

American Bar Association

Section of Public Utility, Communications,
and Transportation Law

Report of

NUCLEAR ENERGY COMMITTEE

2009 Fall Council Meeting

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EXECUTIVE SUMMARY¹

On the legislative front, Representative Joseph Pitts introduced a bill that would establish and implement an expedited procedure for the issuance of a combined construction and operating license. There were also bills that proposed to use the Nuclear Waste Fund to make grants or enter into long-term contracts for the recycling of spent nuclear fuel. Companion bills were introduced in the House and Senate that would reauthorize the Uranium Enrichment Decontamination and Decommissioning Fund. In addition, several bills addressed the nation's policies regarding energy efficiency, energy independence, and the development of clean and reliable energy sources. Senator Jeff Bingaman introduced legislation that would create a federal advisory committee to study alternative means of managing and disposing of nuclear waste. An appropriations bill for energy and water development allocated \$1,061,000,000 for the necessary expenses of the United States Nuclear Regulatory Commission ("NRC").

On the judicial front, the Court of Claims and the Court of Appeals for the Federal Circuit both upheld the 1987 Acceptance Rate as the proper measure for determining damages for the Department of Energy's breach of its contract to collect SNF. The U.S. District Court considered the role of regional compacts in regulating the storage of radioactive waste from outside their regions, while the Court of Appeals for the Second Circuit explained that waste management activities at a facility and the facility's closure are not connected actions for National Environmental Policy Act purposes. The Court of Appeals for the Tenth Circuit held that DNA and cell damage from radiation exposure, without symptoms of illness or injury, do not constitute bodily injury under the Price-Anderson Act. The Court of Appeals for the Ninth Circuit upheld the NRC's decision refusing to include the threat of air attacks in the final revised design basis threat rule, and the Court of Appeals for the Second Circuit held it had no jurisdiction under the Hobbs Act to review the NRC's granting of an exemption.

On the administrative front, the NRC has completed and proposed several new rulemaking efforts. The NRC is conducting a major overhaul of its Enforcement Policy. It is also proposing enhancements to emergency planning regulations, smaller limits on the quantity of byproduct material contained in generally licensed devices, and amendments to its environmental protection regulations. The NRC has issued a final update on its Waste Confidence Decision, revising two of the five waste confidence findings. Additionally, the NRC is preparing to release a final safety culture policy statement, stressing the equal importance of safety and security within the overarching safety culture. Most recently, the NRC issued a proposed rule which would clarify the term limits for dry storage cask certificates of compliance and independent spent fuel storage installation specific licenses.

Recent adjudicatory activity has focused on new power reactors and power reactor license renewal. The NRC has issued two license renewals in 2009, and is currently reviewing fourteen license renewal applications, as well as seventeen applications for new reactors. In

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addition, the NRC has accepted for formal review applications for two new uranium enrichment facilities, Areva Enrichment Services' Eagle Rock Enrichment Facility and General Electric's Hitachi Global Laser Enrichment plant. The NRC estimates that it will take two and a half years to reach decisions on these applications.

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I. LEGISLATIVE ACTIVITY

A. Nuclear Licensing

On July 31, 2009, Representative Joseph Pitts (R-PA) introduced the “Streamline America’s Future Energy Nuclear Act” (H.R. 3448). The bill was referred to the House Committee on Energy and Commerce and the Committee on Natural Resources. H.R. 3448 would establish an expedited schedule for the issuance of a COL for nuclear reactors that meet certain conditions.

The bill would require the United States Nuclear Regulatory Commission (“NRC”) to establish and implement an expedited procedure for issuing a combined operating license (“COL”). In order to qualify for the expedited procedure, an applicant must apply for construction of a reactor based on a design approved by the NRC, construct the new reactor on or adjacent to a site where an operating nuclear power plant already exists, not be subject to an NRC order to modify, suspend, or revoke a license, and submit a complete COL application that is docketed by the NRC.

When an applicant satisfies the requirements and seeks fast track consideration, the NRC will undertake an expedited environmental review and issue a draft Environmental Impact Statement within 12 months after the application is accepted for docketing. The NRC must also complete any public hearings within 24 months, complete the technical review process and issue the Safety Evaluation Report within 18 months, and make a final decision on whether to issue the COL within 25 months after docketing the application.

H.R. 3448 would authorize the appropriation of \$121,000,000 for the Nuclear Power 2010 program to accomplish its mission of defining the plant permitting and design certification process by September 30, 2010. The bill would also require the Department of Energy (“DOE”) and the NRC to reevaluate the Next Generation Nuclear Power Plant schedule with the purpose of significant acceleration.

B. Nuclear Waste

1. Recycling of Spent Nuclear Fuel

Representative Joe Barton (R-TX) introduced H.R. 3385 on July 29, 2009, and the bill was referred to the House Committee on Energy and Commerce and the Committee on the Budget. H.R. 3385 would authorize the use of amounts in the Nuclear Waste Fund to promote the recycling of spent nuclear fuel (“SNF”). Funds would be used to make grants or enter into long-term contracts with private sector industries for the recycling of SNF. The bill would also require the NRC to complete a rulemaking (within 2 years) to establish a process for NRC licensing of facilities for this recycling.

2. Yucca Mountain

On May 12, 2009, Representative Erik Paulsen (R-MN) introduced the “Rebating America’s Deposits Act” (H.R. 2372), and the bill was referred to the House Committee on

Energy and Commerce. H.R. 2372 would amend the Nuclear Waste Policy Act of 1982 (“NWPA”) to require the President to certify that the Yucca Mountain site remains the designated area for the development of a repository for the disposal of high-level radioactive waste. The bill also states that if the President fails to publish the certification or revokes it, each entity that is required to make a payment to the Nuclear Waste Fund shall not be required to make any additional payment, and any entity that has made a payment shall receive a refund.

C. Uranium

On May 18, 2009, Senator Sherrod Brown (D-OH) introduced the “Uranium Enrichment Decontamination and Decommissioning Fund Reauthorization Act of 2009” (S. 1061), and Representative Ed Whitfield (R-KY) introduced a companion bill (H.R. 2471) in the House of Representatives. S. 1061 was referred to the Senate Committee on Energy and Natural Resources, and H.R. 2471 was referred to the House Committee on Energy and Commerce and the Committee on Ways and Means.

The bills would reauthorize the Uranium Enrichment Decontamination and Decommissioning Fund and direct the Secretary of Energy to provide a plan for the re-enrichment of certain uranium tailings. Within 180 days, the Secretary would be required to develop, complete, and publish a plan to re-enrich and sell certain cylinders of uranium tailings. The Secretary would then seek to enter into a contract for such re-enrichment. After the re-enrichment of the material is complete, the Secretary would be allowed to sell or contract for the sale of the product of the re-enrichment. The bills would require fifty percent of the re-enriched materials to be sold to qualified buyers which are licensed to possess such materials, and the bills also contain provisions for a situation in which the Secretary is unable to enter into a contract for the sale of these materials within 270 days.

D. Energy Efficiency

Several bills were introduced that address energy efficiency, energy independence, and the development of clean and reliable energy sources. On May 15, 2009, Representative Henry Waxman (D-CA) introduced the “American Clean Energy and Security Act of 2009” (H.R. 2454), and the bill was passed in the House of Representatives on June 26, 2009. It has since been placed on the Senate calendar. H.R. 2454 aims to create clean energy jobs, achieve energy independence, reduce global warming pollution, and transition to a clean energy economy. The bill would make certain revisions to the Loan Guarantee Program to require sufficient payments from the borrower to cover the cost of the obligation before any guarantee will be made. The bill would also require the Secretary of Energy to provide Congress with a report by February 1, 2011 that shows the results of a study on thorium-fueled nuclear reactors for national energy needs.

On June 11, 2009, Representative Rob Bishop (R-UT) introduced the “American Energy Innovation Act” (H.R. 2828), and the bill was referred to several House committees. H.R. 2828 would provide the United States with a comprehensive energy package to place Americans on a path to a secure economic future through increased energy innovation, conservation, and production.

H.R. 2828 addresses many issues concerning the development of nuclear power. The bill would allow certain amendments to the Energy Policy Act of 2005 regarding project costs and the implementation of the Nuclear Power 2010 program. It would also create an Interagency Working Group to increase the competitiveness of the United States nuclear energy products and services. In addition, H.R. 2828 proposes terms for a qualifying nuclear power manufacturing credit, authorizes the use of amounts in the Nuclear Waste Fund for the recycling of SNF, and addresses the licensing of new nuclear power plants. Next, the bill proposes investment tax credits and construction credits for investments in nuclear power facilities. Under H.R. 2828, the Secretary of Energy would be authorized to initiate SNF storage agreements by allowing representatives of a community to notify the Secretary that the community is willing to host a temporary spent nuclear storage facility within its jurisdiction and to determine whether a specific site is suitable to house such a facility. The Secretary also has the authority to enter into agreements for the temporary storage of SNF.

On June 24, 2009, Senator John Barrasso (R-WY) introduced the “Clean, Affordable, and Reliable Energy Act of 2009” (S. 1333), and the bill was referred to the Senate Committee on Finance. The purpose of the bill is to provide clean, affordable, and reliable energy. Specifically, S. 1333 would require the NRC to complete a rulemaking for the licensing of facilities for the recycling of SNF within two years. Next, the NRC would not be allowed to deny an application for a license, permit, or other authorization under the Atomic Energy Act of 1954, as amended (“AEA”) on the grounds that sufficient capacity does not exist, or will not become available on a timely basis, for the disposal of SNF or high-level radioactive waste from the facility for which the license, permit, or other authorization is sought. Similar to other bills, S. 1333 would allow for the expansion of tax credits for certain nuclear facilities.

On July 16, 2009, Senator Jeff Bingaman (D-NM) introduced the “American Clean Energy Leadership Act of 2009” (S. 1462), and the bill was referred to the Senate Committee on Energy and Natural Resources. The bill would promote clean energy technology development, enhanced energy efficiency, improved energy security, and energy innovation and workforce development. S. 1462 would amend the NWPA to establish a federal advisory committee called the “National Commission on Nuclear Waste.” The purpose of this commission would be to conduct a comprehensive study of alternative means for safely managing or disposing of SNF and high-level radioactive waste and to recommend to Congress what legislative or other actions may be needed to manage or dispose of this waste.

On May 5, 2009, Representative Dan Burton (R-IN) introduced the “Energy Independence Now Act of 2009” (H.R. 2250), and the bill was referred to several House committees. The goal of the bill is to immediately provide for domestic energy production and jobs and to pursue alternatives in renewable energy. H.R. 2250 would allow a tax credit in an amount equal to fifteen percent of the qualified nuclear expenditures paid or incurred by the taxpayer. A qualified nuclear expenditure includes any expenditure related to increasing the taxpayer’s capacity to construct, fabricate, assemble, or install components for any facility which uses nuclear energy to produce electricity.

E. Appropriations

On July 9, 2009, Senator Byron Dorgan (D-ND) introduced the “Energy and Water Development and Related Agencies Appropriations Act, 2010” (S. 1436). On July 13, 2009, Representative Ed Pastor (D-AZ) introduced a companion bill (H.R. 3183) in the House of Representatives (H.R. 3183). S. 1436 and H.R. 3183 make appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2010. The Senate requested a conference and appointed conferees on July 29, 2009.

The bills would appropriate \$1,061,000,000 for the necessary expenses of the NRC in carrying out the purposes of the Energy Reorganization Act of 1974 and the AEA. In addition, the bills would allocate \$761,274,000 for DOE expenses including the purchase, construction, and acquisition of plant and capital equipment, and for other expenses necessary for nuclear energy activities. These activities include the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion. The bills require that \$2,000,000 be used for projects specified in the table that appears under the heading “Congressionally Directed Nuclear Energy Projects” in the report of the Committee on Appropriations.

For nuclear waste disposal, the bills would appropriate \$98,400,000 to carry out the purposes of the NWPA. Of this amount, 2.54 percent shall be provided to the Office of the Attorney General of the State of Nevada for expenditures to conduct scientific oversight responsibilities and participate in licensing activities pursuant to the NWPA. In addition, 4.57 percent of this amount shall go to affected units of local government to conduct appropriate activities and participate in licensing activities under Section 116(c) of the NWPA.

II. JUDICIAL ACTIVITY

A. Spent Nuclear Fuel

Beginning in 1998, nuclear utilities began filing suits against DOE for its failure to remove SNF from reactor sites pursuant to the terms of the Standard Contract and the NWPA. The following discussion summarizes the aspects of each SNF decision that are unique to that decision.

1. *Consol. Edison Co. of N. Y., Inc. v. United States*

On May 18, 2009, the Court of Federal Claims granted motions for partial summary judgment in favor of the two plaintiff utilities, Consolidated Edison Company of New York, Inc. and Entergy Nuclear Indian Point 2, LLC.² Consolidated Edison sought a ruling establishing the rate at which DOE was obligated to accept SNF through 2022 and Entergy Indian Point sought to extend that rate through 2036. The court concluded that DOE was obligated to accept SNF at the

² *Consol. Edison Co. of N.Y., Inc. v. United States*, Nos. 03-2622C and 04-33C, 2009 U.S. Claims LEXIS 122, at *5 (Fed. Cl. May 18, 2009).

aggregate annual rate set forth in the June 1987 Annual Capacity Report (“ACR”) and June 1987 Office of Civilian Radioactive Waste Management Mission Plan Amendment (“MPA”). Although DOE argued that the 1991 ACR reflected the acceptance rate, the court found that there were no genuine issues of material fact and that the utilities were entitled to judgment as a matter of law. The court adopted the acceptance rate in the 1987 documents for 1998 through 2037. The court concluded that the 1987 ACR process incorporated the 1987 ACR and 1987 MPA, which established the parties’ intent at the time of executing the 1983 standard contract that DOE was obligated to accept SNF at a series of aggregate annual rates through 2037.

2. *Carolina Power & Light Co. v. United States*

On July 21, 2009, the Court of Appeals for the Federal Circuit vacated and remanded an award of \$82,789,289 for recalculation under the aegis of the 1987 acceptance capacity schedule (“ACS”) process.³ The Court of Federal Claims had entered a judgment against the United States for DOE’s partial breach of its contract with plaintiffs. The plaintiffs incurred substantial mitigation costs in storing SNF that otherwise would have been stored by DOE under the contract. The court held that the trial court improperly relied on the 2004 annual capacity reports process for calculating damages and thus remanded the case for a determination of damages based on the proper 1987 ACS - the appropriate measuring stick for determining the parties’ contractual intent. The court refused make findings as to whether the two rates were materially different in lieu of a remand. The court also held that the trial court did not clearly err in holding that plaintiffs should be allowed to recover an appropriate portion of indirect overhead costs or in refusing to offset loading costs that plaintiffs would have to pay when DOE picked up SNF in the future. Finally, the court affirmed the portion of the damages award directed to overhead costs and other indirect expenses.

B. Waste Storage

1. *EnergySolutions, LLC v. Northwest Interstate Compact on Low-Level Radioactive Waste Management*

On May 15, 2009, the District Court for the District of Utah granted in part EnergySolutions, LLC’s Motion for Summary Judgment.⁴ EnergySolutions operates a Low-Level Radioactive Waste facility located inside the Northwest Interstate Compact on Low-Level Radioactive Waste Management’s (“Northwest”) regional boundaries. Although inside the boundaries, EnergySolutions’ facility was not designated a regional compact facility by statute. The State of Utah required Northwest’s consent to importation of out-of-region waste for disposal, and the State and Northwest argued that this effectively transformed the facility into a regional compact facility and would allow Northwest to refuse EnergySolutions’ desired storage of waste from Italy. The Court disagreed, holding that the State of Utah had no authority, absent Congressional language indicating the intent to waive dormant commerce clause limitations, to transform the facility to a regional compact facility. The Court held that Congress did not grant

³ *Carolina Power & Light Co. v. United States*, 573 F.3d 1271 (Fed. Cir. 2009).

⁴ *EnergySolutions, LLC v. Northwest Interstate Compact on Low-Level Radioactive Waste Management*, No. 2:08-CV-352, 2009 U.S. Dist. LEXIS 41209, *2 (D. Utah May 15, 2009)

Northwest the broad authority to regulate out-of-region waste disposal within its boundaries for non-compact facilities; however, Northwest did have authority over storage of waste from inside the region.

2. *Coalition on West Valley Nuclear Wastes v. Chu*

On August 31, 2009, the Court of Appeals for the Second Circuit upheld summary judgment in favor of the Department of Energy.⁵ The plaintiff, Coalition on West Valley Nuclear Wastes (“Coalition”), argued that the DOE violated NEPA and the terms of a 1987 settlement between the Coalition and the DOE when its environmental impact statement concerning waste management at a portion of the Western New York Nuclear Service Center did not address issues regarding long-term closure of the rest of the Center. The Coalition contended that the DOE committed impermissible “segmentation” by separating waste management and closure issues, and that the DOE could not split the environmental impact statement into two phases after beginning it as one. Finding the DOE had discretion to order two phases, the court held that the waste management activities neither triggered the closure nor depended on the closure, so the two activities were not connected actions under NEPA and summary judgment in favor of DOE was appropriate.

C. *Uranium - Ad Hoc Utilities Group v. United States*

On June 15, 2009, the United States Court of International Trade granted the defendant’s motion to dismiss the action, which challenged a decision of the Department of Commerce (“Commerce”) for lack of subject matter jurisdiction.⁶ During the relevant time period, Commerce had designated USEC, Inc. as the only agent in the United States with authority to purchase enriched uranium from Russia and distribute it to American utility companies. In 2006, the utility group filed an action to challenge Commerce’s decision that continued dumping of uranium was likely. Commerce concluded that the utility group did not have standing as an interested party (that is, a “producer”) of low enriched uranium. The court held that the utility companies individually did not qualify either as producers or importers of the subject uranium. Further, the utility group did not qualify as a trade or business association with a majority of the members being producers or importers, and the court concluded that the utility group lacked standing, as required by 28 U.S.C.S. § 2631(c), and 19 U.S.C.S. § 1677(9), to challenge Commerce’s determinations.

D. *Price-Anderson Act - June v. Union Carbide Corp.*

On August 21, 2009, the Court of Appeals for the Tenth Circuit upheld the lower court’s grant of summary judgment on claims arising from radiation exposure at a former uranium and vanadium milling town.⁷ Plaintiffs brought claims under the Price-Anderson Act⁸ for personal

⁵ *Coalition on West Valley Nuclear Wastes v. Chu*, No. 07-5243-cv, 2009 U.S. App. LEXIS 19492, *2 (2d Cir. Aug. 31, 2009).

⁶ *Ad Hoc Utilities Group v. United States*, 625 F. Supp. 2d 1330 (Ct. Int’l Trade 2009).

⁷ *June v. Union Carbide Corp.*, No. 07-1532, 2009 U.S. App. LEXIS 18886, *1 (10th Cir. Aug. 21, 2009).

injury based on disease or death allegedly caused by radiation and for medical monitoring to detect the onset of disease in those plaintiffs not yet exhibiting symptoms. As required by the Price-Anderson Act, the court, applying Colorado state substantive law, found that plaintiffs did not show the causation required for the physical injury claims. The court further held that, under the Price-Anderson Act, the asymptomatic DNA damage and cell death that results whenever one is exposed to radiation is not in itself a bodily injury.

E. Environmental Impacts

1. *Goliad County v. Uranium Energy Corp.*

On June 5, 2009, the District Court for the Southern District of Texas granted the defendant's Motion to Dismiss the Complaint for lack of federal subject matter jurisdiction.⁹ The suit arose out of Uranium Energy Corporation's ("UEC") attempt to obtain a Class III injection well permit from the Texas Commission on Environmental Quality for *in situ* uranium mining in Goliad County, Texas. Goliad County alleged that UEC, by failing to properly plug, seal, and re-topsoil numerous exploratory boreholes, allowed storm water to damage the local aquifer. The County attempted to invoke federal jurisdiction under the Safe Water Drinking Act ("SDWA"). The District Court dismissed the complaint because (1) the County's claim was not ripe because there were a number of administrative steps remaining before UEC could be granted its Class III permit, (2) the court did not possess subject matter jurisdiction over Goliad County's SDWA claim since the statutory touchstone was its allegation that UEC "converted" the exploratory boreholes into "injection wells" and/or "injection activity," and the court concluded that no such conversion or injection activity took place; and (3) the court could not grant supplemental jurisdiction over Goliad County's state law claims, nor could it use the Declaratory Judgment Act as an independent basis for jurisdiction.

2. *Burton v. Commissioner of Environmental Protection*

On June 2, 2009, the Supreme Court of Connecticut reversed the judgment of the trial court, holding that the plaintiff had standing to bring an action under Conn. Gen. Stat. § 22a-16.¹⁰ The plaintiff alleged that Dominion Nuclear Connecticut, Inc.'s Millstone Nuclear Power Station caused unreasonable pollution of the waters of the state in violation of the Connecticut Environmental Protection Act, and the existing administrative proceeding involving Dominion's permit to discharge wastewater from Millstone into the Long Island Sound was inadequate to protect the rights recognized by the statute. The Supreme Court held that the plaintiff had standing because her claim was that the permit renewal proceeding was inadequate to protect the rights recognized by the Environmental Protection Act, not that a technical violation had occurred during the renewal proceeding.

⁸ 42 U.S.C. 2210.

⁹ *Goliad County v. Uranium Energy Corp.*, No. V-08-18, 2009 U.S. Dist. LEXIS 47685, at *1 (S.D. Tex. Jun. 5, 2009).

¹⁰ *Burton v. Commissioner of Environmental Protection*, 970 A.2d 640 (Conn. 2008).

F. Design Basis Threat Rule - *Public Citizen v. NRC*

On July 24, 2009, the Court of Appeals for the Ninth Circuit denied judicial review of the NRC order that modified the design basis threat (“DBT”) rule and partially denied a petition for rulemaking.¹¹ The petitioners asserted that the NRC acted arbitrarily and capriciously and contrary to law by refusing to include the threat of air attacks in the final revised DBT rule, and this risk created a potentially significant impact on the environment necessitating a full environmental impact statement (“EIS”). The Ninth Circuit found that the NRC did not act arbitrarily or capriciously in concluding that air-based threats were beyond the scope of the DBT rule. The court held that once the NRC made the general determination that air-based threats were outside the scope of the DBT, it was under no obligation to consider passive protection measures as part of the rulemaking procedure. Further, the NRC’s reliance on other government agencies, whose charge was to provide security and defense of the nation against air-based attacks, was neither inconsistent with its past practices nor an unreasonable interpretation of its statutory obligations. Finally, the court found that the petitioners identified no effect of the revised DBT rule that could cause significant degradation of some human environmental factor, and thus no EIS was necessary.

G. Hobbs Act - *Brodsky v. NRC*

On August 27, 2009, the Court of Appeals for the Second Circuit held that under the Hobbs Act, it lacked jurisdiction to review an NRC exemption order.¹² The Court explained that the Hobbs Act provided jurisdiction over “the granting, suspending, revoking, or amending” of a license. Deferring to the NRC’s explanation that its decision to allow a revised exemption to certain fire barrier requirements was in fact an exemption, the Court held it did not have authority under the Hobbs Act to review NRC exemptions.

III. ADMINISTRATIVE ACTIVITY

A. Nuclear Regulatory Commission Policy, Practices, and Procedures

1. Commission Developments

The NRC is headed by five Commissioners appointed by the President and confirmed by the Senate for five-year terms. The Chairman is designated by the President and serves as the principal executive officer and official spokesperson of the Commission. On May 13, 2009, the Honorable Gregory B. Jaczko was designated Chairman by President Barack Obama. Chairman Jaczko was sworn in as a Commissioner in January 2005, and his term runs through June 2013. He replaced the Honorable Dale E. Klein, who remains on the Commission. Commissioner Kristine L. Svinicki is the third current member of the Commission, which has two vacancies at this time.

¹¹ *Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009).

¹² *Brodsky v. NRC*, No. 08-1454-ag, 2009 U.S. App. LEXIS 19230, *2 (2d Cir. Aug. 27, 2009).

2. New Plant Developments

(a) Discussion of Status of Applications

(i) Florida Power and Light Company submits COLA for TP 6 & 7

On June 30, 2009, Florida Power and Light Company (“FPL”) submitted its application for a combined license (“COLA”) for two Westinghouse Advanced Passive 1000 (“AP1000”) Pressurized Water Reactors designated as Turkey Point Units 6 and 7 to be located on FPL’s current Turkey Point site in Homestead, Florida. The NRC released the public version of the COLA on July 16, 2009, and announced that it expects to docket or accept the COLA for review by early September, if the application passes the NRC Staff’s initial docketing review.

(ii) Nine Mile Point

UniStar Nuclear Energy (“UNE”) asked the NRC Staff, on August 17, 2009, to postpone its Phase 1 review of the Nine Mile Point Unit 3 (“NMP3”) COLA to September 2010. The NMP3 COLA was initially submitted on September 30, 2008, and supplemented on October 24 and October 18, 2008, and the application was docketed on December 12, 2008. On February 9, 2009, UNE asked the NRC to maintain some “schedule spacing” between the NRC Staff’s review of UNE’s COLAs for Calvert Cliffs Unit 3 (which was already underway) and NMP3. UNE requested that the NRC Staff begin the NMP3 COLA review in September 2009, and the NRC Staff agreed. A month before the review was scheduled to begin, UNE discussed internal project schedule information with the NRC Staff regarding the NMP3 COLA, and one week after these discussions, UNE asked for the postponement. UNE stated that it evaluated a number of factors in making the decision, including the need to focus on state regulatory reviews. The delay also allows UNE to apply for the Department of Energy’s federal loan guarantee program for advanced nuclear energy projects as Congress is considering another allocation for new nuclear projects in 2010.

(iii) Entergy revives RB COLA

Entergy submitted a notice on August 21, 2009 to Louisiana regulators stating that it would seek their approval for certification for the siting and licensing of a nuclear power plant. In January 2009, Entergy asked the NRC to suspend review of its license applications for the proposed nuclear units at the River Bend and Grand Gulf stations in Mississippi, citing difficulties in closing a deal with its vendor, GE Hitachi. Entergy plans to submit its request for certification within 90 days to the Louisiana Public Service Commission (“LPSC”). The 90-day notice on August 21st complies with the LPSC’s “Incentive Cost Recovery Rule for Nuclear Power Generation.” The Rule, enacted in 2007, enables utilities to recover some pre-construction costs from ratepayers before the capacity comes online.

(iv) AmerenUE requests suspension of Callaway review

AmerenUE requested, by motion filed June 26, 2009, that the Atomic Safety and Licensing Board (“ASLB”) terminate the adjudicatory hearing in the COL proceeding for its proposed USEPR nuclear reactor in Callaway County, Missouri. Up to that date, two petitioners

had filed hearing requests, and AmerenUE and the NRC Staff had filed answers to the requests on May 15, 2009. During the preparation of these filings, AmerenUE made a public statement announcing its intention to suspend efforts to build the new Callaway unit. Subsequently, the ASLB requested that AmerenUE address the current status of its application in its May 15th answer. AmerenUE indicated that it would keep the ASLB and petitioners informed about the status of its internal review.

Upon receiving AmerenUE's answer the ASLB scheduled an initial prehearing conference to hear arguments on the admissibility of the petitioners' interventions for July 28, 2009. However, a month before the prehearing conference, AmerenUE requested that the adjudicatory hearing be terminated, and the NRC Staff supported the request. One of the petitioners also stated that it supported the request, but asserted that the hearing termination order should include, among other things, payment of the petitioner's litigation expenses, including attorney fees. The ASLB agreed to postpone the prehearing conference and allow the parties an opportunity to submit a settlement agreement outlining the terms of the consent order to terminate the proceeding. The parties filed a settlement agreement on August 14, 2009, and the ASLB, in LBP-09-23, accepted it, thus ending the proceeding.

(b) DOE Loan Guarantees (4 finalists and 1 alternate)

DOE has announced that UniStar Nuclear Energy's Calvert Cliffs Unit 3, NRG Energy Inc.'s South Texas Project Units 3 and 4, Scana Corporation's Summer Units 2 and 3, and Southern Corporation's Vogtle Units 3 and 4 are the four finalists that are expected to share the \$18.5 billion in federal loan guarantees. Luminant's Comanche Peak project in Texas is the first alternate. DOE's Loan Guarantee Program, authorized under the Energy Policy Act of 2005, aims to facilitate early commercial use of new or significantly improved energy related projects. The guarantees, which reduce the financial uncertainty of new technology by putting federal backing behind any loans companies assume, are critical to obtain financing for the new projects, and would enable the companies to start building the reactors as early as 2011. Developers of 21 new reactors initially applied for the program, requesting guarantees of \$122 billion, far exceeding the program's budget. Several of the 14 companies that applied dropped out, and only 10 remained at the end of 2008 before the four final candidates and first alternate were chosen in May 2009.

(c) Status of Advanced Reactor Pre-application Reviews

Reactor designers are developing more advanced reactors that are expected to be safer and use simplified, passive or other methods to accomplish safety functions. To facilitate the licensing of these advanced reactors, the NRC conducts public pre-application hearings to identify major safety and technical issues and research needed to resolve the identified issues. There are ongoing pre-application reviews for seven advanced reactors. Westinghouse's International Reactor Innovative and Secure application is expected to be submitted in the third quarter of 2012; NuScale Power has no tentative submittal date for its NuScale application; the Pebble Bed Modular Reactor application is expected to be submitted in 2013; Toshiba will submit the application for its Super-Safe, Small and Simple in October 2010; Hyperion Power does not have a tentative submittal date for its Hyperion reactor; GE Hitachi's Power Reactor Innovative Small Module application has an expected submittal date of mid-2011; Babcock and

Wilcox Company's mPower reactor has the earliest expected application submittal date of the first quarter of 2010; and the Department of Energy's Next Generation Nuclear Plant ("NGNP") has an expected application submittal date of 2013. DOE is currently selecting which reactor design will be used for the NGNP.

(d) Issuance of Final Rule on Aircraft Impact

In February 2009, the NRC issued a final rule that requires applicants for new power reactors to analyze whether the design features of their facility could avoid or mitigate the impact of a large commercial aircraft. The Final Rule was published in the *Federal Register* on June 12, 2009. The aircraft-crash scenarios would be treated as "beyond-design-bases events," meaning the rule's requirements are intended to provide an additional level of protection. While the NRC does not believe reactor operators should be required to prevent an aircraft strike (that being the federal government's responsibility), the NRC is working with other agencies and the intelligence community to provide "layered protection against such a threat." The final rule requires applicants to show they have incorporated design features and functional capabilities so that even in the event of an aircraft impact at a nuclear power plant, the reactor core would remain cooled or the containment structure would remain intact. In addition, applicants must demonstrate that the spent fuel cooling or spent fuel pool integrity would be maintained. The Commission believes that the final rule will result in new nuclear power reactor facilities being more inherently robust with regard to an aircraft impact.

(e) Watts Bar 2 Update Application & Establish of ASLB

On May 1, 2009, the NRC issued a Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for Tennessee Valley Authority's Watts Bar Nuclear Plant, Unit 2. Petitioners Southern Alliance for Clean Energy, Tennessee Environmental Council, We the People, the Sierra Club and the Blue Ridge Environmental Defense League filed requests for hearing. In response, the Commission established an ASLB to preside over the Watts Bar Unit 2 proceeding on July 28, 2009. To date, no decision has been issued on standing or contention admissibility.

(f) Bellefonte Projected Start Date

On July 21, 2009, the NRC Staff sent a letter to Tennessee Valley Authority ("TVA") stating that it would not issue the draft environmental impact statement ("DEIS") for Bellefonte Units 3 and 4 until TVA's Board of Directors decides whether to complete Units 1 and 2. TVA submitted the application for the COL for units 3 and 4 on October 30, 2007. TVA has decided to cancel plans for completing construction of the current design for Bellefonte, to seek withdrawal of the construction permits from the NRC and to redress the Bellefonte site. Because there are other ongoing activities on the Bellefonte site and because the switchyard at Bellefonte is utilized as a substation for system operations in the region, TVA will not withdraw existing environmental permits or remove equipment associated with these other activities.

3. License Renewal

(a) Status of License Renewal Applications

To date, the NRC has issued operating license renewals for 54 nuclear units. Two renewals have been issued since March 2009: Vogtle (June 3, 2009) and Oyster Creek (issued April 8, 2009). Currently, applications for 14 units are under review, including Pilgrim 1 (received January 27, 2006); Vermont Yankee (received January 27, 2006); Susquehanna (received September 15, 2006); Indian Point Units 2 and 3 (received April 30, 2007); Beaver Valley (received August 28, 2007); Three Mile Island (received January 8, 2008), Prairie Island, Units 1 and 2 (received April 15, 2008); Kewaunee Power Station (received August 14, 2008); Cooper Nuclear Station (received September 20, 2008); Duane Arnold Energy Center (received October 1, 2008); Palo Verde (received December 15, 2008); Crystal River (received December 18, 2008); Hope Creek (received August 18, 2009); and Salem (received August 18, 2009). The NRC has also received numerous letters of intent to apply for license renewal (at 17 sites). The NRC has issued Safety Evaluation Reports for Prairie Island, Indian Point and Three Mile Island. In accordance with 10 C.F.R. § 2.109, a renewal application must be submitted at least five years before the expiration of the license in order to ensure that the plant can operate uninterrupted during the renewal process.

(b) Issuance of Part 51 Proposed Rule

The NRC is proposing to amend its environmental protection regulations by updating the Commission's 1996 Generic Environmental Impact Statement ("GEIS") findings (located in Table B-1) on the environmental impacts related to the renewal of a nuclear power plant's operating license. The proposed rule, issued on July 31, 2009 (74 Fed. Reg. 38,117), redefines the number and scope of the environmental impact issues which the Commission must address when reviewing license renewal applications. Based on comments the NRC received on the 1996 GEIS, as well as lessons the NRC has learned from undertaking license renewal environmental reviews at 29 nuclear plants since 1996, the NRC considered modifying, adding to or deleting the 92 issues in Table B-1 of the 1996 GEIS. The NRC Staff decided to carry forward 78 impact issues for detailed consideration in this GEIS revision. While the NRC Staff did not eliminate any of the environmental issues in Table B-1, several of the issues were combined based on similarities. Fifty-eight of the remaining issues are generic for all nuclear power plants, and thus do not require additional plant-specific environmental review unless new and significant information is revealed. The other 20 environmental issues in Table B-1 require plant-specific review or assessment.

Concurrent with the proposed rule, the Commission revised the 1996 "Generic [GEIS] for License Renewal of Nuclear Plants," Regulatory Guide 4.2 entitled "Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications," and the Environmental Standard Review Plan ("ESRP") entitled "Standard Review Plans for Environmental Reviews for Nuclear Operating Plans, Supplement 1: Operating License Renewal." Comments on the proposed rule, the revised GEIS, the revised regulatory guide, and the ESRP are due October 14, 2009.

(c) Options for Streamlining Review of Research and Test Reactor (“RTR”)

Past agency staffing issues, limited licensee resources, and poor existing license infrastructure needed to comply with changing regulatory requirements have contributed to a backlog in the NRC’s review of RTR license renewal applications, many of which are greater than 4 years old. In response, the NRC Staff submitted for Commission consideration several options delineated in SECY-08-0161 for streamlining the review process. Those options included adopting: (1) an alternate safety review; (2) a risk-based graded approach; (3) a generic analysis approach based on similar reactor designs; (4) a generic siting analysis; or (4) extending the license terms for RTRs.

In response, the Commission, in March and August 2009, approved the implementation of the graded approach whose scope is commensurate with the risk posed by each facility combined with elements of the alternate safety review option. Second, the NRC Staff was directed to initiate immediate short-term measures to complete reviews of the outstanding applications within an 18-month period. During an August 2009 Commission briefing, the NRC Staff indicated that the backlog would be eliminated by the end of fiscal year 2010 with the goal of establishing the new streamlined process by 2014.

4. Veteran Hospital Medical Events

In May 2008, the Veterans Affairs Medical Center in Philadelphia, Pennsylvania (“VA Philadelphia”) notified the NRC of a prostate cancer procedure in which the patient received a radioactive dose more than twenty percent lower than prescribed. The treatment, brachytherapy, was intended to implant 125 iodine seeds into the patient’s prostate in order to create a “radioactive cloud” that would conform to and treat the disease. A subsequent investigation revealed an additional ninety-one medical events at VA Philadelphia – fifty-seven events where the dose delivered to the prostate was less than prescribed and thirty-five involving an unintended dose to an organ or tissue. Virtually none of the substandard implants were reported. Thus, according to the NRC, errors went uninvestigated for months or years, during which many patients were unaware of their flawed treatment.

The NRC investigation identified six violations of NRC regulations, including the failure to: develop adequate written procedures to ensure prostate seed implant procedures are performed in accordance with NRC regulations; develop procedures to ensure practitioners follow those written procedures; train supervised and unsupervised individuals to identify and report medical events to regulators; record patients’ total dose in written directives; and follow reporting requirements. Following the NRC investigation, five programs at Veterans Affairs hospitals, including the program at VA Philadelphia, were suspended.

Most recently, the NRC announced on July 28, 2009 that it is conducting a special inspection at Gamma Knife Center of the Pacific in Honolulu. Weeks earlier, a patient being treated for brain cancer received a larger than prescribed dose of gamma radiation. The NRC is expected to issue its report in early September 2009.

5. Issuance of Proposed Rule: Enhancement to Emergency Planning

On May 18, 2009, the NRC published a proposed rule, “Enhancements to Emergency Preparedness Regulations,” in the *Federal Register*. The proposed rule would codify certain voluntary protective measures contained in NRC Bulletin 2005-02, “Emergency Preparedness and Response Actions for Security Based Events,” and other generically applicable requirements similar to those previously imposed by Commission orders after the September 11, 2001 terrorist attacks. The proposed amendments would apply to current power reactor licensees, applicants for operating licenses under Part 50 or combined licenses under Part 52, applicants for construction permits under Part 50, and certain applicants for early site permits under Part 52. This rulemaking would serve to establish consistent requirements across the nuclear power industry for hostile action events.

6. Davis-Besse Misconduct – Approval of Siemaszko Settlement and Geisen Appeal

In July 2009, the NRC approved a settlement in the NRC enforcement hearing against former nuclear power plant engineer Andrew Siemaszko, ending the proceeding and barring Siemaszko from any involvement in NRC licensed activities until April 2010. The Siemaszko case stemmed from violations of NRC regulations associated with significant reactor vessel head damage discovered in 2002 at the Davis-Besse Nuclear Power Station. Siemaszko was responsible for reactor vessel head cleaning during a 2000 outage. The NRC found that Siemaszko deliberately provided incomplete and inaccurate information regarding the cleaning and condition of the head to the NRC. Once the ban ends, the settlement requires Siemaszko to notify the agency within twenty days of accepting an NRC regulated job, explaining why the NRC should have confidence he will comply with the regulations.

On August 28, 2009, a three member panel of an ASLB set aside, in a 2-1 decision, the Enforcement Order against David Geisen. The Geisen Enforcement Order stemmed from the same incident at Davis-Besse as the Siemaszko settlement. A majority of the Licensing Board held that the NRC Staff failed to show by a preponderance of the evidence that Mr. Geisen engaged in the deliberate misrepresentation with which he was charged. The decision underlies the point that the burden is on the NRC Staff to thoroughly investigate, support, and ultimately prove allegations. The NRC’s Administrative Judges are independent of the NRC Staff, have the ability to be critical of the NRC Office of Investigation conclusions, and will be sensitive to and protective of the rights of individuals.

7. Issuance of Proposed Rule (Part 31)

On August 3, 2009, the NRC proposed a rule to amend its regulations to limit the quantity of byproduct material contained in a generally licensed device to below one-tenth of the International Atomic Energy Agency Category 3 thresholds. 74 Fed. Reg. 38,372. The NRC hopes the proposed rule will provide greater device accountability, improve control of radioactive sources, protect public health and safety, and improve common defense and security. The amendment would require individuals possessing devices with byproduct material meeting or exceeding these thresholds to apply for and obtain a specific license. In determining the limit on generally licensed devices, the NRC considered the need to securely handle and use these

materials without discouraging the beneficial use of these devices in academic, medical and industrial arenas. The NRC is also proposing to further clarify the requirements that apply when a device authorized to be used under the general license is, instead, held under a specific license. Finally, the proposed amendments would modify the Compatibility Categories contained in the current regulations. Comments on the rule are due by October 19, 2009, and comments specific to the information collection aspects of the rule were due by September 2, 2009.

8. Proposed Rule to Modify 10 CFR 72 License and Certificate of Compliance Terms

On September 15, 2009, the NRC published a proposed rule: “License and Certificate of Compliance (“CoC”) Terms” in the *Federal Register*. The proposed rule would clarify the term limits for dry storage cask CoCs and independent spent fuel storage installation (“ISFSI”) specific licenses by amending 10 C.F.R. §§ 72.238 and 72.42, respectively. Specifically, the proposal would extend the initial and renewal license terms for site-specific ISFSI licenses from a term not to exceed 20 years to a term not to exceed 40 years. To address the lack of consistency between the general and specific ISFSI license term requirements, the proposal would impose a similar 40-year license renewal term on general licensees. The proposed rule also would allow general licensees to implement changes associated with CoC amendments to previously loaded casks without agency approval, provided certain conditions are met. The basis for the 20-year license term was “rooted in the philosophy that an ISFSI provides for interim storage of [SNF] and not long-term or permanent storage.” However, after the Commission approved an exemption request to increase the Surry ISFSI license term to 40 years, it “acknowledge[d] the likely need for licensees to continue to store some spent fuel on site beyond the current 20-year ISFSI license period.”

9. SECY-09-0090—Final Update Waste Confidence Decision

On June 15, 2009, the NRC issued a final update of the Commission’s Waste Confidence Decision. The Waste Confidence proceedings, which the NRC first initiated in October 1979, resulted in five findings. The NRC is proposing to amend Findings 2 and 4. The objectives of Finding 2 were to predict when a repository for high-level waste and spent fuel would be available for use and how long spent fuel would need to be stored on a reactor site pending the opening of the repository. The NRC has revised Finding 2 to state that the Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available within 50-60 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level radioactive waste and spent fuel generated up to that time. Finding 4 reflects the NRC’s confidence that spent fuel can be stored safely for several decades without impacting the environment. In 1984, the NRC determined that spent fuel could be stored safely for at least 30 years beyond the expiration of a reactor’s operating license. In 1990, the NRC changed this timeline to 30 years beyond a 40 year initial license and 30 year license renewal period for a total of at least 100 years. Now, based on the NRC’s review of spent fuel pools and dry cask storage along with post-9/11 security enhancements and study results, the NRC has revised Finding 4 to state that spent fuel can be stored safely for at least 60 years beyond the life of a reactor’s license in spent fuel storage basins or dry storage facilities.

10. Status of Gas Enrichment Applications

(a) AREVA Hearing Order – CLI-09-15

On December 30, 2008, Areva Enrichment Services (“AES”) filed with the NRC an application, safety analysis report and environmental report for its proposed uranium enrichment facility. The facility, to be known as the Eagle Rock Enrichment Facility, is to be located in Bonneville County, Idaho. On March 12, 2009, the NRC Staff notified AES that its application was accepted for formal review. Subsequently, AES filed a revised application, doubling the capacity of the facility to 6.6 million separative work units per year. On April 30, 2009, the NRC accepted the revised application for review, and later published notice of its intent to prepare an environmental impact statement (“EIS”).

On July 23, 2009, the NRC issued its notice of hearing in the AES proceeding. As the proposed location for the facility is within the jurisdictional boundaries of the Ninth Circuit, the NRC is obligated to ensure that its EIS considers the environmental impacts of a terrorist attack at the facility, as required by *San Luis Obispo Mothers for Peace*.¹³ Petitions to intervene in the licensing proceeding are due September 28, 2009. The NRC estimates that it will issue a decision on the application within two and a half years from the date of the hearing order.

(b) Acceptance of General Electric Hitachi Application

On August 17, 2009, the NRC accepted for formal review an application by General Electric-Hitachi Global Laser Enrichment (“GE Hitachi”) for a license to construct and operate a uranium enrichment plant using laser technology in Wilmington, N.C. GE Hitachi submitted its application in two stages: an environmental report, submitted in January 2009, and a safety report, tendered in June 2009. The NRC’s licensing review will proceed on two tracks: an environmental impact statement, which will be published in draft for public comment, and a technical safety review. The Commission anticipates these reviews and adjudicatory hearings will take approximately 30 months.

11. Pending Commission Decision re Safety Culture Policy

On May 18, 2009, the NRC Staff issued SECY-09-0075, “Safety Culture Policy Statement,” which requests Commission approval to publish a draft safety culture policy statement) in the *Federal Register*. SECY-09-0075 develops a single safety culture statement that stresses the equal importance of safety and security within the overarching safety culture. It concludes that the NRC’s oversight of safety culture as applied to reactors is effective and continues to be refined in accordance with the existing reactor oversight process self-assessment process. It further describes actions taken and planned for increasing attention to safety culture in the materials area and for effectively utilizing stakeholder involvement to address safety culture. The Commission appears poised to approve the Draft Statement for publication in the *Federal Register*. The NRC Staff recommends a 75 day comment period to facilitate additional

¹³ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007).

discussions with stakeholders prior to the development of a final policy statement. It is expected that the final policy statement will be issued in early 2010.

12. Enforcement Summary

A major revision of the NRC's Enforcement Policy is under development. The Enforcement Policy contains the policy and procedures that support the agency's review and disposition of possible infractions of its regulatory requirements. The current Enforcement Policy covers eight activity areas: (1) Reactor Operations; (2) Part 50 Facility Construction; (3) Safeguards; (4) Health Physics; (5) Transportation; (6) Fuel Cycle and Materials Operations; (7) Miscellaneous Matters; and (8) Emergency Preparedness. The updated Enforcement Policy will address enforcement issues in areas not fully addressed in the policy supplements including: (1) the agency's use of the Alternative Dispute Resolution process; (2) enforcement issues associated with combined licenses for the proposed new reactors; (3) enforcement issues associated with the construction phase of proposed fuel facilities; and (4) enhanced requirements in the areas of safeguards and security, and fitness-for-duty.

In July 2009, the NRC issued its fourth annual "Report to Congress on the Security Inspection Program for Commercial Power Reactor and Category [CAT] I Fuel Cycle Facilities: Results and Status Update."¹⁴ That report fulfills the requirements set forth in the Energy Policy Act of 2005 to keep Congress and the public informed of the NRC's efforts to protect the public health and safety, the common defense and security, and the environment. For calendar year 2008, the NRC conducted 182 security inspections. Those inspections identified 125 findings that were of very low security significance.

The escalated enforcement trends for *Traditional* (i.e., those involving Severity Levels and possibly civil penalties) and the Significance Determination Process ("SDP") of the Reactor Oversight Process from 2001 to August 2009 *not identified during security inspections* are provided below in the following data tables:

¹⁴ CAT I fuel cycle facilities are those that use or possess formula quantities of uranium-235 (contained in uranium enriched to 20 percent or more in the uranium-235 isotope), uranium-233, or plutonium.

Figure 1 -- Traditional Historical Enforcement Summary

	Number of Escalated Enforcement Actions	Number of Escalated Enforcement Actions w/CP	Number of Escalated Violations	Proposed Civil Penalty (CP) Amount	Average CP per Escalated Enforcement Action
2001	6	3	6	\$198,000	\$66,000
2002	3	2	4	\$348,000	\$174,000
2003	6	2	6	\$120,000	\$60,000
2004	8	4	8	\$208,000	\$52,500
2005	12	8	17	\$5,886,000	\$735,750
2006	10	3	10	\$229,000	\$76,333
2007	6	3	6	\$260,000	\$52,000
2008	3	2	3	\$930,000	\$465,000
As of Sept. 09	3	1	5	\$65,000	\$65,000

Figure 2 -- Historical SDP Enforcement Summary

	Number of Escalated Enforcement Actions ^{1/}	Number of Escalated Findings ^{2/}	White Findings	Yellow Findings	Red Findings
2001	18	20	18	2	0
2002	24	26	24	0	1
2003	13	16	11	2	2
2004	15	16	15	0	0
2005	17	17	14	2	1
2006	16	17	14	0	0
2007	11	11	9	2	0
2008	8	8	8	0	0
As of Sept. 09	9	9	1	0	0

13. Status of Decommissioning Funding Issues

In June 2009, the NRC contacted the licensees of 18 nuclear power plants to clarify how they will address the recent economic downturn's effects on decommissioning funds. Nuclear power plant licensees are obligated to set aside funds during the operating life of reactors to ensure that the reactor sites will be properly cleaned up once the reactors are permanently shut down. The NRC does not consider current shortfalls to be a safety issue, but the Commission will be working with licensees to ensure that decommissioning funds recover any shortfalls caused by the economic downturn. The specific deadlines for fund recovery have not yet been established.

14. EnergySolutions

As previously discussed, on May 15, 2009, the United States District Court for the District of Utah ruled that the Northwest Compact lacks authority to restrict EnergySolutions' receipt of waste generated outside the Compact region. The Commission had been holding in abeyance its review of EnergySolutions' import and export applications pending resolution of the district court proceeding since October 2008. In light of the court's recent decision, the Commission sought the views of the potential parties in the proceeding regarding how the Commission should proceed. In June 2009, Utah, HEAL Utah, the Northwest Interstate Compact and EnergySolutions filed views with the Commission. The Commission has not yet reached a decision on how to proceed.

15. Risk-Informed Changes to Analyze Emergency Core Cooling Systems During Accidents

On August 10, 2009, the NRC published a supplemental proposed rule: "Risk-Informed Changes to Loss-of-Coolant Accident [LOCA] Technical Requirements" in the *Federal Register*. Specifically, the NRC is proposing an alternative set of risk-informed requirements that licensees may voluntarily choose in lieu of the current requirements for analyzing the performance of emergency core cooling systems in 10 CFR § 50.46. The alternative requirements will enable some licensees to change aspects of facility design and procedures. The supplemental proposal also addresses recommendations made by the Advisory Committee on Reactor Safeguards in its comments on the 2005 draft final rule (and later affirmed by the Commission in 2007) to increase the defense-in-depth provided by the rule for LOCA accidents.

16. Industry Response to Pandemic Planning

Over the past three years, the industry has been preparing response plans so that nuclear power plants can safely operate and maintain electricity grid stability in the event of a global influenza outbreak. These efforts are especially timely given the recent H1N1 influenza developments. The NRC has its own pandemic response plan, developed by the Office of Nuclear Reactor Regulation. Based on this plan, the NRC will be able to maintain its essential functions and services in the face of a pandemic, *i.e.*, to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment. In addition, the plan recognizes the need for the NRC to anticipate and be prepared for responding

to needs during a pandemic to monitor and ensure adequate safety while allowing licensees to maintain essential services to the public.

B. Important NRC Adjudication Developments

1. Vogtle ESP Initial Decision

On August 26, 2009, Southern Nuclear Operating Co. (“SNC”) became the fourth applicant (Exelon Corporation’s Clinton Plant, Entergy’s Grand Gulf Plant and Dominion’s North Anna Plant were the first three) to receive an early site permit (“ESP”) from the NRC. However, SNC was the first applicant to receive a technology-specific ESP and an ESP that includes a limited work authorization (“LWA”). The LWA will allow limited construction to begin on the reactors, including the placement of backfill and retaining walls, prior to SNC’s receipt of its COL. The ESP is valid for 20 years and can be renewed. The issuance of an ESP indicates that the NRC has determined the Vogtle site in Augusta, Georgia is suitable for the two proposed reactors, but it does not commit SNC to building and operating a plant there. SNC submitted its ESP and LWA request in August 2007 and its COL application in March 2008. SNC expects to have Vogtle Units 3 and 4 operating in 2016 and 2017, respectively.

2. Vermont Yankee LR Full Initial Decision

New England Coalition, Inc. (“NEC”), a petitioner in the license renewal proceeding for Entergy Nuclear’s Vermont Yankee Nuclear Power Station in Windham County, Vermont, submitted a new contention challenging the adequacy of Entergy’s recent calculations concerning the environmentally adjusted cumulative usage factor (“CUFen”) analyses for metal fatigue for the core spray and reactor recirculation outlet nozzles. The ASLB, in LBP-09-09, issued on July 8, 2009, denied the motion.

LBP-09-09 was the Board’s final decision as the ASLB had issued a partial initial decision on November 24, 2008. In that decision, the Board concluded that Entergy’s CUFen reanalyses were deficient because they used an inappropriate methodology. Entergy was instructed to either recalculate the CUFen using an appropriate analysis or submit an adequate aging management program for those components. The Board also held that NEC could file new or amended contentions challenging the CUFen analyses if the analyses did not use a new approach, contained significantly different scientific or technical judgments, or demonstrated values more than unity.

Entergy submitted CUFen reanalyses using the suggested methodology and confirmed that the CUFen values were less than unity. Nevertheless, NEC filed its motion. The Board rejected it because Entergy met the requirements for CUFen reanalyses, NEC’s motion renewed challenges that had already been resolved in the proceeding, and NEC raised new arguments that did not meet the requirements for new contentions under the NRC’s regulations. Thus, LBP-09-09 constitutes the ASLB’s Initial Decision.

3. Crow Butte CLI-09-12 and CLI-09-09

Crow Butte Resources, Inc. (“CBR”) currently has two proceedings before the NRC – a license renewal proceeding for its existing *in situ* leach uranium mine in Nebraska, and a license application for the North Trend expansion of its mine. In the license renewal proceeding, the Commission issued CLI-09-09 on May 18, 2009, affirming the ASLB’s ruling granting standing for all of the petitioners, except for two organizations, which the Commission believed did not supply sufficient affidavits authorizing organizational representation. The Commission remanded the issue to the ASLB to provide the two organizations with the opportunity to submit amended affidavits. The Commission also reversed the ASLB’s decision on the admission of five contentions related to cultural resources, waste removal, the economic value of environmental benefits, foreign ownership, and arsenic. A group of consolidated petitioners had appealed the ASLB’s initial decision regarding 11 of the 19 proposed contentions that the ASLB rejected, but the Commission denied the petitioners’ appeal. Finally, the Commission granted CBR’s motion for summary disposition of a contention concerning CBR’s foreign ownership.

In the North Trend proceeding, the Commission issued a decision, CLI-09-12, on June 25, 2009. The Commission affirmed the ASLB’s ruling on standing for all petitioners. The NRC also affirmed, in part, the Board’s granting of a hearing on contentions related to the contamination of water resources and the environmental and health impacts of this contamination. The Commission combined the admissible parts of these two contentions into one revised contention addressing the technical and environmental impacts of *in situ* leach uranium mining on a local river and aquifers. The Commission reversed the Board’s decision to admit contentions related to consultation with Indian tribes, foreign ownership, and arsenic. Finally, the NRC declined to direct the Board to apply the formal hearing procedures of 10 CFR Part 2, Subpart G.

4. License Renewal Orders

(a) Pilgrim

In CLI-09-11, the Commission requested additional briefing on Entergy’s severe accident mitigation alternatives (“SAMA”) analysis for its Pilgrim Nuclear Power Plant. The SAMA contention was submitted by intervenor Pilgrim Watch in the proceeding stemming from Entergy’s application to renew the operating license for its Pilgrim plant for an additional 20 years. After several ASLB decisions in the proceeding, Pilgrim Watch filed a petition for Commission review. Both Entergy and the NRC Staff opposed the petition.

One of Pilgrim Watch’s principal challenges was to LBP-07-13, which dismissed Pilgrim Watch’s contention that questioned the SAMA “input data” for evacuation, economic and meteorological information. The Commission deferred a decision on all of Pilgrim Watch’s challenges pending briefing of Pilgrim Watch’s SAMA contention. The Commission stated that the briefs should address whether Pilgrim Watch provided support for its claim that there is a genuine material dispute that could lead to a different conclusion on potential cost-beneficial SAMAs; and whether it was appropriate for the Board majority to exclude challenges to the use of particular methodologies to determine economic costs and the atmospheric dispersion of

radionuclides. The briefs and responsive briefs were filed in June and July. The Commission has yet to issue a further decision.

(b) Pilgrim/Vermont Yankee

The Commonwealth of Massachusetts has petitioned the U.S. Court of Appeals for the First Circuit to review the Commission's decision to deny the Commonwealth's petition for rulemaking. The Commonwealth petitioned for a rulemaking related to the GEIS Category 1 finding on spent fuel pool storage impacts. In August 2008, the NRC denied the petition for rulemaking, finding that the spent fuel pool environmental impact findings in the GEIS remain valid.

In light of its appeal to the First Circuit, the Commonwealth petitioned the Commission for review of LBP-08-22 and LBP-08-25 (both partial initial decisions) in the Pilgrim Nuclear Power Plant and Vermont Yankee Nuclear Power Plant license renewal proceedings. In its petition for review of the decisions, the Commonwealth requested that the NRC either defer a final decision in the license renewal actions until the above rulemaking litigation is completed or "expressly condition" any license renewal "on compliance with the court ruling." Because the Commonwealth did not participate in either of the license renewal proceedings, and the petitions for review did not challenge anything the Board decided, the Commission construed the petitions for review as requests for direct Commission action. The Commission denied relief to the Commonwealth, but provided assurance that if the Court of Appeals issues a decision in favor of the Commonwealth, the Commission will issue an order indicating whether further steps in the Pilgrim and Vermont Yankee proceedings are necessary. It further stated that its commitment to effectuate the First Circuit's conclusion renders unnecessary the relief the Commonwealth seeks.

(c) Oyster Creek

Various parties petitioned the Commission for review of the ASLB's initial and interlocutory decisions in Amergen Energy Company, LLC's ("Amergen") license renewal proceeding for its Oyster Creek Nuclear Generating Station. The petitioners initially challenged the frequency of scheduled monitoring in the sand bed region of the drywell shell. In its decision, LBP-07-17, the Board rejected the parties' challenge to the application finding that the applicant had provided reasonable assurance of the frequency of its monitoring of the sand bed. In an Additional Statement attached to LBP-07-17, Judge Barratta questioned whether there was reasonable assurance that the safety factor required by NRC regulations would be met throughout the period of extended operation under a four-year inspection cycle.

Following issuance of the Board's decision, the applicant notified the Commission and the Board of several cracks and a rust stain in the drywell shell that the applicant noticed during a recent refueling outage. The NRC Staff evaluated the development and submitted a completed post-outage Inspection Report of the drywell shell. Subsequently, the petitioners filed a motion to reopen the record and postpone final disposition of the proceeding, because the petitioners argued the Report contained facts contradictory to witness testimony in the earlier proceeding.

In its April 1, 2009 decision, CLI-09-07, the Commission denied the motion to reopen the record for failure to satisfy the reopening standards, and affirmed LBP-07-17, finding that the

petitioners had not met their burden for showing that their petition for review should be granted. Nonetheless, the Commission undertook review of LBP-07-17 for two purposes: (1) to clarify the Board's decision in light of the Additional Statement and (2) to direct the NRC Staff to enhance its review and verification of Exelon's compliance with License Condition 7, which directs AmerGen to perform a 3-D finite element structural analysis of the drywell shell. Apart from this limited review, the Commission denied the petition for review and terminated the proceeding.

Chairman Jaczko dissented in part, arguing that the Inspection Report provides evidence that directly contradicts evidence the Board relied upon when ruling against the petitioners. Chairman Jaczko suggested that the Board should have admitted the Inspection Report into evidence, rendering moot the motion to reopen the case.

5. Levy COLA

An ASLB ruled on July 8, 2009, in LBP-09-10, that three environmental groups in Florida have standing to challenge three elements of Progress Energy Florida's plan to build two Westinghouse AP1000 reactors in Levy County. The three groups challenging licensing of the reactors (the Green Party of Florida, the Nuclear Information and Resource Service, and the Ecology Party of Florida) are challenging the location of the Levy station's radioactive waste storage, the impacts of the project on the site's wetlands, and the impacts of "salt drift." Progress Energy plans to use salt water to cool the two units, and the groups claim that salty vapor from the cooling towers could detrimentally affect nearby freshwater sources. The ASLB rejected nine of the groups' contentions, and has not yet scheduled the hearing to address the three admitted contentions.

6. Harris COLA

In LBP-08-21, the ASLB admitted one of the North Carolina Waste Awareness and Reduction Network's ("NC WARN") 10 contentions. NC WARN argued that Progress Energy Carolinas, Inc.'s COLA for its Shearon Harris Nuclear Power Plant, Units 2 and 3 was incomplete because many of the major safety components and procedures, including its AP1000 advanced pressurized water power reactor, are conditional at this time. The NRC Staff and Progress Energy appealed the ASLB's decision, and the Commission, in CLI-09-08, granted the appeals and remanded the proceeding to the ASLB to reassess the admissibility of the contention. The Commission also denied NC WARN's motion to hold the proceeding in abeyance pending completion of the NRC's rulemaking on the AP1000 reactor.

In LBP-09-08, the Board reviewed the admitted contention and found that it was inadmissible because it addressed an issue that was part of the design certification rulemaking process. Thus, because NC WARN did not present an admissible contention, the ASLB denied its petition to intervene and ended the proceeding. On July 22, 2009, NC WARN appealed the ASLB's decision to the NRC asking the Commission to reverse LBP-09-08 and LBP-08-21 and consider all 11 of NC WARN's contentions. The Commission has yet to rule on NC WARN's appeal.

7. Prairie Island

In April 2008, Northern States Power Co. (“NSPM”) requested renewal of the operating licenses for Prairie Island Nuclear Generating Plant, Units 1 and 2. Prairie Island Indian Community (“PIIC”) submitted eleven proposed contentions on the renewal application, seven of which were admitted by the Licensing Board. In response to the admission of contentions, NSPM has supplemented its application and has succeeded in having five of the seven admitted contentions dismissed. On April 14, 2009, the Licensing Board granted the approval of a settlement between NSPM and PIIC on three of PIIC’s admitted contentions, all contentions of omission. (Contention 1 related to the discussion of historic and archaeological resources in the Environmental Report (“ER”); Contention 6 alleged that the LRA failed to include a plan to manage the aging of containment coatings; Contention 11 alleged that the LRA did not provide sufficient details of the AMP for flow accelerated corrosion.) NSPM augmented its ER and LRA to address the deficiencies alleged in the settled contentions to the satisfaction of PIIC. On July 16, 2009, the Licensing Board approved settlement on Contention 2, which alleged that the SAMA analysis did not accurately reflect the site restoration costs for the PIIC property, the value of that property, and the effects on the Treasure Island Resort Casino. NSPM provided a sensitivity analysis addressing PIIC’s concerns without requiring disclosure of PIIC’s confidential financial information. Accordingly, PIIC has agreed to withdraw Contention 2.

8. Fermi COLA

On July 31, 2009, the Licensing Board in LBP-09-016 ruled on hearing requests in the Fermi Nuclear Power Plant, Unit 3 proceeding. Thirteen petitioners, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, the Sierra Club and eight individuals, sought jointly to intervene in the proceeding. The Licensing Board determined that all thirteen petitioners had established standing to intervene. The Licensing Board also admitted for hearing four of the fourteen contentions proffered by the petitioners. The admitted contentions concern: extended onsite storage of Class B and C wastes; on-site measurement of hydrologic transport with regard to exceedance of effluent concentration limits in accidental releases to groundwater; the potential contribution of chemical and thermal effluents to the algal population and the potential proliferation of a newly identified species of harmful algae; and impacts on the eastern fox snake.

9. Vogtle COLA (CLI-09-16 and CLI-09-13)

Five organizations have challenged SNC’s COLA for its Vogtle Electric Generating plant, Units 3 and 4. The ASLB, in LBP-09-3, admitted one of the petitioners’ contentions, but rejected two contentions that challenged the completeness of the COLA, because it references design control document revisions still under review by the Commission. The Board referred its ruling denying the two contentions to the Commission. In CLI-09-13, the Commission declined to review the Board’s rulings because the NRC’s consideration would not advance the orderly disposition of the Board’s proceeding. Furthermore, the Commission stated that it had addressed the same issue in a number of other COL matters and did not feel the need to revisit it in this proceeding.

One month later the Commission addressed the NRC Staff's and SNC's appeals of the ASLB's decision to admit one of the petitioners' contentions in LBP-09-3. The Board reformulated the petitioners' contention rejecting the portion of the contention relating to disposal of low-level radioactive waste ("LLRW"). The admitted contention stated that the FSAR fails to provide any detail as to how SNC will comply with NRC regulations governing storage of LLRW if an off-site waste disposal facility remains unavailable. The Commission declined to disturb the Board's admission of the contention, but did suggest that the adjudicatory record on the contention would benefit from further development by the Board and the parties.

10. Comanche Peak

Luminant Generation Company, LLC ("Luminant") submitted a COLA on September 19, 2008 for its Comanche Peak Nuclear Power Plant in Somervell County, Texas. On April 6, 2009, petitioners Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, and State Representative Lon Burnam filed petitions for intervention and requests for a hearing, seeking the admission of 19 contentions. Neither the NRC Staff nor Luminant contested the petitioners' standing, but both parties argued against the admissibility of all 19 contentions. In LBP-09-17, issued on August 6, 2009, the ASLB granted standing to all of the petitioners, and admitted two of the 19 contentions.

The two admissible contentions relate to Luminant's failure to address the impacts from a severe radiological accident on any of the existing units at the Comanche Peak site as well as the applicant's failure to include in its environmental report any consideration of alternative energy sources to create baseload power. The Board also stated that it would rule at a later date on the mootness of one contention, relating to the applicant's description and plans for implementation of the guidance strategies used to maintain or restore core cooling, containment and spent fuel cooling capabilities with the loss of large areas of the plant due to explosions or fires.

The remaining inadmissible contentions concerned the reactor design, high-level waste, long-term on-site waste storage, off-site waste disposal, radiological discharge into a local reservoir, MOX fuel, global warming, foreign sources of uranium, decommissioning, and aircraft attacks. The Board has not yet set a hearing date to address the admitted contentions.

11. Bell Bend

On August 20, 2009, the Licensing Board in LBP-09-18 issued its decision on standing and contentions in the Bell Bend Nuclear Power Plant licensing proceeding. Two petitions to intervene were submitted in the proceeding, one by Gene Stilp and Taxpayers and Ratepayers United ("TRU"), and the other by Eric Joseph Epstein. The Licensing Board found that Stilp and TRU had standing, but failed to proffer a single admissible contention, and that Epstein did not have standing. Accordingly, the Licensing Board terminated the proceeding. The Board's ruling on Epstein's standing demonstrates that petitioners bear an affirmative burden to clearly state the facts establishing the number, length and frequency of their contacts with the proposed action – a lack of specificity in this regard is sufficient to reject claims of standing. On August 10, 2009, Epstein filed an appeal of the Licensing Board's decision on his standing and one of his proffered contentions, pertaining to storage of Class B and C wastes. The Commission has not yet ruled on Epstein's appeal.

12. Calvert Cliffs

In LBP-09-15, which arose from UniStar Nuclear Operating Services, LLC's ("UniStar") COLA submission for its Calvert Cliffs Unit 3 ("CC3") in Calvert County, Maryland, the ASLB granted the NRC Staff's motion for summary disposition of Contention 2. The ASLB, in an earlier decision (LBP-09-04), admitted Contention 2, which asserts that CC3 cannot rely on a financial parent guarantee because UniStar does not pass the NRC's financial test. The ASLB initially concluded that it was beyond its authority to require UniStar to choose a particular method of decommissioning funding, and therefore did not admit the Intervenor's request that it direct the Applicant to use the prepayment method. However, the ASLB found that the contention required resolution of a legitimate issue of law: the proper timing for an applicant to demonstrate that a parent company guarantee complies with the financial test.

Subsequently, the NRC Staff submitted a motion for summary disposition of the contention, UniStar supported the NRC Staff's motion, and argued, in the alternative that the contention was moot because UniStar provided the decommissioning information required by the NRC's regulations and the intervenors did not create a genuine dispute on that issue as required to survive a motion for summary disposition.

In LBP-09-15, the ASLB resolved the timing of the financial test issue in favor of the intervenors. The ASLB concluded that the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the COLA. The ASLB therefore denied the motion for summary disposition on the ground argued by the Staff. The ASLB agreed, however, with UniStar's alternative argument for summary disposition and therefore granted the motion.

C. High Level Waste Storage and Disposal Developments

1. CABs Issue Initial Standing Order

On May 11, 2009, the Construction Authorization Boards ("CABs") issued its first pre-hearing conference order, LBP-09-06, in the Yucca Mountain proceeding. The CABs admitted 299 of the 318 proposed contentions. The CABs granted the petitions to intervene of eight parties: the State of Nevada, the Nuclear Energy Institute, Nye, the State of California, Clark County, Inyo County, White Pine County, and Churchill, Esmeralda, Lander and Mineral counties (jointly). The CABs rejected the petition of the Caliente Hot Springs Resort, which failed to demonstrate standing. The Timbisha Shoshone Tribe and the Timbisha Shoshone Yucca Mountain Oversight Program (acting jointly), and the Native Community Action Council were not admitted because of their failure to comply with the NRC's Licensing Support Network (these petitioners could be admitted at a later date if they demonstrate compliance.) Eureka and Lincoln counties in Nevada were granted status as interested governmental participants. The CABs noted that an unusually high proportion of proposed contentions were admitted, but noted that many are identical or nearly identical in their arguments. These contentions are likely to be consolidated or grouped together to facilitate case management.

2. Commission Issues Order on Appeal

On June 30, 2009, the Commission voted, in a 4-0 decision, to uphold the CABs' initial standing order. The NRC Staff had appealed LBP-09-06 on the ground that the CABs improperly admitted forty contentions, and Clark County appealed the CABs' decision to reject one of its contentions. The Commission rejected most of the NRC Staff's appeal and rejected Clark County's appeal. In addition, the Commission rejected two Nevada contentions challenging DOE's managerial competence and institutional integrity. The Commission determined that these contentions were impermissible challenges to the Nuclear Waste Policy Act ("NWPA"), and, as a petitioner may not challenge applicable statutory requirements as part of an administrative action, therefore beyond the scope of the Yucca licensing proceeding.

3. Budgetary Impact on Hearing Process

On May 2009, the Department of Energy reduced the budget of the Office of Civilian Radioactive Waste Management for fiscal year 2010 to \$197 million, a cut of almost \$90 million from the previous fiscal year. The budget document states that the decision "implements the [Obama] administration's decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives." All funding for development of the Yucca Mountain facility would be eliminated, and the remaining funding for Yucca Mountain in the new budget is directed toward a Blue Ribbon Commission (discussed below). The Department of Energy will continue its participation in the NRC licensing proceedings which it believes will provide helpful information.

4. Blue Ribbon Panel

Energy Secretary Steven Chu is creating a Blue Ribbon Commission to study long-term solutions for managing nuclear waste in the United States. Prior to the commission being formed, both Secretary Chu and President Obama stated that the nuclear materials repository at Yucca Mountain, Nevada, would not be one of the options considered. The House of Representatives then passed a bill requiring the Blue Ribbon Commission to examine "all nuclear waste disposal alternatives," including Yucca Mountain.