

September 25, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Northern States Power Company)	Docket No. 72-10-ISFSI-2
)	
(Prairie Island Nuclear Generating Plant)	ASLBP No. 12-922-01-ISFSI-MLR-BD01
Independent Spent Fuel Storage))	

NRC STAFF RESPONSE TO THE REQUEST FOR HEARING AND
PETITION TO INTERVENE BY THE PRAIRIE ISLAND INDIAN COMMUNITY

INTRODUCTION

The Staff of the Nuclear Regulatory Commission (“NRC Staff” or “Staff”) responds to the Prairie Island Indian Community’s (“PIIC’s” or “Petitioner’s”) Request for Hearing and Petition to Intervene, filed on August 24, 2012.¹ On September 17, 2012, an Atomic Safety and Licensing Board (“Board”) was designated to preside in this proceeding.² PIIC requests a hearing on the Northern States Power Company d/b/a Xcel Energy, Inc. (“NSPC” or “Applicant”) Application for the renewal of an NRC license to be used in connection with an Independent Spent Fuel Storage Installation (“ISFSI”) facility located at the Prairie Island Nuclear Generating Plant (“PINGP”). The Staff contends that PIIC’s request for hearing and petition to intervene should be granted because PIIC has demonstrated standing in this proceeding and several of their proffered contentions are admissible in whole or in part. However, PICC’s contention concerning Waste Confidence (contention 1) should be held in abeyance.

¹ Prairie Island Indian Community’s (“PIIC’s”) Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island Independent Spent Fuel Storage Installation, August 24, 2012 (“Petition”). On September 18, 2012, the Board granted both the Staff and Applicant’s request for an extension of time to reply to PIIC’s hearing request until September 25, 2012. See Order (Granting Motions for Extension of Time and Setting Dates for Oral Argument), September 18, 2012.

² See Establishment of Atomic Safety and Licensing Board, September 17, 2012 (Agencywide Documents Access and Management System (“ADAMS”) Accession No. ML12261A309).

BACKGROUND

On October 19, 1993, the NRC issued a 20-year license for the Prairie Island ISFSI, which authorizes the storage of up to 48 casks. The current license for the Prairie Island ISFSI expires on October 19, 2013. NSPC submitted to the NRC an application dated October 20, 2011,³ as supplemented February 29, 2012,⁴ for the renewal of its Special Nuclear Material (SNM) License No. 2506, under the provisions of 10 C.F.R. Part 72. The license authorizes the receipt, possession, storage, and transfer of spent fuel, reactor-related Greater than Class C (GTCC) waste and other radioactive materials associated with spent fuel storage at the Prairie Island ISFSI. The PINGP site is located within the city limits of Red Wing, Minnesota, in Goodhue County. If granted, the renewed license will authorize PINGP to continue to store spent fuel in a dry cask storage system at its ISFSI. Pursuant to the provisions of 10 C.F.R. § 72.42, the renewal term of the license for the ISFSI would be forty (40) years.

On June 25, 2012 (77 Fed. Reg. 37937), the NRC published a notice of opportunity for hearing on NSPC's application. On August 24, 2012, PIIC timely filed the instant Petition containing seven contentions and requesting wavier of 10 C.F.R. § 51.23(a), "Temporary Storage of Spent Fuel After Cessation of Reactor Operations."

DISCUSSION

In order for a hearing request to be granted, a petitioner must demonstrate that it has standing to intervene in the proceeding and submit at least one admissible contention. 10 C.F.R. § 2.309(a).

I. Standing

A. Legal Standards Governing Standing to Intervene

Under the NRC's Rules of Practice:

³ ADAMS Accession No. ML11304A068.

⁴ ADAMS Accession No. ML12065A073.

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

10 C.F.R. § 2.309(a). NRC regulations further provide that the designated Board “will grant the request [for a hearing] if it determines that the requestor has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].” *Id.*

Under the general standing requirements in 10 C.F.R. § 2.309(d)(1), a request for hearing must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2011 *et seq.*] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

“At the heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.”⁵ The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient personal interest to intervene as a matter of right.⁶ To establish standing, a petitioner must allege:

- (1) an “injury in fact” that is
- (2) “fairly traceable to the challenged action”; and

⁵ *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (citing *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁶ *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 913 (2009).

(3) is “likely” to be “redressed by a favorable decision.”⁷

Additionally, a petitioner’s claimed injury must arguably be within the zone of interests protected by the governing statute in the proceeding.⁸ In order to determine whether an interest is within the “zone of interests” of a statute, the Board must determine both what interests are “arguably...to be protected” by the statute and whether the petitioner’s interests affected by the proceeding are among them.⁹ In this case, the AEA and NEPA are the statutes governing the proceeding before the Board.

Commission practice allows petitioners an alternate way of establishing standing, without an inquiry into traditional standing requirements, through presumptions based on geographical proximity. The Commission has historically presumed standing in power reactor construction permit and operating license proceedings based on a petitioner’s 50-mile proximity to the facility.¹⁰ In nuclear materials cases, however, “proximity alone does not suffice for standing, absent an ‘obvious’ potential for offsite harm.”¹¹ “[W]hether a petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account the petitioner’s distance from the source, the nature of the activity, and the significance of the radioactive source.”¹² For instance, “a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination

⁷ *Id.* at 915 (citing *Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Plant, Unit 1) CLI-93-21, 38 NRC 87, 92 (1993)).

⁸ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998).

⁹ *U.S. Enrichment Corp.* (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 272-273 (2001) (citing *Nat’l Credit Union Admin. v. First Nat’l Bank*, 522 U.S. 479, 492 (1998)).

¹⁰ *Florida Power & Light, Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989); *Calvert Cliffs 3*, CLI-09-20, 70 NRC 911, 915 (2009).

¹¹ *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

¹² *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 188 (2010).

that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”¹³

“Where there is no ‘obvious’ potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner’s ‘burden to show a specific and plausible means’ of how the challenged action may harm him or her.”¹⁴ “Conclusory allegations about potential radiological harm,” however, are not sufficient to establish standing.¹⁵ Although the Commission has applied a “proximity-plus” theory to evaluate claims of standing in materials licensing actions, a presumption of standing based on geographical proximity to the proposed facility is only applied “where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”¹⁶

B. Organizational Standing

An organization does not have independent standing to intervene in a licensing proceeding merely because it asserts an interest in the litigation.¹⁷ An organization may meet the injury-in-fact test for standing in one of two ways: by demonstrating an effect upon its organizational interest, or by demonstrating that one of its members is suffering immediate or threatened harm from the proposed action.¹⁸ Relevant here, an organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational

¹³ *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 75 n.22.

¹⁴ *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311-12 (2005) (quoting *Nuclear Fuel Servs., Inc.*, CLI-04-13, 59 NRC at 248).

¹⁵ *Nuclear Fuel Services, Inc. (Erwin, Tennessee)*, CLI-04-13, 59 NRC 244, 248 (2004).

¹⁶ *Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-12, 42 NRC 111, 116 (1995) (citing *Sequoyah Fuels Corporation (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 75 n.22 (1994)).

¹⁷ *Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 & 2)*, LBP-82-74, 16 NRC 981, 983 (1982), citing *Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station)*, ALAB-328, 3 NRC 420, 422 (1976).

¹⁸ See, e.g., *Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120)*, LBP-98-9, 47 NRC 261, 271 (1998).

interests that is within the scope of interests of the AEA or NEPA.¹⁹ An organization cannot assert injury-in-fact to itself based upon nothing more than a broad, unparticularized interest—shared with many others—in the preservation of the environment, no matter how longstanding the interest or how qualified the organization may be in evaluating the problem.²⁰

C. Prairie Island Indian Community has demonstrated standing

In its Petition, PIIC stated that it is a Federally-recognized Indian Tribe and that its property is adjacent to the Prairie Island nuclear facility. Petition at 17. PIIC relies on the “proximity presumption” in its assertion that it has standing to intervene in this proceeding.²¹ While PIIC is correct in its statement that petitioners living within 50 miles of a nuclear power reactor are presumed to have standing, it is incorrect that that presumption applies equally to nuclear materials sites such as ISFSIs.²² Rather, petitioners’ standing in nuclear materials proceedings is evaluated on a case-by-case basis.

In this case, members of PIIC live within 600 yards of the PI ISFSI. Petition at 9, 17. In addition, the NRC Staff is in the process of executing a Memorandum of Understanding (“MOU”) with PIIC designating PIIC as a cooperating agency for development of the PI ISFSI Environmental Assessment (“EA”).²³ Given those facts, and the potential injuries to PIIC discussed throughout the Petition, such as the potential disturbance of culturally significant sites and the potential for radiological exposure,²⁴ as well as PIIC’s previous demonstration of

¹⁹ *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 528-530 (1991).

²⁰ *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 739 (1972).

²¹ Petition at 17 (citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 *1987).

²² *Nuclear Fuel Servs., Inc.*, CLI-04-13, 59 NRC at 248.

²³ The Staff and PIIC have agreed to the final terms and conditions of the MOU, but the document is awaiting signatures. As soon as that transpires, the MOU will be available in ADAMS.

²⁴ See Petition at 34, 47.

standing in the license renewal proceeding for the PINGP,²⁵ the Staff does not challenge PIIC's organizational standing in this proceeding.

II. Contentions

A. Legal Requirements for Contentions

The legal standards governing admissibility of contentions are set forth in the NRC's Rules of Practice at 10 C.F.R. § 2.309(f)(1). In order to be admissible, a contention must:

- (i) Provide a specific statement of the legal or factual issue sought to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised 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 the hearing, together with references to the specific sources and documents, which the petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute with the applicant/licensee exists 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.

The purpose of the Commission's contention pleading requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."²⁶ The Commission "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." *Id.* The "contention admissibility 'requirements are deliberately strict, and [the Commission] will reject

²⁵ See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 912-14 (2008).

²⁶ *Changes to Adjudicatory Process (Part II)*, 69 Fed. Reg. 2182, 2202 (January 14, 2004).

any contention that does not satisfy the requirements.”²⁷ Mere “notice pleading” does not suffice.²⁸ Further, the petitioner bears the burden of meeting the pleading standards. The Board may not supply missing information or draw inferences on the petitioners’ behalf.²⁹

A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.³⁰ “Requiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself.”³¹ Therefore, a contention must demonstrate a genuine dispute with the applicant because “[i]t is the license application, not the NRC staff review, that is at issue in [NRC] adjudications.”³² Petitioners are likewise required to raise environmental contentions on

²⁷ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC 245, 253 (2010) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)).

²⁸ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (citing *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007)).

²⁹ See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2)).

³⁰ *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20–21 (1974)); see also 10 C.F.R. § 2.335.

³¹ *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

³² *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 25 (2001) (citing *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998), *aff’d sub nom Nat’l Whistleblower Ctr v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 121 S.Ct. 758 (2001).

the applicant's ER.³³ When a contention challenging the ER is admitted, the Staff can then request additional information from the applicant in order to resolve any deficiencies as the Staff develops its EIS. *Id.* "If the EIS addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete." *Id.*

B. PIIC's Contentions

PIIC proffers seven contentions based on the Applicant's license application and environmental report ("ER"). Contentions 1-4 challenge various aspects of the ER, and Contentions 5-7 challenge the license application based on safety issues. The Staff's review of the license application is ongoing and the Staff is currently preparing an EA based on the Applicant's ER, which was submitted pursuant to 10 C.F.R. § 51.45. Therefore, PIIC's contentions are wholly based on the license application as the Staff's documents are not ripe for adjudication.

1. Contention 1 Should be Held in Abeyance

Contention 1:

The NSPM's Environmental Report Improperly Minimizes Waste Storage Impacts.

Petition at 23. PIIC asserts that the applicant's ER is flawed because of its reliance on the NRC's Waste Confidence Decision ("WCD") and Temporary Storage Rule, which were deemed legally insufficient by the U.S. Court of Appeals for the District of Columbia Circuit.³⁴ *Id.* at 24. PIIC also asserts that the ER is deficient because it "engages in no forward-looking analysis of potential harms that the District of Columbia Circuit found necessary." *Id.*

³³ *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

³⁴ PIIC has also petitioned the NRC for a waiver to challenge the Waste Confidence Decision and Temporary Storage Rule, pursuant to 10 C.F.R. § 2.335. See Petition at 23. The Staff does not believe such a waiver is necessary because, as the Staff argues with respect to contention 1, Commission action is pending on this matter and the contention should be held in abeyance.

The Staff maintains that, consistent with the recent Commission decision in *Calvert Cliffs Nuclear Project (LLC)*, (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., this contention should be held in abeyance pending further Commission order.³⁵ As the Commission explained in its ruling, “[w]aste confidence undergirds certain agency licensing decisions ...”³⁶ The Commission noted that “[b]ecause of the recent court ruling striking down [its] current waste confidence provisions, [it is] now considering all available options for resolving the waste confidence issue, which could include generic or site-specific NRC actions, or some combination of both.”³⁷ The Commission also indicated that, as an exercise of its inherent supervisory authority over adjudications, all waste confidence-related contentions filed in the near term be held in abeyance pending further order.³⁸

Although the Commission issued a Staff Requirements Memorandum (“SRM”) directing the Staff to develop a generic environmental impact statement (“EIS”) to support an updated WCD and temporary storage rule and proceed with a rulemaking, the Commission noted that it supports maintaining the option to conduct some environmental analyses of waste confidence issues on a site-specific basis in support of licensing decisions.³⁹ In addition, the Commission has not yet provided additional direction with regard to waste confidence-related contentions. Thus, this contention, like similar contentions in adjudication, should be held in abeyance unless the Commission orders otherwise.

³⁵ CLI-12-16, 76 NRC __ (Aug. 7, 2012) (slip op. at 6).

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ See Memorandum from Annette L. Viette-Cook to R.W. Borchardt, Staff Requirements – COMSECY-12-0016 – Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012).

2. Contention 2 is admissible in part

Contention 2:

NSPM'S Environmental Report Fails to Address Cumulative Impacts on Related Projects, on PIIC, its Members and its Lands

Petition at 26. PIIC asserts that the Applicant fails to assess the cumulative effects of the following: potential permanent waste storage at the site; the generation of additional spent nuclear fuel ("SNF") given the recent relicensing of the plant for an additional 20 years; the potential expansion of the ISFSI in light of the Certificate of Need ("CON") submitted before the Minnesota Public Utilities Commission ("MPUC"), with particular focus on the impacts to archaeological resources; and how extended storage will affect the fuel assemblies and internal cask components that may be necessary for long-term onsite storage. Petition at 26-35.

To the extent that PIIC contemplates cumulative impacts associated with the WCD and temporary storage rule, the Staff maintains that these issues should be held in abeyance for the reasons discussed *supra*. The Staff, however, does not oppose the remaining aspects of the contention.

While the regulation at 10 C.F.R. § 51.45 does not require an assessment of cumulative impacts from the applicant in its ER, the applicable guidance in NUREG-1748 requests that an applicant discuss "any past, present or reasonably foreseeable future actions which could result in cumulative impacts when combined with the proposed action."⁴⁰ In turn, NUREG-1748 notes that while not required to do so, it is suggested that for purposes of an EA, the Staff include a discussion of cumulative impacts and state whether there are significant cumulative impacts.⁴¹

The Staff intends to follow the guidance in NUREG-1748 and consider cumulative effects associated with the relicensing of the PI ISFSI. Although the Applicant provided

⁴⁰ NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, Section 6.2.3 at 6-4, dated August 2003.

⁴¹ See Section 3.4.6.2 at 3-12.

sufficient information for the Staff to begin its review, the Staff is still in the process of determining whether, and the extent to which, it may request additional information from the Applicant in order to perform its analysis. In addition, the Staff recognizes that this contention may be a “place-holder” in order to potentially challenge the Staff’s analysis in its EA.⁴² Thus, the Staff does not challenge this contention as one of omission, notwithstanding aspects related to the WCD and temporary storage rule, which should be held in abeyance.

3. Contention 3 is inadmissible

Contention 3:

NSPM’s Environmental Report Fails to Account for the Federal Trust Responsibility that Informs Its Review of Potential Impacts on the Community, Its People, and Its Land.

Petition at 36. PIIC’s third contention states that “the federal government has a trust responsibility to Indian tribes.” PIIC asserts that the trust doctrine, originating in *Cherokee Nation v. Georgia*,⁴³ imposes “certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., health care, education), the duty to protect tribal sovereignty, and the duty to protect tribal resources.”⁴⁴ Further, the Petition states that the trust doctrine requires the Federal government to consult with Indian tribes to effectuate those substantive duties.⁴⁵ The remainder of contention 3 alleges that the Federal government is violating the trust responsibility by not constructing and licensing the Yucca Mountain High Level

⁴² As the Board explained in its ruling on the admissibility of contentions for the reactor license renewal proceeding, “NRC regulations require the Petitioner to raise contentions related to NEPA as challenges to the Applicant’s environmental report, which acts as a surrogate for the EIS during the early stages of a relicensing proceeding.” *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, LBP-08-26, 68 NRC 905, 931 (2008) *citing* 10 C.F.R. § 2.309(f)(2) (explaining that “[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant’s environmental report”). The Staff recognizes that the same tenet applies for purposes of an environmental assessment.

⁴³ 30 U.S. 1, 17 (1831).

⁴⁴ Petition at 36, citing Reid Peyton Chamber, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Sta. L. Rev. 1213 (1975).

⁴⁵ Petition at 37.

Waste Repository; thus creating a situation where the Prairie Island Nuclear Generating Plant's waste will remain at the ISFSI indefinitely. PIIC asserts that such a situation cannot have "small" environmental impacts.

The Federal Government, as trustee for Indian tribes, has a fiduciary duty to act in the tribe's best interest.⁴⁶ The Department of the Interior, which houses the Bureau of Indian Affairs, has a significant fiduciary duty based on its role as manager of "all Indian affairs and all matters arising out of Indian affairs."⁴⁷ For agencies such as the NRC, which do not manage, control or supervise Indian affairs, "unless there is a specific duty that has been placed on the [agency] with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."⁴⁸ The NRC exercises its trust responsibility in the context of the AEA and NEPA, and is not required to afford an Indian tribe or its members greater rights than they would otherwise have under those statutes.⁴⁹ Thus, as long as the NRC complies with its statutory duties, it will have fulfilled its trust responsibility.

Correspondingly, contention 3 is inadmissible because it fails to raise a genuine dispute with the Applicant.⁵⁰ The trust responsibility, inasmuch as it applies to NRC licensing actions, is the Federal government's not the private applicant's. Accordingly, there is no requirement for the Applicant to address the trust responsibility in its ER. Finally, contention 3 appears to state a general opposition to the relicensing of the PI ISFSI without a final decision regarding Yucca

⁴⁶ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

⁴⁷ See 25 U.S.C. §§ 1, 1a, 2.

⁴⁸ *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); *accord Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000).

⁴⁹ *Cf. Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (stating that FERC was required to exercise its trust responsibility in the context of the Federal Power Act and properly declined to provide the tribe "greater rights than they otherwise have under the FPA and its implementing regulations.").

⁵⁰ 10 C.F.R. § 2.309(f)(1)(vi).

Mountain or the Waste Confidence and Temporary Storage rules. The allegation that the NRC and DOE are violating the NWPA is beyond the scope of this proceeding and cannot be settled here. PIIC's concerns regarding waste confidence and temporary waste storage are encompassed in contention 1, which the Staff reiterates should be held in abeyance.

4. Contention 4 is admissible in part

Contention 4:

NSPM's Environmental Report Does not Adequately Assess the Impacts of the PI ISFSI on the Adjacent Minority Population.

Petition at 42. PIIC's fourth contention correctly states that "the purpose of an environmental justice review is to insure that the Commission 'considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population.'"⁵¹ PIIC contends that there will be disparate impacts on the adjacent PIIC, a minority population, and thus the ER is deficient because it fails to consider those disparate impacts. Contention 4 goes on to enumerate specific risks and costs that have been and will be borne disproportionately by PIIC, and which, PIIC asserts, the NRC must take into account in its environmental justice (EJ) analysis.⁵²

PIIC again argues that the NRC must evaluate this impact area for environmental effects beyond the 40-year renewal term because the WCD has been vacated.⁵³ Next, PIIC lists several past or ongoing injuries caused by the construction and operation of the power plant and the ISFSI, including: the destruction of culturally and historically significant sites; an unfulfilled promise of jobs and opportunities; no infrastructure improvements; radiological pollution in the air, surface water, and groundwater; thermal pollution raising water temperatures

⁵¹ Petition at 42 (citing *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)).

⁵² The Petitioner acknowledges that it is the NRC's duty rather than the Applicant's to evaluate environmental justice concerns. Petition at 43.

⁵³ The Staff more fully discusses the WCD in its response to Contention 1, above.

in the Mississippi River and Sturgeon Lake; adverse environmental, health, and safety risks; spent fuel pool risks; high level waste storage at Prairie Island; inadequate environmental and health monitoring data and technology; and an increased need for emergency preparedness and emergency response capabilities.⁵⁴

According to PIIC, those ongoing and past injuries and risks “have caused and will continue to cause anxiety, fear, stress, and other mental health damages to PIIC’s current members and future generations.”⁵⁵ Contention 4 then specifically calls for an evaluation of skyshine radiation because PIIC will be disparately impacted by that type of exposure, as well as a consideration of a 2012 National Academy of Sciences Interim Report on the cancer risks of populations near nuclear facilities.

The NRC Staff agrees that contention 4 is admissible, but the contention should be narrowed to exclude some of the bases. PIIC is correct in its statement that it is not the Applicant’s duty but the NRC’s duty to comply with NEPA. Thus, applicants are not required to include an environmental justice analysis in their ERs. NUREG-1748 § 6.3.10 does, however, request that applicants include socioeconomic data enough to inform the Staff’s analysis on a number of impact areas including, when appropriate, environmental justice. Here the Applicant included sufficient socioeconomic information for the Staff to begin its review. As noted above, the NRC’s contention admissibility standards require petitioners to raise environmental contentions based on the ER, so even though the Applicant did not err in excluding an environmental justice analysis, this contention is properly raised now.⁵⁶

From the outset, the consideration of environmental justice in this licensing action is unusual. Generally, the Staff does not analyze environmental justice in EAs because where

⁵⁴ Petition at 45-47.

⁵⁵ *Id.* at 47.

⁵⁶ *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 129, 130 (2004).

there is no finding of a significant impact on any population, there is no need to discuss disproportionately significant and adverse impacts on minority or low income populations.⁵⁷

After the PI ISFSI application was submitted, however, the Staff agreed to analyze environmental justice in the EA for the PI ISFSI. As noted in the section on standing above, the Staff and PIIC are in the process of finalizing a MOU naming PIIC a cooperating agency for the NEPA review. The MOU lists environmental justice as one area where PIIC holds special expertise. Through its role as a cooperating agency, PIIC will be able to contribute information to address its specific concerns.

That being said, there are a number of bases underlying contention 4 that are beyond the scope of this proceeding. First, several of the injuries the Petitioner lists stem from the power plant rather than the ISFSI, which is at issue in this proceeding. The impacts from the power plant and spent fuel pool will be considered in the cumulative impacts analysis, but not the indirect impacts analysis. Second, contention 4 includes fear and anxiety due to proximity to the PINGP and PI ISFSI as an injury that needs to be evaluated. It is well settled that psychological harm caused by the presence of a nuclear facility need not be included in the NRC's NEPA analyses.⁵⁸

Additionally, contention 4 argues that the ER is deficient because it did not take into account the effect of skyshine on the nearby PIIC. That is incorrect. The Applicant and the NRC both consider skyshine as a part of the overall dose calculation for the ISFSI. The dose to the public, namely the nearest resident, is calculated by combining any effluents as well as direct radiation, *i.e.*, skyshine.⁵⁹

⁵⁷ *Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions*, 69 Fed. Reg. 52040, (p. 29) (August 24, 2004).

⁵⁸ *Metropolitan Ed. Co. v. People Against Nuclear Energy*, 460 U.S. 766, 779 (1983).

⁵⁹ Application at E4.2.6, "Dose to the Public" (ADAMS Accession No. ML113040115)

Finally, contention 4 calls for consideration of a 2012 National Academy of Sciences Interim Report on the cancer risks of populations near nuclear facilities. The 2012 Interim Report does not contain the National Academy of Sciences' final findings, and so the NRC has not acted to incorporate any of the findings into its regulations or licensing actions. Accordingly, the Applicant's ER is not deficient for failing to consider the report's findings. It is premature at this point to determine whether or how the report could be incorporated into the PI ISFSI EA, but as a cooperating agency, PIIC will be in a unique position to discuss with the NRC concerns raised by the report.

In short, the Staff believes that contention 4 is admissible as a contention of omission inasmuch as it pertains to the PI ISFSI. The Applicant's ER does not contain an environmental justice analysis, but the Staff will cure that omission in its EA with the input of PIIC.

5. Contention 5 is admissible

Contention 5:

The NSPM license application is deficient because it does not include the ISFSI pressure monitoring system as a SSC within the aging management program.

Petition at 49. PIIC argues that the pressure monitoring system should be within the scope of license renewal and should be addressed in the aging management program. *Id.*

PIIC further argues that the pressure monitoring system should be defined as an item which could have a major impact on safety. *Id.* at 50. Also, PIIC cites to two examples of seal leaks at Peach Bottom Atomic Power Station and Surry Power Station ISFSI in support of its contention. *Id.* at 51.

NSPM's application includes design bases information from the most recently updated Final Safety Analysis Report ("FSAR"),⁶⁰ as required by 10 C.F.R. § 72.42(b). The Staff's

⁶⁰ See Prairie Island Independent Spent Fuel Storage Installation, Safety Analysis Report, Rev. 14 (ADAMS Accession No. ML113040131) ("FSAR"). The Staff refers to this FSAR as the current licensing basis. This document is different from the FSAR required for license renewal. See Prairie Island Independent Spent Fuel Storage Installation Application for Renewed ISFSI Site-Specific License (ADAMS Accession No. ML113040123) ("License Renewal FSAR").

guidance regarding ISFSI license renewal (NUREG-1927, “Standard Review Plan for Renewal of Spent Fuel Dry Cask Storage System Licenses and Certificates of Compliance”) provides in Section 1.4.4 that a license renewal request should not include any changes to the current licensing basis. Licensees are required to have instrumentation systems for dry storage casks to monitor conditions that are important to safety.⁶¹ The NRC requires all storage confinement systems to have the capability for continuous monitoring (or periodic monitoring consistent with cask design requirements) in a manner such that the licensee will be able to determine when corrective action needs to be taken to maintain safe storage conditions.⁶² In the current licensing basis of the Prairie Island ISFSI, the Applicant identifies the pressure monitoring system as “not important to safety.”⁶³ Per the FSAR in the Prairie Island ISFSI license renewal application,⁶⁴ the Applicant provides that the ISFSI Pressure Monitoring System is not within scope of license renewal.

As part of its safety evaluation, the Staff is currently reviewing the Applicant’s determination that the pressure monitoring system is not within the scope of the license renewal.⁶⁵ PIIC’s contention challenges the Applicant’s characterization of the pressure monitoring system based on factors that the Staff is currently considering as part of its ongoing review. As such, the contention is within the scope of this proceeding and is material to the

⁶¹ See 10 C.F.R. § 72.122(i).

⁶² 10 C.F.R. § 72.122(h)(4).

⁶³ See FSAR, *supra* note 60, at Section 3.3.3.2, “Instrumentation,” (Safety-related instrumentation is not necessary. Instrumentation to monitor cask pressure is furnished.); Section 3.3.5.3, “Radiological Alarm Systems,” (Non safety grade pressure monitors are provided.); Section 8.1.1 “Loss of Electrical Power,” (Postulates an accident in which the pressure monitoring system loses power and the applicant determined that this event has no safety or radiological consequences).

⁶⁴ See License Renewal FSAR, *supra* note 60, at Table 2.4-1 (ADAMS Accession No. ML113040123).

⁶⁵ See NUREG-1927, Section 2.4.2, “Structures, Systems, and Components Within the Scope of License Renewal.”

Staff's review. Further, PIIC's references to previous seal leaks provide sufficient information to support its contention that the pressure monitoring system is incorrectly scoped in the Applicant's license renewal FSAR.⁶⁶ Therefore, the Staff concludes that the contention is admissible because it would be premature for the Staff to determine whether the Applicant's scoping of the pressure monitoring system is adequate.⁶⁷

6. Contention 6 is admissible in part

Contention 6:

NSPM's license renewal application is deficient because it did not adequately address the potential degradation of high burnup fuel due to aging during storage, subsequent handling, and transportation. 10 CFR 72.122 requires confinement barriers and systems to protect degradation of fuel and to not pose operational safety problems.⁶⁸

Petition at 52. PIIC argues that the Applicant has not adequately addressed a number of potential deficiencies and uncertainties regarding high burnup fuel. *Id.* at 54. Further, PIIC argues that the Applicant failed to demonstrate that it can protect spent fuel from significant degradation during the proposed extended storage period, pursuant to 10 C.F.R. § 72.122. *Id.* at 54. PIIC argues that the Applicant has not shown that criticality will be prevented under all storage conditions and has not provided adequate justification and support for use of full burnup credit in the criticality analysis. *Id.* In addition, PIIC contends that the Applicant has not adequately addressed potential fuel cladding degradation from hydriding effects, oxidation, clad creep, embrittlement, and thermal-driven cracking and leakage. *Id.*

⁶⁶ See Petition at 51.

⁶⁷ As the Staff discusses above, pursuant to 10 C.F.R. § 2.309(f)(2), contentions must be based on documents available at the time the petition is filed, such as the application. Because the Staff's safety evaluation is ongoing, the Staff believes that PIIC has raised an issue sufficient to challenge the Application.

⁶⁸ Similar to Contention 1, PIIC has petitioned the NRC for a waiver to challenge the Waste Confidence Decision and Temporary Storage Rule, pursuant to 10 C.F.R. § 2.335. See Petition at 52 n.139. The Staff reiterates that it does not believe such a waiver is necessary. Here, PIIC has proposed an admissible safety contention, in part.

NRC requirements ensure safe fuel storage and handling and minimization of post-operational safety problems with respect to the removal of the fuel from storage.⁶⁹ Section 72.122(h)(1) requires spent fuel cladding to be “protected during storage against degradation that leads to gross ruptures or the fuel must be otherwise confined such that degradation of the fuel during storage will not pose operational problems with respect to its removal from storage.” Additionally, § 72.122(l) requires that the storage system “be designed to allow ready retrieval of the spent fuel from the storage system for further processing or disposal.” Staff guidance provides that the safe storage and handling of high burnup fuel is evaluated on a case-by-case basis to determine whether it meets the Staff’s safety objectives.⁷⁰ Section 3.4.3 of NUREG-1927 states that the applicant should provide any new supporting data demonstrating high burnup fuel performance during extended storage.

PIIC’s contention raises issues that are material to the Staff’s ongoing review of the Applicant’s NSPM license renewal application. However, contrary to PIIC’s assertion,⁷¹ NSPM does not take full burnup credit in its criticality analysis.⁷² Further, PIIC does not identify the specific storage conditions that NSPM has not evaluated with respect to criticality prevention.⁷³ To the extent that PIIC’s contention challenges NSPM’s criticality analysis, PIIC has not provided adequate factual support as required by § 2.309(f)(1)(v). Therefore, the Staff concludes that PIIC has proposed an admissible contention, in part, as it relates to the storage of high burnup fuel during the proposed license renewal period.

⁶⁹ See 10 CFR § 72.122(h)(1).

⁷⁰ See Interim Staff Guidance No. 11 (ISG-11), Rev. 3, “Cladding Considerations for the Transportation and Storage of Spent Fuel.”

⁷¹ See Petition at 54.

⁷² See FSAR, Section 3.3.4, “Nuclear Criticality Safety” (ADAMS Accession No. ML113040131).

⁷³ See Standard Review Plan for Spent Fuel Dry Storage Facilities, NUREG-1567, Sections 15.2.1, 15.2.2 for off-normal and accident storage conditions an applicant must analyze to meet the requirements of 10 C.F.R. § 72.124.

7. Contention 7 is inadmissible

Contention 7:

The NSPM license renewal application does not address the potential for operational radiological effluent releases in excess of the limits in NRC regulations from the fuel cask confinement system due to aging of the system.

Petition at 55. PIIC argues that it can reasonably be anticipated that over a 50-year license period, one or more casks will experience confinement failure, which can lead to offsite dose to members of the public. *Id.* PIIC argues that the Applicant dismissed, without any basis, the possibility of effluent dose resulting from degraded materials and seals from normal operation of the ISFSI over the period of license renewal. *Id.* PIIC contends that the total effective dose equivalent for reasonably anticipated operational releases exceeds the limits in 10 C.F.R. Part 20 and Part 72 for operational releases. *Id.* at 56. Finally, PIIC argues that NSPM has failed to adequately address and provide for the safe performance of spent fuel, particularly high burnup fuel, under the dry storage conditions that are proposed in the license renewal application. *Id.*

Contention 7 should be dismissed because it (1) is not within the scope of this proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii); (2) does not contain the factual support required by 10 C.F.R. § 2.309(f)(1)(v); and (3) fails to show that a genuine dispute exists with the Applicant on a material issue of fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

First, effluent releases should not be considered as part of the licensing basis for the period of extended operation. The NRC requires NSPM's license to contain technical specifications that state the limits on the release of radioactive materials for compliance with 10 C.F.R. Part 20 and the "as low as is reasonably achievable" or "ALARA" objectives for effluents.⁷⁴ The Staff's guidance regarding ISFSI license renewal, NUREG-1927, provides in

⁷⁴ See 10 C.F.R. § 72.44(d)(2). Any effluent releases during the previous 12 months of operations must be submitted in an annual report to the NRC. 10 C.F.R. § 72.44(d)(3). On the basis of this report, the NRC may require the licensee to take additional action. *Id.* For radioactive materials in effluents during operation, the annual dose equivalent to any individual who is located beyond the controlled area must not exceed 25 mrem to the whole body, 75 mrem to the thyroid, and 25 mrem to any other critical organ. 10 C.F.R. § 72.104(c).

Section 1.4.4 that a license renewal request should not include any changes to the current licensing basis. The FSAR for the ISFSI license renewal states that because the casks provide containment, they yield “essentially no radioactive effluents.”⁷⁵ In other words, the Applicant demonstrates that the casks will not leak radionuclides into the environment under normal conditions of operations. The NRC requires the Applicant’s license renewal application to include an Aging Management Program (“AMP”), which provides for the management of issues associated with aging of structures, systems, and components important to safety.⁷⁶ In order to maintain its current licensing basis, which assures no release of radioactive effluents from the casks, the Applicant must provide reasonable assurance that the confinement boundary will perform its intended function during the period of extended operations. Therefore, consideration of dose of the effluents from the cask contents during normal operation is outside of the scope of the license renewal proceeding. Further, PIIC does not show a genuine dispute of material fact with the Applicant.

Second, PIIC makes several unsupported assertions regarding the operating history of the casks as well as the resulting dose from operation. PIIC contends that the casks used at Prairie Island have a “history of defects that have caused leaks to occur” which indicates operational releases will exceed the dose limits in 10 C.F.R. Parts 20 and 72. Petition at 55-56. Although no examples are cited in contention 7, PIIC’s Petition previously discussed two leaks related to Surry Power Station ISFSI and Peach Bottom Atomic Power Station ISFSI in contention 5.⁷⁷ The Staff notes that the referenced “leaks” involved the secondary seal of the

⁷⁵ See License Renewal FSAR, *supra* note 60, at Section E4.2.6, “Dose to the Public.”

⁷⁶ See 10 C.F.R. § 72.240(b)(3).

⁷⁷ See Petition at 51.

casks, and no loss of confinement occurred as a result.⁷⁸ Both leaks were detected by a low pressure alarm, resulted in appropriate corrective actions, and involved no release of radioactive effluents. As such, PIIC has not identified any basis to conclude that the casks have a history of operational effluent releases. Further, PIIC submits no evidence that any such releases would be greater than NRC regulatory dose limits. Therefore, PIIC's contention lacks the factual support required by 10 C.F.R. § 2.309(f)(1)(v) and should be dismissed.

CONCLUSION

For the reasons stated above, the Staff concludes that PIIC's Request for Hearing and Petition to Intervene should be granted in part. PIIC has demonstrated standing to intervene in this proceeding and has proffered four contentions that meet the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) in whole or in part. However, contention 1, which relates to the Commission's WCD, should be held in abeyance consistent with the Commission's decision in CLI-12-16.

Respectfully submitted,

/Signed (electronically) by/

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Molly Barkman Marsh
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Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of September, 2012.

⁷⁸ See NRC Inspection Report Nos. 05000277/2010010 and 05000278/2010010, Exelon Nuclear Peach Bottom Atomic Power Station (July 29, 2011) (ADAMS Accession No. ML112101576) at 2 ("The cask inner seal and the seals on the vent and drain ports were confirmed to be functional."); NRC Inspection Report No. 72-002/2000-06, Surry Power Station Independent Spent Fuel Storage Installation (ISFSI) (Aug. 4, 2000) (ADAMS Accession No. ML003738176) at 2 ("Test results indicated that the primary O-ring seal continued to perform its intended function and there was no leakage from the cask cavity. Therefore, there were no safety consequences or implications from the secondary cask seal leakage."). The Staff notes that the confinement of the storage casks used in the Prairie Island ISFSI are designed with two concentric seals that provide redundant confinement capability (i.e. inner and outer seals).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Northern States Power Company)	Docket No. 72-10-ISFSI-2
)	
(Prairie Island Nuclear Generating Plant)	ASLBP No. 12-922-01-ISFSI-MLR-BD01
Independent Spent Fuel Storage))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing NRC STAFF RESPONSE TO THE REQUEST FOR HEARING AND PETITION TO INTERVENE BY THE PRAIRIE ISLAND INDIAN COMMUNITY, dated September 25, 2012, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 25th day of September, 2012:

Signed (electronically) by
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