

**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, Independent Spent Fuel Storage Installation)	)	ASLBP No. 12-922-01-ISFSI-MLR- BRD01

**NORTHERN STATES POWER COMPANY’S ANSWER OPPOSING PRAIRIE ISLAND  
INDIAN COMMUNITY’S MOTION TO ADMIT NEW AND AMENDED  
CONTENTIONS**

Northern States Power Company, a Minnesota corporation (“NSPM”), submits its answer opposing the Prairie Island Indian Community’s (“PIIC”) Motion to Admit New and Amended Contentions after Issuance of NRC’s Draft Environmental Assessment (December 12, 2013) (“Motion”).

**I. BACKGROUND**

On December 20, 2012, the Atomic Safety and Licensing Board’s (“Board”) Memorandum and Order granted PIIC’s request for hearing, holding one contention in abeyance and admitting three contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 N.R.C. 503 (2012) (“M&O”). The Board subsequently ordered that any new or amended contentions on new data would be timely if filed within 30 days of when new and material information became available or was otherwise obtained by or provided to PIIC, whichever is sooner. Amended Initial Scheduling Order (Feb. 1, 2013) at 7. On November 7, 2013, the NRC Staff’s Draft Environmental Assessment (“Draft

EA”) became available on ADAMS.<sup>1</sup> On December 12, 2013, PIIC submitted its Motion seeking leave to file new or amended contentions ostensibly based on the Draft EA.

## II. STANDARDS FOR CONTENTIONS

### A. Timeliness

Contentions must be based on information available at the time the petition is filed. 10 C.F.R. § 2.309(f)(2). In particular, 10 C.F.R. § 2.309(f)(2) states, “[o]n issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant’s environmental report.” As the Commission has explained, “[i]t is essential to efficient case management that intervenors file contentions on the basis of the applicant’s environmental report and not delay their contentions until after the Staff issues its environmental analysis.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 N.R.C. 31, 45 (2004)(footnote omitted).

An intervenor may amend or file new environmental contentions if there are data or conclusions in the NRC’s draft or final environmental assessment that differ significantly from the data or conclusions in the applicant’s documents. 10 C.F.R. § 2.309(f)(2). However, this does not permit new or amended contentions that could have been raised previously. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 385-86 & n.61 (2002). Rather, the filing of new or amended contentions is only permitted where information was not available early enough to provide the basis for a timely filing. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1045 (1983). New or amended contentions based on the Draft EA must be

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<sup>1</sup> NSPM shared the Draft EA with the PIIC on November 12, 2013. The NRC transmitted the Draft EA to the PIIC on November 18, 2013. See NRC Letter to PIIC (ADAMS Accession No. ML13172A424).

based on information that was not previously available, based on information that is materially different from information previously available, and submitted in a timely fashion based on the availability of the subsequent information. 10 C.F.R. § 2.309(c)(1).

### **B. Migration Tenet and Mootness**

Two complementary legal principles apply to PIIC's new and amended contentions: the "migration tenet" and mootness. The migration tenet provides that an admitted contention contesting an applicant's Environmental Report ("ER") is construed as a challenge to a subsequently filed NRC environmental document without the need to file a new or amended contention, if the information in the subsequent document is sufficiently similar to the information in the original document. Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 N.R.C. 19, 26 (2011)(citation omitted). Thus, a new or amended contention is not needed where it merely states that the NRC Staff's environmental document suffers from the same flaw as the applicant's ER. The mootness doctrine, on the other hand, requires a new or amended contention where the NRC Staff's environmental document has addressed an alleged omission in the ER. McGuire/Catawba, CLI-02-28, 56 N.R.C. at 382. Thus, where a contention is superseded by subsequent licensing documents – "whether a draft EIS or an applicant's response to request for information – the contention must be disposed of or modified." Id.

### **C. Admissibility**

Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vi).

### **III. PIIC'S NEW AND AMENDED CONTENTIONS ARE UNTIMELY AND DO NOT MEET NRC STANDARDS FOR ADMISSIBILITY**

#### **A. PIIC's EA Contention 1 is not Necessary Under the Migration Tenet**

PIIC's initial Contention 1 challenged the ER's absence of an evaluation of the environmental impacts of long term storage; EA Contention 1 alleges that "[t]he draft EA is similarly deficient." Motion at 2. Since the Draft EA does not substantively address long term storage issues, EA Contention 1 does no more than assert the same omission in the EA that was alleged in the ER and is already covered by Contention 1. Under the migration tenet, there is no need to amend Contention 1. Levy, LBP-11-1, 73 N.R.C. at 26.

#### **B. PIIC's EA Contention 2 Raises Waste Confidence Issues and is Otherwise Unsupported by Law and Facts**

PIIC would amend Contention 2 to include the failure of the Draft EA to address cumulative impacts in three areas: (1) long term waste storage; (2) impact of the ISFSI expansion on cultural and historic resources; and (3) the potential inability to transport high burnup ("HBU") fuel off site. Motion at 3.

##### **1. Waste Confidence Issues in EA Contention 2 Should Be Held in Abeyance**

The first and third areas of EA Contention 2 are Waste Confidence issues that should be held in abeyance. As PIIC notes, the Board determined that portions of its original Contention 2 implicated Waste Confidence issues and have been held in abeyance. Motion at 3. PIIC requests that its Contention 2 (cumulative impacts) be amended to include Waste Confidence deficiencies "in the draft EA." Id. at 4. Similar to Contention 1, under the migration tenet this amendment is unnecessary. In its original petition, PIIC raised the issue of "long-term storage on site in the event a geologic repository is not available at the end of the term of relicensing, particularly in light of the 'state of flux' surrounding the vacated [Waste Confidence Decision] WCD and

[Temporary Storage Rule] TSR.” M&O at 511. PIIC also raised the issue of “long-term viability of cask storage beyond the forty-year relicensing term and the risks of future transportation.” M&O at 512. The Board held that these issues were within the scope of Contention 1 as held in abeyance. M&O at 513. Likewise, the Waste Confidence issues in EA Contention 2 are within the scope of Contention 1 and should likewise be held in abeyance.

As for transporting HBU fuel, PIIC asserts that “the Draft EA fails to analyze the cumulative impacts of the potential difficulties of transporting the high burnup spent (HBU) fuel that will increase in volume over the life of PINGP” and that such fuel might remain on site indefinitely. Motion at 7. PIIC attempts to distinguish this from Waste Confidence issues claiming that the Waste Confidence proceeding does not focus on the practical difficulties of getting fuel off site. Id. But, PIIC raised this issue in its original Petition (at p. 35 & n. 105) and the Board held that this part of Contention 2 implicated Waste Confidence, and would be held in abeyance. M&O at 513. PIIC is attempting to take another bite of the apple. PIIC’s contention is simply that the Draft EA must evaluate the “possibility of HBU fuel remaining on site.” Motion at 7. Whether this is due to the unavailability of a repository or the alleged “transport difficulties” (id.), the environmental impacts of this potential long term storage is a Waste Confidence issue, and therefore should be held in abeyance.

There is no doubt that the transportation of HBU fuel is a Waste Confidence issue and that the draft Waste Confidence Generic Environmental Impact Statement (“Draft GEIS”) addresses this issue. For example, the draft GEIS discusses the concerns with HBU fuel with respect to the effects of hydride reorientation (e.g., reduced ductility). Draft GEIS at Appendix B p. B-13. That reduced ductility increases the difficulty of keeping spent fuel assemblies intact during handling and transportation. Id. The draft GEIS concludes that, should spent fuel cladding be

more brittle, greater care could be required to limit the potential for damage that could affect retrievability of the spent fuel and complicate repackaging. Id. The draft GEIS states that “[r]epackaging of spent fuel may be needed if storage continues beyond the short-term storage timeframe.” Id. It also evaluates the environmental impacts associated with that repackaging. E.g., id. at 4-5 (describing the land use impacts from building a Dry Transfer facility to facilitate repackaging). PIIC’s concerns are Waste Confidence issues and should be treated accordingly.

PIIC contends that the NRC cannot rely on promises to provide data needed to benchmark models for HBU fuel, and therefore, the EA must evaluate methods to ultimately transport HBU fuel offsite, based on current technology, not long term research and development. Motion at 8. In addition to being a Waste Confidence issue, this contention is unsupported by law, is untimely and lacks specificity with respect to the “other methods to ultimately transport fuel offsite.” NEPA does not bar decision-making when data is uncertain or not available. 40 C.F.R. § 1502.22 (“When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking”); see, e.g., Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir. 1983)(“Notably, the unavailability of information, even if it hinders NEPA’s ‘full disclosure’ requirement, should not be permitted to halt all government action.”). NRC’s draft GEIS states that it “continues to evaluate aging management programs and to monitor dry cask storage so that it can update its service life assumptions as necessary and consider any circumstances that might require repackaging spent fuel earlier than anticipated.” Draft GEIS at B-13. This acknowledgement along with reliance on ongoing studies is sufficient to meet NEPA’s requirements. Furthermore, PIIC points to no legal requirement that to obtain or renew an ISFSI license, there must be an existing certified

method to transport the fuel offsite. In addition, even though PIIC (Motion at 8 n.21), cites to references dated November 2013, none is new information within the timeliness window. The Draft Interim Staff Guidance-24 was published in the Federal Register on July 3, 2013, 78 Fed. Reg. 40,199. The Billone and Yiu November 2013 paper is a summary of a February 2013 Billone paper that is cited in the Draft Interim Staff Guidance-24 at note 4. And the Boyle November 2013 presentation is likewise a summary of prior information describing the DOE High Burnup Fuel Dry Storage Draft Test plan, which has been available since August 2013 and which NSPM disclosed to PIIC in its September 2013 disclosures.

**2. The Assertion that the Future ISFSI Expansion Will Have a High and Adverse Impact is Unsupported by Facts**

PIIC asserts that expanding the PI ISFSI to accommodate 98 casks will have a “high and adverse impact on cultural and historic resources” and that actions must be taken to mitigate these impacts prior to issuing a renewed license. Motion at 4. PIIC’s assertion is wholly unsupported and thus fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). PIIC admits that the NRC evaluated the cumulative impacts of the future ISFSI expansion on archaeological and cultural resources, but simply disagrees with the Staff’s conclusion that there are no high and adverse impacts. Motion at 6. PIIC relies on the Staff’s conclusion that “there is a high probability that additional unrecorded cultural resources may exist within the PINGP property,” but ignores the remainder of the Staff’s analysis. Id. PIIC provides no expert opinion or other references to show that because there is a “potential” for unrecorded cultural resources on the PINGP, the ISFSI expansion will cause a “high and adverse” impact on archaeological and cultural resources. PIIC merely states that it “believes that it is a high and adverse impact – potential destruction of tribal historic and cultural resources is a serious matter[.]” Id. at 5.

PIIC ignores the Draft EA's analysis of the impacts of the ISFSI expansion on archaeological and cultural resources. PIIC states, without support, that it "believes that the NRC staff must require the license applicant to perform additional field investigations before the license is renewed and/or impose a license condition on the applicant to ensure that any potential impacts are mitigated." Motion at 4. But, PIIC fails to address the draft EA's extensive analysis. The NRC Staff reviewed and summarized the archaeological studies that have been performed to date (Draft EA at 3-16 - 3-18), the resources identified on the site (Id. at 3-16 - 3-19), and NSPM's Cultural Resource Management Plan and procedures used to protect archaeological and cultural resources (Id. at 3-18). With respect to the "area of potential effect" ("APE"), i.e., "the PI ISFSI site and access road", the Draft EA described its prior uses, the survey completed in the vicinity of the site, and noted that "[n]o arch[a]eological sites, potential archaeological resources, or sites determined eligible for listing in the NHRP [National Register of Historic Places] are within the APE for this license renewal." Id. at 3-20; 4-10 - 4-11. The NRC Staff reviewed ISFSI construction photographs and concluded that "it is likely that grading activities for construction of the concrete ISFSI pads removed any potential for buried archaeological deposits up to 1.8 m [6ft] below the pad surface." Id. at 4-10. The Draft EA also noted that NSPM has implemented the Cultural Resource Management Plan ("CRMP") "to manage and ensure the protection of archaeological and cultural resources at the PINGP Units 1 and 2," described the contents and use of the CRMP, and noted NSPM's commitment to maintain and implement the CRMP as long as NSPM owns or controls the plant site. Id. at 4-11. It also includes the ISFSI expansion to accommodate up to 98 casks in its cumulative impacts analysis. See Draft EA at 4-24 - 4-25. The Draft EA describes the expansion of the ISFSI and notes that the expansion would occur within the existing ISFSI area. Draft EA at 4-25. Thus, the Staff's review of the existing studies on the



PINGP site, including the ISFSI area, and the ISFSI construction photos support the Draft EA's conclusions with respect to the impacts from an ISFSI expansion. The fact that a more thorough impact analysis will be completed when the ISFSI expansion project is actually designed and a license amendment applied for, as noted in EA Contention 2, does not detract from the fact that the NRC evaluated the impacts in the Draft EA.

Furthermore, the NRC Staff stated that its analysis of potential archaeological and cultural resource impacts, and potential measures to mitigate the impacts, from the ISFSI expansion would be similar to the analysis of decommissioning activities. Id. at 4-40. Thus, the analysis of the impacts of ISFSI decommissioning activities presented in the Draft EA applies to the ISFSI expansion. This decommissioning analysis provides that, if “activities are determined to have the potential to cause disturbance to previously undisturbed soils with the potential to contain archaeological resources, then subsurface testing would be required to determine the significance of the resources that may be present.” Id. at 4-11. It also provides that “[a]rchaeological testing may also be required to determine if unreported human burials are present in accordance with Minnesota’s Private Cemeteries Act . . . prior to ground disturbance.” Id. Finally, through implementation of NSPM’s CRMP and compliance with federal, state, and local requirements, the potential impacts of decommissioning to historic and cultural resources could be SMALL to MODERATE depending on the results of the subsurface tests. Id. PIIC fails to address this analysis, which includes reliance on the CRMP and associated procedures that PIIC itself participated in developing in order to protect archaeological and cultural resources. PIIC provides no factual or expert support to indicate that impacts will be significant, much less disproportionately high and adverse. PIIC’s statement that it “believes” that the NRC should require additional field investigations before the license is renewed and/or impose a license

condition to ensure that any potential impacts are mitigated is not sufficient to establish a genuine dispute. Motion at 4. A statement that an intervenor wants the NRC to require some mitigation measure is not a sufficient demonstration of a genuine dispute to give rise to an admissible contention. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), review denied, CLI-94-2, 39 N.R.C. 91 (1994).

**3. The Assertion that the NRC is Required to Take Action Now to Mitigate the Potential Impacts of Expansion is Unsupported by Law**

The PIIC contends that the NRC must take “action now to mitigate the potential impacts of the expansion” by performing field activities to ascertain whether there are unrecorded cultural resources present in the expansion area for the 98 casks. Motion at 4-6. PIIC asserts that the Commission’s Environmental Justice Policy Statement compels such mitigation. Motion at 5. PIIC is wrong for several reasons. First, NEPA is a procedural statute and does not impose a substantive obligation for a reviewing agency to require or enforce mitigation measures discussed in an EIS. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351, 353 & n.16 (1989). Nothing in the Commission’s Policy Statement even suggests that potential impacts associated with a later proceeding need be mitigated as part of an earlier proceeding not causing those impacts. Furthermore, the Prairie Island Nuclear Generating Plant License Renewal Board rejected the notion that any substantive requirements were imposed by the Commission’s statements that the NRC will “take care to mitigate or avoid special impacts”. Order Granting Motion for Leave to File New Contentions and Denying Their Admission (Feb. 25, 2010), at 7. Rather, the Board found that the NRC must only “determine and discuss whether there are any mitigative measures that could be taken to reduce the impact.” Id. The Draft EA has met this obligation.

PIIC simply disagrees with NRC's decision to rely on the CRMP and associated procedures to mitigate potential future impacts. The NRC Staff's reliance on NSPM's compliance with the CRMP and associated procedures to mitigate future impacts is reasonable and meets the requirements of NEPA. The NRC Staff is entitled to rely on mitigation to demonstrate that environmental impacts will be SMALL, if it has reasonable assurance that monitoring and mitigation will be implemented and successful and that the monitoring and mitigation measures are not options that can be ignored or discarded at will. Levy, LBP-13-4, 77 N.R.C. 107, 218 (2013). The mitigation measures relied on by the NRC, the CRMP and its procedures, as well as compliance with Federal laws, are not merely options, and therefore, the NRC has reasonable assurance that NSPM will comply with these mitigating actions. As noted in the Draft EA (at 3-18), the CRMP and its procedures were developed in cooperation with the PIIC under a Settlement Agreement (attached hereto as Exhibit 1). The Agreement provides that "NSPM will maintain and implement the Plan and the above-described procedures so long as NSPM owns or controls the Plant site." Exhibit 1 at ¶ 7. This Agreement is legally binding, and thus the NRC has reasonable assurance that NSPM will abide by the CRMP to protect archaeological and cultural resources during an ISFSI expansion.

Furthermore, NEPA does not require further data to be collected regarding the future ISFSI expansion in order to make a decision on the current proposed action. "[A]n EIS is required to furnish only such information as appears reasonably necessary under the circumstances for evaluation of the project[.]" NRDC v. Callaway, 524 F. 2d 79, 88 (2d Cir. 1975). Here, the data presented in the Draft EA is sufficient under NEPA because the proposed action, i.e., license renewal, has no impact on archaeological and cultural resources. Thus obtaining additional data on a future project beyond what is currently presented in the Draft EA will not alter the decision

making on the ISFSI license renewal. As stated in the Draft EA, “[a]lthough past, present, and reasonably foreseeable future activities may impact historic and cultural resources in the vicinity of the ISFSI, continued operation of the ISFSI would not have a significant incremental contribution to cumulative impacts.” Draft EA at 4-35. No matter how much additional field work PIIC asserts is necessary to determine the impacts of the ISFSI expansion, the NRC Staff’s conclusion regarding the proposed action will not change because there will be no ground disturbing activities associated with continued ISFSI operation.

#### **4. PIIC’s Original Contention 2 is Now Moot and Must be Dismissed**

PIIC’s original Contention 2, as admitted, alleged that NSPM’s ER was deficient because it failed to address the cumulative impacts of the ISFSI expansion on archaeological resources. As described above, the Draft EA (as well as NSPM’s responses to NRC Staff’s request for additional information available at ADAMS Accession No. ML13073A087) has now addressed this issue. See, e.g., Draft EA at 4-25, 4-35, 4-40. Thus, the omission alleged in PIIC’s original Contention 2 has been cured. As a result, PIIC’s Contention 2 “must be disposed of or modified.” McGuire/Catawba, CLI-02-28, 56 N.R.C. at 382. PIIC has attempted to modify Contention 2, but as described above, this amended contention is not admissible. Thus, PIIC’s Contention 2 remains as a contention of omission that must now be dismissed because it has been rendered moot by issuance of the Draft EA.

#### **C. PIIC’s EA Contention 3 is Unsupported by Law, Raises Issues Outside the Scope of this Proceeding, and is Untimely**

PIIC seeks to renew and amend its Contention 3 regarding Federal Trust Responsibility. Motion at 9. PIIC claims that the NRC breached its trust responsibility by (1) failing to establish a permanent repository, resulting in permanent storage of spent nuclear fuel near PIIC’s reservation; (2) relying on the non-existent WCD and TSR; (3) inadequately analyzing the

cumulative impacts of the ISFSI expansion on cultural and historic resources; and (4) failing to analyze the likelihood of a terrorist attack. This renewed amended contention is outside the scope of this proceeding, addresses Waste Confidence issues encompassed in Contention 1, is not supported by law or fact, and with respect to analysis of a terrorist attack, is untimely and outside the scope of NEPA.

PIIC's first basis for supporting EA Contention 3, NRC's alleged failure to comply with the Nuclear Waste Policy Act with respect to establishing a permanent repository, is outside the scope of this proceeding, is immaterial to an ISFSI license renewal proceeding, and does not raise a genuine dispute with the Draft EA. 10 C.F.R. § 2.309(f)(1)(iii). Impacts that may result from such alleged failure, i.e., indefinite long term storage at Prairie Island, are WCD issues, which are held in abeyance.

PIIC's second basis, NRC reliance on the non-existent WCD and TSR, is not supported by facts. The Draft EA explicitly states that the the NRC will not issue a renewed license until a revised WCD/TSR is issued and that the Draft EA will be supplemented as necessary following issuance. Draft EA at vi.

PIIC's third basis for this contention, that the NRC breached its trust responsibility by performing an inadequate analysis of the cumulative impacts of the ISFSI expansion on archaeological and cultural resources, is unsupported by law or facts. PIIC's claim that the NRC must do more than comply with existing statutes to meet its Federal Trust Responsibility is unsupported by law. While the Supreme Court has long recognized the "distinctive obligation of trust incumbent upon the Government in its dealing with [Indian Tribes]," United States v. Mitchell, 463 U.S. 206, 225 (1983), this trust does not impose a duty to take action beyond complying with generally applicable statutes and regulations. Shoshone-Bannock Tribes v.

Reno, 56 F.3d 1476, 1482 (D.C. Cir.1995); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998). The Commission's Tribal Protocol Manual follows this precedent by complying with its governing statutes and assuring that tribal members receive the same protections from these implementing procedures as are available to other persons. See Tribal Protocol Manual at 6 (ADAMS Accession No. ML11271A151). Thus, PIIC's contention that the NRC breached its trust responsibility by performing an inadequate analysis of the future impact of the ISFSI expansion can only be supported by a showing that NRC failed to comply with NEPA in performing its analysis. As described above, the NRC's analysis of the impacts of the ISFSI expansion meets NEPA's requirements.

PIIC claims that the Federal Trust Responsibility requires the NRC to take action now to ascertain whether unrecorded cultural resources are present in the future ISFSI expansion area. Motion at 13. As noted above, NEPA does not require such action, and therefore, nor does the Federal Trust Responsibility. The NRC met its Federal Trust Responsibility by taking a "hard look" at the archaeological studies for the site; the ISFSI construction photos; the CRMP and procedures that protect archaeological, historical and cultural resources; and concluding that there would be no high and adverse impact. In addition, the NRC consulted with PIIC in the development of the Draft EA and considered its input. See e.g. Draft EA at 4-10. The only basis for PIIC's contention is that it disagrees with the NRC Staff's conclusion. This disagreement, without more, will not support an admissible contention.

PIIC's fourth basis for EA Contention 3, failure to evaluate the likelihood of a terrorist attack, is untimely and unsupported by law. The ER did not contain an analysis of terrorist attacks. For this part of the Contention to be timely, it should have been raised at the start of the proceeding. A late contention is properly denied where the only assertion is that a concern not dealt with in

the ER has also not been dealt with in the Draft EA. McGuire/Catawba, CLI-02-28, 56 N.R.C. at 386 n.61. EA Contention 3 cannot use the Federal Trust Responsibility as a crutch to raise an untimely contention that could have been raised in PIIC's original petition.

NEPA does not require analysis of terrorist attacks. The NRC has held that NEPA does not require it to analyze terrorist attacks because the cause of a terrorist attack is not reasonably related to its licensing action, Ameren Energy Co. (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-8, 65 N.R.C. 124 (2007), a position upheld in N.J. Dep't of Env'tl. Prot. v. NRC, 561 F.3d 132 (3d Cir. 2009) and Limerick Ecology Action v. NRC, 869 F.2d 719, 743-44 (3d Cir. 1989). Only in the 9th Circuit is the NRC required to analyze terrorist attacks. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006). The Federal Trust Responsibility does not require the Prairie Island ISFSI licensing action to be moved to the 9th Circuit.

#### **IV. CONCLUSION**

For all the reasons above, the PIIC's new or amended contentions and its original Contention 2 should be dismissed.

Respectfully Submitted,

/Signed electronically by Kimberly A. Harshaw/

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**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
	)	
(Prairie Island Independent Spent Fuel Storage)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of “Northern States Power Company’s Answer Opposing Prairie Island Indian Community’s Motion to Admit New and Amended Contentions,” was provided to the Electronic Information Exchange for service on the individuals listed below, this 13<sup>th</sup> day of January 2014.

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/Signed electronically by Kimberly A. Harshaw/

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Kimberly A. Harshaw



**SETTLEMENT AGREEMENT AMONG THE PRAIRIE ISLAND INDIAN  
COMMUNITY AND NORTHERN STATES POWER CO.  
REGARDING CONTENTIONS 1, 6 AND 11**

This Settlement Agreement is made and entered into as of April 1, 2009, by and among the Prairie Island Indian Community ("PIIC") and Northern States Power Co., a Minnesota corporation ("NSPM"), hereinafter referred to collectively as "Parties."

WHEREAS, Nuclear Management Company, LLC, now NSPM, submitted a License Renewal Application, dated April 11, 2008, to the U.S. Nuclear Regulatory Commission ("NRC"), seeking renewal of its license to operate Prairie Island Nuclear Generating Plant, Units 1 and 2 ("the Plant");

WHEREAS, on August 18, 2008, the PIIC petitioned to intervene as a party in the NRC proceeding to renew the operating license of the Plant, and raised a contention relating to the sufficiency of the analysis of historical and archaeological resources contained in the Environmental Report ("PIIC Contention 1"), a contention relating to the sufficiency of the plan described in the License Renewal Application to manage the effects of aging for containment coatings ("PIIC Contention 6"), and a contention relating to the adequacy of the aging management program for flow accelerated corrosion in the License Renewal Application ("PIIC Contention 11");

WHEREAS, by Memorandum and Order dated December 5, 2008, the Atomic Safety and Licensing Board (the "Board") admitted PIIC as a party to the license renewal proceeding and admitted, as limited and reworded by the Board, PIIC Contention 1, PIIC Contention 6, and PIIC Contention 11;

WHEREAS, there was disturbance of certain historic and archaeological resources during the construction of the Plant but, as stated in the Environmental Report, NSPM is not aware of any historic or archaeological resources that have been significantly affected by Plant operations, including operation and maintenance of transmission lines;

WHEREAS, NSPM and the PIIC have continued to discuss NSPM's efforts and the PIIC's concerns related to the protection of cultural, historical and archaeological resources, and NSPM has presented additional information responsive to issues raised in PIIC Contention 1;

WHEREAS, on March 4, 2009, in order to address the PIIC's concerns, NSPM filed with the NRC an amendment to the Environmental Report which included additional discussion of the archaeological, historical, and cultural resources within and around the Plant site and of NSPM's actions to further define and protect such resources;

WHEREAS, PIIC and NSPM both desire to work cooperatively and amicably to protect and preserve cultural, historical and archaeological resources on the Plant site and now desire to resolve and settle PIIC Contention 1;

WHEREAS, on March 12, 2009, NSPM filed with the NRC a supplement to the License Renewal Application describing the aging management program for containment coatings and the aging management program for flow accelerated corrosion;

WHEREAS, PIIC and NSPM further desire to resolve and settle PIIC Contention 6 and PIIC Contention 11;

NOW, THEREFORE, in consideration of the premises and mutual promises herein, PIIC and NSPM agree as follows:

1. As described in the March 4, 2009, amendment to the Environmental Report, NSPM agrees to conduct a Phase I Reconnaissance Field Survey of the disturbed areas within the Plant's boundaries. In addition, NSPM agrees to conduct Phase I field surveys of areas of known archaeological sites, using a GIS or GPS format, to precisely determine their boundaries. The Phase I Reconnaissance Field Survey will consist of a 100% pedestrian survey of disturbed areas at close transects (maximum 5 meters). There will be no shovel testing, although areas will be identified as candidates for shovel testing. Soil probes during field surveys will be used to identify disturbed or undisturbed soil horizons. The surveys will identify areas and the degree and type of disturbance. Findings from the field surveys will be documented using photographs, written description, and sketch maps as needed. NSPM will use the results of these surveys to designate areas for archaeological protection. Site layout drawings using the GIS or GPS format will be prepared and maintained to identify archaeological exclusion areas and areas requiring additional archaeological investigation. The Phase I Reconnaissance Field Survey will be completed before the end of 2010. Prior to conducting the Phase I Reconnaissance Field Survey, NSPM will provide the PIIC with a reasonable opportunity to review and provide comments on the survey protocol to be used. NSPM will also allow representatives of the PIIC a reasonable opportunity to observe performance of the Phase I Reconnaissance Field Survey, subject to their compliance with NSPM's Plant site access restrictions. In addition, NSPM will provide the PIIC a reasonable opportunity to review and provide comments on the draft report summarizing the results of the Phase I Reconnaissance Field Survey prior to that report's finalization. With respect to any opportunity for review and comment under this paragraph, PIIC agrees that a ten-day period from receipt is sufficient.

2. NSPM agrees to prepare and implement a Cultural Resources Management Plan ("the Plan") to protect significant historical, archaeological, and cultural resources that may currently exist on the Plant site. The site drawings and maps reflecting the results of the Phase I Reconnaissance Field Survey will be incorporated into the Plan, and its distribution will be controlled and limited to protect this information. In connection with the preparation of the Plan, NSPM will conduct botanical surveys to identify culturally and medicinally important species on the Plant site, and incorporate provisions to protect such plants into the Plan. The Plan will provide reporting guidelines, including an annual report from NSPM to the PIIC regarding any archeological or ground-disturbing activities which have occurred at the Plant site within the previous year, in any

area designated as undisturbed and in any disturbed area that is described as potentially containing archaeological resources as identified in the 2009 Phase 1 Reconnaissance Field Survey. NSPM agrees to work cooperatively with the PIIC in the preparation of the Plan, will provide a draft plan to the PIIC for review and comment, and will meet to discuss resolution of comments prior to finalization of the Plan. NSPM will work diligently with the PIIC to finalize the Plan by the end of 2010.

3. NSPM further agrees to review and revise its Archaeological, Cultural & Historic Resources Procedure and its Excavation & Trenching Controls Procedure to identify sensitive areas and provide guidance for ground-disturbing activities. Procedures will be revised to reference drawings and illustrations in the Cultural Resource Management Plan to assist users in identifying culturally sensitive areas and include pictures of artifacts that are prevalent in the area of the Plant site. NSPM agrees to work cooperatively with the PIIC in the preparation of the revised Procedures and will provide draft Procedures to the PIIC for review and comment.

4. NSPM agrees to provide training to personnel who are responsible for the proper execution of excavation or other ground-disturbing activities – including the Environmental Coordinator, construction lead(s) and any other persons assigned responsibilities for cultural and archaeological protection – on the procedures for protecting cultural and archaeological resources, and on awareness and recognition of such resources. The training module will include review of cultural exclusion areas on the Plant site, artifact identification, notification of the state archaeologist and the PIIC, and the stop work process. The PIIC will be invited to assist in this training by sharing information and perspective on the cultural significance of the area and its resources.

5. NSPM agrees to retain a qualified archaeologist for consultation. NSPM agrees to consult with this archaeologist prior to conducting any ground-disturbing activity in any area designated as undisturbed and in any disturbed area that is described as potentially containing archaeological resources in the results of the Phase 1 Reconnaissance Field Survey. NSPM agrees that it will notify and consult with the PIIC whenever the Site Environmental Coordinator or qualified archaeologist determines to consult with or notify the State Historic Preservation Office. As stated in the amendment to the Environmental Report, the Site Environmental Coordinator is responsible for determining if proposed land-disturbing activity will occur in the vicinity of a culturally-significant site and, if so, for consulting with the State Historic Preservation Office. The qualified archaeologist is responsible for evaluating any cultural artifact discovered during ground disturbing activities to determine potential archaeological or historic significance and if of potential significance ensuring proper reporting to the State Historic Preservation Office.

6. If NSPM identifies any change in the expected footprint of the Unit 2 steam generator replacement project as described in the March 4, 2009 amendment to the Environmental Report that would affect either undisturbed areas or disturbed areas identified as having cultural resources potential, NSPM will notify the PIIC and perform additional surveys of such areas prior to any ground-disturbing activities.

7. NSPM will maintain and implement the Plan and the above-described procedures so long as NSPM owns or controls the Plant site.

8. PIIC and NSPM agree that NSPM has no claim to or ownership of historical or cultural items removed from the Plant site by Dr. Elden Johnson. NSPM and PIIC further agree to work cooperatively to encourage the repatriation of any remains from burial mounds at the Plant site currently in the possession of Hamline University.

9. With reasonable notice, NSPM agrees to allow the PIIC access to the Plant site for the PIIC to conduct any healing or other reparative ceremony it may desire in connection with any adverse impacts to historic or archaeological resources which are currently known or subsequently discovered. PIIC agrees to comply with all safety and security requirements requested by NSPM while on the Plant site.

10. PIIC hereby consents to the dismissal of Contention 1 and agrees to take such other actions as may be reasonably necessary to obtain its dismissal.

11. PIIC agrees that the License Renewal Application supplement filed by NSPM on March 12, 2009, satisfactorily resolves its concerns regarding NSPM's aging management program for containment coatings and aging management program for flow accelerated corrosion.

12. PIIC consents to the dismissal of PIIC Contention 6, and agrees to take such other actions as may be reasonably necessary to obtain its dismissal.

13. PIIC consents to the dismissal of PIIC Contention 11, and agrees to take such other actions as may be reasonably necessary to obtain its dismissal.

14. PIIC and NSPM agree to file a joint motion seeking a Consent Order from the Board approving this Settlement Agreement and dismissing PIIC Contentions 1, 6 and 11.

15. With regard to this Settlement Agreement, NSPM and PIIC expressly waive any and all further procedural steps before the Board or any right to challenge or contest the validity of any order entered by that Board in accordance with this Settlement. The Parties also expressly waive all rights to seek judicial review or otherwise to contest the validity of any order entered by the Board, so long as such order is fully consistent with each provision of this Settlement Agreement.

16. NSPM and PIIC agree that an order entered by the Board in accordance with this Settlement Agreement will have the same force and effect as an order entered after a full hearing.

17. NSPM and PIIC acknowledge this Settlement Agreement resolves the matters identified in this Settlement Agreement that are required to be adjudicated.

18. This Settlement Agreement shall be effective upon the last signature dated below. In the event that the Board disapproves this Settlement Agreement, it shall be null and void.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be signed by their respective representatives on the dates indicated below.

FOR NORTHERN STATES POWER COMPANY - MINNESOTA

By: Michael D. Wadley 4/2/09  
Michael D. Wadley Date  
Site Vice President,  
Prairie Island Nuclear Generating Plant

FOR THE PRAIRIE ISLAND INDIAN COMMUNITY

By: Ronald Johnson 4-1-09  
Ronald Johnson Date  
Tribal Council President

Johnny Johnson 4-1-09  
Johnny Johnson Date  
Tribal Council Vice President

Lucy Taylor 4/1/09  
Lucy Taylor Date  
Tribal Council Secretary

Victoria Winfrey 4-1-09  
Victoria Winfrey Date  
Tribal Council Treasurer

Shelley Buck 4-1-09  
Shelley Buck Date  
Tribal Council Assistant Secretary/Treasurer