

NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

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PREFACE

This is the thirty-fifth volume of issuances (1 - 260) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 1992 - June 30, 1992.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. Reg. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission--CLI, Atomic Safety and Licensing Boards--LBP, Administrative Law Judges--ALJ, Directors' Decisions--DD, and Denial of Petitions for Rulemaking--DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

CONTENTS

Issuances of the Nuclear Regulatory Commission

CLEVELAND ELECTRIC ILLUMINATING COMPANY and TOLEDO EDISON COMPANY	
(Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1)	
Dockets 50-440-A, 50-346-A	
Order, CLI-92-6, March 5, 1992	86
FEWELL GEOTECHNICAL ENGINEERING, LTD.	
(Thomas E. Murray, Radiographer)	
Docket 30-30870-OM	
Order, CLI-92-5, March 5, 1992	83
GEORGIA POWER COMPANY, <i>et al.</i>	
(Vogtle Electric Generating Plant, Units 1 and 2)	
Dockets 50-424-OLA, 50-425-OLA	
Memorandum and Order, CLI-92-3, February 12, 1992	63
LONG ISLAND LIGHTING COMPANY	
(Shoreham Nuclear Power Station, Unit 1)	
Docket 50-322-OLA-3 (License Transfer)	
Memorandum and Order, CLI-92-4, February 26, 1992	69
LOUISIANA ENERGY SERVICES, L.P.	
(Claiborne Enrichment Center)	
Docket 70-3070-ML	
Memorandum and Order, CLI-92-7, March 5, 1992	93
OHIO EDISON COMPANY	
(Perry Nuclear Power Plant, Unit 1)	
Docket 50-440-A	
Order, CLI-92-6, March 5, 1992	86
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, <i>et al.</i>	
(Seabrook Station, Units 1 and 2)	
Dockets 50-443-OL, 50-444-OL	
Decision, CLI-92-8, April 3, 1992	145
SACRAMENTO MUNICIPAL UTILITY DISTRICT	
(Rancho Seco Nuclear Generating Station)	
Docket 50-312-OLA	
Memorandum and Order, CLI-92-2, February 6, 1992	47

SAFETY LIGHT CORPORATION, <i>et al.</i> (Bloomsburg Site Decontamination) Dockets 030-05980, 030-05982, 030-08335, 030-08444 Memorandum and Order, CLI-92-9, April 10, 1992	156
TEXAS UTILITIES ELECTRIC COMPANY (Comanche Peak Steam Electric Station, Units 1 and 2) Dockets 50-445-OL&CPA, 50-446-OL Memorandum and Order, CLI-92-1, January 17, 1992	1

Issuances of the Atomic Safety and Licensing Boards

ARIZONA PUBLIC SERVICE COMPANY, <i>et al.</i> (Palo Verde Nuclear Generating Station, Units 1, 2, and 3) Dockets 50-528-OLA-3, 50-529-OLA-3, 50-530-OLA-3 Memorandum and Order Finding Mitchell Petitioners in Default, LBP-92-3, March 4, 1992	107
CERTIFIED TESTING LABORATORIES Docket 030-12145-CivP Initial Decision, LBP-92-2, January 29, 1992	20
CHEMETRON CORPORATION, Providence, RI 02903 (Harvard Avenue Site and Bert Avenue Site Decontamination) Docket 040-08724 Memorandum and Order, LBP-92-11, May 12, 1992	193
CLEVELAND ELECTRIC ILLUMINATING COMPANY, <i>et al.</i> (Perry Nuclear Power Plant, Unit 1) Docket 50-440-OLA-3 Memorandum and Order, LBP-92-4, March 18, 1992	114
DAVID M. MANNING (Senior Reactor Operator) Docket 55-8615-SC Memorandum and Order, LBP-92-1, January 21, 1992	11
Memorandum and Order, LBP-92-6, March 31, 1992	130
ENVIROCARE OF UTAH, INC. Docket 040-08989-ML Prehearing Conference Order, LBP-92-8, April 30, 1992	167
JOSE A. RUIZ CARLO Docket 030-20541-OM Memorandum and Order, LBP-92-5, March 24, 1992	128

LAFAYETTE CLINIC

Docket 030-13204-OM

Memorandum and Order, LBP-92-13, May 27, 1992 199

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

Docket 50-322-OLA-3

Order, LBP-92-14, June 17, 1992 207

Docket 50-322-DCOM

Order, LBP-92-15, June 17, 1992 209

MIDWEST INSPECTION SERVICE, LTD.

Docket 30-10749-CivP&OM

Memorandum and Order, LBP-92-9, May 6, 1992 189

NEW YORK POWER AUTHORITY

(James A. FitzPatrick Nuclear Power Plant)

Docket 50-333-OM

Memorandum and Order, LBP-92-1, January 21, 1992 11

PATRICK K.C. CHUN, M.D.

Docket 30-31570-EA

Order, LBP-92-12, May 26, 1992 195

PIPING SPECIALISTS, INC.

Docket 030-29626-OM

Memorandum and Order, LBP-92-7, April 17, 1992 163

SAFETY LIGHT CORPORATION, *et al.*

(Bloomsburg Site Decontamination)

Dockets 030-05980, 030-05981, 030-05982, 030-08335, 030-08444

Order, LBP-92-3A, March 16, 1992 110

Dockets 030-05980-ML&ML-2, 030-05982-ML&ML-2

Order, LBP-92-13A, June 11, 1992 205

Issuances of Directors' Decisions

ARIZONA PUBLIC SERVICE COMPANY, *et al.*

(Palo Verde Nuclear Generating Station, Units 1, 2, and 3)

Dockets 50-528, 50-529, 50-530

Director's Decision, DD-92-1, March 16, 1992 133

SEQUOYAH FUELS CORPORATION

(Gore, Oklahoma Facility)

Docket 40-8027

Director's Decision, DD-92-2, June 7, 1992 211

Director's Decision, DD-92-3, June 8, 1992 236

Indexes

Case Name Index	I-1
Legal Citations Index	I-3
Cases	I-3
Regulations	I-11
Statutes	I-19
Other	I-21
Subject Index	I-23
Facility Index	I-31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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E. Gall de Planque

In the Matter of

Docket Nos. 50-445-OL & CPA
50-446-OL

TEXAS UTILITIES ELECTRIC
COMPANY

(Comanche Peak Steam Electric
Station, Units 1 and 2)

January 17, 1992

The Commission denies a motion to reopen the record because Petitioners were not parties to the proceeding, and their motion did not address the five factors necessary for late intervention. Even if they had addressed and satisfied the late intervention standards, they failed to satisfy the reopening requirements.

**RULES OF PRACTICE: MOTIONS TO REOPEN RECORD;
REOPENING OF RECORD (STANDARD FOR APPLICANT);
STANDING TO INTERVENE; NONPARTY PARTICIPATION**

Petitioners are barred from seeking a reopening of the record because they were not parties to the proceeding itself.

**RULES OF PRACTICE: INTERVENTION (STANDING);
INTERVENTION PETITION (PLEADING REQUIREMENTS);
MOTIONS TO REOPEN RECORD; STANDING TO INTERVENE;
NONPARTY PARTICIPATION**

Petitioners have never been parties to the Comanche Peak proceeding; at this time they may only become parties by filing a petition for late intervention under 10 C.F.R. § 2.714(a)(1) and satisfactorily addressing the five factors contained therein. Unless and until Petitioners petition for, and are granted, intervention in the proceeding, they cannot move to reopen the record.

RULES OF PRACTICE: LICENSING PROCEEDING; NOTICE OF HEARING

Because the NRC has not yet issued the license for Unit 2, there remains in existence an operating license "proceeding" that was initiated for Comanche Peak by the 1979 *Federal Register* notice.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); NONTIMELY INTERVENTION PETITIONS

The petition before us clearly does not satisfy NRC requirements for consideration of a late-filed petition for leave to intervene. Quite simply, Petitioners have not even addressed the five factors contained in 10 C.F.R. § 2.714(a)(1)(i)-(v).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); REOPENING OF RECORD (TIMELINESS)

Even if Petitioners could satisfy the requirements for late intervention, their present petition clearly fails to satisfy the requirements of section 2.734 for reopening the record.

AEA: ENFORCEMENT ACTION (HEARING RIGHT)

RULES OF PRACTICE: JURISDICTION (10 C.F.R. § 2.206 PETITIONS)

Because the license for Comanche Peak Unit 1 has already issued, Petitioners may seek enforcement action under Section 2.206. Therefore, the pleading is referred to Staff for consideration under section 2.206 inasmuch as the pleading relates to Unit 1.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a request by Sandra Long Dow and Richard E. ("R. Micky") Dow ("Petitioners") to reopen the Comanche Peak operating license proceedings.¹ The Texas Utilities Electric Company ("TU Electric"), the Licensee, and the NRC Staff have responded in opposition to the request. For the reasons stated below, we deny the request to reopen the proceedings.²

II. FACTUAL BACKGROUND

The NRC initiated the Comanche Peak operating license ("OL") proceedings in 1979. *See* 44 Fed. Reg. 6995 (Feb. 5, 1979). At that time, three parties were admitted into the proceeding. Neither the Dows nor the "Disposable Workers of Comanche Peak," the organization they represent, were among those parties. Subsequently, two of the three original intervenors voluntarily withdrew from the proceedings. A second proceeding dealing with a construction permit amendment ("CPA") for Comanche Peak Unit 1 was added in 1986 and consolidated with the OL proceeding. Again, neither the Dows nor the "Disposable Workers" sought intervention. In July 1988, the NRC's Atomic Safety and Licensing Board issued an order dismissing the Comanche Peak proceedings pursuant to a settlement agreement between the parties: TU Electric, the Staff, and the Citizens Association for Sound Energy ("CASE"), the lone remaining intervenor. *See* LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988).³

¹ Sandra Dow represents an organization named "Disposable Workers of Comanche Peak Steam Electric Station."

² Petitioners styled their pleading as "before the Atomic Safety and Licensing Board." However, there is no Board currently constituted in the Comanche Peak operating license proceedings because all activity in the adjudicatory portion of that proceeding ended several years ago. Indeed, were it not for the fact that the license for Unit 2 has yet to be issued, there would be no operating license proceeding to "reopen." Accordingly, this matter is before the Commission for disposition.

The pleading also contains statements that might be construed as allegations of misconduct by NRC employees. For that reason, it has been referred to the Office of Inspector General for appropriate action.

³ We subsequently denied a request for "re-intervention" by a former intervenor who had previously withdrawn from the proceedings. CLI-88-12, 28 NRC 605 (1988), *as modified*, CLI-89-6, 29 NRC 348 (1989), *aff'd* *Citizens Association for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 246 (1990).

III. ARGUMENTS OF PARTIES

A. Petitioners' Request

On November 20, 1991, the Petitioners filed the pleading now before us. Petitioners labeled the pleading a "motion to reopen the record," but asked the Commission to both "reopen the record . . . and thereafter grant the petitioners leave to file their motion for intervention." See Motion to Reopen ("Motion") at 1. Petitioners stated their intention to "file, within 45 days, all necessary affidavits and other documentation . . ." Motion at 8. Petitioners claimed authority for their submission under 10 C.F.R. § 2.734, which governs motions to reopen a record, and addressed the three factors required by that section.⁴

A request to reopen the record must be (1) timely, (2) address "a significant safety or environmental issue," and (3) "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a). Briefly, Petitioners allege that they satisfy the first prong of the test "because some of the evidence, of the greatest material value to [the NRC], has only come to light within the last thirty (30) days." Motion at 2-3. Petitioners allege that this

[n]ew evidence regarding the payment of "hush" money to whistleblowers, not to testify before this Board surfaced for the first time after the record was closed; and, new evidence concerning the payment of "hush" money to the intervenor C.A.S.E., has only, now, surfaced.

Id. at 3.

Petitioners allege that they satisfy the second prong of the test because they have provided evidence of (1) money paid to potential witnesses not to testify before the Licensing Board, and another witness coerced into accepting money in exchange for not testifying before the Licensing Board (*id.* at 3-4); (2) false and misleading evidence submitted by TU Electric, which was the basis for a Licensing Board decision in December 1983 (*id.* at 4-5); and (3) false testimony by the management of TU Electric and Brown & Root, its principal contractor, in a Department of Labor ("DOL") proceeding arising from actions at Comanche Peak (*id.* at 5-6).

Finally, Petitioners allege that they satisfy the third prong of the "reopening" test because they believe that they would have been granted leave to intervene in the proceedings had they known about this information at that time and

⁴Petitioners also cite "29 C.F.R. Part 18" as authority for their submission. However, Title 29 of the *Code of Federal Regulations* contains regulations applicable to the Department of Labor ("DOL"), not the NRC. We presume Petitioners have confused DOL regulations with NRC regulations, found at Title 10 of the *Code of Federal Regulations*.

been able to bring it to the Board's attention. *Id.* at 6. Petitioners also allege that various representatives of TU Electric, CASE, and the NRC Staff either "knowingly remained silent" and deliberately failed to notify the Board of relevant information or actively perjured themselves before the Licensing Board during these proceedings. *Id.* at 6-8.

However, the Petitioners do not submit any affidavits by themselves or anyone else in support of these allegations in this particular motion. *See* 10 C.F.R. § 2.734(b). Instead, they submit selections from various prior pleadings before either the NRC or the DOL.

B. The Licensee's Response

The Licensee argues that Petitioners cannot seek to "reopen" the record because they were never a "party" to the proceeding when it was an active, ongoing proceeding. *See* Texas Utilities Response ("TU Resp.") at 20-21. The Licensee then argues that Petitioners have failed to demonstrate any right to intervene in the proceedings because they failed to address the requirements for a late-filed petition. TU Resp. at 21-25. Finally, the Licensee argues that, assuming *arguendo* that Petitioners can seek reopening of the record, Petitioners' pleading does not satisfy the requirements of section 2.734. *Id.* at 25-41. The Licensee urges, among other things, that the allegedly "new" material is not new and that all of the concerns raised by Petitioners have been reviewed and addressed by the NRC.

C. The NRC Staff's Response

The Staff supports the Licensee's argument that only a party to a proceeding can seek to reopen that proceeding. NRC Staff Response ("Staff Resp.") at 5-6. The Staff then argues that Petitioners have failed to demonstrate that they have standing to intervene (Staff Resp. at 6-9), and that Petitioners have failed to address the requirements for a late-filed petition to intervene (*id.* at 9). Finally, the Staff argues that Petitioners have failed to satisfy the requirements for a motion to reopen. *Id.* at 10-18. In the process, the Staff points out that, with perhaps two exceptions, the pleadings submitted as "new evidence" by the Petitioners have been submitted to the NRC on previous occasions by other potential intervenors.

IV. ANALYSIS

A. Petitioners' Request to Reopen the Record

We find that Petitioners are barred from seeking a reopening of the record because they were not parties to the proceeding itself. As the Staff correctly points out, the regulation itself does not — by its words — limit motions to reopen to *parties*. However, we believe that such is the proper interpretation.

The purpose of Part 2, Subpart G, is to set out the procedures whereby a person or organization petitions for and then exercises the right to participate in formal NRC adjudications. *See generally* 10 C.F.R. § 2.700. A brief review of our regulations clearly demonstrates that the word “motion” is used when describing a pleading filed by those who have become parties to a proceeding and are attempting to exercise rights gained as a result of that status. On the other hand, our regulations use the word “petition” to describe a pleading filed by one who has not yet been admitted to “party” status, i.e., one who has not yet established a legal right to participate in a proceeding. *Cf.* 10 C.F.R. § 2.714.

Here, Petitioners have never been parties to the Comanche Peak proceeding; at this time they may only become parties by filing a petition for late intervention under 10 C.F.R. § 2.714(a)(1) and satisfactorily addressing the five factors contained therein. Unless and until Petitioners petition for, and are granted, intervention in the proceeding, they cannot move to reopen the record.⁵

Petitioners also cite Rule 60(b) of the Federal Rules of Civil Procedure (“FRCP”) in support of their position that a closed proceeding may be reopened and reexamined. *See* Motion at 1-2 (a “court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding . . .”). However, consistent with the language in that rule, all the judicial decisions we have found addressing the issue have held that only a “party” or one in privity with a party may request relief under Rule 60(b). *Western Steel Erection Co. v. United States*, 424 F.2d 737, 739 (10th Cir. 1970); *Ratner v. Bakery & Confectionery Workers*, 394 F.2d 780, 782 (D.C. Cir. 1968); *Screven v. United States*, 207 F.2d 740, 741 (5th Cir. 1953); *United States v. 140.80 Acres of Land, Etc.*, 32 F.R.D. 11, 14 (E.D. La. 1963). *See generally* 7 J. Moore, *Moore’s Federal Practice* ¶ 60.19 (2d ed. 1985); 11 Wright and Miller, *Federal Practice and Procedure* § 2865 (1973). Thus, Rule 60(b) does not support Petitioners’ argument for reopening the Comanche Peak proceeding at their insistence.

⁵Because the NRC has not yet issued the license for Unit 2, there remains in existence an operating license “proceeding” that was initiated for Comanche Peak by the *Federal Register* Notice that was published in 1979. *See* 44 Fed. Reg. 6995 (Feb. 5, 1979). Accordingly, we reject the Licensee’s argument that Petitioners have no right to seek reopening of the record because the Commission has approved the settlement agreement dismissing proceedings below. TU Resp. at 19-20.

B. Petitioners' Request for Late Intervention

Petitioners' pleading asks that we "both re-open the record of the [Comanche Peak] proceedings, and thereafter grant Petitioners leave to file their motion for intervention." Motion at 1. However, we find that the pleading before us clearly does not satisfy our requirements for consideration of a late-filed petition for leave to intervene. Quite simply, Petitioners have not even addressed the five factors contained in 10 C.F.R. § 2.714(a)(1)(i)-(v). Accordingly, we do not grant Petitioners late intervention and, therefore, we deny their request for reopening.

C. The Merits of Petitioners' Reopening Request

While we hold today that Petitioners are not entitled to seek to reopen the record of the Comanche Peak operating license proceeding, we have reviewed their submission in an effort to determine if their arguments have any merit. We conclude that even if Petitioners could satisfy the requirements for late intervention, their present petition clearly fails to satisfy the requirements of section 2.734 for reopening the record.

As we noted above, Petitioners must first demonstrate that their request is timely. 10 C.F.R. § 2.734(a)(1). However, while Petitioners allege that their "new" information has only come to light "within the last thirty (30) days," we find that the information supporting their motion has been before us on previous occasions. As the Staff notes, Exhibits A and B were formally submitted to the Commission either by the Citizens for Fair Utility Regulation ("CFUR"), Mr. Joseph J. Macktal, or Mr. Lon Burnam in their attempts for late intervention several years ago. Thus, this material is hardly "new" or "recently discovered" material supporting reopening of the Comanche Peak record.⁶

Exhibit C is an initial decision by the Department of Labor in an employment discrimination case dated May 12, 1989, almost 3 years ago. This decision is a public document and is hardly "new" evidence. Exhibit D appears to be a hand-written note critical of an attorney for CASE but without any date or authentication. Moreover, even if it were dated and authenticated as being an evaluation of this attorney by a DOL Administrative Judge — as alleged by Petitioners — we find that it hardly constitutes "new evidence" warranting reopening the record of an unrelated NRC proceeding. Exhibit E is a portion of a published opinion by the NRC's Atomic Safety and Licensing Board, dated December 28, 1983. Again, this is hardly "new" evidence discovered "within the last 30 days."

⁶The Commission denied both the CFUR and Macktal requests. See CLI-88-12 and CLI-89-9, *supra*. Mr. Burnam withdrew his request voluntarily. Petitioners allege that this withdrawal was under "suspicious circumstances." Motion at 2. However, they provide absolutely no support for that allegation.

Exhibits F and G are briefs filed with the DOL in support of an employment discrimination case filed by a Mr. Hasan, a former worker at Comanche Peak. However, those briefs are dated February 16, 1988, and April 18, 1988. Again, these materials are public documents that are almost 4 years old. Moreover, both the Commission and the NRC Staff have long been aware of the general thrust of the arguments in Mr. Hasan's case, if not in actual possession of these documents themselves. In fact, Petitioners allege that the Staff had these documents in 1988. See Motion at 6. Thus, these materials hardly constitute "new" evidence. Likewise, Exhibit I is dated July 8, 1987, and is addressed to the Licensing Board itself. We can see no reason to conclude that this document, which was filed before the Licensing Board over 4 years ago, can be termed "new" evidence.

Finally, Exhibit J contains two parts. The first part is a settlement agreement between CASE, Mrs. Juanita Ellis, and TU Electric. The agreement is published in full as Exhibit B to the settlement agreement. See LBP-88-18B, *supra*, 28 NRC at 126-35. The second part is an affidavit by Barbara N. Boltz, a former member of CASE, reciting disagreements with the decision to settle the Comanche Peak proceeding. This document is over a year old and there is no allegation that this document contains "new" evidence. Furthermore, as the Staff correctly notes, the NRC was well aware that some CASE members disagreed with the decision to settle the proceedings. See CLI-88-12, 28 NRC at 610 n.6. Accordingly, we conclude that Petitioners have failed to satisfy the first prong of the reopening test because their "new" information is simply not timely in any sense of the word.⁷

The second prong of the reopening test requires that Petitioners demonstrate that the "new" evidence concerns "a significant safety or environmental issue." 10 C.F.R. § 2.734(a)(2). However, Petitioners point to no such issue. Instead, they raise numerous allegations regarding other Comanche Peak-related matters.

For example, Petitioners allege attorney misconduct by CASE attorneys in DOL proceedings. However, as we noted before when faced with the very *same* allegations, "the proper forum for these complaints is likely not the NRC." CLI-88-12, 28 NRC at 612 n.8. Instead, the affected persons should seek sanctions against those attorneys before the DOL or before the appropriate state bar associations. Likewise, Petitioners allege that unnamed TU Electric employees perjured themselves in the Hasan case before the DOL. However, there is no

⁷On December 27, 1991, the Commission received a pleading from the Citizens Association for Sound Energy ("CASE"), seeking leave to file a response to Petitioners' Motion to Reopen the Record. CASE's response is an effort to refute the allegations contained in the Boltz Affidavit and does not address the legal issues upon which we have resolved Petitioners' request. We grant CASE's motion and accept the tendered response. However, because we have resolved the question of reopening the record on other grounds, we do not reach the question of the accuracy of the allegations contained in either the Boltz Affidavit or the CASE response. The Staff should review both documents to determine if anything in either document affects its review of activities at Comanche Peak.

allegation — much less a showing — that the Licensing Board may have relied upon testimony by these employees. Again, this matter appears to be a concern for the DOL, not the NRC.

Finally, Petitioners allege that TU Electric employees committed perjury before the Licensing Board prior to the Board's Order of December 28, 1983. Motion at 4-5. However, in their motion, Petitioners cite absolutely no documentation for that allegation. Petitioners do not even support the allegation with their own affidavit; instead, we have only their own *ipse dixit* in the motion. The only document cited in the motion in relation to this matter is a copy of the Licensing Board's opinion. But that opinion does not contain any verification of Petitioners' allegation. This unsupported allegation simply cannot support reopening the record. Accordingly, we find that Petitioners have failed to meet the second prong of the reopening test.⁸

The third prong of the reopening test requires that Petitioners "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a)(3). In this situation, Petitioners needed to show that the Licensing Board — and the Commission — might well have refused to accept the proposed settlement agreement between CASE, TU Electric, and the NRC Staff and instead would have continued the proceedings with the same or new intervenors. Instead, Petitioners simply aver that they would have been allowed to intervene in the proceeding. Motion at 6.

As the NRC Staff and TU Electric have noted, many of these same arguments were made both at the public hearing to discuss the proposed settlement agreement and in various motions for late intervention. See, e.g., Transcript of Hearing (July 5, 1988); CLI-88-12; CLI-89-6. We concluded then that those arguments — based on allegations similar to these and on these and similar documents — were insufficient to support either challenges to the agreement or petitions for late intervention. Three years have not changed our opinion that these allegations are insubstantial and unsupported and do not constitute a basis for voiding the settlement agreement or reopening the proceedings.

⁸ The Petitioners' allegations appear to be addressed to the question of pipe support design at Comanche Peak. Motion at 4-5. The NRC has issued the operating license for Unit 1 of Comanche Peak and the Staff may take enforcement action against that license should circumstances warrant. Accordingly, we hereby refer the Petitioners' motion to the Staff under 10 C.F.R. § 2.206 for review of these allegations to the extent that they may apply to Unit 1. We also expect that the Staff will incorporate any evidence uncovered in this process into their review of activities at Unit 2.

V. CONCLUSION

Because Petitioners were not parties to the Comanche Peak proceeding, they cannot seek to reopen the record unless they first become parties by filing a successful petition for late intervention. Their "motion to reopen" does not address the five factors required to be satisfied in order to achieve this status. Therefore, we do not grant them late intervention. Even if Petitioners had addressed and satisfied the late intervention standards, the motion to reopen would have been denied, because Petitioners have failed to satisfy the reopening standards.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of January 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Peter S. Lam, Ph.D.
Harry Rein, M.D.

In the Matter of

Docket No. 50-333-OM
(ASLBP No. 91-645-02-OM)
(Facility Operating
License No. DPR-59)
(EA 91-053)

NEW YORK POWER AUTHORITY
(James A. FitzPatrick Nuclear
Power Plant)

In the Matter of

Docket No. 55-8615-SC
(ASLBP No. 91-646-02-SC)
(Senior Reactor Operator
License No. SOP-10561-1)
(EA 91-054)

DAVID M. MANNING
(Senior Reactor Operator)

January 21, 1992

MEMORANDUM AND ORDER (Terminating FitzPatrick Proceeding)

SYNOPSIS

The Board terminates the *FitzPatrick* proceeding by granting the joint motion by the NRC Staff and the New York Power Authority (NYPA) to approve a settlement agreement. Mr. David M. Manning, a party to the related *Manning* proceeding, objects to the settlement agreement because, he states, his hearing rights may be adversely affected by it. Because Mr. Manning failed to state grounds upon which his objection can be sustained, the *FitzPatrick* proceeding is terminated. The resolution of factual issues by the *FitzPatrick* settlement agreement is not *res judicata* respecting any of those issues in the *Manning* proceeding.

BACKGROUND

David M. Manning is an NRC-licensed senior reactor operator (SRO) employed by the licensee, NYPA, at its FitzPatrick Nuclear Power Plant. Mr. Manning admits that he has used unlawful drugs in violation of the policies of the Nuclear Regulatory Commission and that, on October 9, 1990, he tried to thwart a random drug test administered in accordance with NRC regulations and NYPA's related drug-use screening program. Mr. Manning also admits that he had previously been referred to the NYPA Employee Assistance Program as a result of a cocaine-positive test in August 1988. Manning Affidavit at 2 (attached to Answer).

On May 2, 1991, the NRC Staff issued an "Order Modifying License (Effective Immediately)" to NYPA with respect to the FitzPatrick license. The order was founded upon the drug-testing and use episodes. It stated that the episodes raised concerns about Mr. Manning's integrity and trustworthiness. The order modified the FitzPatrick license to prohibit NYPA from employing Mr. Manning in Part 50 activities without prior NRC approval. 56 Fed. Reg. 22,022 (May 13, 1991). On May 31, 1991, NYPA answered the order requesting that it be rescinded or, if it is not, that NYPA be afforded a hearing on the order.

Also on May 2, 1991, the NRC Staff issued an "Order Suspending License (Effective Immediately) and Order to Show Cause Why License Should Not Be Revoked" respecting Mr. Manning's Part 55 SRO license — an action also based upon the drug-testing and use episodes. 56 Fed. Reg. 22,020 (May 13, 1991). On June 6, 1991, Mr. Manning, by his attorney, requested a hearing on the orders against his license. However, Mr. Manning did not request a hearing

on the order modifying the FitzPatrick license even though the *Federal Register* notice announced his right to do so. 56 Fed. Reg. at 22,023.

On August 9, 1991, in consideration of the respective answers, the NRC Staff modified both the FitzPatrick and Manning orders. The Modified FitzPatrick Order permits NYPA to allow Mr. Manning to return to Part 50 duties provided, among other things, that he follows a specified 3-year drug-testing program. 56 Fed. Reg. 41,378 (Aug. 20, 1991).

Mr. Manning's suspension and show-cause orders were modified to suspend his Part 55 SRO license for a minimum of 3 years, rather than to pursue an outright revocation. The Modified Manning Order would require Mr. Manning to participate in extensive 3-year drug-testing and rehabilitation programs. After completion of the programs, he may apply to have his license reinstated. 56 Fed. Reg. 41,590 (Aug. 21, 1991).

On August 28, 1991, Mr. Manning returned to Part 50 duties, but not to licensed reactor-operator duties, as permitted by the modifications. However, neither NYPA, at first, nor Mr. Manning accepted the modified orders as a resolution of the issues each wish to be heard by this Board. Later, on October 7, 1991, the NRC Staff and NYPA filed their joint motion for approval of a settlement agreement.

SETTLEMENT AGREEMENT

Under the settlement agreement, the NRC Staff withdraws both orders issued to NYPA, and NYPA withdraws its request for a hearing. NYPA agrees not to deviate from a followup drug-testing program it established for Mr. Manning in accordance with section 2.4(f) of Appendix A to 10 C.F.R. Part 26 (integrity of urine specimens) for 3 years from the date Mr. Manning returns to Part 50 duties. The period between drug tests will not exceed 90 days. There are provisions for testing after absences from work.

The settlement agreement and the Modified FitzPatrick Order require Mr. Manning to be tested far less frequently than does the Modified Manning Order. Under the latter, Mr. Manning would be subject to weekly, then semimonthly, then monthly testing during the 3-year program, compared to the 90-day minimum interval under the Modified FitzPatrick Order and the settlement agreement.

REGULATORY FRAMEWORK

NYPA notes that:

Mr. Manning . . . is subject to at least two separate sources of regulation: (1) by the NRC under Part 55, and (2) by his employer, NYPA, which has independent responsibilities under its Part 50 license, generally, and pursuant to federal regulation (i.e., 10 C.F.R. Part 26), specifically.

NYPA Response at 2.

NYPA is correct. Part 50 permits licensees of nuclear power units to employ only reactor and senior reactor operators licensed under Part 55 to manipulate or to supervise the manipulation of reactivity-related controls. 10 C.F.R. § 50.54(i)-(m). There is no specific regulation in Part 50 covering the employment of nonlicensed personnel for activities under that part. But consistent with Part 50, the Commission has, by a statement of policy, adopted Industry Guidelines for Nuclear Power Plant Access Authorizations. The Guidelines are designed to assure that personnel granted unescorted access to protected and vital areas of nuclear facilities are trustworthy and reliable.¹ Final responsibility under the Guidelines rests upon the utility. There is no aspect of Part 50 that would prevent facility licensees from establishing their own, higher reliability standards for its Part 50 personnel.

In the proceedings before us, Mr. Manning's objection is that NYPA's settlement action would unfairly affect the reinstatement of his Part 55 SRO license. But Mr. Manning is not an independent actor in his dispute with the NRC Staff. He is an NYPA employee, and he needs his employer's confidence in him to regain his SRO license.

An applicant for an operator's license under Part 55 can be licensed only upon the request from the nuclear power facility licensee where the applicant will be employed. The facility licensee must provide evidence that the applicant is needed and meets the facility's NRC-imposed requirements to be licensed. The regulations impose a clear duty upon nuclear power facility licensees to foster, support, and maintain the licensing of only those reactor operators it believes to be qualified and in good health. *E.g.*, 10 C.F.R. Part 55, Subpart C; § 55.31(a)(3)-(6); § 55.61.

In addition, Part 26 requires nuclear-power reactor facility licensees to implement a fitness-for-duty program for employees such as Mr. Manning. Such programs must:

¹ Nuclear Power Plant Access Authorization Program, Policy Statement, Appendix A. 53 Fed. Reg. 7534-45 (Mar. 9, 1988).

Provide reasonable assurance that nuclear power plant personnel will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance . . . which in any way affects their ability to safely and competently perform their duties . . .

10 C.F.R. § 26.10(a).

The requirements for the fitness-for-duty programs are detailed and demanding. *E.g.*, Appendix A to Part 26. Particularly relevant to these proceedings is the requirement that covered workers be subject to unannounced random drug testing at a rate equal to at least 100% of the workforce each year.² Moreover, facility licensees may take even more stringent fitness-for-duty actions than those required by the rule. 10 C.F.R. § 26.27(b).

THE PARTIES' POSITIONS

A. Mr. Manning's Objections

Mr. Manning, who is not a party to the *FitzPatrick* proceeding, did not join in the settlement agreement or motion. The Board afforded him an opportunity to comment on the agreement.

On October 24, 1991, Mr. Manning, by his counsel, objected to the settlement, stating that such a settlement, "would render a nullity a significant portion of his hearing" Counsel argues that Mr. Manning would be denied his statutory and constitutional right to a hearing because, even if he were to prevail before the Board, NYPA would be required to impose the conditions "sought by the Staff." Objections at 3.

Mr. Manning seeks a change in the settlement agreement that would subject him to either the testing program imposed by the Board in a future order or that imposed in the Modified Manning Order. *Id.* at 3-4. However, the Board doubts that this proposal has been well thought out. Counsel for Mr. Manning seems not to understand that the testing provisions of the Modified FitzPatrick Order and the settlement agreement are much more lenient than the provisions of the Modified Manning Order. *Id.* at 2-4. Moreover, Counsel's arguments are virtually void of any legal analysis. For example, he does not discuss the fact that the Board has no authority simply to alter the provisions of the agreement between the NRC Staff and NYPA at his request.

²The pertinent regulation is 10 C.F.R. § 26.24(a)(2). That section does not specify the testing cycle period and is, therefore, logically incomplete. However, the Statement of Considerations for Part 26 indicates that the Commission intended to adopt an annual cycle, i.e., a method whereby covered workers "are covered at a rate equal to approximately 100 percent of the workforce, resulting in about two-thirds of the workers being tested during the course of a given year." 54 Fed. Reg. 24,468 (June 7, 1989); 26-SC-7. The Board has been informed that a conforming correction to Part 26 is forthcoming.

B. NRC Staff's Reply

The NRC Staff argues that Mr. Manning was afforded constitutional due process by the *Federal Register* notice and opportunity to request a hearing in the *FitzPatrick* proceeding. The NRC Staff also notes that Mr. Manning did not seek to participate in the settlement negotiations even though he had been notified that the negotiations were under way. Thus, according to the NRC Staff, it is too late for Mr. Manning to raise constitutional objections. NRC Staff Reply at 2-5.

The NRC Staff also repeats a puzzling assertion (with which we disagree) that the proposed agreement would have no effect in the proceeding regarding Mr. Manning's senior reactor operator's license. *Id.* at 5; Joint Motion at 1 n.1.

C. NYPA's Response

NYPA responded that it has the authority, as Mr. Manning's employer, to administer "all applicable FitzPatrick policies and procedures." NYPA notes also that it must meet NRC Part 26 requirements. Pursuant thereto, FitzPatrick has a fitness-for-duty program, which, incidentally, was accepted by Mr. Manning's labor union. NYPA Response at 5.

Further, according to NYPA:

[T]he conditions of the Settlement Agreement are not simply those sought by the Staff. They are conditions which NYPA has purposefully adopted. NYPA requires compliance with these conditions in order for Mr. Manning to do work pursuant to NYPA's Part 50 license.

Id. at 6.

At the Board's invitation, NYPA provided the affidavit of Radford J. Converse, FitzPatrick's Resident Manager.³ Mr. Converse explains that the proposed drug testing of Mr. Manning under the settlement agreement is appropriate in the ordinary course of business, given NRC regulations and FitzPatrick policies and procedures. Affidavit at 2. The proposed settlement is also important to NYPA because it will conclude the controversy with the NRC. But, even without that benefit, the testing program is appropriate because it provides reasonable assurance of Mr. Manning's fitness to return to work. *Id.*

³ Memorandum and Order, November 25, 1991 (unpublished). The Board also provided an opportunity to Mr. Manning to respond to any NYPA affidavit. *Id.* at 2. He did not respond.

DISCUSSION

A. The FitzPatrick Proceeding

To ensure his standing to object to any settlement or order in the *FitzPatrick* proceeding, Mr. Manning should have intervened there in accordance with the opportunity announced in the *Federal Register* notice. Moreover, as the NRC Staff argues, by waiting until settlement negotiations were completed to object to the result, Mr. Manning may be guilty of laches.

In a neat, traditional civil proceeding, Mr. Manning would be found to have rested on his rights too long, and that would be the end of it. However, this proceeding is neither neat nor traditional. It is a complex, tri-lateral set of related proceedings with parties shifting from one side to another as the issues change.

At bottom, the NRC Staff and NYPA move this Board to find that the settlement is in the public interest. We were unwilling to do so in the presence of a reasonable question of whether NYPA was conveniently and unfairly sacrificing Mr. Manning to settle its dispute with the NRC Staff. If the settlement would unconscionably deny Mr. Manning his opportunity for a fair hearing in his own proceeding, we would attempt to afford some relief.

It is not our purpose in this analysis to decide whether NYPA is imposing the correct testing regimen upon Mr. Manning. Rather, we look to whether the testing regimen falls within NYPA's very broad discretion to assure that its covered employees are reliable and trustworthy. We do this solely to test whether NYPA has been unduly influenced by a desire to settle an annoying litigation.

We are convinced by Mr. Converse's uncontroverted affidavit, the facts admitted by Mr. Manning, and our review of the relevant regulatory framework, that the drug-testing program to be imposed upon Mr. Manning in the settlement agreement has a legitimate business purpose apart from its coincidental value as a settlement factor.

The settlement is consistent with the fitness-for-duty regulations. Equivalent, or possibly more severe, testing would be imposed on Mr. Manning even if there were no dispute to be settled. The frequency of testing under the settlement agreement, 90-day minimum, is not very different from the minimum annual-rate Part 26 requirement for the general workforce. Unlike the general workforce, however, Mr. Manning has been tested once as cocaine-positive, and deemed once to be cocaine-positive by his refusal to provide a specimen. In that light, the 90-day testing cycle appears to be rather lenient. Moreover, after two positive tests, Mr. Manning could have been removed from Part 50 duties for a minimum of 3 years. 10 C.F.R. § 27.27(b)(2). Instead he was permitted to return to Part 50 work within 1 year — another indication of lenient treatment.

There is not the slightest indication that NYPA has acted unreasonably toward Mr. Manning for the purpose of settling the *FitzPatrick* proceeding. Nor is the NRC Staff imposing a testing regimen for Mr. Manning upon NYPA, as he has averred. The settlement is essentially a recognition between NYPA and the NRC Staff that they have nothing to litigate. Neither party seems to yield any significant *quid pro quo* as considerations in the settlement agreement.

There are no grounds upon which this Board can sustain Mr. Manning's objection to the settlement; the matter is beyond the purview of the Board in the *Manning* proceeding. The settlement is in the public interest and is approved.

B. The Manning Proceeding

When Mr. Manning's counsel failed to understand that the *FitzPatrick* settlement agreement would impose a much more lenient testing regimen upon Mr. Manning than that imposed by the Modified Manning Order, his argument that Mr. Manning would be adversely affected by the settlement lost most of its force. Nevertheless, it is still open for Mr. Manning to try to establish that a testing program more lenient than the program imposed by NYPA in the settlement, or no program at all, is appropriate. Since NYPA will still have considerable leeway and concomitant responsibility under Part 26 to impose its testing program upon Mr. Manning, the value of a favorable order of this Board may be diminished.⁴ In any event, the *Manning* proceeding shall go forward.

The NRC Staff and Mr. Manning are directed:

1. To enter into negotiations toward possible settlement in light of this opinion within 15 days following its service. The NRC Staff shall initiate such negotiations.

2. If no settlement agreement is reached within 30 days following the service of this order, the parties shall begin discovery and prepare for hearing in accordance with the schedule following page 54 of the prehearing conference transcript. The issue to be heard is: "Should the Modified Manning Order be sustained?" Mr. Manning's proposal for additional issues is unacceptably vague and is rejected.

⁴ However, NYPA states that the evidence that may be developed at Mr. Manning's hearing "could well constitute information which brings about a reconsideration of the terms of the NYPA-mandated follow-up drug testing program." NYPA Response at 9.

ORDER

IT IS THEREFORE ORDERED that the *FitzPatrick* proceeding be terminated. The parties to the *Manning* proceeding shall comply as directed.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Peter S. Lam, Ph.D.
ADMINISTRATIVE JUDGE**

**Harry Rein, M.D. (by I.W.S.)
ADMINISTRATIVE JUDGE**

**Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland
January 21, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Cadet H. Hand, Jr.
Elizabeth B. Johnson

In the Matter of

Docket No. 030-12145-CivP
(ASLBP No. 91-622-01-CivP)
(Materials License
No. 29-14150-01)
(EA 89-079)

CERTIFIED TESTING
LABORATORIES, INC.

January 29, 1992

The Licensing Board, in an Initial Decision, determines that a civil monetary penalty sought to be imposed by the NRC Staff against a Licensee involved in industrial radiography should be reduced from \$8000 to \$5000. The Board ruled that various reports and statements by the Licensee were not intentionally false, as claimed by the Staff, but that the Licensee's system of records was inappropriate and inadequate for complying with the recordkeeping requirements of the license. As a result, the Board reduced the penalty from Severity Level II to Severity Level III.

LICENSE CONDITIONS: REPORTS

Accurate reports are material to the NRC's licensing scheme for industrial radiography. Inaccurate reports are thus material whether or not the NRC would be led to take action on the basis of the erroneous information.

RULES OF PRACTICE: CIVIL PENALTIES

In reviewing a civil penalty sought to be assessed by the Staff, a licensing board may determine whether the proposed severity level and penalty are appropriate or, alternatively, whether the proceeding should be dismissed or the penalty imposed, mitigated, or remitted. A board may not increase the penalty sought by the Staff.

CIVIL PENALTIES: ASSESSMENT (BREAKDOWN IN CONTROL OF LICENSED ACTIVITIES)

Because of the demonstrated potential dangers of radiographic operations to the public health and safety and the importance of audit reports to NRC's system of regulation, a failure to prepare correct reports can be of safety significance. In this case, the preparation of inaccurate audit reports some time after the audit had taken place was inappropriate for complying with the license requirement and amounted to a breakdown in control of licensed activities.

CIVIL PENALTIES: ASSESSMENT (MITIGATION)

The promptness and extent to which a licensee takes corrective action is a factor that a licensing board may consider in determining the amount of a civil penalty.

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: Industrial radiography.

APPEARANCES

Mark C. Trentacoste, Esq., Moorestown, New Jersey, for Certified Testing Laboratories, Inc., Licensee.

Bernard M. Bordenick, Esq., and **Marian L. Zobler, Esq.,** for the United States Nuclear Regulatory Commission Staff.

TABLE OF CONTENTS

	Page
OPINION (INCLUDING FINDINGS OF FACT)	22
I. VIOLATIONS ALLEGED	23
II. POSITIONS OF THE PARTIES	26
III. NATURE OF BUSINESS	26
IV. STAFF DISCOVERY OF ALLEGED VIOLATIONS	31
V. INVESTIGATION OF ALLEGED VIOLATIONS	33
VI. RULINGS ON ALLEGED VIOLATIONS	35
A. Violation I.A.1	36
B. Violation I.A.2	39
C. Violation I.B	39
VII. SEVERITY OF VIOLATIONS AND APPROPRIATE CIVIL PENALTY	40
A. General Description	40
B. Severity Levels Governing This Proceeding	42
C. Determination of Severity Level of Proved Violations	43
CONCLUSIONS OF LAW	44
ORDER	45

INITIAL DECISION

(Order Imposing a Civil Monetary Penalty)

Opinion (Including Findings of Fact)

This proceeding involves an Order Imposing a Civil Monetary Penalty, dated August 29, 1990,¹ in the amount of \$8000, against Certified Testing Laboratories, Inc., Bordentown, New Jersey (hereinafter, CTL or Licensee). CTL is the holder of License 29-14150-01, which authorizes the use of byproduct material for the

¹The Order was published at 55 Fed. Reg. 36,729 (Sept. 6, 1990).

conduct of industrial radiography and related activities.² The license requires, *inter alia*, field audits of radiographers to be performed at intervals not to exceed 3 months, during periods when radiographic work is being performed.³

The Order was preceded by a written Notice of Violation and Proposed Imposition of Civil Penalty, dated March 9, 1990, which proposed the \$8000 civil penalty.⁴ On the same day, the Staff issued an Order to Show Cause why the Licensee's license should not be modified to prohibit Mr. Joseph Cuozzo, Radiation Safety Officer (RSO) at the Bordentown facility, from serving as RSO or in any other position involving performance or supervision of licensed activities for the Licensee.⁵ The show-cause proceeding was later settled, permitting Mr. Cuozzo to resume his duties as RSO but subject to additional corporate supervision.⁶

For reasons set forth below, we conclude that the violations proved by the Staff to have occurred are of a lower severity than those for which a penalty was sought and, accordingly, that the civil penalty should be reduced from \$8000 to \$5000.

I. VIOLATIONS ALLEGED

As set forth in the Appendix to the Order Imposing a Civil Monetary Penalty, the alleged violations for which a civil penalty is sought to be imposed are as follows:⁷

- I.A. Condition 16 of License No. 29-14150-01 requires, in part, that licensed material be possessed and used in accordance with statements, representations and procedures contained in a letter dated January 7, 1985. Item No. 5 of this letter requires the Radiation Safety Officer or his designated representative to perform unannounced field audit inspections of each radiographer at intervals not to exceed three months.

Contrary to the above,

1. Field audit inspection reports, dated July 20, 1987 and July 21, 1987, documenting quarterly field audits of two radiographers, were created by the

² Order Imposing a Civil Monetary Penalty, dated August 29, 1990.

³ Licensee Admission of Fact No. 2, dated February 28, 1991; NRC Staff Testimony of Geoffrey Cant, Richard Matakas, John Miller, and John White (hereinafter, Staff Testimony), ff. Tr. 77, Attach. 6 (OI Report), Exhs. 2 and 3; Tr. 209-11 (Miller); Tr. 538-39, 549-50 (Cuozzo). Hereinafter, references to the prepared testimony of particular Staff witnesses will be cited by the name of the witness and page in the prepared testimony — e.g., "Cant, ff. Tr. 77, at (page)."

⁴ Cant, ff. Tr. 77, at 22.

⁵ *Id.*

⁶ Memorandum and Order (Approving Settlement Agreement and Terminating Proceeding), dated June 28, 1990 (unpublished). See Cant, ff. Tr. 77, at 22, 25-26; Tr. 220-21 (Cant).

⁷ 55 Fed. Reg. at 36,730. The Notice of Violation also included other violations for which no civil penalty has been sought. Cant, ff. Tr. 77, at 23.

Vice President/Radiation Safety Officer (VP/RSO); however, field audits of the indicated radiographers were not performed on the recorded dates, as admitted by the VP/RSO in an interview with an NRC investigator on February 8, 1989.

2. Between July 1987 and January 6, 1988, no field audits for one specific radiographer were performed.

- I.B. 10 CFR 30.9(a) requires, in part, that information provided to the Commission by a licensee be complete and accurate in all material respects.

Contrary to the above, information provided by the VP/RSO during a telephone conversation with three NRC representatives on April 25, 1988, was inaccurate in that the Vice President/Radiation Safety Officer (VP/RSO), in response to questions regarding the field audit inspection report dated July 21, 1987, stated that he personally performed the field audit inspection. This statement by the VP/RSO was not accurate in all material respects in that the VP/RSO subsequently admitted to an NRC investigator on February 8, 1989 that he had not audited the radiographer on July 21, 1987, but had "made up" the audit report to give the appearance of compliance with the quarterly audit requirement. The statement was material because it had the potential to affect an ongoing NRC review of the matter.

The Order categorized the two violations in the aggregate as Severity Level II and sought to assess a civil penalty of \$8000. The penalty was stated to be divided equally between the two violations.

The Licensee admitted Part I.A.2 of Violation I.A and denied Part I.A.1 of Violation I.A and Violation I.B.⁸ The Licensee also filed a timely request for a hearing, dated September 25, 1990. This Licensing Board was established on October 30, 1990.⁹ In our Memorandum and Order (Schedules for Proceeding), dated November 5, 1990 (unpublished), we granted the hearing request and issued a Notice of Hearing.¹⁰

The issues to be considered at the hearing, as prescribed by the Civil Penalty Order, were (a) whether the Licensee committed Violations I.A.1 and I.B, as set forth in the Notice of Violation (and as quoted above), and (b) whether, on the basis of these violations and Violation I.A.2 as set forth in the Notice of Violation (also quoted above) that the Licensee admitted, the Civil Penalty Order (in the amount of \$8000) should be sustained. At a prehearing conference held in Bordentown, New Jersey, on December 10, 1990, the following subissues (to be considered under the aegis of the two broad issues spelled out above) were also approved by the Board for litigation purposes:¹¹

1. Whether the RSO promptly advised the NRC that the audit report dated July 21, 1987 was incorrect.

⁸ Cant, ff. Tr. 77, at 26.

⁹ 55 Fed. Reg. 46,593 (Nov. 5, 1990).

¹⁰ The Notice of Hearing, dated November 5, 1990, was published at 55 Fed. Reg. 47,160 (Nov. 9, 1990).

¹¹ Prehearing Conference Order (Issues and Schedules), dated December 19, 1990 (unpublished), at 3-4.

2. Whether, in stating that the July 21, 1987 audit report was "made up," the RSO admitted that he intended to mislead the NRC or, alternatively, that the report was merely incorrect and not intended to mislead the NRC.
3. The scope and extent of NRC reliance on the July 21, 1987 audit report, as referenced in the Appendix to the Order Imposing a Civil Monetary Penalty (at p. 4) and as contemplated by 10 C.F.R. Part 2, Appendix C (VI).
4. Whether the NRC Staff properly applied the 7 standards in 10 C.F.R. Part 2, Appendix C (VI), relating to the consideration of oral information. In particular, whether the RSO was provided a copy of the notes or transcript of his remarks for review and correction.
5. Whether the NRC Staff gave appropriate consideration to mitigation based on the Licensee's corrective action in requiring hand-prepared and countersigned audit reports (as 10 C.F.R. Part 2, Appendix C (V), B.2 appears to require).
6. The adequacy, accuracy and validity of the report of the audit dated July 20, 1987.¹²

In its Prehearing Conference Order (Issues and Schedules), dated December 19, 1990 (unpublished), the Board established schedules for discovery, the filing of direct testimony, and for the evidentiary hearing. Both parties engaged in discovery, which terminated on March 6, 1991. The Staff filed written direct testimony on March 25, 1991. The Licensee elected to present its witnesses' testimony orally, as it has a right to do in a proceeding of this type (*see* 10 C.F.R. § 2.743(b)(3)).¹³ The Board conducted a second prehearing conference on April 16, 1991, immediately preceding the evidentiary hearing, which took place on April 16, 17, and 18, 1991.¹⁴

At the hearing, the Staff presented the testimony of a panel of four witnesses: Mr. Geoffrey D. Cant, an Enforcement Specialist with NRC's Office of Enforcement; Mr. Richard A. Matakas, a Senior Investigator with NRC's Region I Office of Investigations; Mr. John J. Miller, formerly Senior Health Physicist in Nuclear Materials Safety Section C, Region I; and Mr. John R. White, formerly Chief, Nuclear Materials Safety Section C, Region I.¹⁵ It also relied on certain documentary evidence. The Licensee presented two witnesses — Messrs. Joseph Cuozzo, the RSO,¹⁶ and Peter M. Sideras, a former radiographer and nondestructive technician for CTL¹⁷ — and also relied on documentary

¹² As amended through Memorandum and Order (Telephone Conference Call, 12/28/90), dated December 28, 1990 (unpublished), at 2.

¹³ *See also Tulsa Gamma Ray, Inc.*, LBP-91-25, 33 NRC 535 (June 13, 1991).

¹⁴ *See* Notice of Prehearing Conference and Evidentiary Hearing, dated February 19, 1991, published at 56 Fed. Reg. 7733 (Feb. 25, 1991).

¹⁵ Staff Testimony, ff. Tr. 77, Attachs. 1-4 (Statements of Professional Qualifications).

¹⁶ Tr. 325 (Cuozzo).

¹⁷ Tr. 244 (Sideras).

evidence. We find each of these witnesses technically qualified to present the testimony that each sponsored.

The NRC Staff filed its proposed findings of fact and conclusions of law on May 17, 1991. The Licensee filed its proposed findings of fact and conclusions of law on June 7, 1991. The Staff filed reply findings on June 21, 1991.¹⁸

II. POSITIONS OF THE PARTIES

The Staff founded its case on the questioned accuracy of two of the Licensee's audit reports — one, dated July 21, 1987, concerning a radiographer named Peter Sideras; the other, dated July 20, 1987, concerning a radiographer named Milton Ramero — together with statements made by the Licensee's RSO to NRC representatives concerning the two audits. The NRC stressed the importance of such reports to the regulatory scheme employed by NRC. It maintains in essence that these reports and statements were deliberately falsified to convince the NRC that the Licensee was abiding by the requirements of its license concerning audit reports (noted earlier in this Decision). Based on these assertedly fraudulent reports and statements, the Staff sought its \$8000 civil penalty.

On the other hand, the Licensee concedes the inaccuracy of at least one of the reports and certain of its statements but claims that it acted through confusion or lack of proper care, with no intent to mislead the NRC. The Licensee at the hearing acknowledged the importance of the reports in question but indicated that it had not accorded importance to the reports during the time frame in which the alleged violations were uncovered. As a result, the Licensee claims that the violations should be considered of less severity than asserted by the Staff, leading to a civil penalty of no more than \$500.

III. NATURE OF BUSINESS

The Bordentown facility is a satellite of the New York office of CTL. The portion of CTL's business conducted from the Bordentown facility that is relevant to this case concerns sealed radioactive sources containing byproduct material that are used for radiological testing.¹⁹ NRC Materials License 29-

¹⁸ These documents will hereafter be referenced as "Staff FOF," "Licensee FOF," and "Staff Reply FOF." The Licensee, along with its findings, also filed comments on certain of the Staff findings; these comments will be referenced as "Licensee FOF Comments."

¹⁹ The record of this case does not indicate that CTL's entire business is concerned with the use of radioactive sources. Testimony of Mr. Cuzzo at Tr. 417, 420, 428, and 592 implies that other activity persisted at the Bordentown site, at least during the temporary cessation of radiography following discovery of the instant violations.

14150-01 permits CTL to possess²⁰ and use certain radioactive materials as sealed sources under carefully prescribed conditions, subject to regulations promulgated to protect both the radiographers and the general public.²¹

These regulations govern such matters as the training and certification of radiographers; the required records that must be maintained, including source usage, radiation levels, and personnel exposures; the control and testing of sealed sources; radiation survey instruments; requirements for the various devices associated with radiographic use of sealed sources, including functional criteria, radiation levels on external surfaces and from the storage container, repair, and maintenance; and inventories. Additional requirements or details may be included in the facility license.

Each holder of a license for radiography is inspected at irregular intervals by NRC inspectors, usually from the cognizant field office, who arrive on site unannounced. In the course of the inspection, they may inspect and copy any and all relevant records of the licensee, observe operations, inspect the facility, and interview personnel. The inspectors may later ask the licensee for clarification, confirmation, or additional information; this request may be by letter, in person, or by phone. The product of the inquiry is the NRC inspection report.²²

The Staff testimony (not contested in this respect by CTL) forcefully demonstrated the importance of the NRC's regulation of radiographic activities. Relative to many operations regulated by the NRC, radiography presents the greatest potential for inadvertent exposure, both for the radiographer and for the general public. Indeed, the record suggests that radiographic sources are responsible for most of the acute-radiation-exposure industrial accidents in the United States.²³

The staff employed at CTL's Bordentown facility was small at the time of the audit of concern in this case. Those CTL employees playing roles in the events being considered here consisted of a secretary, two radiographers, and the RSO.²⁴

The secretary performed such tasks as typing audit reports, logging in work submitted by customers and recording any special requests, transmitting reports of testing, and undoubtedly performing other similar duties. The radiographers had been trained, examined, and certified in accordance with the requirements

²⁰ Under its license, CTL can possess sources containing iridium-192, cobalt-60, or cesium-137 of assorted strengths, no one of which can exceed 100 curies. The cesium isotope is used, under this license, for calibration purposes. Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 2.

²¹ Regulations directed specifically to the licensing of radiography and radiological operations as practiced by CTL are found in 10 C.F.R. Part 34; regulations of more general applicability are located elsewhere in Title 10, particularly Parts 20 and 30.

²² See, e.g., Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4 (Inspection Report 030-12145/88-001).

²³ White, ff. Tr. 77, at 2-3. In the Statement of Considerations to a 1990 revision of 10 C.F.R. Part 34, the Commission provided recent examples of radiography incidents. White, ff. Tr. 77, at 3; Staff Testimony, Attach. 5 (copy of 55 Fed. Reg. 843 (Jan. 10, 1990)).

²⁴ Tr. 245, 268, 285-86 (Sideras). CTL also employed a second secretary, a time and attendance clerk, and a bookkeeper at Bordentown (Tr. 286 (Sideras)).

of Appendix A of 10 C.F.R. Part 34.²⁵ The RSO, Mr. Cuozzo, who was also a trained and certified radiographer and a Vice-President of CTL,²⁶ had the overall responsibility for the operation of the Bordentown facility and, as its RSO, for the radiological safety of its employees and the public. He was required to be familiar with the governing regulations, with the facility license, and with the work being done by the radiographers.²⁷

Of particular importance to this case was Mr. Cuozzo's responsibility to audit the work performance of each radiographer quarterly and to prepare and maintain the report of that audit. 10 C.F.R. §34.11(d)(1). For this purpose, a printed form had been prepared that contained the name of the radiographer, a checklist of a number of items to be observed, comments of the auditor, the signature of the auditor, and the date of the audit.²⁸ The purpose of the audit was to determine, by observing him as he worked, whether the radiographer was continuing to follow the procedures established to protect the public and to minimize his own exposure to radiation, as he had been trained.²⁹ An audit of a radiographer could be conducted, without advance notice, either within the Bordentown facility or at a remote worksite.³⁰

The radiographers had the use of an assortment of sealed radioactive sources, each installed in an exposure device that also served as a shield from the radiation; in order to make the necessary exposure, the source could be mechanically driven by remote operation from this device, then retracted into its shield.³¹ When not in use, all sources were kept in a locked storage facility;³² inventory of the contents of the storage facility was maintained by means of a source utilization log, in which the radiographer entered, *inter alia*, his name, the source identification, the date, the job location, and the times he removed and returned the source.³³ Calibrated radiation survey instruments were used to determine radiation levels on the outside of the storage facility, on the outside of the exposure device with the source in its fully shielded position, and around the periphery of the work area, with the source out of its shield and in position to make the exposure.³⁴ These levels were recorded on radiation reports.³⁵ The radiation levels at each location were limited to predetermined values.

²⁵Tr. 140-42 (Miller, White); *see* 10 C.F.R. §34.31(a)(1).

²⁶Tr. 591 (Cuozzo); *Cant*, ff. Tr. 77, at 23.

²⁷White, ff. Tr. 77, at 3-4; Tr. 198 (White).

²⁸*See, e.g.*, Staff Exh. 1; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 7, at 7-11.

²⁹White, ff. Tr. 77, at 4.

³⁰Tr. 246-47 (Sideras); Tr. 336, 337, 357 (Cuozzo).

³¹White, ff. Tr. 77, at 3.

³²Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4, at 3.

³³Miller, ff. Tr. 77, at 6; Licensee Exh. 1; Tr. 300 (Sideras); Tr. 426-27 (Cuozzo).

³⁴Tr. 368 (Cuozzo).

³⁵Miller, ff. Tr. 77, at 6; Licensee Exhs. 2A, 2B, 2C, and 2D.

The sources used by CTL contain radioactive material that gives off gamma rays as it decays; the number and energy of the gamma rays emitted depend on the specific activity of the radioactive isotope that has been encapsulated. The source "strength" (a measure of the number of disintegrations occurring per unit time, often expressed in curies) depends primarily on the quantity of the radioactive isotope in the source. The sources are sealed in order to confine the radioactive material, thereby preventing contamination of the surrounding areas. Sources such as these can be used much as are X-rays: to make pictures on film of specific portions of objects³⁶ in order to determine conditions not otherwise visible (nondestructive testing).

The record of this case contains lengthy discussion, albeit not for technical reasons, of inspections that CTL radiographers made for, e.g., welder certification purposes.³⁷ Because of their small physical size, these sources are manageable, are easily transported, even in their mandatory shielded containers, and can be used in locations inaccessible to cumbersome X-ray machines.³⁸ Radiography can be performed "on site" (within the Bordentown facility) or in the field, by transporting the radiographer (and a helper, if needed) and all his equipment to a job site.³⁹

With this background, it may be helpful to follow a specimen submitted for radiological testing along its route through the facility. The secretary would log in the specimen and record any specific requirements or instructions from the customer. Mr. Cuozzo would assign the specimen to one of the radiographers, who would proceed to perform the test. The radiographer would likely place it in an open area inside the building appropriate for making the test. He would remove the selected source, in its exposure device, from storage, fill out the utilization log, and position the exposure device so that the source would be appropriately located when driven from the device. He would drive the source out of its shield to its position for making the exposure, but only long enough for him to determine, with the radiation survey instruments, where to place the ropes that would designate the delimited area.⁴⁰

With ropes in place and tagged and the area diagrammed for record purposes (exposed source and specimen location, distances from the exposed source, and radiation levels at the ropes recorded), he would place his film and proceed to

³⁶ CTL's radiography business concerns inspection (or testing) of metals. Medical radiography is, obviously, a separate field and is governed by differing regulatory requirements. See 10 C.F.R. Part 35, "Medical Use of Byproduct Material."

³⁷ This testimony had nothing to do with the actual measurements but only with the dating of the inspection reports that were sent to the customer. See, e.g., Tr. 263-69 (Sideras); Tr. 325-35 (Cuozzo). See also note 76, *infra*.

³⁸ See White, ff. Tr. 77, at 2.

³⁹ Tr. 336 (Cuozzo); Tr. 113-14 (Miller).

⁴⁰ Tr. 249 (Sideras).

make the exposure.⁴¹ After lapse of the necessary time, he would retract the source, survey the outside of the exposure device to ensure that the source had properly retracted and was thus shielded, retrieve his film, and, if that was the last test to be made with that source, return it to storage, again surveying the outside of the storage facility to confirm proper placement of the device in storage. The utilization log would be used to record the return of the device and the radiation levels.⁴²

It was during one of these setups and restorations that Mr. Cuozzo would perform his audit. He testified that his office was fairly close to the area in the Bordentown facility in which the radiographers worked and that when he observed one working "back there," he would go back and do an audit on a piece of paper, which he perhaps would give to a secretary for typing at some later time.⁴³

It would appear that only a few of the actual field audits ever made it to typing. However, one must ask the reason for the audit and its report. A radiographer must repetitively perform a number of actions, no one of which is, of itself, challenging or complex, but each intended to minimize his exposure to radiation and to prevent exposure of anyone else, all while doing his job efficiently and professionally. In many ways, the type of audit addressed at length on the record of this case is similar to the periodic personnel evaluations used by many employers; in the present context, it is a formal record of a radiographer's *safety* performance of his job — does he adhere to the rules (demonstrate good safety practices) or has he become careless. It is appropriate (and required) that these audits be periodic and unannounced.⁴⁴ It is commendable that a supervisor does not wait for the mandated date on the calendar to observe (even though not always recording) the work of his co-worker. The NRC depends on accurate records of periodic audits to assist in its determination of whether a licensee is maintaining vigilance in protecting its employees and the public.⁴⁵

⁴¹ This case is not concerned with the quality of the picture made on film by the exposure, although this quality is, of course, of major importance to the company. Each radiographer must also pass a "practical exam," which determines, *inter alia*, whether he is capable of obtaining the requisite information on a specimen. The "practical exam" also includes a review as to whether the radiographer is adhering to applicable safety requirements, comparable to matters covered by the field audits. See p. 38, *infra*.

⁴² See Licensee Exh. 1. It is not clear from the record, nor is it important for this case, when in this sequence the radiographer might develop his film.

⁴³ Tr. 356-60 (Cuozzo).

⁴⁴ 10 C.F.R. § 34.11(d)(1); White, ff. Tr. 77, at 4; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 3, at 2.

⁴⁵ White, ff. Tr. 77, at 4; Cant, ff. Tr. 77, at 24-25, 27.

IV. STAFF DISCOVERY OF ALLEGED VIOLATIONS

On April 22, 1988, Mr. John Miller, then an NRC inspector, conducted a routine, unannounced safety inspection at the CTL facility in Bordentown, New Jersey. Mr. Miller was the senior inspector and was assisted by Mr. Michael Varela, also an NRC inspector. The details of the inspection are documented in NRC Inspection Report No. 030-12145/88-001.⁴⁶

During the inspection, Mr. Miller reviewed records documenting the audits of radiographic personnel performed by the Licensee's RSO, Mr. Joseph Cuozzo. In an effort to validate the veracity of the audits, he cross-checked the audit records against the Licensee's utilization logs and radiation reports. The utilization log contains a record of the exposure device used on a given date and who used it, and the radiation report documents the radiation measurements of the surrounding unrestricted area when a source has been used and also documents the quality assurance check performed on the radiographic equipment.⁴⁷ Mr. Miller also explained that if no radiation report and utilization log exist for a given day, one would assume no radiography was performed on that day; and, if no radiography was performed on a given day, no field audit could have been performed on that day.⁴⁸

Mr. Miller inspected the Licensee's utilization log and radiation reports and noticed that the RSO (Mr. Cuozzo) had documented that he performed an audit of Mr. Peter Sideras, one of CTL's radiographic personnel, on July 21, 1987. He found there was no entry in the source utilization log indicating use of a source on that day or radiation report documenting that radiography had been performed on that date. At that point, he became suspicious of the audit record.⁴⁹

Mr. Cuozzo was not present at the Bordentown CTL office on the day of the inspection, and Mr. Miller asked Mr. Sideras and one of the CTL secretaries to assist him in locating the records needed. He asked Mr. Sideras and the secretary if they could produce any paperwork, such as a bill to a client, to verify that radiography had been performed on July 21, 1987. They searched the files but could find nothing to verify that radiography had been performed on that date.⁵⁰

Mr. Miller asked Mr. Sideras if he could remember if he had been audited on July 21, 1987, but Mr. Sideras' response to Mr. Miller was that he could not remember if he had or had not been audited on that date. Mr. Miller further

⁴⁶ Miller, ff. Tr. 77, at 5; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4.

⁴⁷ Miller, ff. Tr. 77, at 5-6. See also notes 33 and 35, and accompanying text, *supra*.

⁴⁸ Miller, ff. Tr. 77, at 6.

⁴⁹ *Id.*; see also Staff Testimony, Attach. 6, Exh. 4, at 3.

⁵⁰ Miller, ff. Tr. 77, at 7.

testified that the secretary stated that she thought Mr. Sideras might have been on vacation during that time of the year and that the time and attendance clerk, Ms. Lea Machulskis, would have the information. Upon checking, Ms. Machulskis found that Mr. Sideras had been on vacation on July 21, 1987.⁵¹

Mr. Miller checked a representative sample of the other audit reports in the file to see if they corresponded to the utilization logs and radiation reports. He found no other inconsistencies at that time other than the audit report dated July 21, 1987. The secretary made a copy of that audit report and Mr. Miller took that photocopy of the July 21, 1987 report back to the NRC Region I office.⁵²

Because the RSO, Mr. Cuozzo, was not present at the April 22, 1988 inspection, Mr. Miller interviewed him on the phone on April 25, 1988. (This interview constituted the exit interview for the particular inspection.)⁵³ The telephone call was made from Mr. John White's office (Mr. White was Mr. Miller's supervisor) on the speaker phone, and Mr. White, Mr. Miller, and Mr. Varela were present for the whole conversation.

Mr. Miller stated that Mr. Cuozzo said he could remember personally performing an audit of Mr. Peter Sideras on July 21, 1987. Mr. Miller told him that they were unable to locate a radiation report for July 21, 1987, during their inspection. Mr. Miller further reported that Mr. Cuozzo said he would look for that report and forward it to Mr. Miller, and that Mr. Cuozzo did not inform him, either at that time or at any other time, that the July 21, 1987 audit report was incorrect.⁵⁴

Mr. Miller testified that NRC Region I received a letter from Mr. Cuozzo on May 3, 1988, that included radiation reports for May 6, 1987, July 20, 1987, October 22, 1987, and January 6, 1988, none of which had been requested. No radiation report for July 21, 1987, the date of the Sideras audit report, was included. However, also enclosed were two audit reports for Mr. Milton Ramero, dated July 20, 1987, and October 22, 1987.⁵⁵

Upon inspection, Mr. Miller noticed that the audit report dated July 20, 1987, for Mr. Milton Ramero and the July 21, 1987 audit report for Mr. Peter Sideras, which had been copied during the April 22, 1988 inspection, were identical except for the names and dates. The signature on the July 21, 1987 report was a photocopy, as were the checks associated with the various items. Mr. Miller stated that he became suspicious that the July 21, 1987 audit report was fraudulent, and subsequently the matter was referred to the NRC Office of Investigations (OI).⁵⁶ (At that time, Mr. Miller was not suspicious of the July 20,

⁵¹ *Id.* See also Staff Exh. 2.

⁵² Miller, ff. Tr. 77, at 7-8.

⁵³ Tr. 96 (Miller).

⁵⁴ Miller, ff. Tr. 77, at 8.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 8-9.

1987 audit report on Mr. Ramero.)⁵⁷ The basis for involving OI is documented in the May 9, 1988 referral to OI.⁵⁸

The Region I Administrator requested OI Region I to determine whether the RSO at CTL had falsified a field audit report in an effort to mislead NRC inspectors into believing that field audits of radiographic personnel were being performed in accordance with the requirements of CTL's license. Additionally, OI was requested to determine if the RSO had made false statements to NRC inspectors concerning this matter. The investigation was originally assigned to investigator Jerome A. Cullings but was reassigned to Richard A. Matakas, Senior Investigator, OI Field Office, Region I, on or about January 31, 1989.⁵⁹

V. INVESTIGATION OF ALLEGED VIOLATIONS

Following referral of the matter to OI, the Staff investigator, Mr. Richard Matakas, interviewed Mr. Cuozzo at the Licensee's facility on February 8, 1989.⁶⁰ Mr. Cuozzo first indicated his awareness of the license requirement for preparing quarterly field audit reports. Mr. Matakas showed Mr. Cuozzo copies of the reports dated July 20, 1987 (for Mr. Ramero) and July 21, 1987 (for Mr. Sideras), and advised Mr. Cuozzo that both copies appeared to be photocopies of the other and that NRC suspected that both were fraudulent.⁶¹

Following a search of CTL files, the original of the July 20, 1987 (Ramero) audit report was located, but the original of the July 21, 1987 (Sideras) report could not be found.⁶² According to Mr. Matakas, the July 20 report "appeared to be a photocopy with white-out on it and Mr. Ramero's name and the date July 20, 1987 typed on it. Mr. Cuozzo acknowledged his signature on the document."⁶³ Mr. Matakas further testified that Mr. Cuozzo "readily admitted" [to Mr. Matakas] that he had "made up" both documents and that he had not performed the indicated audits on the days in question.⁶⁴ At the hearing, however, it became clear that, by his use of the term "made up," Mr. Cuozzo meant that he had "prepared" the formal reports on a date subsequent to the date set forth on the audit form, not that he had "fabricated" such reports.⁶⁵

⁵⁷ Tr. 99 (Miller).

⁵⁸ Miller, ff. Tr. 77, at 9-10. The referral appears in Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 1.

⁵⁹ Matakas, ff. Tr. 77, at 10.

⁶⁰ Matakas, ff. Tr. 77, at 12. The interview had been scheduled by a telephone call from Mr. Matakas to Mr. Cuozzo on January 31, 1989. *Id.*; Tr. 167-68 (Matakas).

⁶¹ Matakas, ff. Tr. 77, at 13; Tr. 170, 173 (Matakas).

⁶² Matakas, ff. Tr. 77, at 13-14; Tr. 107, 173 (Matakas).

⁶³ Matakas, ff. Tr. 77, at 13. The original of this document has been entered into evidence as Staff Exh. 1.

⁶⁴ *Id.* at 14.

⁶⁵ Tr. 358-59, 604-05 (Cuozzo).

During the interview, Mr. Matakas asked Mr. Cuozzo to sign a statement regarding the two audit reports. Mr. Matakas first offered to write up a statement and return the next day for Mr. Cuozzo's review and signature, but Mr. Cuozzo stated that he would have his secretary type up a short statement. Mr. Cuozzo left the room and returned with a short, typed signed statement, which he thereafter corrected in longhand.⁶⁶ The corrected statement, in letter form and dated February 8, 1989, reads as follows [crossouts as indicated; longhand corrections underlined]:⁶⁷

Dear Sir,

The following forms of qualification for General Electric dated July 21, 1987 were made up by one ~~Pete Sideras and Milton Ramero~~ Joseph Cuozzo J.C. However audits were never actually performed. On 7-20-87 and 7-21-87 qualification were for Milton Ramero and Pete Sideras. J.C.

Respectfully Yours,
(signed and typed)
Joseph Cuozzo

At the hearing, Mr. Cuozzo was questioned extensively about what he meant by this statement. Although he conceded that he had not audited Mr. Sideras on July 21, 1987,⁶⁸ he claims that he did audit Mr. Ramero on July 20, 1987, but did not prepare the audit form on that day.⁶⁹ With respect to his statement about the Ramero audit not being performed, Mr. Cuozzo stated that "[t]hat just means those particular audit sheets I was shown were not done on those days."⁷⁰

Subsequent to the February 8, 1989 interview, Mr. Cuozzo was questioned by the Staff at an enforcement conference in December 1989 as well as at a deposition in January 1991. On both occasions, Mr. Cuozzo emphasized that he had performed audits on both Mr. Sideras and Mr. Ramero in July 1987 but that, when he made up the audit reports after the fact, he must have gotten the dates confused.⁷¹ Among other matters, he indicated at the enforcement conference that the February 8, 1989 statement appearing above had been obtained by "duress."⁷² (The Staff denies any such duress.)⁷³ Mr. Cuozzo continued to assert that he never intended to mislead the NRC by the audit reports in question, but

⁶⁶ Matakas, ff. Tr. 77, at 15; Tr. 118-20, 188-90 (Matakas).

⁶⁷ Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 12, at 3.

⁶⁸ Tr. 381, 411 (Cuozzo).

⁶⁹ There is no explicit regulatory requirement for an audit report to be prepared the same day as the audit is performed. Tr. 90 (Miller).

⁷⁰ Tr. 576 (Cuozzo). To the same effect, see Tr. 578, 600-01 (Cuozzo).

⁷¹ Tr. 215 (Matakas, Miller); Staff Exh. 5 (Deposition Transcript at 170-72). The Staff indicated that the enforcement conference was the first occasion that Mr. Cuozzo had mentioned a possible mistake in dates. Tr. 215 (Miller).

⁷² Tr. 117-18 (Miller, Matakas); Tr. 598 (Cuozzo).

⁷³ Tr. 118 (Matakas).

he (and company management) agreed to procedure revisions (including new audit forms) intended to preclude the production in the future of any misleading information.⁷⁴

VI. RULINGS ON ALLEGED VIOLATIONS

In considering the violations at issue here, we must first observe that the burden of proof is on the Staff, as proponent of the Civil Penalty Order. 10 C.F.R. § 2.732. We have evaluated the entire record with that in mind, both with respect to whether the violations were committed and the civil penalty, if any, that should be imposed as a result of any such violations.

We will here deal with each of the alleged violations *seriatim*. To the extent necessary, we will rely on factual findings set forth earlier in this opinion.

At the outset, we must explain our view on the credibility of the witness providing the bulk of the Licensee's testimony, Mr. Joseph Cuozzo, the RSO who allegedly produced the records deemed by the Staff to be fraudulent. The Staff would have us find the testimony of Mr. Cuozzo not to be credible primarily because of its alleged inconsistencies.⁷⁵ Additionally, the Staff questions Mr. Cuozzo's credibility on the basis of his testimony that he on at least one occasion had predated or postdated welder qualification reports as requested by a customer.⁷⁶

We reject this evaluation of Mr. Cuozzo's credibility. We acknowledge, of course, that there have been apparent inconsistencies in his version of the events under review here. But he has offered cogent explanations for the inconsistencies. The most persuasive is that on occasion his statements to the NRC have been misunderstood and hence do not represent inconsistencies — e.g., his statement that he “made up” the audit reports was construed by the Staff as an admission that he fabricated the reports, whereas his testimony stated only that he “prepared” the reports on a date later than that on which the audit was performed, a practice that he had frequently (if not routinely) followed at that time.⁷⁷ Similarly, the explanation he provided of the admittedly ambiguous language appearing in his signed statement demonstrated to us that he did not admit that he did not audit Mr. Ramero.

⁷⁴Tr. 561-62, 615 (Cuozzo).

⁷⁵Staff FOF at 17-19.

⁷⁶*Id.* at 18-19. Normally, a welder performs a weld on a sample plate (or coupon) on a given date, the weld sample is forwarded to CTL for testing, and the welder is considered qualified only after a successful test by CTL (on a date likely to be subsequent to the date of the weld sample). Messrs. Cuozzo and Sideras each testified that one particular customer had requested that the welders be considered qualified as of the date they performed their sample welds (assuming CTL found the samples to be qualified) and the welder qualification reports were dated to reflect that request. Tr. 328-35, 338-39, 550-58 (Cuozzo); Tr. 264-69, 270, 281, 303-05 (Sideras). Examples of such misdated documents appear to be Staff Exhs. 3 and 4.

⁷⁷Tr. 549-50, 558 (Cuozzo).

As for the testimony concerning the misdating of a customer's welder qualification reports, it was corroborated in large part by Mr. Sideras' prior testimony. It represents no more than an attempt by a small business to satisfy the desires of its customers by complying with a particular dating request by that customer (*see* note 76, *supra*). Mr. Cuozzo also testified concerning CTL's warning of that customer concerning the potential adverse effects of the misdating.⁷⁸ Given those warnings, Mr. Cuozzo opined that he was not misleading anyone.⁷⁹ "[M]y client knew about it, and that's who we were concerned with[.]"⁸⁰

But when questioned by the Board as to whether the NRC might be misled, he conceded that such might be the result but stated that he had not considered this effect when agreeing to the postdating or predating.⁸¹ In our view, this testimony reflects Mr. Cuozzo's candor in attempting to provide a complete account of his practices and does not (merely because it represents a misstatement of dates) represent a tendency for deliberately deceiving anyone.

Our evaluation of Mr. Cuozzo as a witness is that he was not always completely articulate in describing his activities but that he was doing his best to recollect what actually happened almost 4 years earlier. He occasionally had to be asked questions several times before he understood exactly what information the questioner was seeking. After understanding the gist of a question, he appears to have answered with candor. In addition, it is clear that Mr. Cuozzo often acted or testified precipitously, without completely considering the ramifications of what he was doing or saying — e.g., he testified that he would frequently sign reports or forms without reading them.⁸² We thus consider Mr. Cuozzo to be a credible witness for whom some caution must be exercised because of his difficulty in vocalizing his thoughts fluently, as well as his lack of precise recollection. Turning now to the particular violations:

A. Violation I.A.1

Violation I.A.1 asserts that field audit inspection reports dated July 20, 1987, and July 21, 1987, documenting quarterly field audit reports of two radiographers (Messrs. Milton Ramero and Peter Sideras, respectively) were created by the Radiation Safety Officer (RSO), Mr. Joseph Cuozzo, but that field audits were not actually performed on the recorded dates.⁸³ This charge was based on an

⁷⁸ Tr. 329, 334 (Cuozzo).

⁷⁹ Tr. 550-58 (Cuozzo).

⁸⁰ Tr. 551 (Cuozzo).

⁸¹ Tr. 556-57 (Cuozzo).

⁸² Tr. 479 (Cuozzo).

⁸³ Civil Penalty Order, Appendix, at 1; 55 Fed. Reg. 36,730; Notice of Violation and Proposed Imposition of Civil Penalty — \$8000, dated March 9, 1990, referenced by Cant, ff. Tr. 77, at 22-23.

alleged admission by Mr. Cuozzo to an NRC investigator (Mr. Matakas) on February 8, 1989.⁸⁴

1. With respect to the field audit of Mr. Sideras on July 21, 1991, the evidence clearly reflects that no audit was performed on the date indicated. The firm's personnel records, as well as Mr. Sideras himself, indicate that Mr. Sideras was on vacation on that date.⁸⁵ Indeed, Mr. Sideras testified that he was not in the Bordentown area during that week but was "down at the New Jersey shore," so that he would not have been able to come to work for even a brief interval during that time period.⁸⁶

Furthermore, Mr. Matakis reiterated that, on February 8, 1989, during an interview at the Bordentown facility, Mr. Cuozzo had conceded that he had not performed an audit of Mr. Sideras on July 21, 1987.⁸⁷ And Mr. Cuozzo testified at the hearing that he had not performed an audit of Mr. Sideras on that date.⁸⁸

Based on this evidence, the Board concludes that no audit of Mr. Sideras was performed on July 21, 1987, and that Mr. Cuozzo admitted as much to the NRC on February 8, 1989 (as alleged in the violation). This portion of Violation I.A.1 has therefore been proved. Whether an audit of Mr. Sideras was performed in that general time frame (i.e., July 1987) will be discussed in conjunction with Violation I.B, *infra*.

2. With respect to the alleged audit of Mr. Milton Ramero on July 20, 1987, the evidence is less clear. During that time period, Mr. Ramero was a radiographer associated with the Licensee's New York facility, but on occasion he came to the Bordentown facility to perform work. Specifically, he performed work at the Bordentown facility on both July 9, 1987, and July 20, 1987.⁸⁹

Moreover, as set forth earlier, Mr. Cuozzo denied that he had admitted not performing an audit of Mr. Ramero on July 20, 1987. All he said he admitted was that he had not prepared an audit sheet on that day and that the audit sheet with the July 20, 1987 date on it may not be accurate. We find this explanation by Mr. Cuozzo to be reasonable and the Staff's interpretation of Mr. Cuozzo's admission to be incorrect (although clearly not unfounded). That being so, the basis relied on by the Staff for demonstrating that Mr. Cuozzo admitted to not auditing Mr. Ramero on July 20, 1987, has not been proved.

That is not to say that the audit of Mr. Ramero recorded on the report dated July 20, 1987, was not in fact performed on July 20, 1987. Indeed, although we would have preferred that the Licensee call Mr. Ramero as a witness to clarify

⁸⁴ *Id.*

⁸⁵ Staff Exh. 2; Tr. 257-59 (Sideras).

⁸⁶ Tr. 259 (Sideras).

⁸⁷ Matakis, ff. Tr. 77, at 14.

⁸⁸ Tr. 411 (Cuozzo).

⁸⁹ The Staff stipulated that Mr. Ramero was at the Bordentown office of the Licensee on both July 9 and 20, 1987. Tr. 476 (Bordenick).

this point, we recognize the logistical difficulties faced by a relatively small company in doing so.⁹⁰ In the first place, the evidence supports a finding that an audit of Mr. Ramero was in fact performed on July 9, 1987. As noted above, Mr. Ramero was in Bordentown that day and received what is denominated as a “practical exam.”⁹¹ Although the Staff questions whether a “practical exam” is in fact the same as an audit,⁹² the practical exam appears to us to involve many, if not all, of the same findings or observations as does the audit.

Indeed, it would appear that the “field audit” is concerned primarily with radiological safety whereas the “practical exam,” which is administered prior to a radiographer’s assumption of duties with the company, is intended to measure not only the safety aspects of a radiographer’s activities but also the ability of the radiographer to produce a proper film.⁹³ For that reason, we will regard the July 9, 1987 “practical exam” as encompassing the substantive requirements of an audit and, for purposes of this inquiry, as being equivalent.⁹⁴

As for whether an audit of Mr. Ramero was also performed on July 20, 1987, Mr. Cuozzo testified that he would audit radiographers every time he observed their work and would routinely prepare the audit forms at a subsequent date.⁹⁵ Thus, the form dated July 20, 1987, for Mr. Ramero could represent an audit performed on either July 9 or 20, 1987. We find that it is likely that Mr. Cuozzo audited Mr. Ramero on both of the above dates but that it is uncertain whether the audit form dated July 20, 1987, is correct — i.e., that it recorded the audit performed on July 20, 1987 rather than the July 9, 1987 audit.

We conclude, therefore, with respect to the July 20, 1987 audit of Mr. Ramero, that the basis for the Staff’s allegation does not support the alleged violation but that, in any event, it is unclear whether the audit report reflects the audit performed on July 9 or 20, 1987, and may therefore be dated incorrectly. We further find, however, that an audit was likely performed on July 20, 1987, but, because of the failure of the Licensee at that time to have in operation a reasonable system for audit reports, such audit may not have been recorded. No evidence was presented that the date on the Ramero audit form, if incorrect, was

⁹⁰The Licensee testified that it was unaware of Mr. Ramero’s location until about a week before the hearing. Tr. 483-84 (Cuozzo). We agree with the Staff (Staff FOF, n.6; Staff Reply FOF, n.2) that the Licensee had an obligation to notify the Staff when it discovered Mr. Ramero’s location. See 10 C.F.R. § 2.740(e)(1)(i). We reject the Licensee’s observation (Licensee FOF Comments at 1) that it would have been “silly” for it to have so notified the Staff, although we also reject the Staff’s conclusion that its failure to do so adversely reflects upon Mr. Cuozzo’s credibility. We recognize the difficulties faced by CTL, a relatively small organization, responding at virtually the last minute, in a proceeding where the total amount at stake is \$8000.

⁹¹Tr. 429 (Cuozzo); Licensee Exh. 2D.

⁹²Staff FOF at 17-18.

⁹³Tr. 430, 433, 435-36, 439, 486-87, and 494 (Cuozzo).

⁹⁴See also note 41, *supra*. We express no opinion as to whether the practical test in question complies procedurally in all respects with the applicable license requirement for audits. In particular, it is not clear whether the July 9, 1987 practical exam was “unannounced.” Cf. Tr. 436 (Cuozzo) with Tr. 491 (Cuozzo).

⁹⁵Tr. 357-58, 360 (Cuozzo).

intentionally so. (The Staff concedes that, in itself, the use of a photocopied form with a substituted name violates no requirement.)⁹⁶ The NRC Staff thus has not sustained its burden of proof with respect to whether an audit of Mr. Ramero was not performed on July 20, 1987.

B. Violation I.A.2

Violation I.A.2 asserts that, between July 1987 and January 6, 1988, no field audits for one specific radiographer (Mr. Sideras) were performed.⁹⁷ The record reflects that Mr. Sideras performed radiographic work on several occasions from August 1987 up to January 6, 1988,⁹⁸ but that there were no audit reports prepared for any such work activities.⁹⁹ Mr. Cuozzo also conceded that he had not audited Mr. Sideras for a period in excess of 3 months and thus had violated CTL's license.¹⁰⁰ The Licensee has admitted this violation.

C. Violation I.B

Violation I.B asserts that, in a telephone conversation with NRC representatives on April 25, 1988, the RSO provided information to NRC that was not complete and accurate in all material respects — namely, that he had performed a field audit of Mr. Sideras on July 21, 1987 — and that he subsequently had admitted in the 1989 interview by Mr. Matakas that he had not performed such an audit but had “made up” the audit report to give the appearance of complying with the quarterly audit report requirement. The violation further asserts the materiality of the statement in question.

It is clear to us that, in the telephone conversation in question, Mr. Cuozzo provided inaccurate information concerning the reported July 21, 1987 audit of Mr. Sideras. Mr. Cuozzo has conceded that he did not audit Mr. Sideras on that date. Further, he conceded that he had advised NRC that he had “made up” the report although, as we have seen, he meant that he prepared the report after the fact, not that he had fabricated it.

Mr. Cuozzo strongly denies any admission that he “made up” the report to give the appearance of compliance with license reporting requirements. In the

⁹⁶Tr. 129-30 (Miller).

⁹⁷We understand, as acknowledged by the Staff, that this period begins in August 1987 and ends on January 6, 1988. These dates were chosen because, during the period, there were no “true or alleged” audits of Mr. Sideras, thus clearly exceeding the audit period specified in the license. Tr. 208 (Cant).

⁹⁸Specifically, September 15, 1987; October 12, 1987; November 4, 6, and 25, 1987; and December 11, 15, and 21, 1987. See Licensee Exh. 1.

⁹⁹An audit report for Mr. Sideras, dated January 6, 1988, was included among the documents transmitted to the Staff by Mr. Cuozzo on April 28, 1988. Miller, ff. Tr. 77, at 9. See Staff Testimony, Attach. 6, Exh. 7, at 10.

¹⁰⁰Tr. 582 (Cuozzo); Matakas, ff. Tr. 77, at 14; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4, at 4.

first place, no report in July 1987 was required for Mr. Sideras, inasmuch as an earlier audit had been performed in May 1987,¹⁰¹ and the license only required an audit every 3 months.¹⁰²

More important, under the procedure that he routinely followed in 1987, Mr. Cuozzo frequently did not prepare a report on the same day that an audit had been performed.¹⁰³ Thus, in preparing the report dated July 21, 1987, Mr. Cuozzo appeared to be following the same practice that he routinely followed and for which he had not previously been cited. The record reflects that Mr. Sideras performed radiographic activities on July 6, 14, and 27, 1987.¹⁰⁴ Although the record is not clear in this respect, the audit report incorrectly dated July 21, 1987, could have represented any of these work sessions (or, indeed, others).

Given these considerations, we do not find that Mr. Cuozzo fabricated the report in question for the purpose of appearing to comply with the reporting requirements. Finally, we agree with the Staff that accurate reports are material to the NRC's licensing scheme and that the inaccurate advice to the NRC accordingly was material, whether or not the NRC would be led to take action on the basis of the erroneous information. *See Federal Communications Commission v. WOKO, Inc.*, 329 U.S. 223, 227 (1946).

VII. SEVERITY OF VIOLATIONS AND APPROPRIATE CIVIL PENALTY

A. General Description

Standards for determining the amount of a civil penalty for various types of violations appear in 10 C.F.R. Part 2, Appendix C, "General Statement of Policy and Procedure for NRC Enforcement Actions." In general, the "nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved."¹⁰⁵ Further, the penalty should be tailored to the particular facts and circumstances of the violation or violations involved.

Base civil penalties, as set forth in Table 1A of those regulations, are categorized in accordance with the type of activity authorized by the license under review and the particular aspect of that activity giving rise to the violation in question.¹⁰⁶ Here, the Licensee falls within the activity generally described,

¹⁰¹ Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 7, at 9; Tr. 581-82 (Cuozzo).

¹⁰² Staff Testimony, ff. Tr. 77, Attach. 6, Exhs. 2 and 3; Tr. 209-11 (Miller); Tr. 538-39, 549 (Cuozzo).

¹⁰³ Tr. 359-60, 548 (Cuozzo).

¹⁰⁴ Licensee Exhs. 1, 2A.

¹⁰⁵ 10 C.F.R. Part 2, Appendix C, § V. For a further description, see *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 304-05 (1991).

¹⁰⁶ 10 C.F.R. Part 2, Appendix C, § V.B, Table 1A.

at the time of the alleged violations, as "Industries [sic] users of material"¹⁰⁷ (specifically defined to include "industrial radiographers"). The specific aspect of that activity giving rise to all the violations here under review is denominated as "Plant operations." For the activity and aspect of the activity involved here, the base civil penalty is \$10,000.

The base civil penalty for a given violation is then adjusted for the severity of the identified violation, using percentages of the base violation. As set forth in Table 1B of the regulations,¹⁰⁸ there are five severity levels of violations, ranging from the most serious (Level I) to the least serious (Level V). The applicable percentages of the base civil penalty for particular severities are 100% for Severity Level I, 80% for Severity Level II, 50% for Severity Level III, 15% for Severity Level IV, and 5% for Severity Level V. The rules also permit violations to be evaluated "in the aggregate and a single severity level assigned for a group of violations."¹⁰⁹ As evaluated by the Staff, the violations under review here collectively represent Severity Level II, and the Staff is seeking the standard civil penalty (\$8000) for that level of violation (80% of the base civil penalty of \$10,000).

To determine the appropriate severity level for a violation, various examples are set forth in eight Supplements to the regulations. The examples potentially appropriate to be considered in this proceeding are set forth in Supplement VI (*Fuel Cycle and Materials Operations*) or Supplement VII (*Miscellaneous Matters*). The Staff deems the violations here at issue to fall within Supplement VII,¹¹⁰ although the Licensee seeks to include the violations within the lowest severity level of Supplement VI.

Other factors may also be taken into account in determining the amount of a civil penalty. The tables referenced above take into account "the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration."¹¹¹ In addition, the severity levels may be escalated or mitigated for various listed factors. The criteria intend to permit the NRC to consider each civil penalty case on its own merits and, after considering all relevant circumstances, to adjust "the base civil penalty values upward or downward appropriately."¹¹²

¹⁰⁷ This typographical error was later corrected to read "Industrial Users of Material." 56 Fed. Reg. 40,664, 40,686 (Aug. 15, 1991).

¹⁰⁸ 10 C.F.R. Part 2, Appendix C, § V.B, Table 1B.

¹⁰⁹ 10 C.F.R. Part 2, Appendix C, § III.

¹¹⁰ Notice of Violation and Proposed Imposition of Civil Penalty, dated March 9, 1990, at 2; Civil Penalty Order, dated August 29, 1990, Appendix, at 2; 55 Fed. Reg. at 36,370.

¹¹¹ 10 C.F.R. Part 2, Appendix C, § V.B. The regulations add that it is not NRC's intention to put a licensee out of business through the imposition of civil penalties (NRC relies on orders for that purpose), or to compromise a licensee's ability to conduct safe operations.

¹¹² 10 C.F.R. Part 2, Appendix C, § V.B. See also section V.D ("Escalation of Enforcement Sanctions"), where it states that "enforcement sanctions will normally escalate for recurring similar violations."

Finally, in reviewing the civil penalty sought to be imposed by the Staff, we may determine whether the proposed severity level and penalty are appropriate or, alternatively, whether the proceeding should be dismissed or the penalty imposed, mitigated, or remitted. 10 C.F.R. § 2.205(f). We may not increase the penalty sought by the Staff. *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 224 (1987).

B. Severity Levels Governing This Proceeding

The NRC Staff categorized the two overall violations and their subparts as, in the aggregate, a Severity Level II problem.¹¹³ On the other hand, the Licensee judged the violations collectively (including the one that it admitted) as no more than a Severity Level V.¹¹⁴

As set forth in the Staff letter transmitting the Notice of Violation to CTL, dated March 9, 1990, the basis for the Severity Level II categorization was that the violations "involved falsification of records and willfully providing information that was not accurate in all material respects to the NRC by a licensee official responsible for the Radiation Safety Program, namely, the VP/RSO." In that connection, the regulations define willfulness to include "a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements."¹¹⁵ Among other matters, however, the "intent of the violator" is to be taken into account in establishing severity levels.¹¹⁶

Turning to the examples set forth for Severity Level II, under Supplement VI (*Fuel Cycle and Materials Operations*), all either involve excessive radiation exposures or relate to deficiencies in the actual conduct of radiographic operations. None would serve as an example for use in this proceeding.

Under Supplement VII (*Miscellaneous Matters*), which is relied upon by the Staff, Severity Level II includes two examples that might be applicable here. Specifically, in pertinent part

1. Inaccurate or incomplete information which is provided to the NRC (a) by a licensee official because of careless disregard for the completeness or accuracy of the information

2. Incomplete or inaccurate information which the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of careless disregard for the accuracy of the information on the part of a licensee official

¹¹³ Staff FOF at 27.

¹¹⁴ Licensee FOF, ¶ 34, at 3.

¹¹⁵ 10 C.F.R. Part 2, Appendix C, § III.

¹¹⁶ *Id.*

In contrast, Severity Level III currently includes the following under Supplement VI:

7.¹¹⁷ Breakdown in the control of licensed activities involving a number of violations that are related or, if isolated, that are recurring violations that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

And under Supplement VII, Severity Level III includes, in pertinent part:

1. Incomplete or inaccurate information which is provided to the NRC (a) because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation
2. Incomplete or inaccurate information which the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation

The only relevant example provided for Level V, which the Licensee appears to deem appropriate, is (for Supplement VI) violations "that have minor safety or environmental significance." (No applicable examples appear in Level V of Supplement VII.) The Staff indicated that a simple failure to perform an audit as required by the license would amount to a Severity Level IV violation.¹¹⁸ There are no applicable examples under Severity Level IV of Supplement VI but, in pertinent part, Severity Level IV of Supplement VII includes

1. Incomplete or inaccurate information of more than minor significance which is provided to the NRC but not amounting to a Severity Level I, II, or III violation[.]
2. Information which the NRC requires be kept by a licensee and which is incomplete or inaccurate and of more than minor significance but not amounting to a Severity Level I, II, or III violation[.]

C. Determination of Severity Level of Proved Violations

As set forth above, we have determined that the Licensee committed Violation I.A.1 (in part) and Violation I.A.2 (admitted). Each of these standing alone would appear to constitute a Severity Level IV violation. (If Violation I.A.1 had been proved in full, it would have constituted an additional, separate Severity Level IV violation.)

As for Violation I.B, the Staff has demonstrated that the July 21, 1987 audit of Mr. Sideras was not performed on that date and that the information provided by Mr. Cuozzo by telephone concerning that audit was incorrect. The Staff has

¹¹⁷ When the violations in this case occurred, this criterion was numbered as "8" under Supplement VI, Severity Level III.

¹¹⁸ Cant, ff. Tr. 77, at 23; Tr. 154 (Cant).

not proved, however, that Mr. Cuozzo intended to mislead the NRC or to falsify the audit report for that date. Nor has the Staff proved a "careless disregard" of requirements, for there was no explicit requirement to prepare a report on the date of an audit.¹¹⁹ All that the Staff has proved is that the system used by Mr. Cuozzo — preparing audit reports some time after the audit had taken place — was inappropriate for complying with the license requirement.

We evaluate these proved violations as falling within the criteria for Severity Level III. They do not include any of the aspects of willfulness — either improper intent or a careless disregard of requirements — that would elevate these violations to a Level II. They appear rather to be comprehended by "inadequate actions" by licensee officials or, alternatively, by a "breakdown in the control of licensed activities" — each constituting a criterion for Level III. In the words of Mr. Cuozzo, he was "sloppy with [his] paperwork."¹²⁰

On the other hand, because of the demonstrated potential dangers of radiographic operations to the public health and safety and the importance of the audit reports to NRC's system of regulation, we view the foregoing violations as of a significantly higher level than the "minor safety significance" accorded it by the Licensee. There clearly were "inadequate" Licensee actions amounting to a "breakdown" in control of licensed activities.

Accordingly, we rate the violations, in the aggregate, as a Severity Level III violation. A civil penalty reflecting that level of severity is to be assessed.

CTL previously sought mitigation on the basis of the administrative changes that it put into place. Under 10 C.F.R. Part 2, Appendix C, § V.B.2, the promptness and extent to which a licensee takes corrective action is a factor we may consider in determining the amount of a civil monetary penalty. Here, however, CTL effectuated its changes only subsequent to the enforcement conference in December 1989, almost 2 years after the Staff discovered the violations and discussed them with the Licensee in the exit interview. We agree with the Staff that the changes were not instituted early enough, and then only through Staff influence, for mitigation to be appropriate. Accordingly, we deny any mitigation.

Conclusions of Law

1. As in part claimed by the NRC Staff, the Licensee committed Violation I.A.1, but only insofar as it asserts that field audit inspection reports, dated July 20, 1987, and July 21, 1987, documenting audits of two radiographers, were created by the VP/RSO, and that one audit, on July 21, 1987, was never

¹¹⁹ See note 69, *supra*.

¹²⁰ Tr. 585 (Cuozzo).

performed. Contrary to the conclusion of the Staff, a field audit was performed on July 20, 1987.

2. Violation I.A.2 was committed by the Licensee, as claimed by the Staff and admitted by the Licensee.

3. Violation I.B was committed by the Licensee in part, to the extent that the VP/RSO incorrectly advised NRC representatives that he personally performed the July 21, 1987 audit and the statement was material because it had the potential to affect an ongoing NRC review of the matter. The record fails to support the allegation that the VP/RSO stated that he "made up" the audit report to give the appearance of compliance with the quarterly audit requirement.

4. Contrary to the claim of the Staff, the foregoing violations do not comprise a Severity Level II violation, inasmuch as they did not involve attempts to mislead the NRC.

5. These violations in the aggregate amount to a Severity Level III violation and warrant a base civil penalty of \$5000.

6. The Staff has not sought escalation of the base civil penalty. Mitigation, as sought by the Licensee, is not warranted.

7. Accordingly, a civil penalty of \$5000 should be substituted for the \$8000 sought by the Staff and be imposed on and assessed against the Licensee.

Order

On the basis of the foregoing opinion, including findings of fact, conclusions of law, and the entire record, it is, this 29th day of January 1992, ORDERED:

1. The Order Imposing a Civil Monetary Penalty, dated August 29, 1990, is *modified* by substituting a civil monetary penalty of \$5000 for the \$8000 originally sought by the Order.

2. A civil penalty of \$5000 is hereby *assessed* against the Licensee, Certified Testing Laboratories, Inc.

3. This Initial Decision is effective immediately and, in accordance with 10 C.F.R. § 2.760 of the Commission's Rules of Practice, shall become the final action of the Commission forty (40) days from the date of its issuance, unless any party petitions for Commission review in accordance with 10 C.F.R. § 2.786 or the Commission takes review *sua sponte*. See 10 C.F.R. § 2.786, as amended effective July 29, 1991 (56 Fed. Reg. 29,403 (June 27, 1991)).

4. Within fifteen (15) days after service of this Decision, any party may seek review of this Decision by filing a petition for review by the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.786(b)(1).

5. The petition for review shall be no longer than ten (10) pages and shall contain the information set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. Such an answer shall be no longer than ten (10) pages and, to the extent appropriate, should concisely address the matters in 10 C.F.R. § 2.786(b)(2). The petitioning party shall have no right to reply, except as permitted by the Commission.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Cadet H. Hand, Jr. (by C.B.)
ADMINISTRATIVE JUDGE**

**Elizabeth B. Johnson
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
January 29, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-312-OLA
(Possession-Only License)

SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station)

February 6, 1992

The Commission considers the Environmental Conservation Organization's appeal of a Licensing Board order that denied the organization's petition for leave to intervene in a proceeding involving an amendment that, if granted, would convert the Rancho Seco operating license into a "possession-only" license (POL). The Commission finds that the Petitioner has failed, on appeal, to demonstrate that it has standing to intervene in the proceeding. The Commission therefore directs the Staff, after it makes the findings necessary for the issuance of a license amendment, to issue the POL, subject to a two-stage administrative stay to allow orderly processing of anticipated judicial challenges to this action.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.762)

The Commission regulations in 10 C.F.R. § 2.762 apply only to appeals from "initial decisions," i.e., decisions of a licensing board that dispose of a major portion of, or conclude, the proceeding before that board, such as a decision to grant, suspend, revoke, or amend a license.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

The Commission's regulations in section 2.714a allow for an immediate appeal from decisions granting and/or denying in whole a petition for leave to intervene.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

Section 2.714a contains a completely different provision for appeal than section 2.762. Section 2.762(b) provides that the brief in support of the notice of appeal may be filed within 30 days of the notice of appeal. Section 2.714a requires the appellant's brief to be submitted *with* the notice of appeal, within 10 days of the Licensing Board's decision.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

When the Commission adopted 10 C.F.R. § 2.714a, it contemplated less stringent requirements for briefs filed under section 2.714a because these briefs must be filed in a shorter time frame and — presumably — will address much narrower issues than an appeal from the final decision of an entire licensing process.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.762)

While there is a clear benefit to the reviewing body in having the assistance of the items specified in 10 C.F.R. § 2.762 — such as a Table of Contents and a table of cases — in the brief submitted, the Commission does not find that these items are required under its rules.

REGULATIONS: INTERPRETATIONS (PLEADINGS)

Prior Commission case law requires that all briefs — including those filed under 10 C.F.R. § 2.714a — shall contain a "statement of the case" or "statement of facts" including "an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640, 641 (1977). However, the Commission can exercise its discretion and waive that requirement on occasion.

REGULATIONS: INTERPRETATION (PLEADINGS)

All parties who appear before the Commission "bear full responsibility for any misapprehension of [their] position caused by the inadequacies of [their] brief" *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982).

RULES OF PRACTICE: INTERVENTION PETITIONS

NRC regulations provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party to [the] proceeding" should file a petition to intervene setting forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d).

RULES OF PRACTICE: STANDING TO INTERVENE

The NRC has "long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189 of the Atomic Energy Act." *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

RULES OF PRACTICE: STANDING TO INTERVENE

The NRC has held that, in order to satisfy "judicial" standing, a petitioner must demonstrate that it could suffer an actual "injury in fact" as a consequence of the proceeding and that this interest is within the "zone of interests" to be protected by the statute under which the petitioner seeks to intervene. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985).

NEPA: SCOPE OF INTERESTS PROTECTED

It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage.

NEPA: SCOPE OF INTERESTS PROTECTED

A petitioner's loss of employment that results directly from a licensee's decision not to operate a nuclear facility and that does not result in environmental

damage, does not fall within the "zone of interests" protected by NEPA and cannot support a petitioner's standing to challenge the agency's action.

RULES OF PRACTICE: STANDING TO INTERVENE

There is Commission precedent for rejecting an assertion of "informational interests" as grounds for standing. *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976).

NEPA: SCOPE OF INTERESTS PROTECTED

"Interest" means an interest affected by the outcome of the proceeding, not an interest in the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner seeking to intervene cannot demonstrate standing simply by asserting a loss of information if it is not allowed to participate in a proceeding.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.788(e))

The NRC's stay procedures apply only when there is an order in existence to be stayed. If there is no order in existence to be stayed, the proper motion is a motion to hold in abeyance.

MEMORANDUM AND ORDER

This matter is before the Commission on an appeal by the Environmental Conservation Organization ("ECO") from an order by the Atomic Safety and Licensing Board ("Licensing Board") wholly denying its petition for leave to intervene in a proceeding involving an amendment to the Rancho Seco operating license. The proposed amendment would allow the Sacramento Municipal Utility District ("SMUD"), the Licensee, to possess both the reactor and its nuclear fuel but would remove SMUD's authority to operate the Rancho Seco facility — in essence converting the operating license into a so-called "possession-only" license ("POL"). The Licensing Board found that ECO did not have standing to intervene in the proceeding and that its proposed contentions were not in accordance with our directions for proceedings of this nature. ECO challenges these findings and, in addition, alleges that the Licensing Board

denied it "due process" in the proceeding below. The NRC Staff and SMUD have responded in opposition to the appeal.

After due consideration, we find that the Petitioner has failed to demonstrate on this appeal that it has standing to intervene in the proceeding. Petitioner also recently moved for a stay of the issuance of the POL pending disposition of this appeal. In view of our resolution of this matter, that motion is now moot. However, in order to permit orderly processing of anticipated judicial challenges to this action, we have directed the Staff to institute a two-stage administrative stay, after it has made the findings necessary for issuance of the POL.

I. FACTUAL BACKGROUND

In June 1988, SMUD's ratepayers adopted a public referendum directing SMUD to cease operations at Rancho Seco. On April 26, 1990, SMUD applied for an amendment to the Rancho Seco operating license that would authorize only the "use and possession" of the facility, not its operation. This type of amended license is generally termed a possession-only license or POL. The NRC Staff published a corrected notice of the requested amendment in the *Federal Register* and proposed to issue the amendment on an immediately effective basis following a finding of "no significant hazards considerations." 55 Fed. Reg. 41,280 (Oct. 10, 1990).

On November 8, 1990, ECO filed a petition to intervene and a request for a hearing in addition to comments opposing the proposed finding of "no significant hazards considerations," and the Staff and SMUD filed opposition to ECO's petition and comments. On January 30, 1991, we referred the matter to the Licensing Board for further proceedings in accordance with our Rules of Practice. See 56 Fed. Reg. 6691 (Feb. 19, 1991). The Licensing Board invited ECO to file a response to the Staff's and SMUD's pleadings and ECO filed such a response on March 4, 1991. In the interim, in a similar case involving the Shoreham nuclear power plant, we issued guidance regarding the admissibility of contentions directed at challenging a Staff decision not to prepare an Environmental Impact Statement ("EIS") for actions of the sort under consideration here. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991) ("*Shoreham*, CLI-91-4").

On April 15, 1991, by agreement of the parties, ECO filed additional affidavits supporting its petition. Also on April 15, ECO filed a document that it termed a "Further Amendment" to its petition. The Staff and SMUD moved to strike this pleading, alleging that they had not consented to this filing and that it constituted an unauthorized "rebuttal" or "reply" pleading not allowed by our Rules of Practice.

On May 1, 1991, the Licensing Board issued a Memorandum and Order on the petition to intervene. LBP-91-17, 33 NRC 379 (1991). After reviewing the filings before it, the Licensing Board found that it could not determine whether ECO had demonstrated standing to intervene in the proceeding. However, the Licensing Board believed that it would be assisted in determining the issue of standing by reviewing proposed contentions addressing the issues ECO wished to litigate. Accordingly, the Licensing Board directed ECO to file proposed contentions by June 3, 1991, and scheduled a prehearing conference to review the issue of standing for June 25, 1991.

In LBP-91-17, the Licensing Board provided several specific directions to ECO. First, the Licensing Board specifically stated that "[n]o further filings [after the June 3d date] will be permitted absent specific leave of the Board." LBP-91-17, 33 NRC at 392. Second, the Licensing Board reminded ECO to "pay particular heed" to our directions describing admissible contentions regarding the lack of proposed EIS in *Shoreham*, CLI-91-4, *supra*, and to our rulings in previous *Shoreham* cases that the scope of any EIS ordered would be limited to alternative methods of decommissioning, not alternatives to the decision to decommission. LBP-91-17, 33 NRC at 392-93. Third, the Licensing Board agreed that ECO's "Further Amendment" constituted an unauthorized reply to the responses to the petition and ordered the pleading stricken. *Id.* at 381 n.3.

ECO filed twenty-five proposed contentions on June 3, 1991, as directed. On June 10, 1991, ECO filed an additional set of six contentions. Both the Staff and SMUD responded in opposition to both sets of proposed contentions. In addition, the Staff moved to strike the second set of proposed contentions as untimely because these contentions were not filed within the time limits established by the Board's instructions in LBP-91-17. SMUD supported the Staff's motion but also requested that the Licensing Board rule on the additional contentions and dismiss them.

After reviewing the proposed contentions and the transcript of the prehearing conference, the Licensing Board dismissed the proceeding. *See* LBP-91-30, 34 NRC 23 (1991). Initially, the Licensing Board ruled that ECO's first set of contentions did not satisfy the directions contained in *Shoreham*, CLI-91-4, and in our earlier rulings. *See* LBP-91-30, 34 NRC at 26-27. Moreover, the Licensing Board found that ECO's second set of proposed contentions were untimely, i.e., filed outside the deadlines established in LBP-91-17, and that ECO had made no attempt to satisfy the five factors required for accepting late-filed contentions, found in 10 C.F.R. § 2.714(a)(1)(i)-(v). *See* LBP-91-30, 34 NRC at 27. Finally, the Licensing Board found that ECO had failed to establish standing. *See id.* at 27-28.

II. ARGUMENTS OF PARTIES

A. ECO's Arguments on Appeal

On appeal, ECO argues that: (1) it has standing to intervene in the license amendment proceeding; (2) the Licensing Board erred in dismissing its first set of proposed contentions; and (3) the Licensing Board ("ASLB") deprived it of due process by its procedural rulings and by dismissing the second set of proposed contentions. First, ECO argues that it demonstrated standing to intervene through its "informational interests" in an EIS and through its members' economic interest in employment at the plant, Appeal at 1-4. Moreover, ECO argues that the ASLB erred in finding that ECO had only a "general interest" in the proceeding, not a specific injury," *Id.* at 7-9.

Second, ECO argues that the ASLB erred in finding that any EIS need not consider the option of "resumed operation" of Rancho Seco, *id.* at 4-5; in its characterization of ECO's contentions as directed solely at that issue, *id.* at 5-6; in finding that the NRC's Generic Environmental Impact Statement ("GEIS") for decommissioning, NUREG-0586 (1988), was applicable to the Rancho Seco's proposed decommissioning, *id.* at 6-7; and in requiring that ECO's NEPA contentions be filed before SMUD had filed its environmental report. *Id.* at 9.

Finally, ECO argues that it was deprived of "due process" in the proceeding below because the ASLB issued its decision in LBP-91-30 before ECO had a chance to address arguments presented in two Staff pleadings that were not served on it, *id.* at 10-11; because the ASLB erred in striking the "Further Amendment" filed on April 15, 1991, *id.* at 11-12; because the ASLB struck the proposed contentions filed on June 10, 1991, as being untimely filed, and because the ASLB — according to ECO — dismissed the first set of proposed contentions without a specific discussion of each one, *id.* at 9-10.

B. The Staff's and SMUD's Responses

In response, the Staff and SMUD argue that ECO has not demonstrated standing to intervene because (1) prior Commission precedent has eliminated "informational interests" as a basis for standing, citing *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976), and because case law holds that ECO's members' interests in employment at the facility cannot support standing because those interests were not germane to ECO's organizational purpose, citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Next, the Staff and SMUD argue that the Licensing Board correctly applied the Commission's *Shoreham* rulings when the Board held that any environmental

review of the proposed early decommissioning of Rancho Seco need not review alternatives to the decision not to operate the facility; instead whatever environmental filings were required need only address alternative methods of decommissioning. Therefore, they argue that the Licensing Board correctly dismissed the first set of proposed contentions because they were solely directed toward obtaining an EIS analyzing “resumed operation” or “mothballing” as an alternative to decommissioning. In this regard, they argue that the Commission has already held that the GEIS will apply to nuclear plants that are prematurely decommissioned. Additionally, the Staff argues that ECO has failed to brief *why* its contentions were improperly denied. *See* NRC Staff Response at 24. n.10.

Finally, the Staff and SMUD argue that ECO was not prejudiced by its lack of opportunity to respond to two pleadings that were not served upon it; that the Licensing Board correctly struck the “Further Amendment” as an improper “rebuttal” argument; and that the Licensing Board correctly rejected the second set of proposed contentions because LBP-91-17 expressly provided that there would be no filings made after the ASLB’s established deadline without specific leave of the Board.

III. ANALYSIS

A. Sufficiency of ECO’s Brief

First, we must address the Staff’s and SMUD’s (“respondents”) arguments that ECO’s brief is in violation of our Rules of Practice. *See* Staff Brief at 20 & n.9; SMUD Brief at 13 & n.17. Respondents argue that ECO’s Brief is in violation of 10 C.F.R. § 2.762(d) which requires that all appellate briefs “in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.” 10 C.F.R. § 2.762(d). ECO failed to include these tables in its brief.

However, section 2.762 — on its face — applies only to appeals from “initial decisions,” i.e., decisions of a licensing board that dispose of a major portion of, or conclude, the proceeding before that board, such as a decision to grant, suspend, revoke, or amend a license. All the cases cited by the respondents in their briefs, *supra*, were decisions of that nature. Instead, this matter is before the Commission under 10 C.F.R. § 2.714a, which allows an immediate appeal from decisions granting and/or denying in whole a petition for leave to intervene. This section contains a completely different provision for appeal in that while section 2.762 provides that the brief in support of the notice of appeal may be filed within 30 days of the notice of appeal (10 C.F.R. § 2.762(b)), section 2.714a requires the appellant’s brief to be submitted *with* the notice of appeal,

within 10 days of the Licensing Board's decision. When we adopted section 2.714a, we contemplated less stringent requirements for briefs filed under section 2.714a because these briefs must be filed in a much shorter time frame and — presumably — will address much narrower issues than an appeal from the final decision of an entire licensing process.¹ Therefore, while there is a clear benefit to the reviewing body in having the assistance of the items specified in section 2.762 — with a corresponding benefit to the writer of the brief — and while organizing the pleading in this fashion also provides a discipline in assisting brief writers to organize their thoughts and ideas clearly, we do not find that it is required under our rules.²

B. Petitioner's Standing

1. Introduction

In its appeal, Petitioner argues that it has two alternative bases for standing to pursue this matter. First, Petitioner argues that it has standing based upon its members' loss of employment at Rancho Seco. Second, Petitioner argues that it has standing as an organization because the agency's failure to issue an EIS has deprived it of the opportunity to participate in the EIS process. We find that the Licensing Board correctly ruled that neither alleged injury provided Petitioner with standing in this matter.³

¹ Moreover, section 2.762 was omitted in adopting our new appellate procedures, see 56 Fed. Reg. 29,403, 29,408 (June 27, 1991), although it was retained under the interim appellate rules. See 55 Fed. Reg. 42,944 (Oct. 24, 1990). Meanwhile, section 2.714a was retained essentially unchanged. See 56 Fed. Reg. at 29,408. Thus, we have always envisioned section 2.714a as standing alone.

² Our prior case law requires that all briefs — including those filed under section 2.714a — shall contain a "statement of the case" or "statement of facts" including "an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640, 641 (1977). In this case, Petitioner clearly failed to provide us with this information in its brief. However, we have determined to exercise our discretion and waive that requirement on this occasion. We remind all parties who appear before us that they "bear full responsibility for any possible misapprehension of [their] position caused by the inadequacies of [their] brief" *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982).

³ Before the Licensing Board, Petitioner also asserted that it could suffer additional injuries if: (1) SMUD took action under the POL to dismantle the plant or allow it to deteriorate and then changed its mind and decided to "resume operation" without adequately restoring the plant to its current condition; (2) SMUD took action under the POL to make "resumed operation" impossible, resulting in both a shortage of electrical power and increased environmental pollution from replacement energy sources for Petitioner's members; and (3) SMUD was allowed to decommission the facility without filing a decommissioning plan under 10 C.F.R. § 50.82. The Licensing Board found that those asserted injuries did not provide Petitioner with standing to challenge the POL. See generally LBP-91-17, 33 NRC at 387-90. Because Petitioner does not challenge those rulings on appeal, we do not address them here.

2. Criteria Required to Establish Standing

Section 189(a) of the Atomic Energy Act provides that the Commission shall "grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit such person as a party to the proceeding." 42 U.S.C. § 2239(a). Accordingly, NRC regulations provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party to [the] proceeding" should file a petition to intervene setting forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d).

"We have long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189 of the Atomic Energy Act." *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In order to satisfy "judicial" standing, we have held that a prospective petitioner must demonstrate that it could suffer an actual "injury in fact" as a consequence of the proceeding and that this interest is within the "zone of interests" to be protected by the statute under which the petitioner seeks to intervene. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Edlow International*, CLI-76-6, *supra*, 3 NRC at 572; *see generally Lujan v. National Wildlife Federation*, — U.S. —, 110 S. Ct. 3177, 3185-86 (1990).

3. Petitioner's Economic-Standing Argument

The Licensing Board correctly dismissed Petitioner's economic-standing argument based upon its members' loss of employment at Rancho Seco. Petitioner argued that SMUD had been allowed to close Rancho Seco and initiate decommissioning activities without being required to perform an environmental review, and that these actions caused its members to lose their employment. The Licensing Board held that this injury was not within the scope of interests protected by NEPA. LBP-91-17, 33 NRC at 390-91.

It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage. For example, if the licensing action in question destroyed a woodland area, those persons who would be deprived of their livelihood in a local timber industry could assert a protected interest under NEPA. *See, e.g., Jersey Central Power and Light Co.* (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business, resulting from

the operation of a nuclear power plant); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water that may affect his catch).

Here, however, as the Appeal Board stated on an earlier occasion, Petitioner's members' loss of employment was not "occasioned by the impact that the [agency action] would or might have upon the environment." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977), *quoting Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 640 (1975) (Opinion of Mr. Rosenthal). Instead, the loss of employment results directly from SMUD's decision not to operate the facility, not from any environmental damage. Therefore, Petitioner's members' loss of employment at Rancho Seco itself does not fall within the "zone of interests" protected by NEPA and cannot support Petitioner's standing to challenge the agency's action.

4. *Petitioner's Informational-Standing Argument*

Petitioner asserts that it has standing to contest the proposed amendment because it will suffer an injury to its "informational interests" if it is not allowed to participate in the EIS process. This alleged injury has two aspects: first, the injury of being deprived of the right to comment on the EIS; and second, the injury of being deprived of information to disseminate because of the lack of an NRC-prepared EIS. *See* LBP-91-30, 34 NRC at 27-28. The Licensing Board found that these injuries were not sufficient to establish standing by themselves because they constituted a "general interest" in the proceeding, not a "specific injury." *Id.* at 28.

This decision was consistent with prior Commission precedents. We have already rejected the assertion of "informational interests" as grounds for standing. *Edlow International, supra*. Because that case is closely analogous to the case at bar, a brief review of that case and our holding there is in order at this time.

In *Edlow*, we reviewed two applications for licenses to export "special nuclear material" intended as fuel for the Tarapur Atomic Power Station in India. Three organizations⁴ petitioned for leave to intervene and requested hearings regarding these proposed licenses. *See generally id.*, CLI-76-6, 3 NRC at 565-68. The petitioners asserted "institutional" interests based upon alleged injuries that could result to their informational and educational activities in addition to "representational" interests that derived from alleged injuries to the individual members of the organizations. *Id.* at 572.

⁴The Natural Resources Defense Council, the Sierra Club, and the Union of Concerned Scientists. *See* 3 NRC at 565.

The organizational interests asserted by the *Edlow* petitioners were almost identical to the organizational interests asserted by ECO in this case. The *Edlow* petitioners asserted an interest in "disseminating information" and "promoting" wise use of technology and resources and the development of sound energy policy." *Id.* Moreover, the *Edlow* "[p]etitioners allege[d] that a 'failure of the Commission to carry out relevant analyses of the risks posed by the pending proceedings impairs petitioners' ability to fulfill their information and educational functions" *Id.*

The interests asserted in ECO's organizational charter appear to be no different. See Articles of Incorporation of Environmental Resources and Conservation Organization ("Art. Incorp."), attached to Petitioner's Reply of March 4, 1991. See generally LBP-91-17, 33 NRC at 382. For example, ECO seeks "[t]o provide accurate technical and financial information about energy supply and demand in California in the years to come" Art. Incorp. at 1. ECO also seeks "[t]o provide expert and objective information about safety and environmental issues concerning nuclear energy in general and the Rancho Seco Nuclear Generating Station in particular" *Id.* at 2. Finally, ECO seeks "[t]o provide factual information to specific parties or organizations . . . and to petition the [NRC] to accept and consider information this organization can provide in its deliberations" *Id.*⁵

We found that the *Edlow* petitioners had failed to demonstrate that they had standing to intervene as a matter of right and that while the *Edlow* petitioners were "interested" in the proceeding, they had failed to demonstrate an "interest" affected by the outcome of the proceeding, i.e., they had failed to demonstrate that they could be harmed by the actual grant or denial of the license itself. Thus, we were

hard pressed to see how petitioners' desire to have the Commission carry out relevant analyses (a concern directed not to the granting or denial of a particular license, but to the process of Commission action) is an "interest [which] may be affected by the proceeding." In our view, the term "proceeding" can only be interpreted to mean the outcome on the merits of the license. This is clear from the language of the license. This is clear from the initial language of Section 189(a) which speaks of proceedings "for the granting (etc.) of any license"

⁵It is clear that Petitioner's Articles of Incorporation are a "thirteenth" hour or "after-the-fact" creation, drawn up specifically for the purpose of establishing "informational standing." ECO filed its petition to intervene and request for hearing on November 8, 1990. However, ECO's Articles of Incorporation are dated on January 10, 1991. The affidavit of Mr. Rossin, ECO's president, describes these Articles as "pending," presumably before the appropriate agency of the state of California. See Rossin Affidavit (April 12, 1991) attached to Petitioner's pleading of April 15, 1991.

3 NRC at 572. Accordingly, we concluded that “[p]articipation in a hearing is not an end in itself, but must be related to an issue — in this case, grant or denial of a license.” *Id.* at 574.

Our analysis is the same here. ECO claims to be “interested” in the proceeding because it wishes to “disseminate information” regarding the need for future energy sources in California. However, this interest is not an “interest affected by the *proceeding*” itself, i.e., it is not an injury caused by the grant or denial of the proposed license amendment. Instead, ECO simply alleges before us that it will not be able to perform its “informational” activities unless it is allowed to “participate” in the EIS process, i.e., unless the Commission “carries out its relevant analyses,” *id.* at 572. As in *Edlow*, we find that this “interest” is not sufficient to confer standing on ECO as a matter of right.

Before the Licensing Board, Petitioner relied heavily upon *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107 (D.C. Cir. 1990), for the proposition that “[o]rganizational standing is established whenever the agency’s action interferes with the organization’s informational purposes to the extent that it interferes with the organization’s activities.” Petition at 23. *See generally* LBP-91-17, 33 NRC at 382-86, 391-92. While Petitioner does not cite that case in its brief on appeal, it does raise that argument. *See* Petitioner’s Brief at 2-3. However, we not only find that the *Competitive Enterprise* decision is inapposite but also that its validity has been severely compromised by a more recent decision by that same court.

The *Competitive Enterprise* Court found that “a right to specific information under NEPA has so far been recognized for standing purposes only when the information sought relates to *environmental* interests that NEPA was designed to protect.” 901 F.2d at 123 (citations omitted, emphasis in original). “We find that there is a critical difference between seeking an EIS for the purpose of disseminating information about potential environmental harm and seeking an EIS as a vehicle for obtaining and disseminating information on a nonenvironmental issue.” *Id.* A subsequent decision has indicated that the “informational standing” concept implicitly endorsed by the *Competitive Enterprise* Court requires an allegation that the requested information relates to specific environmental issues with a direct impact on the petitioner. *City of Los Angeles v. NHTSA*, 912 F.2d 478, 495-98 (D.C. Cir. 1991).

However, ECO makes no such allegation in this appeal. Instead, we find only a generalized allegation that if the NRC issues a POL without preparing an EIS

ECO[’s] and its members’ rights to participate in the development and consideration of the FEIS, to have access to the information made available through that EIS, and to be assured by the existence of that FEIS that the Commission has taken the required “hard look” at the proposal to decommission would all have been denied.

Petitioner's Brief at 2-3. Moreover, the allegation is supported only by Petitioner's Articles of Incorporation, issued at the "thirteenth hour," well after the start of this proceeding, and clearly written with the *Competitive Enterprise* guidelines in mind. See note 5, *supra*.

This vague, generalized allegation supported only by the "after-the-fact" action is insufficient to satisfy the requirements of *Competitive Enterprise*. We read that decision to require an allegation that the organization has been denied access to information relating to a specific environmental issue with particular application to petitioner, not just that petitioner has been denied access to "environmental information" in general that has no specific impact on the petitioner. Furthermore, that "impact" or "application to the petitioner" must be based upon an established organizational purpose, not some justification drawn up after the fact to satisfy required guidelines not met in the original petition. Otherwise, as the Licensing Board noted, petitioner would have standing to intervene "with regard to any other power reactor," LBP-91-30, 34 NRC at 28, based upon any *post hoc* rationalization that could be devised by an ingenious mind. We do not think the *Competitive Enterprise* Court intended such a result. We certainly would not permit such a result with regard to intervention in our licensing proceedings.

Moreover, even if the *Competitive Enterprise* Court had intended such a result, that decision has been significantly undermined by the recent decision in *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991). The *Lyng* Court reviewed the concept of "informational standing," 943 F.2d at 83-84, and concluded that "we have never sustained an organization's standing in a NEPA case *solely* on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain." 943 F.2d at 84 (emphasis added). The *Lyng* Court reached the logical conclusion that such a provision "would potentially eliminate any standing requirement in NEPA cases, save when an organization was foolish enough to allege it wanted the information for reasons having nothing to do with the environment." *Id.*

Additionally, the *Lyng* Court observed that "[i]t was not apparent" how the concept of "informational standing" was different from the concept of generalized "interest" in a problem that the Supreme Court had found insufficient for standing in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Furthermore, the *Lyng* Court could find no difference between the concept of "informational standing" for an organization and "informational standing" for an individual, another concept that the Supreme Court had found insufficient to support standing. *United States v. Richardson*, 418 U.S. 166, 176-80 (1974). Finally, the *Lyng* Court found that such a concept "exists day in and day out whenever the federal agencies are *not* creating information a member of the public would

like to have.” 943 F.2d at 85 (emphasis added). The *Lyng* Court found that this could allow

a prospective plaintiff [to] bestow standing upon itself in every case merely by requesting the agency to prepare [an EIS], which in turn would prompt the agency to engage in “agency action” by failing to honor the request.

Id. at 85. In sum, we find that the *Competitive Enterprise* decision does not support Petitioner’s standing to challenge the proposed Rancho Seco POL and that even if it did support such an argument, it would be of questionable value.⁶

C. Petitioner’s Request for a Stay of the POL

On December 3, 1991, Petitioner filed a pleading asking that we “stay” issuance of the POL pending our resolution of this appeal. As we noted on a similar occasion, our stay procedures do not apply to a situation in which there is no outstanding order to “stay.” See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991) (“*Shoreham*, CLI-91-8”). See 10 C.F.R. § 2.788(e). Thus, we consider this a request for an “anticipatory” stay or a “motion to hold in abeyance.” *Id.* In view of the fact that we have resolved this matter, that request is now moot.

Petitioner also requested an administrative stay to allow orderly processing of an anticipated request for a judicial stay of the POL. We have granted similar requests in similar situations. See *Shoreham*, CLI-91-8, 33 NRC at 471-72. We hereby direct the Staff to enter a two-stage administrative stay of the POL similar to that it issued in the *Shoreham* decision, *supra*. See 56 Fed. Reg. 28,424, 28,426 (June 20, 1991). When the Staff issues the POL, it shall stay the effectiveness of the amendment for 10 working days. If Petitioner files a petition for review and a motion for a judicial stay within that time with a United States Court of Appeals, the Staff shall extend the administrative stay for an additional 10 working days.⁷

⁶Because we find that ECO has failed to demonstrate standing on this appeal, we do not reach the other issues raised. We note that ECO alleges that the Licensing Board improperly excluded various standing arguments by striking some of its pleadings. However, ECO has not been prevented from raising any standing arguments on this appeal.

⁷We remind the parties that “[m]ajor dismantling and other activities that constitute decommissioning under the NRC’s regulations must await NRC approval of a decommissioning plan.” See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5. (1991).

Pursuant to its normal practice, the Staff should also review all of Petitioner’s proposed contentions and satisfy itself with regard to any applicable and discernable safety or environmental issues contained therein prior to issuing the POL.

IV. CONCLUSION

In conclusion, we hereby find that (1) Petitioner has failed to demonstrate that it has standing to challenge the proposed POL amendment on this appeal; (2) the Staff may issue the POL when it makes the findings necessary for the issuance of the license amendment; and (3) the Staff should include a two-stage administrative stay in the POL when it is issued.

Commissioner de Planque did not participate in this matter.

It is so ORDERED.

For the Commission⁸

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of February 1992.

⁸ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtliss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 50-424-OLA
50-425-OLA

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

February 12, 1992

The Commission considers the Petitioner's appeal of a licensing board decision dismissing its contentions and denying its petition to intervene on amendments to operating license requirements pertaining to emergency diesel generators. The Commission dismisses the appeal for the Petitioner's failure to file a brief supporting its appeal; however, certain technical issues related to operation of the diesel generators are referred to the NRC Staff for further review.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

Participants in NRC proceedings, whether acting *pro se* or represented by counsel, are expected to become familiar with the applicable rules of practice.

RULES OF PRACTICE: CONTENTIONS (APPEALABILITY OF DISMISSAL)

Appeals from a licensing board order having the effect of dismissing all of a prospective party's contentions and denying intervention lie under 10 C.F.R. § 2.714a.

RULES OF PRACTICE: BRIEFS

The necessity of a brief supporting an appeal has long been emphasized in the NRC's appellate practice; mere recitation of a party's prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the licensing board in its order below.

RULES OF PRACTICE: LICENSING BOARD REFERRAL OF ISSUES TO STAFF

If a licensing board believes from its involvement in a proceeding that serious safety issues remain to be addressed, in circumstances in which the remaining intervenor has been dismissed, the board may refer any outstanding concerns to the NRC Staff for appropriate action.

NUCLEAR REGULATORY COMMISSION: HEALTH AND SAFETY RESPONSIBILITY

If an adjudicatory proceeding is terminated, the Commission may refer remaining safety issues of potential concern to the NRC Staff for review pursuant to the Commission's general supervisory authority and responsibility for safety matters.

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 25, 1991, Georgians Against Nuclear Energy (GANE) filed an appeal from the Atomic Safety and Licensing Board's Memorandum and Order, LBP-91-21, 33 NRC 419 (1991), that dismissed GANE's proffered contentions and denied its petition for leave to intervene in this proceeding on a proposed amendment to each of the operating licenses for the Vogtle Electric Generating

Plant. Because GANE was the only party seeking a hearing on the amendment, the Board's order also had the effect of terminating the proceeding. Although GANE's May 25th filing satisfied the requirement to file a notice of appeal, GANE has not filed a brief in support of its position on appeal. Both the NRC Staff and Georgia Power Company, the Licensee, have noted this deficiency and ask that we dismiss the appeal.

The Commission has jurisdiction over the appeal in accordance with the interim appellate procedures in effect at the time of the Licensing Board's decision. See 10 C.F.R. § 2.785, note (b) (1991). We agree that GANE should be dismissed for failing to file a brief in support of its appeal; however, we are directing the NRC Staff to provide its evaluation of certain matters related to the operation of the diesel generators and their associated instrumentation.

II. BACKGROUND

The proceeding concerns an amendment to the technical specifications for each of the Vogtle units to permit the Licensee to bypass, in emergency start conditions, the high jacket-water temperature trip of the emergency diesel generators. The intended purpose of the change is to minimize the potential for spurious trips of the diesel generators during emergency starts. The Staff and the Licensee believe that the change will enhance safety, particularly in light of a serious loss-of-power event that occurred at Vogtle Unit 1 on March 20, 1990. During that event, the Licensee had difficulty in establishing sustained operation of one of its emergency diesel generators, and investigation of the event indicated that a trip of the diesel generator was likely caused by a spurious trip signal from the high jacket-water temperature sensors.¹

A notice of the proposed change and of opportunity for hearing was published in the *Federal Register* on June 22, 1990, and the Staff approved the change as an amendment involving "no significant hazards consideration" on July 10, 1990.² GANE filed a petition to intervene on July 23, which was referred to the Licensing Board for consideration. Although both the Staff and the Licensee opposed the petition, the Board declined to reject the petition on its face but scheduled a prehearing conference to further consider the petition and any supplement thereto. LBP-90-29, 32 NRC 89 (1990).

¹See NUREG-1410, "Loss of Vital AC Power and the Residual Heat Removal System During Mid-Loop Operations at Vogtle Unit 1 on March 20, 1990," at 3-21, 6-12 (June 1990). This document contains the report of the NRC's special Incident Investigation Team.

²55 Fed. Reg. 25,756 (June 22, 1990) and 55 Fed. Reg. 32,337 (Aug. 8, 1990). Even prior to issuing the formal amendment, the NRC Staff gave tacit approval to the change under a "Temporary Waiver of Compliance" from the technical specifications until the amendment application could be processed. See Letter from G. Lainas, Office of Nuclear Reactor Regulation, to W.G. Hairston III, Georgia Power Co. (May 25, 1990).

Prior to the prehearing conference, GANE filed a set of eight proposed contentions. Both the Staff and the Licensee opposed GANE's contentions and indicated their belief, *inter alia*, that GANE had failed to provide adequate bases for its contentions. The Board summarily rejected two of the contentions for lack of relevance to the proceeding.³ Despite the structural flaws in the remaining contentions, the Board believed that a number of safety matters derived from the contentions might be appropriate for hearing, but it deferred ruling on the contentions, largely on the strength of the Licensee's offer to provide the Board and parties additional information in an attempt to resolve potential issues informally.

The Licensee thereafter submitted a supplemental statement, which described its response to the loss-of-power incident and provided additional analysis supporting the proposed changes to the technical specifications. After considering the Staff's and GANE's initial responses to the Licensee's filing and an additional round of comments from the parties, the Board eventually dismissed GANE's remaining contentions, primarily for their lack of sufficient specificity to warrant admission, and indicated its satisfaction that any outstanding concerns over the amendment had been answered. LBP-91-21, *supra*. GANE asks us to "put aside" the Licensing Board's decision.

III. ANALYSIS

As noted at the outset of this decision, both the Licensee and the NRC Staff urge us to dismiss GANE's appeal because GANE has not filed a supporting brief. We agree that GANE has not satisfied the briefing requirement to perfect its appeal, despite GANE's urging that we consider its original May 25th filing as its brief.

In its August 8th "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal," GANE asserts that it was uncertain of the "conventions" involved in an appeal and had "no prior knowledge that a brief would be expected." GANE's claimed unfamiliarity with the procedural rules does not excuse its failure to file a brief. We expect all participants in NRC proceedings, whether acting *pro se* or represented by counsel, to become familiar with the applicable rules of practice. See *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980). The necessity of a brief in our appellate practice has long been emphasized. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 241 (1991); *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973).

³ Prehearing Conference Order (Filing Dates for Further Submissions) (Oct. 2, 1990, unpublished).

In this case, the Licensing Board provided specific instructions for taking an appeal. Although the Commission believes that the Licensing Board erroneously indicated that an appeal would be governed by the provisions of 10 C.F.R. §§ 2.760 and 2.762 then in effect (rather than 10 C.F.R. § 2.714a), the error was of no consequence to GANE's fundamental obligation to file a brief.⁴ At most, the Board's error allowed GANE a more generous period within which to file a brief. While GANE could be excused for relying on the instructions contained in the Licensing Board's order, GANE did not heed those instructions and file a brief.

Even if we were to allow, as GANE asks, its May 25th filing to stand as GANE's "brief," that document simply does not come to grips with the Licensing Board's determination that GANE failed to meet the requirements of 10 C.F.R. § 2.714 applicable to its proffered contentions.⁵ Mere recitation of GANE's prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986). We therefore dismiss the appeal in view of GANE's failure to file a brief.

Although we dismiss GANE's appeal in the adjudicatory proceeding, we are asking the Staff to give further consideration to certain matters that appear related, at least in part, to GANE's expressed concerns with operation of the diesel generators at the Vogtle plant. In this regard, GANE appears to concede that the Licensing Board, within the limits of its jurisdiction in this proceeding, ruled appropriately with respect to GANE's contentions and that, even from GANE's perspective, the change to permit bypass of the high jacket-water

⁴Because the Board's order had the effect of dismissing *all* of GANE's contentions and denying intervention, we believe that section 2.714a governed appeals from LBP-91-21. See *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 284 (1991). The primary significance of the distinction between section 2.714a and then applicable section 2.762 concerns the timing of the supporting brief. The brief must be filed concurrently with an appeal under section 2.714a, but is not required until 30 days after the notice of appeal if section 2.762 governs. Under the Commission's revised appellate procedures, 56 Fed. Reg. 29,403 (June 27, 1991), the distinction in procedure may have greater significance, because most appeals, except those that lie under section 2.714a, are subject to the new discretionary review procedures.

⁵Generally, the Licensing Board found that GANE had failed to refer to the legal authority under which it believed the application should be judged, to provide a brief explanation of the bases for the contentions, to set forth a concise statement of the facts, expert opinion, or sources and documents on which it intended to rely, or to provide the supporting reasons for its dispute with the Licensee. LBP-91-21, 33 NRC at 422-24; see 10 C.F.R. § 2.714(b)(2). As the Board notes, GANE's contentions could have been summarily dismissed. We believe that the Licensee deserves great credit here for attempting to settle or resolve GANE's concerns informally through its proffer of additional information. We do not view, however, the informal exchange of comments that followed as having had any substantial bearing on the admissibility of GANE's contentions. In the absence of the litigants' agreement to pursue informal resolution of the issues, the Board would have been bound to rule on the contentions and, having dismissed them, to refer any outstanding concerns it might have had to the Staff for appropriate action. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 (1991).

temperature trip in emergency conditions is preferable to *prior* practice.⁶ Thus, we believe that GANE's "appeal" can be fairly understood to seek relief from the Commission in its broader safety oversight role, rather than to challenge the Licensing Board's disposition of GANE's contentions in the narrow amendment proceeding. Where, for any number of reasons, an adjudicatory proceeding is terminated, we may still refer safety matters of potential concern to the Staff for review. *See Turkey Point, supra* note 5, CLI-91-13, 34 NRC at 188.

Our specific direction to the Staff which describes the issues of interest to the Commission will be contained in a separate Staff Requirements Memorandum to be issued to the Staff in the near future.

IV. CONCLUSION

For the reasons stated in this decision, GANE's appeal from the Licensing Board's Memorandum and Order, LBP-91-21, is *dismissed* and the proceeding is *terminated*. The Commission is referring certain other matters to the NRC Staff for evaluation pursuant to the Commission's general supervisory authority and responsibility over safety matters.

Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.

For the Commission⁷

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of February 1992.

⁶ In its May 25th filing GANE states, "We understand the Board's limitations under . . . 10 C.F.R. 2.714 to take our case to a conclusion that would give us relief." GANE states in its August 8th filing, "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal" at 1, that "the safety switch is not performing correctly and would pose a danger if left in place." The latter statement essentially recognizes that, as the NRC Staff and Licensee have concluded, bypass of the trip under certain circumstances is a preferable course of action.

⁷ Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-322-OLA-3
(License Transfer)

LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

February 26, 1992

The Commission concludes that the proposed license transfer is not an "amendment" as that term is normally construed but a "license transfer," which is a separate and distinct action under the Atomic Energy Act. However, the AEA does not require a pre-effectiveness or "prior" hearing for a license transfer. In addition, the Commission determines that a pre-effectiveness discretionary hearing is not appropriate under the facts of this case. Finally, the Commission denies Petitioners' requests (1) to hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law and (2) for an administrative or "housekeeping" stay pending judicial challenge. Therefore, when the Staff has conditioned the transfer as the Commission directs herein to assure that the results of any post-effectiveness hearing will not be prejudiced, the Staff may approve the immediately effective transfer of the Shoreham license from LILCO to LIPA.

AEA: INTERPRETATION

A "transfer of license" cannot be accomplished solely by an amendment to an operating reactor license.

AEA: HEARING RIGHT

A "transfer of control" invokes only the hearing rights afforded by the first sentence of section 189a(1). The AEA does not require the offer of a prior hearing on an application to transfer control of a license before the transfer is made effective.

NRC: DISCRETIONARY HEARING

Given the limited scope of activities that LIPA can undertake until a ruling on the decommissioning plan, its inability to operate the plant from both a legal and a practical standpoint, the reduced hazard from a plant that operated only at low power for a short time, and the evident availability of qualified personnel to maintain the plant in the interim, the Commission finds that the transfer does not raise any public health and safety issues that warrant a prior hearing as a matter of discretion.

AEA: POST-EFFECTIVENESS HEARING

When an action is taken subject to a post-effectiveness hearing, the action must be conditioned on reverting to its previous condition if the hearing does not ratify the action taken. In this case, the Staff should condition the transfer of the POL (1) on the license's reverting to LILCO if LIPA ceases to exist or otherwise is found to be unqualified to hold the license and (2) on LILCO's providing certification to the NRC Staff that it will retain and maintain adequate capability and qualifications to take over the license promptly in the event that either of these situations occurs.

OPERATING LICENSES: AMENDMENTS

Once a transfer is finalized through the post-effectiveness hearing process, there remains the need — for administrative purposes — to have the license changed to reflect the name of the new licensee. Such an amendment, which presumes an effective transfer, presents no safety questions and clearly involves no significant hazards considerations.

RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)

Petitioners request that this action be held in abeyance until the resolution of the question of LIPA's existence under New York state law. Given the reversion of the license back to LILCO mandated here under those circumstances, and the fact that Petitioners did not immediately file such an action in state court, so

there is no indication from the state court that there could be some merit in petitioner's argument, the Commission denies Petitioners' request.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS OF DECISIONS (STAY PENDING APPEAL)

Petitioners request that the Commission stay the transfer's effectiveness pending their expected challenge in the Court of Appeals. The D.C. Circuit has observed "that tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions" *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The Commission does not perceive a difficult legal question here, particularly in view of the Commission's prior interpretation and the deference customarily accorded an agency's interpretation of its organic statute.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS OF DECISIONS (STAY PENDING APPEAL)

RULES OF PRACTICE: STAY OF AGENCY ACTION (IRREPARABLE HARM)

Petitioners fail to convince the Commission that they will suffer any irreparable injury should it deny the stay. LIPA cannot do anything under this license that LILCO could not do. Both the School District and LILCO may have serious economic interests at risk. The courts have held consistently that mere economic loss does not constitute irreparable injury. It is the Commission's intent to avoid making decisions based solely on economic reasons. Thus, the balance of equities in this matter does not tilt in Petitioners' favor, and the Commission denies Petitioners' request for a stay pending appeal.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on two different requests. The NRC Staff has proposed to issue an immediately effective amendment to the Shoreham operating license, and the Shoreham-Wading River Central School District ("School District") and the Scientists and Engineers for Secure Energy ("SE2") (collectively "Petitioners") have asked the Commission to "stay" issuance of

the proposed amendment. The proposed amendment would transfer ownership of Shoreham from the Long Island Lighting Company ("LILCO") to the Long Island Power Authority ("LIPA").

This matter presents a true anomaly: an unprecedented situation in which one utility is transferring the license — amended to "possession-only" status — for an almost totally unused nuclear reactor, which has been defueled, to another entity that intends to decommission and dismantle it. Shoreham is not a fully operating nuclear reactor with a full radioactive inventory, and LIPA is not authorized to operate Shoreham, either by its creating charter under state law or by the license to be transferred. Thus, the action before us is not one in which a nuclear reactor is being transferred to a utility that intends to, and would be authorized to, operate the facility.

After due consideration, we have concluded that the proposed license transfer is not an "amendment" as that term is normally construed but — as the Petitioners themselves argue — a "license transfer," which is a separate and distinct action under the Atomic Energy Act ("AEA"). However, the AEA does not require a pre-effectiveness or "prior" hearing for a license transfer. In addition, we have determined that a pre-effectiveness discretionary hearing is not appropriate under the facts of this case. Finally, we have denied Petitioners' requests (1) to hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law and (2) for an administrative or "housekeeping" stay pending judicial challenge. Therefore, when the Staff has conditioned the transfer as we direct herein to assure that the results of any post-effectiveness hearing will not be prejudiced, the Staff may approve the immediately effective transfer of the Shoreham license from LILCO to LIPA.

II. FACTUAL BACKGROUND¹

On June 28, 1990, LILCO and LIPA filed a joint application to transfer the Shoreham license from LILCO to LIPA. The NRC Staff noticed receipt of the application and issued a notice of opportunity for a hearing and a proposed finding of "no significant hazards consideration" ("NSHC"). See 56 Fed. Reg. 11,781 (Mar. 20, 1991). Petitioners responded with comments opposing the proposed NSHC finding and petitioned for leave to intervene and requested a hearing on the proposed amendment. Administrative proceedings are now ongoing before the NRC's Atomic Safety and Licensing Board ("Licensing Board"),

¹ We have discussed at length on numerous occasions the factual background surrounding LILCO's decision not to operate Shoreham. See, e.g., CLI-90-8, 32 NRC 201 (1990); CLI-91-2, 33 NRC 61 (1991); CLI-91-8, 33 NRC 461 (1991). Therefore, we will not repeat that background here.

which directed Petitioners to file proposed contentions. These contentions are now being reviewed by the Licensing Board.

On December 17, 1991, Petitioners filed a pleading with the Commission asking that it "stay" issuance of the proposed amendment pending completion of the administrative proceedings before the Licensing Board. On December 19, 1991, Petitioners filed an additional pleading "suggesting" that LIPA would cease to exist under the "sunset" provisions of New York law. By order of December 23, 1991, we directed the Staff, LILCO, and LIPA to respond to both pleadings, and they have filed responses.²

The Staff has also filed a paper recommending that it be allowed to issue the proposed amendment on an "immediately effective" basis under the Commission's Sholly provisions, a copy of which has been served on Petitioners. See SECY-92-041 (Feb. 6, 1992). Petitioners have responded to the Staff's paper and LIPA has filed a reply to Petitioners' comments. We accept both papers for filing. We have also accepted a letter submitted by Petitioners, dated January 22, 1992; two letters submitted jointly by LILCO and LIPA on January 31, 1992, and February 14, 1992; a pleading by Petitioners, dated February 24, 1992; and another pleading by Petitioners on February 26, 1992, less than 1 hour before issuance of this Order.

III. ARGUMENTS OF PARTIES

A. Petitioners' Arguments

Petitioners raise several arguments in support of their stay request. First, Petitioners argue that the Staff cannot apply the "Sholly" or "immediately effective" procedures to the proposed license transfer amendment. Petitioners argue that Congress' authorization to the Commission to issue immediately effective amendments, 42 U.S.C. § 2239(a)(2)(A), applies only to amendments to "operating" licenses and that the current Shoreham license is not an operating license because the Commission has amended it to a "possession-only" license ("POL"). See Petitioners' Motion ("Pet. Mtn.") at 3-4. In addition, Petitioners argue that the Atomic Energy Act distinguishes between amendments to operating licenses and requests to transfer control of a license. See 42 U.S.C. § 2239(a)(1). Therefore, argue Petitioners, because the Sholly provisions only apply to operating license amendments and because the transfer of control of a plant is separate from a license amendment, the Staff cannot issue the proposed amendment on an immediately effective basis. Pet. Mtn. at 4-6.

² LIPA has also submitted a pleading containing supplemental authority on this question, which we have accepted for filing.

Second, Petitioners present two alternative arguments based upon LIPA's financial condition. Petitioners allege that LIPA is bankrupt and does not have the necessary management competency to perform the decommissioning of Shoreham. Thus, Petitioners argue that LIPA is neither financially nor technically qualified to hold the Shoreham license. *Id.* at 6-7. In the alternative, Petitioners filed a separate pleading entitled "Suggestion of Mootness" in which they allege that LIPA will cease to exist under the "sunset" provisions of New York State law if they have no outstanding liabilities. While Petitioners concede that LIPA has outstanding liabilities, they argue that the statute could be interpreted to require "no net liabilities." *See* Suggestion of Mootness at 3-7.

Third, Petitioners point out that the Staff's proposal to issue the transfer on an immediately effective basis is based upon the fact that only a POL is being transferred and that the issuance of the POL is now before a federal Court of Appeals. Petitioners argue that if that court reverses the issuance of that amendment, the POL would revert to a full-power license, leaving LIPA in possession of an operating license for a plant that it would not be qualified to operate and thereby in a situation outside the Staff's proposed NSHC determination. *Pet. Mtn.* at 7-8. Finally, Petitioners again argue that the proposed license transfer is a part of the proposed decommissioning of Shoreham and that the Commission cannot approve the proposed transfer without an environmental review of the decommissioning of Shoreham, including the alternative of "resumed operation."

B. LIPA's Response³

In its response, LIPA argues as a threshold matter that Petitioners' filing is both untimely and procedurally defective. Briefly, LIPA argues that the Stay Motion does not comply with the requirements for a stay motion under 10 C.F.R. § 2.788 of the Commission's regulations and, in any event, is an unauthorized comment on the proposed NSHC finding. LIPA also argues that the motion constitutes an unauthorized supplement to Petitioners' original petition because it raises new information and allegations not previously raised. *See* LIPA Response ("LIPA Resp.") at 2-3. LIPA also argues that Petitioners are motivated by philosophical and monetary concerns, not public health and safety concerns, implying that the Commission should reject their filings for this reason alone. *See id.* at 3-4.

Turning to substantive arguments, LIPA argues that it has the requisite "financial" and "managerial" integrity to become an NRC licensee, that LIPA is not bankrupt, and that, in any event, LILCO will supply all of LIPA's Shoreham-

³LILCO has not filed a response on its own; instead, it has filed a short pleading adopting LIPA's filing.

related expenses. *See id.* at 5-6, *citing* LIPA's Response to Petitioners' Original Petition before the Licensing Board. In addition, LIPA argues that under Commission precedent the mere pendency of a challenge to the POL cannot bar transfer of the POL to LIPA, and that even if the Court of Appeals were to vacate the POL, LIPA is statutorily barred under New York state law from operating Shoreham. *See* LIPA Resp. at 7-8.

Next, LIPA argues that under prior NRC Staff practice, transfer of control of a facility can be accomplished by an immediately effective license amendment following an NSHC finding. *See id.* at 9, *citing* LIPA, LILCO, and NRC Staff Responses to Petitioners' Original Petition before the Licensing Board. Essentially, LIPA, LILCO, and the Staff ("Respondents") argued before the Licensing Board that in the past the Staff has issued proposed NSHC findings and immediately effective amendments to effectuate changes in ownership shares. Respondents argued that this practice established a valid Commission precedent that should be followed in this case, although apparently there has never been a challenge to this practice and the Staff itself conceded "the facial validity of Petitioners['] arguments." *See* NRC Staff Response to Original Petition (May 17, 1991) at 38. Furthermore, LIPA argues that the Sholly procedures apply to any license issued under 10 C.F.R. § 50.52 because NRC regulations do not specifically refer to a POL; instead, the term "POL" is simply an NRC term referring to a specifically amended Part 50 license. *See* LIPA Resp. at 9-12.

Finally, LIPA argues that Petitioners have misinterpreted the applicable provisions of the New York "sunset law" which they allege may cause LIPA to cease to exist. First, LIPA argues that the law was intended to terminate agencies that were inactive, not ongoing agencies that were actively performing their duties. *See id.* at 11-12, 13-16. Second, LIPA argues that its termination would conflict with provisions of the LIPA Act and that the LIPA Act would take priority. *See id.* at 12, 16-19.

C. NRC Staff Response

First, the NRC Staff argues that no "special circumstances" exist that would justify the Commission's delaying issuance of the license transfer. Initially, the Staff argues that Commission precedent holds that pending judicial challenges do not warrant staying Commission proceedings. *See* Staff Response ("Staff Resp.") at 3-4, *citing, e.g., Consumers Power Co.* (Midland Plant, Units 1 and 2), 4 NRC 474, 475 n.1 (1976). Additionally, the Staff argues that the proposed amendment will only transfer the license as already amended, i.e., a POL. Furthermore, even if issuance of the POL is vacated by the Court of Appeals, the Staff argues that Shoreham is currently defueled, LIPA is contractually prohibited from operating the reactor, and the reactor cannot be restarted without

NRC approval. Accordingly, the Staff argues that any possible court decision vacating the POL would not affect public health and safety and should not delay the proposed transfer. *See* Staff Resp. at 4-5. Moreover, the Staff argues that Petitioners have failed to demonstrate that LIPA is not qualified to hold the Shoreham license. *See id.* at 5-6.

Second, the Staff argues that because the Atomic Energy Act does not specifically preclude use of a license amendment to transfer a license, it should be allowed to use the immediately effective provisions of 10 C.F.R. § 50.91 to accomplish this task. *See* Staff Resp. at 6-7. The Staff then lists several other amendments that it argues are similar to this proposed amendment and have been issued under the Commission's Sholly provisions in recent years, and it argues that the Commission has acknowledged this practice. *See id.* at 7-8. Third, the Staff argues that not only have Petitioners failed to address the traditional stay criteria contained in 10 C.F.R. § 2.788, but that they cannot satisfy them. *See* Staff Resp. at 8-12. Finally, the Staff supports LIPA's arguments that Petitioners have misinterpreted the "sunset" provisions of New York law. *See id.* at 12-14.

IV. ANALYSIS

A. The Atomic Energy Act Does Not Require a Hearing Before Transfer of a License

Petitioners argue that the transfer of a license is a different action from a license amendment under the Atomic Energy Act ("AEA"). Section 184 of the AEA provides that

[n]o license granted hereunder . . . shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

42 U.S.C. § 2234. Section 189a(1) of the AEA provides that

[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or any application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1). However, this language does not indicate whether this hearing is to come before the action taken or after the action taken (i.e., a pre-effectiveness or post-effectiveness hearing).

The requirements for a pre-effectiveness or "prior" hearing are found in the second and third sentences of section 189a(1). There, the AEA requires the Commission to hold a pre-effectiveness or "prior" hearing on certain applications for a construction permit (second sentence),⁴ and to offer a pre-effectiveness hearing on certain applications for an amendment to a construction permit, an operating license, or an amendment to an operating license (third and fourth sentences).⁵

Where applications for actions that do not fall into the four categories described above are involved, the Commission has construed section 189a(1) as not requiring the offer of a pre-effectiveness or "prior" hearing. For example, the Commission generally does not offer pre-effectiveness notice and hearings in actions regarding materials licenses. See 10 C.F.R. Part 2, Subpart L. This interpretation is longstanding, and supported by the legislative history of the 1957 amendments to the AEA which added the second sentence to section 189. See *Joint Committee on Atomic Energy Staff Report "A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities"* at 8 (1957). In this case, Petitioners argue that the proposed action constitutes a "transfer of license," not an amendment to an operating reactor license. We agree. However, this agreement does not achieve Petitioners' desired result of a hearing prior to the transfer. If this action is a "transfer" rather than an "amendment" to an operating license, it is not one of the four actions for which the Commission is required to offer a pre-effectiveness hearing. Instead, a "transfer of control" invokes only the hearing rights afforded by the first sentence of section 189a(1). Thus, by their own arguments, Petitioners have effectively taken themselves outside the scope of the AEA's requirements for a pre-effectiveness hearing. Quite simply, the AEA does not require the offer of a prior hearing on an application to transfer control of a license before the transfer is made effective.⁶

B. In These Circumstances, a Discretionary Hearing Is Not Required

While we have concluded above that the Atomic Energy Act does not *require* a pre-effectiveness hearing before granting a license transfer, we must also consider whether we should direct that a hearing be held as a matter of discretion. Under section 161c of the Atomic Energy Act,

⁴ Added by Pub. L. No. 85-256, 71 Stat. 576, § 7 (1957).

⁵ Added by Pub. L. No. 87-615, 76 Stat. 409, § 2 (1962).

⁶ In view of this finding, we need not reach the arguments presented by the Staff and LILCO/LIPA that the license may be transferred by an immediately effective license amendment that presents no significant hazards considerations. However, once the transfer is finalized through the post-effectiveness hearing process, there remains the need — for administrative purposes — to have the license changed to reflect the name of the new licensee. Such an amendment, which presumes an effective transfer, presents no safety questions and clearly involves no significant hazards considerations.

the Commission is authorized to . . . hold such hearings as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act

42 U.S.C. § 2201(c). We would direct the holding of a pre-effectiveness hearing regarding a proposed transfer if one were necessary or desirable because potentially significant public health and safety issues were raised.

However, such a case is not presented here. First, Shoreham was operated only during low-power testing; as a result, the radioactive inventory in the Shoreham reactor and spent fuel pool is equal to that generated by approximately 2 days of full-power operation. Thus, the public health and safety risks presented here are much reduced compared to those of a plant that has been fully operational. Furthermore, LILCO appears to have taken actions that may have effectively foreclosed operation of Shoreham without substantial reconstruction activities by any future owner.

Second, LIPA is statutorily prevented by New York state law from operating Shoreham as a nuclear plant. Third, the license that is being transferred is subject to two conditions: (1) the license has been amended to allow "possession only" of the facility; and (2) the license is subject to a confirmatory order preventing LILCO from placing fuel into the Shoreham reactor core without NRC permission. By accepting the transfer of the Shoreham license, LIPA accepts it subject to those conditions. Thus, even if LIPA wished to operate the facility, as it cannot do under New York law, and even if it could physically operate the facility, which it apparently cannot do at this time because of actions taken by LILCO, it cannot legally operate the facility for two separate reasons without NRC prior approval, which would only be given after NRC review and, in the case of the POL, a prior opportunity for interested members of the public to participate.

Fourth, and perhaps more important for Petitioners' apparent goal of preventing the dismantling of Shoreham, LIPA cannot take any actions that would foreclose any decommissioning options for Shoreham until the NRC approves a decommissioning plan. Under our regulations, LILCO cannot at this time take any actions that would foreclose a decommissioning alternative. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991). As we noted above, LIPA succeeds only to the license that LILCO holds. Clearly, LIPA cannot take any action under the transferred license that LILCO could not have taken. Thus, LIPA may not take any action that would foreclose a decommissioning alternative until approval of a decommissioning plan. Consideration of a proposed decommissioning plan has been noticed in the *Federal Register*, see 56 Fed. Reg. 66,459 (Dec. 23, 1991), and Petitioners will have an opportunity to challenge the proposed plan if they can demonstrate that they meet the normal prerequisites for intervention under our Rules of Practice.

Fifth, we have reviewed the Staff's safety evaluation and we are convinced that the transfer presents no public health and safety issues that need to be addressed in a hearing prior to the administrative proceeding. As we noted above, the spent fuel is stored in the spent fuel pool and cannot be returned to the reactor without NRC permission. Moreover, the total radioactive contamination is equivalent to that generated by 2 days of full-power operation. Finally, the Staff points out that in the interim LIPA has retained a number of LILCO personnel and hired a number of qualified personnel from other utilities. Given the limited scope of activities that LIPA can undertake until a ruling on the decommissioning plan, its inability to operate the plant from both a legal and practical standpoint, the reduced hazard from a plant that was operated only at low power for a short time, and the evident availability of qualified personnel to maintain the plant in the interim, we find that the transfer does not raise any public health and safety issues that warrant a prior hearing.

In summary, we find that the transfer presents no public health and safety issues requiring that we hold a prior hearing as a matter of discretion.

C. Issuance of the Transfer

We have found that the AEA does not require a prior hearing for a transfer of control. We have also found that a discretionary hearing is not required in this case. However, there are three issues that we believe need to be addressed before issuance of the license transfer, two of which require Staff action. First, Petitioners correctly point out that the license transferred is the modified "possession-only" license ("POL") and that the Staff has "conditioned" the transfer on the license being a POL. *See* 56 Fed. Reg. 11,781. The action granting the POL amendment is now before the Court of Appeals, and Petitioners argue that a decision by that court vacating the POL would undermine the basis for the license transfer. However, even if the Court of Appeals reversed the POL, the public health and safety is still protected by the Confirmatory Order preventing the Licensee from loading fuel into the Shoreham reactor. Thus, we do not find that this possibility prevents the transfer.

Second, Petitioners argue that LIPA may soon cease to exist under New York "sunset" law. We do not find Petitioners' arguments convincing at this preliminary stage, but this is a question of state law that presumably must be decided by New York state courts. Third, Petitioners have challenged the license transfer in what we now hold will be a post-effectiveness hearing. Obviously, that proceeding holds the potential for a finding that LIPA does not qualify as a licensee. Therefore, for these two reasons, before approving the license transfer, the Staff should condition the transfer (1) on the license's reverting to LILCO if LIPA ceases to exist or is otherwise found to be unqualified to hold the license and (2) on LILCO's providing certification to the NRC Staff that it

will retain and maintain adequate capability and qualifications to take over the license promptly in the event that either of these situations occurs. This action is without prejudice to Petitioners' rights in the post-effectiveness proceeding before the Licensing Board.

V. REQUEST TO HOLD IN ABEYANCE AND FOR AN ADMINISTRATIVE STAY

Petitioners request that we hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law. However, at this time, they have not actually filed an action seeking such a resolution.⁷ Moreover, as we noted above, Petitioners have not presented a persuasive argument on this issue at this preliminary stage. Our position might well be different had Petitioners filed such an action immediately in a New York state court and were there in turn some indication from the state courts that there could be some merit in Petitioners' argument.⁸ Accordingly, we deny Petitioners' request to hold the transfer in abeyance pending action by the New York state courts. Petitioners also request that if we authorize the issuance of the transfer, we stay its effectiveness pending their expected challenge in the Court of Appeals. The Court of Appeals for the D.C. Circuit has observed "that tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained." *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). We do not perceive a difficult legal question here, particularly in view of the Commission's prior interpretation and the deference customarily accorded an agency's interpretation of its organic statute.

⁷ On February 25, 1992, after this order was substantially complete, the NRC's Office of the Secretary informed counsel for the parties to the Shoreham proceedings, including counsel for Petitioners, that the Commission would affirm an order relating to this matter. In response, counsel for Petitioners advised the Secretary that he intended to file an additional pleading that evening with the Commission. At approximately 5:30 p.m., the Secretary received Petitioners' "Notice of LILCO/LIPA Exaggeration and Commencement of State Court Action."

This pleading contests several assertions regarding statements by LILCO/LIPA in letters of January 31, 1992, and February 14, 1992, *supra*, and announces Petitioners' intent to seek a declaration in New York courts that LIPA has ceased to exist under New York "sunset" law. As a result of this announced intention to file a state court action, Petitioners renew their request that the NRC not transfer the license to LIPA. LIPA and LILCO have filed a joint response in opposition.

We inquired at an earlier date to see if Petitioners would seek such an action in our belief that such an action was appropriate on Petitioners' part. See Letter from J.P. McGranery (January 22, 1992), *supra*. Moreover, as we noted above, we have conditioned the transfer upon (1) the license reverting to LILCO if the New York court dissolves LIPA and (2) LILCO certifying that it will retain and maintain sufficient capacity to take back the license in that eventuality. *Supra*. Accordingly, Petitioners' pleading in response to the Commission's decision to act on this issue is not sufficient to stay our decision.

⁸ In addition, as a result of such a state court proceeding, we could have reviewed pleadings from parties more familiar with New York law than we are.

Second, Petitioners have failed to convince us that they will suffer any irreparable injury should we deny the stay. After all, as we noted above, this action simply transfers to LIPA that which is held by LILCO. LIPA cannot do anything under this license that LILCO could not do. LIPA cannot operate the plant, it cannot load fuel into the plant, and it cannot foreclose a decommissioning option until the Staff approves a decommissioning plan.

Both the School District and LILCO may have serious economic interests at risk. Quite simply, if LILCO holds Shoreham on March 1, 1992, it appears that LILCO may be required to make a tax payment to the School District, which LILCO naturally seeks to avoid. Presumably, the School District seeks to receive that payment, which it would lose if this order becomes immediately effective.

The courts have consistently held that "mere economic loss does not constitute irreparable injury." *Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 291 (6th Cir. 1987). See, e.g., *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (2d Cir. 1990). In this case, we are not in a position to judge which economic interest is more compelling or whether the parties are able to seek redress and recovery of any funds expended or not expended in future litigation. Moreover, it is our intent to avoid making any decision based solely on economic reasons. Thus, we find that the balance of equities in this matter does not tilt in favor of the Petitioners.

As for the public interest, as we noted above, factors associated with the tax payment do not, in our view, carry the day one way or the other, based upon the record before us. Other public interest factors are subsumed in our discussion of a discretionary hearing and also do not support issuance of a stay. Thus, we deny Petitioners' request for a stay pending appeal.⁹

VI. CONCLUSION

Based upon the foregoing, we find that the Atomic Energy Act does not require a pre-effectiveness hearing before approval of a license transfer and that, under the circumstances of this case, a discretionary pre-effectiveness hearing is not required. We deny Petitioners' request to hold the transfer in abeyance pending a determination by New York state courts that LIPA will not cease to

⁹ We have issued administrative or "housekeeping" stays in previous proceedings, such as the issuance of the Shoreham POL. However, in that instance, both LILCO and LIPA did not contest such a stay. Here, they do. As we noted above, there are no public health and safety issues present in this case. In addition, LILCO submitted this application over one and a half years ago and it has been pending without resolution since that time. Finally, as we noted above, LILCO may face a potential tax payment if this order is not effective before March 1, 1992. After considering all these issues, we find that the balance of equities does not weigh in favor of a "housekeeping" stay of this matter.

exist and we deny Petitioners' request for an administrative stay. The Staff may issue an order approving the license transfer on an immediately effective basis when it has conditioned the transfer as we have specified above.

Commissioner de Planque did not participate in this Order.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 30-30870-OM
(Byproduct Material License)

FEWELL GEOTECHNICAL
ENGINEERING, LTD.

(Thomas E. Murray, Radiographer)

March 5, 1992

The Commission vacates on the grounds of mootness the Atomic Safety and Licensing Board's Initial Decision (LBP-91-29) which modified an order issued by the NRC Staff to Fewell Geotechnical Engineering, Ltd. Staff's original order modified Fewell Geotechnical Engineering, Ltd.'s license by barring Mr. Thomas E. Murray from working as a radiographer under the license for a period of 3 years.

RULES OF PRACTICE: MOOTNESS

Decisions below will normally be vacated when prior to the outcome of the appellate process, through happenstance, the proceeding becomes moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982).

ORDER

This proceeding concerns an immediately effective order issued by the Nuclear Regulatory Commission (NRC) Staff to Fewell Geotechnical Engineering, Ltd. (Fewell). The order modified Fewell's byproduct materials license by barring Mr. Thomas E. Murray from working as a radiographer under that license for 3 years. *See* 55 Fed. Reg. 47,409 (Nov. 13, 1990). Mr. Murray requested a hearing on the order. After a hearing was conducted, the Atomic Safety and Licensing Board issued an Initial Decision that modified the NRC Staff's order by, *inter alia*, reducing the term of Mr. Murray's suspension from 3 years to 9 months. LBP-91-29, 33 NRC 561 (1991).

The NRC Staff filed an appeal before the Commission requesting reversal of the Licensing Board's Initial Decision. However, while the appeal was pending, the Executive Director for Operations notified the Commission that Fewell had requested termination of its byproduct materials license.

In view of Fewell's request, the NRC Staff was directed in an order dated September 12, 1991, to notify the Commission of the Staff's action on the termination request and then to advise the Commission as to whether the Staff wished to proceed with its appeal or whether the appeal should be dismissed in the event the license was terminated. On October 15, 1991, the NRC Staff filed its "Motion to Vacate the Licensing Board's Initial Decision, LBP-91-29," on the grounds of mootness and provided a copy of its letter informing Fewell that the license had been terminated. By order dated October 22, 1991, Mr. Murray was permitted until October 31, 1991, to file a reply if he so desired. Mr. Murray has not replied to Staff's motion.

We agree with Staff that the termination of Fewell's materials license has rendered this proceeding moot. The proceedings before the Licensing Board concerned Mr. Murray's challenge to the original order barring him from performing radiography under the Fewell license for 3 years. When Fewell's license was terminated, the original order ceased to have any operative effect or purpose. Thus, the proceeding is moot.

In cases such as this, when prior to the outcome of the appellate process, through happenstance, the proceeding becomes moot, the decision below normally will be vacated. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Consumers Power Co. (Palisades Nuclear Power Facility)*, CLI-82-18, 16 NRC 50, 51 (1982). Vacating the Licensing Board's decision eliminates it as precedent.¹

¹ The Staff suggests that we may render an advisory opinion on the matters raised in its appeal. We decline the suggestion. Vacating the Licensing Board's decision obviates the need to review the Board's interpretation of the governing law and policy or, because it can have none, to consider its potential impact on future cases.

Accordingly, the NRC Staff's motion is *granted* and its appeal is *dismissed*. The Licensing Board's Initial Decision, LBP-91-29, 33 NRC 561 (1991), is *vacated as moot*. The proceeding is hereby terminated.

IT IS SO ORDERED.

For the Commission²

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March 1992.

²Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 50-440-A
50-346-A
(Suspension of
Antitrust Conditions)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC
ILLUMINATING COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

March 5, 1992

The Commission denies Applicants' motion for reconsideration of CLI-91-15, 34 NRC 269 (1991), in which the Commission *sua sponte* exercised its inherent supervisory power over an adjudicatory proceeding initiated by Applicants' request for amendments that would remove certain antitrust license conditions pertaining to the Perry and Davis-Besse nuclear plants. CLI-91-15 directed the Atomic Safety and Licensing Board to suspend consideration of all matters, except for two issues referred to as the "bedrock" legal issues.

LICENSING BOARD: CONSIDERATION OF NRC STAFF EVIDENCE

In general, the NRC Staff is only one party to a Commission adjudicatory proceeding. The Staff does not occupy a favored position and its presentations are subject to the same scrutiny as those of other parties. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). On some questions, such as interpretation of statutes or judicial decisions, the Staff's submissions have no more weight than those of any other party. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).

DECISIONAL BIAS: NRC STAFF

When a case turns on a question of law, the Licensing Board and the Commission, on review, are capable of correcting party bias by providing independent decisions. In addition, a party dissatisfied with the outcome of a final Commission decision can seek review from an appropriate court, which is fully capable of correcting bias when a case turns on a question of law. *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 612 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

ORDER

In CLI-91-15, 34 NRC 269 (1991), the Commission directed the Atomic Safety and Licensing Board to suspend consideration of all matters, except the so-called bedrock legal issue (or issues), in this proceeding involving applications for amendments to the operating licenses for the Perry and Davis-Besse nuclear plants. Ohio Edison Company (OE), Cleveland Electric Illuminating Company, and Toledo Edison Company (Applicants) have sought amendments to suspend certain antitrust conditions from the operating licenses. OE has filed a motion for reconsideration of CLI-91-15, requesting that the Commission vacate its order and allow the proceedings to continue as they were prior to the suspension. The NRC Staff opposes the motion.¹ For the reasons stated in this Order, OE's motion is *denied*.

¹No other answers were received, although the City of Cleveland noted its opposition to OE's motion in its separate Motion for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision, at 4-6 (Dec. 27, 1991).

In its order memorializing its rulings during a prehearing conference, the Licensing Board ruled that it had jurisdiction to conduct the proceeding,² admitted OE's contention regarding decisional bias, and provided an opportunity for the parties' joint submission of a "bedrock" legal issue (or issues) that would be the subject of potentially dispositive motions for summary disposition. LBP-91-38, 34 NRC 229 (1991). In light of the potential for the bedrock legal issue to be dispositive of this proceeding, a point emphasized by OE, the Commission exercised its inherent supervisory power over adjudicatory proceedings and issued CLI-91-15, which directed the Licensing Board to suspend its consideration of all matters in the proceeding with the exception of the "bedrock" issue. By its terms, the suspension included OE's decisional bias issue.

OE objects to the suspension and asks that we reconsider our earlier order because, OE argues, this proceeding cannot be resolved fairly without reaching the decisional bias issue, even as to the bedrock legal issue. OE also objects to the suspension of other issues that may require consideration in the proceeding, such as the actual cost of Perry and Davis-Besse power. Additionally, OE suggests that we have misunderstood the "bedrock issue."³

As its primary basis for reconsideration, OE argues that the decisional bias issue must be decided in conjunction with or prior to the bedrock legal issue. This is so, OE maintains, because the decision on bias will affect the weight to be given the NRC Staff's position throughout the proceedings and will thus be relevant to the decision on the bedrock issue. We do not agree.

In general, the NRC Staff is only one party to a Commission adjudicatory proceeding. The Staff does not occupy a favored position and its presentations are subject to the same scrutiny as those of other parties. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). We think it significant here that, as all parties agree, the bedrock issue is a legal question. In this context, we have specifically observed that "[o]n some questions, such as interpretation of statutes or judicial decisions, the staff submissions have no more weight than those of any other party." *Public Service Co. of New Hampshire*

²The City of Cleveland's appeal of the Licensing Board's jurisdictional ruling is pending before the Commission. Our ruling today is without prejudice to our consideration of that appeal and Cleveland's separate motion (referenced in the preceding footnote) to remove the conduct of all proceedings from the Licensing Board to the Commission.

³OE notes that our corrected order, CLI-91-15, 34 NRC at 271 n.3, lumped the two issues that the parties agreed would be subject to motions for summary disposition under the general rubric "bedrock issue." Motion for Reconsideration at 4 n.4. Our intention was to ensure that the parties understood that they could proceed, as they had agreed, with the litigation of both those potentially dispositive issues before the Licensing Board. Our characterization of the issues solely for the purpose of the order did not change the meaning or the treatment being given to those two issues for any other purpose.

(Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).⁴ OE has not explained why either the Licensing Board, or the Commission, on review, is incapable of rendering an independent decision regarding a question of law, even accepting *arguendo* some bias on the part of the Staff due to the alleged congressional interference.⁵ Importantly, OE can seek review from an appropriate United States Court of Appeals, if it should be dissatisfied with the outcome of the proceeding. When a case turns on a question of law, "Judicial review is fully capable of correcting bias. . . ." *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 612 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). Thus, at least with respect to the legal issues being addressed by the parties at this time, we do not see a compelling reason to proceed with consideration of the decisional bias issue.⁶

Contrary to OE's suggestion, our order in CLI-91-15 is not inconsistent with representations made by the NRC in prior judicial proceedings. Although the NRC represented in prior judicial proceedings that the claim of decisional bias must be raised at the agency level, the NRC did not promise a decision on the merits of that issue. At most, the representations indicate that the issue must be raised before the Commission and that a final Commission decision on OE's amendment request, subject to judicial review, will be provided.⁷ Suspending the bias issue from consideration while the parties address the bedrock legal issue is not contrary to these representations. Even if the issue of decisional bias were to be dismissed altogether, without a review of its merits, a final Commission decision on the amendment application would provide OE, if it were dissatisfied

⁴In unusual situations (not the case here) where Staff is directed by the Commission to conduct a study and are subject to ongoing Commission review during the study, the Staff's views may be afforded more weight. *Seabrook*, CLI-76-17, *supra*, 4 NRC at 462. In this case, the Licensing Board has assured OE that it considers all lawyers to be on equal footing. Prehearing Conference Transcript at 78-79.

⁵In fact, counsel for OE assured the Licensing Board that OE was not "suggesting that this tribunal was adversely affected or is now somehow adversely influenced by threats from members of Congress." Prehearing Conference Transcript at 74. Moreover, OE has not alleged that the Commissioners are incapable of rendering a fair decision because they will be adversely affected by supposed threats from Congress.

⁶We recognize that bias or predisposition may bear on the credibility of a party's witnesses or evidence, although it is far from clear that bias is appropriate as a principal issue for litigation in NRC proceedings. However, as we decided in CLI-91-15, we need not reach that question or provide guidance on the further litigation of such questions pending resolution of the potentially dispositive legal issues proposed by the parties.

⁷Ohio Edison Company's Motion for Reconsideration of CLI-91-15 at 5-9. Specifically, OE claims support for its position in the following NRC statements before the district court (*see id.* at 6):

If the NRC Staff determines initially to deny the requested amendment, plaintiff will have an opportunity for an adjudicatory hearing before an Atomic Safety and Licensing Board. That Board's on the record decision will in turn be reviewable by the Atomic Safety and Licensing Appeal Board and the Commission. It is through this agency process that Ohio Edison must first present its claims of improper congressional interference in the administrative process.

NRC Memorandum of Points and Authorities in Support of Motion to Dismiss at 4 (Aug. 22, 1988); and

Subject matter jurisdiction over this claim rests with the NRC in the first instance, and, on appeal, exclusively in the Court of Appeals. Plaintiff will have ample opportunity to raise a charge of improper influence or bias in that forum.

Transcript of Hearing on Defendants' Motion to Dismiss at 5-7 (Dec. 13, 1988).

with the outcome, the opportunity for judicial review. In its order dismissing OE's petition for writ of mandamus, the District of Columbia Circuit Court of Appeals noted that OE did not show that it would be prevented from raising the issue of decisional bias on judicial review *after* the administrative process had been concluded. *In re Ohio Edison Co.*, No. 89-1014, slip op. at 4 (D.C. Cir. Apr. 27, 1989) (unpublished *per curiam* order). The Court did not state that an opportunity to litigate the issue of decisional bias would be provided by the NRC. Therefore, neither prior judicial proceedings nor NRC representations before the courts require us to allow OE to proceed with its decisional bias claims at this time.

Although OE focuses mainly on the Commission's suspension of the decisional bias issue, OE also complains of the suspension of consideration of other matters that might be germane if the Applicants were to prevail on the bedrock issue. OE suggests that the suspension implies that the Commission believes the only outcome will be that OE will lose the bedrock issue. As stated in CLI-91-15, by suspending consideration of these matters, the Commission intimates no opinion on the bedrock legal issue or any other matter. The Commission's order has suspended, but not precluded, consideration of other relevant matters as warranted upon resolution of the bedrock legal issue. If an evidentiary hearing is appropriate, in the event that Applicants win the bedrock issue, the Commission will provide appropriate instructions and guidance for the conduct of further proceedings.

For the reasons stated in this order, OE's motion for reconsideration is *denied*.

Commissioner Curtiss disapproved this order; his dissenting views are attached. Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.

For the Commission⁸

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March 1992.

⁸ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

DISSENTING VIEWS OF COMMISSIONER CURTISS

I respectfully disagree with the Commission's decision to deny Ohio Edison's motion for reconsideration of CLI-91-15 and to continue the suspension of the consideration of the Staff "bias/predisposition" contention in this formal adjudicatory proceeding.

Instead, I believe that the Commission should take up the question of the admissibility of the bias/predisposition issue now, rather than defer consideration of that question until the Licensing Board decides the so-called "bedrock issues" in this proceeding.

The fact of the matter is that the Applicants' bias/predisposition contention raises a question about whether "the Licensing Board and the Nuclear Regulatory Commissioners [should] give no weight to the *recommendations of the NRC staff*" on the substantive issues in this case. LBP-91-38, 34 NRC 229, 257 n.92 (emphasis added). The NRC Staff has made, and will be making, recommendations to the Licensing Board on the "bedrock issues"¹ and to the Commission on the City of Cleveland's appeal on jurisdictional issues. In such a case, it seems evident that the challenge to the Staff's impartiality must be resolved prior to, not at the conclusion of, any proceedings on the substantive merits of the antitrust issue. For that reason, I believe the Commission should resolve the question of whether such a contention is admissible now.² To ignore the concerns that have been raised at this stage of the proceeding will, unfor-

¹ Although the "bedrock issues" are primarily legal in nature, it is not clear that the parties' positions will be confined strictly to legal arguments (where bias/predisposition on the part of an individual party may be of lesser concern). In this regard, the Licensing Board itself acknowledged that —

[a]t this juncture, . . . we are unable to parse the various controversies between the parties into the neat categories this analysis requires with a degree of certainty sufficient to convince us that threshold dismissal of these allegations [about Staff bias] is appropriate.

LBP-91-38, *supra*, 34 NRC at 256.

² On the question of whether a contention alleging Staff bias/predisposition should be admitted as a litigable issue, I have substantial doubts about allowing such contentions in our proceedings. While the credibility of a witness who presents evidence is always a consideration, I am not aware of any NRC proceeding in which a party's bias/predisposition *per se* was made a principal issue for litigation on the merits. Nor does the Staff's role in the agency's proceedings suggest a different conclusion. Indeed, in a formal adjudicatory proceeding, the Staff does not occupy a favored position; it is just another party to the proceeding. When a board comes to decide contested issues, it must evaluate the Staff's evidence and arguments in light of the same principles that apply to the presentations of the other parties. The Staff's views cannot be accepted without passing under the same scrutiny as those of the other parties. *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). In general, in these proceedings, the application is in issue, not the adequacy of the Staff's review of the application. A party may raise contentions challenging the particular action that is the subject of the proceeding, but it may not proceed on the basis of the allegations that the Staff has somehow failed in its performance. To the extent that a party seeks to litigate the adequacy of the Staff's work in a particular proceeding, it proposes a contention that is not litigable. See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 809 (1983). In my view, these holdings raise serious questions about the admissibility of the bias/predisposition issue in the instant proceeding.

unately, leave in place the cloud that has been cast on the Staff's impartiality and, as a consequence, on the arguments, evidence, and recommendations that the Staff will be advancing on the basic substantive issues that must be decided in this proceeding.

For the foregoing reasons, I respectfully dissent.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
James R. Curtliss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 70-3070-ML

LOUISIANA ENERGY SERVICES, L.P.
(Calborne Enrichment Center)

March 5, 1992*

The Commission decides issues before it relating to its hearing order that set forth standards by which this application for a license to construct and operate a uranium enrichment facility would be judged. Both the Applicant and the sole Intervenor in the proceeding sought reconsideration of various portions of the hearing order. The Commission clarifies that the existing 10 C.F.R. Part 140 be applied to the license application solely as guidance. The Commission orders that the *final* Commission rule on material control and accounting for enrichment facilities, instead of the proposed rule, shall be applied to this proceeding; that the hearing shall proceed as directed in the order; and that all other requests for reconsideration are denied.

ATOMIC ENERGY ACT: SECTION 193(e)

Congress dictated that the Price-Anderson Act liability insurance requirements will not be applied to uranium enrichment facilities. See Atomic Energy Act, § 193(e).

*Re-served March 9, 1992.

REGULATIONS: INTERPRETATION AND APPLICATION (10 C.F.R. PART 140)

Of the existing NRC regulations under 10 C.F.R. Part 140, only sections 140.15-140.17 and Part 140, Appendix A are applicable to this proceeding, and then only as guidance or models as to proof of liability insurance.

NRC: HEARING STANDARDS (NATURE OF CONSIDERATION)

An intervenor's objection to the use of the word "reconsideration" in a hearing order that relates to Commission consideration of the hearing standards raises solely a semantic problem, as long as the nature of the reconsideration offered by the Commission is sufficient to meet the intervenor's objections and the Commission's obligations.

NRC: CHOICE OF RULEMAKING OR ADJUDICATION

When standards set forth in a hearing order to govern an adjudication have not been established by rulemaking, the Commission may provide an opportunity for parties to challenge the standards by seeking reconsideration.

RULES OF PRACTICE: HEARING STANDARDS (CHALLENGE; LACK OF ESTABLISHED RULE)

The status of an unchallenged hearing standard would not be simply that of a proposed standard; an unchallenged standard would be, without more, fully applicable to the matter being heard.

NRC: HEARING STANDARDS (NATURE OF CONSIDERATION)

It should be evident from the terms of a hearing order that requires among other things that petitions for reconsideration "must contain all technical or other arguments to support the petition," that the Commission intends to initiate a process in which each objection would be fully considered *de novo* and the parties provided with the Commission's reasoned decision.

URANIUM ENRICHMENT FACILITY: SITING CRITERIA (PLANT BOUNDARY LIMITS)

For purposes of siting and design of a uranium enrichment facility against accidental atmospheric releases of uranium hexafluoride, the Commission estab-

lished plant boundary limits that were intended to be generally equivalent to the Commission's reactor siting criteria found in 10 C.F.R. Part 100.

**URANIUM ENRICHMENT FACILITY: SITING CRITERIA
(PART 100 EQUIVALENCY)**

The Commission's objective in applying the Part 100 siting criteria to a uranium enrichment facility, is equivalency to Part 100; it was never the intent to set levels below which *no* adverse effects would occur from hydrogen fluoride.

**URANIUM ENRICHMENT FACILITY: DESIGN CRITERIA
(PERFORMANCE-BASED SAFEGUARDS STANDARDS)**

The Commission chose the approach of performance-based design standards for the contemplated enrichment facility. Those standards established "principal design criteria which are commensurate with their safety function." 53 Fed. Reg. at 13,278.

**URANIUM ENRICHMENT FACILITY: DESIGN CRITERIA
(PERFORMANCE-BASED SAFEGUARDS STANDARDS)**

The Commission's design criteria for the contemplated enrichment facility did not include a performance-based safeguards standard directed at common defense and security.

**URANIUM ENRICHMENT FACILITY: SAFEGUARDS
(10 C.F.R. § 74.33)**

The need for safeguards against unauthorized activities at uranium enrichment facilities was addressed primarily through creation of a new section 74.33 in NRC's existing material control and accounting regulations.

**URANIUM ENRICHMENT FACILITY: MC&A SYSTEM
(10 C.F.R. § 74.33)**

The new section 74.33 of 10 C.F.R. includes as a performance-based requirement that each uranium enrichment licensee must establish, implement, and maintain an NRC-approved material control and accounting system.

URANIUM ENRICHMENT FACILITY: MC&A OBJECTIVES (PHYSICAL SECURITY REQUIREMENTS)

Specific requirements for the use of physical security measures in achieving material control and accounting objectives is unnecessary; physical security measures may be included in an applicant's program, but the applicant is free to develop its program in any manner as long as it meets the general performance objectives.

MEMORANDUM AND ORDER

Before us are issues related to the criteria that will govern the decision by the Nuclear Regulatory Commission ("NRC" or "Commission") whether to license Louisiana Energy Services, L.P. ("LES" or "Applicant")¹ to construct and operate the Claiborne Enrichment Center in Claiborne Parish, near Homer, Louisiana. The contemplated operation would involve the possession or use or both of byproduct, source, and special nuclear material for the purpose of enriching natural uranium to a maximum of 5% U-235 by the gas centrifuge process. The LES application for an enrichment facility license is the first since the NRC was required to consider such an application in a single, on-the-record adjudicatory hearing. The requirement appears in new section 193 of the Atomic Energy Act ("Act"), enacted as an amendment to the Act by section 5 of the Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990 (Pub. L. No. 101-575).²

I. BACKGROUND

The Commission published a notice of hearing on the LES license application (Hearing Order) on May 21, 1991. *See* 56 Fed. Reg. 23,310. In the Hearing Order the Commission referenced relevant, codified NRC regulations that would be applicable to the licensing decision and, in the absence of a final rule specifically addressed to licensing enrichment facilities,³ set forth as Part III

¹ LES is a limited partnership whose general partners are Urenco Investments, Inc. (a subsidiary of Urenco, Ltd.); Claiborne Fuels, L.P. (a subsidiary of Fluor Daniel, Inc.); Claiborne Energy Services, Inc. (a subsidiary of Duke Power Company); and Graystone Corporation (a subsidiary of Northern States Power Company). In addition, there are seven limited partners.

² *See* 42 U.S.C. § 2243(b).

³ In 1990, the Commission sought comment on a proposed rule that was to establish new performance-based material control and accounting (MC&A) requirements that would be applicable to uranium enrichment facility licensees who produce significant quantities of special nuclear material (SNM) of low strategic significance and to applicants to construct and operate enrichment facilities. *See* 55 Fed. Reg. 51,726 (1990). Advance notice of proposed rulemaking on regulation of uranium enrichment had been given in early 1988 (*see* 53 Fed. Reg. 13,276), but the rulemaking was never initiated. 55 Fed. Reg. at 51,726, col. 2.

of the Hearing Order special standards by which LES's application would be judged and instructions for the hearing. An opportunity was offered for admitted hearing participants to petition directly to the Commission for reconsideration of any of Part III's provisions.

LES and the NRC Staff are parties to the hearing. The Atomic Safety and Licensing Board (Licensing Board) established to conduct the LES hearing admitted a sole intervenor to the proceeding, Citizens Against Nuclear Trash (CANT). CANT is an environmental organization whose membership is comprised mostly of residents of Claiborne Parish.⁴ The State of Louisiana, Department of Environmental Quality, participates as an interested state agency. See 10 C.F.R. § 2.715(c).

The Commission's unusual involvement at this early stage of a proceeding responds to both LES and CANT who each sought reconsideration of the Hearing Order. LES specifies one objection to the Part III provisions and seeks leave to object late to a provision of Part IV. CANT asks for changes in three separate respects. We address Applicant's and CANT's objections in turn along with Staff's responses to those objections. Neither LES nor CANT commented on each other's objections.

II. LES'S REQUEST FOR RECONSIDERATION

A. Provision (from Part III) at Issue: Paragraph 6, establishing *terms for compliance with requirement for liability insurance*

Section 193 of the Act requires that "as a condition of the issuance" of a uranium enrichment facility license, the licensee "have and maintain liability insurance of such type and in such amounts as the Commission judges appropriate to cover liability claims. . . ." Section 193(d)(1). In Part III, ¶ 6, of the Hearing Order, the Commission acknowledged this liability insurance requirement as a licensing standard for LES. The Commission declined then to determine the precise terms or amount of the policy but noted that "10 CFR 140.15, 140.16, and 140.17 provide adequate guidance as to *proof of financial protection (insurance)*. . . ." 56 Fed. Reg. 23,312 (emphasis added). The Commission also referenced Appendix A of Part 140 for the availability of "models" for form, content, and coverage of such liability insurance. The burden of establishing the amount needed was left to LES "in the first instance," the amount to be justified "in terms of a reasonable evaluation of the risks required to be covered" by Pub. L. No. 101-575, but in any case the amount need be no greater than the maximum amount available from commercial insurers.

⁴ See this docket, LBP-91-41, 34 NRC 332, 333, 360 (1991).

Objection and Requested Relief

LES asks that we reconsider our use of the term “financial protection” and that the term should be replaced in the cited sections of Part 140 by the term “liability insurance.” LES maintains that this should be done because the term “financial protection” is used in the context of the Price-Anderson Act and Pub. L. No. 101-575 precluded the application of section 170 (Price-Anderson) to uranium enrichment facilities. As a final paragraph, LES states:

Further, the aspects of Part 140 dealing with the Price-Anderson Act, specifically, secondary financial protection and waiver of defenses, should not be applied.

Staff's Response

The NRC Staff opposed the reconsideration, arguing that NRC's codified regulations implementing Price-Anderson requirements were “cited only as providing ‘guidance’ as to proof of insurance and ‘models’ for the form, content and coverage of such insurance. . . .” The Staff concluded that the Commission's framework for evaluating LES's compliance with the liability insurance requirements was a reasonable one, fully consistent with recent enactments. Staff's Response, dated August 12, 1990.

Commission Decision

The Staff's response is squarely on target, and we need not repeat it. No reading of ¶6 — no matter how contrived — can raise a serious question of applying a requirement for financial protection from public liability different from or beyond the liability insurance required by Congress in Pub. L. No. 101-575.⁵ Moreover, we are unable to discern the slightest reason why further assurance is sought or needed that *Price-Anderson requirements will not be applied to LES's enrichment facility*; Congress has so dictated. See Act, § 193(e). The Commission cannot ignore such a congressional command and has evidenced no inclination or intent to do so. We find no need to amend our hearing notice.

Reconsideration on this basis is denied.

⁵ “Financial protection” is defined in Part 140 as the “ability to respond in damages for public liability and to meet the cost of investigating and defending claims and settling suits for such damages.” 10 C.F.R. § 140.3(d). Section 140.14(a)(1) lists a policy of liability insurance from private sources as a means of providing primary financial protection. Related sections cited in Part III discuss the adequacy of proof of such liability insurance. See section 140.15, *et seq.*

B. Provision (from Part IV) at Issue: *Applying Part 140* of the NRC rules (codified in Title 10) to the hearing by including Part 140 in a list of regulations to be applied “according to their terms”

LES's Objection and Requested Relief

Following shortly upon Staff's August 12 response, LES moved for leave to file to replace an incorrect caption and to supplement its motion for reconsideration. This time, LES challenged Part IV of the *Federal Register* notice where Part 140 was included among NRC regulations that would be applied “according to their terms.”

Staff's Response

Staff noted that LES failed to explain why this additional objection could not have been raised in LES's original motion, but on the substance found that the supplemental argument did not change the Staff's position — “i.e., there is no dispute that Congress specifically excluded uranium enrichment facilities from Price-Anderson Act applicability.” Staff's Response, dated September 6, 1991, at 2-3.

Commission Decision

The Commission accepts LES's additional filing. We believe that the hearing notice erred in a minor respect in including existing Part 140⁶ among the regulations that applied *by their terms*. Only the sections of existing Part 140 designated in Part III of the Hearing Order are applicable and then only by the terms of the Hearing Order, i.e., as guidance or models. Thus, the reconsideration is granted, and the Commission clarifies that existing Part 140 is not applicable by its terms.

⁶ Note that the Commission currently is engaged in rulemaking concerning the licensing of uranium enrichment facilities to reflect changes made to the Atomic Energy Act by the Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990. See Notice of Proposed Rulemaking — Uranium Enrichment Regulations, 56 Fed. Reg. 46,739 (Sept. 16, 1991). That rulemaking includes proposed modifications to 10 C.F.R. Part 140 to address the “financial protection required of uranium enrichment facility licensees pursuant to section 193 of the Atomic Energy Act of 1954” 56 Fed. Reg. at 46,745. The Commission has not yet made any determination on the final rules in this area.

III. CANT'S OBJECTIONS TO OUR PART III PROVISIONS

- A. **Provision at Issue:** Unnumbered paragraph, authorizing motions for *reconsideration of the standards* for this hearing set forth by the Hearing Order

CANT's Objection and Requested Relief

CANT objects to the use of the term "reconsideration" and maintains that the standards set forth for the hearing must receive impartial and thorough consideration and that the Commission must respond to all comments with reasoned justification for its position.

Staff's Response

The Staff asserts that no reconsideration of the use of the term "reconsideration" is warranted.

Commission Decision

As the Staff noted, CANT's objection raises solely a semantic problem; the nature of the reconsideration offered by the Commission is sufficient to meet CANT's objection and the Commission's obligations.⁷ It has long been established that the Commission may proceed by rulemaking or adjudication. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1942). See also Pub. L. No. 101-575, § 5(b). Because the standards set forth in Part III to govern the instant adjudication had not been established by rulemaking, the Commission provided opportunity for parties to challenge them by seeking reconsideration; however, the status of an unchallenged standard would not be simply that of a proposed standard, as CANT's formulation would suggest. An unchallenged standard would, without more, be fully applicable to the matter being heard. As to the standards challenged, it should have been evident from the terms of the Hearing Order, which required among other things that petitions for reconsideration "must contain all technical or other arguments to support the petition" and allowed response by the parties, that the Commission intended to initiate a process in which each objection would be fully considered *de novo* and the parties provided with the Commission's reasoned decision. In any event, as demonstrated by this Order, that is the process being followed, and CANT is

⁷ Our rules attach no special significance to the term "reconsideration" used in the present context. Cf. 10 C.F.R. § 2.771 (petitions for reconsideration of a final decision).

receiving the process it perceives as its due regardless of the nomenclature. Thus, we conclude that no modification of our Hearing Order is warranted.

- B. Provision at Issue:** Paragraph 3, adopting *criteria from NUREG-1391* (entitled "Chemical Toxicity of Uranium Hexafluoride Compared to Acute Effects of Radiation") for purposes of *siting and design of the facility against accidental atmospheric releases of uranium hexafluoride*⁸

CANT's Objection and Requested Relief

CANT objects to the Commission's proposed siting criteria as too lax to protect public health adequately. In support of that objection, CANT incorporates by reference its Contention (G) and the affidavit supporting Contention (G) which in turn rely on statements in EPA's comments on the Commission's Advance Notice of Proposed Rulemaking which was published at 53 Fed. Reg. 13,726 (1988). EPA commented that the NRC's specified limits "may not adequately protect the public from exposure to hydrogen fluoride (HF)." Letter from Robert E. Sanderson, EPA to NRC, July 22, 1988. CANT affirmatively seeks imposition of a boundary limit of 2.5 mg/m³ for 15 minutes or its effective equivalent.

Position of the Staff

Reconsideration was opposed by the Staff based on its demonstration by affidavit that CANT's reliance on the EPA letter is misplaced. Staff's thesis was that EPA's conclusion was faulty because EPA had relied on an incorrectly published formula stated in the work of another organization (corrected in later publication) and on only part of a definition included in a different work.

Commission Decision

The Commission established plant boundary limits that were intended to be generally equivalent to the Commission's reactor siting criteria published at 10 C.F.R. Part 100, i.e., the limits were intended to be quantities or concentration values that produced a level of adverse health effects generally equivalent to the adverse health effects that are associated with the dose guideline values

⁸ The criterion applies the following limitations to the boundary of the site under control of the applicant: A limiting intake of 10 milligrams of uranium in soluble form, and a limiting exposure to hydrogen fluoride at a concentration of 25 milligrams per cubic meter of air for 30 minutes. For exposure times (t) other than 30 minutes, the limiting concentration (C) of hydrogen fluoride in air shall be calculated using the equation $C = 25 \text{ mg/m}^3 (30 \text{ min}/t)^{0.5}$.

in Part 100. We believe that Dr. Maguire's affidavit, submitted by the Staff, considered in conjunction with the rationale for NRC's specified limits in NUREG-1391 amply rebuts CANT's arguments. It bears emphasis that the objective is equivalency to Part 100; it was never the intent to set levels below which *no* adverse effects would occur from HF.

The Commission's standard is appropriate in that it approximates or is stricter than the standard adopted by the Commission in its previous Part 100 rulemaking: as discussed in NUREG-1391, the significant health effects from exposure at the Part 100 guideline values are in excess of those that might be expected from exposures at the chosen HF values. For the foregoing reasons, we decline to consider the issue further.

C. Provision at Issue: Paragraph 2, applying the draft "*General Design Criteria*" for uranium enrichment published in the Advanced Notice of Proposed Rulemaking noticed on April 22, 1988 (see 53 Fed. Reg. 13,276)

CANT's Objection and Requested Relief

CANT complains of the lack of performance objectives addressed to safeguarding nuclear materials in the design objectives made applicable by ¶2. CANT proposes that we incorporate the following design criterion:

The design of a uranium enrichment facility, including hardware, shall be conducive to implementation of effective advanced national and international safeguards techniques and procedures.

CANT also asks that we consider in establishing nuclear safeguard performance criteria the issues raised in four CANT contentions, (L) through (O). We read that as a request to establish licensing standards to ensure effective monitoring by the International Atomic Energy Agency (IAEA) that would require (1) online enrichment monitoring for all cascades at the plant and inner diameters of all process pipes measuring at least 110 mm; (2) effective monitoring of sampling ports, process valves, and flanges; and (3) transparent walls around small cells of centrifuges.

Staff's Position

Here as well, the Staff opposes reconsideration. Staff's first reason is that any lack of material control and accounting (MC&A) requirements has been addressed by issuance of the Commission's final rule, published October 31, 1991 (56 Fed. Reg. 55,991) which established MC&A requirements for

enrichment facilities.⁹ In addition, Staff argues, the Commission's statement of considerations on the final rule resolved that NRC requirements need not encompass as a design criterion the assurance that ready access is available to IAEA inspectors. Staff also argued that an aspect of the detailed criterion proposed that would establish a prohibition against opaque cell walls for centrifuges would be technically irrelevant because the LES design does not appear to contemplate such walls. Staff's Response at 9-10.

Commission Decision

The General Design Criteria from our 1988 Advance Notice of Proposed Rulemaking were made applicable to this proceeding by the Commission in the Hearing Order. In so doing, we chose the approach of performance-based standards. Those standards established "principal design criteria which are commensurate with their safety function." 53 Fed. Reg. at 13,278. Since the rules were linked to "safety" considerations as distinct from "common defense and security" considerations,¹⁰ the criteria did not include a performance-based safeguards standard directed at common defense and security goals such as those to be achieved by the IAEA safeguards regime. This possible gap was addressed by the Commission's Notice of Proposed Rulemaking on MC&A requirements for uranium enrichment facilities. 55 Fed. Reg. at 51,726. Part IV of the Hearing Order (56 Fed. Reg. at 23,313) made the proposed rules for 10 C.F.R. Part 74 relating to MC&A (*see* 55 Fed. Reg. 51,730, *et seq.*) applicable to this proceeding and anticipated conformance to the final rules when issued, noting that if there were not final rules at the conclusion of this proceeding, any license granted LES would be appropriately conformed to final rules on their issuance. The Commission also noted the applicability of already codified regulations on physical security and information control.

In issuing its final rule on MC&A requirements for uranium enrichment facilities (*see* 56 Fed. Reg. 55,991 (Oct. 31, 1991)), the Commission explained that the need for safeguards against unauthorized activities was addressed "primarily through creation of a new § 74.33 in NRC's existing material control and accounting regulations." *Id.* The final rule replaced the proposed rule and became applicable to this proceeding, and lest there be any doubt, by this Order

⁹ CANT's reconsideration request reflected that CANT was well aware that the Commission had published a proposed rule regarding MC&A. *See* 55 Fed. Reg. 51,726 (1990). Indeed, one of the individual commenters apparently has close ties to CANT and essentially made CANT's point with respect to IAEA access in the rulemaking.

¹⁰ "Safety" in our parlance refers to protection of public health and safety from the design, construction, and operation of the plant; the protection of the common defense and security of the United States relates to such matters as protection of classified information and against international diversion of materials from peaceful and non-explosive uses.

we amend our Hearing Order accordingly. The final rule resolves CANT's issue; the Commission explained its choice of performance-based rather than prescriptive standards in establishing safeguards-directed performance standards in the new section 74.33.

The new section 74.33 includes as a performance-based requirement that each uranium enrichment licensee must establish, implement, and maintain an NRC-approved MC&A system. That system must, among other things, protect against production of uranium enriched to 10% or more of U-235 and any unauthorized production of uranium of low strategic significance, and in the unlikely event that protection is thwarted, must be able to detect the consequent unauthorized production. 10 C.F.R. § 74.33(2) and (3). The Commission concluded that specific requirements for the use of physical security measures in achieving MC&A objectives were unnecessary. Physical security measures may be included by an applicant in its MC&A program, but the applicant is free to develop its program in any manner as long as it meets the general performance objectives and has the system features and capabilities specified.

CANT's remaining suggested standards appear to be prescriptive and oriented toward the physical construction of the facility, whereas the Commission has made a reasoned policy choice in the rulemaking to regulate by performance-based standards for MC&A programs. Licensees may, of course, choose or need to employ the CANT-suggested means to achieve an appropriate level of safeguards; however, those means are not necessarily the exclusive solutions to meeting the Commission's performance requirements. Indeed, in some cases those means may be irrelevant because of the design chosen for the facility. Finally, we note that CANT has withdrawn its objection to the lack of a requirement that centrifuge cell walls be transparent. Presumably this was because no provision was apparent that opaque walls were intended. *See, e.g., Staff's Response at 10.*

In light of the foregoing, the hearing should proceed as directed, substituting the final rule on MC&A for the proposed rule and applying existing Part 140 solely as guidance. All other requests for reconsideration are denied.

It is so ORDERED.

For the Commission¹¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of March 1992.

¹¹ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Jerry R. Kline
Peter S. Lam

In the Matter of

Docket Nos. 50-528-OLA-3
50-529-OLA-3
50-530-OLA-3
(ASLBP No. 92-654-01-OLA-3)
(Automatic Closure
Interlock for Shutdown
Cooling Valves)

ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station Units 1, 2, and 3)

March 4, 1992

RULES OF PRACTICE: INTERVENTION

The Atomic Energy Act does not confer the automatic right of intervention upon anyone. The Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements.

RULES OF PRACTICE: INTERVENTION

Prior to the first prehearing conference, the petitioner must file a supplement to his or her petition to intervene which sets forth the contentions the petitioner seeks to have litigated and the basis for each contention. 10 C.F.R. § 2.714.

RULES OF PRACTICE: DISMISSAL OF PARTIES

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

Pursuant to 10 C.F.R. § 2.707, the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order to make such orders in regard to the failure as are just.

RULES OF PRACTICE: DISMISSAL OF PARTIES (DEFAULT)

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

Dismissal of a party is the ultimate sanction applicable to an intervenor. Where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and the Licensing Board may make such orders in regard to the failure as are just. 10 C.F.R. §§ 2.707, 2.718.

**MEMORANDUM AND ORDER
FINDING MITCHELL PETITIONERS IN DEFAULT
(Dismissal of Proceeding)**

On October 30, 1991, the NRC published in the *Federal Register* a notice of application by the Arizona Public Service Co. *et al.* ("Licensees") for license amendments to the licenses for Palo Verde Nuclear Generating Station, Units 1, 2, and 3, to permit the Licensees to remove the automatic closure interlocks for shutdown cooling valves on these units, and of an opportunity for hearing on that application. 56 Fed. Reg. 55,940, 55,942 (Oct. 30, 1991). The notice provided that petitions for leave to intervene with respect to the application could be filed by November 29, 1991, in accordance with 10 C.F.R. § 2.714; that the petition should specifically explain why intervention should be permitted, with particular reference to, *inter alia*, the nature of petitioner's right to intervene under the Atomic Energy Act, as amended; and that the petition should identify the specific aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 56 Fed. Reg. at 55,941.

Allan L. Mitchell and Linda E. Mitchell ("Petitioners") filed a petition ("Petition") to intervene on November 25, 1991. Licensees and the NRC Staff have opposed the Mitchell's petition.

The Atomic Safety and Licensing Board ("Board") issued a "Notice of Pre-hearing Conference and Order Scheduling Filing of Pleadings" on January 2,

1992 ("Order"). 57 Fed. Reg. 938 (Jan. 9, 1992). In this Order, the Board required that "petitioners . . . shall file *no later than January 27, 1992* a Supplemental Petition which must include a list of the contentions which petitioners seek to have litigated in the hearing and which satisfy the requirements of paragraph (b)(2) of § 2.714 of the Commission's Rules of Practice." Order at 2. Additionally, the pleadings were "to be in the hands of the Licensing Board and other parties on the due date." *Id.* at 3.

On January 27, 1992, the Mitchell Petitioners filed a Notice with the Licensing Board and the other parties stating that they do not intend to comply with the Board's order to submit proposed contentions and moved "to voluntarily dismiss these proceedings." Licensees and NRC Staff do not object to dismissal of this proceeding.

The deliberate decision by the Mitchell Petitioners not to comply with the Licensing Board's Prehearing Order of January 2, 1992, places them in default in this proceeding. Accordingly, pursuant to the provisions of 10 C.F.R. § 2.707, the Petition for Leave to Intervene and Request for Hearing, filed by Allan L. Mitchell and Linda E. Mitchell on November 25, 1991, is hereby denied and the Mitchell Petitioners are dismissed from this proceeding, with prejudice.

There being no other matters outstanding, this licensing proceeding is hereby terminated.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Issued at Bethesda, Maryland,
this 4th day of March 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Marshall E. Miller, Chairman
Frederick J. Shon
Dr. James H. Carpenter

In the Matter of

Docket Nos. 030-05980

030-05981

030-05982

030-08335

030-08444

(ASLBP Nos. 89-590-01-OM

90-598-01-OM-2)

SAFETY LIGHT CORPORATION,

et al.

(Bloomsburg Site Decontamination)

March 16, 1992

ORDER

(Ruling on Licensees' Motion to Compel
Deposition Discovery from the NRC Staff)

On January 31, 1992, USR Industries, Inc., and Safety Light Corporation filed a Motion to Compel Deposition Discovery from the NRC Staff. The NRC Staff on February 18, 1992, filed its Answer in Opposition to Licensees' Motion to Compel Deposition Discovery. At the end of its Answer, the NRC Staff included a request for the entry of a protective order precluding the taking of the requested depositions (Staff Answer at 12).

On February 24, 1992, the Licensees (USR Industries) and Safety Light Corporation filed a Motion for Leave to File a Reply in Support of Motion to

Compel Deposition Discovery. That motion and the proposed reply attached to it were specifically directed only to the NRC Staff's Motion for a Protective Order contained in its filing dated February 18, 1992. The Licensees' Motion for Leave to File a Reply is hereby granted, and the tendered Reply in Support of Motion to Compel Deposition Discovery is received and filed *instantly* insofar as it pertains to the Staff's request for a protective order.

At a conference between counsel and the Licensing Board on January 7, 1992, the parties agreed to the following issues for the evidentiary hearing to be held in these proceedings:

1. Does the NRC have jurisdiction over USR Industries and USR subsidiaries (recognizing that the Staff has pending before the Nuclear Regulatory Commission an appeal at this present time with regard to this issue)?
2. Was there adequate basis in 1989 for making either or both of the 1989 orders immediately effective?
3. Should the Staff's orders of March and August 1989 be sustained, denied or modified as appropriate?

January 9, 1992 Licensing Board Order (unpublished) at 1-2.

The Licensees have requested the discovery depositions of three individuals, one identified by name (Kevin Null, an employee of NRC Region III) and two others identified under the following categories:

An NRC Staff official who prepared or has specific knowledge of the Policy and Processing for Material Licensing Applications Involving Change of Ownership, dated February 11, 1986.¹

An NRC Staff official who prepared or has specific knowledge of the basis for the statements in SECY-91-096 and SECY-91-334 related to "the lack of clear standards for unrestricted release of residual radioactivity" (SECY-91-096 at 4) and "existing NRC regulations do not contain generally applicable and definitive decontamination criteria" (SECY-91-334 at 8).

Under the provisions of 10 C.F.R. § 2.720(h)(2)(i), where discovery is sought from the NRC Staff, it is required to "make available one or more witnesses designated by the Executive Director for Operations for oral examinations at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding." The Staff correctly points out the relevancy requirement of this provision, but then cites the Federal Rules of Evidence (Rule 401) as the sole criterion for determining what is relevant in the pending motion to compel discovery. We have always held that a more liberal definition of relevance may be used in the context of discovery. Such information need not

¹The Staff stated in its Answer, at page 8, footnote 10, that the "correct title of this document is 'Policy and Guidance Directive FC 86-2; Processing Material License Applications Involving Change of Ownership.'"

be admissible *per se*, as would be the case at trial. It is sufficient if the requested discovery could reasonably lead to obtaining evidence that would be admissible at the future evidentiary hearing on this proceeding.

I. DEPOSITION OF KEVIN HULL

The Staff has not objected to the depositions of John D. Kinneman or Francis Costello. Until they have been deposed, the Licensees can make no real showing whether or not the deposition of Kevin Null is needed upon a showing of "exceptional circumstances" as required by 10 C.F.R. § 2.720(f)(2)(i). Accordingly, the Licensees should first depose John D. Kinneman and Francis Costello. If thereafter the Licensees still wish to make a case for compelling the deposition of Kevin Null, they may do so.

II. DEPOSITION OF A STAFF WITNESS REGARDING STAFF GUIDANCE OF FEBRUARY 11, 1986

Here the Licensees have not asked for the deposition of a named individual and hence need not make the difficult threshold showing required by section 2.720(h)(2)(i). As we have noted *supra*, the standard for compelling discovery is much less stringent than that for the admissibility of evidence, and need only involve information that might lead to admissible evidence. Accordingly, we direct the Staff to supply for deposition discovery some individual familiar with the issuance of the guide.

III. DEPOSITION OF A STAFF WITNESS FAMILIAR WITH EXISTENCE OR LACK OF DECONTAMINATION CRITERIA

Here also there is no request for named witnesses. The Staff has offered other witnesses who may be questioned upon this matter. We note that the Staff in issuing its recent orders denying renewal of licenses has now set forth specific decontamination criteria for this specific site. However, the Licensees have always contended that there is a significant difference between the required decontamination of a manufacturing site utilizing licensed nuclear materials, and the cleanup required after the termination of licensed operations. We express no view on this situation. However, if the deposition of some witnesses on this

point shows a clear need for additional depositions, the Licensees may renew the request. The NRC Staff's Motion for a Protective Order is denied.

IT IS SO ORDERED.

**FOR THE ATOMIC SAFETY
AND LICENSING BOARD**

**Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
March 16, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-440-OLA-3
(ASLBP No. 91-650-13-OLA-3)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, *et al.*

(Perry Nuclear Power Plant,
Unit 1)

March 18, 1992

In this Memorandum and Order, the Licensing Board finds that the petitioners lack standing to intervene in this operating license amendment proceeding and, therefore, it denies the petitioners' intervention petition.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission long ago held that "contemporaneous judicial concepts of standing" are to be used in determining whether a petitioner has alleged a sufficient "interest" within the meaning of section 189(a) of the Atomic Energy Act and the agency's regulations to intervene as a matter of right in an NRC licensing proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a petitioner must demonstrate an injury in fact from the action involved and an interest arguably within the zone of interests protected by the statutory provisions governing the proceeding. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

RULES OF PRACTICE: STANDING TO INTERVENE

The same in injury in fact and zone of interest requirements must be met regardless of whether the petitioner is an individual or an organization seeking to intervene in its own right. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991).

RULES OF PRACTICE: STANDING TO INTERVENE

When an organization seeks to intervene as the authorized representative of one of its members, the standing of the organizational petitioner is, *inter alia*, dependent upon that individual member having standing in his own right. *Turkey Point*, 33 NRC at 530-31. See also *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

RULES OF PRACTICE: STANDING TO INTERVENE

Current judicial standing doctrine holds that the injury in fact requirement has three components: injury, cause, and remedial benefit. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

RULES OF PRACTICE: STANDING TO INTERVENE

To meet the injury in fact test in proceedings other than those for construction permits and operating licenses, injury to individuals living in reasonable proximity to a plant must be based upon a showing of "a clear potential for offsite consequences" resulting from the challenged action. *St. Lucie*, 30 NRC at 329.

RULES OF PRACTICE: STANDING TO INTERVENE

Standing cannot be properly predicated upon the denial of a purported procedural right that is uncoupled from any injury caused by the substance of the challenged license amendment. *See United Transp. Union v. ICC*, 891 F.2d 908, 918 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3271 (1990).

MEMORANDUM AND ORDER (Ruling on Intervention Petition)

This matter is before us to determine whether the petitioners, Ohio Citizens for Responsible Energy, Inc. (OCRE) and Susan L. Hiatt, have standing to challenge an operating license amendment sought by the applicants, Cleveland Electric Illuminating Company, *et al.*, for their Perry Nuclear Power Plant located on the shores of Lake Erie in Lake County, Ohio. The amendment removes the reactor vessel material surveillance program withdrawal schedule from the plant's technical specifications and relocates it in the updated safety analysis report for the facility. For the reasons that follow, we find that the petitioners lack standing to intervene. Accordingly, their petition to intervene is denied.

I.

A. To put the petitioners' standing claims in the proper context, it is helpful initially to sketch the regulatory background underlying this license amendment proceeding.

Pursuant to section 182(a) of the Atomic Energy Act,¹ the operating license for a commercial nuclear power plant must include the "technical specifications" for the facility. That section further provides that the technical specifications include, *inter alia*, information on "the specific characteristics of the facility, and such other information as the Commission . . . deem[s] necessary . . . to find that the [plant] . . . will provide adequate protection to the health and safety of the public."² The Commission has implemented this statutory directive through 10 C.F.R. § 50.36. That provision states that each operating license "will include technical specifications . . . [to] be derived from the analyses and evaluation included in the safety analysis report, and amendments thereto, . . . [and] such additional technical specifications as the Commission finds appropriate."³ The

¹ 42 U.S.C. § 2232(a) (1988).

² *Id.*

³ 10 C.F.R. § 50.36(b).

regulation then generally describes, under six category headings, the types of items that must be included in the technical specifications, such as safety limits, limiting safety system settings, limiting control settings, limiting conditions for operations, surveillance requirements, and facility design features that, if altered, would have an effect on safety.⁴

The Commission has recognized, however, that the lack of well-defined criteria in the regulations for determining precisely what should be included in a plant's technical specifications has led licensees to be over-inclusive in developing them. As the Commission stated in its interim policy statement on technical specification improvements,

[t]he purpose of Technical Specifications is to impose those conditions or limitations upon reactor operation necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety by establishing those conditions of operation which cannot be changed without prior Commission approval and by identifying those features which are of controlling importance to safety.⁵

The Commission went on to observe that, "since [the technical specification rule was promulgated], there has been a trend towards including in Technical Specifications not only those requirements derived from the analyses and evaluation included in the safety analysis report but also essentially all other Commission requirements governing the operation of nuclear power reactors."⁶ According to the Commission, this trend has had the deleterious effect of increasing the volume of technical specifications to the point where they have become unnecessarily burdensome, diverting the attention of licensees and plant operators from the plant conditions most important to safety, and substantially increasing the number of license amendment applications to make minor changes in the technical specifications — all of which "has resulted in an adverse but unquantifiable impact on safety."⁷

In an effort to eliminate these negative impacts, the Commission initiated, with the issuance of its interim policy statement, a voluntary program designed to encourage licensees to improve their technical specifications. As a small part of this ongoing program, the staff issued Generic Letter 91-01, providing guidance on the preparation of a license amendment application to remove from the technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens.⁸ In addition to explaining the ministerial

⁴ *Id.* § 56.36(c).

⁵ 52 Fed. Reg. 3788, 3790 (1987). See generally *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 273 (1979).

⁶ 52 Fed. Reg. at 3789.

⁷ *Id.*

⁸ Generic Letter 91-01 (Jan. 4, 1991).

function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to protect against reactor vessel embrittlement, the staff guidance letter states that the Commission's regulations already require that a licensee obtain NRC approval for any changes to the withdrawal schedule.⁹ This, the staff maintains, makes it duplicative to retain regulatory control over the schedule through the license amendment process. Finally, the staff guidance letter directs that an application to effectuate this change should include the licensee's commitment to place the NRC-approved version of the specimen withdrawal schedule in the next revision of the licensee's updated safety analysis report.

B. After the staff issued the generic letter, the applicants filed a supplement to a pending license amendment application seeking to remove the reactor vessel material surveillance program withdrawal schedule from the Perry technical specifications. Thereafter, the agency published a notice of opportunity for hearing and a proposed no significant hazards consideration determination concerning the applicant's request.¹⁰ In support of the staff's no significant hazards consideration determination,¹¹ the notice stated that the relocation of the surveillance capsule withdrawal schedule was purely an administrative change and hence did not (1) involve a significant increase in the probability or consequences of a previously evaluated accident; (2) affect any previous accident analyses; or (3) change any existing margin of safety.¹²

Responding to the Commission's notice, the petitioners filed a timely petition to intervene and request for a hearing on the capsule withdrawal schedule portion of the operating license amendment.¹³ The applicants and the staff opposed the intervention petition on the ground that the petitioners lacked standing to intervene.¹⁴ We then issued an order that fixed a schedule for filing any amended petition, provided the petitioners with the opportunity to address the arguments of the applicants and the staff, and requested that the petitioners explain why several standing cases we cited were not persuasive in the circumstances presented.¹⁵ The petitioners filed an "amended" intervention petition in which they addressed the arguments of the applicants and the staff and

⁹ See 10 C.F.R. Part 50, Appendix H, § II.B.3.

¹⁰ 56 Fed. Reg. 33,950, 33,961 (1991). See generally 42 U.S.C. § 2239(a)(2)(A)-(B) (1988); 10 C.F.R. § 50.91.

¹¹ See generally 10 C.F.R. § 50.92(c).

¹² 52 Fed. Reg. at 33,962.

¹³ Petition for Leave to Intervene and Request for a Hearing (Aug. 23, 1991) [hereinafter *Petition*].

¹⁴ Licensees' Answer to Petition for Leave to Intervene and Request for Hearing (Sept. 6, 1991); NRC Staff Answer to Petition for Leave to Intervene (Sept. 12, 1991).

¹⁵ Order (Oct. 28, 1991) (unpublished).

the cases we cited, but made no substantive changes in their standing claims.¹⁶ Finally, the applicants and the staff filed replies to the petitioners' filing.¹⁷

The intervention petition asserts that petitioner OCRE is a nonprofit Ohio corporation whose purpose is to engage in reactor safety research and advocacy with the goal of advancing the use of the highest standards of safety for nuclear plants. The petition recites that some of OCRE's members live and own property within fifteen miles of the Perry plant and that one member, Susan L. Hiatt, has authorized OCRE to represent her interests in the proceeding. Attached to the petition is the affidavit of Ms. Hiatt stating that she is a member and officer of OCRE who resides about thirteen miles from the Perry facility. The affidavit states that, in addition to appearing pro se, Ms. Hiatt has authorized OCRE to represent her interests in this amendment proceeding and, in turn, OCRE has empowered her, as an officer of the organization, to represent it before the agency. With respect to petitioner Hiatt, the petition reiterates that she lives and owns property within fifteen miles of the Perry plant. The petition then states that

Petitioners have a definite interest in the preservation of their lives, their physical health, their livelihoods, the value of their property, a safe and healthy natural environment, and the cultural, historical, and economic resources of Northeast Ohio. Petitioners also have an interest in preserving their legal rights to meaningful participation in matters affecting the operation of the Perry Nuclear Power Plant which may impact these above-mentioned interests.¹⁸

After setting forth the petitioners' purported interests, the petition states that the "Petitioners agree with the Licensee and NRC Staff that this portion of the proposed amendment is purely an administrative matter which involves no significant hazards considerations."¹⁹ The petition then claims that the petitioners wish only to raise a single legal issue, i.e., the challenged amendment violates section 189(a) of the Atomic Energy Act²⁰ by depriving the public of the right to notice and an opportunity for a hearing on any changes to the withdrawal schedule. According to the petition, the withdrawal schedule traditionally has been part of the applicants' technical specifications and hence the Perry operating license so that, pursuant to section 189(a), changes to the schedule can be made only after public notice and an opportunity for a hearing. The petitioners next argue that under the challenged amendment the licensees henceforth will be able

¹⁶ Petitioners' Amended Petition for Leave to Intervene (Nov. 22, 1991).

¹⁷ Licensees' Response to Amended Petition for Leave to Intervene (Dec. 17, 1991); NRC Staff Response to Amended Petition (Dec. 17, 1991).

¹⁸ Petition at 2-4.

¹⁹ *Id.* at 5.

²⁰ 42 U.S.C. § 2239(a) (1988).

to make de facto license amendments to the withdrawal schedule, without any notice or hearing, in violation of their rights under section 189(a).²¹

II.

A. Parroting the language of section 189(a) of the Atomic Energy Act, the Commission's regulations provide that "[a]ny person whose interest may be affected by a proceeding" may seek to intervene by filing a petition.²² The regulations further provide that the petition shall "set forth with particularity the interest of the petitioner in the proceeding [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene."²³ The Commission long ago held that "contemporaneous judicial concepts of standing" are to be used in determining whether a petitioner has alleged a sufficient "interest" within the meaning of section 189(a) and the agency's regulations to intervene as a matter of right in an NRC licensing proceeding.²⁴ According to the Commission, those familiar standing principles require that a petitioner demonstrate an injury in fact from the action involved and an interest arguably within the zone of interests protected by the statutory provisions governing the proceeding.²⁵ The same showing is required regardless of whether the petitioner is an individual or an organization seeking to intervene in its own right.²⁶ Additionally, when an organization seeks to intervene as the authorized representative of one of its members, the standing of the organizational petitioner is, *inter alia*, dependent upon that individual member having standing in his own right.²⁷

As the Supreme Court has recognized, "[g]eneralizations about standing to sue are largely worthless as such."²⁸ It nevertheless is current judicial standing doctrine that the injury in fact requirement has three components: injury, cause, and remedial benefit. As articulated by the Supreme Court,

²¹ Petition at 6-10.

²² 10 C.F.R. § 2.714(a)(1).

²³ *Id.* § 2.714(a)(2).

²⁴ *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

²⁵ *Id.*; see *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

²⁶ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991); see *TMI*, 18 NRC at 332.

²⁷ *Turkey Point*, 33 NRC at 530-31. See also *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

²⁸ *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

the party who invokes the court's authority [must] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).²⁹

Although variously described, the asserted injury must be "distinct and palpable"³⁰ and "particular [and] concrete,"³¹ as opposed to being "'conjectural . . . [,] hypothetical,'"³² or "abstract."³³ The injury need not already have occurred but when future harm is asserted, it must be "threatened,"³⁴ "'certainly impending,'"³⁵ and "'real and immediate.'"³⁶ Additionally, there must be a causal nexus between the asserted injury and the challenged action. In other words, the alleged harm must have "resulted" in a "concretely demonstrable way" from the claimed infractions.³⁷ There also must be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party "stand[s] to profit in some personal interest."³⁸

B. Here, it is clear that the petitioners fail to satisfy the injury in fact test for standing. This being so, we need not reach any question concerning the zone of interest requirement. Further, we need address only Ms. Hiatt's standing claims because OCRE's standing as the representative of its member is, *inter alia*, dependent upon Ms. Hiatt's standing and, to the extent OCRE seeks to intervene as an organization in its own right, both petitioners have alleged the same interests.³⁹ Thus, because Ms. Hiatt has failed to establish an injury in fact, OCRE's claim likewise must fail.

1. In the intervention petition, Ms. Hiatt first asserts that she lives and owns property within fifteen miles of the Perry facility and that she has an interest in preserving her health, livelihood, property, and environment as well as the cultural, historical, and economic resources of northeastern Ohio, all of which

²⁹ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). See generally 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.4-.6 (1984).

³⁰ *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

³¹ *United States v. Richardson*, 418 U.S. 166, 177 (1974).

³² *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

³³ *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 40.

³⁴ *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

³⁵ *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

³⁶ *Los Angeles v. Lyons*, 461 U.S. at 102.

³⁷ *Warth v. Seldin*, 422 U.S. at 504.

³⁸ *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 39.

It should be noted that when the requested relief is the cessation of the putatively illegal conduct, the analysis of the causal nexus between the alleged injury and the challenged action (i.e., the "fairly traceable" analysis) and the asserted harm and the requested relief (i.e., the "redressability" analysis), is the same. See *Allen v. Wright*, 468 U.S. 737, 759 n.24 (1984).

³⁹ See *supra* notes 26-27 and accompanying text.

may be impacted by the operation of the plant. But petitioner's mere interest in these enumerated matters, without a great deal more, is woefully insufficient to establish that she has suffered some actual or threatened injury from the challenged license amendment. Generalized interests of the kind asserted by the petitioner do not comprise an injury that is distinct and palpable or particular and concrete. Rather, the petitioner's asserted interests are abstract and conjectural grievances that fall far short of the kind of real or threatened harm essential to establish an injury in fact.⁴⁰ As the Supreme Court has stated, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act]."⁴¹ Similarly, the concerns listed by the petitioner are inadequate to demonstrate her "interest" in this proceeding within the meaning of the Commission's regulations.

As previously indicated, to satisfy the injury in fact requirement, the alleged harm to the petitioner also must have been caused by the challenged licensing action. Yet, the amendment at issue only removes the reactor vessel material surveillance withdrawal schedule from the Perry technical specifications and places it in the updated safety analysis report. Ms. Hiatt concedes that the license amendment is purely an administrative matter that involves no significant hazards considerations. As solely an administrative change, the instant licensing action has no effect on any of the petitioner's asserted interests in preserving her life, health, livelihood, property, or the environment. Hence, the essential causal nexus between the petitioner's alleged harm and the challenged license amendment is missing.

Nor is the petitioner's position enhanced by her claim that she lives within fifteen miles of the Perry facility and that her interests, therefore, may be impacted by matters affecting the operation of the plant. Such a speculative claim is far too tenuous a causal link between the petitioner's alleged injury and the licensing action at issue to meet the injury in fact test. The Commission has emphasized that, in proceedings other than those for construction permits and operating licenses, injury to individuals living in reasonable proximity to a plant must be based upon a showing of "a clear potential for offsite consequences" resulting from the challenged action.⁴² Not only has the petitioner not made any such showing here, but her gratuitous admission in the intervention petition that the license amendment is purely an administrative matter with no significant hazards considerations precludes it.

⁴⁰ See *TMI*, 18 NRC at 332-33; *Turkey Point*, 33 NRC at 530.

⁴¹ *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

⁴² *St. Lucie*, 30 NRC at 329.

2. Ms. Hiatt's second claim of injury is as unavailing as her first. She asserts that she has an interest in preserving her "legal right" to meaningful participation in matters affecting the operation of the Perry facility. This claim of injury, however, also fails to meet the injury in fact test.

Setting aside for the moment the petitioner's declaration that she has a legal right to participate in NRC licensing proceedings, we note initially that the injury claimed by Ms. Hiatt is a future one. She does not allege any actual present harm from the license amendment. Indeed, she concedes it is merely an administrative matter with no safety implications. Instead, the petitioner complains that if future changes in the withdrawal schedule occur, there will be no future license amendment proceedings so she will lose her right to participate meaningfully in matters affecting the operation of the Perry plant.

Although a future injury can meet the injury in fact test, it must be one that is realistically threatened and immediate.⁴³ Here, however, the petitioner's alleged future injury is speculative.⁴⁴ Before the petitioner's alleged harm can occur, a number of uncertain and unlikely events must take place including, most obviously, a change in the withdrawal schedule. But Ms. Hiatt has not asserted that future changes in the withdrawal schedule will be made or even that such changes are likely.⁴⁵

Equally damaging to her argument, however, is the fact that the speculative harm asserted by the petitioner is footed on an erroneous premise. Without citing any direct authority, Ms. Hiatt declares that pursuant to section 189(a) of the Atomic Energy Act she has a "legal right" to participate in NRC license amendment proceedings. From this thesis, she argues that the challenged license amendment violates that right with respect to future changes in the specimen withdrawal schedule — changes she characterizes as *de facto* license amendments made without notice and an opportunity for a hearing. Contrary to the petitioner's apparent belief, section 189(a) does not give the petitioner an absolute, automatic right to intervene in NRC licensing proceedings. That provision bestows no legal or vested right on her to participate in agency licensing actions. As the United States Court of Appeals for the District of Columbia Circuit recently stated, "we have long recognized that Section

⁴³ See *supra* notes 34-36 and accompanying text.

⁴⁴ See *Judice v. Vail*, 430 U.S. 327, 332-33 & n.9 (1977) (plaintiff previously imprisoned and fined for contempt for ignoring deposition subpoena regarding outstanding judgment lacked standing to enjoin future enforcement of state statutory contempt procedures because prospect of future contempt was speculative conjecture even though judgment remained unsatisfied). See also *Los Angeles v. Lyons*, 461 U.S. at 105; *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974); *United Transp. Union v. ICC*, 891 F.2d 908, 913-14 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3271 (1990).

⁴⁵ Additionally, the petitioner has failed to identify the chain of circumstances culminating in "offsite consequences" that must be linked to those future changes before she reasonably can claim to be threatened by the operation of the Perry facility. See *supra* p. 122.

189(a) 'does not confer the automatic right of intervention upon anyone.'⁴⁶ Rather, section 189(a) grants participatory rights only to those persons who first establish, *inter alia*, that they have standing to intervene. Here, of course, the petitioner has not demonstrated that she has standing so section 189(a) cannot be used as the bootstrap to establish it.

Finally, the purported harm claimed by the petitioner fails to pass the injury in fact test for another reason: it has no causal link to any substantive regulatory impact. For example, the petitioner does not allege that the removal of the withdrawal schedule from the Perry technical specifications violates 10 C.F.R. § 50.36, the Commission's substantive rule prescribing the matters that must be included in a plant's technical specifications. Rather, Ms. Hiatt claims only the deprivation of a purported procedural right to have notice and an opportunity to request a hearing on future changes to the withdrawal schedule. Stated otherwise, she alleges a right to participate in a license amendment hearing as an end in itself.⁴⁷ But standing cannot be properly predicated upon the denial of a purported procedural right that is uncoupled from any injury caused by the substance of the challenged license amendment. As the District of Columbia Circuit has stated, "before we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer . . . standing. Without such a nexus, the procedural injury doctrine could swallow [the injury in fact] standing requirements."⁴⁸

Illustrative of this substantive nexus principle is the same circuit's decisions in *Capital Legal Foundation v. Commodity Credit Corp.*⁴⁹ There, Capital Le-

⁴⁶ *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (quoting *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)).

⁴⁷ Additionally, the petitioner argues that, if the amendment is granted, the only mechanism available for public participation in future changes to the withdrawal schedule is through 10 C.F.R. § 2.206. According to the petitioner, that provision provides neither meaningful participation nor a right to judicial review. This argument, like the one above, is bottomed on the erroneous, albeit implicit, notion that the petitioner has a legal right, without more, to participate in NRC license amendment proceedings. As previously stated, section 189(a) of the Atomic Energy Act grants no right to the petitioner to participate in agency proceedings for the sake of participating. Whether Ms. Hiatt has other avenues to challenge future changes in the specimen withdrawal schedule is irrelevant to the determination of her standing to intervene in *this* license amendment proceeding, which must rest on a showing that the instant amendment results in an actual or threatened injury in fact.

⁴⁸ *United Transp. Union v. ICC*, 891 F.2d at 918 (citation omitted).

Interestingly, in its decision, the court of appeals went on to posit an example that is closely analogous to the situation at hand:

Consider, for example, what would happen if the ICC adopted a rule stating that any American could intervene in an ICC proceeding to challenge any interlocking directorate between two railroads, and then later repealed that rule. Would every American be entitled to sue alleging that he or she suffered a procedural injury when the right to intervene was revoked? Surely some showing that interlocking directorates would be likely to injure the complainant should be required. Indeed, if a procedural injury alone suffices to confer Article III standing, any American could sue any agency alleging that it is arbitrary and capricious not to have a procedure by which they can challenge agency action.

Id. at 918-19.

⁴⁹ 711 F.2d 253 (D.C. Cir. 1983).

gal Foundation (Capital) sought declaratory and injunctive relief against the Commodity Credit Corporation (CCC) for offering to assume certain Polish government debts owed to American creditors and guaranteed by the agency, without first complying with the requirement of the CCC's regulation that the creditors declare the Polish debts in default. Capital, an organization involved in monitoring agencies engaged in economic regulation, claimed that the CCC's violation of the default provisions in its regulations was a de facto rule amendment undertaken without compliance with the notice and comment rulemaking procedures of the Administrative Procedure Act. Capital alleged it was harmed by the CCC's action because it had been deprived of its procedural right to comment on the rule change. It also conceded that it suffered no other injury stemming from the CCC's action. The court held that Capital lacked standing because it was not injured by the CCC's action.⁵⁰

Capital's injury claim directly parallels Ms. Hiatt's claim that the challenged license amendment harms her procedural right to notice and an opportunity to request a hearing on future changes to the withdrawal schedule.⁵¹ And like Capital, Ms. Hiatt effectively concedes she has no other injury by admitting the challenged amendment is purely an administrative matter with no significant hazards considerations. Given these circumstances, the same result must obtain here for Ms. Hiatt and OCRE which stands her stead.

C. Although the petitioners do not rely upon or even mention it in their filings, we think it incumbent upon us to account for our divergence from another Licensing Board's decision in an earlier *Perry* license amendment proceeding that the applicants and the staff brought to our attention.⁵² There, in circumstances indistinguishable from those before us, the Board found that OCRE had standing. We decline to follow that ruling.

In the earlier proceeding, OCRE, as the representative of its member Ms. Hiatt, challenged a license amendment that removed the cycle-specific core operating limits and other cycle-specific fuel information from the *Perry* technical specifications and replaced them with an agency-approved calculation methodology and acceptance criteria. As in this case, OCRE conceded that the amendment involved purely an administrative matter that involved no significant haz-

⁵⁰ 711 F.2d at 255-57, 259-60. See also *United Transp. Union v. ICC*, 891 F.2d at 918-19; *Telecommunications Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990); *Wilderness Society v. Griles*, 824 F.2d 4, 19 (D.C. Cir. 1987).

⁵¹ The petitioner seeks to distinguish *Capital Legal Foundation* on the ground that Capital claimed injury only to procedural rights conferred upon everyone by the Administrative Procedure Act. In contrast, she argues that her injury is to the substantive right to a hearing on license amendments given by the Atomic Energy Act to the special class of citizens living in close proximity to a nuclear plant. The petitioner's argument is meritless. As previously indicated, section 189(a) of the Atomic Energy Act does not confer upon anyone an automatic right of intervention in NRC licensing proceedings. See *supra* pp. 123-24. Further, mere residence in the vicinity of a nuclear plant is insufficient by itself to confer standing on a person seeking to intervene in an operating license amendment proceeding. See *supra* p. 122.

⁵² LBP-90-15, 31 NRC 501, 506, *reh'g denied*, LBP-90-25, 32 NRC 21, 24 (1990).

ards considerations. And, as here, OCRE claimed that it was harmed because the challenged license amendment would permit future core operating limit changes without notice and an opportunity to request a hearing. Similarly, OCRE asserted that it wished to raise the single legal issue of whether the challenged amendment violated section 189(a) of the Atomic Energy Act by depriving the public of the right to notice and an opportunity to request a hearing on future core operating limit changes.⁵³

In holding that OCRE had standing, it appears the Board determined that, because the Commission's regulations allow the filing of a contention raising only a legal issue, and OCRE raised such an issue, OCRE had standing to intervene.⁵⁴ Further, in its ruling denying motions for reconsideration, the Board appears to have concluded that OCRE's injury claim was sufficient because the challenged amendment deprived OCRE of its "legal right" to notice and an opportunity to request a hearing on future cycle-specific parameter limits. Additionally, the Board apparently found persuasive OCRE's argument that if the amendment were granted OCRE would have no effective opportunity to confront future cycle-specific operating limit changes.⁵⁵

In our view, the regulatory requirement that a petitioner must establish standing to intervene is independent of, and unrelated to, the type of issue, i.e., legal or factual, a petitioner seeks to raise. The requirement of 10 C.F.R. § 2.714(b)(1) that a petitioner must proffer at least one admissible legal or factual contention in order to obtain a hearing has nothing to do with the separate requirement that the petitioner establish its standing. Moreover, for the reasons already detailed herein, we conclude that section 189(a) of the Atomic Energy Act grants no automatic hearing rights and that the lack of other avenues for challenging the changes permitted by the amendment is irrelevant to the determination of the petitioner's standing.⁵⁶ Accordingly, we do not concur with the reasoning or the ruling of the previous *Perry* Board.

Order

For the foregoing reasons, we find that both petitioner Hiatt and petitioner OCRE lack sufficient interest within the meaning of 10 C.F.R. § 2.714(a)(1) to intervene in this operating license amendment proceeding. Accordingly, the intervention petition of Ms. Hiatt and OCRE is *denied*.

⁵³ 31 NRC at 503-05.

⁵⁴ *Id.* at 506.

⁵⁵ 32 NRC at 24.

⁵⁶ See *supra* pp. 122, 123-24, 124 n.47.

Pursuant to 10 C.F.R. §2.714a, the petitioners, within 10 days of service of this Memorandum and Order, may appeal this Order to the Commission by filing a notice of appeal and accompanying brief.

It is so ORDERED.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Richard F. Cole
ADMINISTRATIVE JUDGE**

**Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
March 18, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Jerry R. Kline

In the Matter of

Docket No. 030-20541-OM
(ASLBP No. 92-658-04-OM)
(Byproduct Material License
No. 52-21350-01)
(EA 91-171)

JOSE A. RUIZ CARLO

March 24, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement
and Terminating Proceeding)

On February 21, 1992, the parties to this enforcement proceeding, the NRC Staff and Mr. Jose A. Ruiz Carlo, filed with the Atomic Safety and Licensing Board (1) a Settlement Agreement that has been accepted and signed by both parties and the Licensee, and (2) a joint motion requesting the Board's approval of the Agreement and entry of an order terminating this proceeding, together with a proposed Order.¹ The Board has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the Settlement Agreement and consequent termination of this proceeding is in the public interest. We have requested and received additional explanation. Based upon its review, the Board

¹ Licensee, Alonso and Carus Iron Works, Inc., while it did not request a hearing, is also a signatory to the Agreement for reasons set out therein.

is satisfied that approval of the Settlement Agreement and termination of this proceeding based thereon is in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and, pursuant to sections 81 and 161 of the Atomic Energy Act of 1954, as amended (42 U.S.C. §§ 2111 and 2201), incorporates the Settlement Agreement by reference into this Order. Pursuant to 10 C.F.R. § 2.203, the Board hereby terminates this proceeding on the basis of the Settlement Agreement.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Richard F. Cole
ADMINISTRATIVE JUDGE**

**Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
March 24, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Peter S. Lam, Ph.D.
Harry Rehn, M.D.

In the Matter of

Docket No. 55-8615-SC
(ASLBP No. 91-646-02-SC)
(Senior Reactor Operator
License No. SOP-10561-1)
(EA 91-054)

DAVID M. MANNING
(Senior Reactor Operator)

March 31, 1992

MEMORANDUM AND ORDER
(Terminating Proceeding)

We have before us the NRC Staff's motion of February 24, 1992, to terminate this proceeding. The background of this and the related *FitzPatrick* proceeding is set out in our Memorandum and Order (Terminating *FitzPatrick* Proceeding), *New York Power Authority* (James A. FitzPatrick Nuclear Power Plant), LBP-92-1, 35 NRC 11 (1992).

In sum, David M. Manning held a senior operator's license in connection with his employment with the New York Power Authority (NYPA) at the FitzPatrick plant. This proceeding was initiated upon Mr. Manning's request for a hearing

on an enforcement action by the NRC Staff suspending his license. Since then Mr. Manning's employment with NYPA has been terminated.¹

The Staff's motion is grounded upon 10 C.F.R. § 55.55(a) which provides that each senior operator license expires "upon termination of employment with the facility licensee" Thus, in the Staff's view, this proceeding is moot and should therefore be terminated. Mr. Manning did not answer Staff's motion.

ORDER

Staff's motion is granted. This proceeding is moot and is therefore terminated.

THE ATOMIC SAFETY AND LICENSING BOARD

Peter S. Lam, Ph.D.
ADMINISTRATIVE JUDGE

Harry Rein, M.D.
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 31, 1992

¹ See Board Notifications 92-01 and 92-02. Board Notification 92-02 enclosed a letter dated January 24, 1992, from NYPA to NRC Region I advising that Mr. Manning is no longer employed by NYPA and requesting that his license be terminated in accordance with 10 C.F.R. § 55.55. Since NYPA is required to report this information under 10 C.F.R. § 50.74(b), the Board takes official notice of its accuracy.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-528

50-529

50-530

ARIZONA PUBLIC SERVICE

COMPANY, *et al.*

(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

March 16, 1992

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Messrs. David K. Colapinto and Stephen M. Kohn, requesting action with regard to the Palo Verde Nuclear Generating Station Units 1, 2, and 3. Specifically, the Petition alleged that: a hydrogen leak in the main generator of Unit 2 could pose a fire hazard; fire pumps at the plant have malfunctioned and cannot pump water in the event of a fire; the cooling towers are crumbling and are unsafe; the plant has been operating outside of safety regulations under "justifications for continued operation"; the Licensee has not identified the electrical circuit breakers for fire protection such that, in the event of a fire, it would not know what equipment could be damaged; it is rumored that Unit 2 has a primary-to-secondary leak of 2 gallons per minute; the Licensee has willfully operated Palo Verde Nuclear Generating Station in violation of unspecified licensing requirements and willfully failed to report unspecified safety violations to the NRC through Licensee event reports; the Licensee has never moved the portable hydrogen recombiner from one unit to another, has no procedure to do so, and has no backup recombiner; the Licensee failed to correctly implement a design change for the reactor control element drive mechanisms on Unit 3; the Licensee has engaged in widespread harassment and retaliation against employees who raise safety concerns. The Petitioners request emergency action to shut down Palo Verde Units 1, 2, and 3, and that the NRC

appoint a special investigative team to monitor and inspect conditions at the plant.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On June 6, 1991, Messrs. David K. Colapinto and Stephen M. Kohn sent a letter addressed to the Chairman of the U.S. Nuclear Regulatory Commission (NRC) which presented ten allegations regarding various facets of plant operation at the Palo Verde Nuclear Generating Station, and requested that the three units be immediately shut down until matters raised in the letter are resolved. The letter also stated that a special investigative team should be appointed to monitor and inspect conditions at the plant. The letter is being treated as a request for action (petition) under the NRC's regulations contained in section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). By letter dated August 15, 1991, Petitioners' request for emergency action to shut down Palo Verde Units 1, 2, and 3 was denied, and receipt of the petition was acknowledged.

II. DISCUSSION

In the June 6, 1991 letter, the Petitioners presented 10 concerns as bases for Petitioners' request. Petitioners' concerns are summarized as follows: a hydrogen leak in the main generator of Unit 1 could pose a fire hazard. Fire pumps at the plant have malfunctioned and cannot pump water in the event of a fire. The cooling towers are crumbling and are unsafe. The plants have been operating outside of safety regulations under "justifications for continued operation." The Arizona Public Service Company (APS, the Licensee) has not identified the electrical circuit breakers for fire protection such that, in the event of a fire, it would not know what equipment could be damaged. It is rumored that Unit 2 has a primary-to-secondary leak of 2 gallons per minute. The Licensee has willfully operated Palo Verde in violation of unspecified licensing requirements and willfully failed to report unspecified safety violations to the NRC through licensee event reports, as required. The Licensee has never moved the portable hydrogen recombiner from one unit to another, has no procedure to do so, and has no backup recombiner. The Licensee failed to correctly implement a design change for the reactor control element drive mechanisms on Unit 3. The Licensee has engaged in widespread harassment and retaliation

against employees who raise safety concerns.¹ Additional details regarding the condition of the cooling towers were provided in a supplemental letter of January 14, 1992.

I will address each of these items below.

A. Unit 1 Hydrogen Leak

Petitioners allege the following:

A hydrogen leak in Palo Verde Unit 1 has been ongoing since late 1990 or early 1991. This has created an extremely dangerous and volatile condition which could ignite in a catastrophic fire. It is believed that APS has known of this condition for at least six months but has not fixed the problem. Moreover, APS had an opportunity to resolve the problem during a planned outage earlier this year but failed to do so.

The NRC has no specific regulations regarding hydrogen leakage from the generator portion of the turbine generator. However, good fire protection practices would require that such fire and explosion hazards be minimized. Hydrogen leakage from generators *is* normal, and hydrogen does leak from the Unit 1 generator. The rate of hydrogen leakage has been as high as 4600 cubic feet per day (cfm). Contrary to the allegation, the Licensee performed extensive work during the Unit 1 outage in February 1991 to reduce the hydrogen leakage to approximately one-third (1300 cfm) of its former value. The leakage rate had increased to about 2000 cfm just prior to the unit shutdown for refueling in February 1992. During this refueling, a modification is being made to the unit generator which is expected to reduce hydrogen leakage. The generator area is well ventilated and has notices posted regarding the possible presence of hydrogen and a prohibition of smoking in the area. Specific portions of the generator hydrogen seal oil system are vented outside of the turbine building in an isolated area to minimize the fire hazard. Additionally, the Licensee has procedures for monitoring the hydrogen concentration levels during plant operation. The levels of hydrogen detected to date are indicative of no significant risk of fire.

A lack of hydrogen purity in the generator is an explosion hazard. Procedures at Palo Verde require that the hydrogen concentration in the main generator be maintained between 90 and 100% to ensure adequate cooling of the generator and to avoid a flammable mixture of hydrogen and oxygen. The concentration

¹ The NRC's Office of Investigations is investigating the matter of alleged intimidation, harassment, and retaliation against employees who raise safety concerns at Palo Verde in response to a Petition of May 22, 1990, filed under 10 C.F.R. § 2.206 by Mr. Colapinto on behalf of Ms. Linda Mitchell. As stated in the Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), this matter will be the subject of a separate Director's Decision. Therefore, this Decision will not address that allegation.

is normally 97%, which is above the specified minimum 90% and well above a flammable limit of 75%. APS has not had a problem maintaining the generator hydrogen purity for Palo Verde.

Consequently, based on all of the above, there is no basis to conclude that the hydrogen leak in the Unit 1 generator is either a fire hazard or a substantial safety concern.

B. Fire Pump Reliability

Petitioners allege the following:

It has been recently discovered that the plant's fire pumps malfunction due to a lack of adequate maintenance. Although this equipment was upgraded to quality augmented system in 1990 APS has failed to perform adequate QA and routine maintenance. Thus, in the event of a fire at the plant there exists an unacceptable risk that the fire pumps would be unable to pump water to extinguish a fire.

Palo Verde has three permanently installed 50% capacity fire pumps, one powered by a motor and two powered by diesels. The site's fire pumper truck is also a backup pump that the Licensee can connect to the fire main system to compensate for the extended loss of a single pump. The three-pump concept allows for one pump to fail because two of the pumps will provide 100% capability. The NRC reviewed pump test data and found that the maintenance history for these pumps has varied annually. Since 1987, the Licensee has initiated four to twelve individual pump outages each year for corrective maintenance. The total number of hours for corrective maintenance outages for all three pumps has varied from 624 to 2706 hours each year since 1987.

The Licensee also periodically tests the pumps in accordance with its NRC-approved fire protection program which requires monthly testing of the pumps. The Palo Verde fire insurer, American Nuclear Insurers, requires weekly pump tests. During both the weekly and monthly tests, individual pumps have failed to produce the required flow six times since 1988. This number of failures is a very small percentage of the total number of test starts over the period. The maintenance history of the pumps indicates that the Licensee could give a higher priority to completing required maintenance. However, in its review, the NRC did not identify any occasions when the Licensee failed to meet the NRC's requirement of 100% available capacity for the fire pumps. Therefore, the Petitioners have raised no substantial safety concern regarding the reliability of the plant's fire pumps.

C. Cooling Towers

Petitioners allege the following:

The cooling towers for all three Palo Verde units are crumbling and are unsafe. In fact, a portion of one of the cooling towers for Unit 1 recently collapsed. APS has not proposed a solution to this problem, and it is believed that APS plans to continue to operate Unit 1 at full power even though a portion of its cooling tower is incapacitated. It is also believed that APS has known for an extended period of time about the weaknesses in the concrete material used to construct the cooling towers but has failed to correct these deficiencies.

The cooling towers at Palo Verde are *not* safety-related structures. If the cooling tower were incapacitated, this could result in Unit 1 operating less efficiently than possible, which would be an economic penalty to APS but not a safety problem. However, falling debris is a hazard to personnel. Two sections of louvers, which direct air and deflect cooling water back into the tower, deteriorated and fell from a Unit 1 cooling tower. The Licensee addressed this problem by restricting access to the area surrounding the cooling towers with rope barriers for personnel safety.

The Licensee also found indications of concrete spalling caused by the corrosion of the reinforced steel within the precast concrete. APS is conducting an engineering evaluation to determine corrective measures for the cooling tower deterioration. A schedule will follow when the corrective measures have been determined.

In summary, the cooling towers have no safety function and consequently there is no substantial nuclear safety concern with their condition.

D. Justifications for Continued Operation

Petitioners allege the following:

In numerous areas the NRC has permitted APS to operate Palo Verde outside safety regulations by accepting letters of Justification for Continued Operation ("JCO"). This is an unacceptable and highly dangerous practice. First, APS has not fully committed to permanent solutions for these JCO's. For example, APS has not proposed a permanent solution for the JCO governing problems with its Reactor Coolant Seals. Second, APS has been permitted to violate Technical Specifications and other licensing conditions for unreasonable and extensive periods of time and JCO's are not resolved in a timely fashion. Third, neither APS nor the NRC has conducted safety evaluations of these JCO's. Fourth, there are no procedures governing the writing and control of JCO's. Fifth, given the sheer volume of JCO's in effect it is believed that the operators are not fully cognizant of operating conditions.

Petitioners allege that the APS's use of JCOs has created an unacceptable and dangerous practice. Appendix B to 10 C.F.R. Part 50 requires APS to

establish measures to ensure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. However, resolution of some of these issues may take a considerable amount of time to develop design changes and procedures and install hardware. APS prepares Justifications for Continued Operation (JCOs) which document the manner in which it can continue to safely operate the plant until it resolves such deficiencies. JCOs are also prepared in support of Temporary Waivers of Compliance (discussed in section 2, below).

1. Reactor Coolant Pump Seals

Petitioners allege that APS has not proposed a permanent solution for the JCO governing the reactor coolant pump seals. Neither APS nor NRC is aware of any JCO on reactor coolant pump seals. The JCO to which the Petitioners refer appears to be the JCO submitted to the NRC for the interface between the nuclear cooling water system and the high-pressure seal cooler for the reactor coolant pump (RCP). The rupture of the high-pressure seal cooler for the RCP was a postulated accident that was not considered for Palo Verde. However, the Licensee analyzed this scenario in response to the NRC's Information Notice 89-54, "Potential Overpressurization of the Component Cooling Water System," of June 23, 1989. APS has presented analyses demonstrating that the doses from such an accident are well within the 10 C.F.R. Part 100 guidelines but are subject to certain operating constraints. The NRC technical staff has reviewed this matter and has documented its approval in safety evaluations of March 12, May 20, and October 9, 1991. APS has committed to correct the design deficiency on Unit 1 during its refueling outage beginning February 1992. APS will modify Units 2 and 3 during their next refueling outages.

2. Violation of Technical Specifications

Petitioners allege that APS has been permitted to violate technical specifications and other license conditions for unreasonable and extensive periods of time. The allegation appears to refer to NRC issuance of Temporary Waivers of Compliance (TWOC). A TWOC is issued upon request and justification by a utility to the NRC and allows the utility to deviate from its technical specifications or other license conditions for a short time if the deviation will result in no significant hazards or irreversible environmental consequences. The TWOC requires a written request from a utility which includes the following:

- a. a discussion of the requirements for which a waiver is requested;
- b. a discussion of the circumstances surrounding the situation, including the need for prompt action and a description of the reasons that the situation could not have been avoided;
- c. a discussion of any compensatory actions;
- d. an evaluation of the safety significance and consequences of the proposed request;
- e. a discussion that justifies the duration of the request;
- f. the basis for the licensee's conclusion that the request does not involve a significant hazards consideration; and
- g. the basis for the licensee's conclusion that the request does not involve irreversible environmental consequences.

Such requests are reviewed by the NRC and approved in writing. The NRC will not act on a utility's request until the Licensee has confirmed that the action has been reviewed and approved by the Plant Operations Review Committee (PORC) or its equivalent and the NRC is clearly satisfied that issuance of a TWOC is consistent with protecting the public health and safety.

The NRC issues a TWOC to allow a utility a short period of time beyond that allowed by technical specifications to fix equipment without requiring a plant shutdown or preventing startup. In many cases, shutting down the plant would involve more risk than allowing a short period of time to fix equipment.

3. Safety Evaluation of JCOs, Timeliness of Resolution, and Procedures for Writing and Control of JCOs

Petitioners allege that neither APS nor the NRC conducts safety evaluations of JCOs, APS does not resolve JCOs in a timely fashion, and APS has no procedures governing the writing and control of JCOs. APS has a procedure that establishes the process for preparing, reviewing, and approving JCOs. Licensing Department personnel prepare JCOs for Palo Verde. The JCOs are reviewed by the affected plant managers, managers of departments providing technical support, and the Nuclear Safety Group, and are approved by the Plant Review Board. The JCOs are made available to the NRC upon request. NRC can and has reviewed the Licensee's JCOs. In some cases, this review has resulted in changes in some of the JCOs.

Petitioners allege that operators are not fully cognizant of operating conditions because the JCOs do not require them to be. When a JCO requires compensatory measures, APS provides instructions to address the specific condition by revising appropriate Palo Verde procedures such as those for operating, maintenance, and surveillance testing. Operations personnel are also briefed about the deficient condition. APS has instructions for initiating and processing JCOs,

and operators know of the JCOs because they are distributed to the control room and are kept in marked binders.

The time needed to resolve the issues discussed in a JCO might involve design changes, revised procedures, or hardware changes. Resolution time varies depending on such matters. The JCO that has been active for the longest period was approved in July 1990 to justify interim operation while APS better defined and implemented the requirements in the quality assurance program for fire protection and related systems. The time required is not unreasonable considering the work that needed to be done.

Petitioners do not identify any issue regarding writing, controlling, evaluating, or using JCOs that raises a substantial safety concern.

E. Appendix R Electrical Circuit Breakers

Petitioners allege the following:

APS has not identified nor coordinated Appendix R breakers throughout the units. Thus, in the event of a fire APS would not know what pieces of equipment would be lost.

The Licensee has studied circuits for fire protection, spurious actuations, and breaker coordination to ensure that the plant can be shut down safely in the event of a fire. In March 1985, the NRC inspected the Licensee's analyses for associated circuits and fuse and breaker coordination and found them acceptable (Inspection Report 50-528/85-06).

Technical Specification 3.3.3.5 lists the electrical equipment, including switches, breakers, and circuits, needed to shut down the plant safely in the event of a fire or any other event that requires the operators to leave the control room. The Palo Verde pre-fire strategies manual lists equipment that would be unavailable or could malfunction during a fire. This manual also lists the equipment or set of components that the Licensee would use to achieve safe shutdown (safe shutdown train B). The NRC has reviewed the Licensee's safe shutdown analysis methodology and spurious actuation analyses and accepted them (Supplemental Safety Evaluation Reports 5 and 7, of November 1983 and December 1984, respectively). Contrary to the allegation, APS has identified the equipment affected by a postulated fire and evaluated the methods to be used to achieve safe shutdown.

Therefore, the NRC finds no reason to conclude that Petitioners have raised a substantial safety concern with regard to Appendix R electrical circuit breakers.

F. Rumor of a Primary-to-Secondary Leak

Petitioners allege the following:

It has been rumored that APS has experienced a primary to secondary leak over 2 gpm in Unit 2 but has failed to properly notify the NRC or shut down the unit. If this is true, then the secondary system in Unit 2 has been contaminated with radiation.

The Palo Verde technical specifications state that leakage from the reactor coolant system shall be limited to a rate of 1 gallon per minute (gpm) of total primary-to-secondary leakage through all steam generators, and of 720 gallons per day through any one steam generator. The Palo Verde technical specifications also require the plant to be shut down if the rate of primary-to-secondary leakage exceeds the technical specification limit. Palo Verde has detection equipment installed in each unit that would alert operators to primary-to-secondary leakage. This system enables the Licensee to detect leakage on the order of hundredths of a gallon per minute. The Licensee can also detect primary-to-secondary leakage by conducting radiochemical analyses of the secondary system, which the technical specifications require to be performed at least once every 3 days. The NRC has examined plant data from Palo Verde Unit 2 and could not verify the rumored primary-to-secondary leakage.

The rumor may have arisen because of coolant from the Palo Verde Unit 2 primary system which leaked at a rate of approximately 2.9 gpm to collection systems. However, this coolant did not leak to the secondary system. Palo Verde has technical specification limits on the primary system leakage of 10.0 gpm on identified primary system leakage and 1.0 gpm on unidentified leakage (TS 3.4.5.2). APS found 2.8 gpm of the 2.9 gpm leakage resulted from a leaking thermal relief valve for the seal injection heat exchanger of the reactor coolant pump. During an outage in August 1991, APS replaced this valve and reduced the primary system leakage substantially.

The Petitioners stated that the secondary side of Unit 2 could become contaminated in the event of primary-to-secondary leakage. This would be true for any pressurized water reactor (PWR) experiencing primary-to-secondary leakage. However, Unit 2 did not have a 2-gpm primary-to-secondary leak, but had only a leak to collection systems, and was within limits. Although such contamination would represent an operational inconvenience, it does not present a significant safety concern. Consequently, there is no reason to conclude that Petitioners have raised a substantial safety concern.

G. Willful Violations of Safety Requirements and Willful Failure to Report Safety Violations to the NRC

Petitioners allege the following:

APS has covered up and knowingly failed to report safety violations to the NRC via Licensee Event Reports ("LERs"). APS has knowingly and willfully operated Palo Verde while not in compliance with its licensing requirements.

Petitioners must "set forth the facts that constitute the basis" for their request according to 10 C.F.R. § 2.206(a). However, the Petitioners have made a general allegation and provided no facts to support it. Moreover, NRC maintains resident inspectors at Palo Verde, who monitor the Licensee's operations to ensure that the facility operates in conformance with its technical specifications and licensing requirements. The NRC knows of no instance in which APS has covered up safety violations or willfully violated the Palo Verde licensing requirements.

Accordingly, the NRC has no basis to conclude that Petitioners have raised a substantial safety concern.

H. Portable Hydrogen Recombiner

Petitioners allege the following:

Although APS committed to be able to move its hydrogen recombinder from one unit to another in a 72 hour period, it has never done so and has no procedure to move it. Moreover, APS does not have a back up hydrogen recombinder (although it committed to have one).

For a multi-unit site, the NRC requires only one set of recombiners. Palo Verde has a redundant set consisting of two recombiners installed in Unit 1. The NRC has no requirement to move the recombiners periodically and allows the recombiners to reside at one unit. However, the NRC reviewed and approved a plant-specific analysis in which the Licensee committed to be able to move the recombiners to one of the other units within 72 hours if accident conditions require it. The Licensee also has procedures by which to disconnect and reconnect the recombiners. The Licensee has demonstrated through a mockup of the recombiners that the recombiners for Unit 1 could be moved to Units 2 and 3 within 72 hours. The Licensee found that a lighting panel interfered with its ability to move the recombinder from Unit 1. The Licensee has since removed the interfering lighting panel. Palo Verde meets its licensing requirements for recombiners.

The NRC finds no reason to conclude that there is a substantial safety concern related to the hydrogen recombiners.

I. Implementation of Control Element Assembly Design Change

Petitioners allege the following:

APS failed to properly implement its Design Change Package ("DCP") for Control Element Drive Mechanisms ("CEDM's") in Unit 3 (RCTS #039846). This DCP was designed incorrectly resulting in pulling the wrong group of rods during testing. However, rather than resolve this problem APS removed the DCP in order to restart Unit 3 without committing to permanent resolution. It is alleged that the CEDM problem is a generic one at Palo Verde.

During the Unit 3 refueling outage in March and April 1991, the Licensee performed substantial work on the control system for the control element drive mechanisms. This work included reversing the polarity of the current to the lower gripper coil on all control element assemblies (CEAs). The Licensee also removed and realigned all CEA timing cards, overhauled power supplies, modified the ground fault detector, calibrated the undervoltage relays, and tested individual CEA circuit breakers with some replacements. In performing this work, APS caused a large number of expected problems with rod control during initial CEA testing and obtained preliminary timing settings that could be refined only during testing. A few timing cards had not been properly seated and some failed and had to be replaced. The Licensee anticipated and corrected these problems before startup. During the tests, some CEAs did not move when called upon to move and some slipped when called upon to move, as alleged. The Licensee corrected each of these anomalies.

During and after startup, all CEAs moved as called upon by the control switches. A position indication anomaly occurred after startup during low-power physics testing. The Licensee performed troubleshooting and found that the problem resulted from the recent work that it had performed to reverse the polarity of the CEA lower gripper coil. The Licensee restored the CEA coil wiring to the configuration used successfully during the last operating cycle. The vendor, Combustion Engineering, Incorporated, concurred with this decision. After restoring the coil polarity to the previous state, the Licensee tested all CEAs again and found that CEA control and position indication were normal.

Accordingly, the NRC finds no basis in fact to conclude that there is a substantial safety concern regarding the control element drive mechanisms.

III. CONCLUSION

Petitioners requested an immediate shutdown of the Palo Verde Generating Station and appointment of an investigative team to inspect and monitor operations at Palo Verde. The institution of proceedings in response to a request for action under 10 C.F.R. § 2.206 is appropriate only when substantial health

and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine if any action is warranted in response to safety allegations in the request. The NRC Staff and resident inspectors at Palo Verde investigated thoroughly the Petitioners' allegations. All available information is sufficient to conclude that no substantial safety issue has been raised regarding safe operation of Palo Verde. Therefore, I conclude that, for the reasons discussed above, no basis exists for taking the actions requested by the Petitioners. Petitioners' requests for immediate shutdown of the Palo Verde Nuclear Generating Station and for an investigative team to inspect and monitor Palo Verde are denied.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. §2.206(c). As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 16th day of March 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 50-443-OL
50-444-OL
(Offsite Emergency
Planning Issues)

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

April 3, 1992

The Commission affirms the Licensing Board's decision in LBP-91-24, 33 NRC 446 (1991) (granting summary judgment to Applicants) that the record in this proceeding now demonstrates that in all foreseeable circumstances evacuation — not sheltering — is the planned protective action option in a general radiological emergency, for the general beach population, within a 2-mile radius of the Seabrook facility. The Commission finds that Intervenor's have failed to make the presentation required in 10 C.F.R. § 2.749(c) to obtain discovery to challenge Applicants' summary disposition request. The Commission further notes that given the record establishing that sheltering is not a planned protective action option, earlier Appeal Board directives to the Licensing Board to consider whether state planners had provided sufficient implementing measures for sheltering the beach population are now moot.

RULES OF PRACTICE: DISCOVERY; SUMMARY DISPOSITION

Under 10 C.F.R. §2.749(c), a party asserting that it needs discovery to respond to a summary disposition motion must identify by affidavit what specific information it seeks to obtain; in the absence of such a showing, a Board is free to grant summary disposition (upon a determination that there are no genuine issues of material fact) without providing for discovery. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 & n.32 (1982).

RULES OF PRACTICE: DISCOVERY; SUMMARY DISPOSITION

A party cannot complain that it has been deprived of any right to conduct discovery when it fails to make the specific showing required under 10 C.F.R. §2.749(c) establishing what information it expects to gain through discovery and how that information is essential support for its opposition to a summary disposition motion.

EMERGENCY PLAN: PROTECTIVE ACTIONS; CONTENT (SHELTERING)

If the record reflects that under a state's radiological emergency response plan, sheltering is not a planned protective action option in any foreseeable circumstance, then a previously identified issue of what actions that state need take to implement such a protective action option is, as a practical matter, moot.

RULES OF PRACTICE: SUMMARY DISPOSITION (MATERIAL ISSUE)

When the provisions of a state's current radiological emergency response plan do not identify sheltering as a protective action option and when state emergency planning officials fully corroborate Applicants' position that no genuine issue of material fact exists relative to that state's intention not to use the sheltering option, to avoid a grant of summary disposition on that matter Intervenor would have to present contrary evidence that is so "significantly probative" as to create a material factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

DECISION

As part of their challenge to the adequacy of emergency planning for the Seabrook Station, various Intervenors questioned whether the New Hampshire Radiological Emergency Response Plan (NHRERP) made sufficient provisions for the use of the protective action option of sheltering. Their central concern in this regard was planners' utilization of sheltering for those members of the public who frequent the New Hampshire Atlantic Ocean beach areas that lie within ERPA A, the portion of the Seabrook plume exposure pathway emergency planning zone (EPZ) within a 2-mile radius from the facility. The matter is now before us pursuant to the appeal of Intervenors Massachusetts Attorney General (MassAG) and the New England Coalition on Nuclear Pollution (NECNP) from LBP-91-24, 33 NRC 446 (1991), a Licensing Board final ruling on this subject.¹ These Intervenors maintain that the Licensing Board erred in accepting Applicants' position that earlier Appeal Board directives to consider further whether State planners had provided sufficient implementing measures for sheltering the beach population are now moot. In doing so, they contest the Licensing Board's pivotal finding that the adjudicatory record now demonstrates that emergency planning officials for the State of New Hampshire (State) have concluded that in all foreseeable circumstances in a general emergency (the highest emergency action level classification), evacuation — not sheltering — is the planned protective action option for the general beach population (i.e., the 98% of the beach population that has evacuation transportation). Because we find that Intervenors' substantive and procedural challenges to the Licensing Board's summary disposition determination are unavailing, we uphold the Board's determination.

I. BACKGROUND

The controversy now before us has its roots in testimony presented to the Licensing Board in May 1988. Responding to assertions by appellant NECNP and other Intervenors that State planners had not properly employed sheltering as a protective action option for the general beach population, State emergency response officials (in conjunction with Applicants' planners) testified that they intended to utilize the plan's "shelter-in-place" option for the general beach

¹ In accordance with the Commission's interim procedures governing any appeal "as of right" filed in proceedings that were before an Appeal Board prior to October 25, 1990, *see* 55 Fed. Reg. 42,944 (1990), Intervenors' June 11, 1991 notice of appeal was filed with the Appeal Board conducting appellate review of Seabrook offsite emergency planning matters. With the dissolution of the Atomic Safety and Licensing Appeal Panel at the end of June 1991, the Appeal Board referred Intervenors' appeal to the Commission.

population.² It was, however, to be invoked only in a limited number of instances, namely when that protective action would afford "maximum dose reduction" or when local conditions (such as weather or road construction) presented impediments that made evacuation — the principal protective action option for the general beach population — impractical.³ In addition, these State officials agreed with Applicants' planners that they could envision essentially one instance that would fulfill the "maximum dose reduction" prerequisite under condition 1: the so-called "puff release," a short-duration, nonparticulate (gaseous) release that would arrive at the beach area within a relatively short time period when, because of a substantial beach population, evacuation time would be significantly longer than exposure duration.⁴ Intervenor's own expert witness agreed that this scenario satisfied condition 1's "maximum dose savings" requirement, but asserted that other circumstances met this condition as well.⁵ In their testimony concerning the use of sheltering under the NHRERP, officials of the Federal Emergency Management Agency (FEMA) supported the State's conclusion, declaring that "[l]here exists a technically appropriate basis for the choice made by the State of New Hampshire not to shelter the summer beach population except in very limited circumstances."⁶

In its December 1988 partial initial decision regarding intervenor challenges to the adequacy of the NHRERP, among the matters the Licensing Board addressed was the use of sheltering as a protective action option for the general beach population. *See* LBP-88-32, 28 NRC 667, 750-76 (1988). The Board concluded that Commission emergency planning requirements and guidance did not mandate that State planners adopt sheltering as a protective action option for the general beach population, but only that they give careful consideration

²Throughout the plan, references to "sheltering" are to be understood as invoking the concept of "shelter-in-place." In the version of the NHRERP initially admitted into evidence before the Licensing Board, the "shelter-in-place" option is described as follows:

This concept provides for sheltering at the location in which the sheltering instruction is received. Those at home are to shelter at home; those at work or school are to be sheltered in the workplace or school building. Transients located indoors or in private homes will be asked to shelter at the locations they are visiting if this is feasible. Transients without access to an indoor location will be advised to evacuate as quickly as possible in their own vehicles (i.e., the vehicles in which they arrived). . . . If necessary, transients without transportation may seek directions to a nearby public building from local emergency workers. Public buildings may be set up and opened as shelters for transients, on an ad hoc basis, if any unfor[e]seen demand for shelter arises during an emergency.

NHRERP, Vol. 1, at 2-6 (Rev. 2, August 1986) (admitted as Applicants' Exhibit 5).

³ Applicants' Direct Testimony No. 6 (Sheltering), fol. Tr. 10,022, at 19. *See also id.* App. 1, at 7-8 (Letter from R. Strome to H. Vickers (Feb. 11, 1988), encl. 1, at 5-6).

Planning officials also stated in this testimony that sheltering would be utilized as a protective action for those beach transients without transportation when evacuation is the recommended protective action option for the beach population. *Id.* at 19-20. Appellants raise no issues before us concerning the New Hampshire plan's utilization of sheltering for this portion of the beach population.

⁴ *See* Tr. 10,719-20.

⁵ *See* Tr. 11,461-64.

⁶ Amended Testimony of William R. Cumming and Joseph H. Keller on Behalf of [FEMA] on Sheltering/Beach Population Issues, fol. Tr. 13,968, at 11.

to the use of that option.⁷ The Board accepted FEMA's technical findings endorsing the State's limited use of sheltering as a protective action option for the beach population and concluded that the State had given adequate consideration to sheltering the New Hampshire beach population. In doing so, it rejected Intervenor's additional assertion that the New Hampshire plan was inadequate because it lacked implementing detail for the sheltering option as applied to the general beach population. The Licensing Board found that, given the uncertainties involved in invoking this option, it was better left without implementing details so that decisionmakers would not misunderstand its utility.

Various Intervenor's challenged this and other aspects of the Licensing Board's determination before the Appeal Board. The Appeal Board addressed their claims regarding sheltering for the beach population in a November 1989 decision. ALAB-924, 30 NRC 331, 362-73 (1989). The Appeal Board rejected Intervenor's assertion that the FEMA technical evaluation was insufficient to support the Licensing Board's findings regarding the adequacy of the State's choice to utilize sheltering for the general beach population only in the limited circumstances outlined in conditions 1 and 2 (i.e., when it achieved maximum dose reduction or when evacuation was a physical impossibility). The Appeal Board, however, did not accept the Licensing Board's conclusion that no additional implementing measures were necessary. Instead, the Appeal Board found that implementing detail was required to provide decisionmakers with an understanding of that protective action's benefits and constraints, thereby allowing them to make an informed judgment about whether to utilize sheltering in the circumstances, albeit limited, apparently contemplated by State planners. The Appeal Board also rejected Applicant and Staff arguments that the low probability that the sheltering option would be employed justified the lack of implementing details. As a consequence, the Appeal Board remanded this matter (along with several others) to the Licensing Board for appropriate corrective action.

The efforts of the Licensing Board to comply with this Appeal Board ruling spawned a series of party filings and Board decisions in which the central focus became the intent of State planners regarding the use of sheltering as a protective action option for the ERPA A general beach population under condition 1 (i.e., maximum dose reduction). See ALAB-939, 32 NRC 165 (1990); LBP-91-8, 33 NRC 197 (1991); LBP-90-12, 31 NRC 427 (1990). Ultimately, in its response to the second of two Licensing Board certified questions regarding its remand directive, the Appeal Board observed that the decisional process relative to its remand had culminated in State, FEMA, and Staff filings that "make clear that

⁷ As our effectiveness determination in this proceeding suggests, the Board's analysis in this regard was correct. See CLI-90-3, 31 NRC 219, 244 (1990), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 112 S. Ct. 275 (1991).

the entities most directly responsible for the administration and evaluation of the NHRERP now insist that sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance." ALAB-945, 33 NRC 175, 177 (1991). The Appeal Board advised that if the adjudicatory record in fact reflected that this "'evolution' of the consideration of sheltering as a protective action for the general beach population has reached the point where it effectively has been discarded as such an option," then the sheltering issues previously identified by the Appeal Board would be moot. *Id.* The Appeal Board, however, left it to the Licensing Board to ensure that the administrative record, as developed through appropriate procedural avenues, reflected whatever information was necessary to support this resolution.

Applicants responded to this guidance by filing a motion for summary disposition with the Licensing Board. In support of that motion, Applicants submitted a statement of material issues not in dispute that declared "[s]heltering is not a planned protective action option under the NHRERP for the general beach population in ERPA-A in a general emergency or in any other foreseeable circumstance."⁸ Applicants justified this statement by reference to (1) a Licensing-Board-ordered "Common Reference Document" that the parties stipulated contains all NHRERP provisions associated with an ERPA A general emergency protective action response from the August 1986 record version of the plan through the current February 1990 version of the plan, and (2) a January 1991 State memorandum, as attested to by State Emergency Management Director George Iverson during a later telephone conference with the Board. Intervenor's countered with a statement that there were genuine issues in dispute concerning "[w]hether sheltering is an anticipated and thus, planned, protective action option under the NHRERP," and "[w]hether sheltering as it is presently a protective action option under the NHRERP accomplishes the stated goal of maximizing dose savings for the beach population of ERPA-A under the current provisions of the plan which contain no implementing procedures for that option and which apparently distinguish between different classes of beach goers."⁹ As support for their statement, Intervenor's submitted the affidavit of Jeffrey Hausner, a self-employed emergency planning consultant who, for 3 years prior to April 1991, was the principal radiological emergency response official for the Commonwealth of Massachusetts.

In a May 1991 order, the Licensing Board ruled upon Applicants' summary disposition request. LBP-91-24, 33 NRC 446 (1991). Refusing to accept Intervenor's statement of material issues in dispute, the Licensing Board declared

⁸ Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 3.

⁹ Opposition of the MassAG and NECNP to the Licensee[s'] Motion for Summary Disposition (Apr. 22, 1991) at 9 [hereinafter Intervenor's Summary Disposition Opposition].

that their statement was based upon the already rejected assumption "that New Hampshire *should* [shelter the general beach population] because of the advantages of that option and because of the guidance in NUREG-0654/FEMA REP 1." *Id.* at 451 (emphasis in original). Instead, finding that Applicants' statement that there is no genuine issue to be heard was supported by the administrative record, the Licensing Board granted summary disposition in favor of Applicants and declared that the Appeal Board's prior concerns regarding the sheltering issue were now moot. Intervenor's appeal this determination.¹⁰

II. ANALYSIS

Intervenor's challenge the Licensing Board's summary disposition decision on two grounds, one procedural and one substantive. They assert initially that the Licensing Board improperly granted Applicants' summary disposition request without first permitting them to undertake discovery. Intervenor's also attack the merits of the Board's ruling, claiming that its decision in Applicants' favor was grounded upon a misinterpretation of the term "planned" as State emergency response officials have employed it to describe the use of evacuation as the protective action option for the ERPA A general beach population. According to Intervenor's, the Licensing Board incorrectly concluded that the State's description of evacuation as the only "planned" option for the beach population was equivalent to saying that the shelter-in-place option had been discarded, as opposed to simply not planned for, as a protective action choice for that population. As support for this premise, they rely principally upon Mr. Hausner's conclusion, as set forth in his affidavit, that on the basis of his review of the relevant portion of the record and his experience in emergency planning matters he believes that the State still contemplates using the shelter-in-place option for the general beach population. Intervenor's assert that his declaration

¹⁰ In ALAB-924, the Appeal Board remanded three other matters to the Licensing Board in addition to the issue of the adequacy of the NUREG's provisions regarding sheltering for the general beach population. See 30 NRC at 373. The Licensing Board previously issued other rulings resolving those issues, see LBP-90-44, 32 NRC 433 (1990); LBP-90-12, 31 NRC 427 (1990), from which Intervenor's also noted an appeal, see Notice of Appeal (June 11, 1991) at 1-2. In their merits brief filed with the Commission, Intervenor's nonetheless have limited their appellate challenge solely to the Licensing Board's beach population sheltering decision in LBP-91-24.

Also in this regard, as was noted earlier, see *supra* p. 149, in ALAB-924 the Appeal Board suggested that sheltering implementation would be necessary to ensure the appropriate use of that protective action option in situations falling under condition 2 involving physical impediments to evacuation, such as fog, snow, hazardous bridge or road conditions, or highway construction. In LBP-90-12, the Licensing Board found additional planning for condition 2 circumstances unnecessary because it involves a response to the complicating effects of a low-probability event occurring independently of the accident sequence that triggered the emergency response. See 31 NRC at 453 (citing *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249, *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1288 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd en banc*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986)). Before us, Intervenor's have not contested that ruling.

created a material issue of fact that precluded the Board from entering summary judgment in Applicants' favor.

Both Applicants and the Staff urge us to reject these Intervenor challenges. They assert that Intervenor were not entitled to any discovery because they failed to comply with the requirements of 10 C.F.R. § 2.749(c) concerning discovery relating to summary disposition motions. Both of these parties also contend that Applicants' showing established that sheltering is not a protective action option for the ERPA A general beach population and that Mr. Hausner's affidavit was insufficient to establish any genuine issue of material fact in this regard.

A. Looking first to Intervenor's discovery entitlement claim, it is apparent that section 2.749(c) furnishes the template against which we must gauge Intervenor's procedural concern. That section provides:

Should it appear from the affidavits of a party opposing the motion [for summary disposition] that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

In line with this provision, a party asserting that it needs discovery to respond to a summary disposition motion must identify by affidavit what specific information it seeks to obtain; in the absence of such a showing, a Board is free to grant summary disposition (upon a determination that there are no genuine issues of material fact) without providing for discovery. *See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1263 & n.32 (1982).

In this instance, in responding to Applicants' summary disposition request, Intervenor made only a general statement suggesting that further discovery should be permitted and, thereafter, a hearing should be held.¹¹ They did not, by affidavit or otherwise, make a specific showing establishing what information they expected to gain through discovery and how that information was essential support for their opposition to Applicants' summary disposition motion. Because they failed to make the appropriate presentation consistent with section 2.749(c), Intervenor cannot now complain that they have been deprived of any right to conduct discovery. We thus find no foundation for this assignment of error.

B. Turning to Intervenor's substantive complaint, we did note previously in this proceeding, although as part of our effectiveness decision, that "so long as sheltering remains a potential, albeit unlikely, emergency response option for

¹¹ See Intervenor's Summary Disposition Opposition at 7-8.

the beach population, the NHRERP should contain directions as to how this choice is to be practicably carried out." CLI-90-3, 31 NRC 219, 248 (1990), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 112 S. Ct. 275 (1991). We observed further that one way to resolve the Appeal Board's concerns would be "identification of the location of sufficient available shelter together with the means to notify the beach population as to where this shelter is located," an exercise we believed would not be "especially difficult or time-consuming." *Id.* This, however, assumes that sheltering is to be utilized as a protective action option for the general beach population. As the Appeal Board later acknowledged in ALAB-945, if the record in this proceeding now reflects that under the NHRERP "sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance," 33 NRC at 177, then the previously identified issue of what actions the State need take to implement such a protective action option is, as a practical matter, moot.

In their motion for summary disposition, Applicants sought to establish that the State's position is as the Appeal Board suggested. As support for this supposition, Applicants relied upon two factors. One is the NHRERP's current provisions regarding protective action options for the general beach population. As is reflected in the relevant portions of the current version of the plan contained in the "Common Reference Document" accepted by the parties, sheltering is not identified as a protective action option for the general beach population in ERPA A in a general emergency.¹² In addition, Applicants referenced statements in a January 1991 pleading, which was signed by a State Deputy Attorney General and confirmed in a sworn statement given by the State's emergency planning director shortly thereafter.¹³ Intervenor's protestations to the contrary notwithstanding,¹⁴ on their face these declarations by responsible State officials provided substantial support for Applicants' position that the State does not plan to utilize sheltering as a protective action option for the general beach population in ERPA A in any circumstance it can now foresee.¹⁵

¹² See Licensees' Response to Memorandum and Order of January 24, 1991 (Jan. 28, 1991) at 71-109 (NHRERP, Vol. 8, at 6.0-1 to 6.10-4 & Form 210A (Rev. 3, February 1990)).

¹³ See Memorandum in Support of Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 5 (citing Memorandum of the [State] on ALAB-939 (Jan. 10, 1991) at 1-2; Tr. 28,493).

¹⁴ The thrust of Intervenor's attack upon these record statements by State officials is that they do not reflect the State's actual intention regarding use of sheltering for the beach population. In light of Intervenor's failure to provide any concrete evidence that these officials' statements cannot be taken at face value, *see infra* p. 154, we see no reason not to do so. This is particularly so given the State's failure to object to Applicants' representations regarding its emergency planning posture, an action that it previously has shown itself more than willing to undertake if it perceives that its position is being misstated. *See* [State]'s Comments Regarding Applicants' Response to Licensing Board Order of January 11, 1990 (Feb. 16, 1990) at 2.

¹⁵ *See also* Tr. 28,468. At earlier points in this proceeding, the record was unclear regarding the State's plan for sheltering, and the State's plan, as originally understood by the parties, seems to have evolved. *See* ALAB-939, 32 NRC at 173-79. As currently understood, however, the State's plan not to include the shelter-in-place option

(Continued)

In the face of the plan's current provisions and these statements "straight from the horse's mouth" that both fully corroborate Applicants' position that no genuine issue of material fact exists relative to the State's intention not to use the shelter-in-place option for the general beach population, to avoid summary disposition on this matter Intervenor's had to present contrary evidence that was so "significantly probative" as to create a material factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In his affidavit, Mr. Hausner does declare that the State intends to utilize sheltering as a protective action option for the beach population. As his affidavit nonetheless makes clear, Mr. Hausner's position in this regard is not based upon any concrete, first-hand knowledge about what the State intends to do. Rather, he provides what is at best an "educated guess" about the State's intentions. His speculation in this regard can hardly be described as so "significantly probative" that it creates a material factual issue.

Simply put, Intervenor's failed to counter the Applicants' showing that was based upon the record before the Licensing Board and established that no material issue of fact now exists regarding the State's intention not to use sheltering as a protective action option for the general beach population in ERPA A in a general emergency. Because the matters remanded by the Appeal Board were rooted in the central premise that it was the State's intent to employ sheltering in some form as a protective action option for this population, Applicants also were correct in asserting that those matters are no longer at issue. Therefore, contrary to Intervenor's claim, the Licensing Board acted appropriately in granting summary disposition in favor of Applicants.

for the general beach population in a general emergency is fully consistent with evidence on the record on the limited value of sheltering as a protective option. *See* LBP-88-32, 28 NRC at 759-68. Indeed, the evolution in the State's plan (or at least the parties' understanding of that plan) has been in a direction that makes the plan more consistent with the weight of evidence on the record than it was at the time of LBP-88-32, the Licensing Board's initial decision addressing sheltering.

III. CONCLUSION

For the foregoing reasons, the Licensing Board's decision in LBP-91-24, 33 NRC 446, is *affirmed*.

IT IS SO ORDERED.

For the Commission¹⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 1992.

¹⁶ Commissioner de Planque abstained, and Commissioners Curtiss and Remick did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
James R. Curtliss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 030-05980
030-05982
030-08335
030-08444

SAFETY LIGHT CORPORATION
UNITED STATES RADIUM
CORPORATION
USR INDUSTRIES, INC.
USR CHEMICAL PRODUCTS, INC.
USR METALS, INC.
USR LIGHTING, INC.
U.S. NATURAL RESOURCES, INC.
LIME RIDGE INDUSTRIES, INC.
METREAL, INC.
(Bloomsburg Site Decontamination)

April 10, 1992

The Commission denies the NRC Staff's petition for review of the Licensing Board's orders framing issues for resolution in the proceeding with respect to jurisdictional matters and the Licensees' financial resources. The Commission observes, however, that an earlier Appeal Board ruling in the proceeding, ALAB-931, 31 NRC 350 (1990), constitutes the law of the case and that the Licensees' financial resources cannot be a deciding factor in deciding the necessity of the safety measures at issue in the proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

A petition for review of an interlocutory order must meet one or more of the criteria in 10 C.F.R. §§ 2.786(b) and 2.786(g).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The expansion of issues for litigation in a proceeding rarely affects the basic structure of a proceeding in such a pervasive or unusual way as to warrant interlocutory review.

ATOMIC ENERGY ACT: SAFETY STANDARDS

The extent of Licensees' financial resources cannot be a deciding factor in determining whether the actions ordered by the Staff are necessary to adequately protect public health and safety. The Licensees' solvency has no relevance to determining the hazard or the need for action to address the hazard at a site potentially requiring decontamination or other remedial action.

LICENSING BOARDS: AUTHORITY

RULES OF PRACTICE: LAW OF THE CASE

Licensing Boards are obligated to adhere to the decision of higher tribunals in the Commission's adjudicatory system. Thus, the decision of an appellate tribunal, even at an interlocutory phase of the proceeding, constitutes the law of the case as to questions actually decided or decided by necessary implication.

MEMORANDUM AND ORDER

The NRC Staff has petitioned the Commission for review of an unpublished interlocutory order of the Atomic Safety and Licensing Board, dated December 13, 1991, in which the Board denied the Staff's request for clarification or reconsideration of certain issues that the Board identified in a September 10, 1991 order as germane to the resolution of this proceeding. Safety Light Corporation and USR Industries (hereinafter "Licensees") urge the Commission to deny the petition. For the reasons stated in this Order, we deny Staff's petition for review.

Before we address Staff's petition for review, the appropriate standards for review of interlocutory orders merit reiteration because neither Staff nor the

Licensees have properly addressed those standards in their filings before us.¹ Staff relies on 10 C.F.R. § 2.786(b) as the basis for the Commission's taking review of the disputed aspects of the Licensing Board's orders. However, in addition to showing that one or more of the five criteria in section 2.786(b)(i)-(v) are met, Staff is also obligated to demonstrate that its petition meets one of the criteria in 10 C.F.R. § 2.786(g) because the orders for which review is sought are essentially interlocutory in nature.

When the Commission adopted its revised appellate procedures last year, the Commission preserved the existing case law standard for interlocutory review. *Procedures for Direct Commission Review of Decisions of Presiding Officers*, 56 Fed. Reg. 29,403 (June 27, 1991). As a general rule, interlocutory review has been disfavored and is not allowed under our rules of practice. 10 C.F.R. § 2.730(f). Over the years, the former Atomic Safety and Licensing Appeal Board recognized certain limited exceptions to this prohibition in extraordinary circumstances under which a party could ask the Licensing Board to refer a matter for interlocutory appellate review or could seek "directed certification" from the Appeal Board itself.² In establishing the new appellate structure under which the Commission will conduct any appellate review of decisions and actions of presiding officers in agency adjudications, the Commission codified in section 2.786(g) the existing standard governing interlocutory review pursuant to 10 C.F.R. §§ 2.718(i) and 2.730(f). Thus, in addition to meeting one of the criteria in section 2.786(b), the petitioner seeking interlocutory review must also show that the certified question or referred ruling either

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g).

In this context, Staff's petition for review is properly understood as a request for directed certification. In particular, Staff asks the Commission to undertake review and reverse the Licensing Board insofar as the Board adopted the following two issues:

What fiscal resources are actually available to the Licensees, either as probable payments under their insurance policies or as expenditures from their own corporate resources?

¹ The Licensees quote a superseded version of our rules in their answer to Staff's petition. Our current rule, effective July 29, 1991, was published at 56 Fed. Reg. 29,403, 29,409-10 (June 27, 1991).

² 10 C.F.R. § 2.718(i); see, e.g., *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977).

and

Since the Board has already noted (Tr. 563-564) that there is at this point no law of the case on such matters as jurisdiction, are there any matters of fact needed to clarify this issue so that we can rule on it with finality?

Order (unpublished) at 6-7 (Sept. 10, 1991). Staff contends that the Licensing Board's refusal in its December 13 order to reconsider the adoption of the two issues is "contrary to established law and constitutes a prejudicial procedural error which threatens to affect the basic structure of the proceeding in a pervasive manner." NRC Staff's Petition at 2.³ The Licensees support the Board's adoption of the issues and suggest that neither warrants Commission review.

Whatever the merits of Staff's position on the particular issues, we do not believe that our review is necessary at this time. The harm, if any, that Staff may suffer is largely prospective in nature. The Licensing Board has not precluded Staff from putting on its own case or from ultimately demonstrating that the questions are not determinative of whether Staff's orders should be sustained. At most, the Licensing Board has included within the scope of its deliberations two questions that *may* shape its final decision. In earlier proceedings, even if there was a conflict with prior precedent, the mere expansion of issues rarely has been found to affect the basic structure of a proceeding in such a pervasive or unusual way as to warrant interlocutory review.⁴ We think the same principle holds true in the circumstances now before us and, thus, do not believe that interlocutory review is warranted under the criteria of section 2.786(g).

By declining review, we do not mean to imply that the soundness of the Licensing Board's actions is free from doubt. Although the extent of the Licensees' financial resources, even by Staff's admission, has some relevance to this proceeding, the extent of the Licensees' financial resources cannot be a deciding factor in determining whether the actions ordered by the Staff are necessary to adequately protect the public health and safety. See *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114-18 (D.C. Cir. 1987). The Licensees' solvency has no relevance to determining the hazard at the Bloomsburg site or the need for action to deal with that hazard.

Moreover, the Board's generalization that there is no "law of the case" appears to be too sweeping. Under the "law of the case" doctrine, lower tribunals are generally obliged to adhere to the decision of appellate tribunals

³ Although it does not specifically reference them, Staff appears to rely on the second criterion in 10 C.F.R. § 2.786(g) and the criteria in section 2.786(b)(4)(ii) and (iv) as a basis for review.

⁴ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262 (1988), citing ALAB-861, 25 NRC 129, 135 (1987) (same case), *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982), and *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981).

in subsequent proceedings in the same case, even if the appellate body has decided an issue at an interlocutory phase of the proceeding.⁵ The doctrine applies, however, only to questions actually decided or decided by necessary implication. *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985).

In ALAB-931, 31 NRC 350 (1990), the Appeal Board found that USR Industries' sale of Safety Light Corporation in 1982 was a transfer of control within the meaning of section 184 of the Atomic Energy Act and that the failure to notify the NRC of the proposed transfer and the failure to have obtained consent were a sufficient foundation for the inclusion of USR Industries in the enforcement orders. 31 NRC at 368. Although this finding may be challenged in a petition for review of the Licensing Board's initial decision at the conclusion of proceedings before the Board, the Appeal Board's finding in ALAB-931 constitutes the "law of the case" at this point which must be followed by the Licensing Board. The Appeal Board left open, however, the question whether certain other matters needed to be resolved which might bear on jurisdiction over USR Industries and its subsidiaries. *See id.* at 367 n.53 & 370 n.60. With respect to these other matters, there appears to be no "law of the case" and, thus, further inquiry may be appropriate.

We see no need, however, to undertake a closer examination of either issue raised by the Staff at this time. We think it more appropriate to reserve our review, if necessary, to a more fully developed record and focused decision on the merits. To the extent that Staff or any other party believes that it has been aggrieved by the Licensing Board's initial decision related to these or other matters, the Commission will consider appropriate petitions for review in accordance with section 2.786(b).

⁵ *See Lyons v. Fisher*, 838 F.2d 1071, 1074 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2209 (1990); *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). Licensing Boards are certainly bound to follow the directives of higher level tribunals in the Commission's adjudicatory system. *See South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981), *review declined*, CLI-82-10, 15 NRC 1377 (1982); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 251-52 (1988).

Accordingly, Staff's petition for review of the Licensing Board's orders of September 10 and December 13, 1991, is *denied*.

IT IS SO ORDERED.

For the Commission⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of April 1992.

⁶Chairman Selin and Commissioner Remick were not available for the affirmation of this order; if they had been present, they would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 030-29626-OM
(ASLBP No. 92-653-02-OM)
(Byproduct Material License
No. 24-24826-01)
(EA 91-136)
(License Suspension)

PIPING SPECIALISTS, INC.

April 17, 1992

The Board issues subpoenas at the request of a party and expresses its appreciation for the appearance of the witnesses. It also requires prefiled written direct testimony in this enforcement case but permits parties to avoid filing written statements to the extent that they have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

**RULES OF PRACTICE: ENFORCEMENT CASE; PREFILED
DIRECT TESTIMONY**

The Board requires prefiled written direct testimony in this enforcement case but permits parties to avoid filing written statements to the extent that they have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

MEMORANDUM AND ORDER
(Subpoenas: Issuance, Explanation and Related Matters)

MEMORANDUM

We are issuing the four subpoenas requested by the Staff of the Nuclear Regulatory Commission (Staff) on April 13, 14, and 16, 1992. Because a party has requested these subpoenas, we are assured that the testimony of the subpoenaed witnesses is relevant to a full and fair hearing of this case and we have ordered them to appear, according to long-established legal tradition and to the regulations of the Nuclear Regulatory Commission (10 C.F.R. § 2.720(a)). We appreciate the appearance of the witnesses.

The subpoenas require each of the witnesses to appear at the beginning of our proceeding. However, all four will not be first to testify. Hence, we authorize the party that requested the subpoenas (in this instance, the Staff), to arrange a reasonable time for each of the witnesses to report to the hearing. This time should be set in light of negotiations between the parties concerning the scheduling of witnesses, in light of reasonable needs for the Staff to speak with the witnesses or prepare written direct testimony prior to eliciting their sworn testimony, and in light of the need for the proceeding to progress without interruption.

We note that the Staff, in a Motion of April 13, 1992,¹ has requested permission to present oral testimony in lieu of the written direct testimony ordered by the Board on April 7, 1992. This request shall be granted only to the extent that the parties have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

We are aware that the Administrative Procedure Act, 5 U.S.C. § 556(d), contains the following sentence: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be provided for a full and true disclosure of the facts." Under our ruling, a witness may swear to the accuracy of prepared written direct testimony and must be present for cross-examination. Consequently, the party will have an opportunity to present testimony "in oral or documentary form," and we will have an opportunity to examine the demeanor of the witness. The procedure we have adopted will save time and will avail us of all the evidence.

¹ NRC Staff Motion for Leave to Present Oral Testimony of Subpoenaed Witnesses (Motion).

We understand the short time period available at this time for preparing written testimony. Hence, we are requiring only that the parties make reasonable efforts to prepare in advance all or part of the testimony of each witness. We also would understand a party's difficulty, and would grant an exemption from the requirement for written direct testimony, with respect to hostile or unfriendly witnesses or those with respect to which the party has special reasons for requesting a complete or partial exemption from the requirement for written direct testimony.

As the Staff correctly notes, at page 1 of its Motion, the Commission's regulations do not require the submission of written testimony in enforcement proceedings. 10 C.F.R. § 2.743(b)(3). However, we consider our Order of April 7 to be authorized by 10 C.F.R. § 2.718(d) and (e); *see also* 10 C.F.R. § 2.721(d).

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 17th day of April 1992, ORDERED, that:

1. The Board shall issue the subpoenas requested for Mr. Barry Mitchell, Mr. Aaron L. Reil, Mr. James A. Hosak, and Ms. Rene Husberg.
2. The Board authorizes the Staff of the Nuclear Regulatory Commission to accommodate the convenience of the witnesses, consistent with the needs of this proceeding, with respect to the time at which parties are required to appear at the hearing.
3. The parties shall make reasonable efforts to prepare written direct testimony. Exemptions from this requirement may be granted for specific witnesses upon motion.

4. This Memorandum and Order shall be served together with the subpoenas.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Foster
Frederick J. Shon

In the Matter of

Docket No. 040-08989-ML
(ASLBP No. 91-638-01-ML)
(Byproduct Material Waste
Disposal License)

ENVIROCARE OF UTAH, INC.

April 30, 1992

In a proceeding involving the licensing of a facility for the disposal of section 11e(2) uranium and thorium byproduct material, the Licensing Board determines that the only petitioner for intervention lacks standing and, accordingly, that its petition for intervention and request for a hearing should be denied and the proceeding terminated.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

Section 189a(1) of the Atomic Energy Act, and implementing NRC regulations, provides an opportunity for hearing to "interested" persons and, accordingly, requires persons to possess standing in order to participate as a matter of right in a hearing.

RULES OF PRACTICE: STANDING TO INTERVENE

Commission regulations specify that a petitioner for intervention must set forth its interest in the proceeding and the “possible effect of any order that may be entered in the proceeding” on its interest.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing, the Commission applies contemporaneous judicial concepts of standing. Under those standards, in order to establish standing, a petitioner must demonstrate both that it has suffered or will likely suffer injury from the action under review and that the injury falls within the “zone of interests” at least arguably sought to be protected by the statute being enforced.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

To demonstrate injury in fact, courts require a showing that the petitioner has suffered or will suffer a “distinct and palpable” harm, that the harm fairly can be traced to the challenged action and that the injury is likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

Where purported harm or injury has not yet occurred, it must at least be shown to be likely. The petitioner must have a “real stake” in the outcome of the proceeding, although not necessarily a substantial stake.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In ruling on standing questions, a Licensing Board must accept as true all material factual allegations of a petition, except to the extent it deems them to be overly speculative. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United Transportation Union v. Interstate Commerce Commission*, 991 F.2d 908, 911-12 (D.C. Cir. 1989). In evaluating injury in fact, a board is limited to the types of injury in fact actually asserted by the petitioner.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

A generalized grievance shared in substantially equal measure by all or a large class of citizens will not result in the distinct and palpable harm sufficient to support standing. Interest “as a corporate citizen,” as alleged in this proceeding, is such a generalized grievance.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

An alleged injury that is neither caused by the licensing of a facility nor could be alleviated by license conditions imposed on the facility cannot be recognized as a basis for injury in fact.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

Perpetual joint and several liability for onsite incidents involving byproduct waste, irrespective of fault, as imposed by the Superfund statute, can constitute injury in fact for a waste disposer to intervene in a proceeding involving licensing of a waste disposal facility, as long as the disposer has shown sufficient interest in considering use of the facility in question.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

It is not a valid basis for denying injury in fact from the licensing of a facility that the potential user of the facility could alternatively establish its own facility, particularly where the potential user claims no expertise in the establishing or operating of such a facility.

RULES OF PRACTICE: STANDING (ZONE OF INTEREST)

Although historically economic injury has been held not to constitute a zone of interest sought to be protected by the Atomic Energy Act, the amendment of section 84a(1) to include consideration of the economic costs of the disposal of byproduct material expanded the zone to include certain types of such injury.

RULES OF PRACTICE: STANDING (DISCRETIONARY)

A petitioner that lacks standing of right may nonetheless be granted standing as a matter of discretion, based on a weighing of six specified factors. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

RULES OF PRACTICE: STANDING (DISCRETIONARY)

Intervention on a discretionary basis has not been granted in a proceeding where no other intervenor had established standing of right. Before intervention founded on discretionary standing were granted in such a case, there should be cause to believe that "some discernible public interest will be served by the

hearing." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

RULES OF PRACTICE: CONTENTION REQUIREMENT FOR INTERVENTION

In order to be admitted as a party, a petitioner must not only demonstrate its standing but also must proffer at least one viable contention. 10 C.F.R. § 2.714(b)(1).

PREHEARING CONFERENCE ORDER (Terminating Proceeding)

Pending before us is a novel — indeed unique — application of the law of interest or standing to participate in an NRC licensing proceeding. Because we conclude that Kerr-McGee Chemical Corporation (Kerr-McGee or Petitioner) does not possess standing of right and, in the particular circumstances of this case, should not be afforded standing as a matter of discretion, we are denying its petition for leave to intervene and request for a hearing and terminating the proceeding.

I. PROCEDURAL BACKGROUND

This proceeding involves the application by Envirocare of Utah, Inc. (Applicant) for a license to accept and dispose of uranium and thorium byproduct material (as defined in section 11e(2) of the Atomic Energy Act, as amended, 42 U.S.C. § 2014(e)(2)) received from other persons, at a site near Clive, Utah, approximately 85 miles west of Salt Lake City. In response to a Notice of Opportunity for Hearing, published on January 25, 1991,¹ a timely request for a hearing and petition for intervention, dated February 25, 1991, was filed by Kerr-McGee. This Licensing Board was created to consider that request and to preside at a hearing, if necessary.²

By filings dated March 25, 1991, and April 5, 1991, the Applicant and NRC Staff, respectively, filed responses in opposition to Kerr-McGee's request and petition. On April 15, 1991, Kerr-McGee filed a reply memorandum in support

¹ 56 Fed. Reg. 2959.

² Establishment of Atomic Safety and Licensing Board, dated March 14, 1991, 56 Fed. Reg. 11,796 (Mar. 20, 1991). The Board was reconstituted on January 27, 1992, 57 Fed. Reg. 4502 (Feb. 5, 1992).

of its hearing request, and on April 30, 1991, the Applicant filed a supplemental answer to Kerr-McGee's request.

We initially scheduled a prehearing conference for June 19, 1991, but to accommodate settlement negotiations among the parties and Petitioner, we postponed and rescheduled that conference on a number of occasions. We also granted Kerr-McGee several extensions of time to file proposed contentions, based in part on modifications to the application for the proposed facility. Kerr-McGee's contentions were filed on December 9, 1991, together with its responses to questions posed by us on May 2, 1991. The Applicant filed its responses to Kerr-McGee's contentions and to our questions on January 24, 1992. The Staff filed its responses to the contentions and our questions on February 3, 1992 (corrected on February 5, 1992).

On Tuesday, March 10, 1992, we conducted a prehearing conference in Salt Lake City, Utah.³ Participating in the conference were representatives of the Applicant, Kerr-McGee, and the NRC Staff (Staff). Information provided prior to and during the conference provides the basis for our conclusion that Kerr-McGee lacks standing to participate in this proceeding, that at least one of its proposed contentions satisfies the Commission's standards for admissible contentions, and that one particular contention (absent adjudicatory consideration) warrants additional Staff attention.

II. LEGAL ANALYSIS

A. Standing

In order to be admitted as a party to an NRC proceeding, a petitioner for intervention must demonstrate both that it has standing to participate in a proceeding and that it has proffered at least one valid contention. 10 C.F.R. § 2.714(a) and (b). The standing question formed the basis for the opposition of the Applicant and Staff to the intervention of Kerr-McGee.⁴

I. General

As pointed out by the Commission in a recent determination on standing, the requirement stems from section 189a(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1), which provides that the Commission shall "grant a hearing upon the request of any person *whose interest may be affected* by [a] proceeding . . ."

³ The conference was announced through a Notice of Prehearing Conference, dated February 7, 1992, published at 57 Fed. Reg. 5495 (Feb. 14, 1992).

⁴ Both the Applicant and Staff conceded that at least one of Kerr-McGee's proffered contentions conforms to the Commission's contention requirements. See pp. 184, 185-86, *infra*.

(emphasis supplied). As a result, Commission regulations specify that a petitioner for intervention (such as Kerr-McGee) must set forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992).

The standing questions in this proceeding arise from Kerr-McGee's status as a potential customer of this facility. Kerr-McGee possesses a large quantity of mill tailings (estimated by Kerr-McGee as amounting to some 376,400 cubic meters), defined by the Atomic Energy Act as section 11e(2) byproduct material, at its site in West Chicago, Illinois, a now-inoperative thorium milling facility. Kerr-McGee has long been seeking a way of disposing of this material — either on its own site or at an offsite location.⁵ The proposed Envirocare facility is one possible disposal site. At the prehearing conference, however, Kerr-McGee stated that its disposal options had narrowed and that, reflecting environmental concerns expressed by the State of Illinois, it had agreed with Illinois not only that the material would not be disposed of on site but also that it would be shipped to a site out of the State of Illinois.⁶

It has long been held that, in determining standing, the Commission applies contemporaneous judicial concepts of standing. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Under those standards, in order to establish standing, a petitioner must demonstrate both that it has suffered or will likely suffer injury from the action under review — i.e., that there has been or is likely to be "injury in fact" — and that the injury falls within the "zone of interests" at least arguably sought to be protected by the statute being enforced — here, the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Id.*, CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see *Air Courier Conf. v. Postal Workers*, — U.S. —, 112 L. Ed. 2d 1125, 1134 (1991).

The Applicant and Staff each claim that Kerr-McGee satisfies neither aspect of this standing test. We turn to these claims *seriatim*.

⁵ See, e.g., *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81 (1991).

⁶ Tr. 9-10, 17, 19, 23, 75. Written material submitted by Kerr-McGee following the prehearing conference raised a question about whether the material would necessarily be disposed of outside the State of Illinois; but, in response to our Memorandum dated March 17, 1992, Kerr-McGee emphasized that "there are no disposal facilities . . . available in Illinois and no facility is contemplated for such materials" (Response dated March 27, 1992, at 2).

2. Injury in Fact

(a) General

To demonstrate injury in fact, courts require a showing that the petitioner has suffered or will suffer a "distinct and palpable" harm, that the harm fairly can be traced to the challenged action and that the injury is likely to be redressed by a favorable decision. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988), citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975) and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Where (as here) the purported harm or injury has not yet occurred, it must at least be shown to be likely. The petitioner must demonstrate that it has a "real stake" in the outcome of the proceeding, although not necessarily a substantial stake. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), *aff'd*, ALAB-549, 9 NRC 644 (1979). In ruling on standing questions, we must accept as true all material factual allegations of the petition, except to the extent we deem them to be overly speculative. *Warth, supra*, 422 U.S. at 501; *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 911-12 (D.C. Cir. 1989).

(b) Kerr-McGee's Claims

Kerr-McGee has propounded the following claims of injury in fact stemming from the licensing of this facility, to which we will apply the foregoing standards:⁷

1. Kerr-McGee's interest in assuring that the review of the application by the Commission fully addresses the health, safety, and environmental implications of the application, inasmuch as failure to do so "might subject Kerr-McGee to potential liability for claims arising under state tort law and federal and state environmental statutes."⁸ Kerr-McGee focused this interest in terms of its potential liability under the Superfund laws.⁹
2. Kerr-McGee's financial interest, premised upon the increased cost (including environmental costs both to Kerr-McGee and to persons near the shipment routes) of shipping material to the Envirocare site rather than leaving it on site.¹⁰ Kerr-McGee subsequently withdrew

⁷In evaluating Kerr-McGee's claims of injury, we are of course limited to the types of injury in fact actually asserted by Kerr-McGee. See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114 (1992).

⁸Request for Hearing, dated February 25, 1991, at 6; Reply Memorandum of Kerr-McGee, dated April 15, 1991, at 4.

⁹Tr. 11-12, 119-20.

¹⁰Request for Hearing, *supra* note 8, at 6; Tr. 12.

this claim of injury in view of its agreement with Illinois to ship the material off site and out of state.

3. Kerr-McGee's asserted injury caused by environmental damage or accidents arising from the transport of wastes to the Envirocare facility.¹¹
4. Kerr-McGee's interest "as a corporate citizen" in the "entire range of public health and safety issues."¹²

(c) *Board Rulings on Injury in Fact*

(i) Dealing with these claims in inverse order, we find the fourth ("corporate citizen interest") is clearly not a valid basis for standing. It represents a type of "generalized grievance" shared in substantially equal measure by all or a large class of citizens — such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic interest as a ratepayer — that will not result in the distinct and palpable harm sufficient to support standing. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332-33; *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977); *Dellums*, *supra*, 863 F.2d at 971; *Warth*, *supra*, 422 U.S. at 501. That the class of corporate citizens is smaller than the totality of all citizens does not rescue it from the generality of the "large class" that lacks the particularity necessary to establish an interest in the proceeding.

(ii) The third claim (based on environmental damage or accidents stemming from transportation of wastes to the site) is invalid because it contains an insufficiently particularized relationship to the Envirocare site. Under its agreement with the State of Illinois, Kerr-McGee clearly will have to transport its wastes someplace. From the material before us, it appears that Kerr-McGee will risk essentially the same damages if it ships the wastes to any location, and it is clear that it will have to do so. Kerr-McGee has pointed to nothing that makes shipment to the Envirocare site different from shipment to any other site. And the Applicant has stated that shipment would be by rail or truck using conventional containers.¹³

That being so, there are no particularized reasons why the transportation claims — notwithstanding their foundation in environmental or public health and safety claims — should be recognized as a basis for standing in this particular proceeding. The injury, if any, would neither be caused by the licensing of this

¹¹ Reply Memorandum of Kerr-McGee, dated April 15, 1991, at 4.

¹² Tr. 12, 112.

¹³ Tr. 31-32, 40, 60.

facility nor alleviated by any conditions that we could impose on the facility. *See Simon, supra*, 426 U.S. at 38.

(iii) As noted above, the second basis (costs of shipping off site, as compared to onsite storage) has been withdrawn in light of Kerr-McGee's agreement to so dispose of its wastes.

(iv) The first basis listed represents the only potentially viable basis for standing of right proffered by Kerr-McGee. Namely, Kerr-McGee asserts perpetual liability for onsite incidents should it store wastes at Envirocare. Kerr-McGee relies on the Superfund statute to support this claim of potential damage. We review this claim in some detail.

Kerr-McGee asserts — and no other party appears to dispute — that some of the waste material on the West Chicago site is subject to Superfund liability. Such liability arises from section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), which reads in pertinent part:

§ 9607. *Liability*

(a) Covered persons, scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

. . .

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, . . .

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

There are relatively few defenses against liability under the foregoing provision. They are all set forth in section 107(b) of CERCLA, 42 U.S.C. § 9607(b), which reads:

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damage resulting therefrom were caused solely by —

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant (except . . .), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

Kerr-McGee asserts that the Superfund liability remains with it notwithstanding the transfer of the waste material to a disposal site such as Envirocare and notwithstanding that the damage giving rise to the liability occurs while the material is in the disposal facility's control and possession (and through no fault of Kerr-McGee, its employees or agents). Kerr-McGee also claims that it could be jointly and severally liable under the Superfund statute not only for damages from its own waste but also for damages from the wastes of others stored at the facility that may become commingled with its own waste. Therefore, Kerr-McGee reasons, it has an obligation to assure that the waste is handled and stored in as appropriate a manner as possible, at a facility designed to assure that its waste is properly stored to prevent damages from arising and, in addition, will not become commingled with the wastes of other disposers.¹⁴

Kerr-McGee claims that its intervention into this proceeding is an appropriate way to effectuate its interest in achieving this goal and, accordingly, that its interest will be affected by the results of this proceeding. Kerr-McGee particularly emphasizes its interest in assuring that its wastes are kept separate and apart from wastes provided by other customers of the facility, to avoid joint and several liability and to assure that any eventual Superfund liability on its part is limited to that arising from its own wastes.

In response, the Applicant and Staff each assert that, notwithstanding the Superfund liability, Kerr-McGee does not have an interest in the Envirocare proceeding, because it may never seek to store its wastes at the Envirocare site. They deem Kerr-McGee's interest described above as being too speculative to serve as a basis for standing to participate in the proceeding.

The Applicant and Staff acknowledge that there currently is no licensed disposal site that would be authorized to accept Kerr-McGee's West Chicago wastes. They also acknowledge that applications are currently pending for such authority at two separate facilities, the Envirocare facility and one other

¹⁴ No party has claimed that Superfund liability would not extend to materials stored at an NRC-regulated site such as Envirocare, and we thus do not explore the ramifications or legal validity of such a claim.

similar proposed facility located near Spofford, Texas, to be operated by Texcor Industries, Inc.¹⁵ (The Texas facility license is currently under review by the State of Texas.)

But the Staff, at least, also claims that Kerr-McGee has other storage alternatives, even if it has agreed that it will not store the wastes on its own West Chicago site or within the State of Illinois. The Staff lists three general categories of such alternatives.

The first is any site that Kerr-McGee itself may develop to dispose of the West Chicago tailings. In this category the Staff includes onsite storage (both in-place and relocated), but even absent the availability of such option, the Staff maintains that Kerr-McGee could obtain a suitable site and develop it itself.¹⁶ It adds that there are potentially a large number of sites that could meet the siting criteria of 10 C.F.R. Part 40, Appendix A.

In our view, it is not appropriate to deny injury in fact (and hence standing) on the ground that a petitioner could go out and develop its own site and thus may never use the site in question. In the first place, although Kerr-McGee has had much experience in handling thorium wastes, it disclaims any expertise in the disposal of wastes — as we understand it, the establishing or operating of a long-term waste storage facility.¹⁷

Beyond that, such a response is equivalent to the declaration, in an antitrust context, that monopoly control over a scarce resource is not objectionable inasmuch as a purchaser can always go out and establish its own source of supply of the resource — a claim that has been routinely rejected. *See, e.g. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). Moreover, under the Staff's reasoning, a petitioner would never have an interest in a facility to be operated in the future, inasmuch as the petitioner's interest might well change before the facility in question becomes operational.

The Staff's second category of so-called available sites is any existing site under the Uranium Mill Tailings Radiation Control Act (UMTRCA), Title II, that has enough room in its tailings impoundment to hold the West Chicago tailings. The Staff points out that many such sites would be physically capable of accepting the West Chicago tailings, and it lists 23 mills capable of taking section 11e(2) byproduct material from other sites.¹⁸ It acknowledges, however,

¹⁵ Applicant's Response to Board Questions of May 2, 1991, dated January 24, 1992, at 3; NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, dated February 3, 1992 (corrected on February 5, 1992), at 4.

¹⁶ NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, dated February 3, 1992 (corrected, February 5, 1992), at 2.

¹⁷ Tr. 75.

¹⁸ NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, corrected version dated February 5, 1992, Exhibit A.

that it has not inquired about how much unused capacity remains available at any such site, whether any site has sufficient excess capacity to accommodate the West Chicago tailings, or whether the owners would be willing to accept West Chicago wastes. The Staff adds that any site owner subject to NRC regulation would have to seek a license amendment to permit its site to receive the West Chicago wastes, and any site owner subject to Agreement State control would have to obtain necessary regulatory approval from such State.

We acknowledge that the existence of identified sites of this type might easily undercut Kerr-McGee's claim of injury from the licensing of Envirocare. But we are rejecting this second category of potential sites for essentially the same reason we rejected the first — the lack of identified site whose owner is expressly willing and able to handle Kerr-McGee's wastes. None of the sites would currently be available to take the West Chicago wastes, and no site owner has sought to make its site available. Indeed, the record includes no suggestion that any owner would wish to do so. Absent such a showing, the theoretical acceptability and potential availability of such sites does not elevate them to the status of available alternatives — particularly given Kerr-McGee's expressed need for disposing of the wastes as soon as possible.

Finally, the Staff's third category of potentially available sites are commercial disposal facilities licensed to receive section 11c(2) byproduct material. The Staff acknowledges that no such facility is currently licensed, and it indicates knowledge of only two that are seeking regulatory approval for that purpose — the Envirocare facility (involved in this proceeding) and the Texcor Industries facility in Texas, mentioned earlier. The Staff indicates that it has had informal conversations with others who might seek to establish such facilities.

In our view, based on the representations of both Kerr-McGee and other parties, only the Envirocare and Texcor facilities constitute viable options for the near-term disposal of the West Chicago wastes. As Kerr-McGee points out, "[t]here are only two potential sites out [] there . . . [t]he available options are Envirocare and Texcor."¹⁹ The record additionally reflects that authorities and public opinion in the State of Illinois view the Envirocare site as the prime option for waste disposal²⁰ and, for purposes of standing, we must give credit to these statements (which are reiterated by Kerr-McGee).

As the Staff points out,²¹ Kerr-McGee's interest in the Envirocare facility would be stronger if it had taken steps to arrange for potential disposal at that site — a step it has apparently not taken. We disagree, however, with the Staff's conclusion that, absent any such arrangement, Kerr-McGee's interest in

¹⁹ Tr. 73, 84.

²⁰ Request for Hearing, dated February 25, 1991, at 4-5 and various attachments.

²¹ Tr. 51.

the Envirocare facility would necessarily be too hypothetical and speculative to constitute a valid interest.

In our view, there are currently only two potential facilities for the near-term disposal of Kerr-McGee's wastes that we must consider in evaluating Kerr-McGee's standing to participate in this proceeding — Envirocare and Texcor. If Kerr-McGee had expressed an intent to use either Envirocare or Texcor, or both, or perhaps the first licensed, we would have no difficulty in concluding that Kerr-McGee has an interest in assuring that either or both of these facilities meet its special need for acceptable long-term isolation and separation of its wastes. Such assurance is needed to preclude Kerr-McGee from becoming liable for damages caused by improper handling and storage of its own wastes and generally and severally liable under CERCLA for damages caused by wastes generated by others that become co-mingled with its own wastes.

Kerr-McGee, however, has not even expressed the intent that would provide it standing to protect against CERCLA liability. The farthest that it has gone is its statement that it "consider[s] Envirocare as an alternative site for the materials."²² It also stated that "we have no preference as between Texcor and Envirocare or anyone else."²³ Something more is required, to provide the concrete interest that must be demonstrated under the Commission's Rules of Practice. Otherwise, the Applicant might be required to make extensive changes to its facility to accommodate the CERCLA liability of a single potential customer that has not expressed any intent to use the facility.

Absent such an expression of intent, we conclude that Kerr-McGee has failed to demonstrate its interest in this proceeding. It has not met its burden in establishing injury in fact. Kerr-McGee thus lacks standing of right to participate in this proceeding.

3. Zone of Interest

Given our conclusion on injury in fact, we need not rule on the second aspect of standing, i.e., whether the asserted injury of Kerr-McGee falls "arguably within the zones of interest" sought to be protected by the statute being enforced — here, the Atomic Energy Act or NEPA. See *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614; see also *Air Courier Conf.*, *supra*, 112 L. Ed. 2d at 1134; *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Because an appeal of our determination might well be taken, however, we believe it to be useful to express our opinion on whether the only basis for standing that we have found could have merit arguably falls within the zones of interest of the foregoing statutes — namely, potential CERCLA

²² Tr. 10.

²³ Tr. 75 (corrected).

liability of Kerr-McGee from improper handling and storage of its wastes and from the co-mingling of its wastes with those of others.

The Applicant and Staff have cited a number of cases holding that economic matters of various sorts are not within the zones of interests sought to be protected by the Atomic Energy Act or NEPA. In particular, either or both rely on, *inter alia*, *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976); and *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 638-39 (1975). On such basis, they assert that Kerr-McGee's interests are likewise not within a qualifying zone of interest and, on that ground as well, Kerr-McGee has failed to establish standing.

We have reviewed those and other cases of the same sort — e.g., *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992), *appeal pending sub nom. Environmental and Resources Conservation Organization v. NRC*, No. 92-70202 (9th Cir., filed Apr. 2, 1992) (economic interest of plant employees in employment at plant that was shutting down for management-determined reasons not within protected zone of interest). We agree that they do hold that, at the time of their issuance, the particular economic interest being asserted did indeed fall outside the zones of interest sought to be protected by the governing statutes. But, as Kerr-McGee observes, the economic interest it seeks to assert (vis-a-vis its CERCLA liability) depends upon an amendment to the Atomic Energy Act that was not in effect at the time of (or, with respect to the *Rancho Seco* decision, did not apply to) the foregoing decisions.²⁴

The amendment in question was enacted in 1983.²⁵ It modified section 84a(1) of the Atomic Energy Act to include the language underscored below:

a. The Commission shall insure that the management of any byproduct material, as defined in section 11.e(2), is carried out in such manner as —

(1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and nonradiological hazards associated with the processing and with the possession and transfer of such material *taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate* . . . [emphasis supplied].

Kerr-McGee asserts that this language added economic considerations to the Atomic Energy Act, at least in the area of section 11e(2) waste disposal, enlarging the ambit of the zones of interest sought to be enforced by the Act to

²⁴ Tr. 111, 113-14, 115.

²⁵ Pub. L. No. 97-415 (96 Stat. 2067) (1983).

include claims of the adequacy of the facility satisfactorily to isolate the wastes provided by different disposers.²⁶ Although the Applicant and Staff acknowledge some change to the zones of interest comprehended by the Act, both claim that the NRC fulfilled its entire obligation in regard to the economic aspects of waste disposal by its issuance (in 1985) of revised implementing regulations in 10 C.F.R. Part 40, Appendix A. The Staff stresses the portion of that revision that allows reduction in a 1000-year isolation design standard to 200 years under certain circumstances.²⁷ They each cite *Quivira Mining Co. v. U.S. NRC*, 866 F.2d 1246 (10th Cir. 1989) (hereinafter, *Quivira*).

We agree (and Kerr-McGee does not here dispute) that *Quivira* held that NRC satisfactorily recognized economic considerations and performed the requisite cost-benefit rationalization in its issuance of the 1985 version of Appendix A to Part 40. Beyond that, however, Kerr-McGee cites the Court's acknowledgment that, in approving the 1985 criteria, it recognized that "NRC has pledged to take into account 'the economics of improvements in relation to benefits to the public health and safety' in making site specific licensing decisions [emphasis added], see 1985 Criteria, Introduction" and, as a result, concluded that "this commitment is consistent with the statutory mandate to determine that the costs of regulation bear a 'reasonable relationship' to benefits."²⁸ Further, and significantly, the Court commented that those challenging the regulations (including Kerr-McGee) "may have cause in the future to challenge, in the context of individual licensing procedures, whether the NRC's application of [the Introduction of Appendix A to Part 40] achieves the statutory command of flexibility."²⁹

We agree with Kerr-McGee that this material persuasively establishes that issues such as Kerr-McGee wishes to raise (concerning the adequacy of material storage and isolation in light of CERCLA liability) are at least "arguably" (the only standard that must be met) within the zone of interests sought to be protected by section 84a(1) of the Atomic Energy Act. Thus, adequate storage and isolation under the criteria of the Appendix to Part 40 may not be sufficient in view of CERCLA liability. But, on the other hand, the added cost (if any) of constructing the facility and managing its operations to take CERCLA liability into account may exceed the bounds of reasonableness that the Atomic Energy Act now directs the Commission to consider. The zones of interests covered by section 84a(1) of the Atomic Energy Act are thus at least "arguably" broad enough to encompass such claims. The second aspect of standing has thus been satisfied by Kerr-McGee.

²⁶ Tr. 115, 119-20.

²⁷ Tr. 135 (Staff).

²⁸ 866 F.2d at 1254. Cited by Kerr-McGee at Tr. 136-37.

²⁹ 866 F.2d at 1259 (citation omitted).

4. Discretionary Standing

Although we have found that Kerr-McGee has failed to set forth at least a reasonable basis for us to conclude that it has standing of right in this proceeding, we also recognize that the Commission has authorized participation on the basis of discretionary standing under prescribed circumstances. See *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614-17. We therefore have also considered Kerr-McGee's claim that it should be granted standing as a matter of discretion. In determining whether to allow participation on the basis of discretionary standing, the Commission has directed us to look at the following factors:

- (a) Weighing in favor of allowing intervention —
 - (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - (3) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.
- (b) Weighing against allowing intervention —
 - (4) The availability of other means whereby petitioner's interest will be protected.
 - (5) The extent to which petitioner's interest will be represented by existing parties.
 - (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Weighing the varying factors, we believe that the first — the most important³⁰ — weighs slightly in favor of Kerr-McGee's intervention, on topics relating to the capability of the facility (and its management) to store wastes properly to avoid CERCLA liability and to keep isolated one entity's wastes from the wastes of others, although Kerr-McGee itself disclaims any expertise in disposal of waste.³¹ The second factor — Kerr-McGee's interest in the proceeding — is, however, negative; as we have stated earlier, Kerr-McGee has demonstrated a general interest in the safe handling and storage of wastes but no particular interest in the use of this facility. We have reviewed the third factor in conjunction with our consideration of standing of right and conclude that it tends to favor discretionary intervention, inasmuch as any license conditions designed to enhance the ability of the Applicant to avoid CERCLA liability for

³⁰ *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 617; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

³¹ Tr. 75.

improper storage and to isolate the material of various disposers would enhance the option of Kerr-McGee to utilize the Envirocare facility for its wastes.

As for the contrary factors, Kerr-McGee could perhaps attain its stated desire — a facility properly designed and operated to minimize Kerr-McGee's potential CERCLA liability — through informal conversations with the Applicant and Staff, as suggested by the Staff.³² Although Kerr-McGee would have no right to have its views considered, much less acted upon, the Staff and Applicant at the prehearing conference appeared amenable to such an approach and willing to take responsible suggestions seriously. We rank this factor as neutral, neither favoring nor disfavoring intervention. The fifth factor favors intervention, inasmuch as there is no other party who could represent or protect Kerr-McGee's interest.

Finally, and significantly, intervention of Kerr-McGee clearly will produce some delay in the proceeding — adjudication in a situation where there otherwise would be none will of necessity produce that result. Kerr-McGee denies any intent to delay the proceeding through its participation and offers to proceed expeditiously and abide by expedited discovery and hearing schedules.³³ Were a hearing to be authorized, we would also take steps to minimize that necessary result by limiting Kerr-McGee's intervention to issues clearly related to its interest in avoiding CERCLA liability. Nonetheless, delay would occur, and we would thus weigh this factor negatively.

One further factor needs to be considered. Based on our inquiries to the parties as well as our own research, we are unaware of any proceeding where discretionary intervention was the only intervention granted.³⁴ We also are unaware of any bar to doing so. Indeed, the Appeal Board long ago suggested that no such bar exists, commenting that "before a hearing is triggered at the instance of one who has not alleged any cognizable personal interest in the operation of this facility, there should be cause to believe that some discernible public interest will be served by the hearing." *Watts Bar*, ALAB-413, *supra*, 5 NRC at 1422. There do not appear to be any established standards for determining whether a discernible public interest would be served by a hearing.

Here, we believe that a discernible public interest would not be served by the hearing that Kerr-McGee has requested. The issues it has raised are not being ignored by the Staff — indeed, as pointed out by the Staff and Applicant,³⁵ many of the proposed contentions are derived from or suggested by questions previously asked the Applicant by the Staff.³⁶ In addition, we are urging the Staff

³² Tr. 63, 68-69.

³³ Tr. 13, 154, 155.

³⁴ Tr. 14, 16, 153.

³⁵ Tr. 69, 156-57, 162.

³⁶ In particular, proposed contentions 1, 2, 3, 4, 5, 7, 8, 9, 12, 13, 14, 15, 16, 18, 19, and 20.

(later in this opinion) to devote particular attention to one issue that was initially highlighted by Kerr-McGee and which is currently under review by the Staff — namely, Contention 6, concerning the capability of management adequately to manage the proposed facility (*see* p. 186, *infra*).

Thus, the primary reason why we are declining to grant intervention on a discretionary basis is the same reason we refused to grant standing as a matter of right — the absence of any commitment or even expressed intent by Kerr-McGee actively to consider use of the facility (whether separately from or in conjunction with the Texcor facility) for all or a portion of its wastes. Another reason is our failure to perceive any “discernible public interest” that will be served by a hearing in a situation where, as here, there are no other intervenors. Accordingly, as a matter of discretion, and particularly absent an expression of intent such as we have described, we conclude that Kerr-McGee has failed to establish adequate grounds to merit convening a hearing to provide it an adjudicatory opportunity to participate in resolving issues bearing upon the CERCLA liability of waste disposers (including itself).

B. Contentions

In order to be admitted as a party to a proceeding, a petitioner must not only demonstrate its standing but also that it has proffered at least one viable contention. 10 C.F.R. § 2.714(b)(1). Given our finding of lack of standing, we normally would not discuss the adequacy of contentions. Because of potential review, however, we believe it desirable to express our view on whether Kerr-McGee has proffered at least one valid contention.

In its December 9, 1991, filing, Kerr-McGee submitted twenty proposed contentions. In their responses to those contentions, the Applicant and Staff, respectively, have acknowledged that many of the contentions are consistent with the NRC rules governing contentions, and they offered no objection to their admission, assuming standing were to be found. We discussed the contentions with the parties at the prehearing conference.³⁷

In its response to Kerr-McGee’s contentions, the Applicant suggests that, if we were to find that Kerr-McGee has standing, we limit its participation to those issues as to which it has demonstrated a proper interest, based on authority in 10 C.F.R. § 2.714(g).³⁸ That section authorizes us, upon determining that a petitioner’s interest is limited to one or more of the issues involved in the proceeding, to limit its participation to those issues. In addition, in conjunction with discretionary intervention, the Commission explicitly empowered boards

³⁷ Tr. 178-219.

³⁸ Applicant’s Answer to Kerr-McGee’s Contentions, dated January 24, 1992, at 14; Tr. 36.

to limit the participation of intervenors "to the issues they have specified as of particular concern to them." *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 617.

Given the limited subject that we have determined even warrants participation of Kerr-McGee, and given our determination that Kerr-McGee can contribute in some degree to the development of the record insofar as it bears on that subject, we find the Applicant's suggestion to be well founded. If a hearing were authorized, we would limit Kerr-McGee's participation to contentions having a bearing upon the ability of the facility and its management properly to handle and store wastes to avoid CERCLA liability and to assure isolation of one organization's wastes from the wastes of others.

As submitted, the proposed contentions fall into several discrete categories:

1. Above-Grade Disposal — Contention 1.
2. Siting — Contentions 2, 3.
3. Transportation Issues — Contentions 4, 5.
4. Applicant's Qualifications — Contention 6.
5. Seismic Stability — Contention 7.
6. Hydrological Performance — Contentions 8, 9.
7. Maintenance — Contention 10.
8. Intrusion — Contention 11.
9. Waste Characteristics — Contention 12.
10. Embankment Liner — Contention 13.
11. Radon Barrier — Contention 14.
12. Water Erosion — Contention 15.
13. Endangered Species — Contention 16.
14. Waste Dust — Contention 17.
15. Monitoring — Contention 18.
16. Cost-Benefit Analysis — Contention 19.
17. Surety Arrangements — Contention 20.

Kerr-McGee has stated that its contentions (filed on December 9, 1991) are not based on the latest version of the Applicant's proposal, that filed on December 16, 1991, but that if we determined that it had standing, it would discuss its contentions with the parties, drop any that had become moot, and revise the others in accordance with the latest proposal.³⁹ If a hearing were to be held, we would adopt that course of action. However, inasmuch as we wish to provide guidance as to how we would rule on contentions, we turn to the contentions that are before us.

Under the criteria we have adopted, Contention 1 would appear to raise issues of the suitability of above-grade disposition to achieving the protection and isolation that Kerr-McGee believes is necessary. Neither the Applicant

³⁹ Tr. 198, 218-19. Any revised contentions that raise new issues would be subject to the late-filing criteria of 10 C.F.R. § 2.714(a)(1).

nor Staff opposes this contention. We would accept it if a hearing were to be authorized. Thus, the contention requirement for a hearing would be satisfied.

As for the others, we leave most of them to a time when, by virtue of an appeal from our decision, we may be directed to hold a hearing. Only one — number 6 — warrants our comments at this time. That contention challenged the adequacy of the Applicant's management to achieve proper disposal and isolation of wastes from the wastes of others. Kerr-McGee cites four separate examples of management practice at the existing Envirocare facility.

The Staff does not oppose this contention, and the Applicant objects on the merits. It claims that Kerr-McGee is merely using isolated instances in Envirocare's 4-year management of NORM wastes and is unfairly considering them out of context. We note, however, that Kerr-McGee is using a traditional way of raising management issues and that it may be the only way to raise potential systemic management deficiencies. Assuming this contention were never to be litigated, we strongly urge the Staff (as it apparently intends) to perform additional investigation into the alleged circumstances and to determine whether the cited circumstances reflect management deficiencies that ought to be remedied prior to licensing.⁴⁰

III. ORDER

On the basis of the foregoing, it is, this 30th day of April 1992, ORDERED:

1. The request for a hearing and petition for leave to intervene of Kerr-McGee Chemical Corp. is hereby *denied*.
2. This proceeding is hereby *terminated*.
3. Objections to this Order may be filed by a party or petitioner within five (5) days of its service, except that the Staff may file such objections within ten (10) days after service. *Cf.* 10 C.F.R. § 2.752(c).
4. This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.714a. Any appeal must be filed within ten (10) days of service of this Order and must include a Notice of Appeal and supporting

⁴⁰ Indeed, the Staff has indicated that, as of February, 1992, although "unable to form an opinion at this time as to the significance of these incidents, it will consider this matter as appropriate in the course of its ongoing review of Envirocare's license application." NRC Staff's Response to Kerr-McGee's Contentions, corrected version dated February 5, 1992, at 14 n.19.

brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Foster
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 30, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of

Docket No. 30-10749-CivP&OM
(ASLBP Nos. 91-649-04-CivP
92-652-01-OM)
(Byproduct Material License
No. 48-16296-01)
(EA 90-152, 90-085)

MIDWEST INSPECTION
SERVICE, LTD.

May 6, 1992

MEMORANDUM AND ORDER
(Terminating Proceeding)

On April 23, 1992, the parties to these enforcement proceedings, the NRC Staff and Mr. Donald Paschen, President of Midwest Inspection Service, Ltd., filed (1) a Settlement Agreement to Terminate Proceedings that had been accepted by both parties; and (2) a joint motion requesting approval of the Settlement Agreement and the entry of an order terminating these proceedings, with a proposed Order. The Licensing Board¹ has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the

¹ On April 30, 1992, the Presiding Officer in these proceedings, Administrative Law Judge Ivan W. Smith, was replaced by this Atomic Safety and Licensing Board.

Agreement and consequent termination of these proceedings are in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and incorporates it by reference into this Order. Pursuant to sections 81 and 161 of the Atomic Energy Act, and 10 C.F.R. § 2.203, the Board terminates these proceedings on the basis of the attached Agreement.

THE ATOMIC SAFETY AND
LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
May 6, 1992

ATTACHMENT

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of

**Docket No. 030-10749-CivP&OM
(Byproduct Materials License
No. 48-16296-01)
(EA 90-152)**

**MIDWEST INSPECTION
SERVICE, LTD.**

SETTLEMENT AGREEMENT

On May 9, 1991, the NRC staff (Staff) issued an Order Imposing Civil Monetary Penalty in the amount of \$8,571.43 to Midwest Inspection Service, Ltd. (Licensee) (56 Fed. Reg. 22,894, May 17, 1991). On June 5, 1991, the Licensee requested a hearing on the Order Imposing the Civil Penalty, and the matter was assigned to the Presiding Officer on July 3, 1991 (Docket No. 030-10749-CivP). On September 9, 1991, the Staff issued an Order Modifying License (Effective Immediately) and Demand for Information (56 Fed. Reg. 46,808, Sept. 16, 1991). On September 25, 1991, the Licensee requested a hearing on the second Order. This matter was assigned to the Presiding Officer on October 15, 1991 (Docket No. 030-10749-OM).

On February 3, 1992, the Licensee sent a letter to the NRC Region III Administrator stating that it "shall by February 28, 1992, in accordance with NRC Regulations, dispose or transfer all licensed material" and that after February 28, 1992, it "shall not conduct any radiographic operations as defined by 10 C.F.R." The Licensee retracted all requests for hearings.

In accordance with the Licensee's February 3, 1992 letter and later actions carrying out its stated desire to terminate its Byproduct Materials License No. 48-16296-01, the NRC Staff and Mr. Donald Paschen, individually and as owner and president of the Licensee, hereby agree as follows:

1. The Licensee agrees to withdraw its requests for hearings dated June 5, 1991, and September 25, 1991.

2. Effective immediately, Byproduct Materials License No. 48-16296-01 is suspended. The Licensee shall not receive or use licensed material on or after the date of this Settlement Agreement under the foregoing License.
3. Licensee has transferred ownership of all licensed material and devices to authorized recipients and will: (1) notify NRC Region III of the name, address, and location of the licensed person(s) or licensed firm(s) and to whom all licensed material has been transferred on an NRC Form 314; and (2) submit verification of material transfer in the form of a receipt from the transferee.
4. Upon a written finding by the Regional Administrator, NRC Region III that no licensed material remains in the Licensee's possession, Byproduct Materials License No. 48-16296-01 shall be terminated.
5. Upon termination of Byproduct Materials License No. 48-16296-01, the NRC Staff agrees to withdraw the Civil Penalty and retract the September 9, 1991 Order Modifying License (Effective Immediately) and Demand for Information.
6. Mr. Donald Paschen agrees to notify the Regional Administrator, NRC Region III, for two years from the effective date of this Settlement Agreement, in the event he obtains a controlling interest in an entity which engages in any activities associated with the possession or use of licensed materials under an Agreement State or NRC license.
7. In an attached joint motion, the NRC Staff and the Licensee jointly move the Presiding Officer for an order approving this settlement agreement and terminating this proceeding. The agreement shall become effective upon the approval of the Presiding Officer.

For the U.S. Nuclear Regulatory
Commission

For Midwest Inspection Service, Ltd.

Michael H. Finkelstein
Counsel for NRC Staff

Donald Paschen, President
Midwest Inspection Service, Ltd.

Dated at Rockville, Maryland,
this 23d day of April 1992.

Dated at Green Bay, Wisconsin,
this 22d day of April 1992.

[LBP-92-10, which would have followed this issuance, was withdrawn from publication.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Jerry R. Kline
Charles N. Kelber

In the Matter of

Docket No. 040-08724
(ASLBP No. 92-661-05-OM)
(License No. SUB-1357)

CHEMETRON CORPORATION
Providence, RI 02903
(Harvard Avenue Site and
Bert Avenue Site Decontamination)

May 12, 1992

The Licensing Board grants a Joint Motion of Licensee and Staff in approving a Consent Order and terminating a proceeding.

MEMORANDUM AND ORDER
(Order Approving Consent Order and Terminating Proceeding)

This proceeding involves an Order Modifying License (Effective Immediately) issued by the Staff to the Chemetron Corporation (Licensee) on April 8, 1992. The Order set forth that pursuant to the Commission's Regulations, the Licensee or any other person adversely affected could request a hearing on the Order. The Licensee filed an answer to the Staff's Order, requested a hearing, and moved to set aside the Immediate Effectiveness of the Order.¹ The Licensee also filed a ". . . Request for Expedited Production of Documents" from the

¹ Licensee Chemetron Corporation's Answer to the United States Nuclear Regulatory Commission's April 8, 1992 Order Modifying License, Request for a Hearing and Motion to Set Aside the Immediate Effectiveness of the Order, April 28, 1992.

Staff.² No other requests for a hearing or petitions to intervene have been received. In telephone calls on May 5 and May 6, 1992, the Board established to preside over this proceeding pursuant to 10 C.F.R. § 2.271 was notified by Staff and Licensee's Attorneys that the parties were engaged in settlement negotiations. Those discussions resulted in a proposed Consent Order agreed to by the parties, and a Joint Motion for the Board's approval of the Order and termination of the proceeding.³ The Consent Order is intended to supersede the Order Modifying the License. On Board approval, the Joint Motion provides that the Staff will issue the Consent Order and the Licensee will withdraw its request for hearing, the motion to set aside the immediate effectiveness order and request for the production of documents.

In the terms and conditions outlined in the Consent Order, there does not appear to be any reason why the public health, safety, and interest will not be protected. Accordingly, the Board herein *approves* the Consent Order (incorporating its provisions by reference in this *ORDER*) and *grants* the motion of the parties to terminate this proceeding.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Bethesda, Maryland

² April 29, 1991. The motion was filed with the ASLBP's Chief Administrative Judge prior to the establishment of this Board.

³ Joint Motion of Chemetron Corporation and NRC Staff for Approval of Consent Order and Termination of Proceeding, May 5, 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulles, Chairman
Thomas D. Murphy
Harry Rein

In the Matter of

Docket No. 30-31570-EA
(ASLBP No. 92-657-02-EA)
(Materials License
No. 35-27026-01)

PATRICK K.C. CHUN, M.D.

May 26, 1992

ORDER

(Approving Settlement Agreement and Terminating Proceeding)

On May 19, 1992, the parties to this enforcement proceeding, the NRC Staff and Patrick K.C. Chun, M.D., filed with the Atomic Safety and Licensing Board (1) a Settlement Agreement that has been accepted and signed by both parties and (2) a joint motion requesting the Board's approval of the Agreement and entry of an order terminating this proceeding, together with a proposed Order. The Board has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the Settlement Agreement and consequent termination of this proceeding is in the public interest. Based upon its review, the Board is satisfied that approval of the Settlement Agreement and termination of this proceeding based thereon is in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and, pursuant to sections 81 and 161 of the Atomic Energy Act of 1954, as amended (42 U.S.C. §§ 2111 and 2201), incorporates the Settlement Agreement

by reference into this Order. Pursuant to 10 C.F.R. § 2.203, the Board hereby terminates this proceeding on the basis of the Settlement Agreement.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE**

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

**Harry Rein, M.D. (by M.B.M.)
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
May 26, 1992**

ATTACHMENT

SETTLEMENT AGREEMENT

On November 12, 1991, the NRC Staff (Staff) issued Order Prohibiting Involvement in Certain NRC-Licensed Activities (Effective Immediately) to Patrick K.C. Chun, M.D., 56 Fed. Reg. 56,716 (Nov. 21, 1991). That Order was subsequently modified on November 27, 1991, to correct an unintentional inconsistency. Order Modifying Order Prohibiting Involvement in Certain NRC-Licensed Activities (Effective Immediately). 56 Fed. Reg. 63,985 (Dec. 6, 1991).

On November 18, 1991, Dr. Chun, in response to the first Order, requested a hearing on the Order. On December 1, 1991, in response to both the Order and the Modified Order, Dr. Chun filed an answer denying all "allegations and charges made in the Orders," and requested that the Orders be rescinded. Dr. Chun also requested a hearing. In response to Dr. Chun's hearing request, an Atomic Safety and Licensing Board was established on January 14, 1992. 57 Fed. Reg. 2795 (Jan. 23, 1992).

After discussions between the Staff and Dr. Chun, both the Staff and Dr. Chun agree that it is in the public interest to terminate this proceeding without

further litigation and without reaching the merits of the underlying orders, and agree to the following terms and conditions.

1. The Staff agrees to withdraw the Orders issued to Dr. Chun, dated November 12 and 27, 1991. Such withdrawal will become effective upon approval of this Settlement Agreement by the Atomic Safety and Licensing Board.

2. Dr. Chun agrees to withdraw his request for a hearing dated November 18, 1991. Such withdrawal will become effective upon approval of this Settlement Agreement by the Atomic Safety and Licensing Board.

3. Dr. Chun agrees that from November 12, 1991, the date of the issuance of the original order, until November 11, 1992, he will not apply for or hold an NRC license, will not be named on an NRC license in any capacity, and will not perform any activities as an authorized user either under a broad scope license, issued pursuant to 10 C.F.R. Part 33, or as a visiting authorized user pursuant to 10 C.F.R. § 35.27.

4. Dr. Chun agrees that from November 12, 1992, until November 11, 1994, he will provide the following notice to the NRC:

A. For work activities that require Dr. Chun being named on an NRC license (e.g., Radiation Safety Officer or Authorized User), Dr. Chun shall provide a copy of the license application or amendment to the Chief, Medical Use Safety Branch, Office of Nuclear Material Safety & Safeguards, at the same time that the application or amendment is sent to the NRC licensing office.

B. For work activities performed by Dr. Chun as an authorized user under a broad-scope license or as a visiting authorized user, Dr. Chun shall provide the Chief, Medical Use Safety Branch, Office of Nuclear Material Safety & Safeguards, with two weeks notice prior to performing any such activities.

5. Dr. Chun assures the NRC that he can be relied upon to comply with all Commission requirements, including that of providing complete and accurate information to the Commission.

6. The Staff agrees, with regard to information relating to this proceeding, that it will comply with all existing federal statutes, Commission regulations, and policy regarding the dissemination of information.

7. The Staff and Dr. Chun shall jointly move the Atomic Safety and Licensing Board for an Order approving this Settlement Agreement and terminating

this proceeding. This agreement shall become effective upon approval by the Licensing Board.

FOR THE NUCLEAR
REGULATORY COMMISSION

Marian L. Zabler
Counsel for NRC Staff

FOR PATRICK K.C. CHUN, M.D.

Dale Joseph Gilsinger
Counsel for Patrick K.C.
Chun, M.D.

Dated May 19, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. George F. Tidey

In the Matter of

Docket No. 030-13204-OM
(ASLBP No. 92-655-03-OM)
(Order Modifying
Byproduct Material License
No. 21-00864-02)
(EA 91-130)

LAFAYETTE CLINIC

May 27, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

In this proceeding, petitioner Natraj Sitaram, M.D., contests the validity of an October 3, 1991 NRC Staff order modifying the 10 C.F.R. Part 30 byproduct material license of Lafayette Clinic. *See* 56 Fed. Reg. 51,415 (1991). Dr. Sitaram has challenged the order as it imposes an immediately effective license condition that precludes the Clinic from utilizing him in any licensed activity for a period of three years. Now, by joint motion dated May 14, 1992, the parties request that we approve a settlement stipulation they have provided and terminate this proceeding without adjudication of any of the legal or factual matters at issue.

Pursuant to 10 C.F.R. § 2.203, we have reviewed the settlement agreement to determine whether approval of the agreement and termination of this proceeding is in the public interest. On the basis of that review, and according due weight

to the position of the Staff, we have concluded that the parties' agreement and the termination of this proceeding are consistent with the public interest.

Accordingly, the joint motion of the parties is *granted* and we *approve* the "Stipulation for Settlement of Proceeding," which is attached to and incorporated by reference in this order. Further, pursuant to sections 81, 161(b), 161(o), and 191 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2111, 2201(b), 2201(o), 2241, and 10 C.F.R. § 2.203, the Board *terminates* this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

George F. Tidey
ADMINISTRATIVE JUDGE

Bethesda, Maryland
May 27, 1992

ATTACHMENT

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

**Docket No. 030-13204-OM
(ASLBP No. 92-655-03-OM)
(Order Modifying
Byproduct Material License
No. 21-00864-02)
(EA 91-130)**

LAFAYETTE CLINIC

STIPULATION FOR SETTLEMENT OF PROCEEDING

WHEREAS, the NRC Staff issued a Notice of Violation and Order Modifying License (Immediately Effective) dated October 3, 1991 (Order Modifying License), to Lafayette Clinic, Detroit, Michigan; and

WHEREAS, Dr. Natraj Sitaram (Petitioner) requested a hearing in connection with the Order Modifying License; and

WHEREAS, Petitioner understands and appreciates the importance of the ability of individuals to raise safety issues without fear of retribution, and the importance of cooperating in safety investigations; and

WHEREAS, pursuant to 10 C.F.R. § 2.203, the NRC Staff and Petitioner have stipulated and agreed to the following provisions for the settlement of the above-captioned proceeding, subject to the approval of the Atomic Safety and Licensing Board, before and without the taking of any testimony or trial or adjudication of any issue of fact or law; and

WHEREAS, the NRC Staff is willing to forbear from initiating any enforcement proceeding against Petitioner based upon the facts set forth in the Notice of Violation and Order Modifying License, dated and issued October 3, 1991, for so long as Petitioner is in full compliance with all terms and provisions of this Stipulation; and

WHEREAS, Petitioner is willing to waive his hearing and appeal rights regarding this matter in consideration of the terms and provisions of this Stipulation; and

WHEREAS, the terms and provisions of this Stipulation, once approved by the Atomic Safety and Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (c) of section 161 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 et seq.;

NOW THEREFORE, IT IS STIPULATED AND AGREED between the NRC Staff and Petitioner as follows:

1. The NRC Staff withdraws from the above Order Modifying License all allegations against and references to Petitioner. In addition, the NRC Staff withdraws from the Notice of Violation (a) violation I.B, and (b) all inferences to Petitioner and references to the disposal of radioactive waste on June 18 through June 19, 1988, contained in violation III.B.

2. Petitioner withdraws his request for and waives his right to a hearing in connection with this matter, and waives any right to contest or otherwise appeal this Stipulation once approved by the Atomic Safety and Licensing Board.

3. Prior to his first use of any radioactive materials at an NRC-licensed facility after the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Petitioner shall obtain education and/or training such that he would be qualified to be an authorized user of radioactive materials at such facility.

4. For a period of two years following the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Petitioner shall provide written notice to the NRC Staff of his intended use of radioactive materials prior to his first use of any such materials at each NRC-licensed facility at which he may be employed or otherwise working. Written notice shall be sent to the attention of the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

5. Petitioner shall not engage in any act, practice, or omission inconsistent with 10 C.F.R. § 30.7.

6. Definitions contained in the regulations of the NRC, 10 C.F.R. Chapter I, shall apply to the extent relevant to terms and phrases used herein.

FOR THE NRC STAFF:

FOR PETITIONER DR. NATRAJ
SITARAM

Steven R. Hom
May 13, 1992

Kathleen A. Stibich
May 14, 1992

APPROVED:

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
AND PRESIDING OFFICER

Before Administrative Judges:

Thomas S. Moore, Chairman and Presiding Officer
Frederick J. Shon
James H. Carpenter

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2
(ASLBP Nos. 92-659-01-ML
92-664-02-ML-2)

SAFETY LIGHT CORPORATION, *et al.*
(Bloomsburg Site Decontamination;
License Renewal Denials)

June 11, 1992

ORDER

On April 13, 1992, the NRC Staff filed a motion seeking, *inter alia*, to have the portion of the *Safety Light* proceeding involving the Director's February 7, 1992 denial of the Licensees' renewal applications referred to the Chief Administrative Judge. By order dated June 1, 1992 (unpublished), we referred that portion of the proceeding to the Chief Administrative Judge and, on June 9, 1992, he severed the license renewal application denials from the proceeding and appointed a single presiding officer to hear that portion of the case.

The Licensing Boards in the *Safety Light* ML proceeding and the *Safety Light* ML-2 proceeding find that the consolidation of these two proceedings for all purposes will be in the best interests of justice and be most conducive to the effective and efficient resolution of the issues and the proceedings. In such circumstances, 10 C.F.R. § 2.716 empowers the presiding officers of the two

proceedings to consolidate them. Indeed, at the May 8, 1992 oral argument on its referral motion, the Staff conceded that the two proceedings, one a Subpart G proceeding and one a Subpart L proceeding, properly could be consolidated as a Subpart G proceeding pursuant to section 2.716.* Accordingly, the *Safety Light* ML and ML-2 proceedings are hereby consolidated for all purposes.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARDS

Thomas S. Moore, Chairman
and Presiding Officer
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Bethesda, Maryland,
June 11, 1992

*Tr. 61.

Moreover, the Staff also suggested (Tr. 97) at the May 15, 1992 prehearing conference in the *Safety Light* ML proceeding that the Licensing Board consolidate the OM and OM-2 proceedings with the ML proceeding for purposes of deciding the common jurisdictional questions. We shall revisit that suggestion after we receive the party's summary disposition filings on the jurisdictional issues.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. George A. Ferguson
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-322-OLA-3
(ASLBP No. 91-642-10-OLA-3)
(License Transfer)

LONG ISLAND LIGHTING
COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

June 17, 1992

ORDER

On June 3, 1992, the Petitioners, Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc., filed in the above-captioned license amendment proceeding a motion to dismiss, with prejudice, their pending intervention petitions and hearing requests. Counsel for the NRC Staff, the Long Island Lighting Company, and the Long Island Power Authority consent to the granting of the Petitioners' motion.

The Petitioners' motion to dismiss, with prejudice, is *granted*. Accordingly, the proceeding is terminated.

It is so ORDERED.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE**

**George A. Ferguson
ADMINISTRATIVE JUDGE**

**Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
June 17, 1992**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. George A. Ferguson
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-322-DCOM
(ASLBP No. 92-660-01-DCOM)
(Decommissioning Order)

LONG ISLAND LIGHTING
COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

June 17, 1992

ORDER

On June 3, 1992, the Petitioners, Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy, Inc. ("SE2"), filed in the above-captioned proceeding a motion to dismiss, with prejudice, their pending intervention petitions and hearing requests. According to the motion, it "is being submitted pursuant to the School District's and SE2's obligations pursuant to certain agreements, copies of which are attached."* The first attachment is a settlement agreement executed June 1, 1992, between the School District and SE2, on the one hand, and the Long Island Power Authority ("LIPA"), on the other hand, and settles all litigation between these parties. The second attachment is an agreement between LIPA, on the one hand, and the

*Petitioners' Consented Motion to Dismiss (June 3, 1992) at 2.

County of Suffolk, the Town of Brookhaven, and the School District, on the other hand, and relates to certain assessments, taxes, and payments in lieu of taxes. Counsel for the NRC Staff, LIPA, and the Long Island Lighting Company consent to the granting of the Petitioners' motion.

Although it is not entirely clear under the Commission's regulations that we need to approve the June 1, 1992 settlement agreement between the School District/SE2 and LIPA, we nevertheless have, pursuant to 10 C.F.R. § 2.203, reviewed it and conclude that the agreement and the termination of this proceeding are consistent with the public interest. Accordingly, the Petitioners' motion to dismiss, with prejudice, is *granted*; the settlement agreement (which is hereby incorporated by reference into this order) is *approved*; and the proceeding is *terminated*.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

George A. Ferguson
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 17, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 40-8027

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Facility)

June 7, 1992

The Director of the Office of Nuclear Material Safety and Safeguards denies a petition ("Limited Appearance Intervention and Objection to Renewal" filed before the Atomic Safety and Licensing Board presiding over the proceeding on the application for license renewal for Sequoyah Fuels Corporation's Gore, Oklahoma facility, and referred by the Licensing Board to the Nuclear Regulatory Commission Staff for consideration under 10 C.F.R. § 2.206) and a supplementary petition filed by Citizens' Action for a Safe Environment (CASE). The Petitioner requested that the NRC deny Sequoyah Fuels Corporation's (SFC) application to renew its license to operate the Sequoyah Fuels facility because of "the radionuclides and chemical toxics discharged by Sequoyah Fuels Facility [...] . . . the health affects [sic] to the general public," violations of regulatory requirements, and environmental and external cost concerns. In addition, Petitioner requested that the NRC issue a temporary order staying the restart of SFC's operation and revoke SFC's operating license because of the "licensee's unfitness to operate the facility."

**LICENSE RENEWAL APPLICATIONS: DECOMMISSIONING
FUNDING**

Lack of approved certification of financial assurance for decommissioning in the amount of \$750,000 is not a basis to deny a renewal application where the certification is an interim requirement intended to establish a minimum level of financial assurance for decommissioning pending license renewal, a

license condition currently requires the licensee to maintain a reserve account for decommissioning, and the reserve account contains over \$750,000.

NUCLEAR REGULATORY COMMISSION: AUTHORITY

The Nuclear Regulatory Commission has no authority to enforce the conditions of permits or licenses issued by other federal or state agencies.

MATERIALS LICENSES UNDER PART 40: AMENDMENTS

The demonstration section of a license (Part II, chapters 9-17 of the license application) is not incorporated into the license and does not contain license requirements, and, therefore, changes to the demonstration section do not require NRC approval or licensing action.

ATOMIC ENERGY ACT: TRANSFER OF CONTROL OF A LICENSE

A name change not associated with a change in corporate structure or ownership is not a transfer of control of a license requiring prior NRC approval in writing to be valid.

ATOMIC ENERGY ACT: MATERIALS LICENSES

The Atomic Energy Act of 1954, as amended, does not limit the terms of a materials license issued under 10 C.F.R. Part 40. As a matter of policy and discretion, the Commission sets the terms of materials licenses to protect the public health and safety.

RULES OF PRACTICE: RENEWAL APPLICATION; ORDER REVOKING LICENSE

Where petitioners have not provided the factual basis for their request with the specificity required by 10 C.F.R. § 2.206, action need not be taken on their request.

ATOMIC ENERGY ACT: SCOPE OF INTERESTS PROTECTED

Protection of economic interests is not within the scope of the Atomic Energy Act.

TECHNICAL ISSUES DISCUSSED

Benefits of installing autoclaves for heating cylinders filled with UF_6 ;
Segregation of process lab from environmental lab;
Solid waste disposal;
Substitution of H_2 for dissociated ammonia in UF_6 reduction plant;
Radiological contingency plan — frequency of exercises;
Detection level for analysis of fluoride and nitrates in effluents;
Groundwater monitoring and contamination;
Nitrate groundwater contamination from fertilizer application;
Actual health effects of facility.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

INTRODUCTION

By Memorandum and Order dated August 2, 1991 (unpublished), the Atomic Safety and Licensing Board presiding over the proceeding on the application for license renewal for Sequoyah Fuels Corporation (SFC) referred the Citizens' Action for a Safe Environment (CASE) "Limited Appearance Intervention and Objection to Renewal" (Petition), dated July 1, 1991, to the U.S. Nuclear Regulatory Commission (NRC or Commission) Staff for consideration as a petition under 10 C.F.R. § 2.206. The Petition requests that the Commission deny SFC's application to renew its license to operate the Sequoyah Fuels facility (facility) because of "the radionuclides and chemical toxics discharged by Sequoyah Fuels Facility[,] . . . the health affects [sic] to the general public," violations of regulatory requirements, and environmental and external cost concerns. The Petition alleged the following bases for CASE's request:

- (1) The SFC documentation purporting to meet a \$750,000 decommissioning funding requirement is inadequate because (a) the SFC letter of credit and Citibank authorization do not match, in that Citibank's assistant secretary states that Joseph Jaklitsch is a Services Officer but does not state that a Services Officer may sign and authenticate documents, does not state whether the letter of credit is a trust document, does not state whether the letter of credit is a trust certificate or any other instrument that may be authenticated and signed by the specified officers, or whether the letter of credit is held in trust; (b) the instrument submitted 1/4/91 and dated 7/27/90 is not *prima facie* binding; and (c) a decommissioning funding plan as per 10 C.F.R. § 40.36, was to have been submitted at the time of the renewal application request;

- (2) SFC is in violation of the license in that on 3 days in 1988 and 1989, measurements of water effluents were either not made or showed that certain measures fell outside ranges allowed by applicable environmental standards;
- (3) SFC promised to retrofit autoclaves on the main process building as a result of the 1986 offsite occurrence shutdown hearings and has not installed them;
- (4) since the last renewal, license amendments have been made which adversely affect and impair the safety and efficiency of the facility;
- (5) renewal for a term of 10 years is twice as long as is statutorily permitted;
- (6) SFC is spreading about 270,000 gallons per day of barium-treated uranium raffinate solvent extract as "fertilizer" on approximately 10,000 acres with cumulative loading Maximum Permissible Concentrations set so very high that fatal toxicity would result; in addition, this practice is antithetical to the 12/15/88 NRC "Review of Sequoyah Fuels Corporation 11/14/88 Report Entitled: The Behavior of Five Monitor Wells to Repetitive Evacuation," and soil farming should be halted under the Clean Water Act; and
- (7) the license fails to internalize the social and economic costs of the proposed activity onto the Licensee; in 1986, CASE requested the NRC to prepare an Environmental Impact Statement for the facility, and this request was never ruled upon by the NRC and remains pending.

By letter dated August 27, 1991, the NRC acknowledged receipt of the Petition and informed the Petitioner that the Petition would be reviewed in accordance with 10 C.F.R. § 2.206 of the Commission's regulations and that a decision would be issued within a reasonable time. The letter also provided the Petitioner the opportunity to submit a supplementary Petition to set forth the specifics of the concern in issue (4) which dealt with licensing amendments that have adversely affected and impaired the safety and efficiency of the facility.

On November 15, 1991, the Petitioner responded by submitting a "Supplemental Petition for Emergency and Remedial Relief" (Supplement). The Supplement specified six items under issue (4), described above. In addition, the Supplement requested that the NRC issue a temporary order staying the restart of SFC's operation and revoke SFC's operating license because of the "licensee's unfitness to operate the facility." The Supplement alleged the following six items as bases for CASE's request:

- (1) The name change from "New Sequoyah Fuels Corporation" to "Sequoyah Fuels Corporation" was intended to shield Sequoyah Fuels International, the holding company, from liability for the acts of Sequoyah Fuels Corporation — the Licensee in prior years; as a result,

in the event of a forced cleanup, attorneys responsible for identifying primarily responsible parties will have a tougher time of properly identifying the Parent Corporation;

- (2) the segregation of the process laboratory from the environmental laboratory results in an isolated testing environment not accurately reflecting the true radiological conditions at the facility and is an admission that background levels are so high as to influence environmental samples;
- (3) SFC revised its "Solid Waste" plan and notice was not given to interested parties of the revision;
- (4) a March 12, 1990 requested revision substituted hydrogen (H_2) for dissociated ammonia in the UF_4 facility, thereby significantly increasing fire risk within the facility; in addition, because the ammonia was the beneficial component in the raffinate that is used as fertilizer, surface application should be regulated as a waste stream and not as a beneficial "byproduct" of the process;
- (5) the September 7, 1990 license amendment request to reduce SFC's onsite emergency exercises from annual to biennial is unwarranted in light of the 1986 release of uranium hexafluoride into the atmosphere, because SFC did not identify what percentage of Plan cooperating agency personnel have never been through a drill; and
- (6) on September 11, 1989 revisions to chapter 5 of the license application were made, which (a) do not appear in the license and increased the facility's permissible effluent discharge of fluoride in violation of the Clean Water Act, (b) set nitrate discharge levels at double the maximum permissible level allowed for public and private drinking water supplies, and (c) reduced monitoring frequency for wells, allowing the facility to continue to weaken its permit with less frequent modifications.¹

By letter dated December 23, 1991, the NRC acknowledged receipt of the Supplement, informed the Petitioner that the Supplement would be reviewed in accordance with section 2.206 of the Commission's regulations and that a decision would be issued within a reasonable time, and denied the Petitioner's request for immediate relief.

I have now completed my evaluation of the matters raised by the Petitioner in both the Petition and the Supplement and have determined that, for the reasons stated in this Decision, the Petitioner's request should be denied.

¹ In addition, Petitioner asks the Staff to inquire whether "[r]adium limits should be set by Oklahoma, since Gross Alpha maximums would subsume these." Since no further explanation of this matter was provided, the Staff declines to make such an inquiry. However, radium discharge limits are set by 10 C.F.R. Part 20, Appendix B, Table II, col. 2, and fall under the NRC's jurisdiction.

BACKGROUND

On August 29, 1990, SFC submitted an application to renew Source Material License No. SUB-1010, which authorizes SFC to operate the Sequoyah Fuels facility. In response, on September 28, 1990, Native Americans for a Clean Environment (NACE) filed a request, pursuant to 10 C.F.R. § 2.1205, for a hearing on the application. On January 24, 1991, the Licensing Board issued an order in which it granted NACE's request for a hearing. *See* LBP-91-5, 33 NRC 163 (Memorandum and Order (Requests for Hearing and Petitions for Leave to Intervene)). The order afforded other interested persons the opportunity to file petitions for leave to intervene within 30 days of the order's publication, i.e., by March 25, 1991. CASE filed its Petition on July 1, 1991, and provided no explanation for the delay. On August 2, 1991, pursuant to 10 C.F.R. § 2.1205(k)(2), the Licensing Board issued an order (unpublished) referring CASE's Petition to the NRC Staff for consideration under section 2.206. On November 15, 1991, CASE filed a Supplement with the NRC Staff for consideration under section 2.206.

DISCUSSION

In the Petition, CASE opposes SFC's license renewal and requests that the Commission deny renewal of the SFC license. In the Supplement, CASE opposes the restart of the SFC facility and requests revocation of the SFC license. As discussed above, the Petitioner raises seven issues as grounds for its requested relief. Each issue is considered below.

1. Decommissioning Funding

The Petitioner asserts that SFC's license requires that adequate assurance of funding for decommissioning be provided, and the Petitioner questions the adequacy of SFC's decommissioning submittals. The Petitioner asserts that on January 4, 1991, SFC submitted inadequate documentation purporting to meet the \$750,000 decommissioning funding requirement. Petitioner further asserts that the letter of credit and Citibank authorization do not match; that Citibank's assistant secretary does not state that a Services Officer may sign and authenticate documents; that the document does not state whether the letter of credit is an instrument that may be authenticated and signed by the specified officers; that the document does not state whether the letter of credit is held in trust; and that the instrument submitted January 4, 1991, and dated July 27, 1990, is not *prima facie* binding.

The regulations in 10 C.F.R. § 40.36(c)(2) require that licensees authorized to possess certain amounts of source material submit, on or before July 27, 1990, a decommissioning funding plan or certificate of financial assurance for decommissioning in an amount at least equal to \$750,000. On July 26, 1990, SFC submitted its financial assurance package intended to meet the requirements of section 40.36 and provided supplemental information on January 4, 1991. The January 4, 1991 submittal was additional information to address some deficiencies related to the July 26, 1990 submittal. The January 4, 1991 letter makes it clear that the submittal is additional information and was not intended to meet the \$750,000 certification requirement by itself.

The Staff has reviewed SFC's financial assurance documents and has identified four deficiencies, which are documented in a March 4, 1992 letter to SFC. The deficiencies involve the standby trust agreement, the letter of credit, and the letter of acknowledgment and are described below. First, SFC has been requested to amend the notification-of-nonrenewal provision in the letter of credit to require notification by "certified mail, as shown in the signed return receipts" instead of by registered airmail as shown on the signed return receipt. Second, SFC has been requested to resubmit the letter of acknowledgment with the standby trust agreement since the submitted letter certifies the signature and authority of the financial institution representative to execute a letter of credit for the bank, but does not verify the execution of the standby trust agreement. Third, SFC has been requested to modify the withdrawal limit of the standby trust agreement from 50% to 10%. Finally, SFC has been requested to modify section 11 of the standby trust agreement concerning trustee consultation with counsel.

The January 4, 1991 documents on which Petitioner relies to support the assertion that the submittal is inadequate was not the complete certification package. Based on the complete certification package, the Petitioner's alleged deficiencies, as described above, raise valid assertions only insofar as they relate to the failure of SFC's submitted acknowledgment letter to verify the execution of the standby trust. SFC will be required to correct this deficiency, as well as the other deficiencies identified by the Staff.

The lack of an approved certification of financial assurance for decommissioning in the amount of \$750,000, however, is not a basis to deny the renewal application for the following reasons. First, the requirement for the \$750,000 certification is an interim requirement intended to establish a minimum level of financial assurance for decommissioning pending the license renewal. The July 26, 1990 and January 4, 1991 submittals are not part of the renewal application, but relate to the current license and will be superseded by the decommissioning funding plan upon license renewal. Second, SFC is required by the license to maintain a reserve account for decommissioning; the account currently contains over \$750,000. This license requirement served a function similar to section

40.36 prior to the codification of section 40.36. While this requirement is more substantial than the certification requirement of section 40.36, it too was not intended to provide the level of financial assurance for decommissioning that a decommissioning funding plan provides. The reserve account requirement will also be superseded by the decommissioning funding plan upon license renewal. Therefore, the alleged and real deficiencies in the January 4, 1991 submittal do not provide a basis to deny the license renewal application.

The Petitioner asserts that the renewal application is incomplete in that it lacks a decommissioning funding plan and, therefore, the license renewal application cannot be granted. SFC did submit a document with the renewal application titled the "Decommissioning Funding Plan for Sequoyah Facility." In the funding plan, SFC committed to provide financial assurance for decommissioning in the form of an irrevocable standby letter of credit that meets the criteria in 10 C.F.R. §40.36(e). SFC will execute the letter of credit once the NRC accepts the Decommissioning Funding Plan. As SFC has submitted such a plan, the Petitioner's contention regarding the lack of a decommissioning funding plan provides no basis for denying SFC's license renewal application.

2. Historical Violations

The second reason the Petitioner asserts for denial of the license is that SFC was in violation of its license four times in 1988 and 1989 and that these historical violations show that SFC lacks the requisite expertise and character to operate the facility. The four violations referred to by the Petitioner were not violations of NRC regulations or SFC's NRC License No. SUB-1010, but were violations of the National Pollution Discharge Elimination System (NPDES) permit that is issued by the U.S. Environmental Protection Agency (EPA). Although the NRC may review the general compliance history and the status of both the NPDES permit and the Oklahoma Water Resources Board (OWRB) discharge permit issued to the facility as part of an environmental review under 10 C.F.R. Part 51, the NRC has no authority to enforce the conditions of the permits. Only EPA and OWRB have jurisdiction to enforce these discharge permits. Violations of these permits do not constitute violations of the NRC-issued license or any other regulatory requirement of the Commission. The Petition does not present any reasons why these violations demonstrate SFC to be unfit to operate the facility in any other respect. Accordingly, the alleged violations are no basis to deny SFC's application for renewal of its NRC license.

3. Retrofitting of Autoclaves

The Petitioner asserts that at the time of the last renewal, SFC made promises that it did not keep regarding operating parameters. Specifically, the Petitioner asserts that autoclaves² were to be retrofitted in the main process building as a result of the 1986 offsite-occurrence shutdown hearings and pursuant to promises made in the House Subcommittee Hearings (Markey Investigation). The Petitioner notes that these autoclave plans were abandoned, and no autoclaves have been installed.

Petitioner's concern regarding autoclaves is rooted in the following sequence of events. On January 4, 1986, a 14-ton cylinder filled with uranium hexafluoride ruptured while it was being heated in a steam chest at the Sequoyah Fuels facility. The rupture resulted in a release of uranium hexafluoride. The incident occurred because SFC heated a cylinder containing uranium hexafluoride in excess of the normal limits for filling in a steam chest without knowing the actual amount of material in the cylinder or providing for pressure measurement, venting, and automatic termination of heating while the cylinder was in the steam chest. As a result of the accident, SFC suspended its operations and was not allowed by the NRC to restart the facility until October 14, 1986.

In response to the accident, SFC modified the operation of the steam chests and the procedures for heating cylinders in steam chests. The steam chests have been modified by providing pressure-sensing instrumentation for the cylinder to be heated. The pressure sensor is interlocked with the steam heat system to automatically terminate heating and provide both local and control room alarms on a high pressure measurement. Filled uranium hexafluoride cylinders are not heated in steam chests unless the overpressure sensor and steam interlock shutoff system are operable. In addition, cold traps connecting to the steam chests through a new drain line allow removal of uranium hexafluoride from the cylinder during heating.

Additionally, SFC installed an in-line sampling system in the cylinder filling area. Previously, heating of cylinders was required to obtain a sample for chemical analysis. Samples from the cylinders are now obtained during filling, thereby reducing the number of cylinders that must be heated. Generally, only cylinders that do not meet product specifications (e.g., concentration, purity) are now heated. Currently, cylinders containing product that does not meet specifications are heated in order to withdraw the UF_6 and return it to the process.

SFC now uses two separate scales for measuring the amount of uranium hexafluoride in a cylinder, providing reasonable assurance that a malfunction of a scale will not, in itself, result in the overfilling of a cylinder. SFC has installed

² An autoclave is an apparatus that uses superheated steam under pressure to heat the contents of a cylinder.

a photoelectric switch to confirm that the cylinder cart is properly positioned on the weighing scale platform while it is being weighed. An interlock between the switch and the uranium hexafluoride filling valves prohibits filling if the cylinder is improperly positioned (i.e., is not completely on the scale). The use of interlocks with the scale cart position switch and weigh scales reduces the dependence that must be placed on operators to ensure correct weighing and filling. These checks reduce the likelihood of overfilling as a result of scale errors.

Following the January 4, 1986 accident, SFC appeared before the Commission at an NRC briefing on March 13, 1986. During the briefing, SFC made a commitment to evaluate the benefits of replacing the facility's existing heat chests with autoclaves for heating and sampling. On March 14, 1986, SFC appeared before the House of Representatives' Environment, Energy, and Natural Resources Subcommittee of the Committee on Government Operations, which was chaired by Congressman Synar. Mr. Randolph, President of SFC at the time, said in his opening statement before the Subcommittee that "we are evaluating the benefits of replacing the facility's existing heat chests with autoclaves for heating and sampling." Under questioning from the Subcommittee about adding autoclaves, Mr. Randolph stated "That — as I mentioned, as our statement — it is our intent, to put those devices in." Mr. Randolph's latter statement is ambiguous. SFC's statements to the Commission, however, were clear, namely that SFC would evaluate the benefits of installing autoclaves. SFC did not indicate to the Commission that it had already decided to install autoclaves. As explained below, SFC did, in fact, evaluate the benefits of installing autoclaves and the NRC Staff agreed with SFC that it was not necessary to install autoclaves at Sequoyah Fuels to protect public health and safety.

By letter dated October 30, 1986, SFC submitted a report, "Probabilistic Risk Assessment Concerning UF_6 Heating in Autoclaves versus Modified Steam Chests" (PRA report), dated August 1986. In the report, SFC concluded that autoclaves did not provide any significant increased safety margin over the modified steam chest operation. NRC hired an independent organization, Martin Marietta Energy Systems, Inc. (MMES), to review the PRA report and SFC's "Analysis and Improvements in Handling Procedures for Product Cylinders Containing Liquid UF_6 ," Volumes I and II, dated April 1986. MMES's independent review was documented in a May 6, 1988, "Independent Review of Documents Assessing the Comparative Risks of Heating UF_6 Cylinders" (MMES review). The conclusion of the MMES review was that a more comprehensive risk assessment was needed to substantiate the conclusions of the SFC report. By letter dated March 3, 1989, the Staff forwarded the MMES issues to SFC for further analysis. SFC responded by letter dated June 19, 1989, noting that the installation of an in-line sampling system in the cylinder filling area enables SFC to heat only those uranium hexafluoride cylinders where the contents do

not meet product specifications. In addition, process improvements, such as uranium hexafluoride filtering (which filters out contaminants), have reduced the number of cylinders containing out-of-specification products. As a result, the incidence of heating product cylinders in the modified steam chest has decreased significantly. Based on the changes SFC made, as described above, the reduced number of heated cylinders, and the improved cylinder weighing procedures established since the 1986 restart, the Staff determined that SFC did not need to further evaluate autoclaves. SFC did satisfy its commitment to evaluate the use of autoclaves, and the NRC Staff agreed that, based on the changes SFC made, there was no need to require SFC to replace the steam chests with autoclaves. Therefore, this is not a basis for denying SFC's application to renew the license.

4. Licensing Amendments Adversely Affect Safety

The Petitioner asserts that license amendments made since the 1985 renewal adversely affect and impair the safety and efficiency of the facility and that SFC, through amendments, has systematically regressed to pre-accident health and safety procedures. The Petitioner also claims that this concern can only be thoroughly presented in an evidentiary hearing. The Petition does not provide any specifics relating to this concern. In the Supplement, the Petitioner specified six items, including four amendments submitted on February 12, 1990, a revised Radiological Contingency Plan submitted on September 7, 1990, and an application omission on September 11, 1989, to support the allegation that safety has been eroded by issuance of these amendments. Each is considered below.

A. The Petitioner states that four proposed amendments were submitted on February 12, 1990. Petitioner alleges that these amendments deal with a corporate name change, segregation of the process laboratory from the environmental laboratory, revision of the solid waste provisions, and elimination of the use of dissociated ammonia. SFC's February 12, 1990 submittal dealt with four issues: (1) a corporate name change; (2) a reorganization of plant personnel that involved a title change and a reporting change; (3) decontamination; and (4) UF_6 reduction plant process changes. The actual amendment to SFC's license involved only the corporate name change and the reorganization-and-concern Part I of the license application. Part I (chapters 1-8) of the license application contains the proposed license conditions which state the performance requirements and are license requirements. Part I of the application is incorporated into the license. The amendment approving these changes was issued on March 26, 1990. In contrast, the decontamination and process change issues involved a change to the demonstration section (Part II) of the license application. The demonstration section consists of chapters 9-17 of the license application and is not incorporated into the license. Accordingly, Part

II of the license application does not contain license requirements and therefore does not require NRC approval or licensing action. *See* Regulatory Guide 3.55, April 1985.

(1) The first issue from the February 12, 1990 submittal is related to a corporate name change. The Licensee at the time, New Sequoyah Fuels Corporation, changed its name to Sequoyah Fuels Corporation. The Petitioner alleges that the name change was intended to shield the Licensee's parent corporation, Sequoyah Fuels International, from liability for the acts of the former licensee, Sequoyah Fuels Corporation. The Licensee's February 12, 1990 license amendment application requested that the name on the license be changed from New Sequoyah Fuels Corporation to Sequoyah Fuels Corporation and the name of the Licensee's parent simultaneously be changed from Sequoyah Fuels Corporation to Sequoyah Fuels International Corporation. These transactions resulted in no change to the Licensee or its parent except for their names. No change in corporate structure or ownership was associated with these name changes, nor did the name change involve a transfer of control of the license. Unlike a transfer of control of a license, a name change does not affect liability. Pursuant to section 184 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2234), a transfer of control is not valid unless the Commission obtains full information regarding the proposed transfer and gives its consent in writing prior to the transfer. The name change here involved no such transfer of control of a license. Accordingly, this amendment did not have any effect on liability.

The Petitioner has not made any argument that the amendment decreased safety. To the contrary, the Petitioner states that the amendment does not appear to diminish the effectiveness of the operation. The Petitioner does allege that in the event of a forced cleanup, it would be difficult to identify the primarily responsible party. The Staff disagrees. The Licensee at the time of cleanup will be primarily responsible for all cleanup activities. The Petitioner has not provided a basis either to revoke the license or deny license renewal.

(2) The second issue from the February 12, 1990 submittal deals with segregating the process laboratory from the environmental laboratory. The Petitioner alleges that this change adversely affects the public health and safety by allowing the Licensee a testing environment that does not reflect the real radiological conditions at the facility. The Petitioner further alleges that the Licensee admits that the background levels are so high as to influence environmental samples.

The actual licensing action involved a reorganization approval that changed reporting requirements for the lab managers. The movement of the environmental laboratory into a separate and dedicated facility did not require NRC approval or a licensing action. In any case, the movement of the environmental laboratory into a separate building is an improvement. The Petitioner has confused the background levels of the laboratory, which should be as low as

possible, with ambient background levels around the facility. The process lab is used to analyze process samples, some of which exhibit high radioactivity concentration. The presence of process samples will increase the background in the laboratory for environmental sample analysis. A high background from a process sample may dwarf the low activity of an environmental sample, thus making the latter more difficult to measure. Because the background should be lower in the new environmental lab, the minimum detectable levels should be reduced, allowing environmental samples of lower concentration to be analyzed. Background does not affect the concentration of the sample, merely the minimum detectable levels. The samples themselves are not affected by the background, only the analysis of the samples. The background referred to is the background for sample analysis and not the background or concentration levels that exist in various environmental media outside of the facility. For the reasons given above, the movement of the environmental laboratory into a separate and dedicated facility should improve the accuracy of measurements. The Petitioner has not, therefore, provided a basis to revoke the license or deny the license renewal application.

(3) The third issue from the February 12, 1990 submittal deals with the solid waste provisions of the facility's license. The Petitioner states that CASE was a party to a hearing before an Administrative Judge on the Solid Waste Plan and objects that notice was not given on the alleged revision to this plan. The Solid Waste Plan, submitted on May 25, 1985, sought authorization under 10 C.F.R. § 20.302 to dispose of contaminated materials at the Sequoyah facility. On November 2, 1987, the Administrative Judge terminated the proceeding based on SFC's commitment to dispose of contaminated sludges and refuse by transfer to other licensees authorized to receive them under 10 C.F.R. § 40.51(b)(5). The Administrative Judge determined that, as a result of SFC's commitment, there was nothing pending before him that required an authorization pursuant to section 20.302, and, accordingly, that he had no jurisdiction to consider any matters that had been raised in the proceeding. In addition, the Administrative Judge noted that in the event SFC failed to meet its commitment, it would be required to seek approval of some onsite disposal plan pursuant to section 20.302, and a new hearing could be initiated.

The change the Petitioner refers to was a change to chapter 10 of the demonstration section of the license application; it did not require NRC approval or a licensing action, and it did not involve the Solid Waste Plan described above. Rather, this change related to the process for sorting contaminated waste from uncontaminated waste. In short, the change did not involve onsite disposal under section 20.302 and, consequently, Petitioner was not deprived of an opportunity to initiate or participate in a hearing concerning any such onsite disposal. Moreover, the Petitioner does not claim that operational safety was

decreased by this action. Accordingly, this concern does not provide any basis to revoke the license or deny the license renewal application.

(4) The fourth issue from the February 12, 1990 submittal concerns the use of hydrogen instead of dissociated ammonia in the UF_6 reduction plant (Petitioner refers to this as the UF_4 facility). The process in the UF_6 reduction plant involves the chemical reaction of UF_6 with hydrogen to produce UF_4 and anhydrous hydrofluoric acid. The off-gases containing any excess hydrogen are routed to the off-gas treatment, hydrofluoric acid recovery, a hydrogen burner to burn excess hydrogen, and then to the HF scrubber. The only change to the process is the source of the hydrogen, not the actual use of hydrogen in the process. Previously, SFC used dissociated ammonia as the hydrogen source. Dissociated ammonia is ammonia that has been separated into hydrogen and nitrogen. The Petitioner alleges that the substitution of hydrogen significantly increases the fire risk in the facility and that the change in the process stream has a consequence to the composition of the treated raffinate that is used as fertilizer. Although this modification was to chapter 16 of the demonstration portion and did not require any licensing action by the Staff, the Petitioner's concerns are addressed below.

The Petitioner claims that substitution of hydrogen for dissociated ammonia significantly increases fire risk within the facility and that SFC should have conducted an assessment of the adequacy of the fire protection system because of the increased risk. Petitioner does not explain why it believes that the fire risk has increased other than to state that flaring-off hydrogen creates a risk because of the toxicity of the process chemicals and product. However, hydrogen (from the dissociated ammonia) has always been used in the reaction, and the off-gas has always been routed to a burner to burn the excess hydrogen. Consequently, there is no greater fire risk due to this change. In fact, the elimination of the risk of accidentally introducing raw anhydrous ammonia, which is also a flammable gas, is a positive factor in favor of the change because the accidental introduction of ammonia into the process could result in a reaction with the uranium hexafluoride and production of an unwanted byproduct. The toxicity of the process chemicals and product do not affect the potential for a fire to occur. Accordingly, no increase in fire risk should result from the change. In addition, SFC limits the risk of fire by utilizing ambient-air hydrogen detectors that alarm at 1% hydrogen concentration and shut off gas flows of 2% hydrogen.

The facility is served by a fire-main system, part of which loops around the UF_4 building, where the process takes place. There is an adequate number of fire hydrants in the loop. The fire main is supplied by two 2000-gpm (gallon per minute) fire pumps from a 250,000-gallon storage tank and the perennial source of the Tenkiller Reservoir. Because the fire risk to the building has not increased, the capacity of the system for supplying water to fight fires, augmented by portable extinguishers, continues to be adequate. The Petitioner

has not shown that there is a significant increase in the fire risk and has provided no basis to revoke the license or deny the license renewal application.

The Petitioner alleges that the substitution of hydrogen will adversely affect the beneficial component of the treated raffinate. The change actually has no effect on the raffinate program. The hydrogen is used as a reactant in the uranium hexafluoride reduction process described above. The UF_6 reduction process does not generate liquid wastes. The raffinate program is associated exclusively with the uranium hexafluoride conversion facility. The claim that the change will adversely affect the raffinate program is incorrect and does not provide a basis for the requested relief.

In sum, Petitioner has not shown that the changes authorized when the February 12, 1990 submittal was incorporated into the license have decreased the safety of the facility operations. Therefore, no basis has been provided for revocation of the license or denial of the license renewal application.

B. Petitioner alleges that a September 7, 1990, revision to the Radiological Contingency Plan (RCP), which reduces the frequency of the onsite emergency exercise from annual to biennial, is against the public safety. The Petitioner asserts that SFC has not identified employee turnover and the percentage of cooperating agency personnel who have never been through a drill. The Petitioner contends that turnover is important because high turnover means that key employees may have never been involved in a walk-through.

The NRC approved the change because it was consistent with recently promulgated 10 C.F.R. § 40.31 requirements regarding emergency preparedness for major fuel cycle facilities. 54 Fed. Reg. 14,051 (Apr. 7, 1989). The new regulation codified the requirement that major fuel cycle licensees maintain emergency plans and established the biennial interval for exercises. While the frequency of *exercises* was changed from annual to biennial, the *drill* frequency was not changed. An exercise is designed to measure the integrated capability of the participants and covers a major portion of the elements of the RCP. The exercise is accomplished through a formal, detailed scenario, using observation and control personnel. A drill is a supervised instruction period to test, develop, and maintain skills in emergency response. SFC conducts monthly drills of the communications systems, which include the air sirens and the automatic telephone dialing system. SFC also conducts fire drills three times a year; semiannual onsite hazards control and assessment drills for liquid and airborne releases; annual medical emergency drills involving a simulated contaminated victim; and an annual radiological monitoring drill. Additionally, the SFC license requires that all employees receive training in the emergency requirements and procedures, as part of the general employee training; and the annual retraining program includes the emergency plan. Employees receive training and walk-through experience through the training program and drills. With respect to employee familiarity with emergency procedures, the change

from annual to biennial onsite emergency exercises should not significantly affect preparedness. Additionally, the requirements for training of newly hired employees (the general employee training) and the frequency of drills indicates that employee turnover will not be a problem with respect to emergency preparedness. As for offsite response group participation, these groups are invited, but are not required by the regulation to participate in the exercises.

The Petitioner has failed to show that the change to a biennial exercise in accordance with regulations promulgated for major fuel cycle facilities or the other concerns asserted by Petitioner regarding emergency preparedness will adversely affect the safety of the public or the facility. The change to a biennial exercise is consistent with requirements in section 40.31 and does not provide an adequate basis to revoke or deny the license.

C. The Petitioner alleges that on September 11, 1989, changes were made to chapter 5 of the license application which do not appear in the license. However, the September 11, 1989 proposed changes to chapter 5 were approved by license amendment on October 6, 1989, and became part of the license at that time. The Petitioner further alleges that the changes increased the permissible amount of fluoride that could be discharged. The limit on fluoride discharge is not set by the NRC but by the OWRB and EPA. The OWRB has set the maximum allowable concentration on fluoride discharge for SFC's liquid effluent at 1.6 milligrams/liter (mg/l); this value was not changed by the license amendment. The change SFC requested in the NRC license involved the detection level for sample analysis and the action level. The action level is the effluent concentration, which triggers a licensee investigation; it is not a discharge limit. The NRC did not change the discharge limit.

The Petitioner also alleges that the nitrate discharge limits have been set above the maximum level allowed for drinking-water supplies. Again, the NRC does not set the limits on nitrate discharges. The OWRB discharge permit sets the maximum allowable concentration for nitrates at 20.0 mg/l. SFC changed the detection level and the action level for nitrates in the NRC license. The amendment did not change the discharge limit.

The Petitioner also states that radium-226 and thorium-230 were addressed before the OWRB. However, Petitioner does not state how radium or thorium were addressed or any reasons as to how this has decreased safety. The Petitioner asks the Staff to inquire whether "[r]adium limits should not be set by Oklahoma, since Gross Alpha maximums would subsume these." The Petitioner does not give further explanation of this matter. The NRC has no authority over the Oklahoma Water Resources Board. In any case, the maximum permissible concentrations for radium and thorium are established by the NRC in 10 C.F.R. Part 20, Appendix B, Table II; these limits were not changed by the licensing action. Only the detection levels and the action levels were changed by the licensing action.

The Petitioner further alleges that the monitoring frequency for wells was reduced and that this reduction allows the monitoring results to be stretched out over time, "thereby weakening its permit with less-frequent modifications." The change requested by SFC involved three wells, which are used to monitor the clarifier ponds, the sanitary lagoon, and the emergency basin. The monitoring frequency was changed from monthly to quarterly. (The frequency change had actually been approved in October 1988; the September 11, 1989 submittal corrected typographical errors.) It is not clear exactly what the Petitioner is referring to by "less-frequent modifications" of the permit. SFC is required by its license to sample each of the three wells in question on a quarterly basis; this frequency cannot be decreased without approval from the NRC. Due to the slow rate of groundwater movement, the quarterly sampling is adequate.

The Petitioner further states that recent findings (it is assumed the Petitioner is referring to the discovery of groundwater contamination around the process buildings) have reduced the Licensee responsiveness to concerns for the public health and safety. The groundwater contamination is located on SFC property and is not an immediate threat to the public health and safety. The groundwater is not used as a drinking-water source. The Licensee has recently completed a facility environmental investigation that included installation of additional groundwater monitoring wells. SFC has also installed recovery wells to recover the uranium from the groundwater. The Petitioner alleges that the widespread contamination has been concealed over time by changing the sampling locations and confusing the tracking system. SFC cannot change the sampling locations without NRC approval. Any changes in the required monitoring program can be tracked through various licensing amendments. The Petitioner has not provided any information as to how the public health and safety have been impacted. No basis has been provided to revoke the license or deny the renewal application.

In summary, the Petitioner states that the modifications have reduced the Licensee's ability to protect the public health and safety and that the changes have resulted in increased medical expenses, modification of diet, restricted use of property, and diminished values for land and homes, but gives no bases for these contentions. The Petitioner has failed to support any of its allegations and has failed to show that the safety of the facility has been diminished by any of the licensing actions.

5. Renewal Term

The Petitioner asserts that the requested renewal term of 10 years is twice as long as is statutorily permitted. Section 103 of the Atomic Energy Act of 1954, as amended (Act) (42 U.S.C. § 2133(c)), limits the terms of licenses for production and utilization facilities. The Sequoyah facility is neither a production nor a utilization facility, as defined in the Act, § 11v and cc (42

U.S.C. §2014v, cc). The Act does not otherwise limit the term of a license. Rather, as a matter of policy and discretion, the Commission sets the terms of other licenses to protect the public health and safety. The current policy extending the term for fuel cycle licensees from 5 to 10 years was published in the *Federal Register*. 55 Fed. Reg. 24,948 (June 19, 1990). Uranium conversion facilities, including SFC, were specifically included in the policy to extend the license term. The main reason for the extension is that major operating fuel cycle facilities have become quite stable in terms of significant changes to their licenses and operations.

6. SFC's Ammonium Nitrate Fertilizer Program

The Petitioner asserts that the SFC license should not be renewed due to the use of treated raffinate as fertilizer. The Petitioner states that the use of treated raffinate as fertilizer is antithetical to the December 15, 1988 NRC "Review of Sequoyah Fuels Corporation November 14, 1988, Report Entitled: 'The Behavior of Five Monitor Wells to Repetitive Evacuation.'" With regard to groundwater contamination, the Petitioner quotes the December 15, 1988 report to support the position that the license should not be renewed because of the contamination problem perpetuated by the fertilizer application program. However, this report does not analyze the current application program but concerns the ponds used to store the treated raffinate, specifically with three wells that are part of the groundwater monitoring network for the storage ponds (ponds 3-6). After reviewing the available information, the NRC Staff concluded that the major contributor to the elevated nitrate levels in the three wells was thought to be due to past fertilizer application, as described below, and not pond leakage or the current fertilizer program.

Prior to the construction of the first ponds in 1978, the area was used for a fertilizer application test program which included saturation applications to determine maximum vegetation and soil uptake. A 1982 NRC Environmental Impact Appraisal, conducted prior to approval of the use of treated raffinate as fertilizer, concluded that overfertilization was found to leave an undesirable quantity of residual nitrogen that may eventually percolate into the groundwater table and degrade it. To account for this potential problem, the license limits the maximum application of nitrogen to 700 pounds of nitrogen per acre per year. The conclusions quoted by the Petitioner that "the recommended course of action for this particular site would be to aggressively pursue the elimination of any additional nitrate releases into the ground water" and "[i]t would be truly unfortunate to create an additional nitrate plume that is incapable of being rapidly remediated . . . to prevent further ground water contamination from occurring" refer to the ponds and various impoundments on the site and not to the fertilizer application program. Specifically, the nitrate plume discussed is

from pond 2. Pond 2 was an unlined pond that is no longer used. SFC has remediated this pond by removing the liquid and sludge and placing a liner over the bottom of the pond to limit further impact.³

The Petitioner claims that the soil farming should be discontinued under the Clean Water Act. The Commission does not have authority to enforce the Clean Water Act, and therefore, the Clean Water Act does not form a basis for the Commission to deny SFC's application to renew the license.

The Petitioner claims that application levels are so high in liquid concentration that runoff impacting public waters is occurring; that the cumulative loading maximum permissible concentrations are set so very high that fatal toxicity would result at those levels; and that soil farming of barium-treated uranium raffinate solvent extract should be halted altogether due to the high potential for severe public health impacts. Petitioner speculates that the fertilizer is impacting the surface water and public health without any specific supporting information. The use of treated raffinate as fertilizer has been thoroughly reviewed by the NRC. The environmental impacts of using the treated raffinate as fertilizer were evaluated in the Environmental Impact Appraisal of the Proposed Amendment for Use of Raffinate (March 1982) (EIA), and a Safety Evaluation Report (SER) was issued on June 30, 1982. The EIA included a consideration of the effects upon surface water and groundwater. No significant radiological health and safety concerns were identified in connection with the use of barium-treated neutralized raffinate as a fertilizer. The raffinate fertilizer program was also included in the environmental review conducted for the 1985 license renewal. The 1985 environmental assessment concluded that continued use of raffinate-treated vegetation for forage should have no significant impact on cattle or humans. The concentrations of radionuclides in the treated raffinate are well below the 10 C.F.R. Part 20 limits for unrestricted release of radionuclides in water. The concentration of radium-226 is also below levels for drinking water specified by EPA in 40 C.F.R. Part 141 (Interim Primary Drinking Water Regulations).⁴ The radium-226 and uranium concentrations are limited by the license to 2 picocuries/liter (pCi/l) and 0.1 mg/l, respectively. Calculated dose commitments, which could result from the use of treated raffinate as fertilizer and human consumption of food products grown using treated raffinate as fertilizer, were determined to be far below the limits in 10 C.F.R. Part 20 and those established by EPA in 40 C.F.R. Part 190. The program is conducted such that the nonradioactive trace elements are within the limits recommended by the National Academy of Sciences, considering both long-term buildup in soils and

³ During an inspection held on March 3-6, 1992, documented in Inspection Report 92-02 dated April 13, 1992, the Staff noted that there is now a well-defined nitrate plume that is expanding under the ponds used to store treated raffinate. The plume is not a result of the application program, but results from pond leakage.

⁴ EPA's interim regulations presently allow up to 5 picocuries of radium per liter of water. The raffinate fertilizer contains approximately 1 pCi/l. Final regulations have not been promulgated.

content of the forage produced. The use is limited to crops that are not used directly as human food.

In sum, the Petitioner's concerns over the fertilizer program do not provide an adequate basis for the requested relief. The use of ammonium nitrate raffinate in the fertilizer program has been evaluated and determined by the NRC to present no undue risk to public health and safety or the environment. The Petitioner presents no new facts or data that afford an adequate basis for reevaluating this determination.

7. Failure to Internalize the Cost of the Proposed Activity

The final topic discussed in the Petition concerns the failure of the Licensee to internalize the social and economic costs of the license renewal. Additionally, the Petitioner states that in 1986, CASE requested that the NRC prepare an Environmental Impact Statement for the facility and that this request was never ruled upon by the NRC and remains pending.

Social Costs

Petitioner claims that social costs are being externalized onto the community, the area, and state and federal taxpayers. These social costs are alleged to include a higher incidence of cancer and birth defects to area residents and an increase in overall health consequences due to exposure to the facility's product and effluent stream. The Petitioner has alleged that facility operations have negatively affected the health of the public, but has provided no details to support this assertion. While the Petitioner has referenced a number of documents, it has articulated no arguments as to how any of these documents support the allegation of increased health consequences from SFC effluents.

The Staff has analyzed the potential and known actual health effects of the facility by reference to the Commission's regulations and empirical studies of the health of workers at the facility. Releases from the plant are limited by the Commission's rules in 10 C.F.R Part 20, Appendix B, Table II, that are based on scientific data and that the NRC considers to provide adequate protection to the public health and safety. With the exception of the 1986 accident, described above, NRC is not aware of any information or data that establish a connection between SFC activities and adverse health consequences. After the 1986 accident, some individuals within the plume did experience hydrogen fluoride skin burns, acute irritation of the eyes and mucosal surfaces, and acute respiratory irritation. Respiratory irritation resulting in pulmonary edema was fatal to one worker. However, medical data and uranium bioassay data from the exposed workers were collected over a 2-year period; and analysis of the

data showed no evidence of long-term toxicological damage to kidneys of SFC workers, the primary health effect of concern from intake exposure of soluble uranium (NUREG/CR-5566). NUREG-1391 compares the chemical effects from acute exposures to uranium hexafluoride to the nonstochastic effects from acute radiation doses of 25 rems to the whole body and 300 rems to the thyroid. The document does not support the allegation of increased health consequences from SFC effluents. The comments of Ms. Pat Costner on NUREG-1189, to which the Petitioner refers, were reviewed by the NRC and the Ad Hoc Task Force that prepared NUREG-1189. On February 6, 1987, the NRC responded by letter to Ms. Costner's critique of NUREG-1189. The Petitioner has not provided any specific information that effluents from the SFC facility have negatively affected the health of the public. Without specific information to support the allegation, further action is not warranted.

The Petitioner further states that social costs include the foregone use value of converting the facility to nontoxic use; that socially beneficial (sustainable) goods and services could be produced, manufactured, or managed on the land; and that the property could be restored to productive habitat. Thus the Petitioner asks the Commission to choose a use for the facility different from that chosen by SFC, without any demonstration that SFC is in violation of the Commission's regulations or the facility's license and in the absence of any radiological hazard to public health and safety. The Commission issues operating licenses on an applicant's showing that it will comply with all of the Commission's regulatory requirements and that it will operate the facility such that the public health and safety will be protected. The Petition's contention regarding foregone use does not mention, much less establish, a violation of the Commission's regulatory requirements or a radiological hazard to public health and safety. Accordingly, that contention is no basis for denying SFC's application to renew its license.

The Petitioner states that the NRC has never ruled on a 1986 request for an EIS (Environmental Impact Statement). The Staff was unable to identify a 1986 request for an EIS; however, a June 20, 1985 request for an EIS on plant expansion was identified. NRC responded to this request in a July 17, 1985 letter, stating that the NRC was preparing an environmental assessment to evaluate the impact of the expansion on the environment. Additionally, there was a hearing on the plant expansion before an Atomic Safety and Licensing Board (ASLB) in which CASE was a participant. One of the conclusions of the ASLB regarding the hearing was that "[t]he NRC Staff's Environmental Assessment is adequate and its finding of 'no significant impact' appropriate." LBP-87-8, 25 NRC 153, 167-68, 171 (1987).

The Petitioner further asserts that the incremental and cumulative impacts of facility operations have never been evaluated, in violation of both the National Environmental Policy Act (NEPA) and the Atomic Energy Act, as amended. The statement that the cumulative and incremental impacts have never been evaluated

is incorrect. The environmental impact of the facility's operation was evaluated in a Final Environmental Statement dated February 1975, an Environmental Impact Appraisal dated October 1977, and an Environmental Assessment dated August 1985. The 1985 EA resulted in the publication of a Finding of No Significant Impact. Therefore, preparation of an EIS was unnecessary. Environmental evaluations have also been prepared for various amendments. These documents were prepared to comply with the Commission's regulations which implement the requirements of NEPA. The evaluations considered both the cumulative and incremental impacts of facility operation. Additionally, the environmental impact of operations will be assessed in connection with the pending license renewal application. The Petitioner's charge, that the impacts of the facility's operation have never been evaluated, is unfounded. Therefore, the Petitioner does not provide a basis to deny the license renewal application.

The Petitioner states that the Licensee should be required to assume all social costs. Petitioner asserts that the assumption of social costs for health harms should be forced through strengthening standards and compliance for airborne releases. The Petitioner further states that this is probably not possible for this Licensee due to an ongoing, continuing pattern of disregard for regulatory authority and license responsibility evidenced by the history of lies, falsifications, and misinformation. Petitioner has not provided any evidence or any information to support its position. While the Licensee has on some occasions violated conditions of its license, those violations have not been related to exceeding the airborne release limit.

The Petitioner further states that decommissioning should be timely, quick, efficient, and complete and that ultimate cleanup responsibility should not be with the State of Oklahoma. Petitioner states that cleanup is stagnant at other sites historically affiliated with the Sequoyah facility and the Licensee. The statements relating to the historically affiliated facilities refers to facilities owned by Kerr-McGee, the former owner of SFC. Any alleged failures of Kerr-McGee to decontaminate another site are irrelevant to SFC's responsibilities at this facility. As to the responsibility for decommissioning the SFC facility, that responsibility will rest fully with the Licensee at the time licensed activities cease at the site. The State of Oklahoma will not be responsible for decommissioning costs. As for the timing of decommissioning, it would not begin until operations at the facility have ceased. The license will remain in effect until terminated in writing by the Commission. No basis has been provided to deny the application for license renewal.

Externalized Economic Costs

The Petitioner states that the cost of regulation should be assumed by the Licensee and that the taxpayers should not subsidize the cost of regulatory

oversight and monitoring. Congress has mandated that the NRC recover approximately 100% of its budget authority, less the amount appropriated from the Department of Energy-administered Nuclear Waste Fund, for fiscal years 1992 through 1995, by assessing license, inspection, and annual fees. (Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (Nov. 5, 1990)). The Commission has implemented this statute by rulemaking amending 10 C.F.R. Parts 170 and 171. (56 Fed. Reg. 31,472 (July 10, 1991)). This means that the nuclear industry bears the full burden of regulatory cost; the taxpayers are not subsidizing the cost of regulatory oversight and monitoring. Accordingly, the Petitioner's contention regarding the cost of regulation provides no basis for denying SFC's application to renew its license.

The Petitioner further states that the Licensee should be required to assume all economic costs including compensating individuals for health consequences when they are unable to maintain human productivity. Petitioner further states that SFC's neighbors must sue to be compensated for obvious causally related losses. Petitioner states that the policy of 42 U.S.C. § 2012(i) is to protect the public but that 42 U.S.C. § 2210 is not being enforced against SFC. Petitioner claims that individuals with alleged valid serious claims and health consequences were "bargained-out" of the 1986 accident by contest and that almost all the Plaintiffs settled for a mere token of the value of their claims, complete with releases in contravention of the provisions of 42 U.S.C. § 2210(n). The Petition is alleging a basis resting on tort claims and that the Commission is not enforcing sections 3 and 170 of the Atomic Energy Act of 1954, as amended (Pub. L. No. 85-256, 71 Stat. 576 (1957)), which is commonly referred to as the Price-Anderson Act. While the Price-Anderson Act authorizes the Commission, in its discretion, to apply Price-Anderson to NRC materials licensees, the Commission has done so only under the limited circumstances set forth in 10 C.F.R. § 140.13a; this provision applies only to licensees that use and possess plutonium at a plutonium processing and fuel fabrication plant, as defined in 10 C.F.R. Part 140. Because SFC does not use and possess plutonium at such a plant, Price-Anderson does not apply to SFC. Accordingly, SFC has not failed to comply with the Price-Anderson Act, and the Petitioner's allegation to the contrary is no basis for denying SFC's application to renew its license.

With further regard to its tort-claims basis, the Petitioner is requesting that the Commission deny SFC's application to renew its license because of the results of litigation involving alleged torts by SFC. While the Petition alleges "health effects" from the operation of the facility, it presents no specific information documenting such alleged effects. The NRC Staff has concluded, based on a review of all available information, that operation of the SFC facility does not pose an undue risk to public health and safety. Moreover, the NRC has no authority to regulate how persons recover damages for allegedly tortious activity (aside from Price-Anderson, as discussed above), and thus cannot act

on the Petitioner's allegations regarding the necessity of suit to recover damages in tort. Accordingly, the Petitioner's contentions in this regard cannot be a basis for denying SFC's application to renew its license.

CONCLUSION

Our review of the seven concerns contained in the Petition and specified further in the Supplement has identified no information that was not already available to the NRC Staff. As set forth above, the concerns raised by the Petitioner (1) have no bearing on the license renewal application, (2) are not related to the NRC license, (3) do not assert a safety concern, (4) reiterate previously known information, or (5) constitute generalized assertions without any supporting bases. Considering that the Petition does not offer any new information or new insights into the issues it raises, I find no basis for denying SFC's license renewal application or for revoking SFC's current operating license.

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised (*see Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984)). In addition, the Commission may deny any application to renew a license if the licensee is in violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulatory requirements. These are the standards that I have applied to the concerns raised by the Petitioner in this Decision to determine whether enforcement action is warranted.

For the reasons discussed above, I conclude that the Petitioner has not raised any substantial health and safety issues and has not demonstrated any violation of the Act or the Commission's requirements. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied as described in this Decision. As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission twenty-five (25) days

after issuance unless the Commission on its own motion institutes review of the Decision within that time.

**FOR THE U.S. NUCLEAR
REGULATORY COMMISSION**

**Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards**

**Dated at Rockville, Maryland,
this 7th day of June 1992.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 40-8027

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Facility)

June 8, 1992

The Director of the Office of Nuclear Material Safety and Safeguards denies, except insofar as a Notice of Violation will be issued citing Sequoyah Fuels Corporation (SFC) for violating 10 C.F.R. §40.9, and grants insofar as the Staff will publish in the *Federal Register* notice of all SFC license amendment applications until the Staff takes final action on the license renewal application, a petition filed by the Native Americans for a Clean Environment and the Cherokee Nation. Specifically, the Petition alleged that: SFC's August 29, 1990 license renewal application contains deliberate material omissions of fact and material false statements relating to soil and groundwater contamination at the site; the NRC Order Modifying License (Effective Immediately) and Demand for Information (EA 91-067) issued on October 3, 1991, constitutes the third time in 5 years that the NRC has cited SFC for a serious breakdown in management of the plant, the order is inadequate to reasonably ensure safe operation of the plant, and the experience of the past 5 years demonstrates that SFC is doomed to repeat its unsafe and poor environmentally hazardous practices until the basic causes of its poor environmental and safety record are resolved; and SFC has been given and wasted numerous chances to address and resolve its serious safety and environmental problems, at the expense of public safety and the environment, when onsite environmental investigations have revealed that the site is grossly contaminated with uranium and other chemicals. The Petitioners requested emergency action to revoke the operating license of SFC's uranium processing plant in Gore, Oklahoma. In the alternative, Petitioners requested that the NRC withhold authorization to restart the SFC plant until: completion of a formal adjudicatory hearing on whether the plant can be operated safely and

in compliance with its license and NRC safety and environmental regulations; access is provided to the Petitioners to certain internal SFC documents; SFC undertakes a "truly independent" audit of its management and operations; and SFC completes and implements all changes to management and procedures that are necessary to ensure safe operation of the facility. Petitioners also requested *Federal Register* notice of all SFC license amendment applications.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

Native Americans for a Clean Environment (NACE) and the Cherokee Nation (Petitioners) submitted to the Commission an "Emergency Petition to Revoke Operating License for Sequoyah Fuels Corporation's Uranium Processing Facility" (Petition) dated November 27, 1991. The Petition requests that the Commission immediately revoke the operating license of Sequoyah Fuels Corporation's (SFC or Licensee) uranium processing plant in Gore, Oklahoma. In the alternative, Petitioners request that the Petition be considered pursuant to 10 C.F.R. § 2.206 and that the U.S. Nuclear Regulatory Commission (NRC) withhold authorization to restart the SFC plant until: (1) completion of a formal adjudicatory hearing on whether the plant can be operated safely and in compliance with its license and NRC safety and environmental regulations; (2) access is provided to the Petitioners to certain internal SFC documents; (3) SFC undertakes a "truly independent" audit of its management and operations; and (4) SFC completes and implements all changes to management and procedures that are necessary to ensure safe operation of the facility. Petitioners also request *Federal Register* notice of all SFC license amendment applications. The Petition was submitted on an emergency basis because the Petitioners believed that restart of the facility was imminent.

The Petition alleges the following bases for its requests:

- (1) SFC's license renewal application contains deliberate material omissions of fact and material false statements relating to soil and groundwater contamination at the site;
- (2) the NRC Order Modifying License (Effective Immediately) and Demand for Information (Order or EA 91-067) issued to SFC on October 3, 1991, constitutes the third time in 5 years that the NRC has cited SFC for a serious breakdown in management of the plant. The Order is inadequate to reasonably ensure safe operation of the plant, and the experience of the past 5 years demonstrates that SFC is doomed to repeat its unsafe and poor environmentally hazardous practices un-

til the basic causes of its poor environmental and safety record are resolved; and

- (3) SFC has been given and wasted numerous chances to address and resolve its serious safety and environmental problems, at the expense of public safety and the environment. Moreover, onsite environmental investigations have revealed that the site is grossly contaminated with uranium and other chemicals.

By Memorandum dated December 9, 1991 (unpublished), the Commission referred the Petition to the Staff for consideration pursuant to section 2.206. The Commission also stated that, prior to any decision by the Staff to permit restart of SFC's facility, an open Commission meeting would be held, at which the Staff would brief the Commission, and at which Petitioners and SFC would also be given an opportunity to address the Commission.

By letter dated December 23, 1991, the NRC Staff acknowledged receipt of the Petition, denied the emergency relief requested, and informed the Petitioners that their Petition would be treated under section 2.206 of the Commission's regulations and that a decision would be issued within a reasonable amount of time. Also, by letter dated December 23, 1991, the Staff requested SFC to respond to the Petition. SFC responded to the Petition on December 23, 1991. By letter dated January 24, 1992, the NRC requested clarification on SFC's response to the Petition. SFC responded by letter dated February 3, 1992. On January 22, 1992, Ms. Curran on behalf of the Petitioners filed a reply to SFC's December 23, 1991 response. SFC responded to the Petitioners' reply by letter dated February 3, 1992.

On March 17, 1992, the Commission held an open meeting at which the Staff, SFC, and Petitioners briefed the Commission.¹ On March 20, 1992, SFC, Petitioners, and the Staff submitted supplemental materials for consideration before a decision on restart.

On February 28, 1992, Petitioners asked the NRC to prepare an Environmental Impact Statement or an Environmental Assessment prior to restart of the SFC facility. By letter dated March 5, 1992, the Staff denied the Petitioners' request. Petitioners' March 5, 1992 request that I reconsider my denial was denied on April 13, 1992. On March 10, 1992, Petitioners filed suit against the NRC in the United States District Court for the District of Columbia seeking a temporary restraining order to prevent the Commission from authorizing restart. On April 15, 1992, the Court dismissed the Petitioners' suit for lack of jurisdiction. On April 16, 1992, Petitioners sought review of that Order and stay of the April 16, 1992 restart authorization in the United States Court of Appeals for the District of Columbia Circuit. Petitioners' motion for an emergency stay was denied by

¹ The Oklahoma Department of Wildlife Conservation filed a written statement with the Commission regarding restart but did not attend the meeting.

the D.C. Circuit Court of Appeals on April 22, 1992. Their Petition for review, and motion for expedited briefing, remain pending.

I have completed my evaluation of the matters raised by the Petitioners and have determined that, for the reasons stated below, the Petition shall be denied, except insofar as a Notice of Violation will be issued citing SFC for violating 10 C.F.R. § 40.9, and granted insofar as the Staff will publish in the *Federal Register* notice of all SFC license amendment applications until the Staff takes final action on the license renewal application.

II. BACKGROUND

On August 22, 1990, SFC reported to the NRC that uranium-contaminated soil and water had been discovered during excavation work near the solvent extraction (SX) building. On August 27, 1990, an NRC Augmented Inspection Team (AIT) began to investigate the event. The AIT concluded that SFC's staff did not demonstrate the necessary sensitivity to the potential for uranium contamination or understand the urgency and potential significance of such a problem. As part of SFC's commitments to the NRC, the company agreed that an independent party would review SFC's entire response to the situation. An investigation by the NRC's Office of Investigation was initiated on September 4, 1990, to determine whether willful violations of NRC regulations had occurred.

On August 29, 1990, SFC submitted its license renewal application to the NRC. SFC was notified on September 18, 1990, that, pursuant to the provisions of 10 C.F.R. § 40.43(b), the current license would not expire until final action on the renewal application was taken by the Commission. On September 28, 1990, NACE filed a request for hearing, pursuant to 10 C.F.R. § 2.1205. NACE's request for hearing was granted by Order dated January 24, 1991 (LBP-91-5, 33 NRC 163). 56 Fed. Reg. 7422 (Feb. 22, 1991). The order afforded other interested persons the opportunity to file petitions for leave to intervene within 30 days of publication of the order. The Oklahoma Department of Wildlife Conservation and the Cherokee Nation of Oklahoma filed requests to participate in the hearing and were granted intervenor status on May 6, 1991.²

On September 13, 1990, after an AIT followup inspection, the NRC Staff concurred in the restart of the solvent extraction process. Subsequently, on September 14, 1990, SFC reported the identification of uranium-contaminated water beneath the main process building (MPB). Because the NRC Staff was concerned that SFC was not aggressively pursuing an investigation of the

²Citizens' Action for a Safe Environment (CASE) filed a "Limited Appearance Intervention and Objection to Renewal" on July 1, 1991. The Atomic Safety and Licensing Board referred CASE's petition to the Staff for consideration as a petition under section 2.206. That petition is being treated as a separate matter and is currently under Staff review.

groundwater contamination under the MPB, on September 19, 1990, the Staff issued an Order Modifying License (Effective Immediately) requiring SFC to ensure the integrity of the floor and sumps of the MPB, obtain information and develop characterization studies regarding seepage of uranium-contaminated water from under the MPB, and develop a plan to identify and characterize other locations on SFC property where past or present operations could have resulted in environmental contamination. (EA 90-162), 55 Fed. Reg. 40,959 (Oct. 5, 1990). SFC inspected all sumps and floors of the MPB for defects or conditions that could compromise the integrity of the floor. Repairs were made to all identified defects and suspect areas. On December 18, 1990, SFC submitted the final report on the MPB investigation. The site characterization plan for the rest of the site was submitted on October 15, 1990. The order was closed out in Inspection Report 90-07 dated March 1, 1991. SFC implemented the environmental investigation outlined in the characterization plan and on July 31, 1991, submitted the "Facility Environmental Investigation Findings Report." On January 10, 1992, SFC submitted its Action Plan for dealing with the site contamination.

Based on information obtained from NRC inspections, the NRC became concerned that certain aspects of the SFC safety and environmental programs were not being performed in full accord with NRC requirements. On November 5, 1990, the Staff issued a Demand for Information (EA 90-158) that required the Licensee to describe (1) an oversight program it would put into place while management deficiencies and weaknesses in the permanent organization were being remedied, and (2) plans for an independent written appraisal of site and corporate organizations and activities, which would develop recommendations for improvements in management controls and oversight to provide assurance that personnel would comply with regulatory requirements and site procedures. SFC's November 20, 1990 response contained SFC's interpretation of the August and September events and agreement to implement the oversight program and the management assessment. SFC proposed the firm of PLG, Inc. (PLG) to implement the oversight program. The Staff agreed to the use of PLG for the independent oversight. By letter dated December 18, 1990, SFC proposed the firm of Morton and Potter to conduct the independent management assessment. SFC also indicated in this letter that following the completion of the management assessment, Morton and Potter would conduct a technical appraisal of SFC's safety program. By letter dated January 14, 1991, the NRC approved the use of Morton and Potter with the understanding that Dr. Bernard Keys would be a primary participant in conducting the appraisal. Morton and Potter submitted the management assessment on May 15, 1991. The assessment contained recommendations for needed improvements in the areas of policy, planning, communications, organization, management controls, human resource management, training, and regulatory relations. However, the assessment did not

include a discussion and analysis of the root causes of the deficiencies referenced in EA 90-158. SFC submitted its response to the management assessment on July 15, 1991, agreeing to implement the majority of the recommendations over the next 18 months.

During the time period that the management assessment was being conducted, the NRC continued its investigation into the circumstances surrounding the August and September 1990 events. The NRC investigation activities concluded on June 28, 1991. The Staff concluded that certain SFC managers had failed to provide complete and accurate information to the NRC, willfully failed to comply with NRC regulations, and made false statements during NRC inspection and investigation activities.

Based on investigation activities and increased inspection effort, the NRC Staff determined that although SFC was addressing some of the Staff's concerns, additional enforcement action was warranted. On October 3, 1991, the NRC Staff issued the Order Modifying License (Effective Immediately) and Demand for Information (EA 91-067), 56 Fed. Reg. 51,421 (Oct. 11, 1991). The Order required SFC to perform an in-depth review of the administrative control and implementing procedures in the health and safety and environmental programs by qualified non-SFC personnel. The plan and schedule detailing this review were to be submitted to, and approved by, the NRC Staff prior to SFC's restart from a planned plant shutdown. The Order also modified SFC's license to remove the Environmental Manager from supervisory or managerial responsibilities over NRC-regulated activities for a period of 1 year. The Demand for Information required that SFC provide information as to why the Senior Vice President, the Vice President of Regulatory Affairs, and the Health Physics Supervisor should be allowed to remain in their respective positions, and as to why the NRC should not be notified 30 days before rehiring the former Manager, Health, Safety, and Environment.

On October 17, 1991, SFC proposed Mr. Henry Morton as the overall project manager of the health and safety and environmental programs review effort required by the Order; several additional reviewers were also proposed. By letter dated October 24, 1991, the NRC Staff approved the proposed reviewers, finding them to be technically qualified to perform the programmatic reviews required by the Order. On November 4, 1991, SFC submitted the list of procedures that SFC planned to review prior to restart, those procedures that SFC plans to review after restart and the justification for the priority established, and the time frame for reviewing the procedures. During December 2-6, 1991, the NRC Staff conducted a team inspection to review the progress SFC had made toward addressing the Order. The team found that SFC had made appreciable progress in satisfying the requirements of the Order but that extensive work remained. The results of this inspection are documented in Inspection Report 91-16. By letter dated December 10, 1991, SFC submitted additional information on the

procedure review to address concerns identified by the team inspection and to respond to questions that were posed by the Staff in a letter of November 15, 1991. During January 27-31, 1992, the NRC Staff conducted a second team inspection. The team concluded that SFC had satisfied item B of section VI of the Order, which required SFC to submit, for NRC approval, the plan and schedule for reviewing the adequacy of health and safety and environmental programs. The results of this inspection are documented in Inspection Report 91-17.

By letter dated October 7, 1991, SFC informed the NRC that, in accordance with the Order, the Environmental Manager had been removed from supervisory or managerial responsibilities over NRC-regulated activities at the facility. By letter dated November 15, 1991, SFC informed the NRC that the Senior Vice President, the Vice President of Regulatory Affairs, and the Health Physics Supervisor (discussed in the Demand) had been removed from their respective positions. The individuals no longer have any management or operational responsibilities related to NRC-regulated activities. By letter dated December 2, 1991, SFC submitted its response to the Demand. In the response, SFC asserted that, based on the information available to SFC, SFC believed that the individuals named in the Demand neither acted in careless disregard of their respective responsibilities for licensed activities nor failed to be candid with the NRC. The Licensee did admit that the individuals made errors in judgment, missed opportunities to identify and correct deficiencies at an earlier stage, and could have done more to ensure that the NRC was fully informed of SFC activities. In addition, by letter dated December 18, 1991, SFC stated that for the foreseeable future SFC does not plan to use any of these individuals in the performance or supervision of NRC-licensed activities. SFC also stated that it will provide the NRC with 30 days' notice before utilizing any of the individuals in the performance or supervision of NRC-regulated activities. On January 13, 1992, the Staff modified SFC's license to confirm these commitments. Confirmatory Order Modifying License (Effective Immediately), EA 91-196, 57 Fed. Reg. 2611 (Jan. 22, 1992).

By letter dated January 3, 1992, SFC identified two fundamental underlying causes of the problems leading to the NRC's enforcement action. The first was that a strong nuclear safety and regulatory compliance culture had not been instilled throughout the SFC organization, and the second was that a disciplined/formal management process had not been implemented throughout the organization. Factors contributing to these underlying causes included the particular background and experience of SFC senior managers, weaknesses in organizational structure, insufficient sensitivity to radiological aspects of SFC's activities, and inadequate communications internally and with the NRC. Attached to the letter was SFC's "Sequoyah Fuels Corporation Plan for Achieving and Maintaining High Performance Standards." The Plan contains the objectives

that SFC believes are the principal elements of an effective management process and which will ensure that previous problems do not recur at SFC. In a letter dated January 27, 1992, SFC provided a matrix showing how the independent management assessment recommendations and SFC actions in response to those recommendations had been integrated into the Plan.

As part of the January 27-31, 1992, team inspection, the inspection team examined those management issues associated with the November 1990 Demand for Information. The team reviewed SFC's response to the management assessment recommendations, which was supplemented by a program of objectives developed by the current management team. The team concluded that effective implementation of SFC's long-term corrective measures would substantially improve management oversight and controls. The team's review of the root causes identified by the Licensee, as well as examination of the deficiencies identified within the organization, indicates that the causal factors identified by SFC are consistent with NRC's view. The Staff concluded that the measures proposed and taken by SFC to correct the weaknesses identified within its management organization satisfy the NRC Staff concerns raised in the 1990 Demand. However, the team was concerned about SFC's management controls and oversight during the interim period while the planned long-term improvement programs are being developed and the staffing of permanent health and safety technicians takes place.

At the open Commission meeting on March 17, 1992, the Staff presented its evaluation of issues related to restart of the SFC facility. The Staff stated that authorization to restart depends on: (1) the outcome of a current investigation by the Office of Investigations, (2) a satisfactory response to issues raised by the inspection team and documented in Inspection Report 91-17, (3) effective SFC performance up to the time of restart authorization, and (4) any advice or direction from the Commission, resulting from the meeting. The resolution of the items is outlined below.

The first item concerning the investigation by the Office of Investigations is no longer a restart issue. The Staff concludes that there were no unresolved safety issues that would be a basis for delaying restart. Regarding item 2, SFC's March 13, 1992 response describes its interim management oversight measures, plans for increased health and safety technician staffing, and corrective actions stemming from a contamination incident. The response satisfies NRC's concerns from Inspection Report 91-17. The third item concerns effective SFC performance. SFC has demonstrated the requisite ability to manage, control, and perform its activities. This conclusion was based on observations made during NRC inspections since the March 17, 1992 Commission meeting. The fourth item, a March 27, 1992 Staff Requirements Memorandum directed the Staff to undertake nine actions related to SFC. The Staff completed those actions necessary prior to a restart authorization and authorized a phased restart of SFC's

facility on April 16, 1992. These matters are addressed in SECY-92-132, a copy of which was provided to the Petitioners and is publicly available.³

III. DISCUSSION

Petitioners request revocation of the operating license for the SFC facility, or in the alternative, withholding authorization to restart the plant until: (1) completion of a formal adjudicatory hearing on whether the plant can be operated safely and in compliance with its license and NRC safety and environmental regulations; (2) Petitioners are provided access to certain internal SFC documents; (3) SFC undertakes a "truly independent" audit of its management and operations; and (4) SFC completes and implements all changes to management and procedures that are necessary to ensure safe operation of the facility. Petitioners also request *Federal Register* notice of all SFC license amendments. The concerns that formed the bases for the Petitioners' requests are addressed below.

A. Request for Revocation Based on Material False Statements

Petitioners allege that SFC knew of severe uranium groundwater contamination at the site but made three material false statements in the August 29, 1990 license renewal application. The statements are (1) in effect, SFC gave false assurances that it had comprehensively surveyed the plant site for uranium contamination and found no serious problems because SFC characterized its groundwater monitoring program as "extensive"; (2) SFC stated that groundwater monitoring wells were located in the areas most susceptible to groundwater contamination, when in fact there were no groundwater monitoring wells around or near the main process building (MPB) and the solvent extraction (SX) building; and (3) SFC omitted monitoring data that demonstrated significant uranium contamination (data collected from sand wells around the SX building between 1976 and 1989 and from the subfloor process monitor under the MPB since 1976), and that by omitting such information created a false picture that its operations have had a harmless environmental impact. Petitioners also assert that SFC made similar omissions in previous renewal applications.

As alleged by Petitioners, SFC did characterize its groundwater monitoring program as "extensive." That characterization is, however, simply an opinion describing the size of its program, not a statement of fact that could constitute a

³The NRC also considers the permitted phased restart of the SFC facility to be a denial of Diane Curran's request that an EA and EIS be performed prior to restart. That request, made in correspondence between Diane Curran and Robert Bernero, is considered by the NRC Staff to effectively embody a section 2.206 request that such review take place.

material false statement. The essence of the Petitioners' allegation is that SFC misrepresented the groundwater monitoring data as so thorough that the program would have detected any contamination of concern. Whether the SFC program was vast or small does not permit a conclusion as to whether the program was so comprehensive or inclusive such that SFC would have detected any uranium contamination of concern. SFC made no such representation. Accordingly, the Staff cannot conclude that SFC's description of its groundwater monitoring program as "extensive" was a false statement of fact.

With respect to the second alleged material false statement, SFC did state in the renewal application that its groundwater monitoring wells were located in areas most susceptible to groundwater contamination; and it is true that seepage from operations in the SX building and MPB does constitute a significant source of contamination at the site. Petitioners, however, present no basis to conclude, and it cannot be determined at this time, that groundwater near the SX building or MPB is more susceptible to contamination than groundwater in other locations, such as areas near pond 2, the Emergency Basin, the Sanitary Lagoon, the clarifier pond, or ammonium-nitrate-lined ponds. Moreover, if the SX sandwells and MPB subfloor process monitor measure "perched" groundwater contamination, as argued by Petitioners, then SFC did, in fact, monitor groundwater near the SX building and MPB; and there is no issue of a material false statement. If groundwater near the SX building and MPB were most susceptible to contamination, and if the data collected by the SX sandwells and subfloor process monitor are not groundwater data, then whether SFC's statement should be treated as a material false statement would depend on whether it could be concluded that SFC willfully misstated the matter with an intent to deceive, as explained below.

Whether the omission of the SX sandwell and MPB subfloor process monitoring data from the August 1990 renewal application constitutes a material false statement within the meaning of section 186 of the Atomic Energy Act and 10 C.F.R. § 40.9, requires consideration of two issues: (1) was the omitted information material and (2) was the omission sufficiently egregious?⁴

Information is material if it is capable of influencing the agency decision-maker. *North Anna*, CLI-76-22, *supra* note 4, 4 NRC at 487; *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956); *United States v. Diaz*, 690 F.2d 1352, 1357-58 (11th Cir. 1982). In this case, the omitted SX sandwell and subfloor process monitoring data constitute information relevant to an is-

⁴Not only false statements of material fact, but also omissions of material information from a license application, may constitute violations of section 186 of the Atomic Energy Act. *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2)*, CLI-76-22, 4 NRC 480 (1976), *aff'd sub nom. Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289, 1291 (4th Cir. 1978). "[S]ilence regarding issues of major importance to licensing decisions is readily reached under the statutory phrase 'material false statement.'" *North Anna*, CLI-76-22, *supra*, 4 NRC at 489.

sue of importance in the license renewal proceeding, potential environmental contamination. The Staff concludes that the omitted information is capable of influencing a decision on the renewal of SFC's operating license. Because the Staff would consider the omitted information before reaching a decision on renewal, the omitted information is material to the renewal application.

The NRC has construed section 186 of the Atomic Energy Act and the regulations implementing that statutory provision such that the term "material false statement" will only be applied to misstatements or omissions of material fact that are egregious because they are made with an intent to mislead the NRC. Statement of Consideration, "Completeness and Accuracy of Information," 52 Fed. Reg. 49,362 (Dec. 31, 1987). As explained below, available evidence indicates that neither the omission of the SX sandwell data and the subfloor process monitor data from the August 29, 1990 renewal application, nor SFC's failure to supplement its application with this information, was done with an intent to deceive the NRC. Accordingly, the Staff cannot conclude that the omission of that information from the renewal application constitutes a material false statement. The omitted data do demonstrate uranium contamination under or around the SX building and MPB; however, SFC did notify the NRC of the fact of uranium contamination in the SX excavation pit on August 22, 1990, and beneath the MPB on September 14, 1990. Since SFC informed the NRC of the fact of contamination, the omission cannot be considered to have been the result of an intent to deceive the NRC about, or to conceal the fact of, contamination.

License applicants have a continuing obligation to keep their applications accurate and up to date. The Commission interprets NRC requirements concerning completeness and accuracy of information such that the failure to correct an unintentionally incomplete written submission, or failure to correct written information that raises questions about trustworthiness or commitment to safety, may be treated as violations. General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, Appendix C, § VI. Materials licensees such as SFC submit an environmental report (ER) with any application for a license or renewal of a license. 10 C.F.R. § 51.60(a). By letter dated September 18, 1990, SFC informed the Staff of its intent to revise the ER submitted with the August 29, 1990 renewal application. Moreover, the Staff requested that SFC delay its update of the ER until the environmental characterization was complete and until the Staff's initial review of the license renewal application was complete. On January 10, 1992, SFC submitted a revised environmental report that incorporates the information from the facility environmental investigation that was conducted at the site, including the SX sandwell and MPB subfloor process monitoring data. Moreover, since SFC notified the Staff of uranium contamination in the SX excavation pit on August 22, 1990, and beneath the MPB on September 14, 1990, the delay in updating the ER with the monitoring data cannot be considered the result of an intent to mislead the

NRC. Accordingly, the Staff concluded that although SFC failed to supplement the SFC renewal application until January 10, 1992, there has been no intent to deceive the NRC, and thus the delay in supplementing the renewal application does not constitute a material false statement.

Petitioners contend that because SFC began collecting the SX sandwell and MPB subfloor process monitoring data in 1976 and since SFC did not include those data in any SFC renewal application, including the August 1990 renewal application, SFC must have deliberately "suppressed" or withheld the data from the NRC. The Staff, however, based its conclusion of a management breakdown in part upon the determination, after extensive inspection and investigation of the August 1990 SX excavation pit contamination, that SFC managers who were aware of the monitoring data failed to aggressively pursue the apparent contamination suggested by those data because they failed to comprehend the significance of the data. (EA 91-067.) Accordingly, in the absence of new evidence, it cannot be concluded that the SFC withheld the SX sandwell and MPB subfloor process monitoring data from any SFC renewal application with an intent to deceive the NRC about the presence of contamination.

Although it cannot be concluded that SFC made any false affirmative statements of material fact in its renewal applications, SFC's omission of the SX sandwell and MPB subfloor process monitor data rendered the renewal applications incomplete. Information supplied by an applicant to the Commission must be complete in all material respects. 10 C.F.R. § 40.9(a). License renewal applicants are required to submit an ER, which must discuss "the impact of the proposed action on the environment." 10 C.F.R. §§ 40.31(f) and 51.60(a). The ER must include not only information supporting the proposed action, but also "adverse information." 10 C.F.R. §§ 51.45(b)(1), (e). The omitted SX sandwell and subfloor process monitor data constitute "adverse information" regarding the impact of the proposed action on the environment. Because the Staff would consider that information before deciding whether to grant SFC's renewal application, the license renewal applications are materially incomplete in violation of section 40.9(a).

The NRC may revoke materials licenses in cases where the licensee makes a material false statement in the application. *See All Chemical Isotope Enrichment, Inc.*, LBP-90-26, 32 NRC 30 (1990). As explained above, however, the Staff cannot conclude that SFC made any material false statement in its renewal applications. Accordingly, the Staff concludes that license revocation would be an excessively harsh and unwarranted remedy in this case, and denies the Petitioners' request to revoke SFC's operating license. A violation of NRC requirements, even a material false statement (which is not involved here), does not, in and of itself, warrant the extreme remedy of revocation. The choice of remedy rests within the sound discretion of the Commission, *see Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 405-06 (1978), and

Washington Public Power Supply System (WNP Nos. 4 and 5), DD-82-6, 15 NRC 1761, 1766 n.9 (1982), based on factors such as the significance of the underlying violations and the effectiveness of the sanction in securing lasting corrective action. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit 1), DD-84-8, 19 NRC 924, 933 (1984).

Enforcement options other than revocation include a notice of violation, a civil penalty, or appropriate orders. In this case, the Staff has already ordered SFC to suspend operations based in part upon SFC's failure to promptly notify the NRC of contamination around and under the SX building and the MPB and SFC's failure to supply the SX sandwell and MPB subfloor process monitor data to the NRC. See "Order Modifying License (Effective Immediately) and Demand for Information," EA 91-067 (October 3, 1991). Additionally, significant action has been taken regarding members of SFC management. See "Confirmatory Order Modifying License (Effective Immediately)," EA 91-196 (January 13, 1992). Additionally, the Staff modified SFC's license to remove a manager from the supervision of NRC-regulated activities for 1 year and to require that for 2 years thereafter, SFC shall not reassign that person to the supervision of NRC-regulated activities without providing 30 days' prior notice. See EA 91-067. Those actions were taken in response to a violation that involved withholding from an NRC inspector information concerning uranium contamination in the SX excavation pit.

Even though significant enforcement action has been taken against SFC, the Staff proposes to issue a notice of violation against SFC for violating section 40.9.

B. Request for Formal Adjudicatory Hearing and Access to SFC Internal Documents Before Permitting Restart

Petitioners request that before permitting restart, the Commission order a formal adjudicatory hearing to determine whether the SFC facility can be operated safely. Petitioners argue that the pending Subpart L renewal hearing is inadequate to address this issue because cross-examination of witnesses and discovery of SFC internal documents are necessary, but Subpart L prohibits discovery and provides only for limited oral presentations in lieu of a formal hearing. 10 C.F.R. §§ 2.1231, 2.1233. Although the Commission, in its discretion, could order such a hearing, there is no legal requirement in this case to conduct a formal adjudicatory hearing before restart is permitted. SFC argues that the Petitioners' request for a formal adjudicatory hearing prior to restart is, in essence, a legally impermissible attempt to litigate the sufficiency of NRC enforcement action in EA 91-067. There is no right to a hearing for the purpose of challenging the sufficiency of past or contemplated enforcement actions, including orders to suspend. *Bellotti v. NRC*, 725 F.2d 1380, 1383

(D.C. Cir. 1983); *Sequoyah Fuels Corp.* (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 513-14 (1986); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980); and *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 289 (1980). Nor is there a right to a hearing on the lifting of a suspension. *Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720, 729-30 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1575 n.7 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, *aff'd San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F.2d 26 (D.C. Cir. 1986).⁵ 10 C.F.R. § 2.1209(k). Therefore, the Staff does not believe that the Petitioners have provided a sufficient basis for any hearing or access to internal SFC documents.

C. Petitioners Allege EA 91-067 Is Inadequate to Reasonably Ensure Safe Operation of the SFC Plant

Petitioners contend that SFC has routinely violated safety procedures and put workers at significant risk over the past year despite oversight, that the violations are the same ones for which SFC was cited previously, and that this cycle will not be broken because (a) the fundamental causes of the management breakdown have not been identified and (b) SFC has hired the same consultants who were involved in two previous unsuccessful management studies, and who, therefore, are not sufficiently independent to be objective.

1. Failure to Identify Fundamental Causes of Management Breakdown

Petitioners contend that the Staff has never obtained a satisfactory answer to its questions concerning the fundamental causes of SFC's problems. Petitioners further contend that the Staff apparently plans to allow SFC to resume operations without identifying the source of its management problems.

The November 1990 Demand stated that because the fundamental causes of SFC's failures could not be determined, the Commission required additional information to determine if there was reasonable assurance that the Licensee could properly manage its activities in accordance with the regulations and License No. SUB-1010. Accordingly, SFC was required to state whether it was willing to have an independent management appraisal conducted, which would

⁵ To the extent that discovery of SFC internal documents and cross-examination might be necessary to resolve questions within the scope of the renewal hearing, the Commission's rules provide for such an eventuality. 10 C.F.R. § 2.1209(k).

recommend necessary improvements in management controls and oversight. The appraisal report was to include the view of the independent organization as to causes of the deficiencies. The Staff further addressed the management problems in issuing EA 91-067. Section VIII of EA 91-067 required SFC to provide further information "to determine whether the Commission can have reasonable assurance that in the future the Licensee will conduct its activities in accordance with the Commission's requirements" and information to determine if certain managers "will carry out the responsibilities and authorities assigned to their respective key position descriptions outlined in the license."

The Staff review of the independent management assessment and SFC's response was ongoing at the time EA 91-067 was issued; and at that time, the Staff had not yet completed the analysis of SFC's November 20, 1990 response to EA 90-158. As noted in EA 91-067, neither the independent management assessment nor SFC's response directly addressed the root causes for the deficiencies in SFC's management. The management assessment report did identify goals for strengthening management systems and supporting a high level of safety and compliance with regulatory requirements. To achieve these goals, the report made specific recommendations in the areas of communications, organization, training, policy, planning, management controls, human resources management, and regulatory relations. SFC responded to these recommendations by letters dated July 15 and November 7, 1991, agreeing to implement the majority of the recommendations. Nevertheless, the Staff concluded that the independent management assessment report did not address the root cause of SFC's deficiencies and failed to clearly establish whether the recommended actions were sufficient to correct SFC's problems. (Inspection Report 91-17.)

Because SFC's new president was dissatisfied with the 1991 SFC responses, in January 1992, SFC provided a revised program of objectives developed by the current management team to supplement its 1991 responses to the management assessment. During the January 1992 team inspection, the SFC president informed the NRC Staff that he believed that the corrective measures previously planned by SFC failed to fully address the underlying weaknesses in the organization. In its January 3, 1992 letter, SFC identified what it believes to be the fundamental causes of SFC's problems. First, a strong nuclear safety and regulatory compliance culture had not been instilled throughout the SFC organization. Second, a disciplined/formal management process had not been implemented throughout the organization. To reach these conclusions, SFC relied upon an evaluation of the events that occurred during 1990 and 1991 and a review of contributing factors identified by two SFC consultants. As contributing factors, SFC identified the particular background and experience of SFC senior managers, weaknesses in organizational structure, insufficient sensitivity to radiological aspects of SFC's activities, and inadequate communications both internally and with the NRC.

As part of the January 1992 team inspection, the inspection team reviewed SFC's proposed programs for improving managerial effectiveness (as described in the January 3, 1992 "Sequoyah Fuels Corporation Plan for Achieving and Maintaining High Performance Standards" or Plan) and SFC's evaluation of root causes of the deficiencies and programmatic weaknesses identified in the 1990 Demand and the 1991 Order. The Plan identifies eight objectives that SFC believes are the principal elements of an effective management process. Many of the recommendations from the independent management assessment are incorporated into these objectives. These objectives are: (1) selection of qualified managers with demonstrated records of success; (2) establishment and communication of SFC's corporate mission, goals, and strategies; (3) establishment and communication of SFC management's policies and expectations; (4) improving effectiveness of procedures; (5) provision of adequate staffing and effective training; (6) strengthening of programs for identification and correction of problems to prevent recurrence; (7) establishment and use of performance indicators to assess the effectiveness of performance; and (8) provision of feedback on performance to the SFC organization and individuals.

Although SFC planned to implement some of the Plan objectives prior to any restart authorization (procedures and training requirements captured under the 1991 Order), the majority were viewed as long-term corrective measures to be implemented over the next 1 to 2 years. Some of the specific actions that SFC has taken or plans to take to achieve these objectives include the following: SFC has replaced all of the individuals specified in the Demand and has put in place a new management team. SFC has made organizational changes that will allow the Health and Safety Manager to focus on issues of industrial and radiological safety. SFC has also hired management consultants to assess SFC's improvements.

SFC is also developing a Business Plan to help institutionalize its plans and actions to ensure strong nuclear safety and regulatory compliance. The Plan will have both annual and long-term objectives. Additionally, SFC has established a corporate policy that "employees will perform as *nuclear* professionals who are operating a *nuclear* facility." To communicate its expectations, SFC holds weekly meetings at various organization levels. Approximately every 4 months, the SFC president plans to meet with all employees to communicate SFC standards and expectations. The president also periodically issues written updates informing employees of the plant status and discussing management expectations. The training program now incorporates references to management expectations. SFC is also implementing a Conduct of Operations Program. The objective of the program is to achieve a high level of performance and accountability throughout SFC's organization to ensure that activities are conducted in a manner that protects the environment, the health and safety of workers, and the health and safety of the public. The scope of the program encompasses all

aspects of operations and management systems. The program holds personnel accountable for their performance.

In September 1991, SFC implemented a Procedure Improvement Program to upgrade those operating procedures important to safe operation of the plant. The program was developed in response to NRC concerns regarding the adequacy of SFC's operating procedures. The program is a two-phase effort. For the first phase, SFC listed twenty-three procedures that would be reviewed in the short term and serve as a pilot program. The second phase, a long-term project, will upgrade the remaining procedures. SFC continued the project after the October 1991 Order was issued. By the time of the January 1992 team inspection, SFC had upgraded twenty of the twenty-three procedures in Phase I and was reviewing the other three. The program is designed to develop consistent standards for format, style, and content; improve clarity; incorporate additional detailed instructions and guidance; incorporate cautions, warnings, and work permit requirements; incorporate the need for special tools and equipment; correct errors; highlight important performance standards; and identify activities that should be governed by a procedure.

In the area of staffing, SFC has added several positions. The health physics staff has been increased to include a second health physics supervisor and a staff health physicist, as well as hiring consultants to assist with the program. SFC has added a waste management manager, a human resources manager, a QA engineer, and a licensing engineer, as well as consultants to assist with various programs. SFC also plans to conduct an organizational functional evaluation to analyze staffing levels. Although the project is in the developmental stage, the human resources manager and the controller are to complete the evaluation of the health and safety, quality assurance, nuclear licensing, environment, and operations departments by June 1992.

SFC has provided training on contamination control to operations, maintenance, and health and safety personnel. Health and safety technicians have received 120 hours of training on health physics principles and practices. Training on industrial safety and hygiene is planned. Employees utilizing revised procedures have been trained on those revised procedures. SFC intends to implement a number of improvements to provide a more structured training program for all elements of the organization. SFC has reorganized its training department so all training activities will be conducted under the direction and supervision of the human resources department. As part of the January team inspection, the team reviewed the effectiveness of SFC's training for operators and health and safety technicians. The inspectors concluded that the workers appeared adequately trained on the revised procedures. The team also concluded that SFC's training for its permanent health and safety technicians was thorough.

The Staff has concluded that the responses and actions required by the 1990 Demand have been satisfactorily addressed by SFC. Complete implementation

of the program would result in substantially improved management of licensed operations and satisfy the NRC's concerns. The inspection team found that although a number of improvements had been implemented or were in the planning stages, SFC's proposed plan for improvement represents long-term corrective measures that will require future review to determine whether they are effectively implemented and sustained. The inspection team did identify the following three concerns that SFC had to address prior to a restart authorization.

First, the Staff was concerned about the adequacy of the health-and-safety technician staffing. The concern was primarily focused on the number of permanent positions. SFC has established twenty-two positions of which twelve are staffed. Contract technicians augment the staff and will be phased out as permanent positions are filled by trained SFC employees. SFC has also added a second health-and-safety supervisor position and hired a staff health physicist.

The second concern involves the corrective measures taken to improve management's sensitivity to regulatory concerns. Specifically, the reaction to the identification of contaminated articles located in unrestricted areas raised questions as to why SFC's staff failed to adhere to policies regarding internal notification to management, and failed to promptly control or restrict the area. SFC performed a root-cause analysis and determined that the root cause was significant and rapid change in the work environment. Contributing causes were inadequate job turnover and plans for surveys in unrestricted areas. SFC has since issued a new procedure on contamination control, and a temporary procedure was issued to provide guidance for actions to be taken when contamination is identified in unrestricted areas. For performing surveys in unrestricted areas, SFC has developed a plan that specifies the responsibilities of individuals, provides for prioritization, identifies applicable procedures and regulations, and establishes contamination trigger levels.

The third concern is the need for an additional level of oversight of licensed operations during development and implementation of long-term corrective programs. In its March 13, 1992 response, SFC provided additional information regarding the interim management oversight measures. SFC is implementing a manager-on-shift program during restart and for at least 30 days after restart. SFC is utilizing senior experienced consultants prior to, during, and after restart to deal with ongoing maintenance and operations activities, root-cause analysis, performance indicators, and regulatory compliance self-assessment. The Sequoyah Oversight Team will implement a restart program that focuses on critical procedures and activities. SFC senior management will conduct monthly inspections for at least 6 months. New procedures for deficiency reports and corrective action requests are being implemented so as to involve all SFC personnel. SFC has also adopted interdepartmental reviews prior to new activities, prestartup checklists, revised procedures, frequent management visits to work areas, improvements to the QA program, management meetings

with the workforce to reinforce goals and expectations, improved commitment tracking systems, annual external audits, and use of technology consultants.

Section VI, item B, of EA 91-067 ordered SFC to perform an in-depth review of the administrative control and implementing procedures in the health and safety and environmental programs. Petitioners infer that the submission of a plan to review procedures in the health and safety and environmental programs is all SFC must do prior to resumption of licensed activities. However, the plan required some implementation prior to resumption of licensed activities. Implementation of the plan involves hiring outside individuals to review procedures to ensure that instructions are clear, current, and technically adequate; revising the inadequate procedures; and providing training on the new and revised procedures. The plan itself just lists the procedures to be reviewed and provides justification for the time frame for review, i.e., before or after restart. Moreover, NRC Staff approval is required prior to restart. The Staff concluded that SFC has satisfied the explicit requirements of item B of section VI of the Order. (Inspection Report 91-17.)

Petitioners state that revamping procedures will not address the organizational and attitudinal problems discussed in EA 90-158 and EA 91-067. It is correct that changes to procedures alone will not address these other issues. However, SFC has taken other steps, discussed above, to directly address these issues. SFC has in place new management in key positions, including the president. SFC has also hired additional staff in the areas of health physics, training, and regulatory affairs. SFC is implementing the management controls recommended in the independent management assessment, in the independent review of the August 1990 events, and in SFC's January 3, 1992 letter. SFC is implementing a manager-on-shift program to provide additional oversight to ensure compliance. SFC has also initiated a Conduct of Operations program that is designed to change the cultural problems by making individual employees responsible for their actions.

The changes being implemented by SFC appear to be effective. Workers have demonstrated the ability to perform activities in accordance with the improved procedures. Additionally, workers have demonstrated sensitivity to SFC management expectations and standards for health physics practices and have initiated efforts to prevent and correct work practices that did not meet these standards. The Petitioners have not presented any new information to indicate that SFC will not be able to operate the facility safely.

2. Lack of Independence by Proposed Consultants

Petitioners request that SFC be required to obtain a "truly" independent audit of its management and operations. Petitioners allege that SFC has obtained several evaluations of its management and operations by the same group of

people, and that since these individuals have a long-standing relationship with SFC, their objectivity is compromised because they have a vested interest in affirming their previous conclusions. Petitioners cite as examples the use of Dr. James Buckham, PLG, Mr. Henry Morton, and Dr. B. John Garrick.

Petitioners object to the use of Dr. James Buckham to conduct an independent critique of SFC's response to the August 1990 event because of his association with PLG. Dr. Buckham's conduct of the independent critique does not present reason for concern that the report might be biased. In fact, Dr. Buckham's review concluded that there were problems with SFC's response to the August 1990 events, and he made recommendations for improvement in SFC's programs, including a recommendation for root-cause analysis, changes in reporting of incidents, and improved communications. The Petitioner does not demonstrate that the report could be biased or why, but merely asserts that Dr. Buckham's association with PLG must severely taint the independence of his review.

Petitioners object to the use of PLG to provide the oversight required by EA 90-158 because PLG provided the oversight after the 1986 uranium hexafluoride cylinder rupture. SFC selected PLG to provide the oversight required by EA 90-158 partly because of the company's familiarity with the SFC facility. The NRC agreed to the use of PLG for the independent oversight. The oversight team was intended to provide additional assurance that NRC regulatory requirements were being satisfied during operation of the facility while management deficiencies and weaknesses were being addressed. PLG only provided surveillance over SFC activities; PLG did not conduct any management studies as part of its oversight function. As part of the January 1992 team inspection, the NRC Staff reviewed the oversight team's activities. The NRC Staff concluded that although the oversight team may not have fully communicated its concerns in the daily and weekly reports, in general, the oversight team did fulfill the oversight role as described in the 1990 Demand.

Petitioners question the use of Mr. Henry Morton to head the review of the health and safety and environmental *programs*.⁶ Petitioners assert that Mr. Morton participated in both PLG's 1986 post-accident review and the oversight required by EA 90-158, and participated in the independent management assessment in 1991. Mr. Morton was a participant in the oversight provided after the 1986 accident. He was not, however, a participant in the 1991 oversight by PLG. He was listed as a potential member for that oversight team but in fact did not serve in that function. SFC proposed Morton and Potter to conduct the indepen-

⁶NACE objected formally to the selection of Mr. Morton for the program review. Letter from Diane Curran, attorney for NACE, to Robert D. Martin, NRC (November 4, 1991). NRC concluded that Mr. Morton's participation in the PLG oversight after the 1986 accident did not disqualify him from conducting the program review. Letter from Robert D. Martin, NRC, to Diane Curran (November 27, 1991).

dent management appraisal required by EA 90-158. NRC approval of Morton and Potter was contingent on Dr. Bernard Keys being a primary participant because of his expertise in management and the need to include management issues in the appraisal. The management appraisal did not include a technical appraisal of the health and safety and environmental programs. However, in the December 18, 1990 letter, SFC did state its intention to have Morton and Potter conduct a technical appraisal after completion of the management appraisal. Mr. Morton had already initiated the still-pending technical appraisal before the October 3, 1991 Demand and Order.

Petitioners assert that Mr. Morton participated in reviews that reported approvingly of SFC's operations, and that these conclusions were later proven to be incorrect by SFC's mismanagement and environmental contamination. Petitioners assert that the independent management assessment, conducted by Morton and Potter, gave SFC a positive bill of health less than 5 months before the plant was ordered shut down. The May 15, 1991 management appraisal report, however, did not give SFC a clean bill of health. The report stated that SFC now has the organizational units in place that are needed to operate at a high level of compliance with NRC requirements. The report identified fifteen goals for strengthening management systems and supporting a high level of safety and compliance with regulatory requirements. The report presented forty-seven recommendations to accomplish these goals. Areas needing improvement included policy, planning, communications, organization, management controls, human resources management, training, and regulatory relations.

Petitioners object to SFC hiring Mr. Morton as the project manager overseeing the program review in the health and safety and environmental programs because Mr. Morton has an alleged vested interest in affirming his prior conclusions that SFC's operations are adequate. As explained above, the 1991 management appraisal did not conclude that there were no deficiencies in SFC operations or that those deficiencies played no role in poor performance. Petitioners have not established that because of Mr. Morton's past association with SFC that Mr. Morton's review of the health and safety and environmental programs would be biased. Moreover, Mr. Morton has a highly qualified group of individuals working with him on the procedure review. All reviewers have been approved by the NRC Staff. The NRC Staff has evaluated the adequacy of the health and safety and environmental reviews that were required to be completed prior to restart and concluded that those reviews satisfied EA 91-067. (Inspection Report 91-17.) Further independent review beyond completing the procedure review is not warranted.

Petitioners also disagree with the selection of Dr. B. John Garrick to head SFC's Readiness Review Committee. The Readiness Review Committee was chartered to review SFC's compliance with the Order and to advise SFC's president on the general readiness of the facility to commence operations. The

Committee was not required by EA 91-067 but represented an additional action that SFC took to provide assurance that the facility was ready for restart.

Petitioners assert that unless SFC obtains an independent assessment of its operations and management, the company will not cure those deficiencies. In fact, SFC obtained independent reviews of its programs as required by EA 90-158 and EA 91-067. The Staff was satisfied that those reviews were adequate to allow restart, and concluded that, with the exception of continued oversight by the independent oversight team, additional independent reviews are unnecessary. Petitioners have not provided any information that changes that conclusion. Accordingly, Petitioners' request for further independent assessments of operations and management is denied.

D. Petitioners' Request That SFC Be Held to Its Commitment to Operate Safely by Completing All Changes to Management and Operations Before Restart

Petitioners request that all changes to management and procedures necessary to ensure safe operation of the facility be completed prior to restart. The Staff agreed and, before authorizing restart, determined that such necessary changes had been completed. Petitioners cite SFC's quality assurance (QA) program and performance as an example of SFC's past failure to keep its commitments. Specifically, SFC was cited for failure to audit its preventive maintenance and maintenance surveillance programs. (Inspection Report 91-04.)

As indicated in Inspection Reports 91-04 and 91-16, the Staff is concerned about SFC's QA program, which is why QA procedures were added to the procedure review effort required by the Order. SFC's QA program previously consisted of periodic reviews of operating activities, to determine procedural adherence, which were conducted by a full-time employee assigned to complete the audits and corresponding reports. Program weaknesses included insufficient staffing and the limited scope of the program in that it did not include functional areas other than operations. Audits were compliance-oriented with respect to procedures, rather than programmatic reviews, and failed to evaluate activities not governed by procedures. SFC identified the need for program improvements, including the following:

- (1) enhancement of the QA engineer's qualifications to that of an American National Standards Institute certified Lead Auditor and increasing the QA staffing with personnel having disciplines in the areas routinely audited. SFC also intends to train the QA engineer and other staff members in root-cause analysis methodology;
- (2) evaluation of QA programs at other facilities to determine standards that may be useful at SFC and use of this experience to revise the QA program;

- (3) development of clear definition for QA-identified items to facilitate identification of those audit items of greatest importance; and
- (4) revision of the existing QA procedures to include programmatic audits; establish qualifications of QA auditors; define audit methodology and the issuance, tracking, closing, and trending of audit items; and clarify the use of contracted auditors in the QA program.

SFC also intends to include the QA program in annual audits performed by General Atomics, SFC's parent corporation. In order to improve the identification of operations lacking formal procedures, missed procedure deficiencies, and conditions not authorized in the license, SFC developed and implemented additional audit criteria and guidance for procedural audits and weekly facility walk-through inspections performed by the QA engineer.

The Staff has reviewed SFC's QA plans and the interim measures to be taken while the QA program is being revised. The interim measures are acceptable. A final determination on the QA program will not occur until after SFC has completely implemented the revised program.

Petitioners allege that SFC has repeatedly contaminated the site and put workers at unnecessary risk and that the site has become grossly polluted with uranium and other chemicals. While SFC has exhibited poor contamination control practices in the past, which resulted in the environmental contamination problems of today, SFC is currently taking satisfactory actions to prevent further contamination. SFC has taken or has planned actions to further minimize the source of contamination (i.e., the sump/floor inspection program and relocation of the laundry) and has initiated actions to remedy existing contamination (i.e., recovery wells and trenches, removal and consolidation of soil, and pond 2 remediation). Additionally, although some workers have been contaminated, records indicate that no overexposures have occurred. SFC has addressed the need to include contract workers in the bioassay program.

Before authorizing restart, the Staff evaluated the July 1991 FEI report and other data and concluded that existing contamination was not so extensive or so great that it should prevent restart. Nonetheless, environmental contamination associated with SFC operations is an issue related to license renewal. The Staff's authorization of restart was made without prejudice to resolution of environmental issues in the pending license renewal proceeding. Petitioners are a party to that proceeding and have set forth areas of concern regarding environmental contamination to be addressed in that proceeding.

In summary, SFC completed all pre-restart reviews and is continuing the reviews designated for after restart, as required by EA 91-067, and has put an acceptable management in place, as well as the necessary management controls to ensure safe operation. SFC not only satisfied EA 91-067 but went beyond what was required. SFC removed certain individuals, hired additional staff, implemented a readiness review committee, implemented the

conduct of operations, and continued the procedure performance improvement program. The Staff concludes that SFC identified the fundamental cause of its previous management weaknesses. SFC is implementing its plan to correct the problems at the facility. Upon completion, SFC should have in place the programs necessary to ensure that high performance standards are achieved and maintained. The Staff has determined that there is reasonable assurance that SFC can operate the plant in accordance with regulations and its license. The Petitioners have not presented any new information that was not considered before authorizing SFC's restart or which demonstrates that SFC cannot operate the facility safely. Accordingly, the Staff concluded that all changes necessary before SFC could resume operations had in fact been made, and thus restart was authorized by letter dated April 16, 1992.

E. Request for *Federal Register* Notice

The Petitioners have also requested that if and when restart is permitted, the Commission direct the Staff to provide notice in the *Federal Register* of all proposed amendments to the SFC license. Their request is based on the absence of ready means by which petitioners and members of the public may be informed of such matters. There is no legal requirement to give notice of a materials licensing action. *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). Moreover, as a matter of long-standing practice, the NRC does not notice by publication in the *Federal Register* the approximately 5000 materials licensing actions it considers each year, unless the subject of the amendment is considered significant. See Statement of Consideration, "Informal Hearing Procedures for Materials Licensing Adjudications." 54 Fed. Reg. 8269 (Feb. 28, 1989). Petitioners have presented no reason to change this long-standing practice with respect to any future SFC license amendment applications. Should the Staff conclude that any SFC license amendment application is significant, a notice will be published in the *Federal Register*. See 10 C.F.R. § 2.105(a)(9). In any event, the NRC places all amendment requests, as well as other correspondence, in both the Public Document Room and the Local Public Document Room (LPDR). The LPDR is located at the Stanley Tubbs Memorial Library, 101 E. Cherokee Street, Sallisaw, Oklahoma. Interested members of the public, therefore, have a ready means of learning about license amendments. In light of the ongoing proceeding in connection with the license renewal, however, the Staff does agree to notice all license amendment applications, regardless of significance, in the *Federal Register* until the Staff takes final action on SFC's license renewal application.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the action requested by Petitioners, or additional enforcement action, is warranted.

For the reasons discussed above, there is no basis for taking the actions requested by the Petitioners. The Staff carefully reviewed its enforcement actions and concluded that they were adequate to address SFC's deficiencies. The health and safety concerns regarding contamination at the SFC site raised by the Petitioners have either been resolved through prior enforcement actions or will be addressed in the pending license renewal proceeding. No substantial health and safety concern warranting action has been raised by the Petitioners. Accordingly, the Petitioners' specific requests pursuant to section 2.206 for license revocation, for a formal adjudicatory hearing before restart of SFC operations, and for additional independent management and program reviews are denied. Although the Petitioners' request for revocation because of alleged material false statements in the August 29, 1990 renewal application is denied, a Notice of Violation will be issued citing SFC for providing inaccurate and incomplete information in violation of section 40.9. In addition, the Petition is granted insofar as the Staff agrees to publish in the *Federal Register* notice of all SFC license amendment applications until the Staff takes final action on the renewal application. As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission twenty-five (25) days after issuance unless the Commission on its own motion institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 8th day of June 1992.

CASE NAME INDEX

ARIZONA PUBLIC SERVICE COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER FINDING MITCHELL PETITIONERS IN DEFAULT (Dismissal of Proceeding); Docket Nos. 50-528-OLA-3, 50-529-OLA-3, 50-530-OLA-3 (ASLBP No. 92-654-01-OLA-3) (Automatic Closure Interlock for Shutdown Cooling Valves); LBP-92-3, 35 NRC 107 (1992)

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-528, 50-529, 50-530; DD-92-1, 35 NRC 133 (1992)

CERTIFIED TESTING LABORATORIES, INC.

CIVIL PENALTY; INITIAL DECISION (Order Imposing a Civil Monetary Penalty); Docket No. 030-12145-CivP (ASLBP No. 91-622-01-CivP) (Materials License No. 29-14150-01) (EA 89-079); LBP-92-2, 35 NRC 20 (1992)

CHEMETRON CORPORATION

MODIFICATION ORDER; MEMORANDUM AND ORDER (Order Approving Consent Order and Terminating Proceeding); Docket No. 040-08724 (ASLBP No. 92-661-05-OM) (License No. SUB-1357); LBP-92-11, 35 NRC 193 (1992)

CLEVELAND ELECTRIC ILLUMINATING COMPANY and TOLEDO EDISON COMPANY

ANTITRUST; ORDER; Docket Nos. 50-440-A, 50-346-A (Suspension of Antitrust Conditions); CLI-92-6, 35 NRC 86 (1992)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Intervention Petition); Docket No. 50-440-OLA-3 (ASLBP No. 91-650-13-OLA-3); LBP-92-4, 35 NRC 114 (1992)

DAVID M. MANNING

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Terminating FitzPatrick Proceeding); Docket No. 55-8615-SC (ASLBP No. 91-646-02-SC) (Senior Reactor Operator License No. SOP-10561-1) (EA 91-054); LBP-92-1, 35 NRC 11 (1992)

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Terminating Proceeding); Docket No. 55-8615-SC (ASLBP No. 91-646-02-SC) (Senior Reactor Operator License No. SOP-10561-1) (EA 91-054); LBP-92-6, 35 NRC 130 (1992)

ENVIROCARE OF UTAH, INC.

MATERIALS LICENSE; PREHEARING CONFERENCE ORDER (Terminating Proceeding); Docket No. 040-08989-ML (ASLBP No. 91-638-01-ML) (Byproduct Material Waste Disposal License); LBP-92-8, 35 NRC 167 (1992)

FEWELL GEOTECHNICAL ENGINEERING, LTD.

ENFORCEMENT ACTION; ORDER; Docket No. 30-30870-OM (Byproduct Material License); CLI-92-5, 35 NRC 83 (1992)

GEORGIA POWER COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 50-424-OLA, 50-425-OLA; CLI-92-3, 35 NRC 63 (1992)

JOSE A. RUIZ CARLO

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Approving Settlement Agreement and Terminating Proceeding); Docket No. 030-20541-OM (ASLBP No. 92-658-04-OM) (Byproduct Material License No. 52-21350-01) (EA 91-171); LBP-92-5, 35 NRC 128 (1992)

CASE NAME INDEX

LAFAYETTE CLINIC

MODIFICATION ORDER; MEMORANDUM AND ORDER (Approving Settlement Agreement and Terminating Proceeding); Docket No. 030-13204-OM (ASLBP No. 92-655-03-OM) (Order Modifying Byproduct Material License No. 21-00864-02) (EA 91-130); LBP-92-13, 35 NRC 199 (1992)

LONG ISLAND LIGHTING COMPANY

DECOMMISSIONING; ORDER; Docket No. 50-322-DCOM (ASLBP No. 92-660-01-DCOM); LBP-92-15, 35 NRC 209 (1992)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-322-OLA-3 (License Transfer); CLI-92-4, 35 NRC 69 (1992)

OPERATING LICENSE AMENDMENT; ORDER; Docket No. 50-322-OLA-3 (ASLBP No. 91-642-10-OLA-3) (License Transfer); LBP-92-14, 35 NRC 207 (1992)

LOUISIANA ENERGY SERVICES, L.P.

MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket No. 70-3070-ML; CLI-92-7, 35 NRC 93 (1992)

MIDWEST INSPECTION SERVICE, LTD.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Terminating Proceeding); Docket No. 30-10749-CivP&OM (ASLBP Nos. 91-649-04-CivP, 92-652-01-OM) (Byproduct Material License No. 48-16296-01) (EA 90-152, 90-085); LBP-92-9, 35 NRC 189 (1992)

NEW YORK POWER AUTHORITY

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Terminating FitzPatrick Proceeding); Docket No. 50-333-OM (ASLBP No. 91-645-02-OM) (Facility Operating License No. DPR-59) (EA 91-053); LBP-92-1, 35 NRC 11 (1992)

OHIO EDISON COMPANY

ANTITRUST; ORDER; Docket Nos. 50-440-A, 50-346-A (Suspension of Antitrust Conditions); CLI-92-6, 35 NRC 86 (1992)

PATRICK K.C. CHUN, M.D.

ENFORCEMENT ACTION; ORDER (Approving Settlement Agreement and Terminating Proceeding); Docket No. 30-31570-EA (ASLBP No. 92-657-02-EA) (Materials License No. 35-27026-01); LBP-92-12, 35 NRC 195 (1992)

PIPING SPECIALISTS, INC.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Subpoenas: Issuance, Explanation, and Related Matters); Docket No. 030-29626-OM (ASLBP No. 92-653-02-OM) (Byproduct Material License No. 24-24826-01) (EA 91-136) (License Suspension); LBP-92-7, 35 NRC 163 (1992)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

OPERATING LICENSE; DECISION; Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); CLI-92-8, 35 NRC 145 (1992)

SACRAMENTO MUNICIPAL UTILITY DISTRICT

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-312-OLA (Possession-Only License); CLI-92-2, 35 NRC 47 (1992)

SAFETY LIGHT CORPORATION, et al.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER; Docket Nos. 030-05980, 030-05982, 030-08335, 030-08444; CLI-92-9, 35 NRC 156 (1992)

MATERIALS LICENSE; ORDER; Docket Nos. 030-05980-ML&ML-2, 030-05982-ML&ML-2 (ASLBP Nos. 92-659-01-ML, 92-664-02-ML-2) (License Renewal Denials); LBP-92-13A, 35 NRC 205 (1992)

MODIFICATION ORDER; ORDER (Ruling on Licensees' Motion to Compel Deposition Discovery from the NRC Staff); Docket Nos. 030-05980, 030-05981, 030-05982, 030-08335, 030-08444 (ASLBP Nos. 89-590-01-OM, 90-598-01-OM-2); LBP-92-3A, 35 NRC 110 (1992)

SEQUOYAH FUELS CORPORATION

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 40-8027; DD-92-2, 35 NRC 211 (1992); DD-92-3, 35 NRC 236 (1992)

TEXAS UTILITIES ELECTRIC COMPANY

OPERATING LICENSE AND CONSTRUCTION PERMIT AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 50-445-OL&CPA, 50-446-OL; CLI-92-1, 35 NRC 1 (1992)

LEGAL CITATIONS INDEX CASES

- Air Courier Conf. v. Postal Workers, — U.S. —, 112 L. Ed. 2d 1125, 1134 (1991)
injury-in-fact and zone-of-interests tests for standing to intervene; LBP-92-8, 35 NRC 172, 179 (1992)
- All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30 (1990)
revocation of materials license because of material false statement; DD-92-3, 35 NRC 247 (1992)
- Allen v. Wright, 468 U.S. 737, 759 n.24 (1984)
redressability analysis for injury in fact where requested relief is cessation of putatively illegal conduct; LBP-92-4, 35 NRC 121 (1992)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)
evidentiary standard for avoiding summary disposition; CLI-92-8, 35 NRC 154 (1992)
- Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)
zone-of-interests test for standing to intervene; LBP-92-8, 35 NRC 179 (1992)
- Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 151 (1970)
components of injury in fact; LBP-92-4, 35 NRC 120 (1992)
- Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 950 (3d Cir. 1985)
applicability of "law of the case" doctrine to decided questions; CLI-92-9, 35 NRC 160 (1992)
- Bellotti v. NRC, 725 F.2d 1380, 1383 (D.C. Cir. 1983)
hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974)
scope of intervention rights under Atomic Energy Act; LBP-92-4, 35 NRC 124 (1992)
- Capital Legal Foundation v. Commodity Credit Corp., 711 F.2d 253, 255-57, 259-60 (D.C. Cir. 1983)
nexus principle for standing in procedural injury cases; LBP-92-4, 35 NRC 124-25 (1992)
- City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495-98 (D.C. Cir. 1991)
interference with an organization's informational purposes as basis for standing to intervene;
CLI-92-2, 35 NRC 59 (1992)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114 (1992)
scope of licensing board consideration of injury-in-fact allegations; LBP-92-8, 35 NRC 173 n.7 (1992)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982)
expansion of issues as cause for interlocutory review; CLI-92-9, 35 NRC 159 (1992)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986)
content of appellate briefs; CLI-92-3, 35 NRC 67 (1992)
- Competitive Enterprise Institute v. National Highway Traffic Safety Administration, 901 F.2d 107 (D.C. Cir. 1990)
interference with an organization's informational purposes as basis for standing to intervene;
CLI-92-2, 35 NRC 59 (1992)

LEGAL CITATIONS INDEX

CASES

- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976)
weight given to Staff evidence in adjudicatory proceedings; CLI-92-6, 35 NRC 88, 91 (1992)
- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975)
standard for institution of show-cause proceedings; DD-92-1, 35 NRC 144 (1992); DD-92-2, 35 NRC 234 (1992); DD-92-3, 35 NRC 260 (1992)
- Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-76-19, 4 NRC 474, 475 n.1 (1976)
pending judicial challenges as basis for stay of NRC proceedings; CLI-92-4, 35 NRC 75 (1992)
- Consumers Power Co. (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982)
vacation of decision on mootness grounds; CLI-92-5, 35 NRC 84 (1992)
- Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988)
corporate citizen interest as basis for standing to intervene; LBP-92-8, 35 NRC 174 (1992)
showing required to demonstrate injury in fact; LBP-92-8, 35 NRC 173 (1992)
- Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980)
unfamiliarity with procedural rules as cause for failure to file appellate brief; CLI-92-3, 35 NRC 66 (1992)
- Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)
sites appropriate for storage of thorium byproducts; LBP-92-8, 35 NRC 177 (1992)
- Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976)
informational interests as a basis for standing; CLI-92-2, 35 NRC 53 (1992)
- Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 227 (1946)
materiality of inaccurate licensee reports; LBP-92-2, 35 NRC 40 (1992)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989)
litigability of adequacy of Staff review; CLI-92-6, 35 NRC 91 n.2 (1992)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
injury-in-fact and zone-of-interests tests for standing to intervene; LBP-92-4, 35 NRC 120 (1992)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 241 (1991)
necessity of appellate briefs; CLI-92-3, 35 NRC 66 (1992)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 (1991)
licensing board authority to refer issues to Staff for resolution; CLI-92-3, 35 NRC 67 n.5 (1992)
- Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991)
interference with an organization's informational purposes as basis for standing to intervene; CLI-92-2, 35 NRC 60 (1992)
- Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- Gulf Oil Corp. v. FPC, 563 F.2d 588, 612 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978)
correction of bias through judicial review; CLI-92-6, 35 NRC 89 (1992)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469 (1980)
distinctions between 10 C.F.R. 2.714a and 2.762; CLI-92-3, 35 NRC 67 n.4 (1992)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 289 (1980)
hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), aff'd, ALAB-549, 9 NRC 644 (1979)
showing required to demonstrate injury in fact; LBP-92-8, 35 NRC 173 (1992)

LEGAL CITATIONS INDEX CASES

- Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977)
dependence of organizational standing on individual member's standing to intervene; LBP-92-4, 35 NRC 120 (1992)
- Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)
employment interests as basis for standing; CLI-92-2, 35 NRC 53 (1992)
- Hurley Medical Center (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 224 (1987)
authority of licensing boards to mitigate civil penalties; LBP-92-2, 35 NRC 42 (1992)
- Jersey Central Power and Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973)
economic interests protected under NEPA; CLI-92-2, 35 NRC 56 (1992)
- Johnpoll v. Thornburgh, 898 F.2d 849, 851 (2d Cir. 1990)
economic loss as irreparable injury for purpose of obtaining a stay; CLI-92-4, 35 NRC 81 (1992)
- Juidice v. Vail, 430 U.S. 327, 332-33 & n.9 (1977)
standing to intervene where alleged future injury in fact is speculative; LBP-92-4, 35 NRC 123 n.44 (1992)
- Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81 (1991)
disposal of thorium byproduct material; LBP-92-8, 35 NRC 172 (1992)
- Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245 (1982),
aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983)
Federal Register notice of all license amendments; DD-92-3, 35 NRC 259 (1992)
- Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 638-39 (1975)
zone-of-interests test for standing to intervene; LBP-92-8, 35 NRC 180 (1992)
- Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 640 (1975)
employment interests as basis for standing to intervene; CLI-92-2, 35 NRC 57 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987)
expansion of issues as cause for interlocutory review; CLI-92-9, 35 NRC 159 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262 (1988)
expansion of issues as cause for interlocutory review; CLI-92-9, 35 NRC 159 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991)
effect of license transfer on decommissioning options; CLI-92-4, 35 NRC 78 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991)
admissibility of contentions challenging Staff decision not to prepare an environmental impact statement; CLI-92-2, 35 NRC 51 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991)
stay of issuance of license where there is no outstanding order to stay; CLI-92-2, 35 NRC 61 (1992)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 284 (1991)
distinctions between 10 C.F.R. 2.714a and 2.762; CLI-92-3, 35 NRC 67 n.4 (1992)
- Lorain Journal Co. v. United States, 342 U.S. 143 (1951)
sites appropriate for storage of thorium byproducts; LBP-92-8, 35 NRC 177 (1992)
- Los Angeles v. Lyons, 461 U.S. 95, 102, 105 (1983)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985)
litigability of adequacy of Staff review; CLI-92-6, 35 NRC 91 n.2 (1992)

LEGAL CITATIONS INDEX

CASES

- Lujan v. National Wildlife Federation*, — U.S. —, 110 S. Ct. 3177, 3185-86 (1990)
injury-in-fact and zone-of-interests tests for standing to intervene; CLI-92-2, 35 NRC 56 (1992)
- Lyons v. Fisher*, 888 F.2d 1071, 1074 (5th Cir. 1989), cert. denied, 110 S. Ct. 2209 (1990)
applicability of "law of the case" doctrine to issues decided at an interlocutory phase; CLI-92-9, 35 NRC 160 (1992)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 332 (1983)
applicability of judicial concepts of standing in NRC proceedings; CLI-92-2, 35 NRC 56 (1992);
LBP-92-8, 35 NRC 172 (1992)
injury-in-fact and zone-of-interests tests for standing to intervene; LBP-92-4, 35 NRC 120 (1992)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 332-33 (1983)
corporate citizen interest as basis for standing to intervene; LBP-92-8, 35 NRC 174 (1992)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-85-2, 21 NRC 282, 316 (1985)
injury-in-fact and zone-of-interests tests for standing to intervene; CLI-92-2, 35 NRC 56 (1992);
LBP-92-8, 35 NRC 172 (1992)
- Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)*, ALAB-140, 6 AEC 575 (1973)
necessity of appellate briefs; CLI-92-3, 35 NRC 66 (1992)
- National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971)
applicability of "law of the case" doctrine to issues decided at an interlocutory phase; CLI-92-9, 35 NRC 160 (1992)
- O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974)
standing to intervene where alleged future injury-in-fact is speculative; LBP-92-4, 35 NRC 123 n.44 (1992)
- Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 291 (6th Cir. 1987)
economic loss as irreparable injury for purpose of obtaining a stay; CLI-92-4, 35 NRC 81 (1992)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1)*, DD-84-8, 19 NRC 924, 933 (1984)
penalty for material false statement; DD-92-3, 35 NRC 248 (1992)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-223, 8 AEC 241 (1974)
economic interests protected under NEPA; CLI-92-2, 35 NRC 57 (1992)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-728, 17 NRC 777, 809 (1983)
litigability of adequacy of Staff review; CLI-92-6, 35 NRC 91 n.2 (1992)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-84-12, 20 NRC 249, aff'd sub nom. *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1288 (D.C. Cir. 1984), vacated in part and reh'g en banc granted, 760 F.2d 1320 (D.C. Cir. 1985), aff'd en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986)
emergency response to complicating effect of low-probability event; CLI-92-8, 35 NRC 151 n.10 (1992)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-84-5, 19 NRC 953, aff'd *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (D.C. Cir. 1986)
hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB-641, 13 NRC 550, 552 (1981)
expansion of issues as cause for interlocutory review; CLI-92-9, 35 NRC 159 (1992)
- Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)

LEGAL CITATIONS INDEX

CASES

- Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405-06 (1978)
 penalty for material false statement; DD-92-3, 35 NRC 247-48 (1992)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)
 application of judicial concepts of standing to intervention in NRC proceedings; LBP-92-4, 35 NRC 120 (1992)
 injury-in-fact and zone-of-interests tests for standing to intervene; CLI-92-2, 35 NRC 56 (1992); LBP-92-8, 35 NRC 172 (1992)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976)
 zone-of-interests test for standing to intervene; LBP-92-8, 35 NRC 179, 180 (1992)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976)
 discretionary standing to intervene; LBP-92-8, 35 NRC 182 (1992)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976)
 limitation on litigable issues; LBP-92-8, 35 NRC 185 (1992)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977)
 exceptions to prohibition against interlocutory review; CLI-92-9, 35 NRC 158 (1992)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 273 (1979)
 purpose of technical specifications; LBP-92-4, 35 NRC 117 (1992)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980)
 hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976)
 weight given to Staff evidence in adjudicatory proceedings; CLI-92-6, 35 NRC 88-89 (1992)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 251-52 (1988)
 licensing board obligation to follow directives of higher-level tribunals; CLI-92-9, 35 NRC 160 n.5 (1992)
- Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640, 641 (1977)
 content of appellate briefs; CLI-92-2, 35 NRC 55 n.2 (1992)
- Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977)
 weighing of factors for grant of discretionary intervention; LBP-92-8, 35 NRC 182 (1992)
- Quivira Mining Co. v. U.S. NRC, 866 F.2d 1246, 1254, 1259 (10th Cir. 1989)
 flexibility in application of isolation design standard for thorium byproduct disposal; LBP-92-8, 35 NRC 181 (1992)
- Ratner v. Bakery & Confectionery Workers, 394 F.2d 780, 782 (D.C. Cir. 1968)
 "party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure; CLI-92-1, 35 NRC 6 (1992)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992), appeal pending sub nom. Environmental and Resources Conservation Organization v. NRC, No. 92-70202 (9th Cir., filed Apr. 2, 1992)
 economic interests as basis for standing to intervene; LBP-92-8, 35 NRC 180 (1992)
 interest requirement for intervention; LBP-92-8, 35 NRC 172 (1992)
- Sampson v. Murray, 415 U.S. 61, 90 (1974)
 economic loss as irreparable injury for purpose of obtaining a stay; CLI-92-4, 35 NRC 81 (1992)

LEGAL CITATIONS INDEX

CASES

- Screven v. United States*, 207 F.2d 740, 741 (5th Cir. 1953)
 "party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure;
 CLI-92-1, 35 NRC 6 (1992)
- SEC v. Chenery Corp.*, 318 U.S. 80 (1942)
 challenges to standards through reconsideration; CLI-92-7, 35 NRC 100 (1992)
- Sequoyah Fuels Corp. (UFG Production Facility)*, CLI-86-19, 24 NRC 508, 513-14 (1986)
 hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)
 generalized interest as basis for standing to intervene; LBP-92-4, 35 NRC 122 (1992)
 similarities of "informational interest" and "generalized interest"; CLI-92-2, 35 NRC 60 (1992)
- Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-41 (1976)
 showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992); LBP-92-8, 35 NRC 173 (1992)
- South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1)*, ALAB-663, 14 NRC 1140, 1150 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982)
 licensing board obligation to follow directives of higher-level tribunals; CLI-92-9, 35 NRC 160 n.5 (1992)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1)*, CLI-85-10, 21 NRC 1569, 1575 n.7 (1985)
 hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-268, 1 NRC 383, 399 (1975)
 weight given to Staff evidence in adjudicatory proceedings; CLI-92-6, 35 NRC 88, 91 (1992)
- Telecommunications Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990)
 nexus principle for standing in procedural injury cases; LBP-92-4, 35 NRC 124 (1992)
- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418 (1977)
 corporate citizen interest as basis for standing to intervene; LBP-92-8, 35 NRC 174 (1992)
- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418, 1421 (1977)
 employment interests as basis for standing to intervene; CLI-92-2, 35 NRC 57 (1992)
- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418, 1422 (1977)
 weighing of factors for grant of discretionary intervention; LBP-92-8, 35 NRC 182 (1992)
- Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720, 729-30 (3d Cir. 1985), cert. denied, 475 U.S. 1082 (1986)
 hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- Tulsa Gamma Ray, Inc.*, LBP-91-25, 33 NRC 535 (1991)
 oral testimony in civil penalty proceedings; LBP-92-2, 35 NRC 25 (1992)
- Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 304-05 (1991)
 determinant of nature and extent of enforcement actions; LBP-92-2, 35 NRC 40 (1992)
- Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114-18 (D.C. Cir. 1987)
 licensee's financial resources as a factor in determining if safety actions are necessary; CLI-92-9, 35 NRC 159 (1992)
- Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990)
 scope of intervention rights under Atomic Energy Act; LBP-92-4, 35 NRC 124 (1992)
- United States v. 140.80 Acres of Land, Etc.*, 32 F.R.D. 11, 14 (E.D. La. 1963)
 "party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure;
 CLI-92-1, 35 NRC 6 (1992)
- United States v. Diaz*, 690 F.2d 1352, 1357-58 (11th Cir. 1982)
 standard for determining materiality of information; DD-92-3, 35 NRC 245 (1992)
- United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)
 vacation of decision on mootness grounds; CLI-92-5, 35 NRC 84 (1992)

LEGAL CITATIONS INDEX CASES

- United States v. Richardson, 418 U.S. 166, 176-80 (1974)
informational standing for individuals versus that for organizations; CLI-92-2, 35 NRC 60 (1992)
- United States v. Richardson, 418 U.S. 166, 177 (1974)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- United States v. Weinstock, 231 F.2d 699, 701 (D.C. Cir. 1956)
standard for determining materiality of information; DD-92-3, 35 NRC 245 (1992)
- United Transportation Union v. Interstate Commerce Commission, 891 F.2d 908, 911-12 (D.C. Cir. 1989)
weight given to allegations relevant to standing to intervene; LBP-92-8, 35 NRC 173 (1992)
- United Transportation Union v. Interstate Commerce Commission, 891 F.2d 908, 913-14, 918-19 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3271 (1990)
standing to intervene where alleged future injury in fact is speculative; LBP-92-4, 35 NRC 123 n.44, 124 n.48 (1992)
- Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973)
weight given to Staff evidence in adjudicatory proceedings; CLI-92-6, 35 NRC 91 n.2 (1992)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976)
zone-of-interests test for standing to intervene; LBP-92-8, 35 NRC 180 (1992)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976)
weighing of factors for grant of discretionary intervention; LBP-92-8, 35 NRC 182 (1992)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983)
exceptions to prohibition against interlocutory review; CLI-92-9, 35 NRC 158 (1992)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. NRC, 571 F.2d 1289, 1291 (4th Cir. 1978)
omissions from license applications as material false statements; DD-92-3, 35 NRC 245 (1992)
- Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)
economic loss as irreparable injury for purpose of obtaining a stay; CLI-92-4, 35 NRC 81 (1992)
- Warth v. Seldin, 422 U.S. 490, 501 (1975)
corporate citizen interest as basis for standing to intervene; LBP-92-8, 35 NRC 174 (1992)
- Warth v. Seldin, 422 U.S. 490, 501, 504 (1975)
showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992); LBP-92-8, 35 NRC 173 (1992)
- Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)
authority of tribunals to stay their own orders; CLI-92-4, 35 NRC 80 (1992)
- Washington Public Power Supply System (WNP Nos. 4 and 5), DD-82-6, 15 NRC 1761, 1766 n.9 (1982)
penalty for material false statement; DD-92-3, 35 NRC 247-48 (1992)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923-24 (1984)
standard for institution of show-cause proceedings; DD-92-1, 35 NRC 144 (1992); DD-92-2, 35 NRC 234 (1992); DD-92-3, 35 NRC 260 (1992)
- Western Steel Erection Co. v. United States, 424 F.2d 737, 739 (10th Cir. 1970)
"party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure; CLI-92-1, 35 NRC 6 (1992)
- Wilderness Society v. Griles, 824 F.2d 4, 19 (D.C. Cir. 1987)
nexus principle for standing in procedural injury cases; LBP-92-4, 35 NRC 124 (1992)

LEGAL CITATIONS INDEX

CASES

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 & n.32 (1982)

standard for grant of summary disposition; CLI-92-8, 35 NRC 152 (1992)

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982)

Commission discretion to waive format requirements for appellate briefs; CLI-92-2, 35 NRC 55 n.2 (1992)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.105(a)(9)
Federal Register notice of all license amendments; DD-92-3, 35 NRC 259 (1992)
- 10 C.F.R. 2.202
standard for institution of show-cause proceedings; DD-92-2, 35 NRC 234 (1992); DD-92-3, 35 NRC 260 (1992)
- 10 C.F.R. 2.203
licensing board review of settlement agreements; LBP-92-9, 35 NRC 189 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 199 (1992); LBP-92-15, 35 NRC 210 (1992)
purpose of Board review of settlement agreements; LBP-92-5, 35 NRC 128 (1992); LBP-92-12, 35 NRC 196 (1992)
termination of proceedings because of settlement agreement; LBP-92-9, 35 NRC 190 (1992); LBP-92-13, 35 NRC 200 (1992)
- 10 C.F.R. 2.205(f)
scope of licensing authority to mitigate civil penalties; LBP-92-2, 35 NRC 42 (1992)
- 10 C.F.R. 2.206
allegations of omissions of material facts and material false statements in license renewal application; DD-92-3, 35 NRC 237-60 (1992)
forum for challenging future changes in technical specifications following license amendment; LBP-92-4, 35 NRC 124 (1992)
objection to license renewal on basis of radionuclide and chemical toxic discharges; DD-92-2, 35 NRC 213-35 (1992)
referral of pipe support design question to Staff for review; CLI-92-1, 35 NRC 9 n.8 (1992)
safety allegations at Palo Verde; DD-92-1, 35 NRC 134-44 (1992)
- 10 C.F.R. 2.206(a)
basis requirement for 2.206 petitions; DD-92-1, 35 NRC 142 (1992)
- 10 C.F.R. 2.271
appointment of licensing boards; LBP-92-11, 35 NRC 194 (1992)
- 10 C.F.R. 2.700
participation in formal NRC proceedings; CLI-92-1, 35 NRC 6 (1992)
- 10 C.F.R. 2.707
denial of intervention petition and dismissal of petitioners with prejudice; LBP-92-3, 35 NRC 109 (1992)
- 10 C.F.R. 2.714
content of and deadline for filing intervention petitions; LBP-92-3, 35 NRC 108 (1992)
definition of "petition"; CLI-92-1, 35 NRC 6 (1992)
- 10 C.F.R. 2.714(a)
content of intervention petitions; CLI-92-2, 35 NRC 56 (1992)
demonstration of standing to intervene; LBP-92-8, 35 NRC 171, 172 (1992)
- 10 C.F.R. 2.714(a)(1)
criteria for late intervention; CLI-92-1, 35 NRC 6 (1992)
interest requirement for intervention in operating license amendment proceeding; LBP-92-4, 35 NRC 120, 126 (1992)

LEGAL CITATIONS INDEX REGULATIONS

- standard for admission of revised contentions that raise new issues; LBP-92-8, 35 NRC 185 n.39 (1992)
- 10 C.F.R. 2.714(a)(1)(i)-(v)
 - criteria for late intervention; CLI-92-1, 35 NRC 7 (1992)
 - five-factor test for admission of late-filed contentions; CLI-92-2, 35 NRC 52 (1992)
- 10 C.F.R. 2.714(a)(2)
 - content of intervention petitions; LBP-92-4, 35 NRC 120 (1992)
- 10 C.F.R. 2.714(b)
 - contention requirement for intervention; LBP-92-8, 35 NRC 171 (1992)
- 10 C.F.R. 2.714(b)(1)
 - contention requirement for intervention; LBP-92-4, 35 NRC 126 (1992); LBP-92-8, 35 NRC 184 (1992)
- 10 C.F.R. 2.714(b)(2)
 - basis requirements for admission of contentions; CLI-92-3, 35 NRC 67 n.5 (1992)
 - supplements to intervention petitions; LBP-92-3, 35 NRC 109 (1992)
- 10 C.F.R. 2.714(d)
 - content of intervention petitions; CLI-92-2, 35 NRC 56 (1992)
 - demonstration of standing to intervene; LBP-92-8, 35 NRC 172 (1992)
- 10 C.F.R. 2.714(g)
 - limitation on litigable issues; LBP-92-8, 35 NRC 184 (1992)
- 10 C.F.R. 2.714a
 - appeals of denials of intervention; LBP-92-8, 35 NRC 186 (1992)
 - appeals of rulings on intervention; CLI-92-2, 35 NRC 54 (1992)
 - deadline for appeal of denial of intervention; LBP-92-4, 35 NRC 127 (1992)
 - format and size requirements for appellate briefs; CLI-92-2, 35 NRC 55 (1992)
 - licensing board error in indicating the provisions governing an appeal; CLI-92-3, 35 NRC 67 (1992)
- 10 C.F.R. 2.715(c)
 - participation by state department of environmental quality; CLI-92-7, 35 NRC 97 (1992)
- 10 C.F.R. 2.716
 - authority of presiding officer to consolidate proceedings; LBP-92-13A, 35 NRC 205 (1992)
- 10 C.F.R. 2.718(d) and (e)
 - prefiled written direct testimony in enforcement cases; LBP-92-7, 35 NRC 165 (1992)
- 10 C.F.R. 2.718(i)
 - exceptions to prohibition against interlocutory review; CLI-92-9, 35 NRC 158 (1992)
 - standard for grant of interlocutory review; CLI-92-9, 35 NRC 158 (1992)
- 10 C.F.R. 2.720(a)
 - authority for issuance of subpoenas in enforcement proceedings; LBP-92-7, 35 NRC 164 (1992)
- 10 C.F.R. 2.720(h)(2)(i)
 - discovery from NRC staff; LBP-92-3A, 35 NRC 111, 112 (1992)
- 10 C.F.R. 2.721(d)
 - prefiled written direct testimony in enforcement cases; LBP-92-7, 35 NRC 165 (1992)
- 10 C.F.R. 2.730(f)
 - Commission policy on interlocutory review; CLI-92-9, 35 NRC 158 (1992)
 - standard for grant of interlocutory review; CLI-92-9, 35 NRC 158 (1992)
- 10 C.F.R. 2.732
 - burden of proof on civil penalty orders; LBP-92-2, 35 NRC 35 (1992)
- 10 C.F.R. 2.734
 - authority to file motions to reopen; CLI-92-1, 35 NRC 4 (1992)
- 10 C.F.R. 2.734(a)
 - criteria for reopening a record; CLI-92-1, 35 NRC 4 (1992)
- 10 C.F.R. 2.734(a)(1)
 - demonstration of timeliness of requests to reopen a record; CLI-92-1, 35 NRC 7 (1992)
- 10 C.F.R. 2.734(a)(2)
 - demonstration of safety or environmental significance of new evidence; CLI-92-1, 35 NRC 8 (1992)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.734(a)(3)
demonstration of materially different result; CLI-92-1, 35 NRC 8 (1992)
- 10 C.F.R. 2.734(b)
support required for motions to reopen; CLI-92-1, 35 NRC 5 (1992)
- 10 C.F.R. 2.740(e)(1)(i)
licensee obligation to notify Staff of witness's location; LBP-92-2, 35 NRC 38 n.90 (1992)
- 10 C.F.R. 2.743(b)(3)
oral testimony in civil penalty proceedings; LBP-92-2, 35 NRC 25 (1992)
prefiled written direct testimony in enforcement cases; LBP-92-7, 35 NRC 165 (1992)
- 10 C.F.R. 2.749(c)
requirements for grant of discovery relating to summary disposition motions; CLI-92-8, 35 NRC 152 (1992)
- 10 C.F.R. 2.752(c)
deadline for filing objections to licensing board order; LBP-92-8, 35 NRC 186 (1992)
- 10 C.F.R. 2.760
effect of licensing board error on intervenor's failure to brief issues on appeal; CLI-92-3, 35 NRC 67 (1992)
effectiveness of initial decisions; LBP-92-2, 35 NRC 45 (1992)
- 10 C.F.R. 2.762
effect of licensing board error on intervenor's failure to brief issues on appeal; CLI-92-3, 35 NRC 67 (1992)
- 10 C.F.R. 2.762(b)
deadline for filing appellate briefs; CLI-92-2, 35 NRC 54 (1992)
- 10 C.F.R. 2.762(d)
format and size restrictions on appellate briefs; CLI-92-2, 35 NRC 54 (1992)
- 10 C.F.R. 2.771
reconsideration in context of standards for hearing on uranium enrichment facility license; CLI-92-7, 35 NRC 100 n.7 (1992)
- 10 C.F.R. 2.785, note (b)
jurisdiction over appeals; CLI-92-3, 35 NRC 65 (1992)
- 10 C.F.R. 2.786
finality of initial decisions; LBP-92-2, 35 NRC 45 (1992)
- 10 C.F.R. 2.786(b)
authority for Commission review of disputed aspects of licensing board orders; CLI-92-9, 35 NRC 158, 159 n.3 (1992)
- 10 C.F.R. 2.786(b)(1)
administrative remedies to be sought prior to judicial review; LBP-92-2, 35 NRC 45 (1992)
- 10 C.F.R. 2.786(b)(2)
length of petitions for review; LBP-92-2, 35 NRC 46 (1992)
- 10 C.F.R. 2.786(b)(4)
deadline for seeking review of initial decisions; LBP-92-2, 35 NRC 45 (1992)
- 10 C.F.R. 2.786(g)
showing necessary for review of interlocutory orders; CLI-92-9, 35 NRC 158, 159 n.3 (1992)
- 10 C.F.R. 2.788
stay of license transfer; CLI-92-4, 35 NRC 74, 76 (1992)
- 10 C.F.R. 2.788(e)
stay of issuance of license where there is no outstanding order to stay; CLI-92-2, 35 NRC 61 (1992)
- 10 C.F.R. Part 2, Subpart L
pre-effectiveness notice and hearings on materials licenses; CLI-92-4, 35 NRC 77 (1992)
- 10 C.F.R. 2.1205
hearing rights on license renewal applications; DD-92-2, 35 NRC 216 (1992); DD-92-3, 35 NRC 239 (1992)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.1205(k)(2)
referral of petition to NRC Staff for consideration under section 2.206; DD-92-2, 35 NRC 216 (1992)
- 10 C.F.R. 2.1209(k)
cross-examination of witnesses and discovery in informal proceedings; DD-92-3, 35 NRC 249 n.5 (1992)
hearing rights to challenge sufficiency of enforcement actions; DD-92-3, 35 NRC 248-49 (1992)
- 10 C.F.R. 2.1231, 2.1233
cross-examination of witnesses and discovery in informal proceedings; DD-92-3, 35 NRC 248 (1992)
- 10 C.F.R. Part 2, Appendix C
standards for determining amount of civil penalty; LBP-92-2, 35 NRC 40 (1992)
- 10 C.F.R. Part 2, Appendix C, III
aggregation of violations for assigning severity levels; LBP-92-2, 35 NRC 41 (1992)
definition of "willfulness"; LBP-92-2, 35 NRC 42 (1992)
- 10 C.F.R. Part 2, Appendix C, V
determinant of nature and extent of enforcement actions; LBP-92-2, 35 NRC 40 (1992)
- 10 C.F.R. Part 2, Appendix C, V.B
escalation or reduction of enforcement sanctions; LBP-92-2, 35 NRC 41 (1992)
factors taken into account in determining amount of civil penalties; LBP-92-2, 35 NRC 41 (1992)
- 10 C.F.R. Part 2, Appendix C, V.B, Table 1A
categorization of base civil penalties; LBP-92-2, 35 NRC 40 (1992)
- 10 C.F.R. Part 2, Appendix C, V.B, Table 1B
severity levels of violations; LBP-92-2, 35 NRC 41 (1992)
- 10 C.F.R. Part 2, Appendix C, V.B.2
mitigation of civil penalties on basis of administrative changes put in place by licensee; LBP-92-2, 35 NRC 44 (1992)
- 10 C.F.R. Part 2, Appendix C, V.D
escalation of enforcement sanctions; LBP-92-2, 35 NRC 41 (1992)
- 10 C.F.R. Part 2, Appendix C, VI
treatment of inaccurate and incomplete information as violations; DD-92-3, 35 NRC 246 (1992)
- 10 C.F.R. Part 20
limits on radionuclides in treated raffinate; DD-92-2, 35 NRC 229 (1992)
- 10 C.F.R. 20.302
notice requirements for revision of solid waste disposal plan; DD-92-2, 35 NRC 223 (1992)
- 10 C.F.R. Part 20, Appendix B, Table II
basis for limits on radioactive releases; DD-92-2, 35 NRC 230 (1992)
maximum permissible concentrations for radium and thorium; DD-92-2, 35 NRC 226 (1992)
- 10 C.F.R. Part 20, Appendix B, Table II, col. 2
jurisdiction over radium discharges; DD-92-2, 35 NRC 215 n.1 (1992)
- 10 C.F.R. Part 26
fitness-for-duty program for licensed reactor operators; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 26.10(a)
fitness-for-duty program for licensed reactor operators; LBP-92-1, 35 NRC 15 (1992)
- 10 C.F.R. 26.24(a)(2)
frequency of drug testing cycle for licensee employees; LBP-92-1, 35 NRC 15 n.2 (1992)
- 10 C.F.R. 26.27(b)
right of licensee to impose fitness-for-duty requirements more stringent than regulatory requirements; LBP-92-1, 35 NRC 15 (1992)
- 10 C.F.R. Part 26, Appendix A, 2.4(f)
followup drug testing program for licensee employee program; LBP-92-1, 35 NRC 13 (1992)
- 10 C.F.R. 27.27(b)(2)
penalty for cocaine-positive drug tests; LBP-92-1, 35 NRC 17 (1992)
- 10 C.F.R. Part 30
order modifying clinic's byproduct material license; LBP-92-13, 35 NRC 199 (1992)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. Part 33
 - prohibition on involvement in NRC-licensed activities; LBP-92-12, 35 NRC 197 (1992)
- 10 C.F.R. 34.11(d)(1)
 - audits of radiographer performance; LBP-92-2, 35 NRC 30 (1992)
 - recordkeeping requirements on performance of radiographers; LBP-92-2, 35 NRC 28 (1992)
- 10 C.F.R. 34.31(a)(1)
 - training, examination, and certification requirements for radiographers; LBP-92-2, 35 NRC 27 (1992)
- 10 C.F.R. Part 34, Appendix A
 - training, examination, and certification requirements for radiographers; LBP-92-2, 35 NRC 27 (1992)
- 10 C.F.R. Part 35
 - medical radiography compared with industrial radiography; LBP-92-2, 35 NRC 29 n.36 (1992)
- 10 C.F.R. 35.27
 - prohibition on involvement in NRC-licensed activities; LBP-92-12, 35 NRC 197 (1992)
- 10 C.F.R. 40.9
 - standard for determining whether a material false statement exists; DD-92-3, 35 NRC 245 (1992)
 - violation of; DD-92-3, 35 NRC 239 (1992)
- 10 C.F.R. 40.9(a)
 - requirement for information submitted to NRC to be complete; DD-92-3, 35 NRC 247 (1992)
- 10 C.F.R. 40.31
 - relevance of employee turnover to exercise of radiological contingency plan; DD-92-2, 35 NRC 225 (1992)
- 10 C.F.R. 40.31(f)
 - content of environmental report accompanying license renewal application; DD-92-3, 35 NRC 247 (1992)
- 10 C.F.R. 40.36
 - decommissioning funding plan requirements for license renewal; DD-92-2, 35 NRC 213 (1992)
- 10 C.F.R. 40.36(c)(2)
 - decommissioning funding plan requirements for materials licensees; DD-92-2, 35 NRC 217 (1992)
- 10 C.F.R. 40.36(e)
 - letter of credit as financial assurance for decommissioning; DD-92-2, 35 NRC 218 (1992)
- 10 C.F.R. 40.43(b)
 - extension of current license while license renewal application is pending; DD-92-3, 35 NRC 239 (1992)
- 10 C.F.R. 40.51(b)(5)
 - disposal of contaminated sludges and refuse; DD-92-2, 35 NRC 223 (1992)
- 10 C.F.R. Part 40, Appendix A
 - isolation design standard for thorium byproduct disposal; LBP-92-8, 35 NRC 181 (1992)
 - sites appropriate for storage of thorium byproducts; LBP-92-8, 35 NRC 177 (1992)
- 10 C.F.R. Part 50
 - employment of nonlicensed personnel for manipulation of reactivity-related controls; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 50.36
 - content of technical specifications; LBP-92-4, 35 NRC 116 (1992)
 - removal of schedule for withdrawal of reactor vessel material surveillance specimens from technical specifications; LBP-92-4, 35 NRC 124 (1992)
- 10 C.F.R. 50.36(b)
 - technical specifications requirement for operating licenses; LBP-92-4, 35 NRC 116 (1992)
- 10 C.F.R. 50.52
 - applicability of Sholly procedures to possession-only license; CLI-92-4, 35 NRC 75 (1992)
- 10 C.F.R. 50.54(i)-(m)
 - employment of nonlicensed personnel for manipulation of reactivity-related controls; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 50.74(b)
 - licensee obligation to report senior reactor operator's termination of employment; LBP-92-6, 35 NRC 131 n.1 (1992)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 C.F.R. 50.82
decommissioning without a decommissioning plan; CLI-92-2, 35 NRC 55 n.3 (1992)
- 10 C.F.R. 50.91
hearings on license amendments and no significant hazards consideration determination; LBP-92-4, 35 NRC 118 (1992)
use of license amendment to transfer a license; CLI-92-4, 35 NRC 76 (1992)
- 10 C.F.R. 50.92(c)
no significant hazards consideration determination on relocation of surveillance capsule withdrawal schedule; LBP-92-4, 35 NRC 118 (1992)
- 10 C.F.R. Part 50, Appendix B
use of Justifications for Continued Operation at Palo Verde; DD-92-1, 35 NRC 137-38 (1992)
- 10 C.F.R. Part 50, Appendix H, II.B.3
removal of schedule for withdrawal of reactor vessel material surveillance specimens from technical specifications; LBP-92-4, 35 NRC 118 (1992)
- 10 C.F.R. Part 51
NRC authority to enforce conditions of permits issued by other agencies; DD-92-2, 35 NRC 219 (1992)
- 10 C.F.R. 51.45(b)(1), (e)
content of environmental report accompanying license renewal application; DD-92-3, 35 NRC 247 (1992)
- 10 C.F.R. 51.60(a)
environmental report with license renewal application; DD-92-3, 35 NRC 246, 247 (1992)
- 10 C.F.R. Part 55
effect of settlement agreement on reinstatement of reactor operator license; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. Part 55, Subpart C
health restrictions on licensing of reactor operators; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 55.31(a)(3)-(6)
health restrictions on licensing of reactor operators; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 55.55(a)
expiration of senior reactor operator license upon termination of employment; LBP-92-6, 35 NRC 131 (1992)
- 10 C.F.R. 55.61
health restrictions on licensing of reactor operators; LBP-92-1, 35 NRC 14 (1992)
- 10 C.F.R. 56.36(c)
types of items that must be included in technical specifications; LBP-92-4, 35 NRC 117 (1992)
- 10 C.F.R. 74.33
material control and accounting requirements for uranium enrichment facilities; CLI-92-7, 35 NRC 103-04 (1992)
- 10 C.F.R. 74.33(2) and (3)
safeguards requirements for uranium enrichment facilities; CLI-92-7, 35 NRC 104 (1992)
- 10 C.F.R. Part 100
boundary limits for uranium enrichment facilities; CLI-92-7, 35 NRC 101 (1992)
doses from accident involving reactor coolant pump seals; DD-92-1, 35 NRC 138 (1992)
- 10 C.F.R. Part 140
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- 10 C.F.R. 140.3(d)
definition of "financial protection"; CLI-92-7, 35 NRC 98 n.5 (1992)
- 10 C.F.R. 140.13a
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- 10 C.F.R. 140.14(a)(1)
means of providing financial protection for uranium enrichment facilities; CLI-92-7, 35 NRC 98 n.5 (1992)
- 10 C.F.R. 140.15
proof of liability insurance for uranium enrichment facilities; CLI-92-7, 35 NRC 97, 98 n.5 (1992)

LEGAL CITATIONS INDEX REGULATIONS

10 C.F.R. 140.16, 140.17

liability insurance requirements for uranium enrichment facility licensing; CLI-92-7, 35 NRC 97 (1992)

10 C.F.R. Part 140, Appendix A

models for liability insurance coverage for uranium enrichment facilities; CLI-92-7, 35 NRC 97 (1992)

10 C.F.R. Parts 170 and 171

burden of regulatory cost; DD-92-2, 35 NRC 233 (1992)

40 C.F.R. Part 141

limits on radium-226 in drinking water; DD-92-2, 35 NRC 229 (1992)

40 C.F.R. Part 190

limits on radionuclides in treated raffinate; DD-92-2, 35 NRC 229 (1992)

LEGAL CITATIONS INDEX STATUTES

- Administrative Procedure Act, 5 U.S.C. 556(d)
prefiled written direct testimony in enforcement cases; LBP-92-7, 35 NRC 164 (1992)
- Atomic Energy Act, 3
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- Atomic Energy Act, 42 U.S.C. 2012(i)
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- Atomic Energy Act, 11e(2), 42 U.S.C. 2014(e)(2)
disposal of uranium and thorium byproduct material; LBP-92-8, 35 NRC 170 (1992)
- Atomic Energy Act, 11v and cc, 42 U.S.C. 2014v, cc
definition of production and utilization facilities; DD-92-2, 35 NRC 227-28 (1992)
- Atomic Energy Act, 81, 42 U.S.C. 2111
incorporation of settlement agreement into board order by reference; LBP-92-5, 35 NRC 129 (1992)
termination of proceedings because of settlement agreement; LBP-92-9, 35 NRC 190 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 200 (1992)
- Atomic Energy Act, 84a(1)
economic considerations in management of byproduct material; LBP-92-8, 35 NRC 180, 181 (1992)
- Atomic Energy Act, 103, 42 U.S.C. 2133(c)
renewal term for facilities that are not classified as production or utilization; DD-92-2, 35 NRC 227 (1992)
- Atomic Energy Act, 161, 42 U.S.C. 2201
incorporation of settlement agreement into board order by reference; LBP-92-5, 35 NRC 129 (1992)
termination of proceedings because of settlement agreement; LBP-92-9, 35 NRC 190 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 200 (1992)
- Atomic Energy Act, 161c, 42 U.S.C. 2201(c)
pre-effectiveness hearing requirements on license transfers; CLI-92-4, 35 NRC 77-78 (1992)
- Atomic Energy Act, 42 U.S.C. 2210(n)
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- Atomic Energy Act, 170
applicability of Price-Anderson Act to materials licensees; DD-92-2, 35 NRC 233 (1992)
- Atomic Energy Act, 182(a), 42 U.S.C. 2232(a)
technical specifications requirement for operating licenses; LBP-92-4, 35 NRC 116 (1992)
- Atomic Energy Act, 184, 42 U.S.C. 2234
distinction between transfer of license and license amendment; CLI-92-4, 35 NRC 76 (1992)
name change as a transfer of control; DD-92-2, 35 NRC 222 (1992)
penalty for failure to report transfer of control; CLI-92-9, 35 NRC 160 (1992)
- Atomic Energy Act, 186
omission of monitoring data as material false statement in license renewal application; DD-92-3, 35 NRC 245 (1992)
- Atomic Energy Act, 189(a), 42 U.S.C. 2239(a)
automatic right of intervention; LBP-92-4, 35 NRC 124, 126 (1992)
criteria required to establish standing; CLI-92-2, 35 NRC 56 (1992)
hearing rights on changes in technical specifications; LBP-92-4, 35 NRC 119-20 (1992)

LEGAL CITATIONS INDEX

STATUTES

- Atomic Energy Act, 189a(1), 42 U.S.C. 2239(a)(1)
distinction between transfer of license and license amendment; CLI-92-4, 35 NRC 76 (1992)
immediate effectiveness of transfer of license; CLI-92-4, 35 NRC 73 (1992)
interest requirement for intervention; LBP-92-8, 35 NRC 171 (1992)
- Atomic Energy Act, 42 U.S.C. 2239(a)(2)(A)
NRC authority to issue immediately effective amendments; CLI-92-4, 35 NRC 73 (1992)
- Atomic Energy Act, 42 U.S.C. 2239(a)(2)(A)-(B)
hearings on license amendments and no significant hazards consideration determination; LBP-92-4, 35 NRC 118 (1992)
- Atomic Energy Act, 193
hearing requirements on uranium enrichment facilities; CLI-92-7, 35 NRC 96 (1992)
- Atomic Energy Act, 193(d)(1)
liability insurance requirements for uranium enrichment facility licensing; CLI-92-7, 35 NRC 97 (1992)
- Atomic Energy Act, 193(e)
applicability of Price-Anderson requirements to uranium enrichment facilities; CLI-92-7, 35 NRC 98 (1992)
- Comprehensive Environmental Response, Compensation and Liability Act, 107(a), 42 U.S.C. 9607(a)
applicability to thorium byproduct material disposal; LBP-92-8, 35 NRC 175 (1992)
- Comprehensive Environmental Response, Compensation and Liability Act, 107(b), 42 U.S.C. 9607(b)
defenses against liability; LBP-92-8, 35 NRC 175-76 (1992)
- Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (Nov. 5, 1990)
burden of regulatory cost; DD-92-2, 35 NRC 233 (1992)
- Pub. L. No. 85-256, 71 Stat. 576, § 7 (1957)
pre-effectiveness hearing requirements; CLI-92-4, 35 NRC 77 (1992)
- Pub. L. No. 87-615, 76 Stat. 409, § 2 (1962)
pre-effectiveness hearing requirements; CLI-92-4, 35 NRC 77 (1992)
- Pub. L. No. 97-415 (96 Stat. 2067) (1983)
economic considerations in management of byproduct material; LBP-92-8, 35 NRC 180 (1992)
- Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990, 5, 42 U.S.C. 2243(b), Pub. L. No. 101-575
challenges to standards through reconsideration; CLI-92-7, 35 NRC 100 (1992)
hearing requirements on uranium enrichment facilities; CLI-92-7, 35 NRC 96 (1992)

LEGAL CITATIONS INDEX OTHERS

Federal Rules of Civil Procedure, Rule 60(b)

"party" status required to request relief; CLI-92-1, 35 NRC 6 (1992)

Federal Rules of Evidence, Rule 401

relevance requirement for discovery from NRC Staff; LBP-92-3A, 35 NRC 111 (1992)

7 J. Moore, Moore's Federal Practice ¶60.19 (2d ed. 1985)

"party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure;
CLI-92-1, 35 NRC 6 (1992)

11 Wright and Miller, Federal Practice and Procedure §2865 (1973)

"party" status required to request relief under Rule 60(b) of Federal Rules of Civil Procedure;
CLI-92-1, 35 NRC 6 (1992)

13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3531.4-6 (1984)

showing necessary to demonstrate injury in fact; LBP-92-4, 35 NRC 121 (1992)

SUBJECT INDEX

AMENDMENT

of demonstration section of materials license; DD-92-2, 35 NRC 211 (1992)

See also License Amendments; Operating License Amendments

ANITRUST

suspension of license conditions; CLI-92-6, 35 NRC 86 (1992)

APPEALS

Commission discretion to waive pleading requirements; CLI-92-2, 35 NRC 47 (1992)

deadline for filing supporting briefs; CLI-92-2, 35 NRC 47 (1992)

dismissal for failure to file supporting brief; CLI-92-3, 35 NRC 63 (1992)

from initial decisions; CLI-92-2, 35 NRC 47 (1992)

of intervention denials; CLI-92-2, 35 NRC 47 (1992); CLI-92-3, 35 NRC 63 (1992)

APPLICANTS

standard for reopening a record; CLI-92-1, 35 NRC 1 (1992)

ATOMIC ENERGY ACT

automatic right of intervention under; DD-92-3, 35 NRC 107 (1992)

hearing rights on enforcement actions; CLI-92-1, 35 NRC 1 (1992)

hearing rights on transfer of license; CLI-92-4, 35 NRC 69 (1992)

interpretation of "transfer of license"; CLI-92-4, 35 NRC 69 (1992)

liability insurance requirements for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

licensee's financial resources as a factor in deciding necessity of safety measures; CLI-92-9, 35 NRC 156 (1992)

limits on term of materials license; DD-92-2, 35 NRC 211 (1992)

name change as transfer of control of a license; DD-92-2, 35 NRC 211 (1992)

scope of interests protected; DD-92-2, 35 NRC 211 (1992)

standing to intervene; LBP-92-8, 35 NRC 167 (1992)

AUTOCLAVES

for heating cylinders filled with UF₆; DD-92-2, 35 NRC 211 (1992)

BEACH POPULATIONS

evacuation versus sheltering as planned protective action; CLI-92-8, 35 NRC 145 (1992)

BIAS

decisional; CLI-92-6, 35 NRC 86 (1992)

BRIEFS, APPELLATE

deadline for filing; CLI-92-2, 35 NRC 47 (1992)

dismissal of appeal for failure to file; CLI-92-3, 35 NRC 63 (1992)

format and size of; CLI-92-2, 35 NRC 47 (1992)

party responsibility for content of; CLI-92-2, 35 NRC 47 (1992)

BROAD-SCOPE LICENSE

prohibition on involvement in activities under; LBP-92-12, 35 NRC 195 (1992)

BYPRODUCT MATERIAL LICENSES

settlement agreement on modification order; LBP-92-13, 35 NRC 199 (1992)

BYPRODUCT MATERIALS

disposal of; LBP-92-8, 35 NRC 167 (1992)

SUBJECT INDEX

CIVIL PENALTIES

- for breakdown in control of licensed activities; LBP-92-2, 35 NRC 20 (1992)
- for industrial radiography violations; LBP-92-2, 35 NRC 20 (1992)
- mitigation by licensing boards; LBP-92-2, 35 NRC 20 (1992)

CONSENT ORDER

- effect on order modifying license; LBP-92-11, 35 NRC 193 (1992)

CONSOLIDATION OF PROCEEDINGS

- Subpart G and Subpart L; LBP-92-13A, 35 NRC 205 (1992)

CONTAMINATION

- soil and groundwater, material omissions of fact in license renewal application; DD-92-3, 35 NRC 236 (1992)

CONTENTIONS

- requirement for intervention; LBP-92-8, 35 NRC 167 (1992)

CONTROL ELEMENT ASSEMBLY

- design change at Palo Verde; DD-92-1, 35 NRC 133 (1992)

COOLANT

- See Reactor Coolant

COOLING TOWERS

- safety at Palo Verde; DD-92-1, 35 NRC 133 (1992)

DECISIONS

- See Initial Decisions; Vacation of Decision

DECOMMISSIONING

- financial assurance requirements for license renewal; DD-92-2, 35 NRC 211 (1992)

DESIGN

- change in control element assembly at Palo Verde; DD-92-1, 35 NRC 133 (1992)
- criteria for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

DIESEL GENERATORS

- referral of technical issues to NRC Staff for resolution; CLI-92-3, 35 NRC 63 (1992)

DISCOVERY

- from NRC Staff; LBP-92-3A, 35 NRC 110 (1992)
- relating to summary disposition motions, requirements for obtaining; CLI-92-8, 35 NRC 145 (1992)

DISMISSAL OF PARTIES

- for failure to comply with prehearing order; DD-92-3, 35 NRC 107 (1992)

DISMISSAL OF PROCEEDING

- with prejudice; LBP-92-14, 35 NRC 207 (1992); LBP-92-15, 35 NRC 209 (1992)

DRUG ABUSE

- suspension of Part 50 activities of senior reactor operator because of; LBP-92-1, 35 NRC 11 (1992)

ECONOMIC INTERESTS

- protection under Atomic Energy Act; DD-92-2, 35 NRC 211 (1992)
- protection under NEPA; CLI-92-2, 35 NRC 47 (1992)

EMERGENCY EXERCISES

- frequency, for radiological contingency plan; DD-92-2, 35 NRC 211 (1992)

EMERGENCY PLANS

- content on protective actions; CLI-92-8, 35 NRC 145 (1992)

ENFORCEMENT ACTIONS

- challenges to sufficiency of; DD-92-3, 35 NRC 236 (1992)
- hearing rights on; CLI-92-1, 35 NRC 1 (1992)

ENFORCEMENT PROCEEDINGS

- prefiled written direct testimony in; LBP-92-7, 35 NRC 163 (1992)

EVACUATION

- appropriateness for beach populations; CLI-92-8, 35 NRC 145 (1992)

EVIDENCE

- NRC Staff-sponsored, weight given by licensing boards to; CLI-92-6, 35 NRC 86 (1992)

SUBJECT INDEX

FERTILIZER

barium-treated uranium raffinate solvent extract applied as; DD-92-2, 35 NRC 211 (1992)

FINANCIAL ASSURANCE

for decommissioning, license renewal requirements; DD-92-2, 35 NRC 211 (1992)

FINANCIAL RESOURCES

as a factor in deciding necessity of safety measures; CLI-92-9, 35 NRC 156 (1992)

FIRE PROTECTION

electrical circuit breakers at Palo Verde; DD-92-1, 35 NRC 133 (1992)

FIRE PUMP

reliability at Palo Verde; DD-92-1, 35 NRC 133 (1992)

FIRES

hazard from hydrogen leak at Palo Verde; DD-92-1, 35 NRC 133 (1992)

FITNESS-FOR-DUTY PROGRAM

followup drug-testing program; LBP-92-1, 35 NRC 11 (1992)

FLUORIDE

in effluent, detection level for analysis of; DD-92-2, 35 NRC 211 (1992)

GENERATORS

See Diesel Generators

GROUNDWATER

contamination from barium-treated uranium raffinate solvent extract applied as fertilizer; DD-92-2, 35 NRC 211 (1992)

contamination, material omissions of fact in license renewal application; DD-92-3, 35 NRC 236 (1992)

monitoring and contamination; DD-92-2, 35 NRC 211 (1992)

HEALTH AND SAFETY

NRC responsibilities for; CLI-92-3, 35 NRC 63 (1992)

HEALTH EFFECTS

of radionuclide and toxic chemical discharges; DD-92-2, 35 NRC 211 (1992)

HEARING RIGHTS

on enforcement actions; CLI-92-1, 35 NRC 1 (1992)

on transfer of license; CLI-92-4, 35 NRC 69 (1992)

HEARINGS

discretionary, on transfer of license; CLI-92-4, 35 NRC 69 (1992)

post-effectiveness; CLI-92-4, 35 NRC 69 (1992)

reconsideration of standards for; CLI-92-7, 35 NRC 93 (1992)

HYDROGEN

portable recombiner; DD-92-1, 35 NRC 133 (1992)

HYDROGEN LEAK

at Palo Verde, fire hazard from; DD-92-1, 35 NRC 133 (1992)

IMMEDIATE EFFECTIVENESS

of license transfer; CLI-92-4, 35 NRC 69 (1992)

INDUSTRIAL RADIOGRAPHY

civil penalty for recordkeeping violations; LBP-92-2, 35 NRC 20 (1992)

field audit inspection reports; LBP-92-2, 35 NRC 20 (1992)

INITIAL DECISIONS

appeals from; CLI-92-2, 35 NRC 47 (1992)

INJURY IN FACT

generalized grievance as basis for standing to intervene; LBP-92-8, 35 NRC 167 (1992)

liability for onsite incidents involving byproduct waste as; LBP-92-8, 35 NRC 167 (1992)

standard for intervention in NRC proceedings; LBP-92-4, 35 NRC 114 (1992)

INSURANCE

See Liability Insurance

SUBJECT INDEX

INTERLOCUTORY REVIEW

- criteria for initiation of; CLI-92-9, 35 NRC 156 (1992)
- expansion of issues for litigation as basis for interlocutory review; CLI-92-9, 35 NRC 156 (1992)

INTERVENTION

- appeals of denial of; CLI-92-3, 35 NRC 63 (1992)
- automatic right of; DD-92-3, 35 NRC 107 (1992)
- contention requirement for; LBP-92-8, 35 NRC 167 (1992)
- discretionary, standard for grant of; LBP-92-8, 35 NRC 167 (1992)

INTERVENTION PETITIONS

- supplements to; DD-92-3, 35 NRC 107 (1992)

INTERVENTION, LATE

- five-factor test for; CLI-92-1, 35 NRC 1 (1992)
- pleading requirements for; CLI-92-1, 35 NRC 1 (1992)

JUSTIFICATION FOR CONTINUED OPERATION

- at Palo Verde; DD-92-1, 35 NRC 133 (1992)

LABORATORIES

- separation of process and environmental facilities; DD-92-2, 35 NRC 211 (1992)

LAW OF THE CASE

- applicability to interlocutory decisions; CLI-92-9, 35 NRC 156 (1992)

LIABILITY

- for onsite incidents involving byproduct waste as injury in fact; LBP-92-8, 35 NRC 167 (1992)

LIABILITY INSURANCE

- requirements for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

LICENSE AMENDMENTS

- notice of applications; DD-92-3, 35 NRC 236 (1992)

LICENSE CONDITIONS

- antitrust, suspension of; CLI-92-6, 35 NRC 86 (1992)
- issued by other federal or state agencies, NRC authority to enforce; DD-92-2, 35 NRC 211 (1992)
- materiality of industrial radiography reports; LBP-92-2, 35 NRC 20 (1992)

LICENSE RENEWAL

- financial assurance for decommissioning; DD-92-2, 35 NRC 211 (1992)
- material omissions of fact and material false statements in; DD-92-3, 35 NRC 236 (1992)

LICENSEES

- financial resources as a factor in deciding necessity of safety measures; CLI-92-9, 35 NRC 156 (1992)
- responsibility to report employment changes of licensed reactor operators; LBP-92-6, 35 NRC 130 (1992)

LICENSES

- See Broad-Scope License; Byproduct Material License; Revocation of License; Transfer of License

LICENSING BOARDS

- authority to dismiss parties; DD-92-3, 35 NRC 107 (1992)
- mitigation of civil penalties by; LBP-92-2, 35 NRC 20 (1992)
- obligation to adhere to decisions of higher tribunals; CLI-92-9, 35 NRC 156 (1992)
- referral of issues to Staff for resolution; CLI-92-3, 35 NRC 63 (1992)
- review of settlement agreements; LBP-92-9, 35 NRC 189 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 199 (1992); LBP-92-15, 35 NRC 209 (1992)

MANAGEMENT COMPETENCE

- allegations of breakdown in; DD-92-3, 35 NRC 236 (1992)

MATERIAL CONTROL AND ACCOUNTING

- standards for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

MATERIAL FALSE STATEMENTS

- in license renewal application; DD-92-3, 35 NRC 236 (1992)

MATERIALITY

- of industrial radiography reports; LBP-92-2, 35 NRC 20 (1992)

SUBJECT INDEX

MATERIALS LICENSES

- amendment of demonstration section; DD-92-2, 35 NRC 211 (1992)
- limits on term of; DD-92-2, 35 NRC 211 (1992)
- name change as transfer of control of; DD-92-2, 35 NRC 211 (1992)

MOOTNESS

- termination of proceeding on grounds of; LBP-92-6, 35 NRC 130 (1992)
- vacation of decision on grounds of; CLI-92-5, 35 NRC 83 (1992)

NATIONAL ENVIRONMENTAL POLICY ACT

- zone of interests protected by; CLI-92-2, 35 NRC 47 (1992)

NITRATES

- in effluent, detection level for analysis of; DD-92-2, 35 NRC 211 (1992)

NOTICE

- of license amendment applications; DD-92-3, 35 NRC 236 (1992)

NRC PROCEEDINGS

- judicial concepts of standing applied in; LBP-92-8, 35 NRC 167 (1992)

NRC STAFF

- discovery from; LBP-92-3A, 35 NRC 110 (1992)
- evidence, weight given to, by licensing boards; CLI-92-6, 35 NRC 86 (1992)
- referral of technical issues to; CLI-92-3, 35 NRC 63 (1992)

NUCLEAR REGULATORY COMMISSION

- authority to enforce conditions of permits or licenses issued by other federal or state agencies; DD-92-2, 35 NRC 211 (1992)
- health and safety responsibilities; CLI-92-3, 35 NRC 63 (1992)
- hearing standards; CLI-92-7, 35 NRC 93 (1992)
- sua sponte exercise of supervisory authority over adjudicatory proceedings; CLI-92-6, 35 NRC 86 (1992)

OPERATING LICENSE AMENDMENT PROCEEDINGS

- standing to intervene in; LBP-92-4, 35 NRC 114 (1992)

OPERATING LICENSE AMENDMENTS

- license transfer through; CLI-92-4, 35 NRC 69 (1992)

OPERATING LICENSE PROCEEDINGS

- existence of, where license has not yet been issued; CLI-92-1, 35 NRC 1 (1992)

ORGANIZATIONS

- injury-in-fact and zone-of-interests requirements for intervention in NRC proceedings; LBP-92-4, 35 NRC 114 (1992)

PENALTIES

- See Civil Penalties

PHYSICAL SECURITY

- standards for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

PRESIDING OFFICER

- authority to consolidate proceedings; LBP-92-13A, 35 NRC 205 (1992)

PRICE-ANDERSON ACT

- applicability to uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)

RADIOGRAPHY

- See Industrial Radiography

RADIOLOGICAL CONTINGENCY PLAN

- frequency of exercises; DD-92-2, 35 NRC 211 (1992)

RADIONUCLIDES

- discharge limits; DD-92-2, 35 NRC 211 (1992)

REACTOR COOLANT

- primary-to-secondary leak at Palo Verde; DD-92-1, 35 NRC 133 (1992)
- pump seals, Justification for Continued Operation at Palo Verde; DD-92-1, 35 NRC 133 (1992)

REACTOR VESSEL

- material surveillance program withdrawal schedule; LBP-92-4, 35 NRC 114 (1992)

SUBJECT INDEX

RECORD

See Reopening a Record

RECORDKEEPING

industrial radiography violations; LBP-92-2, 35 NRC 20 (1992)

REGULATIONS

interpretation of 10 C.F.R. 2.714a; CLI-92-2, 35 NRC 47 (1992)

interpretation of 10 C.F.R. 2.762; CLI-92-2, 35 NRC 47 (1992)

interpretation of 10 C.F.R. Part 140; CLI-92-7, 35 NRC 93 (1992)

REOPENING A RECORD

by petitioners that were not parties to the proceeding; CLI-92-1, 35 NRC 1 (1992)

failure to satisfy requirements for; CLI-92-1, 35 NRC 1 (1992)

REPORTING REQUIREMENTS

employment changes of licensed reactor operators; LBP-92-6, 35 NRC 130 (1992)

for safety violations; DD-92-1, 35 NRC 133 (1992)

RES JUDICATA

resolution of factual issues by settlement agreement as; LBP-92-1, 35 NRC 11 (1992)

REVIEW

See Appeals; Interlocutory Review

REVOCATION OF LICENSE

request based on material false statements; DD-92-3, 35 NRC 236 (1992)

RULEMAKING

choice between adjudication and; CLI-92-7, 35 NRC 93 (1992)

RULES OF PRACTICE

application of judicial concepts of standing in NRC proceedings; LBP-92-4, 35 NRC 114 (1992)

automatic right of intervention under Atomic Energy Act; DD-92-3, 35 NRC 107 (1992)

challenges to hearing standards; CLI-92-7, 35 NRC 93 (1992)

contention requirement for intervention; LBP-92-8, 35 NRC 167 (1992)

discretionary standing to intervene; LBP-92-8, 35 NRC 167 (1992)

dismissal of parties; DD-92-3, 35 NRC 107 (1992)

economic injury as basis for standing to intervene; LBP-92-8, 35 NRC 167 (1992)

effectiveness of decisions; CLI-92-4, 35 NRC 69 (1992)

evidentiary support to obtain discovery to respond to summary disposition motions; CLI-92-8, 35 NRC 145 (1992)

existence of operating license proceeding where license has not yet been issued; CLI-92-1, 35 NRC 1 (1992)

five-factor test for late intervention; CLI-92-1, 35 NRC 1 (1992)

genuine issue of material fact, for purpose of avoiding summary disposition; CLI-92-8, 35 NRC 145 (1992)

injury-in-fact test for standing to intervene; LBP-92-8, 35 NRC 167 (1992)

interest requirement for standing to intervene; CLI-92-2, 35 NRC 47 (1992); LBP-92-8, 35 NRC 167 (1992)

interlocutory review criteria; CLI-92-9, 35 NRC 156 (1992)

irreparable harm standard for grant of stay pending appeal; CLI-92-4, 35 NRC 69 (1992)

jurisdiction over 2.206 petitions; CLI-92-1, 35 NRC 1 (1992)

law of the case doctrine; CLI-92-9, 35 NRC 156 (1992)

mitigation of civil penalties by licensing boards; LBP-92-2, 35 NRC 20 (1992)

pleading requirements for late intervention; CLI-92-1, 35 NRC 1 (1992)

pleading requirements to establish standing to intervene; LBP-92-8, 35 NRC 167 (1992)

prefiled written direct testimony in enforcement cases; LBP-92-7, 35 NRC 163 (1992)

referral of issues to NRC Staff; CLI-92-3, 35 NRC 63 (1992)

reopening a record; CLI-92-1, 35 NRC 1 (1992)

responsibilities of parties; CLI-92-3, 35 NRC 63 (1992)

specificity required of 2.206 petition; DD-92-2, 35 NRC 211 (1992)

SUBJECT INDEX

- standing to intervene; CLI-92-1, 35 NRC 1 (1992)
- stay of agency action; CLI-92-4, 35 NRC 69 (1992)
- supplements to intervention petitions; DD-92-3, 35 NRC 107 (1992)
- SAFEGUARDS**
 - performance-based standards for uranium enrichment facilities; CLI-92-7, 35 NRC 93 (1992)
- SAFETY**
 - licensee's financial resources as a factor in deciding necessity of actions; CLI-92-9, 35 NRC 156 (1992)
 - reporting of violations at Palo Verde; DD-92-1, 35 NRC 133 (1992)
 - See also Health and Safety
- SAFETY EVALUATION**
 - of Justifications for Continued Operation at Palo Verde; DD-92-1, 35 NRC 133 (1992)
- SANCTIONS**
 - dismissal of parties; DD-92-3, 35 NRC 107 (1992)
 - See also Civil Penalties
- SECURITY**
 - See Physical Security
- SENIOR REACTOR OPERATOR**
 - suspension from Part 50 activities because of drug abuse; LBP-92-1, 35 NRC 11 (1992)
- SENIOR REACTOR OPERATOR LICENSE**
 - expiration upon termination of employment; LBP-92-6, 35 NRC 130 (1992)
- SETTLEMENT AGREEMENTS**
 - licensing board review of; LBP-92-5, 35 NRC 128 (1992); LBP-92-9, 35 NRC 189 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 199 (1992); LBP-92-15, 35 NRC 209 (1992)
 - objections to, by party to related proceeding; LBP-92-1, 35 NRC 11 (1992)
 - termination of proceedings because of; LBP-92-9, 35 NRC 189 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 199 (1992); LBP-92-15, 35 NRC 209 (1992)
- SHIELTERING**
 - appropriateness for beach populations; CLI-92-8, 35 NRC 145 (1992)
 - content of emergency plans; CLI-92-8, 35 NRC 145 (1992)
- SHOW-CAUSE PROCEEDINGS**
 - standard for initiation of; DD-92-1, 35 NRC 133 (1992)
- SITING**
 - boundary limits for uranium enrichment facility; CLI-92-7, 35 NRC 93 (1992)
- STANDING TO INTERVENE**
 - application of judicial concepts in NRC proceedings; CLI-92-2, 35 NRC 47 (1992); LBP-92-4, 35 NRC 114 (1992)
 - discretionary, standard for grant of; LBP-92-8, 35 NRC 167 (1992)
 - economic injury as basis for; CLI-92-2, 35 NRC 47 (1992); LBP-92-8, 35 NRC 167 (1992)
 - in operating license amendment proceeding; LBP-92-4, 35 NRC 114 (1992)
 - informational interests as basis for; CLI-92-2, 35 NRC 47 (1992)
 - injury-in-fact test for; LBP-92-8, 35 NRC 167 (1992)
 - interest requirement for; CLI-92-2, 35 NRC 47 (1992); LBP-92-8, 35 NRC 167 (1992)
 - judicial concepts applied in NRC proceedings; LBP-92-8, 35 NRC 167 (1992)
 - pleading requirements to establish; LBP-92-8, 35 NRC 167 (1992)
- STAY**
 - applicability where there is no order in existence to stay; CLI-92-2, 35 NRC 47 (1992)
 - housekeeping, pending judicial review; CLI-92-4, 35 NRC 69 (1992)
 - irreparable harm standard; CLI-92-4, 35 NRC 69 (1992)
- SUBPOENAS**
 - witnesses in enforcement cases; LBP-92-7, 35 NRC 163 (1992)
- SUMMARY DISPOSITION**
 - discovery, requirements for obtaining; CLI-92-8, 35 NRC 145 (1992)

SUBJECT INDEX

TECHNICAL SPECIFICATIONS

- removal of reactor vessel material surveillance program withdrawal schedule from; LBP-92-4, 35 NRC 114 (1992)
- temporary waivers of compliance at Palo Verde; DD-92-1, 35 NRC 133 (1992)

TEMPORARY WAIVERS OF COMPLIANCE

- at Palo Verde; DD-92-1, 35 NRC 133 (1992)

TERMINATION OF PROCEEDING

- approval of consent order as cause for; LBP-92-11, 35 NRC 193 (1992)
- incorporation by reference in licensing board order dismissing proceeding; LBP-92-5, 35 NRC 128 (1992)
- on mootness grounds; LBP-92-6, 35 NRC 130 (1992)
- settlement agreement as basis for; LBP-92-9, 35 NRC 189 (1992); LBP-92-12, 35 NRC 195 (1992); LBP-92-13, 35 NRC 199 (1992); LBP-92-15, 35 NRC 209 (1992)

TESTIMONY

- profiled written direct, in enforcement cases; LBP-92-7, 35 NRC 163 (1992)

THORIUM

- byproduct material disposal; LBP-92-8, 35 NRC 167 (1992)

TRANSFER OF CONTROL

- name change as; DD-92-2, 35 NRC 211 (1992)

TRANSFER OF LICENSE

- hearing rights on; CLI-92-4, 35 NRC 69 (1992)

URANIUM

- barium-treated raffinate solvent extract applied as fertilizer; DD-92-2, 35 NRC 211 (1992)
- byproduct material disposal; LBP-92-8, 35 NRC 167 (1992)
- soil and water contamination; DD-92-3, 35 NRC 236 (1992)

URANIUM ENRICHMENT FACILITY

- applicability of Part 140 to license application; CLI-92-7, 35 NRC 93 (1992)
- siting criteria; CLI-92-7, 35 NRC 93 (1992)

URANIUM HEXAFLUORIDE

- autoclaves for heating cylinders filled with; DD-92-2, 35 NRC 211 (1992)
- reduction plant, substitution of H_2 for dissociated ammonia; DD-92-2, 35 NRC 211 (1992)

VACATION OF DECISION

- on mootness grounds; CLI-92-5, 35 NRC 83 (1992)

VIOLATIONS

- safety, reporting of, at Palo Verde; DD-92-1, 35 NRC 133 (1992)
- severity level of; LBP-92-2, 35 NRC 20 (1992)

WAIVER

- of pleading requirements for appeals; CLI-92-2, 35 NRC 47 (1992)
- See also Temporary Waivers of Compliance

WASTE DISPOSAL

- byproduct material, economic costs as basis for standing to intervene; LBP-92-8, 35 NRC 167 (1992)
- radioactive solid; DD-92-2, 35 NRC 211 (1992)

ZONE OF INTERESTS

- standard for intervention in NRC proceedings; LBP-92-4, 35 NRC 114 (1992)

FACILITY INDEX

BLOOMSBURG SITE DECONTAMINATION; Docket Nos. 030-05980, 030-05981, 030-05982, 030-08335, 030-08444
 MODIFICATION ORDER; March 16, 1992; ORDER (Ruling on Licensees' Motion to Compel Deposition Discovery from the NRC Staff); LBP-92-3A, 35 NRC 110 (1992)

BLOOMSBURG SITE DECONTAMINATION; Docket Nos. 030-05980, 030-05982, 030-08335, 030-08444
 ENFORCEMENT ACTION; April 10, 1992; MEMORANDUM AND ORDER; CLI-92-9, 35 NRC 156 (1992)

BLOOMSBURG SITE DECONTAMINATION; Docket Nos. 030-05980-ML&ML-2, 030-05982-ML&ML-2
 MATERIALS LICENSE; June 11, 1992; ORDER; LBP-92-13A, 35 NRC 205 (1992)

CLAIBORNE ENRICHMENT CENTER; Docket No. 70-3070-ML
 MATERIALS LICENSE; March 5, 1992; MEMORANDUM AND ORDER; CLI-92-7, 35 NRC 93 (1992)

COMANCHE PEAK STEAM ELECTRIC STATION, Units 1 and 2; Docket Nos. 50-445-OL&CPA, 50-446-OL
 OPERATING LICENSE AND CONSTRUCTION PERMIT AMENDMENT; January 17, 1992; MEMORANDUM AND ORDER; CLI-92-1, 35 NRC 1 (1992)

DAVIS BESSE NUCLEAR POWER STATION, Unit 1; Docket No. 50-346-A
 ANTI-TRUST; March 5, 1992; ORDER; CLI-92-6, 35 NRC 86 (1992)

GORE, OKLAHOMA FACILITY; Docket No. 40-8027
 REQUEST FOR ACTION; June 7, 1992; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-92-2, 35 NRC 211 (1992)
 REQUEST FOR ACTION; June 8, 1992; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-92-3, 35 NRC 236 (1992)

HARVARD AVENUE SITE AND BERT AVENUE SITE DECONTAMINATION; Docket No. 040-08724
 ENFORCEMENT ACTION; May 12, 1992; MEMORANDUM AND ORDER (Order Approving Consent Order and Terminating Proceeding); LBP-92-11, 35 NRC 193 (1992)

JAMES A. FITZPATRICK NUCLEAR POWER PLANT; Docket No. 50-333-OM
 ENFORCEMENT ACTION; January 21, 1992; MEMORANDUM AND ORDER (Terminating FitzPatrick Proceeding); LBP-92-1, 35 NRC 11 (1992)

PALO VERDE NUCLEAR GENERATING STATION, Units 1, 2, and 3; Docket Nos. 50-528, 50-529, 50-530
 OPERATING LICENSE AMENDMENT; March 4, 1992; MEMORANDUM AND ORDER FINDING MITCHELL PETITIONERS IN DEFAULT (Dismissal of Proceeding); LBP-92-3, 35 NRC 107 (1992)
 REQUEST FOR ACTION; March 16, 1992; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-92-1, 35 NRC 133 (1992)

PERRY NUCLEAR POWER PLANT, Unit 1; Docket No. 50-440
 ANTI-TRUST; March 5, 1992; ORDER; CLI-92-6, 35 NRC 86 (1992)
 OPERATING LICENSE AMENDMENT; March 18, 1992; MEMORANDUM AND ORDER (Ruling on Intervention Petition); LBP-92-4, 35 NRC 114 (1992)

RANCHO SECO NUCLEAR GENERATING STATION; Docket No. 50-312-OLA
 OPERATING LICENSE AMENDMENT; February 6, 1992; MEMORANDUM AND ORDER; CLI-92-2, 35 NRC 47 (1992)

FACILITY INDEX

SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443-OL, 50-444-OL

OPERATING LICENSE; April 3, 1992; DECISION; CLI-92-8, 35 NRC 145 (1992)

SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322

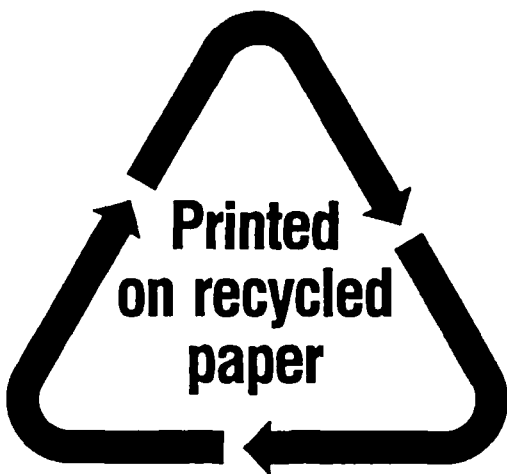
DECOMMISSIONING; June 17, 1992; ORDER; LBP-92-15, 35 NRC 209 (1992)

OPERATING LICENSE AMENDMENT; February 26, 1992; MEMORANDUM AND ORDER;
CLI-92-4, 35 NRC 69 (1992)

OPERATING LICENSE AMENDMENT; June 17, 1992; ORDER; LBP-92-14, 35 NRC 207 (1992)

VOGTLE ELECTRIC GENERATING PLANT, Units 1 and 2; Docket Nos. 50-424-OLA, 50-425-OLA

OPERATING LICENSE AMENDMENT; February 12, 1992; MEMORANDUM AND ORDER;
CLI-92-3, 35 NRC 63 (1992)



Federal Recycling Program