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Docket Number: 70-143-LA

ASLBP Number: 23-976-01-LA-BD02

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PREHEARING CONFERENCE

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In the Matter of: : Docket No.
NUCLEAR FUEL SERVICES, : 70-143-LA
INC. : ASLBP No.
(License Amendment : 23-976-01-LA-BD02
Application) :

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Monday, December 12, 2022

Videoconference

BEFORE:

G. PAUL BOLLWERK, Chair

WILLIAM J. FROEHLICH, Administrative Judge

SUE H. ABREU, Administrative Judge

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P R O C E E D I N G S

1:01 p.m.

JUDGE BOLLWERK: Good afternoon.

This is Administrative Judge Paul Bollwerk.

Today, we are here to conduct an initial prehearing conference in this license amendment proceeding in which the Applicant, BWXT Nuclear Fuel Services, Incorporated, or NFS, requests that the 10 Code of Federal Regulations, or CFR, Part 70 license for its Erwin, Tennessee, nuclear fuel fabrication facility be modified to allow NFS to perform new processes associated with uranium purification and conversion to uranium metal, the so-called U-Metal Project or U-Metal Process.

In response to a hearing opportunity notice published in Volume 87 of The Federal Register at page 53507, on August 31st, 2022, Petitioner Erwin Citizens Awareness Network, Incorporated, or ECAN, submitted a hearing petition that included four contentions challenging various aspects of the November 18th, 2021 NFS license amendment request.

Previously, in our December 6th, 2022 issuance regarding the procedures for this prehearing conference, we indicated that we were convening an

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1 oral argument to allow the participants to present
2 their positions regarding, and respond to Board
3 questions concerning, the focal issue of the
4 admissibility of Petitioner ECAN's four contentions.

5 Briefly, as to those four contentions,
6 Contention A, entitled "Nuclear Weapons Proliferation
7 Review," is required by the National Environmental
8 Policy Act, or NEPA, and the Atomic Energy Act, or
9 AEA. Petitioner ECAN challenges the November 2021 NFS
10 Supplemental Environmental Report, or ER, and the
11 Nuclear Regulatory Commission, or NRC, license
12 application review process for failing to include a
13 nuclear weapons proliferation assessment of the
14 impacts and policy implications associated with the
15 U-Metal process.

16 With its Contention B, entitled "Narrow
17 Scope, Purpose, and Needs Statement Undercuts
18 Consideration of Alternatives," Petitioner ECAN claims
19 that the purpose and needs statement in the NFS
20 Supplemental Environmental Report is lacking.
21 Specifically, ECAN asserts that the Supplemental ER,
22 while positing the need for the NFS license amendment
23 as providing a bridge for the projected interruption
24 of the high enriched uranium metal production process
25 at the Department of Energy, or DOE, National Nuclear

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1 Security Administration, or NNSA, Oak Ridge Tennessee
2 Y-12 facility, fails to contain timely information on
3 the status of the equipment replacement process at the
4 Y-12 facility relative to implementation of the
5 U-Metal Project at the Erwin facility. As a result,
6 ECAN asserts the Supplemental ER does not adequately
7 assess the no action alternative of not implementing
8 the U-Metal Project.

9 Contention C, labeled "Legacy
10 Contamination Is Understated, Uninvestigated, and
11 Missing from Cumulative Effects Analysis in the ER,
12 that contention asserts, among other things, that the
13 NFS Supplemental ER has not adequately identified and
14 assessed past and ongoing radiological and chemical
15 contamination associated with the Erwin facility,
16 particularly as it relates to cumulative groundwater
17 attacks and the possibility and impact of sinkholes in
18 the vicinity of the facility.

19 Finally, with Contention D, entitled "Fuel
20 Cycle Facility Regulations Are Insufficient to Protect
21 Public Health, Safety, and Security Because They lack
22 Stringent Quality Assurance, or QA, Requirements,"
23 Petitioner ECAN claims that they history of Erwin
24 facility regulatory violations establishes that NFS
25 has failed to sustain an adequate safety culture under

1 the NRC's existing regulatory requirements, such that,
2 consistent with the AEA's directive to protect the
3 public health and safety, NRC needs to impose stricter
4 QA requirements for the facility.

5 In answers dated, respectively, November
6 23rd and November 25th, 2022, the NRC staff and NFS
7 both seek the denial of the ECAN hearing request,
8 asserting that Petitioner ECAN has failed to submit an
9 admissible contention, a pleading defect that is
10 fatal, any Board ruling granting ECAN's hearing
11 request.

12 In a December 2nd, 2022 reply to the NFS
13 and NRC staff answers, Petitioner ECAN again declares
14 that it should be admitted as a party to this
15 proceeding because each of its contentions complies
16 with the six standards in 10 CFR Section
17 2.309(f)(1)(i) through (vi), governing contention
18 admissibility.

19 Before beginning the oral argument, I
20 would like to introduce the Licensing Board members,
21 and then, have the representatives of the participants
22 identify themselves for the record, along with any
23 individuals they may have available to provide them
24 with assistance in responding to the Board's
25 questions.

1 Administrative Judge William Froehlich is
2 a legal member of the Atomic Safety and Licensing
3 Board Panel, while Administrative Judge Sue Abreu is
4 an engineer, a nuclear medicine physician, and an
5 attorney who also serves as the Licensing Board
6 Panel's Associate Chief Administrative Judge-
7 Technical.

8 My name is Paul Bollwerk. I'm an attorney
9 and the Chair of this Licensing Board.

10 We are all participating from the
11 Licensing Board Panel's hearing room at NRC
12 Headquarters in Rockville, Maryland, as is our Law
13 Clerk, Noel Johnson, while our Law Clerks Allison Wood
14 and Emily Newman are attending remotely via a video
15 connection.

16 At this point, I'd like to have counsel
17 for the various participants, first, turn on their
18 cameras and unmute themselves, and second, identify
19 themselves for the record, as well as any individuals
20 they may have available to provide them with
21 assistance in responding to Board questions.

22 Why don't we start with the Applicant
23 Nuclear Fuel Services, then move to the NRC staff, and
24 finally, to Petitioner ECAN.

25 Mr. Lighty?

1 MR. LIGHTY: Good afternoon, Your Honors,
2 and may it please the Board, Ryan Lighty of Morgan,
3 Lewis & Bockius, LLP, appearing for the Applicant
4 Nuclear Fuel Services, Incorporated, which I will
5 refer to today as NFS.

6 And joining me in the room today are my
7 co-counsel of record, Molly Mattison, also of Morgan
8 Lewis, as well as Timothy Knowles, Director of Safety
9 and Safeguards at NFS, and Danielle Rogers, Manager of
10 Nuclear Safety and Licensing at NFS.

11 JUDGE BOLLWERK: Thank you.

12 MR. ROACH: Good afternoon, Your Honors.
13 My name is Kevin Roach, and I will be representing the
14 NRC staff today. With me, listening on the phone, are
15 my Co-counsel Travis Jones and the Senior Project
16 Manager for this license amendment review, James
17 Downs.

18 We look forward to addressing your
19 questions today. Thank you.

20 JUDGE BOLLWERK: Thank you, sir.

21 MR. LODGE: And good afternoon to the
22 members of the panel and opposing counsel. My name is
23 Terry Lodge, counsel for the ERWIN Citizens Awareness
24 Network, which I will refer to as ECAN throughout the
25 afternoon. With me remotely will be Wally Taylor, who

1 is an attorney in Iowa who has been serving as non-
2 record, but co-counsel in effect, as well as Linda
3 Cataldo Modica and Barbara O'Neal, who are people who
4 live in northeastern Tennessee and who are members of
5 the ECAN organization.

6 JUDGE BOLLWERK: All right. Thank you,
7 Mr. Lodge, and welcome to all of you.

8 I would note, again, that, as I did prior
9 to the beginning of this session, that I ask all the
10 participants to try to remember that, notwithstanding
11 we're using a video link via Webex, to which the court
12 reporter has access, as a courtesy to those members of
13 the public and others who are joining us via the
14 listen-only telephone connection, as they start to
15 speak, to please identify themselves to make clear who
16 is talking.

17 Also, as the participants/representatives
18 are aware, we are attempting to monitor everyone's
19 connectivity, in an effort to see if anyone drops off
20 unexpectedly, so we can take steps to try to ensure we
21 don't move forward with the argument until they are
22 able to reconnect via video link or telephone. And I
23 think prior to beginning, we talked about the
24 instructions and what to do for counsel in case they
25 feel that they dropped off.

1 And I would note that we made available to
2 the participants and interested members of the public,
3 via the Board's December 6th, 2022 issuance in this
4 case, a notice on the NRC's public website, and posted
5 to the agency's social media accounts, information on
6 how to access this conference by telephone on a
7 listen-only basis. We hope that those members of the
8 public and others who wish to listen to this
9 conference have been able to access that bridge line
10 this afternoon.

11 I would observe as well that this
12 proceeding is being transcribed and a transcript of
13 this conference will be prepared and should be
14 available in the NRC's electronic hearing docket by
15 late this week or early next week.

16 As to the process that we'll follow for
17 today's oral argument, as we outlined in our December
18 5th, 2022 issuance, each participant's designated
19 representative has been allotted a period of time
20 within which to present its position regarding these
21 matters.

22 We will hear, first, from Petitioner ECAN,
23 which has been given a total of 30 minutes, of which
24 it may reserve up to 10 minutes for a rebuttal
25 presentation following the NFS and NRC staff

1 presentations.

2 NFS and the staff will be heard from in
3 that order; have each been allotted 20 minutes to
4 present their arguments.

5 I would observe as well that the matters
6 at issue before the Board have been fully briefed and
7 we have read the participants' pleadings. So, as we
8 indicated in our December 6th, 2022 order, we hope the
9 participants in their arguments will focus on
10 identifying the principal points in controversy and
11 the information that supports or rebuts their legal
12 and/or factual claims regarding those matters.

13 And as we also noted there, because this
14 argument is not an evidentiary hearing, participants
15 should not attempt to introduce material during the
16 argument that has not already been cited in the
17 participants' pleadings.

18 Finally, while some of the information
19 provided by NFS in support of its November 2021
20 license amendment application was non-public, none of
21 the information that was the focus of the
22 participants' pleading before us was not public.
23 Thus, while we do not anticipate discussing any non-
24 public information this afternoon, we, nonetheless,
25 will rely on Applicant, NFS, and the NRC staff to

1 alert us if something being discussed might be verging
2 on non-public information, so we can reframe the
3 inquiry.

4 All that being said, before we turn to Mr.
5 Lodge on behalf of Petitioner ECAN to begin the
6 argument, the Board would like to address the status
7 of the NFS motion filed a little after midday last
8 Friday, December 9th, 2022, seeking to strike portions
9 of the December 2nd, 2022 ECAN reply to the respective
10 November 23rd and 25th, 2022 answers of the NRC staff
11 and NFS to ECAN's October 31, 2022 amended hearing
12 petition.

13 The Board doesn't intent to hear argument
14 on, or otherwise take up the substance of that motion,
15 at this prehearing conference. Rather, we will deal
16 with that motion, and the impacts it might have on the
17 ECAN reply filing, and/or statements of counsel made
18 during this argument, in our decision regarding
19 whether to grant ECAN's hearing petition.

20 Further, with regard to the briefing
21 schedule associated with the NFS Motion to Strike, in
22 footnote 1 to the December 9th NFS Motion to Strike,
23 NFS indicated that, in fulfilling 10 CFR Section
24 2.323(b)'s requirement to consult with the other
25 participants about the motion, the NRC staff indicated

1 it was evaluating whether to respond.

2 Mr. Roach, as counsel for the NRC staff,
3 I'm wondering if you can tell us whether the NRC staff
4 has decided it plans to file an answer to the motion.

5 MR. ROACH: Your Honor, this is Kevin
6 Roach.

7 The staff does not intend to respond to
8 the NFS motion.

9 JUDGE BOLLWERK: So, you won't be filing
10 any response at all then?

11 MR. ROACH: Yes, that's correct.

12 JUDGE BOLLWERK: All right. Let me go
13 ahead, then, and set a schedule, then, for the
14 response by ECAN.

15 Given that the staff will not be filing a
16 response, any ECAN response to the December 9th, 2022
17 NFS Motion to Strike will be due on or before Monday,
18 December 19th, 2022.

19 MR. LODGE: Very good. Thank you.

20 JUDGE BOLLWERK: All right. And I would
21 note that, because the transcript of this conference
22 may not be available until the end of this week, we
23 will memorialize this briefing schedule for the
24 December 9, 2022 NFS Motion to Strike, an order that
25 we will to try to issue by tomorrow.

1 Do any of the participants have any
2 questions regarding the briefing schedule for the
3 December 9th, 2022 NFS Motion to Strike?

4 MR. LODGE: This is Terry Lodge. No.

5 JUDGE BOLLWERK: All right. Then, let's
6 go ahead and move on for the reason that we're
7 gathered today, which is the oral argument regarding
8 the admissibility of Petitioner ECAN's four proffered
9 contentions.

10 And, Mr. Lodge, before you begin your
11 argument for ECAN, how much time do you wish to
12 reserve for rebuttal?

13 MR. LODGE: Ten minutes, sir.

14 JUDGE BOLLWERK: Okay. Thank you.

15 All right. You have the floor, sir.

16 STATEMENT ON BEHALF OF PETITIONER ECAN

17 MR. LODGE: All right. Thank you very
18 much.

19 I believe that the intentions are
20 relatively compact and clear. Before I launch into
21 them, I just want to note for the record that it
22 appears to me that the matter of ECAN having legal
23 standing is not really seriously contested here. We
24 have produced a declaration from Alfred Davies, who
25 lives about a mile from the plant. I won't go through

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1 all of the evidentiary and other pleading associated
2 with it. But we are assuming that standing is not
3 going to be seriously contested in any event.

4 There are four contentions. I will
5 address them not necessarily in the alphabetical order
6 in which they are presented in the petition. I want
7 to talk about things that we believe,
8 organizationally, ECAN believes are priorities.

9 One of the priorities that ECAN has
10 organizationally in its two decades of active study
11 and education about the NFS facility is public safety
12 for the community in and around Erwin, Tennessee. And
13 for that reason, we have raised a contention that
14 there needs to be some type of structured, formalized
15 quality assurance effort made at the plant, as a
16 result of it stemming from the new product line, if
17 you will, the purification line that it has proposed.

18 The problem is that, historically, NFS
19 falls within a classification as to facility type that
20 is not covered by the Nuclear Regulatory Commission
21 regs requiring a formal, structured, internal,
22 process-oriented quality assurance program. Whereas,
23 the product line that is proposed to be added to the
24 facility is one that is very analogous to a
25 longstanding process line at the Y-12 Oak Ridge

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1 facility, which, of course, is owned and operated by
2 the federal government through the National Nuclear
3 Security Administration, the DOE regs appear to cover
4 10 CFR 830.121 and 122 -- appear to be quality
5 assurance regulations that do mandate some type of
6 structured, accountable, and independent quality
7 assurance effort at the Y-12 facility.

8 The fundamental question we have,
9 organizationally, is, how is it that this product line
10 could be initiated at NFS, and merely by virtue of the
11 classification historically of the facility, there
12 would not be a formal quality assurance requirement?
13 We believe -- and I'm well aware of the challenges
14 that have been made to our pleading that contention,
15 that we are, essentially, butting up against, we are
16 challenging existing regulations of the NRC, and that
17 is impermissible in this proceeding. I understand the
18 legal principle involved, but we believe that there is
19 inherent authority within the NRC, under the Atomic
20 Energy Act, certainly, to impose conditions on a
21 license, and we believe that those conditions should
22 be equivalent to the QA regulatory regime that
23 pertains at the Y-12 facility over this, essentially,
24 identical process line. That's our position on that.

25 We believe that, as a matter of historical

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1 fact, there have been many problems at NFS with the
2 existing product lines that have been operated and
3 administered there that have called into question
4 what, essentially, are quality assurance failings. A
5 structured quality assurance program that ECAN
6 envisions would be one that is independent and
7 answerable only to the topmost levels of management at
8 the plant; that, effectively, has written protocols,
9 and that has a sufficient staffing for regular and
10 routine inspections of such things as the
11 configuration of the process line and the handling of
12 this extremely volatile, if not extremely dangerous,
13 material that we anticipate will be handled.

14 Historically, there is an extensive record
15 going back many decades of regulatory activity by the
16 NRC staff in terms of low-level citations and, to some
17 extent, punishments that have civil penalties that
18 have been levied because of quality problems, most
19 publicized I believe of which, at least beyond Erwin,
20 is the 2006 accidental spill of about 37 liters of
21 radioactive material that came close to causing
22 criticality events, if they didn't actually cause
23 them.

24 But, even down to 2022, the NRC identified
25 a clogged plug in the configuration for the existing

1 line at the plant and has had extensive counseling
2 meetings with NFS regarding that. That was another
3 type of quality assurance omission, I guess, or
4 failing.

5 As I understand the regulations, the only
6 QA requirement imposed on any aspect of NFS activity
7 is on transportation of special nuclear material. And
8 while, indeed, there may be quality staff at the NFS
9 facility, it is not clear to the public, certainly,
10 that they are able to function independently without
11 reprisal and to be the tough, unfortunate, irritating
12 source of activity that quality assurance people are
13 actually supposed to be in an industrial setting.

14 Moving on from that, we also believe that
15 a serious problem in the Supplemental Environmental
16 Report is that there's no quantitative analysis that
17 actually discusses meaningfully years of groundwater
18 contamination of industrial chemicals, but also of
19 radioactive contamination in various sources of
20 groundwater that flow in and near and beneath the
21 plant.

22 In particular, we did produce evidence
23 that there has been isotopes of uranium, as well as
24 plutonium, that have been fingerprinted back to the
25 NFS plant, that have been identified dozens of miles,

1 perhaps as many as 85 or 90 miles, down the Nolichucky
2 River from the Erwin facility. We believe, and argue
3 in our petition, there must be some type of
4 meaningful, quantitative-based cumulative effects
5 analysis of the years that radiation has traveled
6 through ground. And I suppose, actually, thinking of
7 the river and adjoining creeks and tributaries, the
8 surface water that has been documented as being
9 contaminated near the plant.

10 This has long-range implications. The
11 problem with radioisotopes is that, unlike many
12 industrial chemicals, they don't readily break down.
13 They, of course, have at times half-lives that run
14 into the dozens, hundreds, thousands, tens of
15 thousands of years. And so, a cumulative effects
16 analysis, the keyword in a cumulative effects analysis
17 certainly is the cumulation of that material.

18 Turning to the remaining contentions, the
19 purpose and needs statement, as Judge Bollwerk pointed
20 out in his opening comments, the purpose and needs
21 statement is defective, in that it is worded and the
22 thrust of the license amendment request is simply
23 results-oriented, aimed at providing a redundant
24 product line that is in some ways a backup in the
25 event that the product line at Y-12 is inoperative or

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1 non-productive, while a technologically more advanced
2 line is being installed at Y-12.

3 The problem is that the purpose and needs
4 statement, as much as I could tell, was written in
5 November 2021. It was, basically, talking in terms of
6 having this line at NFS installed, as I say, so that
7 it would be redundant and able to cover times when
8 there is non-production at Y-12. There's no evidence
9 that we have that there have been such interruptions
10 in the interceding year. Presumably, the new line at
11 NFS is not yet installed and operable, and there are
12 media accounts that we noted in our reply that show
13 that, by perhaps approximately early to mid-2023, the
14 new technology being installed at Y-12 will be tested
15 and perhaps even operable. And so far as we
16 understand, even now in late, very late 2022, the
17 redundant -- pardon me -- I should say the preexisting
18 line for purification at Y-12 has continued to
19 function, apparently, unimpeded and without problems.

20 So, we believe that the no action
21 alternative needs considerable restructuring and
22 presentation within whatever environmental document is
23 chosen by the NRC.

24 Finally, the matter of nuclear
25 nonproliferation we believe is one that attends to

1 this proposed license amendment because of the fact
2 that, in practical terms, it is a major shifting of
3 gears, if you will, at NFS. It is, historically, as
4 understand it, NFS maybe has had a few relatively
5 short-duration projects that have had some possible
6 connection to the Federal Nuclear Weapons Program.

7 The introduction of this product line is
8 evidence that it will be, I would say, full-throated
9 involved in producing nuclear weapons material. We've
10 laid out extensively in our initial petition, and even
11 in the reply, that there is considerable evidence
12 that, under NEPA, the NRC in the past, either in
13 response to litigation or simply in response to a fair
14 reading and purposeful compliance with the federal
15 statute, has addressed nuclear weapons proliferation
16 aspects of various and sundry programs sponsored in
17 more recent decades by the Department of Energy; that,
18 in effect, there is a recognition, judicially as well
19 as, I would say, administratively, at the NRC that
20 projects of this type, which are significant new
21 programs or significant changes/alterations to
22 existing DOE programs require a serious scrutiny of
23 the weapons proliferation aspects.

24 There are at least two ways that we can
25 identify that nuclear weapons proliferation is implied

1 in this license amendment.

2 One of them is that, as a redundant line,
3 it raises some questions as to whether there is some
4 sort of determination within the federal government,
5 within the NNSA, to produce more weapons material than
6 has hitherto been the case.

7 Secondly is that the example being set by
8 the United States, by the federal government, in
9 continuing to sponsor, and even maintain at existing
10 levels, if not an actual outright expansion of the
11 Federal Nuclear Weapons Program, that that is a
12 serious, if not ominous, proliferation sign. The
13 United States is party to, for more than 50 years, to
14 the Nonproliferation Treaty and is, along with every
15 other nuclear weapons state that we know of, is
16 refusing to sign a treaty on prohibition of nuclear
17 weapons, which is gradually gathering increasing
18 numbers, and effectively, I think now a majority, of
19 the population on the planet whose countries have
20 signed onto that treaty.

21 The clear trend at international law, and
22 especially as revived by the saber-rattling associated
23 with the Ukraine War, is that nuclear weapons are
24 again receiving some attention and some close
25 investigation by people as to their necessity and as

1 to the threat that they pose in international
2 relations, and in particularly, in the threatening or
3 undertaking of war activities.

4 One of the problems that I wasn't
5 expecting, frankly, in the course of pleading the
6 petition was the Nuclear Fuel Services' answer,
7 basically, denies flatly that there will be any
8 nuclear weapons use of the material that is generated
9 by the new process line; that it, effectively, that
10 NFS, as was stressed in the NFS response, effectively,
11 they will be producing material for unspecified non-
12 weapons use.

13 I was kind of surprised by that answer
14 because, while, indeed, none of the license amendment
15 application documents mentioned a weapons connection
16 in so many words, we have supplied the panel and the
17 parties with citations in media, including from a
18 union newsletter by Steelworkers Local that is the
19 local union in Erwin for NFS, stating that the
20 material will, in fact, be produced, at least in part,
21 for the Nation's Nuclear Weapons Program.

22 So, we need to clarify and have some type
23 of clear understanding, as the public, about what this
24 process is really about. That has implications for
25 what the potential dangers are. It has implications

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1 for whether or not there will be serious alterations
2 in security and safeguards procedures at the NFS
3 facility.

4 So, we hope that the Board will agree with
5 ECAN that there has to be some serious candor about
6 the nature of the new process line and its connection,
7 since it is being administered by the National Nuclear
8 Security Administration, and is, effectively, a
9 duplicate of an existing line at Y-12 known to be
10 directly connected to our Federal Weapons Program. We
11 need to understand and hope the Board will join us in
12 making sure the public understands exactly what this
13 change at NFS would mean.

14 That's all I have right now. I'm happy to
15 answer questions, or otherwise participate.

16 JUDGE BOLLWERK: All right. I do have a
17 couple of questions, and maybe the other Board members
18 do.

19 You were sort of on a roll, and I didn't
20 want to interrupt you, but I may not be that polite to
21 the staff and the Applicant coming up. We'll see.

22 So, you did the contentions as sort of, if
23 I got it correct, you did it sort of the opposite way
24 that you pleaded them, which you did D, C, B, A. Am
25 I right about that?

1 MR. LODGE: I'm sorry about -- say that
2 again, sir?

3 JUDGE BOLLWERK: You, basically, talked
4 about the contentions sort of the opposite order that
5 you pled them?

6 MR. LODGE: Yes, yes. Yes, correct.

7 JUDGE BOLLWERK: D, C, B, A, right?

8 Okay. I'll will start with D, since it's
9 where you started.

10 MR. LODGE: Okay.

11 JUDGE BOLLWERK: So, the staff has
12 indicated that Section 74.59, which is entitled,
13 "Quality Assurance and Accounting Requirements,"
14 applies to the NFS facility. And if you look at that
15 particular provision, it talks about the licensee
16 maintaining quality assurance standards in such areas
17 as management structure; personnel qualifications and
18 training; measurement controls for special nuclear
19 material processing and handling; periodical physical
20 inventories of a special nuclear materials facility;
21 maintaining auditable records, and internal controls
22 over shipping and receiving and scrap control.

23 So, I wasn't quite clear from what you
24 said. Are you disputing that this provision applies
25 or are you simply saying it's not enough?

1 MR. LODGE: It's not enough.

2 JUDGE BOLLWERK: All right. And so, I
3 take it your --

4 MR. LODGE: And it's just --

5 JUDGE BOLLWERK: Oh, I'm sorry.

6 MR. LODGE: Go ahead. I'm sorry.

7 JUDGE BOLLWERK: No, I'm sorry I cut you
8 off.

9 MR. LODGE: Thank you.

10 It's not enough because the Appendix B
11 requirement under NRC, if that regulation were to
12 directly apply here, it would require an independent,
13 essentially, answerable or accountable only to top
14 management, but, effectively, an independent QA
15 program.

16 I would suspect that an objective history
17 of all the assurance in industrial 20 and 21st century
18 United States applications would suggest that QA is
19 often the source of people who later become
20 whistleblowers, or certainly become internal critics.
21 They are often not received very happily because they
22 cause interruptions in production and they add to the
23 costs of activity at any industrial facility.

24 So, independence is an imperative and a
25 requirement, so that they cannot be silenced or

1 retaliated against simply by being, in effect, very
2 wonkish truth-tellers.

3 Thank you.

4 JUDGE BOLLWERK: Okay. And so, when you
5 said Appendix B, is that -- you're referring to the
6 American Society of Mechanical Engineers, the ASME
7 Nuclear Quality Assurance grade quality assurance
8 standards?

9 MR. LODGE: That is correct. And it is my
10 understanding -- and it was mentioned in, I think, our
11 first petition -- that the standards do not apply
12 because ASME, basically, says that they are not meant
13 to apply to a nuclear-weapons-related facility.

14 JUDGE BOLLWERK: So, one other regulation
15 that you really haven't mentioned, I guess maybe
16 indirectly, but you haven't, I don't think, cited it
17 directly, is 10 CFR Section 2.335, which indicates
18 that "No Commission rule or regulation is subject to
19 attack in an AC adjudication, absent a waiver request
20 that meets certain plea requirements, including an
21 affidavit showing with particularity that special
22 circumstances exist, such that the rule would not
23 serve the purposes for which the rule is adopted."

24 I hear the sort of arguments that might be
25 made in such a waiver petition, but we don't have a

1 waiver petition in front of us. How do we deal with
2 that?

3 MR. LODGE: I believe that it is within,
4 essentially, the inherent licensing discretion of the
5 NRC to impose terms, especially in so unique a
6 circumstance as the one before the Board.

7 JUDGE BOLLWERK: All right. Well, it may
8 well be that the Commission has that authority, but,
9 given what the regulation says, I'm sort of concerned
10 about what the Board can say in that regard.

11 MR. LODGE: I think the Board is legally
12 authorized, among other things, to make recommended
13 findings to the Commission. And certainly, I
14 understand this is a difficult problem, but it appears
15 to be something that is not encompassed within the
16 regulatory framework. Yet, it is a unique and serious
17 problem of quality.

18 And I assure you I was very disappointed
19 when I was reading the Part 50, Appendix B, and
20 realizing, repeatedly, as I kept trying to reread it
21 and hope that it would extend to cover NFS, that,
22 indeed, it does not.

23 JUDGE BOLLWERK: All right. Thank you.

24 Judge Froehlich?

25 JUDGE FROEHLICH: Yes. Mr. Lodge, coming

1 at this issue just from a slightly different
2 perspective, I think in response to Judge Bollwerk,
3 you were that there's not enough additional
4 requirements that should be imposed as part of this
5 license amendment request on NFS.

6 And I'd like you to address the Court's
7 direction to the Commission in the San Luis Obispo
8 Mothers for Peace v. NRC case, where the Court now,
9 not the Commission interpreting its rule, the Court
10 said, "The NRC correctly observes that a petition
11 alleging that existing NRC regulations are grossly
12 inadequate to protect against terrorist attack" -- in
13 the San Luis Obispo -- "and therefore, must be
14 supplemented by additional requirements, cannot, in
15 fact, be raised before a licensing board which cannot
16 hear challenges to NRC rules."

17 How would you respond to the Court's
18 statements there, when the agency was asked to
19 supplement its rules, add additional requirements?

20 MR. LODGE: Well, as I recall, there was
21 a Third Circuit decision involving a plant in New
22 Jersey, and that was a decision that, essentially,
23 ruled that the terrorism requirements do not apply.
24 And the Commission, essentially, chose to follow that
25 determination and not to follow the San Luis Obispo

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1 case, which, as I understand it, is still good law
2 within the states in the Ninth Circuit.

3 But the San Luis Obispo case involved a
4 new facility instead of -- I'm just dimly recalling
5 the facts in the New Jersey case. It was some type of
6 reprise of existing adequacy of safeguards or
7 security. But the facility in San Luis Obispo was a
8 new one, a new proposed ISFSI, and it -- I can't
9 differ with the Commission's choice of which principle
10 it's going to follow, but I believe that what you're
11 talking about at the NFS facility in Erwin is going to
12 be a new product line, and that it, effectively,
13 again, I think triggers the logic that was laid out by
14 the Ninth Circuit.

15 JUDGE FROEHLICH: Okay. Thank you.

16 JUDGE BOLLWERK: Let me step back for a
17 second, then, to C, since that's the one that you went
18 to next.

19 There's still a lot of talk about
20 cumulative impacts here, but it's my recollection,
21 sort of looking at the record and what's been placed
22 before us -- have there been any regulatory violations
23 of either sort of state or local or federal
24 requirements relative to radioactive material or
25 chemical material that the record reflects that

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1 occurred here?

2 MR. LODGE: Well, the straight answer,
3 short answer is, no, there have been very few actual
4 regulatory violations, but one must examine the
5 regulatory apparatus. The State Department of
6 Environmental Protection issues the NPDES, the Clean
7 Water Act National Pollution Discharge Elimination
8 System permits, but that regulatory regime does not
9 include imposition of regulatory standards over
10 radioactive contamination.

11 So, while there are records that there are
12 tests that are taken, samples are taken, and testing
13 samples occurs, and there's recording of some results,
14 the state-permitting process doesn't regulate in a
15 restrictive fashion. It doesn't have the power to
16 impose fines or other kinds of citation activities,
17 and no enforcement.

18 So, it is the NRC which determines what is
19 appropriate, and we believe that what is missing, at
20 least from a NEPA standpoint, even if not from an NRC
21 regulatory standpoint, is that there has to be some
22 attention to the cumulative effects, because we are
23 talking about accumulations of radioactive material
24 over decades. And as I say, it appears that there is
25 considerable historic contamination many, many miles

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1 downstream from the NFS plant. And these are
2 radioisotopes that will be around for a very, very
3 long time to come.

4 JUDGE BOLLWERK: And besides your concern
5 about cumulative impacts, what record material have
6 you provided us which would suggest those cumulative
7 impacts would somehow exceed or state, local, or
8 federal requirements?

9 MR. LODGE: The answer to your question is
10 we have not provided information showing the
11 exceedances. We have submitted a lot of detail
12 suggesting that there are long-term, continuing
13 contamination events, for instance, in the vicinity,
14 in the groundwater in the vicinity within a mile or
15 less of the plant; that there is long-term drainage
16 from tributaries and from groundwater sources into
17 Nolichucky River.

18 And what we are looking for is that the
19 NEPA process be fulfilled, in that the cumulative
20 effects be pulled together into, more or less, one
21 place with some serious analysis of how long and what
22 the possible concentrations would be after this new
23 product line comes to NFS.

24 I would point out that one of the
25 statements in the Supplemental ER suggests that the

1 air quality problems, air pollution from the NFS
2 facility, will effectively be doubled by the
3 installation of the new product line. So, it's very
4 difficult to assume that there won't be additional
5 radiological water contamination problems, and that
6 has to be understood in the context of what has taken
7 place for approximately 65 years in Erwin so far.

8 Thank you.

9 JUDGE BOLLWERK: Any of the other Board
10 members have a question on C?

11 JUDGE FROEHLICH: I have just one for
12 clarification. And these studies that you put forward
13 in your pleadings having to do with cumulative effect
14 those are all based on the work of Dr. Ketterer and
15 the study that he had conducted in 2010? Is that what
16 we're starting as the baseline for this contention?

17 MR. LODGE: Well, in terms of the data
18 that we produced about the downriver contamination,
19 yes, he is our source, correct.

20 JUDGE FROEHLICH: Okay. And is there in
21 the SAER any corresponding studies or statistics or
22 sampling of the things that Dr. Ketterer had sampled
23 in 2010?

24 MR. LODGE: As I understand it, no.
25 While, indeed, NFS and the staff cited to statistical

1 records that have been maintained I think by the NFS,
2 I don't think that there's been any response
3 whatsoever over the years, and certainly not in the
4 pleadings before the panel, to our assertion that
5 there is downriver, and many miles downriver,
6 contamination. It looks to me as though the data that
7 has been produced is sampling from sources in the
8 vicinity of the NFS plant.

9 JUDGE FROEHLICH: Thank you.

10 JUDGE BOLLWERK: All right. I just have
11 one question with respect to B, which is the purpose
12 and needs statement contention. The NFS indicated in
13 a footnote, I guess, that there is a capability to
14 convert uranium oxides to metal as part of this bridge
15 process, as I understand it, that won't actually be
16 completed until 2028, which I'm assuming is beyond
17 when, some years after the U-Metal Project would be
18 implemented.

19 Do you have any response to that in terms
20 of your concern about whether there's adequate
21 discussion of needs and purpose and an action
22 alternative?

23 MR. LODGE: Yes, sir. The idea to have a
24 redundant process line isn't, in and of itself, a bad
25 thing. But I think that this turned out to be a much

1 larger political fiasco for the Department of Energy
2 than they at first expected.

3 We cited, I think in our reply, to a news
4 article wherein local officials in Oak Ridge are very
5 concerned that the line is even being built. And as
6 I say, it appears that DOE, perhaps as a result of
7 some of the -- or maybe even in advance, in
8 anticipation of it -- has decided to continue the
9 operation of the older line at Y-12, that,
10 effectively, it will be closed down only when there is
11 operability, however that's defined by DOE, of the new
12 electrorefining process.

13 So, I'm still sort of unmoved or
14 unpersuaded that the line proposed for NFS isn't
15 merely pointlessly redundantly because it is not at
16 all clear that the Department of Energy is going to
17 require a shutdown of the old process line at Y-12 at
18 any point in the near future.

19 And also, I just want to mention, we cited
20 an article in our reply to the effect that, at some
21 point in 2023, effectively, the new electrorefining
22 process at Y-12 is going to go online. So, I'm not
23 sure what the 2028 date actually means or what will
24 happen over the five years that it's supposedly
25 operable, but isn't complete, according to the

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1 statement in that footnote.

2 JUDGE BOLLWERK: All right. Thank you.

3 This was on B. Anybody have anything on
4 A? I'm going to save my questions for A for later.

5 JUDGE ABREU: This is Judge Abreu. I just
6 have one question about contingent A.

7 In the staff's answer, they cite a case,
8 CLI-05-28, the Louisiana Energy Services National
9 Enrichment Facility case, in which the Commission
10 determined that nonproliferation concerns were outside
11 the scope of that proceeding. Can you find -- or what
12 are your thoughts on how that case can be
13 distinguished from the one we have before us?

14 MR. LODGE: Thank you. It's a good
15 question.

16 We believe it's distinguished when you
17 look at the very specific facts from the LES case,
18 what was -- as I understand the petition, the
19 organization that was petitioning to intervene cited,
20 I am thinking, a white paper type of report by the
21 Carnegie Endowment for International Peace that had
22 suggested a pause in manufacturing weapons material.

23 But it had not petitioned anyone. It was
24 a publication, you know, from a think tank, in effect,
25 and it's out there in the domain. And as I understand

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1 it, the intervenor was citing to that as an example of
2 why there needs to be a proliferation assessment.

3 So, it was an idea that isn't pending
4 anywhere formally, isn't being proposed as some sort
5 of international treaty condition, or anything of that
6 sort. And what we are talking about here, by
7 contrast, is a production line that we believe, at
8 least, indisputably, is going to be generating
9 material that has some role in the manufacture and
10 construction of nuclear weapons for the United States.
11 So, it's not theoretical at all, and it is not
12 something that is simply generated by a think tank.
13 We're talking about, if you will, a very real prospect
14 that there is some change that will be induced in the
15 supply chain for nuclear weapons in the federal
16 government process.

17 JUDGE ABREU: Thank you, Mr. Lodge

18 MR. LODGE: Thank you.

19 JUDGE BOLLWERK: Anything else?

20 (No response.)

21 Let me jump back to one question on C that
22 I forgot to ask. And I apologize for that.

23 There's a statement in your pleadings that
24 PC bioremediation has gone wrong. Is your issue here
25 that the plumes is moving offsite or is there now

1 different contaminants since the bioremediation
2 happened? Do you believe the plume is migrating
3 offsite in terms of that statement?

4 MR. LODGE: We believe it's migrating
5 offsite, but more disturbingly is that considerable
6 remediation has taken place. Yet, the contamination
7 seems to emanate a diffused, I guess, set of sources.
8 So, that, in effect, it is not well understood, at
9 least from a public perspective, how much continuing
10 contamination will occur to the groundwater. But we
11 believe that, yes, the plume is moving; yes, it is
12 likely moving offsite, and given the long-lived
13 isotopes that are implicated, that there will be time
14 enough for perhaps offsite migration of concern.

15 JUDGE BOLLWERK: All right. Thank you.

16 Anything else on C or anything else at
17 this point?

18 (No response.)

19 All right. Thank you very much, sir,
20 then. We'll go ahead and wait for your reply to the
21 statements or the arguments from the staff and the
22 Applicant.

23 Now, we are going to hear from Applicant
24 NFS.

25 Thank you again, Mr. Lodge.

STATEMENT ON BEHALF OF APPLICANT NFS

MR. LIGHTY: Thank you, Your Honor, and may it please the Board, Ryan Lighty, appearing for the Applicant. We very much appreciate the opportunity to have this conversation today.

As noted in our answer pleading, as well as the staff's answer, the petition inappropriately focused on broad policy matters and historical regulatory actions, rather than the specific license amendment that is the subject, and, indeed, the only subject of this proceeding.

And Petitioners offered broad criticisms, but failed to review the information that was in the application and explain why it failed to satisfy some regulatory requirement. And after these defects were pointed out in the answer pleadings, their reply attempted to cure those.

But, that said, we think the answer pleadings articulate the reasons why the four contentions are inadmissible. And so, in the interest of respecting everyone's time today, we won't simply repeat those arguments here, but we do think it would be worthwhile to spend just a couple of minutes to provide some factual clarifications that may be helpful to this discussion.

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1 First, it's helpful to understand the
2 proposed license amendment, what it does and does not
3 do. And perhaps the easiest way to illustrate that is
4 by providing a high-level comparison of current
5 facility operations versus what is proposed under the
6 license amendment.

7 So, currently, NFS receives enriched
8 uranium from NNSA in a quantity up to the possession
9 limit in the license. It performs certain services on
10 that material, and then, that material leaves NFS.

11 And under the proposed license amendment,
12 the same general process would apply. NFS would still
13 receive enriched uranium from NNSA, subject to the
14 exact same possession limit, because the amendment
15 request does not propose any change to that limit.
16 NFS would perform certain services on it, and then,
17 send it out, as directed by NNSA.

18 And the change proposed under the
19 amendment is to add a capability to the menu of
20 services that NFS could provide to its client; mainly,
21 the conversion to metal. So, in terms of the
22 simplified assembly line, so to speak -- enriched
23 uranium in, services performed, material out -- the
24 first and last step are, essentially, identical.

25 Second, in terms of services that are

1 performed on the material, conversion and purification
2 services are currently performed at Y-12. And the
3 issue is that the equipment performing those services
4 is aging and in the near future will not be capable of
5 performing those services. And so, a project to
6 install new equipment capable of performing the
7 purification services at Y-12 is underway, but it
8 won't be fully completed until at least 2028, based on
9 the most recent projections. And NNSA may add
10 conversion capabilities at a later date. So, NNSA has
11 asked NFS to perform those services.

12 It's important to note that these services
13 are, essentially, a one-for-one replacement of like-
14 for-like activities; that there is no net change in
15 terms of what is being done. The only real change is
16 where it's being done, and that's really the focus of
17 the environmental review.

18 And overall, these facts are inconsistent
19 with the claims raised in the petition. For example,
20 proposed Contention One regarding Petitioner's demand
21 for a proliferation assessment, it's inadmissible here
22 for the main reasons noted in the answers. But it's,
23 fundamentally, basis because, again, here there's no
24 change of what is being done. The only change is
25 where.

1 Likewise, as to proposed Contention Two,
2 regarding Petitioner's challenge to the purpose and
3 needs statement and discussion of alternatives.
4 Petitioner assumes that the aging equipment at Y-12
5 could continue to perform conversion and purification
6 services indefinitely, and that's simply factually
7 inaccurate.

8 Proposed Contention Three largely focuses
9 on historical contamination and Petitioner's claim
10 that the supplement to Applicant's Environmental
11 Report, or SAER, does not consider this in the context
12 of cumulative impacts. But cumulative impacts
13 consider the incremental effect of the proposed action
14 in the context of past, present, and reasonably
15 foreseeable future actions. And here, those
16 incremental operational effects are de minimis,
17 largely because the quantity of material in and
18 material out is not changing. NFS has not requested
19 any change to the possession limit in the license.

20 And no changes to existing effluent
21 permits are expected or proposed, either.
22 Petitioner's expert merely notes that there are
23 effluents from the facility, but there's no dispute on
24 that point. The SAER fully acknowledges that and
25 notes that they are subject to a robust monitoring

1 program. And the Petitioner simply has not identified
2 any significant environmental effect that has not been
3 considered, which is the regulatory standard for what
4 must be included in an SAER under Part 51.

5 And proposed Contention Four is
6 inadmissible because it challenges NRC regulations.
7 So, that is the end of the inquiry.

8 In sum, NFS respectfully submits that all
9 four proposed contentions are inadmissible and the
10 Board should deny the petition.

11 And with that, I'm happy to take any
12 specific questions the Board may have.

13 JUDGE BOLLWERK: All right. I'll start,
14 unless somebody else wants to. All right.

15 Since you did them in the order they were
16 presented, A, B, C, D, let's go through it that way
17 then.

18 So, with respect to Contention A, so I
19 sort of went back and I looked at the NRC's website
20 about fuel fabrication. And if you look at
21 [www.nrc.gov/materials/fuel-cycle-fac/fuel-](http://www.nrc.gov/materials/fuel-cycle-fac/fuel-fab.html#cat1)
22 [fab.html#cat1](http://www.nrc.gov/materials/fuel-cycle-fac/fuel-fab.html#cat1), it talks about fuel fabrication in a
23 general sense and what the NRC's regulatory
24 responsibilities are.

25 And it mentions the fact initially that

1 there are low-enriched fuel fabrication facilities,
2 and those are the ones that produce fuel for nuclear
3 power plants, including the Global Nuclear Fuels Plant
4 in Wilmington and the plant in Columbia, South
5 Carolina; also, one in Richland -- run by different
6 entities.

7 And then, it talks about Category 1 fuel
8 fabrication facilities. And that's where NFS and the
9 Lynchburg facility come in, the Erwin and Lynchburg
10 facilities. And it indicates that "NRC regulates fuel
11 fabrication facilities that have government contracts
12 to produce fuel for the U.S. Naval Reactors Program
13 and to down-blend highly-enriched HEU with other
14 uranium to create low-enriched uranium reactor fuel.
15 The HEU being blended down to lower enrichment comes
16 from Russian or U.S. weapons programs as part of an
17 International Arms Control Agreement."

18 And there's also another sentence in there
19 that indicates that the facility, whether it's the
20 Erwin facility or the Lynchburg facility, "produce
21 nuclear fuel containing both high-enriched and low-
22 enriched uranium."

23 The website also talks about mixed oxide
24 fuel and about non-power reactor fuel, but those
25 aren't involved here.

1 And then, if you go and look at the DOE
2 website for the Y-12 facility at
3 www.y12.doe.gov/about, there is an information handout
4 that's been unclassified that indicates that there's
5 three missions at the Y-12 facility.

6 One is to maintain the security, safety,
7 and effectiveness of the U.S. nuclear weapons
8 stockpile. That's, obviously, a nuclear weapons
9 issue.

10 It also talks about reducing the global
11 threat posed by nuclear proliferation and terrorism.
12 That seems to be an indication that the Y-12 will take
13 material back and protect it in some way or another.
14 And again, that would be a proliferation concern.

15 And finally, there is a provision that
16 talks about "provide feedstock to fuel the U.S.
17 Nuclear Navy. Y-12 provides highly-enriched uranium
18 or feedstock used in the fabrication of fuel for
19 reactors and the Navy's nuclear-powered aircraft
20 carriers and submarines under an agreement with NNSA's
21 Naval Reactors Office."

22 So, looking at the descriptions of the two
23 facilities, it seems like where Y-12 and NFS sort of
24 are conjoined is the provisions dealing with naval
25 fuel. One provides, Y-12 provides feedstock. And

1 it's my understanding in your statement, basically,
2 the NFS facility provides the actual fuel. Am I
3 correct about that?

4 MR. LIGHTY: Yes, that is correct, Your
5 Honor.

6 JUDGE BOLLWERK: Okay. So, when you say
7 that you provide services, you're providing fuel that
8 you use the enriched uranium to produce, and the Y-12
9 facility, while it's involved in the nuclear naval
10 fuel process, provides feedstock, which I'm assuming
11 is the enriched uranium that you're dealing with when
12 you actually fabricate the fuel?

13 MR. LIGHTY: Yes. Yes, that is, that is
14 correct, Your Honor.

15 JUDGE BOLLWERK: That's the loop in the
16 relationship between the two. So, my next question,
17 then, is the process you're now talking about is
18 dealing with purified uranium metal. Is that a
19 material that is involved with nuclear fuel?

20 MR. LIGHTY: Yes.

21 JUDGE BOLLWERK: For our Naval Reactor
22 Program?

23 MR. LIGHTY: Yes, I believe that is
24 correct, Your Honor, it can be.

25 JUDGE BOLLWERK: It can be. Can it be

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1 used for anything else?

2 MR. LIGHTY: I suppose it could, yes.
3 Yes, Your Honor.

4 JUDGE BOLLWERK: It can be used for
5 something that Y-12 would do in terms of its dealings
6 with the nuclear stockpile?

7 MR. LIGHTY: I don't think, I don't think
8 that I can speak for NNSA as to what they do for the
9 material, or what they do with the material, but I
10 suppose it could be put to purposes other than what
11 NFS performs.

12 JUDGE BOLLWERK: So, basically, when you
13 say there's a one-to-one, you're now doing something
14 which my understanding is you don't do right now,
15 which is make purified uranium metal, is that correct?

16 MR. LIGHTY: Yes.

17 JUDGE BOLLWERK: Okay. And you're going
18 to, then, provide it back to NNSA for whatever purpose
19 they want to put it to?

20 MR. LIGHTY: Potentially, yes, Your Honor.
21 So, some of that, after the purification and
22 conversion steps, may go to, into a different part of
23 the assembly line to make naval fuel. So, it doesn't
24 necessarily go back to Y-12.

25 JUDGE BOLLWERK: But you're not -- you

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1 don't really know if that's the only thing they're
2 going to use it for, is what you, I think what I heard
3 you say/tell us?

4 MR. LIGHTY: Yes, that's correct.

5 JUDGE BOLLWERK: Okay. So, that's kind of
6 my factual question. Now, let me ask you sort of a
7 legal question. Looking at this process, and if you
8 look at the Commission's cases, one of which Judge
9 Abreu talked with Mr. Lodge about, and the rulemaking
10 that was cited by the staff, it seems at least
11 arguable that the Commission has really spoken to the
12 question of proliferation assessments relative to
13 enrichment and reprocessing facilities. Now,
14 obviously, the NFS facility doesn't fall into that
15 category in any way, shape, or form. That's not what
16 you do.

17 So, one could argue, looking at the cases
18 and the rulemaking, at least the way that they're
19 written, that it's an open question whether
20 proliferation would be required for a nuclear fuel
21 facility?

22 MR. LIGHTY: Well, Your Honor, I would
23 point to a couple of things here.

24 First of all, facilities that manufacture
25 weapons are not under the NRC's jurisdiction. So, if

1 NFS was manufacturing weapons, it would not need to
2 come to seek this license amendment at all. That
3 would be outside of the NRC's licensing purview.
4 That's something that the Department of Energy would
5 handle.

6 But I would also point you to the
7 condition in 10 CFR Section 70.32(a)(6), and there's
8 a very clear prohibition in there that the licensee
9 cannot use a special nuclear material under a Part 70
10 license to construct an atomic weapon or any component
11 of an atomic weapon. And that comes from the Atomic
12 Energy Act, Section 53(e)(6). And so, these
13 applicable license conditions, essentially, prohibit
14 the licensee from using SNM in this way. That's a
15 condition of the license. And so, we're clearly
16 outside of that space.

17 JUDGE BOLLWERK: So, if I understood what
18 you just told me, you're saying that 70.32 prohibits
19 you from generating this enriched -- I'm sorry -- this
20 purified uranium for weapons purposes?

21 MR. LIGHTY: From using special nuclear
22 material to construct a weapon or any component of a
23 weapon.

24 JUDGE BOLLWERK: So, NFS can't construct
25 a weapon, correct, under the way the regulation reads,

1 correct?

2 MR. LIGHTY: That is correct.

3 JUDGE BOLLWERK: What about NNSA, using
4 the material that NFS provides?

5 MR. LIGHTY: Again, Your Honor, I can't
6 speak to what NNSA may or may not do with the
7 material, but, to the extent that we're talking about
8 this licensing proceeding for this matter, where the
9 NRC has jurisdiction to regulate and license the
10 services that NFS performs on uranium metal, that NFS
11 is neither constructing a weapon or any component of
12 it.

13 JUDGE BOLLWERK: Okay. What they're,
14 basically, doing though is providing purified uranium
15 metal, which you've told us, I understand, that can be
16 used either for nuclear fuel, reactor -- I'm sorry --
17 for naval reactor fuel or, potentially, for some other
18 purpose, although you're not aware that that's the
19 purpose, some other purpose, and that would be NNSA's
20 call, basically?

21 MR. LIGHTY: Yes. Yes, that's accurate,
22 Your Honor.

23 But, in the terms of NEPA, in the context
24 of NEPA that we're discussing today, and a
25 proliferation assessment under NEPA, I would note

1 that, you know, the operations at Y-12 have been
2 assessed in an EIS. There is a sitewide Environmental
3 Impact Statement that addresses the scope of
4 activities at Y-12. There, essentially, is no new
5 activity being performed here. The only difference is
6 where the purification and conversion activities would
7 occur. And so, that's what is reviewed in the
8 environmental review and this licensing proceeding, to
9 perform those services at the NFS site.

10 JUDGE BOLLWERK: All right. Thank you.

11 Let me turn to the other judges. Any
12 questions on A?

13 JUDGE ABREU: No.

14 JUDGE BOLLWERK: No?

15 JUDGE FROEHLICH: Maybe. I have a couple,
16 and I apologize if they're so, so very basic.

17 But the U-Metal that's described in the
18 licensing application amendment, that, I'm gathering,
19 is different from uranium dioxide that is generally
20 used in making the fuel, the nuclear navy fuel, is
21 that correct?

22 MR. LIGHTY: That, I'm not sure of, Your
23 Honor.

24 JUDGE FROEHLICH: But it's the use of
25 the --

1 MR. LIGHTY: If you give me a moment, I
2 can confer with my technical colleagues, if you would
3 like.

4 JUDGE FROEHLICH: Yes, please.

5 JUDGE BOLLWERK: Certainly, go ahead, yes.

6 JUDGE FROEHLICH: Thank you.

7 (Pause.)

8 MR. LIGHTY: All right. Thank you, Your
9 Honor. I apologize.

10 (Pause.)

11 Thank you, Your Honor. I appreciate your
12 indulgence.

13 So, I'm told that that information is
14 classified.

15 JUDGE FROEHLICH: Okay. Well, then, I
16 have no more questions along that line. Thank you.

17 JUDGE BOLLWERK: Let's not go there, yes.

18 JUDGE FROEHLICH: Yes, let's not go there.

19 JUDGE BOLLWERK: Anything else?

20 JUDGE FROEHLICH: No.

21 JUDGE BOLLWERK: Is that it? Okay.

22 Let me move, then, to Contention B
23 briefly, and I just had a factual question. We've
24 heard about when the current Y-12 uranium refining
25 equipment shutdown will be, which is supposed to be

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1 around 2023. I think that was -- was that in a
2 footnote to your pleading? Or somewhere in your
3 pleading I think you provided that information.

4 MR. LIGHTY: Yes, Your Honor. I believe
5 that's correct.

6 JUDGE BOLLWERK: Okay. And then, in terms
7 of the Y-12 electrorefining process, that's supposed
8 to be finished and scheduled to come online in 2023 or
9 later. Do you have any further information about that
10 or anything that you know about it in terms of the
11 schedule?

12 MR. LIGHTY: My understanding is that the
13 schedule is now out to approximately 2028, and that is
14 based on the media report that was cited in our answer
15 to you.

16 JUDGE BOLLWERK: Although that had to do
17 with conversion of oxides to metal, right?

18 MR. LIGHTY: Yes, so there are two parts.
19 The facility that may start to come online in the 2023
20 timeframe for testing and other purposes would only be
21 capable of the purification process. And that would
22 expect, is expected to be completed around 2028. And
23 then, the conversion process would be a functionality
24 that may or may not be added later, around the 2028
25 timeframe or afterwards.

1 JUDGE BOLLWERK: Okay. So, if I just
2 heard what you said, the testing process -- don't let
3 me put words in your mouth, obviously -- but the
4 testing process for the Y-12 electrorefining process
5 for the purification is going to run from 2023 to
6 2028?

7 MR. LIGHTY: It could, Your Honor. And
8 again, we're not in charge of that operation, and
9 we're also going off of, you know, off of industry and
10 media reports on the timeline for that project.

11 JUDGE BOLLWERK: All right. And then, my
12 last factual question is, what is your current
13 planning for actually putting the U-Metal Project in
14 place and getting it operational?

15 MR. LIGHTY: Do you mean in terms of
16 timing, what that would look like?

17 JUDGE BOLLWERK: Yes.

18 MR. LIGHTY: I believe the construction
19 would begin as soon as the NRC licensing process is
20 completed and may be online approximately 2026.

21 JUDGE BOLLWERK: Okay. All right. Thank
22 you.

23 Any questions anyone else has about B at
24 this point? No?

25 I don't have any questions about C or D,

1 but I would defer to either of you, if you have a
2 question.

3 JUDGE ABREU: This is Judge Abreu.

4 Just to clarify, the change in process
5 that will happen at NFS, from what I understood you
6 saying, there is no change in the expected effluents
7 or emissions from NFS, based on this change, is that
8 correct?

9 MR. LIGHTY: Yes, Your Honor, I think that
10 is correct. I believe the language in the application
11 says something like de minimis, but it would not be
12 expected to be a significant change. And again,
13 that's because there's no change in the possession
14 limit quantity.

15 So, for example, where NFS would perform
16 new conversion and purification services, that would
17 have to be offset by a reduction in other services it
18 performs, such as downblending. So, there's a cap on
19 the possession of material. And so, at the end of the
20 day, it's the same sort of in and out.

21 JUDGE ABREU: All right. Thank you.

22 JUDGE BOLLWERK: All right. Judge
23 Froehlich, anything you have? Go ahead.

24 JUDGE FROEHLICH: Yes. If we're talking,
25 I think, about Contentions B and C --

1 JUDGE BOLLWERK: Yes.

2 JUDGE FROEHLICH: Okay.

3 JUDGE BOLLWERK: But you can bring
4 anything else you'd like.

5 JUDGE FROEHLICH: Well --

6 JUDGE BOLLWERK: And I'm not trying to
7 order it. I'm just trying to be organized; that's
8 all.

9 JUDGE FROEHLICH: I was just trying to be
10 clear in my mind on the contention raised having to do
11 with keeping to the facts and the testing that's been
12 done and reported in the SAER. Do any of the
13 locations used in the SAER -- that's your tables 22A
14 through 22F at pages 30 to 40 -- correspond to any of
15 the locations that were sampled in Dr. Ketterer's
16 declaration?

17 MR. LIGHTY: That, I don't know that I
18 could answer that question, Your Honor. I don't know
19 that I have enough detail about the location of the
20 testing in the Ketterer declaration to say one way or
21 another.

22 JUDGE FROEHLICH: Okay.

23 MR. LIGHTY: It looks like I'm getting
24 some input that the answer is, no, the locations are
25 different.

1 JUDGE FROEHLICH: They aren't? That they
2 don't correlate with the places that the licensee
3 tests water or downstream effects? There's samples
4 taken from two different areas? Is that --

5 MR. LIGHTY: I believe that's correct,
6 Your Honor, yes.

7 JUDGE FROEHLICH: Okay. And did I read
8 properly, in the SAER, at page 34, that there really
9 hasn't been any surface water testing since 2003?

10 MR. LIGHTY: No, that is -- that is
11 incorrect, Your Honor. There has been surface water
12 testing completed, but I think the reference on page
13 34 of the SAER discusses the chemical monitoring of
14 these particular water bodies that was conducted for
15 this particular purpose that's discussed here on page
16 34.

17 JUDGE FROEHLICH: Would you say that
18 again? Just now that I have 34 in front of me, I want
19 to have an idea of what kind of surface water testing
20 has occurred, I guess, since the -- what? -- since
21 2003, or as has been reflected in the 2009
22 Environmental Report that's mentioned at page 34?

23 MR. LIGHTY: Yes. The chemical monitoring
24 of these for the purpose described here on page 34 was
25 discontinued during the second half of '23 (sic)

1 because there were no significant trends or changes
2 due to the plant operation.

3 And there is currently weekly and monthly
4 testing that does get performed on surface water. So,
5 it's not that the site completely discontinued
6 testing. It's just this particular testing that was
7 in relation to the context on page 34.

8 JUDGE FROEHLICH: Okay. And is stormwater
9 tested for radiological components? And I know this
10 was referring to chemical here. I guess, quick
11 answer, do you test radiologically downstream --

12 MR. LIGHTY: Yes. Yes, yes. The
13 stormwater is tested for radiological components as
14 well.

15 JUDGE FROEHLICH: All right. And as I was
16 looking at Dr. Ketterer's declaration, he had a chart
17 that showed levels of U-236 that, according to a lay
18 review of it, looked very high, much higher than the
19 results for the other isotopes. Are you familiar with
20 his chart? I guess it's at the end of his
21 declaration.

22 MR. LIGHTY: I don't have it in front of
23 me, Your Honor, but if you give me a moment, I can
24 pull it up.

25 JUDGE FROEHLICH: Okay.

1 (Pause.)

2 MR. LIGHTY: Okay, and that was the
3 document that was filed on November 15th.

4 JUDGE FROEHLICH: Yes, I believe so.

5 MR. LIGHTY: Okay. I do have that up now,
6 Your Honor.

7 JUDGE FROEHLICH: And does that final page
8 show like a picture of a computer or some kind of
9 terminal, and it shows a large spike or a large
10 reading for U-236?

11 MR. LIGHTY: And which attachment is this
12 again, Your Honor?

13 JUDGE FROEHLICH: Let me see if I can --

14 MR. LIGHTY: I see three attachments of
15 charts at the end labeled Attachment 1, 2, and 3.

16 JUDGE FROEHLICH: Okay. Okay. It shows
17 up, I guess, primarily, in Attachment 1, where they
18 have readings for U-234, -235, -236, and -238.

19 MR. LIGHTY: Okay.

20 JUDGE FROEHLICH: Okay. And I was trying
21 to compare those results with table 25 of the SAER,
22 which had readings for isotopes 234, 235, and 238.
23 And I was curious why there's no result for U-236.

24 MR. LIGHTY: Well, off the top of my head,
25 Your Honor, I don't know the answer to that question.

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1 That wasn't a criticism of the SAER that Petitioner
2 provided. So, I apologize, I'm not prepared to answer
3 that question.

4 JUDGE FROEHLICH: Okay. Okay. All right.
5 Thank you.

6 JUDGE BOLLWERK: All right. Let me just
7 ask one more question related to Contention A, and I
8 apologize for going back, but it's something that
9 occurred to me.

10 NFS cited a couple of cases, one dealing
11 with a liquid metal fast breeder reactor and the other
12 one having a relationship to the GESMO proceeding, or
13 the Generic Environmental Statement on Mixed Oxide
14 fuel. Both of those involve plutonium. Does
15 plutonium have anything to do with the U-Metal
16 Process?

17 MR. LIGHTY: No, I don't believe, I don't
18 believe it does, Your Honor.

19 JUDGE BOLLWERK: All right. Thank you.

20 All right. Anything further for Mr.
21 Lighty?

22 (No response.)

23 Okay. Then, we'll go ahead.

24 Thank you, sir. We very much appreciate
25 your conversation with us.

1 And we'll move on to the NRC staff.

2 MR. LIGHTY: All right. Thank you, Your
3 Honors.

4 MR. ROACH: Kevin Roach for the NRC staff.

5 And may it please the Court, I'm going to
6 address the four contentions in order, so starting
7 with Contention A. ECAN's overarching argument that
8 NEPA and the AEA require a distinct proliferation
9 analysis for this license amendment request is
10 unsupported.

11 So, first, with respect to the AEA, the
12 Commission has explicitly disagreed with ECAN's
13 position in the 2013 denial of petition for
14 rulemaking, when it said that the NRC's regulatory
15 framework adequately addresses proliferation concerns
16 for all fuel cycle facilities.

17 ECAN may disagree with this conclusive
18 statement, and if it does, the petition for the
19 rulemaking process is available to it under 2.802,
20 where the Commission has stated that there is no
21 requirement to conduct a proliferation assessment for
22 fuel cycle facilities, and that the NRC need not
23 create such a requirement. The proliferation
24 assessment issue is not properly within the scope of
25 the license amendment proceeding.

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1 With respect to NEPA, the cases that ECAN
2 cites in support of its argument simply do not stand
3 for the proposition that NEPA requires the NRC to
4 conduct a proliferation assessment.

5 First, generally, the fact that a previous
6 EIS may have analyzed an issue does not mean that
7 there is a legal requirement in NEPA to analyze that
8 issue. NEPA principles and the NRC regulations in
9 10 CFR Part 51 are the source of the analysis
10 requirements.

11 Second, the examples that ECAN provides
12 are in opposite. For example, ECAN interprets the
13 fact that AEC prepared a Generic Environmental Impact
14 Statement to consider commercial recycling of
15 plutonium as meaning that NEPA requires that the NRC
16 conduct a separate proliferation assessment for this
17 action, but that conclusion does not follow.

18 NEPA does not require consideration of
19 remote and speculative matters, which is what ECAN
20 seeks here. As discussed, in 2013, the Commission
21 concluded that NRC regulations are adequate to address
22 concerns related to proliferation at licensed fuel
23 cycle facilities.

24 Thus, presuming that proliferation would
25 be an outcome of the present licensing action involves

1 speculation about multiple intervening, contingent
2 events and the subversion of NRC's regulations, which
3 NEPA does not require.

4 And to the extent that ECAN seeks to
5 require NRC to attempt to assess policy decisions
6 outside the scope of NRC action, that, too, would be
7 an exercise in speculation. The Commission decisions
8 in National Enrichment Facility and the American
9 Centrifuge Plant proceeding underscore this by noting
10 that there is a "remove" between NRC licensing and
11 proliferation.

12 And in a previously discussed denial of
13 petition for rulemaking, the Commission stated that an
14 NRC domestic licensing proceeding is not the proper
15 forum for establishing national nonproliferation
16 policies and objectives.

17 In many respects, Contention A addresses
18 similar ideas as past contentions, arguing that NEPA
19 requires considering potential terrorism impacts. And
20 the Commission has rejected these contentions with the
21 rationale that applies here.

22 The Commission held in the Oyster Creek
23 relicensing proceeding that, under NEPA, a reasonably
24 close causal relationship between federal agency
25 action and environmental consequences is necessary to

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1 trigger NEPA, and that nexus was absent between NRC
2 licensing actions and terrorism risks. And it is also
3 absent in this context.

4 ECAN insists that a material issue in this
5 proceeding is what NNSA ultimately intends to do with
6 the material that NFS produces, but NNSA is not the
7 applicant, and the NRC regulates NFS and not NNSA.

8 This proceeding concerns whether NFS's
9 request meets NRC regulations to conduct the
10 purification and conversion activities. The NRC's
11 regulatory review of the license amendment request
12 will ensure that, if the amendment is granted, the NRC
13 has reasonable assurance that the activity will be
14 done safely and securely, and that the environmental
15 review has addressed all reasonably foreseeable
16 environmental impacts.

17 Moving on to Contention B, ECAN's argument
18 in Contention B does not raise a genuine dispute with
19 the application, because in challenging NFS's purpose
20 and needs statement, ECAN does not address all aspects
21 of it. This misreading of the application leads it to
22 erroneously conclude that reasonable alternatives are
23 excluded, and even that ECAN's posited alternative is
24 occurring now.

25 The confusion seems to arise from ECAN's

1 conflation of the purification and conversion
2 processes. ECAN asserts that, if metal purification
3 can continue in building 9212, then a reasonable
4 alternative would be the no action alternative. But
5 ECAN does not address how this option would meet the
6 purpose and need of the project.

7 ECAN does not address and dispute the
8 complete purpose and needs statement, which includes
9 the separate process of converting isotopes to metal,
10 as well as creating redundant capacity. Therefore,
11 taken on its face, the purpose and need is not unduly
12 narrow in the way that ECAN alleges.

13 An applicant's purpose and need generally
14 defines the scope of reasonable alternatives for
15 analysis. And per the Commission's ruling in Hydro
16 Resources, the NRC may accord substantial weight to
17 the preferences of the applicant in deciding the
18 design of the project.

19 The NRC staff's environmental review will
20 consider the reasonableness of NFS's purpose and needs
21 statement, taking all factors of it together. By only
22 addressing a part of NFS's purpose and needs, ECAN
23 fails to raise a genuine dispute with the application.

24 Moving on to Contention C, ECAN raises
25 several arguments in Contention C, and broadly, these

1 arguments fail to take account of information
2 disclosed in the Supplemental ER or previous
3 environmental review documents for the NFS facility;
4 or the existence of NRC's dose limits that have been
5 determined to be protective of public health and
6 safety.

7 The cumulative impacts to an environmental
8 resource for the proposed action are the incremental
9 impacts of the license amendment added to the past,
10 present, and reasonably foreseeable future impacts on
11 the resource, which in many significant respects had
12 been previously described during relicensing the NFS
13 facility in 2009. The Supplemental ER and
14 environmental RAI responses disclose that the
15 incremental impact caused by various effluent types
16 will not significantly change.

17 ECAN's position seems largely to take
18 issue with the fact that NFS is permitted to discharge
19 effluents in accordance with permit limitations at
20 all. However, NFS describes its permitted effluent
21 release limits and that its monitoring shows that it
22 adhered to radiological and non-radiological
23 regulatory limits.

24 ECAN does not acknowledge, or therefore,
25 dispute, the portions of the application that

1 disclosed the nature and quantity of F1 releases in
2 monitoring results. Nor does ECAN dispute NFS's
3 conclusion that additional liquid F1 volumes generated
4 by the new process -- in other words, the incremental
5 impact -- would be nominal.

6 While ECAN raises the specter of
7 consequential accumulation of radionuclides, NRC's
8 dose limits have been determined to be adequate to
9 protect public health and safety. And ECAN does not
10 allege that NFS exceeds these limits.

11 To verify adherence to these limits, the
12 license renewal EA notes that, with regard to
13 cumulative radiological impacts, NFS conducts
14 monitoring of ambient air, surface water, soil,
15 sediment, vegetation, and groundwater at offsite
16 locations as part of its Environmental Surveillance
17 Monitoring Program. These limits pertain to isotopes
18 of uranium, plutonium, and other radionuclides.

19 Thus, beyond the disclosures that NFS and
20 the NRC have made in its current and previous
21 environmental review documents, it is not clear why
22 additional analysis would advance NEPA's purpose of
23 disclosing significant impacts.

24 Moving on to Contention D, ECAN's
25 Contention D, as we have discussed, in the first

1 instance is impermissible attack on Commission
2 regulations for which it does not have a waiver per
3 10 CFR 2.335(a). ECAN points to past regulatory
4 citations by NRC at NFS to argue, apparently, that, in
5 addition to or instead of being subject to NRC
6 requirements, the requested activities should be
7 subject to DOE requirements. However, past
8 operational events are not within the scope of this
9 proceeding.

10 The Commission has ruled that routine
11 inspection findings and regulatory determinations
12 should not form the basis for a contention, and that
13 if a stakeholder believes that immediate action is
14 needed to address safety at a facility, the petition
15 process under 10 CFR 2.206 is available.

16 ECAN's arguments that past events at NFS
17 mean that NRC regulations on their own are inadequate
18 vis-a-vis the requested license amendment is also an
19 impermissible challenge to the NRC's regulations.

20 Thank you, and I will take any questions
21 that you have.

22 JUDGE BOLLWERK: Right. Let's go through
23 them, I guess. A, B, C, D? Does that make sense?
24 All right.

25 So, with respect to Contention A, you

1 heard my dialogue with Mr. Lighty, I take it.

2 MR. ROACH: Yes, Your Honor, I did.

3 JUDGE BOLLWERK: And let me make -- well,
4 I guess, one of the things you mentioned is that the
5 -- the rulemaking in particular had basically said
6 that all nuclear fuel facilities -- the Commission
7 does not want proliferation assessments done.

8 But if you read the title of it, which is
9 at 78 Federal Register 33995, it says Nuclear
10 Proliferation Assessment in Licensing Process for
11 Enrichment or Reprocessing Facilities. This is not an
12 enrichment facility, I think as we -- as Mr. Lighty
13 and I talked about, or a reprocessing facility.

14 So can you say that this is -- the
15 comments in this rulemaking are definitive as to a
16 fuel -- fuel cycle -- as a -- for a fuel facility, a
17 fuel construction facility?

18 MR. ROACH: Yes. Well, Your -- Your
19 Honor, we included a citation to this in our -- in our
20 answer to the -- to the specific question and answer
21 that the Commission was responding to, to which I'm --
22 I'm making reference. So it is correct that the --
23 the genesis of the -- of the petition for rulemaking
24 was related to enrichment facilities and reprocessing
25 facilities, but in -- in the course of conducting the

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1 rulemaking, the Commission received broader questions.

2 And so one of the -- I guess one of the
3 suggestions from the public was that all fuel cycle
4 facilities should have to conduct a proliferation
5 assessment. And -- and -- and the Commission
6 responded to that with respect to all fuel cycle
7 facilities. And the specific page in which that's
8 addressed is -- is -- is in our answer.

9 But -- but yes. That is a -- sort of a --
10 a little bit of a twist from the -- the -- the title
11 of the -- of the petition, but they addressed all fuel
12 cycle facilities.

13 JUDGE BOLLWERK: All right. And so
14 another question, then, I guess I have, given what Mr.
15 Lighty told me, is that he indicated that they're
16 going to make uranium -- purify uranium metal, and
17 they're going to hand it over to NSSA for NSSA to do
18 with it what it believes is appropriate.

19 And it could be used for fuel, and it
20 might be used for something else. Does it make any
21 difference if NSSA uses that material to produce
22 nuclear weapons?

23 MR. ROACH: Not -- not from the NRC's
24 regulatory perspective. The -- the NRC is -- is
25 concerned with its licensee, NFS, and -- and its

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1 operations and activities under its license.

2 JUDGE BOLLWERK: So, if NNSA were to
3 declare tomorrow that we're going to use what NFS is
4 going to provide us in terms of purifying uranium
5 metal, it's your position that the NRC would not have
6 any -- have any -- it would not cause a concern with
7 the NRC in terms of proliferation assessment or any
8 other problem?

9 MR. ROACH: Well, I -- I acknowledge that
10 there might be -- there might be some analysis
11 questions about -- about authority under that -- under
12 that fact pattern. But the NRC's position is that it
13 has the authority to -- to grant the current license
14 amendment if the -- if the standards are met.

15 And so, you know, under the facts of the
16 application, the NRC is going to evaluate whether NFS
17 satisfies the regulatory criteria.

18 JUDGE BOLLWERK: Regardless of what's
19 going to happen to the material, assuming it's given
20 to NNSA? That's up to them, then?

21 MR. ROACH: I mean, essentially, the
22 position is that the NRC does not regulate NNSA. So
23 correct, Your Honor.

24 JUDGE BOLLWERK: Correct.

25 JUDGE ABREU: So this is Judge Abreu. So,

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1 essentially, is what we're saying that the NRC is
2 regulating material X, and as long as you fall within
3 the requirements for the possession and handling of
4 material X, what happens with X once it goes to
5 somewhere else regulated by someone else -- not the
6 NRC's turf?

7 MR. ROACH: Yes. You know, and at least
8 with respect to the material under the license
9 amendment, which is -- is not a weapon, is -- is not
10 considered to be a weapon component. So, you know,
11 given those statements, I -- I -- I agree with your
12 statement.

13 JUDGE ABREU: Thank you.

14 JUDGE BOLLWERK: Although, again, I think
15 I heard Mr. Lighty say that the potential is there --
16 I mean, that U-Metal could be used for a weapon. You
17 just -- he just doesn't know.

18 MR. ROACH: Right. I mean, there is --
19 the -- the -- the U-Metal itself is -- is not -- is
20 not itself a weapon, and it -- it would need to be
21 further refined to be placed in a weapon. And so, as
22 -- as far as whether it's considered to be a weapon of
23 -- part of a weapon, the NRC's position is that it is
24 not.

25 JUDGE BOLLWERK: Okay. Thank you.

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1 Any other questions on A anybody has?

2 All right. In terms of B, Mr. Lighty
3 mentioned that they're looking to complete and have
4 operational, I guess, the U-Metal project by 2026,
5 subject to the NRC staff's licensing process. Do you
6 have a -- do you know what the -- the staff's schedule
7 is for this license amendment, all things being equal?
8 Obviously, there's adjudication ongoing, but what is
9 the -- the staff always has a schedule, so --

10 MR. ROACH: Yes. Just one moment, Your
11 Honor, and I can -- I can get the information. I --
12 I am -- I am told that a licensing decision target
13 date is July 2023.

14 JUDGE BOLLWERK: And just so I understand,
15 I know there's been some questions recently about some
16 fuel facilities being able to actually be constructed
17 before the NRC actually licenses them. In this
18 instance, do they -- does NFS have to have a -- this
19 license amendment granted before they can be in
20 construction or put the process in place?

21 MR. ROACH: Well, the -- I mean, the
22 license amendment is particularly -- yeah. Regarding
23 the -- the conduct of a -- of a -- of the radiological
24 process, it is possible that there could be site
25 clearing and -- and other such activities before the

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1 licensing occurs.

2 JUDGE BOLLWERK: Could they construct any
3 kind of facility, or, I mean, could they actually
4 build all the equipment that's necessary and just not
5 operate it until the -- the license amendment is
6 granted? Or do they have to actually have the license
7 amendment in place before they can start construction
8 on a -- on a facility or on putting together
9 equipment?

10 MR. ROACH: Well, I -- I -- I think the --
11 I think the relevant regulation, you know, says that
12 for activities that are considered to be construction
13 activities, those that are defined as construction
14 under Part 70, that -- that -- that those -- that
15 construction activities conducted before a license was
16 issued would be potentially conducted at risk. You
17 know, the -- the NRC would need to be able to ensure
18 that items relied on for safety, for example, were
19 appropriately constructed.

20 JUDGE BOLLWERK: But I take it this is not
21 a no-significant-hazards consideration case.

22 MR. ROACH: I -- I -- let me -- let me --
23 let me check with -- with the technical staff about
24 that so I -- I'm sure I represent that to you
25 correctly. Yeah. That -- that is correct.

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1 JUDGE BOLLWERK: All right.

2 Anybody else have anything on Contention
3 B? All right. Contention C.

4 Judge Froehlich, you have some questions.

5 JUDGE FROEHLICH: I don't think so. No.
6 Thanks.

7 JUDGE BOLLWERK: Okay. Anything?

8 JUDGE ABREU: Just one topic. Since this
9 is a license amendment proceeding rather than a full
10 license or license renewal proceeding, the
11 requirements are of course different for what the
12 Applicant has to submit.

13 If it is the case that there is no
14 significant change in the effluents or emissions based
15 on this proceeding, would the Applicant even have to
16 put in information about that in this amendment
17 request since the big issue is what is changing, what
18 new risks or -- you know, what -- what are the effects
19 that are different based on the amendment? Are -- are
20 -- is there any reason they need to discuss those
21 things?

22 MR. ROACH: Well, I -- I think they -- NFS
23 did sort of do a description of the -- of the --
24 what's changed, you know, perhaps as a -- as a -- as
25 a way to better understand the incremental impact and

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1 its, sort of, relationship with, you know, past,
2 present, and reasonably foreseeable future impacts.

3 You know, the -- the -- the staff will be
4 looking, you know, at the NFS site as it's
5 characterized to sort of understand, you know, the
6 environmental picture presented by the incremental
7 impact.

8 JUDGE ABREU: My -- my question is, if --
9 if there is no significant change over current
10 processes with the new process, other than saying it's
11 the same, would they really have to -- even if they
12 have told us things, is that really something they had
13 to do since it is a license amendment request rather
14 than a new license or a renewed license?

15 MR. ROACH: I -- I guess -- I guess I'm
16 ultimately not -- not sure about whether the staff
17 would insist upon the -- the requirement or not. I
18 think it's -- it's a -- it's a reasonable
19 interpretation of the environmental report regulations
20 in Part 51.

21 JUDGE ABREU: To say -- are you saying the
22 idea that, hey, if it's the same, I really don't have
23 to talk about it compared to my most recent license --
24 I'm just -- if I -- if it were the case that there was
25 no difference, I could -- if I were a license

1 amendment applicant, I could say it's all the same as
2 it was; it's not going to change with what I'm going
3 to be doing? And that theoretically would be
4 sufficient?

5 MR. ROACH: Yes. I -- I -- I -- I -- I
6 agree that, you know, theoretically, if -- if there is
7 no delta anywhere, you could simply kind of rest on
8 the -- on the pleadings, as it were, the environmental
9 documents that are already out there.

10 JUDGE ABREU: So the next step would be,
11 then, if the changes are minimal, all you'd have to do
12 is talk about those minimal areas and not necessarily
13 rehash all the things said in a previous licensing
14 proceeding?

15 MR. ROACH: Yes. That's correct.

16 JUDGE ABREU: Okay. Thank you, sir.

17 JUDGE BOLLWERK: All right. Anything
18 further on D? Good?

19 All right. Mr. Roach, we thank you.

20 MR. ROACH: Thank you.

21 JUDGE BOLLWERK: And now, Mr. Lodge, your
22 -- your opportunity to do your rebuttal.

23 MR. LODGE: Okay. I wonder if -- if the
24 Panel would please consider our taking a break at this
25 point. I would like to consult with some of my

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1 organizational members, and I have to do so by phone.

2 JUDGE BOLLWERK: Okay. It's about -- a
3 little before 3:00, and we've actually been on -- at
4 it almost two hours. So perhaps it is a good time not
5 only for you consult, but all the rest of the people,
6 get up and stretch their legs and use the facilities
7 if they need to. So would ten minutes be enough?

8 MR. LODGE: May we have 15? Fifteen?

9 JUDGE BOLLWERK: Fifteen. So we'll --
10 it's now about ten till 3:00 if my watch is correct.
11 So we'll come back at about 3:05, then.

12 MR. LODGE: Great. Thank you very much.

13 JUDGE BOLLWERK: All right? See everybody
14 back in about 15 minutes. Thank you.

15 (Whereupon, the above-entitled matter went
16 off the record at 2:49 p.m. and resumed at 3:05 p.m.)

17 JUDGE BOLLWERK: Mr. Lodge, have you had
18 an opportunity to consult? You're okay at this point
19 to proceed?

20 MR. LODGE: Yes, I am. And thank you for
21 the courtesy of that break.

22 JUDGE BOLLWERK: Surely.

23 MR. LODGE: Do you want me to go?

24 JUDGE BOLLWERK: Yes, please.

25 MR. LODGE: Okay. Thank you.

1 I -- I will sort of be responding ad hoc.
2 I'm sure the Board understands that. And -- and so
3 this isn't necessarily going to be the tightest
4 elocution, but I want to point out a number of things
5 by way of responses.

6 It is -- I think it's necessary for the
7 Board to understand this is a 65-year-old facility
8 that -- it predates NEPA. There's never been an
9 environmental impact statement conducted of the
10 activities at NFS except in a very oblique fashion in
11 a 1996 HEU disposition programmatic EIS which was
12 supplemented in 2007.

13 The entire supplement in 2007, to address
14 four facilities, including NFS, was only about 39 to
15 40 pages in length. And the HEU disposition in 1996
16 was even shorter in terms of its references to NFS.
17 So there's never been an EIS.

18 And in that 2007 supplement, in fact, NFS
19 was -- it -- it stated that the downblending of HEU at
20 -- at the Nuclear Fuel Services would cause an
21 increased latent cancer fatality of -- in 1 of 71 off-
22 site people. It was -- and in fact, the -- that
23 predicted rate was higher than, for instance, the
24 Savannah research facility, which was one of the other
25 four facilities examined.

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1 And that's because of the proximity of
2 residential populations in the -- in the immediate
3 vicinity, within a few hundred yards of the plant
4 facility. That's kind of the driver behind the
5 community concern, is that the information only comes
6 out in dribs and drabs.

7 And again, for such things as a cumulative
8 analysis of the contaminated groundwater or surface
9 water, the -- that is an imperative here. We believe
10 -- we're not sure if what the NRC's staff is going to
11 compile, whether it's going to be an environmental
12 assessment or EIS -- we believe, certainly, that the
13 more formalized requirements of an EIS are what should
14 come into play here.

15 Anyway, the -- the several other responses
16 I have include that on page 6 of the 43-page request
17 for additional information response that was filed
18 June 30th, I believe, provided by NFS to the NRC -- it
19 very clearly states that there will be a doubling of
20 emissions. I'm trying to bring it up here so I can
21 read the precise quote to the Panel.

22 So this is on page 6 of 43 of that PDF
23 document. And it states, quote, the gaseous effluents
24 from the new U-Metal process are similar in attribute
25 and quantity to those emitted from current operations

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1 at the NFS facility. That means that in effect, the
2 -- and -- and yes, I understand we're talking about
3 airborne, but we're talking about gaseous effluents
4 will be doubled as a result of the new line.

5 And it is certainly reasonable to conclude
6 that there will not be less radioactive contamination
7 from a new product line that is also going to be
8 working with highly enriched uranium and any
9 associated isotopes and impurities. So we believe
10 that there is a -- a very significant obligation here
11 for some type of cumulative effects analysis before
12 the plant is actually modified in that fashion.

13 Also, this is, in effect, construction of
14 a -- of a facility -- product line, at least -- that
15 will have some undeniable role in the NSA's nuclear
16 weapons plans, and it is being constructed in a
17 private -- privately owned plant complex that is not
18 under the direct control of the federal government.
19 In addition, we pointed out that that may be a
20 violation of the Non-Proliferation Treaty.

21 But just in practical terms, that's why I
22 keep saying that this is unprecedented and why it is
23 very troubling that NFS and the NRC appear to be
24 interested in segmenting this project. They're
25 pretending that you take simply what is done here in

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1 isolation, what -- what would be proposed to be done
2 at NFS in isolation, and not considering it in the
3 context of the fact that it is part of a supply chain.

4 The -- the -- the material being
5 manufactured at Y-12 was certainly not denied to be a
6 contribution to the weapons program, but somehow it
7 morphs into harmless material once it's made at NFS,
8 or at least arguably harmless material. More than
9 that, however, what we're seeing here is Don't Ask,
10 Don't Tell, and that's extremely troubling.

11 It's extremely troubling because it's a
12 matter of candor to the -- to the public and the
13 residents who live close in Erwin to the plant. It's
14 really disturbing that a line that is
15 possibly/probably going to be emitting more
16 radioactive isotopes into the air and water is coming
17 in but also the -- as I say, the possible changes in
18 security that should be considered and implemented.
19 But the possible implications for the federal weapons
20 program are unmistakable here.

21 You have this -- this ridiculous scenario
22 where as long as NFS is given plausible deniability
23 and -- and they don't ask where the material is going,
24 then it's somehow okay to pretend that it isn't
25 necessarily going to be a contribution to the nuclear

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1 weapons program. In particular, that Don't ask, Don't
2 Tell policy, I think, is contradicted by some material
3 in the supplemental ER that NFS produced.

4 In -- on page 4, there's a five-and-a-
5 half-line description of the alternatives and the no-
6 action alternative. And it states -- NFS claims that
7 failure -- quote, failure of the NRC to approve the
8 license amendment request could deprive the NNSA of
9 strategically important nuclear material and if not
10 conducted by NFS would have to be conducted by another
11 NRC-licensed or DOE-operated facility.

12 So the NFS knows quite well that this is
13 strategically important nuclear material. I would
14 submit that that is code for strategic nuclear weapons
15 material.

16 Furthermore, in the NNSA Stockpile
17 Stewardship and Management Plan for Fiscal Year '22 --
18 2022 that we cite, I believe, in our original petition
19 -- but it says in that that uranium modernization --
20 and this is a quote -- will continue to fund
21 verification of metal in Building 9212 until the
22 electrorefining process is fully operational, at which
23 point the hazardous wet chemistry conversion and
24 reduction operations in Building 9212 will be shut
25 down. Uranium modernization continues to optimize Y-

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1 12's Building 9212 resource stockpile with purified,
2 enriched uranium metal through 2024.

3 So, again, we believe that this is a
4 redundant facility, that there has not been adequate
5 disclosure of the fact that the -- the no-action
6 alternative possibly militates against doing this. We
7 can only speculate about the motives and intentions of
8 the Department of Energy and the NNSA regarding adding
9 this product line at NFS, but the point is -- is that
10 there's an awful lot of suggestion that the taxpayers
11 could get by with a somewhat slimmer nuclear weapons
12 material producing supply chain.

13 Just a moment, I want to announce -- with
14 regard to the 10 CFR 70.32(a)(6), a supposed
15 prohibition that the Licensee shall not use the
16 material to construct atomic weapons components, I
17 think that implicit in that term is that -- or at
18 least the NFS seeming interpretation, in conjunction
19 with the NRC, is that the Licensee won't knowingly use
20 the material to construct parts of an atomic weapon.

21 But I don't believe that that is a
22 legitimate position for NFS to be taking, that somehow
23 they are agnostic and incurious and have no idea what
24 this contract is about and that this contract, which
25 may turn out to be a very long-running one -- is

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1 about.

2 One moment, please.

3 The difficult question here that we pose
4 to the -- to the Licensing Board is simply that NRC
5 fuel facility regulations -- do they apply to nuclear
6 weapons material? Is there -- what guidance is there?
7 What quality of controls will there be in a
8 circumstance that, as I said, seems to be outside of
9 the normal regulatory reach of NRC regs and yet is
10 going to duplicate a much more regulated facility at
11 Y-12?

12 Regarding the plume questioning of me
13 earlier, the problem is -- is that regarding PCE, for
14 instance, no one knows where the plume is moving
15 because there are no new maps in the license amendment
16 request. There are no new maps of the so-called
17 railroad wells capture zone. And as Dr. Ketterer's
18 report suggests, there is a 90-to-95-mile downriver
19 stretch of the Nolichucky River that is showing the
20 effects of decades of receipt of effluent, radioactive
21 effluent.

22 I'd also note that one of -- one of the
23 troubling things was that whereas Greeneville and
24 Jonesborough, Tennessee, both have water supplies that
25 depend on the Nolichucky, and they are downstream --

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1 that Greeneville was not even mentioned in the license
2 amendment request. And as I say, these are
3 communities dependent utterly, apparently, for their
4 public water supplies on the Nolichucky.

5 So this isn't simply about Erwin. It's
6 not simply about immediate vicinity types of pollution
7 and contamination. It is about the long-term and
8 geographically long-distance effects and impacts of
9 handling radioisotopic material.

10 That's all I have. If there are any
11 questions from the Board, I'm happy to answer.

12 JUDGE BOLLWERK: All right. I've just got
13 a couple things. So Mr. -- Mr. Roach indicated that
14 the -- the -- the rulemaking petition that he
15 referenced on page 3407, which is the -- the -- the
16 jump cite or pin cite to the -- the rulemaking, the --
17 the Agency, the Commission, dealt with the question of
18 fuel cycle facilities and proliferation assessments.

19 And it says at the bottom of the page in
20 the right-hand -- I'm sorry, the left-hand column, the
21 NRC disagrees that proliferation assessments should be
22 required for all fuel cycle facilities. Existing NRC
23 requirements address proliferation risks and concerns
24 at all fuel cycle facilities. As discussed in
25 response to Petition Assertion 2, the existing NRC

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1 licensing framework is adequate to address
2 proliferation concerns associated with nuclear fuel
3 cycle facilities by including requirements to prevent
4 the unauthorized disclosure of classified matter and
5 sensitive technologies and provide physical protection
6 of nuclear equipment and materials.

7 Given that statement, what -- what
8 flexibility do we have here?

9 MR. LODGE: I believe that this is -- that
10 NFS is about to transition into some sort of hybrid.
11 It's a fuel cycle facility, but it is also going to be
12 a nuclear weapons material manufacturing concern. And
13 -- and it is new. It is conceptually, as I said,
14 different because it is -- it's a new product line
15 being installed in a privately owned contractor, and
16 it is definitely worthy of independent consideration
17 under NEPA for the nuclear weapons proliferation
18 concerns as well as, frankly, the other environmental
19 impacts that we've talked about today.

20 JUDGE BOLLWERK: All right. Thank you.

21 Any other questions?

22 No? All right. With that, then, we will
23 conclude this oral argument regarding the
24 admissibility of Petitioner ECAN's four contentions.

25 On behalf of Judges Froehlich and Abreu,

1 I'd like to express our appreciation to Counsel for
2 the Petitioner ECAN, the Applicant NFS, and the NRC
3 staff for their obvious efforts in preparing for and
4 participating in this conference.

5 You can be assured that your filings and
6 arguments will be given serious consideration by the
7 Board, and we'll seek to render a decision regarding
8 the efficacy of ECAN's hearing petition consistent
9 with 10 CFR Section 2.309(j) with the 45-day period
10 for rendering a ruling beginning with the receipt of
11 the last filing associated with the December 9, 2022,
12 NFS motion to strike portions of Petitioner ECAN's
13 December 2nd, 2022, reply.

14 Additionally, the Board would like to
15 express its appreciation to those who provided such
16 superb administrative support for today's conference,
17 including our court reporter and a number of members
18 of the Licensing Board Panel staff. In that regard,
19 our thanks to Panel Administrative Assistant Sarah
20 Culler, who among other things took care of setting up
21 the public telephone line and posting the NRC website
22 notice, and to Panel law clerks Allison Wood, Emily
23 Newman, and in particular Noel Johnson, who served so
24 ably as the Webex master of ceremonies for today's
25 conference.

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1 And speaking of Webex, of course, we
2 couldn't have gotten together today without the -- the
3 usually -- the usual excellent IT support from Andy
4 Welkie, who seems able to overcome any IT challenge
5 with a cool head and a steady mouse.

6 Finally, I would be remiss if I didn't
7 acknowledge this conference likely will be the last
8 for our colleague Bill Froehlich as a full-time member
9 of the Atomic Safety and Licensing Board Panel.
10 Administrative Judge Froehlich will be retiring from
11 full-time federal service at the end of this month
12 after nearly 47 years with the federal government,
13 including some 14 years as an NRC Administrative
14 Judge, in addition to 32 years of service at the
15 Federal -- Federal Energy Regulatory Commission, where
16 he was a member of the Senior Executive Service and
17 held key leadership positions, including Director of
18 the Office of Administrative Litigation.

19 Fortunately, however, Judge Froehlich will
20 be continuing with the Licensing Board Panel and this
21 Licensing Board as an Administrative Judge in a part-
22 time special government employee status. And I would
23 like to thank Judge Froehlich for his many years of
24 service with the government and wish him the best in
25 retirement while expressing, as well, my relief that

1 he will be continuing as a part-time judicial officer
2 with the Panel and with this Board as well as
3 remaining involved in another materials licensing case
4 in which I am serving as a Board Chair, in which he
5 has done yeoman service over the past year as a
6 settlement judge.

7 I have to say 47 years -- I think that's
8 longer than Judge Abreu and I have been alive, but --
9 I wish. No.

10 Judge Abreu, anything you want to say?

11 JUDGE ABREU: No. I just want to say
12 congratulations on your retirement and how much we've
13 enjoyed working with you.

14 JUDGE BOLLWERK: Judge Froehlich, any
15 comments? No? That's enough? Okay. I think we've
16 embarrassed him, but that's okay. It's all right.

17 All right. And with that -- and with a
18 reminder to the participants' Counsel to stay on the
19 Webex conference after we conclude to answer any
20 questions our court reporter might have. So, if
21 Counsel could stay on, we'll talk with the court
22 reporter briefly. And again, thank you all.

23 (Whereupon, the above-entitled matter went
24 off the record at 3:25 p.m.)

25