of its contention-specificity and reopening rules.[64]

[64] *See* CLI-12-07 at 11 n.37 and 13 n.43 (JA29, 31).

1. NRC's contention-admissibility standards are reasonable.

In 1989, faced with recurring hearing gridlock created by lack of contention specificity, NRC amended its rules for admitting contentions to strengthen the requirement that prospective intervenors show the factual bases and supporting evidence for proposed contentions.[65] Extensive rulemaking "raise[d] the threshold" for admitting contentions by requiring the proponent "to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact" with references to the specific portions of the application which are disputed, and "supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware."[66]

This Court has upheld NRC's contention-pleading rules. *See Union of Concerned Scientists v. NRC,* 920 F.2d 50 (D.C. Cir. 1990). NRC has considerable latitude in setting contention-admissibility standards because the Atomic Energy Act "nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." *Id.* at 53. NEPA itself places no constraints on agency hearing procedures; indeed, courts are

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[65] 54 Fed. Reg. 33168 (1989), *codified at* 10 C.F.R. § 2.309(f)(1).

[66] *Id.*

constrained from imposing new agency procedures in the name of NEPA. *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 548 (1978).

NRC's rules embody the Supreme Court's own admonition that NRC hearing participants "must state clear and reasonably specific . . . contentions" and the Court's reminder that, notwithstanding NRC's own legal obligations under NEPA, "it is still incumbent upon intervenors . . . to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." *Vermont Yankee,* 435 U.S. at 534, 553; *accord Baltimore Gas & Elec. Co.,* 462 U.S. at 107; *Seacoast Anti-Pollution League v. NRC,* 598 F.2d 1221, 1229 (1st Cir. 1979). *See also DOT v. Public Citizen*, 541 U.S. 752, 764 (2004). Otherwise, as the Supreme Court said in *Vermont Yankee,* NRC proceedings would become "a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" 435 U.S. at 553-54.

This is particularly so in NRC hearings, which are often steeped in highly sophisticated and technical analyses, like the severe accident risk

analysis in the Vogtle EIS.[67] NRC's contention-admissibility rules are "strict by design," and require more than "notice pleading."[68] NRC properly insists that participants bring specific, fact-based claims, supported by sufficient scientific and engineering expertise, to litigate those claims meaningfully. "[P]residing officers may not admit open-ended or ill-defined contentions lacking in specificity or basis."[69]

Unlike other agencies whose NEPA compliance is reviewed in district court under the Administrative Procedure Act, all NRC actions related to licensing are reviewed exclusively in the courts of appeals under the Hobbs Act, which limits challenges to "a *party* aggrieved by the final order. . . ." 28 U.S.C. § 2344 (emphasis added). The word "party" has been "defined narrowly" to apply "only to those who directly and actually participated in the administrative proceeding." *Clark & Reid Co. v. United States,* 804 F.2d 3, 5 (1st Cir. 1986); *see also Massachusetts v. United States,* 522 F.3d 115, 131 (1st Cir. 2008). Thus, those wishing to challenge NRC's environmental reviews must do so as a "party" to the licensing proceeding.

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[67] *See generally* Vogtle EIS (early site permit) § 5.10.2 (JA835-44).

[68] *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358, 363 (2001).

[69] *Id.* at 349.

With regard to NEPA issues, parties initially file contentions challenging the applicant's Environmental Report, 10 C.F.R. §2.309(f)(2), but are allowed to file new or amended contentions following NRC's EIS or EA. 10 C.F.R. §§ 2.309(c) and (f). NRC's environmental analyses are routinely challenged in this way in licensing proceedings for which the Hobbs Act provides the exclusive means of review.[70] In other words, the Hobbs Act "party" requirement and NRC hearing rules provide the means by petitioners here (and others) exhaust their administrative remedies before NRC in raising NEPA issues. *See Massachusetts,* 522 F.3d at 132.

Petitioners' complaint – that NRC's strict contention-admissibility rules unlawfully shift the burden to them to assure NRC's compliance with NEPA (Pet.Br.50) – therefore ignores the Hobbs Act statutory exhaustion requirement. Moreover, *Vermont Yankee*'s endorsement of "clear and reasonably specific contentions" (435 U.S. at 534) refutes their claim that NEPA requires NRC to adopt "notice" pleading rules (Pet.Br.50). "NEPA does not alter the procedures agencies may employ in conducting public hearings." *Union of Concerned Scientists,* 920 F.2d at 57. To the contrary,

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[70] Hobbs Act cases reviewing NRC resolution of adjudicatory contentions on NEPA include, for example, *San Luis Obispo Mothers for Peace v. NRC,* 635 F.3d 1109 (9th Cir. 2011); *Morris v. NRC,* 598 F.3d 677 (10th Cir. 2010); *New Jersey Dep't of Envtl. Prot. v. NRC,* 561 F.3d 132, 135 (3d Cir. 2009); *Nuclear Info. & Res. Serv. v. NRC,* 509 F.3d 562, 568 (D.C. Cir. 2007); *Envtl. Law & Policy Ctr.,* 470 F.3d 676, 678 (7th Cir. 2006).

"as [NRC's] procedural rules do not facially violate the Atomic Energy Act or the APA, they also are consistent with NEPA." *Id.* at 56-57; *see also Baltimore Gas & Elec. Co.*, 462 U.S. at 100-01("NEPA does not require agencies to adopt any particular internal decisionmaking structure" to assess environmental costs and benefits).

2. NRC reasonably found petitioners' Fukushima contention inadmissible under NRC rules.

Because this Court is "obliged to defer to the operating procedures employed by an agency when the governing statute requires only that a 'hearing' be held," it follows that whether a party has met NRC's contention-admissibility standards "is a matter for the NRC to determine in the first instance and is reviewed deferentially." *Union of Concerned Scientists v. NRC*, 920 F.2d at 53-55. Here, NRC considered public comments on the draft Vogtle EIS[71] and offered contested hearings to determine the sufficiency of the EIS.[72] These actions provided the public fair

[71] *See* 10 C.F.R. § 51.72; Notice of Availability of Draft EIS, 72 Fed. Reg. 52586 (2007).

[72] *See* 10 C.F.R. § 51.104 and 51.107; Notice of Hearing (early site permit), 71 Fed. Reg. 60195 (2006); Notice of Hearing (combined license), 73 Fed. Reg. 53446 (2008).

and ample opportunity to test NRC's NEPA compliance.[73] NRC's determination that petitioners' proposed Fukushima contention fell well short of NRC's admissibility standards was amply support by the record, precedent and logic, and therefore the "permissible product[] of reasoned analysis." *In re Three Mile Island Alert*, 771 F.2d 720, 738 (3d Cir. 1985).

Petitioners asked to reopen the closed *Vogtle* contested proceeding based on a contention that stated in its entirety:

> The EIS for Vogtle fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report, including seismic-flood and environmental justice issues. As required by 10 C.F.R. § 51.92(a)(2) and 40 C.F.R. § 1502.9(c), these implications must be addressed in a supplemental Draft EIS.[74]

This contention is little more than a legal conclusion, bereft of specifics on precisely which "new and significant environmental implications" petitioners actually wished to litigate.

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[73] The authorities petitioners cite merely require an agency to assemble and make public its *available* data (Pet.Br.49), not reopen a closed hearing record and leave it open indefinitely.

[74] *See* LBP-11-27 at 6 (JA240). This contention was originally denied by the Board in LBP-11-27 (JA235). After the Commission issued its first Fukushima-related order, petitioners moved to reinstate and supplement the same contention, but Board ruled that it no longer had jurisdiction. *See* LBP-11-36 at 7 (JA232). Petitioners did not appeal, leaving LBP-11-27 as the sole basis for Commission review.

Applying its well-established contention-admissibility rules, NRC held that "reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics of the sites or reactors that are the subject of the petitions, does not provide sufficient support for the common contention."[75] Accordingly, because the petitioners "did not relate their contention[s] to any unique characteristics of the particular site at issue,"[76] NRC correctly and reasonably held that the contention was not adequately supported by alleged facts or expert opinions and did not raise issues material to NRC's reviews of the pending license applications.

This decision was not an abuse of discretion, but was correct and reasonable. NRC's Licensing Boards must "assess contentions against applicable procedural standards,"[77] and those standards require more than what petitioners' contention offered. Petitioners' proposed contention mentions seismic, flood, and environmental justice issues but did not provide specific facts underlying those claims or expert evidence supporting them. *See* 10 C.F.R. § 2.309(f)(1)(v). Petitioners likewise failed to "include

[75] CLI-12-07 at 13 & n.43 (JA31).

[76] *Id.* at 9 (JA27).

[77] *Id.* at 12 (JA30).

references to specific portions of the . . . applicant's environmental report . . . that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). And petitioners did not, as 10 C.F.R. § 2.309(f)(2) requires, dispute specific "data or conclusions" in the EIS.

In short, the contention did not enable the Board (or NRC) to find that petitioners would bring sufficient information and expertise to a hearing to make it a worthwhile commitment of scarce adjudicatory resources. *See Vermont Yankee*, 435 U.S. at 533-34 (NRC's rules impose those "minimal procedural formalities necessary to give the Board some idea of exactly what [is] at issue"); *Massachusetts v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir. 1991)("[o]ne important purpose of the NRC's pleading requirements . . . is to put all parties on reasonable notice about what issues may be raised").

Petitioners' proposed contention did refer to the "findings and recommendations" of the Task Force. But neither petitioners nor their experts aligned any of the 12 overarching Task Force recommendations with features or conditions specific to Vogtle Units 3 and 4 to show how the existing EIS is deficient.[78] As petitioners concede, their expert said no more than that Task Force input "could affect the outcome of safety and environmental analyses for reactor licensing and relicensing decisions" in

[78] CLI-12-07 at 12-13(JA30-31).

general, with no reference to Vogtle in particular (Pet.Br.20). As NRC held, neither of petitioners' experts "referenced any conditions relevant to any of the sites – or applications – at issue here."[79] Petitioners' brief is similarly silent. NRC reasonably found a contention that did no more than just point to the Task Force's twelve recommendations "too vague to be appropriate for litigation in an individual proceeding."[80]

Petitioners' assertion that they were denied their statutory right to a hearing under 42 U.S.C. § 2239(a) on whether the EIS must be supplemented (Pet.Br.52-53) is not true. The Atomic Energy Act and NRC regulations do require a hearing where relevant, material issues of NEPA compliance are properly framed. Petitioners participated in two such hearings. *See* pages 10-11, *supra.* NRC and its Licensing Board duly considered petitioners' motion to reopen, and the underlying affidavits, but found that NRC's contention-admissibility and reopening criteria had not been met. No further hearing was required by NRC rules, the Atomic Energy Act, or the Administrative Procedure Act.

Finally, contrary to petitioners' view (Pet.Br.39), it was not unreasonable for NRC to invoke "prematurity" as an additional ground to

[79] *Id.* at 12 n.40 (JA30).

[80] *Id.* at 14 (JA32).

reject petitioners' contention. "Prematurity" was simply a short-hand way of explaining that insufficient information had evolved from Fukushima for petitioners to form a specific contention: "The Board found that Petitioners did not relate their contention to any unique characteristics of the particular site at issue, and therefore, the contention was akin to the generic type of NEPA review that we declared premature in CLI-11-5."[81]

At bottom, petitioners' inability to frame a contention suitable for reopening a closed NRC hearing is fatal to their judicial challenge to the Vogtle combined licenses. Petitioners ought not be permitted or encouraged to offer vague and inadmissible NEPA claims before NRC's Licensing Board, and then urge this Court to overturn an NRC-granted license on NEPA grounds. Petitioners' "castigation" of NRC's NEPA decision-making "cannot but ring somewhat hollow, when they have been so singularly lacking in specifics themselves," *Seacoast Anti-Pollution League,* 598 F.2d at 1231.

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[81] CLI-12-7 at 9 (JA27). NRC did recognize that "Fukushima-related contentions in individual adjudications may become more plausible" as more information emerges. *Id.* at 11 (JA29). In addition, petitioners have alternate remedies that are available at any time: a petition for rulemaking under 10 C.F.R. §2.802 and a citizen's petition under 10 C.F.R. § 2.206 to request NRC to take action, including a hearing, to address a safety or environmental issue.

B. NRC reasonably determined that the Task Force recommendations did not, standing alone, constitute "new and significant" information.

Even if petitioners had met NRC's requirements for contention admissibility, their proposed contention fell well short of NEPA standards for assessing new information and requiring EIS supplementation. NRC has devoted considerable attention to the Fukushima accident. As currently understood, however, the accident provides no reason for NRC to supplement its prior NEPA review for Vogtle. The Vogtle EIS had already examined severe accidents and their consequences in depth.

1. NRC's regulations follow NEPA case law in requiring a supplemental EIS whenever "new and significant" information has developed.

Petitioners' Fukushima-based contention failed to meet the basic NEPA standard for requiring a supplemental EIS – "new and *significant*" information, the very standard employed by NRC in its regulations and in the *Vogtle* proceeding. Under its regulations, NRC need prepare a supplement to an existing EIS only if there are "substantial changes in the proposed action that are relevant to environmental concerns" or "new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. §§ 51.72(a)(1)-

(2) and 51.92(a)(1)-(2). NRC applied this regulatory standard to petitioners' proposed contention.[82]

NRC has defined "new and significant information" as that which presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[83] This Court has stated the rule in practically the same terms: a "supplemental EIS is only required where new information provides a *seriously* different picture of the environmental landscape." *Nat'l Comm. for the New River v. FERC,* 373 F.3d 1323, 1330 (D.C. Cir. 2004)(quotation omitted; emphasis in original); *accord Lemon v. Geren,* 514 F.3d 1312, 1314 (D.C. Cir. 2008). *See also* 40 C.F.R. § 1502.9(c)(1)(ii) (Council on Environmental Quality regulations).[84]

However the standard is stated, the decision to prepare a supplemental EIS is guided, at bottom, by whether the remaining action will affect the quality of the human environment "in a significant manner or to a significant extent not already considered." *Marsh,* 490 U.S. at 374. Deciding what constitutes *significant* new information – "the value of the new information"

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[82] *Comanche Peak*, CLI-12-07 at 10 (JA28).

[83] *Id.* (quotation omitted).

[84] CEQ regulations are not binding on NRC as an independent regulatory agency, though as a matter of policy NRC "voluntarily" takes account of them as applicable. *See* 10 C.F.R. § 51.10(a); *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989).

to agency decisionmakers – "is a classic example of a factual dispute" whose resolution "requires a high level of technical expertise," warranting deference to "the informed discretion of the responsible federal agencies." *Marsh,* 490 U.S. at 376-377 (1989) (internal citation omitted); *see also Town of Winthrop v. FAA,* 535 F.3d 1, 8 (1st Cir. 2008)("determining what constitutes *significant* new information . . . is a factual question requiring technical expertise") (emphasis in original); *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.,* 2012 WL 718496 at *8 (7th Cir. 2012). In applying its expertise, the agency is guided by a "rule of reason," which "turns on the value of the new information to the still pending decisionmaking process." *Marsh,* 490 U.S. at 374.

2. NRC reasonably determined that the Task Force recommendations were not environmentally significant, where petitioners alleged no deficiency in the Vogtle EIS.

Because an EIS had already been prepared for Vogtle, NRC was required to decide whether the Task Force report reveals environmental impacts "to a significant extent not already considered." *Marsh,* 490 U.S. at 374. If the Task Force described hazards that "were encompassed" by the existing EIS, those hazards "[do] not constitute 'significant new

circumstances' requiring a supplemental EIS." *Oregon Natural Res. Council v. Lyng,* 882 F.2d 1417, 1423 (9th Cir. 1989).[85]

As discussed above, the record in *Vogtle* is crystal clear that NRC's NEPA review for Vogtle "already contemplated" the "type and magnitude" (882 F.2d at 1424) of the accident at Fukushima – namely, the possibility, consequences and mitigation of severe accidents that involve reactor core damage and release of fission products to the environment.[86] Hence, petitioners are simply wrong that NRC asserted that "Fukushima-like accidents do not warrant NEPA consideration."[87]

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[85] *See also Wyoming v. USDA,* 661 F.3d 1209, 1258 (10th Cir. 2011)(no need for supplementation if "relevant environmental impacts have already been considered"); *County of Rockland, N.Y. v. FAA,* 335 Fed. Appx. 52, 55, 2009 WL 1791345 at *2 (D.C. Cir. 2009)(no supplementation required to consider noise impact of a revised flight path EIS already considered); *North Idaho Cmty. Action Network v. DOT,* 545 F.3d 1147, 1155 (9th Cir. 2008) (supplementation applies only to "environmental impacts that may not have been appreciated or considered").

[86] *See generally* ESP EIS §5.10.2 (JA835-44). The EIS evaluated the impact of a severe accident on human health based on postulated releases of fission material into the air, surface water and groundwater. *See* ESP EIS at 5-80 (JA__). In addition to considering human health impacts, the EIS also considered the economic costs of a severe accident and land contamination impacts. *See* ESP EIS at 5-81(JA836).

[87] Pet.Br.44. NRC quoted the Task Force's statement that continued operation and licensing of nuclear plants did not pose "an imminent risk to public health and safety" to support its ongoing licensing activities, not to evaluate the environmental impacts of those plants, as petitioners erroneously state. *See* Pet.Br.44-45, *citing* CLI-12-11 at 14; CLI-12-02 at 22.

The Vogtle EIS evaluates the human health impacts, economic costs, and land contamination of a severe accident.[88] The EIS concludes that "environmental risks associated with severe accidents" with an AP1000 reactor at the Vogtle site "would be small compared to risks associated with operation of the current-generation reactors" at other sites; these risks are "well below the NRC safety goals."[89] Petitioners have never offered NRC or this Court an explanation why or how this analysis is supposedly affected by the Task Force recommendations. NRC therefore reasonably determined that petitioners' "reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics" of the AP1000 design or Vogtle Units 3 and 4 in particular, does not support their contention.[90]

Rather than extracting any information from the Fukushima accident itself, petitioners just repeat again and again that NRC "adopted all of the Task Force's recommendations."[91] But mere reiteration that NRC has

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[88] Vogtle EIS (early site permit) at 5-81 (JA836).

[89] *Id.* at 5-89 (JA844).

[90] CLI-12-07 at13 (JA31).

[91] Pet.Br.2. *See also* Pet.Br.1 ("complete adoption" of the recommendations); 3 "adoption of all" the recommendations); 24, 31 ("fully adopting"); 37 ("adopted . . . in their entirety"); 39 ("adopted every . . .

adopted the twelve "overarching" recommendations, which will undergo prioritization and various stages of implementation through 2016,[92] does not challenge the sufficiency of the EIS in describing the impacts of a severe accident. The recommendations standing alone do "not change either the footprint of the [Vogtle project] upon the environment or the operations analyzed in the FEIS." *Trout Unlimited v. USDA,* 320 F. Supp. 2d 1090, 1112 (D. Colo. 2004). NRC therefore reasonably determined that petitioners' "reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics" of the AP1000 design or Vogtle Units 3 and 4 in particular, offered no evidence to support their contention.[93]

NRC has never questioned the significance of the Fukushima accident in furnishing valuable "lessons learned" in its regulatory program. That does not mean, however, that Task Force recommendations embracing those lessons learned necessarily provide environmentally "new and significant"

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recommendation"); 41, 43 ("adopting and agreeing to apply"); 46, 52("adopted" or "adopting" the recommendations).

[92] *See* CLI-12-07 at 5 and n.13 (JA23).

[93] CLI-12-07 at13)(JA31). For example, petitioners cite no text from the Vogtle EIS that must now be supplemented. Nor do petitioners refer to any system, component, or procedure at the Vogtle plant that they claim to be affected by the Task Force recommendations, triggering previously unconsidered environmental effects.

information. The meaning of "significant" in the NEPA sense is to require "a *seriously* different picture of the environmental landscape." *Nat'l Comm. for the New River,* 373 F.3d at 1330. Petitioners' semantic gamesmanship does not substitute for actually showing, with record support, that the Task Force recommendations establish a "seriously different picture of the environmental landscape" that undermines NRC's prior severe accident analysis. Petitioners' reliance upon semantics reaches its peak with their claim that NRC may *never* describe an event as "significant" without invoking that word's term-of-art NEPA meaning. *See* Pet.Br.39-41 & n.5.

Petitioners rely on *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016, 1031 (9th Cir. 2006)(Pet.Br.39-41) to support their claim that "safety significance" invariably means "environmental significance," but that case was decided on the substance of NRC's public safety and NEPA responsibilities, not on the meaning of "significant." There, the Ninth Circuit found that NRC could not reconcile its elaborate safety and security measures against terrorism with a "categorical" decision not to consider terrorism *at all* under NEPA. Here, however, NRC indisputably *did* consider severe accident impacts for Vogtle and the AP1000 design under NEPA. The only question is whether *supplemental* EIS consideration is required to address further environmental impacts that petitioners have not specified.

The Ninth Circuit said nothing about the supplementation issue. Moreover, it bears mention that the Third Circuit has expressly disagreed with the Ninth Circuit, holding that "precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis." *New Jersey Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 142-43 (3d Cir. 2009).

Even accepting petitioners' point that NRC regards the Task Force recommendations as "significant," it nonetheless fails because petitioners have not shown how any recommendation adopted by NRC is relevant to the AP1000 design or Vogtle Units 3 and 4 in particular. Petitioners speak as though immediately effective, hard-and-fast decisions have been made on every Task Force recommendation, but most recommendations do not involve immediate changes to plant design or hardware; actual changes await further NRC review.

For example, Task Force Recommendation 2.1 was that NRC "[o]rder licensees to reevaluate the seismic and flooding hazards at their sites against current NRC requirements and guidance, and if necessary, update the design basis and SSCs [structures, systems and components] important to safety to protect against the updated hazards." Task Force Report at 30 (JA608). NRC ordered its Staff to collect this information from licensees and advise NRC

when Staff "has developed the technical bases and acceptance criteria" for implementing this and other recommendations.[94]

Similarly, the Task Force recommendation to upgrade protection against station blackout resulted in an advance notice of rulemaking taking up to 30 months to finalize.[95] Other recommendations, like hardened vents for certain boiling water reactors, would not even apply to the AP1000 design or Vogtle in particular.[96] Still other recommendations involve procedural subjects with no discernible environmental impact, *e.g.*, "strengthening and integrating onsite emergency response capabilities"[97] and "[d]etermine and implement the required staff to fill all necessary positions for responding to a multiunit event."[98]

Nowhere have petitioners shown how NRC's adoption of these and other recommendations constitute significant new information about the

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[94] Staff Requirements Memorandum – SECY-11-0124 at 2 (Oct. 18, 2011)(JA317).

[95] *Id.*

[96] Task Force Report at 41(JA619). The Westinghouse AP1000 design is a pressurized-water reactor as distinct from a boiling-water reactor. *See* Final Safety Evaluation Report at 3-122 (JA566).

[97] Task Force Report at 49 (JA627).

[98] *Id.* at 57 (JA635).

environmental consequences of a severe accident at a licensed reactor. Petitioners have not cited a single Task Force recommendation that even remotely suggests environmental consequences from operating Vogtle Units 3 and 4 greater than those already depicted in the EIS.

Finally, petitioners argue that the EIS conclusions are wrong – and their hearing contention was wrongly rejected – because "compliance by the Vogtle [combined license] with [NRC] safety regulations forms the primary basis for the Vogtle SEIS's conclusion that the environmental impacts of operating Vogtle 3 and 4 are 'small.'" Pet.Br.42. But this conclusion and the related footnote (Pet.Br.42 n. 6) discuss accidents within the plant's "design basis" (*see* COL EIS § 5.10.1; JA805-07), *not* severe accidents like Fukushima, which are "beyond design basis" by definition (*see* COL EIS § 5.10.2; JA807-08).[99] NRC's evaluation of severe accident risk and consequences does *not* assume regulatory compliance. Quite the contrary, that analysis assumes that, despite the safety-engineered features of the AP1000 reactor and the Vogtle plant in particular, a severe accident has

[99] *Compare* ESP EIS §5.10.1 *with* § 5.10.2 (JA832-44).

nonetheless occurred and that fission products have been dispersed to atmospheric, water and land resources throughout the environment.[100]

C. NRC's technical judgments and general pronouncements about improving power plant safety do not automatically trigger NEPA obligations.

While cast in terms of NEPA, the substance of petitioners' claims often pertain to NRC's technical judgment in absorbing and applying lessons learned from the Fukushima accident, in particular, the Task Force recommendations. Indeed, throughout their brief, petitioners switch back and forth between safety and environmental concerns with agility. They complain, for example, that "NRC took no steps to ensure that the Task Force recommendations would be implemented" for Vogtle before the combined licenses were issued and the amended AP1000 design was certified. Pet.Br.3, 26. But nowhere did petitioners present these *safety* claims to NRC.

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[100] *See generally* ESP EIS § 5.10.2 (JA835-44). In the early site permit EIS, NRC compared severe accident risks at Vogtle Units 3 and 4 and other reactors to the safety goals in NRC's Safety Goal Policy Statement. NRC calculated the risks for those units to be lower than those for current-generation plants. NRC therefore concluded "the probability-weighted consequences of severe accidents at the [Vogtle] site would be of SMALL significance" ESP EIS at 5-89 (JA844). In the combined-license EIS, NRC found no new and significant information to change this finding. COL EIS § 5.10.2 (JA807-08).

Petitioners discuss safety and environment concerns interchangeably with the justification that the Atomic Energy Act and NEPA "overlap."[101] But these two statutes are fundamentally different. "While NEPA requires the NRC to consider environmental effects of its decisions, the AEA is primarily concerned with setting minimum safety standards for the licensing and operation of nuclear facilities." *San Luis Obispo Mothers for Peace,* 449 F.3d at 1020. As NEPA itself states: "The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335. Improvements in safety do not always, or even usually, translate to environmental degradation requiring a fresh NEPA review. *See, e.g., Public Citizen v. NRC,* 573 F.3d at 929; *Sierra Club v. Van Antwerp,* 526 F.3d 1353, 1360 (11th Cir. 2008).

Given this statutory dichotomy, NRC's actions or internal recommendations to improve safety to reduce the potential or consequences of a severe accident do not of themselves require a corresponding EIS supplement. Hence, petitioners have not shown that the Task Force recommendations are *environmentally* "significant" even if they ultimately

[101] Petitioners rely upon *Citizens for Safe Power, Inc. v. NRC,* 524 F.2d 1291(D.C. Cir. 1975). Pet.Br.5. But that case merely held that "residual risk," *i.e.,* risk of an accident as a result of normal plant operations, is part of NEPA's "weighing of risks against benefits." *Id.* at 1299. The case does not comment upon the content or supplementation of an EIS.

"alter the standards that the NRC deems essential for adequate protection of public health and safety."[102] (Pet.Br.37).

If NRC's ongoing study of safety issues could trigger immediate NEPA obligations and new hearings as petitioners suggest, even in already-closed proceedings, the result would seriously hamper effective agency functioning. NRC must have the discretion, in refining its rules for reactor safety, to determine whether such safety improvements actually require an EIS supplement. The Supreme Court has recognized this practical principle in two important decisions. *Marsh,* 490 U.S. at 373-74; *Vermont Yankee*, 435 U.S. at 554-55.

As a result, "the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is . . . limited" not only by the statute mandating review but also by "the time at which the decision was made." *Vermont Yankee,* 435 U.S. at 555. This admonition is particularly applicable here, where NRC has found that petitioners have not connected the newly-arising Task Force recommendations to the licensing of the Vogtle plant. Requiring EIS supplementation for individual projects with

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[102] This confusion is highlighted by petitioners' complaint that "NRC postponed the implementation of the Task Force recommendations until sometime in the future." Pet.Br.45. Prioritization and implementation of the recommendations, of course, results from NRC's risk-based safety analysis, wholly apart from NEPA decisionmaking.

every new agency policy decision, regardless of the information's environmental significance to the particular project, would "task the agencies with a sisyphean feat of forever starting over in their environmental evaluations, regardless of the usefulness of such efforts." *Price Road Neighborhood Ass'n, Inc. v. DOT,* 113 F.3d 1505, 1510 (9th Cir. 1997). This Court has warned against treating "new information about nuclear power plant safety arising between the time of the initial application and the commencement of operations" as automatically appropriate for hearings. *Union of Concerned Scientists,* 920 F.2d at 55.

Here, it was not arbitrary for NRC "to conclude that it had enough data to make a reasoned decision. There will always be more data that could be gathered; agencies must have some discretion to decide when to draw the line and move forward with decisionmaking." *Winthrop,* 535 F.3d at 11. NRC will continue to absorb and implement all lessons learned from Fukushima in coming years. But the final changes to NRC safety requirements are as yet far from clear. NEPA does not require an agency to postpone agency decision-making "until inchoate information matures into something that might later affect our review."[103] It merely requires, as NRC held, that the agency "conduct [its] environmental review with the best

[103] CLI-12-07 at 14 (JA32).

information available today."[104] Trying to match ongoing implementation of the Task Force recommendations with corresponding supplements to the Vogtle EIS would turn NRC into a dog chasing its tail.

Petitioners argue that, by adopting Task Force recommendations, NRC "*will* transform measures that formerly were considered unnecessary or dispensable if too costly into mandatory safety requirements," which "necessarily *will* have a significant effect on consideration of SAMDAs in an EIS or EA." Pet.Br.43 (emphasis added). Even accepting this speculation about the future effects of Task Force recommendations for the sake of argument,[105] it does not refute NRC's reasons for rejecting petitioners' contention and declining to reopen the closed *Vogtle* record. It is too early to assess the possible *environmental* impacts of as yet unimplemented measures.

While some Task Force recommendations will, generally speaking, result in regulatory changes that help prevent or mitigate severe accident

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[104] *Id.*

[105] By law NRC must impose whatever measures are necessary to provide "adequate protection" to public health and safety regardless of costs. *See Union of Concerned Scientists v. NRC,* 824 F.2d 108, 114 (D.C. Cir.1987). Whether measures beyond "adequate protection" might result from a cost-benefit analysis that "tip[s] the scales" in favor or against such measures (Pet.Br.43) is sheer speculation. If the "new and significant" standard is met for any of these changes, NRC will follow its Part 51 regulations as applicable.

consequences, the agency need not have every environmental impact mitigation feature in place at the time major federal action is taken; it need only show that it has considered impact mitigation:

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA's reliance on procedural mechanisms-as opposed to substantive, result-based standards-to demand the presence of a fully developed plan *that will mitigate environmental harm before an agency can act.*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989) (emphasis added).

This Court has likewise held that an agency's deferral on the specifics of mitigation until construction is "both eminently reasonable and embraced in the procedures promulgated under NEPA." *California PUC v. FERC,* 900 F.2d 269, 283 (D.C. Cir. 1990). "[A]s long as the mitigation measures discussed in the EIS are sufficient to demonstrate a realistic look by the agency at the adverse impacts of the project, the agency is free to finally adopt a modified mitigation plan." *West Branch Valley Flood Prot. Ass'n v. Stone*, 820 F. Supp. 1, 8 (D.D.C. 1993).

Here, the Vogtle EIS states that the AP1000 reactor design "incorporates many features intended to reduce severe accident

core damage frequencies (CDFs) and the risks associated with severe accidents."[106] Whether or how the Task Force recommendations will bear upon the analysis is speculative at best. But NRC did raise the prospect of future safety requirements based on Task Force recommendations when it reviewed the Vogtle licensing.[107] Petitioners have not challenged the sufficiency of NRC's consideration of accident mitigation, they have not shown how any particular Task Force recommendation relates to SAMDAs at Vogtle, and they have not claimed that NRC cannot impose additional mitigation features in the future.[108] Their SAMDA mitigation arguments are entirely abstract.

Petitioners' arguments are tantamount to insisting that NRC include in the Vogtle EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts" of operating Vogtle. *Robertson*, 490 U.S. at 353 (internal citation omitted; emphasis in original). Analyzing the costs and benefits of additional mitigation measures before they even are developed is irrational and truly impossible here in light of the ongoing and still-incomplete nature of NRC's post-Fukushima reviews. Petitioners cite

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[106] *See* EIS (early site permit) at 5-90 (JA845).

[107] CLI-12-02 at 81-84 (JA175-78).

[108] EIS (early site permit) § 5.10.3 (JA844-45).

no NEPA authority to require analysis of mitigation measures before NRC has developed them.

II. Petitioners' non-participation in the mandatory hearing did not deprive them of hearing rights or an opportunity to present NEPA contentions.

Petitioners complain that they were excluded from NRC's mandatory (or uncontested) hearing on Vogtle (Pet.Br.51), but have failed to show any legal error inasmuch as they had a full opportunity to participate – and did participate – in the *Vogtle* contested hearings. Contested hearings, like those in which petitioners participated, derive from the command in section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a) that, in any proceeding, *inter alia*, for the grant of a license, NRC "shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . . ." Thus, NRC's hearing process forms the "framework for hearings on material issues that interested persons raise by specific and timely petition." *San Luis Obispo Mothers for Peace,* 449 F.3d at 1021.

Contested hearings are adversarial in nature, giving citizens and groups a full opportunity to make their grievances known and to obtain appropriate relief. The presiding officer makes detailed findings of fact, based on the evidence submitted by opposing parties and the governing regulatory standard, and on whether the applicant has met its burden of proof

(except on issues like NEPA where the NRC Staff bears the burden of proof). These findings on controverted issues become suitable for judicial review under the Hobbs Act.[109]

NRC also conducts uncontested hearings, called a "mandatory" hearing. The mandatory hearing stems from the requirement in section 189a that "[t]he Commission *shall* hold a hearing . . . on each application under section 103 or 104b of the Act" (emphasis added), that is, on certain applications such as a combined license application, whether or not anyone requests a contested hearing. In contrast to the review on controverted issues in a contested hearing, which requires the presiding officer to assess evidence and arguments provided by opposing parties, the uncontested hearing requires the presiding officer to conduct a "sufficiency" review, that is, to determine whether the NRC Staff review has been adequate and the safety and environmental record is sufficient to support license issuance.

In short, the contested and uncontested hearing requirements emanate from different provisions of section 189a and serve different purposes. Petitioners point to no statutory text requiring that they be allowed to participate in uncontested hearings. It would run contrary to the structure of the statute, moreover, to infer such a requirement when Congress has

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[109] *See, e.g., Vogtle,* LBP-09-7, 69 NRC 613 (2009).

expressly created a separate hearing requirement in the same provision that *guarantees* public participation. The mandatory hearing is nothing more than a formalized dialogue between the presiding officer – in the *Vogtle* case it was the Commission itself – and the NRC Staff and applicant. This is a supervisory function quite apart from the dispute-resolution function of contested hearings.

In an earlier licensing decision, NRC explained that mandatory hearings do not include public participation because "[a]ny other result would contravene the objectives of our 'contention' requirements" in 10 C.F.R. Part 2, which "permit intervenors (and other parties) to submit written testimony *only* on admitted *contentions* and to submit proposed findings of fact and conclusions of law relevant *only* to those *contentions* that were addressed in the oral hearing."[110] This bifurcation of hearings is meant "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issues."[111]

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[110] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 49 (2005).

[111] *Id.* at 50 (quotation omitted).

As the record demonstrates, petitioners had ample opportunity in the contested hearings on the Vogtle license applications to raise any safety or environmental contention they wanted, including their NEPA-Fukushima claims, subject to NRC's contention-admissibility rules. Insofar as Task Force recommendations are implemented by license amendments, further hearing opportunities will arise. And, of course, NRC rules permit citizen petitions at any time. *See* note 81, *supra.*

Moreover, while public participation is not allowed in mandatory hearings, public transparency nevertheless exists.[112] The entire record of the proceeding, including the hearing transcript and decision, are publicly available, as evidenced by NRC's mandatory-hearing decision in this case.[113]

The bottom line is that to obtain judicial review under the Hobbs Act petitioners must first press their claims properly during NRC's statutorily-created contested hearing process. Uncontested mandatory hearings give NRC a supervisory check on the licensing process. Excluding petitioners from those hearings violates none of their rights. Rather, NRC has faithfully

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[112] *See* 76 Fed. Reg. 50767 (2011)(JA419).

[113] *Vogtle,* CLI-12-2 (JA95).

implemented section 189a by this parallel structure of contested and uncontested hearings.

III. NRC reasonably determined that it need not supplement the Environmental Assessment for the AP1000 design certification amendment.

Petitioners argue that NRC violated NEPA when it did not supplement its environmental assessment for the AP1000 amendment rulemaking to account for the Fukushima Task Force recommendations. Pet.Br.46-47. But, as they do throughout their brief, petitioners conflate NRC's *safety* duties under the Atomic Energy Act with its *environmental* duties under NEPA. As we have discussed above in relation to the Vogtle combined licenses, petitioners cannot create a duty to supplement an environmental analysis – here, the AP1000 EA – simply by pointing to the Task Force report.

As required by 10 C.F.R. § 51.30(d), NRC conducted a SAMDA (severe accident design mitigation alternative) cost-benefit analysis here by considering design modifications to the proposed AP1000 amended certification design (costs) and the benefits of averted severe accidents discounted by their probability (benefits). NRC had already considered (and rejected) a range of SAMDAs in the environmental assessment for the original AP1000 certification in 2006.[114] For the AP1000 amendment, NRC

[114] *See* 2011 Environment Assessment at 5 (JA224).

reexamined the probability that a severe accident might occur and concluded that potential design changes did not significantly affect the original SAMDA evaluation, or lead to additional SAMDAs for consideration.[115]

In their brief, petitioners do not grapple with this regulatory history or dispute NRC's technical cost-benefit analysis. Nor do petitioners explain how the Fukushima accident, seen through the prism of the Task Force recommendations, constitutes "significant new information" that would seriously change NRC's analysis of either the costs of AP1000 design alternatives or the benefits of some accident-aversion mitigation. Petitioners simply assert, akin to its Vogtle licensing arguments, that when NRC "adopted the Task Force recommendations[,] . . . it obligated itself to supplement the AP1000 [environmental assessment] to address the effects of those recommendations on the SAM[D]As and their relative costs and benefits." Pet.Br.46.

But what petitioners overlook is that NRC's original SAMDA analysis had *already* considered environmental consequences of severe accidents similar to a Fukushima-like accident. Thus, when petitioners incorrectly commented in the rulemaking that NRC's SAMDA analysis

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[115] *Id.* (JA224).

"routinely assumes containment failure is a zero probability event,"[116] NRC responded that, consistent with events at Fukushima, its SAMDA analysis "explicitly assumed that any failure of the primary containment would result in releases directly to the environment."[117] Indeed, the rulemaking record is replete with references to both Fukushima and severe-accident analysis.[118] NRC therefore reasonably concluded that the Fukushima accident did not require supplementing the existing environmental assessment.[119]

This conclusion is justified because, as NRC explained, the analysis assumed that each SAMDA "would eliminate all release of radioactive material from containment," thus "maximiz[ing] the benefits of each SAMDA compared to its costs, so that it is more likely that the SAMDA will be cost beneficial and will therefore warrant inclusion in the design."[120] NRC did not regard these conservative assumptions "to be realistic" – the agency erred "on the side of high consequences" – but concluded that "the results make a convincing case that no identified SAMDA is worth the

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[116] NRC Comment Responses at S39-3 (JA277, 280).

[117] *Id.* at 44 (JA280).

[118] *See id.* at 15-23, 44-45 (JA268-76, 280-81).

[119] *Id.* at 46 (JA282).

[120] *Id.* at 44-45.

expense."[121] Petitioners claim no error before this Court in this analysis, nor do they connect any Task Force recommendation to any SAMDA that NRC failed to consider in the AP1000 EA.

Petitioners also argue that NRC is unlawfully "postponing consideration of how the Fukushima Task Force recommendations will affect the AP1000 design until after the design is certified."[122] Pet.Br.47. More accurately, NRC is postponing consideration of how Task Force recommendations might affect the AP1000 design until the agency has actually implemented those recommendations into binding requirements. But, as shown above, NEPA calls on agencies to use the best available information at the time of agency action; it does not require NRC to hold the AP1000 in abeyance pending implementation of all Task Force recommendations in the years to come.

Apart from this governing principle, petitioners never specified in rulemaking comments or in the *Vogtle* licensing proceeding which recommendations NRC should have incorporated into its NEPA analysis or how it should have done so – in short, they have not exhausted their

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[121] *Id.* at 45 (JA281).

[122] Of course, the AP1000 design was certified in 2006; petitioners are limited to the 2011 amended certification, which significantly narrows the reach of their claims.

administrative remedies on this point.[123] Nor do they explain here how NRC's supposed "postponing" constitutes legal error.

The Fukushima lessons-learned effort is an ongoing one, and NRC has pledged to factor into its regulatory program any Fukushima-driven requirements that emerge. If the Task Force recommendations ultimately evolve into new safety requirements that affect the AP1000 design,[124] NRC certainly has ample authority to impose them on the AP1000 certified design (or on the Vogtle combined licenses).[125] But such changes are not a foregone conclusion. The Task Force itself carefully reviewed the AP1000 design in light of its recommendations,[126] and "concluded that, by the nature of its passive design and inherent 72-hour coping capability, the AP1000 design

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[123] *See generally McKart v. United States*, 395 U.S. 185, 194-195 (1969).

[124] NRC recognized when certifying the AP1000 amended design that that further Fukushima review might lead to design changes. Comment Responses at 18 (JA271). No such changes have yet emerged, however.

[125] *See Vogtle,* CLI-12-02 at 81-83 (JA175-77).

[126] Task Force Recommendations 2 (seismic and flooding protection), 4 (mitigation of prolonged station blackout) and 7 (enhanced instrumentation and makeup capability for spent fuel pools) are relevant to the AP1000 design certification. *See* 76 Fed. Reg. at 82081 (JA195). But petitioners, as with their arguments regarding Vogtle licensing, have not connected those longer-term recommendations to any alleged deficiencies in the EA.

has many of the features and attributes necessary to address the Task Force recommendations."[127]

In these circumstances, the Fukushima Task Force recommendations called for no revisions in the AP1000 environmental assessment.[128]

[127] *Id.* at 82081 (JA195). Petitioners' claim that NRC has not identified which of those features and attributes "have yet to be implemented" does not make sense. The Task Force stated that the AP1000 design *already has them*, and NRC added that it can order licensees to implement other design changes if warranted. *Id.*

[128] *Id.* Because no supplement to the environmental assessment was necessary, this Court need not reach petitioners' arguments on recirculating the assessment. Pet.Br.47-48.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

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CERTIFICATIONS

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of this Court, the undersigned counsel certifies:

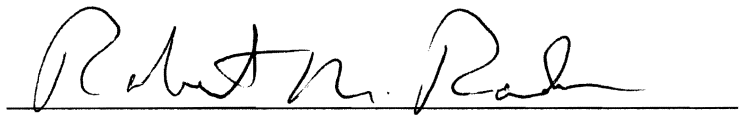
1. I am a member in good standing of the bar of this Court.

2. The foregoing brief of Federal Respondents complies with Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,913 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Microsoft Office Word 2003 software program with which the Brief was prepared.

3. The foregoing Brief complies with Fed. R. App. P 32(a)(5) and Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14 point Times Roman font using Microsoft Office Word 2003.

4. The text of the electronically filed brief and hard copies served upon this Court and counsel are the same, as required by Local Rule 31.1.

5. The foregoing Brief was scanned for virus by Symantec Anti-Virus 10.1.6.6010, and no viruses were detected.



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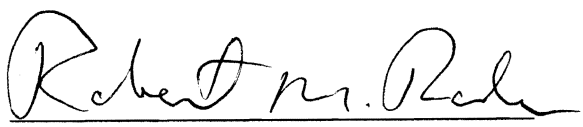

Robert M. Rader
Attorney for Federal Respondents

ADDENDUM

STATUTES CITED

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

42 U.S.C. § 2239(a). Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [FN1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility.

42 U.S.C. § 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

REGULATIONS CITED

10 C.F.R. § 2.206 Requests for action under this subpart.

(a) Any 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. Requests must be addressed to the Executive Director for Operations and must be filed either by hand delivery to the NRC's Offices at 11555 Rockville Pike, Rockville, Maryland; by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or by electronic submissions, for example, via facsimile, Electronic Information Exchange, e-mail, or CD–ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at http://www.nrc.gov/site-help/e-submittals.html; by e-mail to MSHD.Resource@nrc.gov; or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

10 C.F.R. § 2.802 Petition for rulemaking.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent either by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by facsimile; by hand delivery to the NRC's offices at 11555 Rockville Pike, Rockville, Maryland; or, where practicable, by electronic submission, for example, via Electronic Information Exchange, e-mail, or CD–ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at http://www.nrc.gov/site-help/e-submittals.html; by e-mail to MSHD.Resource@nrc.gov; or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The guidance discusses, among other topics, the formats the NRC can accept, the use of electronic signatures, and the treatment of nonpublic information.

(b) A prospective petitioner may consult with the NRC before filing a petition for rulemaking by writing to the Chief, Rulemaking, Directives, and Editing Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. A prospective petitioner also may telephone the Rulemaking, Directives, and Editing Branch on (301) 415–7163, or toll free on (800) 368–5642, or send e-mail to NRCREP@nrc.gov.

(1) In any consultation prior to the filing of a petition for rulemaking, the assistance that may be provided by the NRC staff is limited to--

(i) Describing the procedure and process for filing and responding to a petition for rulemaking;

(ii) Clarifying an existing NRC regulation and the basis for the regulation; and

(iii) Assisting the prospective petitioner to clarify a potential petition so that the Commission is able to understand the nature of the issues of concern to the petitioner.

(2) In any consultation prior to the filing of a petition for rulemaking, in providing the assistance permitted in paragraph (b)(1) of this section, the NRC staff will not draft or develop text or alternative approaches to address matters in the prospective petition for rulemaking.

(c) Each petition filed under this section shall:

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

(3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.

(e) If it is determined that the petition includes the information required by paragraph (c) of this section and is complete, the Director, Division of Administrative Services, Office of Administration, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC Web site, http://www.nrc.gov. Public comment may be requested by publication of a notice of the docketing of the petition in the Federal Register, or, in appropriate cases, may be invited for the first time upon publication in the Federal Register of a proposed rule developed in response to the petition. Publication will be limited by the requirements of Section 181 of the Atomic Energy Act of 1954, as amended, and may be limited by order of the Commission.

(f) If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be made within 30 days from the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete,

the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition.

(g) The Director, Division of Administrative Services, Office of Administration, will prepare on a semiannual basis a summary of petitions for rulemaking before the Commission, including the status of each petition. A copy of the report will be available for public inspection and copying at the NRC Web site, http://www.nrc.gov, and/or at the NRC Public Document Room.

10 C.F.R. § 2.309 Hearing requests, petitions to intervene, requirements for standing, and 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 contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, provided further, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating 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;

(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) In a proceeding other than one under 10 CFR 52.103, 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; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, prima facie, 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. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the 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.

(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. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the

authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

10 C.F.R. § 51.10 Purpose and scope of subpart; application of regulations of Council on Environmental Quality.

(a) The National Environmental Policy Act of 1969, as amended (NEPA) directs that, to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in NEPA, and (2) all agencies of the Federal Government shall comply with the procedures in section 102(2) of NEPA except where compliance would be inconsistent with other statutory requirements. The regulations in this subpart implement section 102(2) of NEPA in a manner which is consistent with the NRC's domestic licensing and related regulatory authority under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and the Uranium Mill Tailings Radiation Control Act of 1978, and which reflects the Commission's announced policy to take account of the regulations of the Council on Environmental Quality published November 29, 1978 (43 FR 55978–56007) voluntarily, subject to certain conditions. This subpart does not apply to export licensing matters within the scope of part 110 of this chapter nor does it apply to any environmental effects which NRC's domestic licensing and related regulatory functions may have upon the environment of foreign nations.

10 C.F.R. § 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

10 C.F.R § 51.30 Environmental assessment.

(a) An environmental assessment for proposed actions, other than those for a standard design certification under 10 CFR part 52 or a manufacturing license under part 52, shall identify the proposed action and include:

(1) A brief discussion of:

(i) The need for the proposed action;

(ii) Alternatives as required by section 102(2)(E) of NEPA;

(iii) The environmental impacts of the proposed action and alternatives as appropriate; and

(2) A list of agencies and persons consulted, and identification of sources used.

. . . .

(d) An environmental assessment for a standard design certification under subpart B of part 52 of this chapter must identify the proposed action, and will be limited to the consideration of the costs and benefits of severe accident mitigation design alternatives and the bases for not incorporating severe accident mitigation design alternatives in the design certification. An environmental assessment for an amendment to a design certification will be limited to the consideration of whether the design change which is the subject of the proposed amendment renders a severe accident mitigation design alternative previously rejected in the earlier environmental assessment to become cost beneficial, or results in the identification of new severe accident mitigation design alternatives, in which case the costs and benefits of new severe accident mitigation design alternatives and the bases for not incorporating new severe accident mitigation design alternatives in the design certification must be addressed.

10 C.F.R. § 51.31 Determinations based on environmental assessment.

(a) General. Upon completion of an environmental assessment for proposed actions other than those involving a standard design certification or a manufacturing license under part 52 of this chapter, the appropriate NRC staff director will determine whether to prepare an environmental impact statement or a finding of no significant impact on the proposed action. As provided in § 51.33, a determination to prepare a draft finding of no significant impact may be made.

(b) Standard design certification.

(1) For actions involving the issuance or amendment of a standard design certification, the Commission shall prepare a draft environmental assessment for public comment as part of the proposed rule. The proposed rule must state that:

(i) The Commission has determined in § 51.32 that there is no significant environmental impact associated with the issuance of the standard design certification or its amendment, as applicable; and

(ii) Comments on the environmental assessment will be limited to the consideration of SAMDAs as required by § 51.30(d).

(2) The Commission will prepare a final environmental assessment following the close of the public comment period for the proposed standard design certification.

. . . .

10 C.F.R. § 51.72 Supplement to draft environmental impact statement.

(a) The NRC staff will prepare a supplement to a draft environmental impact statement for which a notice of availability has been published in the Federal Register as provided in § 51.117, if:

(1) There are substantial changes in the proposed action that are relevant to environmental concerns; or

(2) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(b) The NRC staff may prepare a supplement to a draft environmental impact statement when, in its opinion, preparation of a supplement will further the purposes of NEPA.

(c) The supplement to a draft environmental impact statement will be prepared and noticed in the same manner as the draft environmental impact statement except that a scoping process need not be used.

10 C.F.R. § 51.104 NRC proceeding using public hearings; Consideration of environmental impact statement.

(a)(1) In any proceeding in which (i) a hearing is held on the proposed action, (ii) a final environmental impact statement has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA and this subpart are in issue, the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.

(2) Any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing.

(3) In the proceeding the presiding officer will decide those matters in controversy among the parties within the scope of NEPA and this subpart.

(b) In any proceeding in which a hearing is held where the NRC staff has determined that no environmental impact statement need be prepared for the proposed action, unless the Commission orders otherwise, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing. In the proceeding, the presiding officer will decide any such matters in controversy among the parties.

(c) In any proceeding in which a limited work authorization is requested, unless the Commission orders otherwise, a party to the proceeding may take a position and offer evidence only on the aspects of the proposed action within the scope of NEPA and this subpart which are within the scope of that party's admitted contention, in accordance with the provisions of part 2 of this chapter applicable to the limited work authorization or in accordance with the terms of any notice of hearing applicable to the limited work authorization. In the proceeding, the presiding officer will decide all matters in controversy among the parties.

Chapter I. Nuclear Regulatory Commission

10 C.F.R. § 51.107 Public hearings in proceedings for issuance of combined licenses; limited work authorizations.

(a) In addition to complying with the applicable requirements of § 51.104, in a proceeding for the issuance of a combined license for a nuclear power reactor under part 52 of this chapter, the presiding officer will:

(1) Determine whether the requirements of Sections 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the combined license should be issued as proposed by the NRC's Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate.

(b) If a combined license application references an early site permit, then the presiding officer in the combined license hearing shall not admit any contention proffered by any party on environmental issues which have been accorded finality under § 52.39 of this chapter, unless the contention:

(1) Demonstrates that 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;

(2) Raises any significant environmental issue that was not resolved in the early site permit proceeding; or

(3) Raises any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which new and significant information has been identified.

(c) If the combined license application references a standard design certification, or proposes to use a manufactured reactor, then the presiding officer in a combined license hearing shall not admit contentions proffered by any party concerning severe accident mitigation design alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification or underlying manufacturing license for the manufactured reactor.

(d)(1) In any proceeding for the issuance of a combined license where the applicant requests a limited work authorization under § 50.10(d) of this chapter, the presiding officer, in addition to complying with any applicable provision of § 51.104, shall:

(i) Determine whether the requirements of Section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met, with respect to the activities to be conducted under the limited work authorization;

(ii) Independently consider the balance among conflicting factors with respect to the limited work authorization which is contained in the record of the proceeding, with a view to determining the appropriate action to be taken;

(iii) Determine whether the redress plan will adequately redress the activities performed under the limited work authorization, should limited work activities be terminated by the holder or the limited work authorization be revoked by the NRC, or upon effectiveness of the Commission's final decision denying the combined license application;

(iv) In an uncontested proceeding, determine whether the NEPA review conducted by the NRC staff for the limited work authorization has been adequate; and

(v) In a contested proceeding, determine whether, in accordance with the regulations in this subpart, the limited work authorization should be issued as proposed by the Director of New Reactors or the Director of Nuclear Reactor Regulation, as applicable.

(2) If the limited work authorization is for activities to be conducted at a site for which the Commission has previously prepared an environmental impact statement

for the construction and operation of a nuclear power plant, and a construction permit was issued but construction of the plant was never completed, then in making the determinations in paragraph (c)(1) of this section, the presiding officer shall be limited to a consideration whether there is, with respect to construction activities encompassed by the environmental impact statement which are analogous to the activities to be conducted under the limited work authorization, new and significant information on the environmental impacts of those activities, so that the limited work authorization should not be issued as proposed by the Director of New Reactors or the Director of Nuclear Reactor Regulation, as applicable.

(3) In making the determination required by this section, the presiding officer may not address or consider the sunk costs associated with the limited work authorization.

(4) The presiding officer's determination in this paragraph shall be made in a partial initial decision to be issued separately from, and in advance of, the presiding officer's decision in paragraph (a) of this section on the combined license.