

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

January 1, 1998 — June 30, 1998

Volume 47
Pages 1 – 408

Prepared by the
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PREFACE

This is the forty-seventh volume of issuances (1 - 408) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 1998, to June 30, 1998.

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

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

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

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

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

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Jerry R. Kline
Lester S. Rubenstein

In the Matter of

Docket No. 030-30266-CivP
(ASLBP No. 97-729-01-CivP)

21ST CENTURY TECHNOLOGIES, INC.
(Fort Worth, Texas)

January 12, 1998

In this civil penalty enforcement proceeding, the Licensing Board accepts the parties' proffered settlement agreement.

MEMORANDUM AND ORDER

The NRC Staff and 21st Century Technologies, Inc. ("Technologies"), the holder of a materials license, have filed a joint motion for the approval of the settlement agreement reached in this civil penalty proceeding. The proceeding stems from the Staff's issuance of an order imposing a civil penalty on Technologies in the amount of \$2500 for its failure to conduct licensed activities involving the manufacture of various tritium luminous gunsights in full compliance with NRC requirements. Under the proposed settlement, Technologies agrees to pay a civil penalty in the amount of \$2000 pursuant to a prescribed installment payment schedule. The agreement also reiterates the parties' rights in the event of a breach of the settlement agreement.

The Commission looks with favor upon settlements and, pursuant to 10 C.F.R. § 2.203, the Licensing Board, in approving a proposed settlement of an

enforcement action, must give due consideration to the public interest. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205-06 (1997). Here, the parties' settlement agreement is in full accord with the public interest and there is no reason not to approve the settlement in its entirety. Accordingly, the Board approves the proffered settlement agreement, incorporates it into this Order, and terminates this civil penalty enforcement proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Lester S. Rubenstein (by TSM)
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 12, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 30-31373-CivP
(ASLBP No. 98-735-01-CivP)
(EA 97-207)
(License No. 12-16559-01)
(Order Imposing Civil
Monetary Penalty)

CONAM INSPECTION, INC.
(Itasca, Illinois)

January 21, 1998

The Atomic Safety and Licensing Board in a civil penalty proceeding issues an initial prehearing conference order setting forth rulings made during a telephone prehearing conference on January 14, 1998.

RULES OF PRACTICE: PREPARED TESTIMONY

Prepared testimony is generally used in licensing proceedings, but there is no requirement to do so in enforcement proceedings.

FIRST PREHEARING CONFERENCE ORDER
(Telephone Conference, 1/14/98)

This proceeding concerns the challenge of Conam Inspection, Inc. (Conam or Licensee), to the NRC Staff's November 5, 1997 Order Imposing Civil Monetary

Penalty on the Licensee (published at 62 Fed. Reg. 60,923 (Nov. 13, 1997)) in the amount of \$16,000. By Memorandum and Order dated December 17, 1997, this Licensing Board granted Conam's request for a hearing. A Notice of Hearing was issued on December 18, 1997 (published at 62 Fed. Reg. 67,416 (Dec. 24, 1997)).

On January 14, 1998, the Atomic Safety and Licensing Board conducted, by way of a telephone conference call, the initial prehearing conference in this proceeding. Participating, in addition to the three members of the Licensing Board, were Clifton A. Lake, Esq., counsel for Conam Inspection, Inc. (Licensee); Charles A. Barth, Esq., counsel for the NRC Staff (Staff), accompanied by Nader L. Mamish, Senior Enforcement Officer, NRC Office of Enforcement; and Lee S. Dewey, Esq., counsel for the Atomic Safety and Licensing Board Panel. The conference was transcribed (Tr. 1-28).

1. Issues

The Licensing Board first reviewed the issues that were to be litigated. The Board indicated that the Commission had designated the issues to be considered, and those issues had been set forth in the Board's December 17, 1997 Memorandum and Order and in the December 18, 1998 Notice of Hearing --- specifically: (a) whether the Licensee was in violation of the Commission's requirements as set forth in Violations I.B and I.C of the Notice of Violation and Proposed Imposition of Civil Penalty (NOV), dated June 9, 1997; and (b) whether, on the basis of such violations and the additional violations set forth in the NOV that the Licensee admitted, the Order should be sustained.

The Licensee indicated that it wished to litigate all of the issues that formed the basis for the civil penalties (Tr. 6). It emphasized Issues I.B, I.C., and the penalty aspects of Issue I.A (the facts of which had previously been admitted, but as to which the penalties and intent could be challenged under broad issue (b)).

The Board raised a question concerning the apparent differences in methods being used by the Licensee and Staff, respectively, for calculating dose limits and effective dose equivalents under 10 C.F.R. § 20.1201. The Board requested that the Licensee and Staff each present expert witnesses as to their respective methods of calculating effective dose equivalents, and they agreed to do so (Tr. 7, 8).

In its December 17, 1997 Memorandum and Order, the Board had requested the Staff to provide copies to the Board and parties of Inspection Report 030-31373 (DNMS) and Investigation Report 3-96-014 (OI Report), both of which were explicitly referenced in the NOV. On January 8, 1998, the Staff provided the Inspection Report but not the OI Report, claiming the enforcement action was not premised on the OI investigation. During the prehearing conference,

the Licensee claimed that certain portions of the NOV were explicitly premised on the OI investigation, particularly concerning the alleged intent of the various personnel involved in various incidents and alleged practices engaged in by various unnamed employees or agents of Conam (Tr. 14-15). The Licensee, as well as the Board, also questioned the Staff's refusal to produce the OI Report. The Board indicated that the OI Report could be redacted to protect the identities of confidential informants (Tr. 11).

Although still asserting lack of relevance, the Staff agreed to produce the report in redacted form to the Licensee and Board members (Tr. 15). On January 16, 1998, the Staff provided the redacted report.

2. *Discovery*

The Licensee requested a 60-day discovery period, from the date of its receipt of the OI Report, and the Staff agreed, noting that further developments might warrant a change. The Board set an initial discovery period of 60 days, running from receipt of the OI Report (Tr. 16). Because the report was transmitted on January 16, 1998, the Board presumes it was received by the Licensee on January 21, 1998 (*see* 10 C.F.R. § 2.710). The discovery period will expire on Monday, March 23, 1998. Shortly thereafter, the Board will conduct another telephone prehearing conference to set further schedules and determine arrangements for the remainder of the proceeding. The Board also indicated, and both parties agreed, that, if necessary, telephone conferences would be used to resolve discovery disputes that may arise (Tr. 17).

3. *Other Matters*

a. The Board inquired whether a transcript of the December 13, 1996 enforcement conference had been provided to the Licensee. The Staff indicated it had been provided and Conam acknowledged it had been received (Tr. 17-18).

b. The Board inquired whether the parties wished to use prepared testimony, noting that it was generally used in licensing proceedings (10 C.F.R. § 2.743(b)) but that there was no requirement to do so in enforcement proceedings such as this one. 10 C.F.R. § 2.743(b)(3); *Tulsa Gamma Ray, Inc.*, LBP-91-25, 33 NRC 535 (1991). Conam expressed a preference not to use prepared testimony, but the Staff asked us to impose such a requirement, based on our authority to control the proceeding. The Board declined to require prepared testimony, although it indicated that either party could elect to file prepared testimony if it desired. The Board ruled it would require the filing of lists of documents and witnesses, on a schedule to be determined later. Tr. 19-22.

c. The Board stated that the hearing would be held in Chicago, Illinois, at a location and on a schedule to be determined later (Tr. 22-23).

d. The Board indicated that various filings should be in electronic form, to the extent feasible, as well as in paper form as required by the Rules of Practice (Tr. 23-24).

e. The Staff requested, and the Board acknowledged, that Mr. Lake should file a Notice of Appearance, as required by 10 C.F.R. § 2.713.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 21, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

B. Paul Cotter, Jr., Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

January 23, 1998

**RULES AND REGULATIONS: INTERPRETATION; TEMPORARY
STAY OF STAFF LICENSING ACTION; 10 C.F.R. §§ 2.788(f)
AND 2.1263**

Claims of irreparable injury to natural, historic, and religious resources from premining ground clearing activities present the type of potentially harmful activities the temporary stay provision (10 C.F.R. § 2.788(f)) was meant to prevent.

**RULES AND REGULATIONS: INTERPRETATION; TEMPORARY
STAY OF STAFF LICENSING ACTION; 10 C.F.R. §§ 2.788(f)
AND 2.1263**

Potentially harmful action may be stayed until such time as a ruling can be made on the merits of a motion to stay the effectiveness of a Staff licensing action, usually until such time as the other parties have been given an opportunity to provide their answers.

MEMORANDUM AND ORDER
(Granting Temporary Stay of Staff Licensing Action
and Ruling on Motions)

On January 15, 1998, Petitioners Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (Petitioners) filed a request entitled “ENDAUM’s and SRIC’s Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay” (Stay Motion). The motion requests the Presiding Officer to stay the effectiveness of the Staff’s issuance on January 5, 1998, of a materials license to Hydro Resources, Inc. (HRI or Applicant), for an *in situ* leach mine and milling operation in Church Rock and Crownpoint, New Mexico, pending the completion of: (1) a hearing on the application; and (2) an historic properties review. Petitioners further request in their motion that the Presiding Officer immediately grant a temporary stay to preserve the status quo without waiting for the filing of any answers to the Stay Motion.

Two other filings are relevant here. On January 21, 1998, Petitioner Mervyn Tilden filed a multipurpose pleading which included a request for a temporary restraining order. Mr. Tilden filed a similar, second pleading by telefax on January 20, 1998. In addition, on January 5, 1998, a Petition for Leave to Intervene was faxed to the Presiding Officer on behalf of the Eastern Navajo Allottees Association (Allottees). Members of the Allottees have leased a portion of their land at issue here to HRI for the production of uranium concentrates.

Subsequent to the filing of the Petitioners’ Stay Motion, the NRC Staff filed with the Presiding Officer a Request for Extension of Time dated January 20, 1998 (Staff Request). The Staff Request seeks an extension of time until Friday, February 20, 1998, in which to: (1) file a response to the Intervention Petition of the Eastern Navajo Allottees Association; and (2) file a response to the merits of the ENDAUM/SRIC Stay Motion. Staff’s Request also argues against the Petitioners’ request for an immediate temporary stay to preserve the status quo.

By Telefax copy dated January 20, 1998, Petitioners ENDAUM and SRIC filed a second request entitled “ENDAUM’s and SRIC’s Motion for Leave to Respond to Eastern Navajo Allottees Association’s Intervention Petition and Response to NRC Staff’s Request for Extension of Time” (Petitioners’ Motion). In its second motion, Petitioners request that they also be given until February 20, 1998, to respond to the Allottees Intervention Petition, the same extended response date the NRC Staff seeks in its request. Petitioners’ Motion also responds to the Staff’s objection to the Petitioners’ request for a temporary stay.

TEMPORARY STAY REQUEST

Petitioners' January 15, 1998 Motion for Stay requests the Presiding Officer to grant, pursuant to 10 C.F.R. §§ 2.1263 and 2.788(f) (1997), a temporary stay to preserve the status quo without waiting for the filing of any answers to their Stay Motion by the Staff or the Applicant. Section 2.1263 provides in pertinent part that "Applications for a stay of . . . any action by the NRC staff in issuing a license in accordance with § 2.1205(m) are governed by § 2.788" Section 2.788 specifies the requirements for an application for a stay. In addition, section 2.788(f) authorizes the Presiding Officer to grant a temporary stay to preserve the status quo without waiting for the filing of answers "[i]n extraordinary cases, where prompt application is made under this section." 10 C.F.R. § 2.788(f); *see also* 10 C.F.R. § 2.1263 (1997).

Petitioners allege in their Stay Motion that historic surveys have not been completed in violation of selected provisions of the National Historic Preservation Act, 16 U.S.C. § 470 (1966). Petitioners find the absence of these surveys to present the necessary "extraordinary" case justifying a temporary stay. Petitioners allege that there will be potential irreparable harm to natural, historic, and religious resources resulting from ground clearing operations which they further allege may take place prior to the Applicant receiving all the approvals it needs to commence its mining activities. Stay Motion at 7-8 & n.9 and 10 n.11; Petitioners' Motion at 6 & n.3.

Applicant has not offered any response to Petitioners' stay request, and Staff's response is at best conclusory. According to Staff,

SRIC/ENDAUM provided no basis showing that, pursuant to 10 C.F.R. § 2.788(f), this is an "extraordinary" case requiring a temporary stay "to preserve the status quo," and since the Stay Request does not specify the length of the requested temporary stay, Staff opposes the SRIC/ENDAUM request for a temporary stay.

Staff Request at 3 n.5. Staff's filing is silent on Petitioners' claims of irreparable injury as a result of noncompliance with the NHPA. Moreover, Staff cites no regulatory basis for a petitioner to establish the length of time for a temporary stay.

At present, neither Petitioners' Motion nor the Staff Request alleges that premining clearing activities are currently under way, nor that a temporary stay would adversely affect Applicant's premining activities. As noted, Applicant has not offered any objection to the temporary stay request.

On the other hand, Petitioners' claims of irreparable injury to natural, historic, and religious resources from premining ground clearing activities presents the type of potentially harmful activities the temporary stay provision was meant to prevent. Potentially harmful action may be stayed until such time as a ruling can

be made on the merits of a motion to stay the effectiveness of a Staff action, usually until such time as the other parties have been given an opportunity to provide their answers. With respect to the temporary stay relief sought, Petitioners' Stay Motion is supported by affidavits and otherwise meets the pertinent requirements as to contents specified in 10 C.F.R. § 2.788 (1997).

Therefore, the effectiveness of the Staff's action in granting Hydro Resources, Inc., a license for its proposed *in situ* mining operations at Church Rock and Crownpoint, New Mexico, shall be temporarily stayed until such time as the Presiding Officer has ruled on the Petitioners' Stay Motion or if, in the Presiding Officer's judgment, intervening circumstances warrant lifting the temporary stay. If the Presiding Officer rules in favor of Petitioners' Stay Motion, the temporary stay could automatically evolve into a stay pending completion of the hearing on the merits of the Applicant's license application.

EXTENSION OF TIME TO ANSWER PETITIONERS' STAY MOTION

Staff's Request for an extension of time in which to answer the Petitioners' Stay Motion gives as its sole justification that the motion contains over 220 pages of material. Accordingly, Staff states that the "voluminous nature of the Stay Request justifies a liberal extension of time to make an adequate response." Staff Request at 3. Staff further tells the Presiding Officer that Allottees' Attorney does not object to this extension (Staff Request at 2 n.4), that Applicant intends to file its answer on January 26, 1998 (the regulatory filing date), but that Applicant has no objection to the extension for the Staff. Staff Request at 3. Staff tried to negotiate approval from Petitioners for the extension, but the effort was not successful because Staff refused to approve Petitioners' temporary stay request. Staff Request at 3 n.5; Petitioners' Motion at 5-7. Staff's posture is somewhat peculiar since the potential harm from a temporary stay would affect Applicant's planned activities and not the activities of the Staff.

The grant of Petitioners' request for a temporary stay effectively eliminates its reasons for objecting to the extension the Staff seeks. Accordingly, Staff shall have until February 20, 1998, to answer Petitioners' Stay Motion.

PETITIONERS' MOTION TO RESPOND TO ALLOTTEES' INTERVENTION PETITION

Petitioners move the Presiding Officer to allow them to respond to the Allottees' Intervention Petition. Allottees seek intervention in support of Applicant's

license application. Because the Commission's regulations do not specifically address intervention by proponents of licensing actions, the regulations are silent with regard to the filing of responses to these petitions from parties other than the Applicant and the NRC Staff. *See* 10 C.F.R. § 2.1205(g). Allottees request participation because no other party is likely to address the issues Allottees may raise as proponents of the mining operations. Significantly, Petitioners also advise that none of the other potential parties objects to its filing a response. Petitioners' Motion at 3-4. Under these circumstances, Petitioners' Motion to file a response to the Allottees' intervention petition is granted.

EXTENSION OF TIME TO RESPOND TO ALLOTTEES' INTERVENTION PETITION

Petitioners approve of Staff's request to extend the time for responding to the Allottees' Intervention Petition as long as Petitioners are granted the same time for their response. There are no objections to these requests from the other potential parties. Petitioners and the NRC Staff shall have until close of business, Friday, February 20, to have in the hands of the Presiding Officer and the other potential parties to the proceeding their responses to the Allottees' Intervention Petition.

APPROPRIATE HEADING FOR PROCEEDING

As a further housekeeping matter, by Notice dated December 13, 1996, Jep Hill, Esquire, Counsel for HRI informed the potential parties to this proceeding that the address for Hydro Resources, Inc., had changed from its Dallas, Texas location to one in Albuquerque, New Mexico. The style for the papers filed in this proceeding should have reflected that change, but they have been inconsistent over the last year. Therefore, all potential parties to this proceeding shall adopt the caption with the HRI address in Albuquerque, New Mexico, as set out at the top of this Memorandum and Order.

ORDER

For all the foregoing reasons, it is, this 23d day of January 1998, ORDERED:

1. Pursuant to 10 C.F.R. §§ 2.1263 and 2.788(f), effective immediately, the effectiveness of the NRC Staff's action in granting Hydro Resources, Inc., a license to conduct *in situ* leach mining activities at Church Rock and Crownpoint, New Mexico, is temporarily stayed until such time as the Presiding Officer rules

on the Petitioners' Stay Motion or intervening circumstances cause the Presiding Officer to lift this temporary stay;

2. NRC Staff shall have until close of business, Friday, February 20, 1998, to have in the hands of the Presiding Officer and the other potential parties to the proceeding its response to the Petitioners' Stay Motion;

3. Petitioners ENDAUM and SRIC may respond to the intervention petition of the Eastern Navajo Allottees Association, and they and the NRC Staff shall have until close of business, Friday, February 20, 1998, to have in the hands of the Presiding Officer and the other potential parties to the proceeding their responses to the Allottees' Intervention Petition;

4. All potential parties to this proceeding shall reflect the address of Hydro Resources, Inc., in the caption of their pleadings as:

HYDRO RESOURCES, INC.
2929 Coors Road, Suite 101
Albuquerque, New Mexico 87120

B. Paul Cotter, Jr., Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 23, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket Nos. 030-30266
030-30266-CivP
(License No. 42-23850-02E)
(EA 96-170)
(Confirmatory Order)

21st CENTURY TECHNOLOGIES, INC.
(Fort Worth, Texas)

February 19, 1998

The Commission grants a motion filed jointly by the NRC Staff and the Licensee for termination of a Confirmatory Order proceeding initiated by the Licensee. The Licensee had requested a hearing on the Order, which modified the license to require that the Licensee develop and implement certain written procedures, and develop, and submit for NRC approval, training and audit plans. The joint motion was filed following a settlement agreement reached by the Licensee and the NRC Staff (and approved by the Licensing Board) in a related civil penalty proceeding, which was also initiated by the Licensee.

The Commission finds that the fundamental issue is the same in both proceedings: whether certain conditions in the license issued to 21st Century Technologies are justified on health and safety grounds. The Commission therefore concludes that good cause exists to terminate the Confirmatory Order proceeding in view of the approved settlement and termination of the civil penalty proceeding. For this reason, and because the terms of the Settlement Agreement suggest that the Staff and the Licensee will be able to reach mutually agreeable license terms, the Commission declines to undertake *sua sponte* review of the Licensing Board's approval of that agreement.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED PROCEEDINGS

The Commission looks with favor upon settlements. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

MEMORANDUM AND ORDER

On January 20, 1998, the NRC Staff and the Licensee, successor to Innovative Weaponry, Inc., which initiated this proceeding, filed a Joint Motion for Termination of this proceeding. For the reasons given below, we grant the motion.

BACKGROUND

On May 15, 1996, the Director of the NRC's Office of Enforcement issued a Notice of Violation and Proposed Imposition of Civil Penalty, and an immediately effective Confirmatory Order that modified 21st Century Technologies' license to require that the Licensee develop and implement certain written procedures, and develop, and submit for NRC approval, training and audit plans. The Confirmatory Order stated that the Licensee had committed to these actions at a predecisional enforcement conference and licensing meeting, and that the Licensee's attorney had agreed to the order in a telephone call. 61 Fed. Reg. 25,694-95 (May 22, 1996). The order gave affected persons *other* than the Licensee 20 days to request a hearing on the order. On June 14, 1996, the *Licensee* filed a request for a hearing on the Confirmatory Order, contending, among other things, that the Confirmatory Order "amount[ed] to unjustifiable regulatory duress."

On June 26, 1996, the Commission issued an order that directed the Licensee to file the bases for its contentions and to state whether the Licensee had in fact consented to the Confirmatory Order, and if so, why such consent should not have the legal effect of waiving the Licensee's hearing rights. In response to the Commission's order, the Licensee argued that the license conditions it had violated were "irrelevant to public health and safety" and "therefore beyond the jurisdiction of the NRC to regulate." Licensee's September 30, 1996 Response to Commission Order to Particularize Contentions at 6-10. On October 15, 1996, the NRC Staff filed an Answer to the Licensee's Response, opposing the Licensee's request for a hearing, arguing, in part, that the Licensee had failed to show that the Confirmatory Order was not based on the protection of public health and safety, and citing our remark in *Advanced Medical Systems, Inc.*

(One Factory Row, Geneva, OH 44041), CLI-94-6, 39 NRC 285, 312 (1994), that “[t]he Commission’s safety regulations and license conditions reflect the Commission’s considered judgment as to what is required to protect the public.”

On October 18, 1996, the Staff issued an “amendment” that terminated the one license and issued a new one. The new one contained a license condition that incorporated the substantive requirements of the Confirmatory Order. On December 12, 1996, the NRC Staff filed a motion to terminate this proceeding on the grounds that the license issued on October 18 contained the Confirmatory Order’s substantive requirements on training, audits, and procedures, and that the challenge to the Confirmatory Order was therefore moot. The Licensee opposed the Staff’s motion to terminate the proceeding.

At the same time that the Licensee had been challenging the Confirmatory Order, the Licensee had also been challenging the Staff’s imposition of a civil penalty. The Licensee answered the May 15, 1996 Notice of Violation and Proposed Imposition of Civil Penalty on October 1, 1996. On April 10, 1997, the Staff issued an Order Imposing Civil Monetary Penalty — \$2500, having mitigated the proposed civil penalty by \$5000 in light of the fact that “no adverse consequences to public health and safety actually occurred in this matter.” Order Imposing Civil Monetary Penalty, Appendix at 3-4. The Licensee asked for a hearing on the civil penalty, giving the same reasons for opposing the civil penalty that the Licensee had given for opposing the Confirmatory Order. A licensing board was established to hear the civil penalty proceeding. 62 Fed. Reg. 34,718 (June 27, 1997).

In the proceeding on the civil penalty, the Staff and the Licensee succeeded in reaching a Joint Settlement Agreement, which provides, among other things, that the civil penalty will be reduced to \$2000, and that the Staff will make itself available to meet with the Licensee to discuss possible changes to the license “to address the Licensee’s needs” Joint Settlement Agreement at 3. On January 12, 1998, the Board that had been established to rule on the Licensee’s challenge to the civil penalty approved the settlement and terminated the proceeding on the civil penalty. LBP-98-1, 47 NRC 1 (1998).

THE JOINT MOTION TO TERMINATE

On the basis of the settlement in the civil penalty proceeding, the Licensee asked on January 20, 1998, that it be allowed to withdraw its request for a hearing on the Confirmatory Order. On the same day, the Licensee and the Staff filed their joint motion for termination of the proceeding on the Confirmatory Order. The motion argues that the Licensee’s withdrawal of its request for a hearing on the Confirmatory Order is good cause for termination of the proceeding. The

motion also notes that the requirements imposed by the Confirmatory Order will remain in effect if this proceeding is terminated.

We agree with the parties that the settlement in the civil penalty proceeding and the Licensee's request to withdraw are good cause for terminating this proceeding on the Confirmatory Order. The fundamental issue in both proceedings was the same, namely, whether certain conditions in 21st Century Technologies' license were adequately justified on health and safety grounds. *See* Licensee's September 30, 1996 Response to Commission Order to Particularize Contentions at 6-7. *See also* Licensing Board's September 24, 1997 Prehearing Conference Order at 2. Thus, an approved settlement in the one proceeding and termination of that proceeding would seem to call for an end to the other proceeding also. Moreover, the Commission looks with favor upon settlements. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997). The Licensing Board in the civil penalty proceeding, exercising authority under 10 C.F.R. § 2.203, has concluded that the settlement is "in full accord with the public interest" *See* LBP-98-1, 47 NRC at 2. We see no reason to disagree. For example, as the parties point out in their joint motion to us, the settlement does not lessen any of the safety requirements now applicable to the Licensee. Moreover, the terms of the settlement hold out the prospect that the Staff and the Licensee will be able to reach mutually agreeable license terms. Therefore, we will not undertake *sua sponte* review of the Licensing Board's approval of the settlement. Under these circumstances, to deny the parties' joint motion to terminate the proceeding on the Confirmatory Order could undermine a settlement judged to be in the public interest.

CONCLUSION

For the reasons given above, the parties' Joint Motion to Terminate the Confirmatory Order proceeding is hereby granted and the proceeding terminated. It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of February 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

B. Paul Cotter, Jr., Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

February 9, 1998

**RULES AND REGULATIONS: INTERPRETATION;
10 C.F.R. § 2.713(a)**

By terms of section 2.713(a), the Commission's lack of tolerance for [undignified] conduct by attorneys applies equally to parties. Petitioners to become parties to NRC proceedings . . . are subject to the same requirements in their pleadings before [the ASLBP].

MEMORANDUM AND ORDER
(Denying Petition to Intervene and Setting Schedules)

On January 28, 1998, papers entitled "Red Devil's Petition for Leave to Intervene" with an attached "Affidavit," two documents hand lettered as Exhibits 1 and 2, and a paper entitled "The Red Devil's Entry of Appearance" were received by the Presiding Officer in this 10 C.F.R. Part 2, Subpart L proceeding concerning an application for a license to conduct *in situ* leachate mining of uranium in New Mexico. No certificate of service was attached. The papers

were filed by one Mervyn Tilden whose petition to intervene is pending in this proceeding. It does not appear that all parties were served.

These papers, set out in the form of pleadings in Nuclear Regulatory Commission administrative proceedings, are filled with language that, on its face, is intended to mock and excoriate this proceeding. Such language includes phrases in the “Entry of Appearance” such as “racist Rules and Regulations of the . . . NRC . . . ,” and “this ignominious, satanic mockery of justice. Hallelujah Amerika!” Language in the “Petition to Intervene” includes the following:

The consistent irregularities, treasonous disregard, and perfidious manipulation of the “NRC Rules and Regulations” by the NRC itself and the lack of key and important documents which is public information cannot explain the over abundance of meaningless, useless, abject, and long-winded propaganda in this dark and shameful proceeding. This clearly seizes the title of the “Father of Lies.”

The foregoing “Petition” consists largely of: (1) a diatribe against the United States government and its agencies concerning their dealings with Native Americans such as the Navajo; and (2) the perceived inequity of permitting a filing by another group of Navajo who seek to intervene in support of the mining license application.

The “Affidavit” asserts, *inter alia*,

i [sic] acknowledge this disreputable and wandering proceeding by submitting *my lack* of credentials, bogus degrees, and callous certifications

(emphasis in original). This paper concludes with a mock notarization.

Section 2.713 of the Commission’s rules of practice governs appearance and practice before the Commission in adjudicatory proceedings. It provides in pertinent part

(a) . . . In the exercise of their functions under this subpart, the Commission . . . function[s] in a quasijudicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

. . . .
(c) *Reprimand, censure or suspension from the proceeding.* (1) A presiding officer . . . may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall . . . be guilty of . . . disruptive, or contemptuous conduct.

10 C.F.R. § 2.713 (1997).

The Commission has expressed its lack of tolerance for “intemperate, even disrespectful rhetoric” on the part of attorneys on more than one occasion.

Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 232-33 n.1 (1995), citing, *inter alia*, *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974).¹ By the terms of section 2.713(a), the Commission's lack of tolerance for such conduct by attorneys applies equally to parties. Petitioners to become parties to our proceedings such as Mr. Tilden are subject to the same requirements in their pleadings before us.

The foregoing documents are frivolous on their face and shall be stricken from the record. The language of the petition belittling the proceeding indicates that, in addition to being contemptuous, the filer's purpose is to be disruptive. They demonstrate a total disregard for the adjudicatory process itself, as well as the time and resources of all those seeking to intervene in this proceeding who would be required to respond to these papers were it not for the Presiding Officer's action herein in dismissing them *ab initio*.²

In short, the papers serve solely as a vehicle for indulging in puerile antigovernment and anti-NRC rhetoric. Frivolous, disruptive, and contemptuous pleadings cannot and will not be entertained by the Commission.

In the instant case, some allowance will be made for the fact that Mr. Tilden is a first-time, *pro se* petitioner. Accordingly, no disciplinary action will be taken beyond striking the papers in question. Pursuant to 10 C.F.R. § 2.1209 (1997), this Order is being issued without awaiting responses from the parties to avoid delay and maintain order in the proceeding.

NRC STAFF REQUEST FOR EXTENSION OF TIME

On February 2, 1998, the Presiding Officer granted a request for an extension of time submitted by the Applicant (HRI) to file its responses to petitions for hearing in this proceeding. Subsequently, and because of the grant of the Applicant's request for an extension of time, the NRC Staff submitted a "Request for Clarification and for Extension of Time" dated February 4, 1998. The Staff filing seeks clarification of two procedural matters. First, it desires to know when it must file its response to the Mervyn Tilden petition dated January 16, 1998, and second, it desires to know whether it needs to respond to *all* the hearing

¹ That case quoted from the American Bar Association's Canons of Ethics that "Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system" (footnote omitted). The Appeal Board noted that "Name calling adds nothing to the stature of counsel or to the merits of his argument." *Bailly*, 7 AEC at 838.

² Were these filings legitimate they would fail on the merits because they make no attempt to address the factors in 10 C.F.R. § 2.1205 for intervention and late intervention, they fail to list any areas of interest in the proceeding, and they fail to identify any disagreement with the Hydro Resources license application. In addition, it is clear that the "petitioner's" participation in this proceeding would not contribute toward the resolution of any meaningful issues.

petitions filed in this proceeding since its inception, and not just those “amended hearing requests” filed by ENDAUM and SRIC and the Tilden petition. The Staff’s request further seeks an extension of time to file responses to all hearing petitions until March 6, 1998, and further seeks the Presiding Officer’s aid in directing the parties to serve all filings on the other potential parties to this proceeding.

In the interest of an orderly completion of the petition and response phase of this proceeding, the Staff’s motion for an extension of time is granted. The Staff may respond to the original and amended petitions as it sees fit. It would be helpful to the Presiding Officer if the Staff responded to all points in both the original and amended petitions to the extent they are not duplicative. In the interest of efficiency, Staff’s response to two petitions (where there are two by any one party) could be consolidated, rather than responding to each separately.

ORDER

For all the foregoing reasons and based on the entire record in this matter, it is, this 9th day of February 1998, ORDERED:

1. That pursuant to the powers granted the Presiding Officer by 10 C.F.R. § 2.1209 (1997), “The Red Devil’s Petition for Leave to Intervene” and Affidavit should be, and it hereby is, denied and the filings shall be stricken from the record;

2. That the Staff shall have until close of business on March 6, 1998, to file its responses to petitions for hearing and amended petitions for hearing submitted in this proceeding, inclusive of the Tilden petition;

3. That from this date forward, all filings in this proceeding shall conform to the service requirements found in 10 C.F.R. §§ 2.712, 2.730, and 2.1203 (1997). Those requirements include serving all persons noted on the service list attached to this Order. Filings not conforming with such requirements will be returned, will not be entertained by the Presiding Officer, and will not become part of the official record of the proceeding.

4. That the portion of this Order rejecting “The Red Devil’s Petition for Leave to Intervene” is effective immediately and, absent appeal and pursuant to 10 C.F.R. § 2.1251(a) (1997), will become the final order of the Commission thirty (30) days after the date of issuance.

5. That this Order is appealable to the Commission in accordance with the provisions of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order and may be taken by filing and serving upon all parties a statement that succinctly sets out, with supporting argument, the

errors alleged. Any other party may support or oppose the appeal by filing a counterstatement within fifteen (15) days of the service of the appeal brief.

B. Paul Cotter, Jr., Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 9, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-245
50-336
50-423
50-213
(License Nos. DPR-21
DPR-65
NPF-49
DPR-61)

NORTHEAST UTILITIES
(Millstone Nuclear Power Station,
Units 1, 2, and 3; and
Haddam Neck Plant)

February 11, 1998

By a petition dated March 3, 1997, submitted by Albert A. Cizek (Petitioner), Petitioner requested that the licenses of the three Millstone nuclear reactors and the Haddam Neck nuclear reactor held by Northeast Utilities (NU or Licensee) be modified by placing certain conditions on the operating licenses of each of these facilities. The conditions would call for automatic and specific enforcement sanctions based upon the occurrence of certain violations or events. Petitioner alleged that the license conditions were warranted based on the Licensee's poor past performance including knowing, willful, and reckless past violations of NRC requirements.

The Director of the Office of Nuclear Reactor Regulation issued a Director's Decision on February 11, 1998, concluding that the petition contained no information of which the NRC was not already aware and denying Petitioner's request for specific enforcement-related license conditions. The Director concluded that a mechanistic enforcement approach is neither necessary nor appropriate to ensure regulatory compliance at the Millstone and Haddam Neck

facilities. Extensive efforts have been and are being taken by the Licensee to ensure that future operation of the Millstone units and the decommissioning of the Haddam Neck facility are accomplished safely. The NRC Staff has in place an extensive oversight program to ensure that the Licensee meets its objectives.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On March 3, 1997, Ernest C. Hadley, Esq., filed with the U.S. Nuclear Regulatory Commission (NRC or Commission) a petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), on behalf of Mr. Albert A. Cizek, hereinafter referred to as Petitioner. This submittal will hereinafter be referred to as the petition. The petition was filed with the Executive Director for Operations of the NRC. The petition was referred to the Director of the Office of Nuclear Reactor Regulation for preparation of a response.

The Petitioner requested that the NRC impose the following license conditions on the operating licenses of Millstone Nuclear Power Station, Units 1, 2, and 3, and the Haddam Neck Plant held by Northeast Utilities (NU or Licensee):

1. Within 30 calendar days of receiving a total of three license violations from the U.S. Nuclear Regulatory Commission [NRC] during any [3-year] period, irrespective of the violation level, the operating license of the facility shall be suspended for a period of not less than 90 days and not more than 180 days.
2. Within 30 calendar days of receiving a total of three violations of 10 [C.F.R.] Part 50, including all applicable appendices, from the [NRC] during any [3-year] period, irrespective of the violation level, the operating license of the facility shall be suspended for a period of not less than 90 days and not more than 180 days.
3. Within 30 calendar days of receiving a total of three violations of the UFSAR [Updated Final Safety Analysis Report] from the [NRC] during any [3-year] period, irrespective of the violation level, the operating license of the facility shall be suspended for a period of not less than 90 days and not more than 180 days.
4. Within 30 calendar days of receiving any harassment, intimidation and discrimination ("HI&D") finding by the [NRC], the U.S. Department of Labor, or any [S]tate or [F]ederal court of competent jurisdiction, the operating license of the facility shall be suspended for a period of not less than 90 days and not more than 180 days.
5. If, within [5] years of a license suspension based on paragraphs 1 through 4 above, the licensee receives a total of three license violations from the [NRC], irrespective of the violation level; receives a total of three violations of 10 [C.F.R.] Part 50, including all applicable appendices, from the [NRC], irrespective of the violation

level; receives a total of three violations of the UFSAR from the [NRC], irrespective of violation level; or receives any HI&D finding by the [NRC], the U.S. Department of Labor, or any [S]tate or [F]ederal court of competent jurisdiction, the operating license of that facility shall be permanently revoked within 90 calendar days.

6. In the event that the license of a facility is revoked pursuant to paragraph 5, no operation of that facility for the purpose of generating electric power shall be permitted during the pendency of any administrative or judicial processes or appeals related to such revocation.
7. In the event that the license of a facility is suspended or revoked under paragraphs [1] through [5], the [NRC] shall designate an appropriate licensee to maintain the facility in shutdown mode for the duration of the suspension or until such time as a new licensee is found to operate the facility. [Footnote omitted.] NU [Northeast Utilities] shall be responsible for all expenses related to the operation of the facility during such shutdown. NU shall be required to post a bond in the amount of \$500,000,000 ([5] hundred million) as reasonable assurance that it can fulfill this requirement.

The Petitioner further requested that these license conditions be imposed on the operating licenses of Millstone Units 1, 2, and 3 before Commission approval to restart any of those plants, and further requested that these license conditions be imposed on the operating license of Haddam Neck before any decommissioning of that plant.

Additionally, the Petitioner requested that public hearings on the petition be scheduled in the immediate vicinity of the Millstone and Haddam Neck reactors for the presentation of further evidence in support of the petition. The Petitioner specifically requested that these public hearings be held and that a decision on this petition be issued before restart or decommissioning of any of these units.

The Petitioner sought the above license conditions on the basis of the following contentions:

1. NU has knowingly, willingly and recklessly operated Millstone Unit 1, Unit 2, Unit 3 at Waterford, [Connecticut], and its Connecticut Yankee Nuclear Power Plant [i.e., Haddam Neck Plant] at Haddam Neck, [Connecticut], in violation of their respective operating licenses, the regulations of the NRC, and their respective UFSARs for a prolonged period of time, which unnecessarily but significantly compromised public health and safety by eroding the required defense in depth philosophy.
2. NU has knowingly, willingly and intentionally harassed, intimidated and discriminated against its employees who raise safety concerns in violation of United States statutes and NRC regulations for a prolonged period of time, which unnecessarily but significantly compromised public health and safety by eroding the required defense in depth philosophy.
3. In the absence of express license conditions, there is no reasonable assurance that NU will cease and desist from engaging in these activities in the future.

A letter acknowledging receipt of the petition was sent to the Petitioner on April 8, 1997. In that letter, the NRC Staff informed the Petitioner that the NRC Staff had decided not to hold a public hearing as requested by the Petitioner. Instead, the NRC Staff requested that the Petitioner promptly supply, in writing, any additional information relevant to the petition. In letters of April 16 and July 19, 1997, the Petitioner reiterated his request for an informal public hearing. In a letter dated August 7, 1997, the NRC Staff responded to the Petitioner's letters of April 16 and July 19, 1997, and provided its detailed basis for concluding that an informal public hearing as requested by the Petitioner was not warranted. The NRC Staff also noted that the Petitioner had a public forum to raise his concerns through the regularly scheduled public meetings held in the vicinity of the Millstone site. The Petitioner did not provide the Staff with any additional evidence in support of the petition.

II. DISCUSSION

The NRC Staff has reviewed the petition and has not found any information regarding either the Millstone or the Haddam Neck facilities of which it was not already aware prior to receipt of the petition. As discussed below, these facilities have been the subject of close NRC scrutiny for several years.

A. Millstone Facility

With regard to the Millstone units, the NRC Staff has been concerned for the last several years about the number and duration of violations at the Millstone site in the broad programmatic areas of design and licensing bases, testing, and radiological controls. Programmatic concerns in these areas, along with concerns in other areas, were major contributors to the decline in performance at the Millstone site. In the cover letter to the most recent systematic assessment of licensee performance (SALP) report of August 26, 1994, the NRC Staff stated that it had noted several performance weaknesses, common to all three Millstone units. Among these were continuing problems with procedure quality and implementation, the informality in several maintenance and engineering programs (contributing to instances of poor performance), and the failure to resolve several longstanding problems at the site. In addition to these programmatic problems, the Licensee has had significant problems in dealing with employee concerns involving safety issues at the site.

On November 4, 1995, the Licensee shut down Millstone Unit 1 for a scheduled refueling outage. The NRC sent a letter to the Licensee on December 13, 1995, requiring the Licensee, before restarting Millstone Unit 1, to inform NRC, pursuant to section 182a of the Atomic Energy Act of 1954, as amended

(the Act), and 10 C.F.R. § 50.54(f), of the actions taken to ensure that, in the future, the Licensee would operate that facility according to the terms and conditions of the unit's operating license, the Commission's regulations, and the unit's Final Safety Analysis Report (FSAR).

In January 1996, NRC designated the three Millstone units as Category 2 on the NRC's Watch List. Plants on the Watch List in this category have weaknesses that warrant increased NRC attention until the licensees demonstrate improved performance for an extended period of time.

On February 20, 1996, the Licensee shut down Millstone Unit 2 when it declared both trains of the high-pressure safety-injection (HPSI) system inoperable because of a design issue. There was a potential that the HPSI throttle valves could become plugged with debris when taking suction from the sump during the recirculation mode.

On March 30, 1996, the Licensee shut down Millstone Unit 3 after finding that containment isolation valves for the auxiliary feedwater turbine-driven pump were inoperable because the valves did not meet NRC requirements. In response to a Licensee root-cause analysis of inaccuracies in the Millstone Unit 1 FSAR, identifying the potential for similar configuration control problems at Millstone Units 2 and 3 and the existing design configuration issues identified at these units, NRC sent section 50.54(f) letters to the Licensee on March 7 and April 4, 1996. These letters required that the Licensee inform the NRC of the corrective actions taken regarding design configuration issues at Millstone Units 2 and 3 before the restart of each unit.

In June 1996, the NRC designated the three units at Millstone as Category 3 on the NRC's Watch List. Plants in this category have significant weaknesses that warrant maintaining them in a shutdown condition until the licensee can demonstrate to NRC that it has taken adequate corrective actions to ensure substantial improvement. This category also requires Commission approval before operations can be resumed.

On August 14, 1996, the NRC issued a confirmatory order directing the Licensee to contract with a third party to implement an independent corrective-action verification program (ICAVP) to confirm the adequacy of its efforts to reestablish the design basis and configuration controls for each of the three Millstone units. The ICAVP is intended to provide additional assurance, before a unit restart, that the Licensee has identified and corrected existing problems in the design and configuration control processes for that unit.

On April 16, 1997, the NRC sent another section 50.54(f) letter, which superseded the earlier section 50.54(f) letters and consolidated its requests for information and periodic updates. The following information was requested: (1) significant items that needed to be accomplished before restart; (2) items that are to be deferred until after restart; (3) NU's process and rationale for deferring items; and (4) actions to be taken by NU to ensure that future operation will be

conducted in accordance with the terms and conditions of the operating licenses, the Commission's regulations, and the FSARs. In a letter dated May 29, 1997, the Licensee submitted the initial information requested. Additional information and updates will be submitted in accordance with the time intervals specified in the section 50.54(f) letter.

During eight NRC inspections conducted between October 1995 and August 1996, more than 60 apparent violations of NRC requirements were found at the Millstone site. These apparent violations were discussed at a public predecisional enforcement conference held at the Millstone site on December 5, 1996. During the meeting, the Licensee stated that management had failed to give clear direction and oversight, performance standards were low, management expectations were weak, and station priorities were inappropriate. A notice of violation and proposed imposition of civil penalties in the amount of \$2,100,000 was issued to the Licensee on December 10, 1997. This is the largest civil penalty ever proposed by the NRC. In the enforcement action, the NRC Staff identified violations relating to inadequate engineering, inadequate corrective actions, technical specifications violations, and quality assurance violations.

Additionally, the Licensee has had a chronic problem of not dealing effectively with employee concerns at the Millstone site. On December 12, 1995, the NRC set up a review group to conduct an independent evaluation of the history of the Licensee's handling of employee concerns related to licensed activities at the Millstone facility. The review group determined that, in general, an unhealthy work environment, which did not tolerate dissenting views and did not welcome or promote questioning attitudes, has existed at the Millstone facility for the last several years. To address this problem, the NRC issued an order on October 24, 1996, directing NU to devise and implement a comprehensive plan for handling safety concerns raised by Millstone employees and to ensure an environment free from retaliation or discrimination. In addition, the order required NU to have an independent third party oversee its employee concerns program. The third party is responsible for providing periodic reports to NU and NRC detailing its findings and recommendations. The third-party findings and the NU responses to them will be assessed by the NRC Staff for any restart issues.

The conduct of NRC regulatory oversight at the Millstone site is based on the recognition that the Licensee bears primary responsibility to demonstrate that corrective actions have been effectively implemented. Thus, before the NRC Staff can recommend that the Commission approve the restart of any Millstone unit, the Licensee must determine that a unit is in conformance with applicable NRC regulations, its license conditions, and its FSAR, and that applicable licensing commitments have been met. The Licensee's conformance with NRC regulations, license conditions, and licensing commitments is fundamental to

NRC's confidence in the safety of licensed activities. In short, the Licensee has the primary responsibility for the safe operation of its facilities.

In a June 20, 1996 letter to NRC, the Licensee described its Configuration Management Plan (CMP), which is its principal program to provide reasonable assurance that weaknesses at the Millstone units have been effectively corrected. The CMP includes efforts to understand and correct the licensing and design-bases issues that led NRC to send the section 50.54(f) letters and order actions to prevent recurrence of those issues. The Licensee stated that the objective of the CMP was to document and meet the licensing and design-bases requirements of each unit and to ensure that adequate programs and processes are in place to maintain control of these requirements. The Licensee's CMP must either correct each FSAR deficiency or evaluate it to ensure that the change to the facility does not involve any unreviewed safety question or change to the facility TSs. NU has documented a large number of deficiencies, which vary in scope and safety significance for each unit. These lists contain significant deficiencies that must be corrected before restart and others that the Licensee is planning to correct after restart. In its continuing reviews of the deficiency lists, the NRC Staff will determine whether the Licensee has appropriately scheduled safety-significant items for completion before restart and whether those items that the Licensee will defer until after restart are appropriate for each unit. The results of these efforts will be documented in NRC inspection reports.

The NRC's regulatory oversight of the Licensee's corrective actions requires extensive planning and program integration. To focus more regulatory attention on all of the restart issues related to the Millstone units, NRC has established a Special Projects Office (SPO) within the Office of Nuclear Reactor Regulation to oversee these activities. The SPO has developed a comprehensive and multifaceted oversight program to verify the adequacy of NU's corrective actions, programs, and processes. The breadth and significance of the problems identified at the Millstone site require this program. The SPO has developed a Restart Assessment Plan (assessment plan) for each of the Millstone units, which includes (1) the appropriate aspects of NRC Inspection Manual, Manual Chapter (MC) 0350, "Staff Guidelines for Restart Approval"; (2) oversight of NU's ICAVP; and (3) oversight of NU's corrective actions relating to employee concerns involving safety issues. The activities associated with the assessment plan are in addition to the normal inspection and licensing activities being carried out at the Millstone site.

MC 0350 establishes the guidelines for approving the restart of a nuclear power plant after a shutdown resulting from a significant event, a complex hardware problem, or serious management deficiencies. The primary objective of the guidelines in MC 0350 is to ensure that NRC's restart review efforts are appropriate for the individual circumstances, are reviewed and approved by the

appropriate NRC management levels, and provide objective measures of restart readiness.

The assessment plan for each unit includes those issues listed in MC 0350 that the NRC Staff has identified as relevant to the shutdown of the unit. Each assessment plan also includes additional issues determined to be applicable to the specific situation. The assessment plans include all actions the NRC expects NU to take before the NRC Staff recommends to the Commission that a unit be permitted to restart. Accordingly, the Staff will use the assessment plan for each Millstone unit to track and monitor all significant actions necessary to support a decision on restart approval of the unit.

The assessment plan for each Millstone unit includes the requirement to review the NU Operational Readiness Plan, the deficiency lists associated with the assessment plan, including restart and deferred items, the corrective action program, work planning and controls, the procedures upgrade program, the nuclear oversight function (quality assurance), outstanding enforcement items, and a Significant Issues List (SIL), which includes issues identified by both NU and NRC as issues requiring resolution before restart. NRC MC 93802, "Operational Safety Team Inspection" (OSTI), provides the framework for a team inspection to be performed during the later stages of the restart process. The inspection will be structured to focus on the pertinent issues at each of the Millstone units.

Within the SPO, a Millstone Restart Assessment Panel (RAP) has been formed in accordance with MC 0350. The RAP meets to assess the Licensee's performance and its progress in completing the designated restart activities. The RAP is composed of the Director, SPO (chairman); the Deputy Directors of Licensing, Inspections, and Independent Corrective Action Verification Program Oversight; the project managers for the three Millstone units; the Inspection Branch Chief; the senior resident inspectors for the three Millstone units; and the appointed Division of Reactor Safety representative. The RAP holds periodic meetings with the Licensee to discuss the Licensee's corrective actions and schedules of each Millstone unit. Notices of the meetings with the Licensee are issued and the meetings are open to the public. Additionally, NRC holds frequent meetings with the public near the Millstone facility that include a summary of the latest meeting with the Licensee, updates on NRC activities, and questions and comments from the public.

The purpose of the ICAVP, as stated in the confirmatory order, is to confirm that the plant's physical and functional characteristics are in conformance with its licensing and design bases. The ICAVP audit required by NRC is expected to provide independent verification, beyond NU's quality assurance and management oversight, that the Licensee has identified and satisfactorily resolved existing nonconformances with the design and licensing bases; documented and utilized the licensing and design bases to resolve nonconformances; and

established programs, processes, and procedures for effective configuration management in the future. NU has started programs to identify and understand the root causes of the licensing and design-bases issues that led to NRC issuance of the section 50.54(f) letters to NU and to implement corrective actions to ensure that NU maintains the design configuration and that each unit is in conformance with its licensing basis. NU has indicated that the scope of its corrective programs will include those systems that it has categorized as either Group 1 (safety-related *and* risk-significant) or Group 2 (safety-related *or* risk-significant). The ICAVP audit must provide insights into the effectiveness of NU's programs so that the results can be reasonably extrapolated to the structures, systems, and components that were not reviewed in the audit.

The NRC Staff has developed a comprehensive and multifaceted oversight process to provide a high level of confidence that the Licensee has implemented required corrective actions and that all of the issues on the SILs have been resolved. The independent third-party evaluations required by NRC will be used to enhance NRC confidence that the Licensee's corrective action programs have been effectively implemented at each unit.

NRC activities (including oversight of the ICAVP) to ensure that effective corrective actions are being taken by the Licensee will provide additional assurance that the Licensee's corrective action programs have been effectively implemented. These activities will include in-process reviews of the ICAVP contractor's activities, reviews of the ICAVP results, and additional independent reviews of compliance with the design and licensing bases of selected systems. The State of Connecticut's Nuclear Energy Advisory Council has provided input to the NRC Staff for selecting the systems that will be reviewed by the ICAVP contractor and has been invited to observe the NRC Staff's ICAVP inspections.

When the restart review process has identified, corrected, and reviewed relevant issues regarding each Millstone unit, a restart authorization process will be initiated for that unit. Upon receipt of an NRC Staff recommendation and a briefing on any ongoing investigations, the Commission will meet to assess the recommendation and vote on whether to allow the restart of the unit. The same process will be followed for the remaining units.

It is important to note that the Licensee and NRC are continuing to identify problems at the Millstone site, as documented in inspection reports issued after this petition was filed. These findings indicate that the corrective actions required to restart the Millstone units have not yet been fully implemented. The NRC Staff will not recommend that the Commission allow the restart of a Millstone unit until the NRC Staff has determined, in accordance with the assessment plan, that the necessary corrective actions have been effectively implemented for the unit. Following any positive Commission vote for restart, the unit will remain on NRC's Watch List, in Category 2, and will continue to be subject to a high level of NRC oversight. The unit will remain as a Category 2 Watch-List plant

until the NRC determines that the Licensee's performance warrants a normal level of NRC oversight.

B. Haddam Neck Facility

The Licensee shut down the Haddam Neck facility on July 22, 1996, as required by the facility's TSs, because of concerns that service water piping for the air recirculation fans in the containment may exceed design loads during certain accident scenarios. The Licensee determined that these concerns and other hardware and programmatic problems identified before and during the forced outage should be resolved before restarting the plant. Thus, the Licensee decided to begin Refueling Outage 19 on August 17, 1996. On October 9, 1996, the owners of the Haddam Neck Plant stated that a permanent shutdown of the plant was being considered by the Board of Trustees as a result of an economic analysis of operations, expenses, and the cost of replacement power. Subsequently, all fuel assemblies were removed from the reactor and placed in the spent fuel pool.

From November 21, 1995, to November 22, 1996, NRC conducted numerous inspections at the Haddam Neck Plant to review several facets of plant performance. These inspections included a special team inspection by NRC headquarters staff focused on engineering performance; a special augmented inspection team (AIT) inspection of a reactor vessel nitrogen intrusion event in late August and early September 1996, which lowered the reactor vessel water level; a special radiation protection inspection of a significant contamination event in November 1996; an emergency preparedness inspection to observe the Licensee's response during an emergency exercise held in August 1996; and several resident inspections. Numerous violations, as well as several significant regulatory concerns, were identified during these inspections. Most of the violations were discussed at a transcribed public predecisional enforcement conference at the Millstone training building in Waterford, Connecticut, on December 4, 1996. That conference was open to the public and focused on the broader programmatic deficiencies underlying the violations that contributed to the problems at Haddam Neck. A notice of violation and proposed imposition of civil penalties in the amount of \$650,000 was issued on May 12, 1997, and was subsequently paid by the Licensee.

By letter dated December 5, 1996, the Licensee certified to the NRC, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and 10 C.F.R. § 50.82(a)(1)(ii), that it had decided to permanently cease operations at the Haddam Neck Plant and had permanently removed the fuel from the reactor. The Licensee further noted that a post-shutdown decommissioning activities report (PSDAR) and a site-specific decommissioning cost estimate would be submitted in accordance with 10 C.F.R. § 50.82, "Termination of License." Therefore, the NRC's restart

process oversight described for the three Millstone units is not applicable to the Haddam Neck Plant. However, the NRC Staff has taken pertinent actions at the Haddam Neck Plant.

A confirmatory action letter (CAL) was issued to the Licensee on March 4, 1997, concerning radiological-control problems at the Haddam Neck Plant to ensure that the limited activities at the site will be conducted in a safe manner and in accordance with regulatory requirements. The CAL confirms the Licensee's commitment to not perform any radiological work, except that required to maintain the plant in a safe configuration, until the corrective actions identified in the CAL have been implemented.¹

As with the Millstone site, it is important to note that the Licensee and NRC continue to identify problems at the Haddam Neck Plant, as documented in inspection reports issued after this petition was filed. These findings indicate that the corrective actions required to be completed before conducting significant decommissioning activities have not yet been fully implemented. The NRC Staff will continue to closely monitor the Licensee's activities until the Staff has determined that the necessary corrective actions have been effectively implemented for the unit.

III. NRC RESPONSE TO REQUESTED ACTIONS

The Petitioner requested that a mechanistic enforcement approach be used at the Millstone and Haddam Neck plants to preclude recurrence of the problems.

The NRC's enforcement policy, which has been revised many times since the March 9, 1982 policy was first issued, continues to recognize that the regulation of nuclear activities does not lend itself to a mechanistic treatment. The NRC Staff's extensive experience shows that judgment and discretion must be exercised in determining the severity levels of the violations and the appropriate enforcement sanctions.

The latest Staff assessment of the NRC's enforcement policy was completed in 1997 (NUREG-1622²). This assessment also contained a discussion of a suggestion from the public³ recommending that the enforcement policy be modified to eliminate what was viewed as subjective enforcement based on performance issues. In particular, the commenter recommended that the NRC Staff consistently impose a civil penalty every time a licensee fails to meet a requirement,

¹ In a November 17, 1997 letter, the NRC Staff confirmed certain modifications of the Licensee's commitments on the conduct of radiological work at the Haddam Neck Plant. The modification allows the Licensee to remove an 8-foot section of piping associated with the reactor coolant system to allow vendors to determine the best method for eventual decontamination of the entire reactor coolant system.

² As of the date of this Director's Decision, this NUREG has not been issued. It is expected to be issued shortly.

³ September 9, 1997 letter from David A. Lochbaum of the Union of Concerned Scientists.

regardless of a licensee's performance or ability to meet requirements in other areas. The NRC Staff's assessment concluded, in part, that "the staff does not believe that the enforcement policy should be reduced to a formula for rigid application. Few cases are entirely straightforward, and the NRC must always apply judgment in determining whether to give credit for the licensee's actions." The Petitioner requested that mechanistic enforcement-related license conditions be added to the Millstone and Haddam Neck licenses. As noted above, the NRC Staff has long experience in the enforcement of its requirements. That experience shows that judgment and discretion based on the facts at hand are key elements in any enforcement decision. A fair and reasonable enforcement decision cannot be made without an understanding of the nature of the violations involved and the context in which the violations occurred. The Petitioner's approach calls for specific and severe sanctions based on unknown future events of unknown significance occurring in an unknown context. Such an approach is unreasonable and could very well be found as arbitrary and capricious and thus legally unsound. It is not an approach that the NRC Staff would apply in any case and so it would not be applied in the case of the Millstone and Haddam Neck units as requested by the Petitioner.

As noted in the Discussion section above, the NRC Staff is aware of the significant performance problems at the Licensee's facilities. These performance problems have led the NRC Staff to increase its oversight activities at these facilities. The Millstone plants will not be allowed to restart until the NRC Staff is satisfied that sufficient corrective action has taken place and until Commission approval is granted. After restart, the plants will continue to be subject to a high level of NRC oversight until the NRC determines that the Licensee's performance warrants a normal level of NRC oversight. The decommissioning of the Haddam Neck Plant will not be allowed to proceed until the NRC Staff determines that the applicable performance problems noted there have been corrected. The Licensee has also made significant management changes at each of these facilities. In the NRC Staff's judgment, the scope of actions taken by the Licensee and the NRC regarding these facilities is extensive.

Furthermore, the NRC Staff has had significant experience in overseeing licensees that have either been ordered to or have volunteered to shut down their facilities because of performance problems. For example, in NRC's Region I alone, the Pilgrim, Peach Bottom, Nine Mile Point, Calvert Cliffs, FitzPatrick, and Indian Point Unit 3 plants have been shut down while significant problems were corrected. Despite their significant problems, these plants have been able to perform corrective actions that have significantly improved the performance of these facilities. On the basis of the special circumstances involved with overseeing the restart of plants shut down for performance problems, the NRC Staff developed MC 0350 (for more detail about this document, see Discussion section). Thus, the NRC Staff has a considerable amount of experience

overseeing facilities shut down because of significant enforcement problems; the NRC Staff has seen numerous examples of licensees that have successfully improved their performance to a level acceptable for restart and continued operation; and the NRC Staff has a tested procedure in place to safely oversee the restart of such facilities.

Regarding the Haddam Neck Plant, the risks to the public from a permanently shutdown facility are significantly less than those from an operating power plant. Additionally, as noted in the preceding discussion, the NRC Staff is closely observing the Licensee's actions until confidence in the Licensee is restored.

IV. CONCLUSION

In summary, a mechanistic enforcement approach will not be applied by the NRC Staff in this matter. Such an approach is neither necessary nor appropriate to ensure regulatory compliance and safe conduct of activities at the Millstone and Haddam Neck facilities. Extensive efforts have been and are being taken by the Licensee to ensure that future operation of the Millstone units and decommissioning of the Haddam Neck Plant are accomplished safely. The NRC Staff has in place an extensive oversight program to ensure that the Licensee meets its objectives. The NRC Staff also has extensive experience with other facilities in assessing major corrective action programs providing assurance that its oversight of the Licensee's corrective action efforts will be sound and will ensure that the Commission receives a sound NRC Staff recommendation before the Commission itself determines whether restart of the Millstone units is warranted. After restart, the plants will continue to be subject to a high level of NRC oversight until the NRC determines that the Licensee's performance warrants a normal level of NRC oversight. Accordingly, the Petitioner's request for specific enforcement-related license conditions at the Millstone and Haddam Neck facilities is denied.

As provided for in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. This Director's Decision will constitute the final action of the Commission 25 days

after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 11th day of February 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-282
50-306
72-10

NORTHERN STATES POWER
COMPANY

(Prairie Island Nuclear Generating Plant;
Prairie Island Independent Spent Fuel
Storage Installation)

February 11, 1998

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Prairie Island Indian Community pursuant to 10 C.F.R. § 2.206. The petition asked that the NRC: (1) find that the Licensee violated NRC regulations by using an independent spent fuel storage installation before establishing conditions for safely unloading TN-40 dry storage containers, (2) suspend the license until all significant issues concerning the unloading process have been resolved, (3) provide the Petitioners with an opportunity to participate fully in reviewing the unloading procedures for the casks, and (4) update the relevant technical specifications to incorporate mandatory unloading procedure requirements for the TN-40 dry storage containers.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On August 26, 1997, the Prairie Island Coalition filed a petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206)

requesting that the U.S. Nuclear Regulatory Commission (NRC) take action to accomplish the following:

1. Suspend Northern States Power Company's (the Licensee's) Materials License No. SNM-2506 for cause under section 50.100 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 50.100) until all material issues regarding the maintenance, unloading, and decommissioning processes and procedures, as described in the petition and in an earlier petition filed on May 28, 1997, by the Prairie Island Indian Community, have been adequately addressed and resolved, and until the maintenance and unloading processes and procedures in question are safely demonstrated under the scrutiny of independent third-party review of the TN-40 cask seal maintenance and unloading procedure;
2. Determine that the Licensee violated 10 C.F.R. § 72.122(f) by using a cask design that requires periodic seal maintenance and emergency seal replacement that must be performed in the plant storage pool. The Petitioner asserts that these casks cannot be placed back into the pool to perform these functions due to unresolved problems with fuel degradation during storage, flash steam, thermal shock, and the resulting potential for radiation dispersion;
3. Determine that the Licensee violated 10 C.F.R. § 72.122(h) by using a cask that must be placed into the pool for necessary maintenance and/or unloading procedures. The Petitioner asserts that such placement of the cask into the pool will prematurely degrade the fuel and pose operational safety problems with respect to its ultimate and necessary removal from dry-cask storage;
4. Determine that the Licensee violated 10 C.F.R. § 72.122(l) by loading casks and storing them before developing and preparing procedures adequate to safely unload and decommission the TN-40 casks;
5. Determine that the Licensee violated 10 C.F.R. § 72.130 by using the TN-40 cask and failing to make provisions capable of accomplishing the removal of radioactive waste and contaminated materials at the time the independent spent fuel storage installation (ISFSI) is permanently decommissioned;
6. Determine that the Licensee violated 10 C.F.R. § 72.11 by failing to provide and include complete and accurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submittals regarding cask maintenance and unloading issues;
7. Determine that the Licensee violated 10 C.F.R. § 72.12 by deliberately and knowingly submitting incomplete and inaccurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submittals regarding cask maintenance and unloading issues;
8. Require that the Licensee pay a substantial penalty for each cask loaded in violation of NRC regulations;
9. Administer such other sanctions for the alleged violations of NRC regulations as the NRC deems necessary and appropriate;

10. Provide Petitioner the opportunity to participate in a public review of maintenance, unloading, and decommissioning processes and procedures in question and an opportunity to comment on draft findings after investigation by the NRC;
11. Order modification of the Licensee's Technical Specifications for the Prairie Island ISFSI to ensure a demonstrated ability to in fact safely maintain, unload, and decommission TN-40 casks; and
12. Review the Licensee's processes and procedures for maintenance, unloading, and decommissioning, and if the Licensee does not possess capability to unload casks, order the Licensee to build a 'hot shop' for air unloading of casks and transfer of the fuel.

The petition has been referred to me pursuant to 10 C.F.R. § 2.206. The NRC letter dated October 2, 1997, to George Crocker, on behalf of the Petitioner, acknowledged receipt of the petition and reported the NRC Staff's determination that the petition did not require immediate action to be taken by the NRC. The letter of October 2, 1997, also explained that the NRC Staff would address the requests for formal rulemaking proceedings as detailed in Items 13, 14, and 15 of the petition, in accordance with 10 C.F.R. § 2.802, "Petition for Rulemaking." A notice of receipt was published in the *Federal Register* on October 10, 1997 (62 Fed. Reg. 53,031).

On the basis of the NRC Staff's evaluation of the issues and for the reasons given below, the Petitioner's requests as detailed in Items 1 through 12 of the petition are denied.

II. BACKGROUND

On October 19, 1993, the NRC issued Materials License No. SNM-2506 to allow the Licensee to store spent nuclear fuel in TN-40 dry-storage casks, designed by Transnuclear Incorporated, at the ISFSI located at the Prairie Island Nuclear Generating Plant. The NRC issued Technical Specifications (TSs) defining operating limits, surveillance requirements, design features, and administrative controls as Appendix A to Materials License No. SNM-2506. No spent nuclear fuel was allowed to be loaded into a storage cask at Prairie Island until several preoperational license conditions were satisfied. Among the preoperational license conditions were a required training exercise (dry run) of the loading, handling, and unloading activities for the TN-40 casks and the implementation of written procedures describing the actions to be taken during operational, off-normal, and emergency conditions associated with the Prairie Island ISFSI.

A report dated April 20, 1995, submitted by the Licensee to the NRC pursuant to 10 C.F.R. § 72.82(e), gave the results of the preoperational tests that the Licensee was required to perform before loading spent fuel into a

TN-40 cask.¹ On May 12, 1995, following the completion of the Staff's reviews and inspections that found that the Licensee had satisfied the conditions of the license, the Licensee began loading spent fuel assemblies into a TN-40 cask. The Licensee subsequently placed the cask, and casks loaded since that time, onto the storage pad within the Prairie Island ISFSI.

The NRC Staff's determination that the Licensee was in compliance with applicable regulations and license conditions was the basis for the NRC Staff's decision to approve the ISFSI at Prairie Island and to allow the actual loading of TN-40 casks at that facility. The Petitioner has requested that, in light of the information in the petition, the NRC Staff reconsider its findings and suspend Materials License No. SNM-2506. The regulations cited by the Petitioner as those that establish technical requirements not being satisfied by the Licensee for the ISFSI at Prairie Island are:

- 72.122(f) Testing and maintenance of systems and components.** Systems and components that are important to safety must be designed to permit inspection, maintenance, and testing.
- 72.122(h) Confinement barriers and systems.** (1) The spent fuel cladding must be protected during storage against degradation that leads to gross ruptures or the fuel must be otherwise confined such that degradation of the fuel during storage will not pose operational safety problems with respect to its removal from storage. This may be accomplished by canning of consolidated fuel rods or unconsolidated assemblies or other means as appropriate.
- 72.122(l) Retrievability.** Storage systems must be designed to allow ready retrieval of spent fuel or high-level radioactive waste for further processing or disposal.
- 72.130 Criteria for decommissioning.** The ISFSI or MRS [monitored retrievable storage installation] must be designed for decommissioning. Provisions must be made to facilitate decontamination of structures and equipment, minimize the quantity of radioactive wastes and contaminated equipment, and facilitate the removal of radioactive wastes and contaminated materials at the time the ISFSI or MRS is permanently decommissioned.

The regulations in 10 C.F.R. Part 72 require that the design of the storage system and the procedures implemented by specific licensees support the unloading activity, whether it is being performed to allow further processing or disposal of the spent fuel, such as may be necessary to support decommissioning of the ISFSI; as part of planned maintenance activities; or as part of the response to an unplanned event or condition. The unloading of a cask, for any reason, should be performed in a manner that prevents gross rupture of the fuel

¹On May 11, 1995, the NRC granted a schedular exemption to the provision of section 72.82(e) that requires licensees to submit the preoperational test results at least 30 days before receipt of spent fuel into the ISFSI. The basis for the exemption was the fact that the NRC Staff had reviewed cask fabrication records, observed portions of the preoperational test activities, and completed its review of the report submitted on April 20, 1995.

cladding, which could result in operational safety problems. Although unloading procedures need not contain detailed guidance on removing damaged fuel, they should contain precautions in case fuel cladding has unexpectedly degraded during storage so that additional measures can be taken to address increased radiological hazards during the unloading process.

NRC regulations, facility licenses, and NRC-approved quality assurance programs require licensees to establish and maintain a formal process for preparing and issuing procedures and changes thereto. NRC assessments of licensee procedures are generally conducted within the NRC's inspection program. The major procedures pertaining to dry-cask-storage activities at Prairie Island, including the procedure for unloading a cask, were reviewed by the NRC Staff during a special inspection conducted from January 24 through May 11, 1995, to oversee the preoperational activities discussed above. In addition to reviewing the Licensee's facility and procedures, as previously noted, the NRC inspectors observed preoperational testing that the Licensee was required to perform before loading casks with spent fuel assemblies. The inspection findings are documented in NRC Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP), dated June 30, 1995.

The NRC inspectors noted several instances in which the procedures for dry-cask-storage activities that the Licensee had in place at the beginning of the inspection, including the procedures for loading and unloading of TN-40 casks, did not ensure compliance with the requirements of the license. Although the Licensee corrected these procedural deficiencies during the course of the inspection, the Staff issued a Notice of Violation to the Licensee for failing to satisfy Criterion V of Appendix B to 10 C.F.R. Part 50, which, for activities affecting quality, requires the preparation of and adherence to procedures appropriate to the circumstances. In addition, the inspectors found weaknesses in the Licensee's initial performance in overseeing the activities of the cask vendor and in overall planning for dry-cask-storage activities. On the basis of the licensing reviews and inspection findings, documented in Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP), the NRC Staff concluded that as of May 1995, the Licensee had corrected these deficiencies and was ready to safely load, and if necessary unload, spent nuclear fuel in TN-40 casks.

In July 1995, the NRC Staff issued an action plan for dry-cask storage to manage the resolution of a variety of technical and process issues that were noted during the licensing reviews and inspections completed for the first several ISFSI facilities, including the ISFSI at Prairie Island. An item related to the loading and unloading of dry-storage casks was added to the action plan, in part to ensure that the importance of the unloading procedures was emphasized to licensees and that technical issues related to unloading problems were resolved. Addition of an item pertaining to unloading was deemed prudent because the Staff observed that some of the licensees' unloading procedures failed to consider contingencies

and assumptions related to possible fuel degradation, gas-sampling techniques, cask design issues, radiation protection requirements, and the thermal-hydraulic behavior of a cask during the process of cooling and filling it with water from the spent fuel pool.

To fulfill the goals of its dry-cask-storage action plan, the NRC Staff has emphasized the importance of unloading procedures and shared observations with licensees using or considering dry-cask storage. The Staff revised inspection procedures and licensing review guidance to specifically instruct NRC inspectors to review unloading procedures developed by licensees and to identify those issues that warrant particular attention. Application of the revised guidance ensures that recent and future reviews will address the adequacy of unloading procedures developed by licensees. To address those ISFSIs that began operation before NRC improved its guidance on review and inspection, the Staff audited or inspected those licensee programs for which the inspection record did not document whether the unloading procedures adequately addressed the major issues in the action plan. Regarding Prairie Island, the Staff reviewed the available information and determined that the assessment of the unloading procedure performed as part of the inspection documented in NRC Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP) adequately addressed the concerns in the NRC action plan, and that additional reviews or inspections therefore were not necessary.

In a petition dated June 5, 1995, Prairie Island Coalition requested that, among other things, the NRC review --- and take whatever administrative actions were necessary concerning --- the Licensee's plans to unload a TN-40 cask if the spent fuel pool lacked sufficient space to accommodate the spent fuel assemblies from a cask. The NRC Staff issued DD-96-21, 44 NRC 297, on November 27, 1996, denying the Petitioner's request. The denial was based, in part, on the Staff's finding that if a cask must be unloaded, it is unlikely that the need to unload it would represent a time-urgent activity and the Licensee would be able to develop and execute a plan to maintain the safe storage of the spent fuel assemblies. The NRC Staff determined that even if such an unlikely event occurred and the Licensee needed to implement corrective actions to maintain safe storage conditions, options would be available to the Licensee. These options include returning a cask to the auxiliary building, returning a cask to the spent fuel pool without actually removing the spent fuel, and removing non-fuel-bearing components from the spent fuel pool to allow the removal of fuel assemblies from a cask. *Id.*, 44 NRC at 309.

The Petitioner has incorporated by reference a petition dated May 28, 1997, filed by the Prairie Island Indian Community, which, among other things, asked the NRC to suspend Materials License No. SNM-2506 on the premise that the Licensee has failed to establish adequate procedures for safely unloading the TN-40 dry-storage containers. The Prairie Island Indian Community also requested

that an independent third-party review of the TN-40 unloading procedure be conducted, that they be given an opportunity to participate fully in the reviewing of the unloading procedure for the TN-40 cask, that the NRC hold hearings and allow them to participate fully in these and in any other procedures initiated in response to their petition, and that the TSs for the Prairie Island ISFSI be revised to incorporate mandatory unloading procedure requirements. The NRC issued DD-97-18, 46 NRC 35, on August 29, 1997, denying the requests made by the Prairie Island Indian Community. Although the Staff acknowledged the potential difficulties in retrieving fuel from dry-storage casks if significant fuel degradation has occurred, the NRC Staff concluded that licensees need not be required to incorporate specific guidance into the normal unloading procedure to address this unlikely situation. This conclusion was based on the Staff's findings that (1) the Licensee's procedure could support the normal unloading of spent fuel assemblies from TN-40 casks at Prairie Island, (2) the Licensee's unloading procedure contained the necessary measurements and precautions to detect if fuel had degraded during storage, and (3) the Licensee could reasonably be expected to develop procedures to safely unload damaged fuel assemblies in the unlikely event that fuel did degrade during storage.

III. DISCUSSION

The Petitioner requests actions by the NRC based on the contention that the unloading procedure developed by the Licensee is inadequate and, therefore, the Licensee has violated various NRC regulations related to having the ability to test and maintain systems and components, protecting the spent fuel cladding from degradation, designing storage systems to allow ready retrieval of spent fuel for further processing or disposal, and designing ISFSIs to facilitate decommissioning activities. In addition, the Petitioner alleges that the Licensee violated NRC regulations pertaining to the submittal of complete and accurate information regarding maintenance and unloading issues associated with the TN-40 cask.

Item 1. Suspend SNM-2506

On the basis of the contention that the Licensee's unloading procedure is inadequate, and, therefore, that the Licensee is in violation of NRC regulations such as 10 C.F.R. §§ 72.122 and 72.130, the Petitioner requests that Materials License No. SNM-2506 be suspended for cause, in accordance with 10 C.F.R. § 50.100, until such time as the significant issues in the unloading process

have been resolved and the unloading process has been demonstrated under the scrutiny of an independent third-party review.²

As previously stated, the NRC Staff has reviewed the Licensee's procedure for unloading a TN-40 cask at Prairie Island. The review, including verification that the Licensee's unloading procedure was revised to address deficiencies found by the NRC inspectors, is documented in NRC Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP). Reasonable confidence that the Licensee could, if necessary, safely unload a TN-40 cask is supported by the findings from the NRC inspection. The findings of subsequent evaluations performed by the NRC Staff as part of the activities associated with the dry-cask-storage action plan and the review of the petition filed by the Prairie Island Indian Community confirmed the adequacy of the Licensee's procedure for unloading a cask. The Licensee is required to maintain the adequacy of the unloading procedure through programs required by NRC regulations, facility licenses, and NRC-approved quality assurance programs. Additional bases for the Staff's findings regarding the cited regulatory requirements are discussed in the sections that follow. The NRC Staff has determined that the findings discussed in the subsequent sections of this Decision adequately address the Petitioner's claims regarding the Licensee's compliance with the regulatory requirements pertaining to retrievability of spent fuel, maintenance of ISFSI systems, and decommissioning. The Petitioner's request to suspend Materials License No. SNM-2506 is, therefore, denied.

Regarding a third-party review, the NRC Staff's concern about the quality of licensees' unloading procedures led NRC to include the issue in the dry-cask-storage action plan. The action plan served as a framework for identifying and resolving various technical and administrative issues related to the use of dry-storage casks. The previously mentioned actions taken by the NRC Staff and licensees adequately resolved the issues pertaining to cask unloading procedures. In the specific case of the unloading procedure at Prairie Island, the Licensee revised the procedure to address the problems raised by the Staff during its inspection. On the basis of the actions it has already taken, the NRC Staff does not believe that requiring additional demonstration of the procedures or review of the Licensee's procedures by an independent third party is warranted.

²The Petitioners request that Materials License No. SNM-2506 be suspended for cause in accordance with section 50.100. Provisions for the modification, revocation, or suspension of the licenses for ISFSI facilities are contained in 10 C.F.R. § 72.60. The possible reasons for suspending licenses for ISFSIs in accordance with section 72.60 are similar to the corresponding reasons for suspending licenses for production and utilization facilities in accordance with section 50.100.

Item 2. Determine That the Licensee Violated 10 C.F.R. § 72.122(f)

The Petitioner requests that the NRC determine that the Licensee violated section 72.122(f) by using a cask design that may require periodic seal maintenance or seal replacement that would necessitate returning the cask to the spent fuel pool. The Petitioner asserts that these casks cannot be placed back into the pool for the Licensee to perform these functions, due to unresolved problems with fuel degradation during storage, flash steam, thermal shock, and the resulting potential for radiation dispersion. The Petitioner states that such a condition is in violation of the requirements that systems and components that are important to safety must be designed to permit inspection, maintenance, and testing.

The fact that the TN-40 cask design uses metallic seals to maintain the helium atmosphere within the cask was thoroughly reviewed during the licensing of the Prairie Island ISFSI as well as during Staff reviews of similar casks designed by Transnuclear Inc., such as the TN-24 cask, which has been certified as an acceptable cask for use under the general licensing provisions of Subpart K of 10 C.F.R. Part 72, and the TN-32 cask, which has had an associated topical report approved by the NRC Staff for referencing in site-specific licensing applications. The seal design and related pressure-monitoring system were found to provide the necessary confidence that the inert atmosphere would be maintained and thereby prevent degradation of the fuel cladding during storage.

If it were necessary to repair or replace the metallic seals, the Licensee would use the unloading procedure or a similar procedure to control the return of a TN-40 cask to the spent fuel pool. As will be discussed in more detail in the following section, the Staff has determined that the Licensee's unloading procedure is adequate. As documented in NRC Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP), the NRC Staff did not require demonstration of seal replacement activities but did find that those activities performed during the dry-run exercises were adequate to demonstrate that such an activity could, if necessary, be accomplished. Given the Staff's finding that the Licensee's procedure for returning a cask to the spent fuel pool and subsequently unloading the fuel would not cause operational safety problems and the fact that the same procedure or a similar procedure would be used to support the repair or replacement of a TN-40 cask's metallic seals, the NRC concludes that the Licensee has not violated section 72.122(f) as alleged by the Petitioner.

Item 3. Determine That the Licensee Violated 10 C.F.R. § 72.122(h)

The Petitioner requests that the NRC determine that the Licensee violated section 72.122(h) by using a cask that must be placed into the spent fuel pool to perform necessary maintenance and unloading procedures. The Petitioner

asserts that such placement of the cask into the pool will prematurely degrade the fuel and pose operational safety problems with respect to its ultimate and necessary removal from dry-cask storage. The Petitioner states that such a condition is in violation of the requirements that spent fuel cladding either be protected against degradation that leads to gross ruptures or otherwise confined so that fuel degradation during storage will not pose operational safety problems with respect to its removal from storage.

The Staff has found that the TN-40 cask can adequately maintain the inert atmosphere within the cask to prevent fuel degradation and provides for sufficient indication of the loss of the inert atmosphere using the pressure-monitoring system. Maintaining the inert atmosphere and other design requirements established for the TN-40 casks is sufficient to protect the fuel cladding during storage. In the event that the pressure-monitoring system indicates that the helium atmosphere is not being maintained within a TN-40 cask, the TSs for the Prairie Island ISFSI require that the cask be returned to the spent fuel pool for replacing or repairing the seals.

The Petitioner asserts that the return of the cask to the spent fuel pool will prematurely degrade fuel and poses operational safety problems. In support of this assertion, the Petitioner enclosed, as Exhibit A to the petition, a letter from Dr. Gail Marcus of the NRC Staff, dated February 25, 1997, which responded to an inquiry made to the NRC Staff by Mr. George Crocker of the Prairie Island Coalition. In the letter, Dr. Marcus makes the following statements:

- (1) As part of its assessments of licensees' procedures for unloading dry storage casks, the NRC staff considers the dry-run exercises performed to verify key aspects of unloading procedures, as well as licensees' actual experience in the loading and unloading of transportation casks, loading of storage casks, handling of spent fuel assemblies under various conditions, and performing various activities associated with reactor facilities. In the absence of actual experience in unloading spent fuel from a cask following a long period of storage, a general understanding of technical capabilities and related experiences enables the NRC staff to assess the adequacy of a licensee's procedures for unloading dry storage casks.
- (2) Although the limited unloading experiences with storage casks have not involved the temperature differences between fuel and coolant that may occur if a cask was unloaded after a period of storage, engineering evaluations and experiences with transportation casks have shown that "thermal shocking" is unlikely to cause operational safety problems.
- (3) Although licensees would be able to develop means to retrieve degraded fuel assemblies from a dry storage cask, the accumulated occupational dose to perform this activity may be increased from the previously mentioned estimates. Fuel reactivity for criticality considerations could increase only under very idealistic and highly unlikely disintegration patterns in the fuel. Upon detection that fuel disintegration had occurred, special measures would be developed and implemented to assure an adequate safety margin is maintained during unloading.

The statement regarding “thermal shock” is based on the fact that the Licensee’s unloading procedure contains precautions to slowly introduce water to the TN-40 cask and thereby minimize the thermal shock to the fuel assemblies. As explained in DD-97-18, 46 NRC at 44, the NRC Staff does not believe that the process of refilling a cask with water and returning it to the spent fuel pool will cause fuel degradation or operational safety problems. In DD-97-18, the Staff stated:

The Petitioners expressed concerns regarding the reaction of the cask and stored fuel assemblies to the introduction of spent fuel pool water during the execution of the unloading procedure. The unloading procedure includes the partial immersion of the TN-40 cask into the spent fuel pool, connection of hoses to the vent and drain connections, and the slow introduction of spent fuel pool water to the cask cavity and stored fuel assemblies. The procedure instructs personnel to continuously monitor the temperature and pressure instrumentation installed on the vent connection and to stop pumping water if the pressure exceeds 10 psig or the temperature exceeds 240°F. In the Staff’s judgment, the cooling process imposed by these limitations on temperatures and pressures at the vent port of the cask will adequately ensure that the cooling of the cask and spent fuel is gradual and, thereby, prevent safety problems that could hypothetically result from damage to the cask or the fuel assemblies because of stresses induced by a poorly controlled addition of cooling water from the spent fuel pool.

The Petitioner also cites a letter dated April 15, 1997, from Susan Frant Shankman of the NRC Staff to Sierra Nuclear Corporation, which emphasizes that NRC regulations require that inert atmospheres be maintained within dry-storage casks in order to prevent fuel degradation during storage. The Petitioner states that the pressure-monitoring system is included in the design because the loss of helium from TN-40 casks is an anticipated event and that neither fuel degradation that may result from a loss of the helium nor the method by which the Licensee would replace a damaged seal has been addressed. As previously mentioned, the NRC Staff has found that the design of the TN-40 casks, including its combination of metallic seals and a pressure-monitoring system, is adequate to maintain a helium atmosphere within the cask. The helium atmosphere, in turn, has been found, when combined with other restrictions in the license for the Prairie Island ISFSI, to adequately protect against degradation of the spent fuel cladding.

Given its finding that (1) fuel integrity will be maintained during normal storage by the inert atmosphere and (2) the return of a cask to the spent fuel pool for unloading or seal maintenance would not result in fuel degradation that would result in operational safety problems, the NRC Staff has not identified a violation of section 72.122(h) at the Prairie Island ISFSI, as is claimed by the Petitioner.

Item 4. Determine That the Licensee Violated 10 C.F.R. § 72.122(l)

The Petitioner requests that the NRC determine that the Licensee violated section 72.122(l) by loading casks and storing them before the Licensee had developed and implemented procedures adequate to safely unload and decommission the TN-40 casks.

The Staff's basis for determining that the Licensee has not violated the requirements of 72.122(l) for the reasons cited by the Prairie Island Indian Community was discussed in DD-97-18. As discussed in DD-97-18, normal unloading procedures do not need to incorporate contingency actions for failed fuel, provided that precautions exist to check for fuel degradation before breaching the confinement boundaries of a cask. In the unlikely event that fuel degradation has occurred during storage, the Licensee would need to address the retrieval of failed fuel and implement necessary precautions related to the radioactive and fissile materials within the cask.

In support of its claim regarding potential problems in unloading a TN-40 cask, the Petitioner enclosed, as Exhibit B to the Petition, a letter from the NRC Staff that asked the Licensee questions about a proposed amendment to the operating license for the Prairie Island Nuclear Generating Plant.³ The proposed and subsequently issued amendment pertained to the TSs associated with the operability of the reactor facility's spent fuel pool special ventilation system during movement of fuel assemblies within the spent fuel pool enclosure. During its review of the proposed amendment, the NRC Staff requested that the Licensee submit additional information about the use of the ventilation system during the possible unloading of dry-storage casks. This request for additional information, dated July 10, 1997, is the letter cited by the Petitioner. In its response of July 29, 1997, to the Staff's request for additional information, the Licensee explained the relationship of the ventilation system to dry-cask activities and clarified details of the procedure for unloading a TN-40 cask. The NRC was satisfied with the Licensee's response to the questions which explained that the spent fuel pool special ventilation system is not operable during the filling and venting of a cask during the unloading procedure and

³The Petitioner also claims that an NRC memorandum dated April 16, 1997, that addressed a request from an NRC regional office for clarification of terms associated with dry-cask storage, is deficient in that it does not address possible problems that may be encountered during unloading of a dry-storage cask or all of the possible reasons for returning a dry-storage cask to the spent fuel pool. In that memorandum, the Staff stated:

The two basic reasons to return a cask to the spent fuel pool and unload the spent fuel assemblies are either to (1) retrieve the fuel assemblies for further processing or disposal or (2) respond to an event or condition that has potentially degraded the design requirements established for the cask.

The Petitioner claims that the memorandum failed to address two reasons to return a cask to the spent fuel pool: maintenance of the metallic seals and decommissioning of the ISFSI. These are, however, only specific examples of the general reasons given above to unload a cask. Seal maintenance is performed to respond to or prevent a condition that potentially degrades the design requirements associated with maintaining the inert atmosphere; decommissioning of the ISFSI would obviously require retrieving or transporting the fuel assemblies for further processing or disposal.

that cracking of spent fuel rods is not expected as a result of introducing water to the cask during the unloading procedure. Those aspects of the proposed revision to the Prairie Island TSs that potentially related to dry-cask activities were subsequently approved by the NRC Staff in Amendment No. 130 to Facility Operating License No. DPR-42 and Amendment No. 122 to Facility Operating License No. DPR-60.

In support of its claim regarding potential problems with removing fuel assemblies from TN-40 casks, the Petitioner enclosed, as Exhibits C and D to the Petition, letters from personnel at the Idaho National Engineering Laboratory (INEL) regarding problems with removing fuel canisters from a TN-24P cask during testing at INEL. The TN-24P cask is similar in design to the TN-40 cask used at Prairie Island. The problems were addressed in the rulemaking that added Transnuclear Inc.'s TN-24 cask to the list of NRC-certified casks. The subject comment on the proposed rulemaking pertaining to the TN-24 cask and the NRC Staff's response as published in the *Federal Register* (58 Fed. Reg. 51,762) are provided below:

2. *Comment.* One commenter stated that the TN-24 cask is seriously flawed. Test and operation at Idaho showed the TN-24 storage sleeves to be subject to warpage after only a few years of storage. A fuel assembly became stuck in the TN-24 cask while trying to remove it. It could not be removed and it was forced back into the cask.

Response. The NRC discussed this issue with personnel at INEL who worked on the tests of the TN-24 cask and other casks. These individuals said that a canister of consolidated fuel, not a fuel assembly, got stuck in the TN-24 cask. The canister was larger than a fuel assembly and, unlike a fuel assembly, it had many screws and nuts protruding from it. The storage sleeves in the TN-24 Basket did not warp. The individuals suspect that one of the screws or nuts got caught on an interlocking plate in the basket of the TN-24 cask. The Certificate of Compliance does not allow the storage of consolidated fuel in canisters. Additionally, the basket of the TN-24 tested at INEL is slightly different from the one which Transnuclear plans to use in its certified cask.

The license issued for the Prairie Island ISFSI also prohibits the storage of consolidated fuel assemblies and, therefore, the problems with unloading experienced during the testing at INEL are not expected to occur when the Licensee unloads its TN-40 casks.

The Petitioner asserts that additional evidence that dry-storage casks cannot be unloaded is provided by the experiences of the licensee for the ISFSI at the Palisades Nuclear Plant. As discussed in detail in NRC Inspection Report 50-255/96201(NRR) dated September 4, 1997, the NRC Staff has found that the Palisades dry-cask unloading procedure, along with supporting

operating, maintenance, radiation protection, and administrative procedures, contains adequate directions for the safe unloading of VSC-24 storage casks.⁴

Much of the argument pertaining to the inadequacy of the Licensee's unloading procedure that is presented by the Petitioner centers on the lack of an actual example of the unloading of a dry-storage cask at a commercial reactor facility. As discussed in DD-97-18, the NRC Staff's judgment that there is reasonable assurance that the TN-40 casks can be safely unloaded comes from a variety of experiences related to the use and storage of radioactive materials. Among these experiences are the dry-run exercises that were performed to verify key aspects of unloading procedures for the TN-40 cask; related research sponsored by the commercial nuclear industry, the U.S. Department of Energy, and the NRC; actual loading and unloading of transportation casks; loading of storage casks; handling of spent fuel assemblies under various conditions; and performing relevant maintenance and engineering activities associated with reactor facilities.

The NRC Staff has reviewed the information submitted by the Petitioner and has determined that the Licensee could, if necessary, unload a TN-40 cask and has not, therefore, identified a violation of section 72.122(l).

Item 5. Determine That the Licensee Violated 10 C.F.R. § 72.130

The Petitioner requests that the NRC determine that the Licensee violated section 72.130 by using the TN-40 cask and failing to make provisions to successfully accomplish the removal of radioactive waste and contaminated materials at the time the ISFSI is permanently decommissioned. The basis for this assertion is that TN-40 casks cannot be safely unloaded. As discussed in previous sections and as discussed in DD-96-21, the NRC Staff has found that spent nuclear fuel can be safely unloaded from the TN-40 casks, whether such unloading is necessary in response to an event or in support of decommissioning the ISFSI.

In order to support the decommissioning of the Prairie Island ISFSI, the Licensee may need to transfer the spent fuel stored in TN-40 casks to another cask for transfer of the fuel assemblies to another location for storage or disposal. In order to transfer the spent fuel assemblies, the Licensee will need to either return the casks to the spent fuel pool or use a yet-to-be-approved system that transfers fuel assemblies under dry conditions. In the event that the spent fuel pool is used to transfer fuel assemblies, the unloading procedure or a similar procedure would control the return of the fuel from the ISFSI to the spent

⁴The NRC Staff has also found that the subject cask can safely be used for storing spent fuel despite the Licensee's announced plans for unloading the cask after it discovered (from radiographs for a weld in a VSC-24 multiassembly sealed basket) indications of possible defects. The Licensee subsequently announced that it was deferring the unloading of the cask pending the availability of a cask that supports both storage and transport functions.

fuel pool. Given that the Staff has determined that the unloading procedure is adequate to control the unloading of fuel assemblies from a TN-40 cask to the spent fuel pool, the Staff has no reason to (1) find that its use as part of the decommissioning of the ISFSI facility raises unique questions regarding compliance with section 72.130 or (2) otherwise change the conclusion it reached during the licensing of the ISFSI at Prairie Island regarding the viability of decommissioning the facility.

Item 6. Determine That the Licensee Violated 10 C.F.R. § 72.11

The Petitioner requests that the NRC determine that the Licensee violated section 72.11 by failing to provide and include complete and accurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submittals on the subject of cask maintenance and unloading. In support of this contention, the Petitioner references the letter from G. Marcus dated February 25, 1997 (Exhibit A to the Petition), which explained the NRC action plan for dry-cask storage and its item related to oversimplified descriptions of the process for unloading fuel from casks as the reverse of loading casks. In that letter to Mr. Crocker of the Prairie Island Coalition, Dr. Marcus states:

Some SARs do state that unloading is basically the reverse of loading and this statement, in a general sense, is true. However, such statements may tend to oversimplify matters because they do not reflect that the unloading process introduces different conditions and complications compared to the loading process. In the NRC action plan for dry cask storage and related statements made by the NRC staff, including those by Mr. Kugler, the staff was emphasizing that licensees need to identify the conditions and complications that are associated with the unloading process and ensure that unloading procedures address those concerns. The unloading procedure for the dry storage casks at Prairie Island was inspected by the NRC staff and, following minor revisions, was found to provide adequate guidance to control the unloading process. A copy of NRC Inspection Report 50-282/95002; 50-306/95002; 72-10/95002 is provided as Enclosure 2.

The Petitioner asserts that upon receipt of information related to unloading issues, the Licensee has not taken steps to correct its unloading problem and has refused to address these continuing problems.

As stated in DD-97-18, in response to a similar request made by the Prairie Island Indian Community, the safety analysis report (SAR) for the Prairie Island ISFSI and other docketed correspondence do state that a TN-40 cask would be unloaded using a procedure that is basically the reverse of the procedure used to load the cask. Although this statement, in a general sense, is true, the NRC Staff has expressed its concerns that such statements may oversimplify the description of the unloading activity. For this reason, the NRC Staff added an item

related to unloading procedures to its dry-cask-storage action plan to ensure that actual unloading procedures did not reflect such an oversimplified representation. Additional inspections, revised Staff guidance, and communications with the nuclear industry were conducted under the Staff's action plan related to this issue. The Staff inspected the unloading procedures at Prairie Island and found that they provided adequate guidance to control the unloading process.

The Staff's review of the information originally submitted by the Licensee shows that the information pertaining to cask unloading was complete and accurate given the Staff's expectations and the information provided by other licensees in applications submitted in the same time period. It should be noted that material submitted by the Licensee for the ISFSI at Prairie Island includes copies of the loading and unloading procedures and those procedures have been available for public review. Regarding the information given to the NRC pertaining to maintenance of the TN-40 casks, which the Petitioner also claims was incomplete and inaccurate, the NRC Staff acknowledged in its safety evaluation report that maintenance activities were discussed only briefly in the submittals supporting the ISFSI at Prairie Island. The level of information submitted, however, was generally consistent with the level of information in other applications of that same time period and was sufficient to meet the Staff's expectations for the review process. The NRC Staff has not identified a violation of section 72.11 pertaining to the information provided by the Licensee as is claimed by the Petitioner.

Item 7. Determine That the Licensee Violated 10 C.F.R. § 72.12

The Petitioner requests that the NRC determine that the Licensee violated section 72.12 by deliberately and knowingly submitting incomplete and inaccurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submittals on cask maintenance and unloading issues. The Petitioner states that the Licensee has continually insisted that it can unload TN-40 casks and that the Licensee has referenced inapplicable studies to support its position.

As mentioned in the response to the preceding item, the Staff believes that the information submitted by the Licensee is consistent with the information in other applications of that same time period and was sufficient to meet the Staff's expectations for the review process. Given that the NRC Staff has found that the Licensee could, if necessary, unload a cask, the Staff does not agree that this statement when made by the Licensee was deliberately incomplete or contained inaccurate information in any material respect. The NRC Staff has not identified a violation of section 72.12 pertaining to the information provided by the Licensee as is claimed by the Petitioner.

Item 8. Require That the Licensee Pay a Substantial Penalty

The Petitioner requests that the NRC require the Licensee to pay a substantial penalty for each cask loaded in violation of NRC regulations. Given that the Staff has not identified violations of NRC regulations as alleged by the Petitioner, the Staff has no basis to issue a notice of violation and proposed civil penalty.

Item 9. Administer Other Sanctions Deemed Necessary and Appropriate

The Petitioner requests that the NRC administer such other sanctions for the alleged violations of NRC regulations as the NRC deems necessary and appropriate. Given that the Staff has not identified violations of NRC regulations as alleged by the Petitioner, there is no basis for sanctions against the Licensee.

Item 10. Provide Petitioner the Opportunity To Review Procedures

The Petitioner requests that it be given the opportunity to participate in a public review of maintenance, unloading, and decommissioning processes and procedures in question and an opportunity to comment on draft findings after investigation by the NRC.

Regarding the unloading procedure, the Licensee has provided the NRC with the unloading procedure, including Revision 2, dated November 8, 1996, for placement into the public record, and the Petitioner has been supplied with a copy of the procedure. Accordingly, the Petitioner has had the opportunity to review a recent revision of the unloading procedure and may continue to review other documents in the public domain. As previously discussed in this Decision, the NRC Staff has performed various technical reviews and inspections related to the issues raised by the Petitioner. These reviews and inspections have provided the bases of the NRC Staff's findings that the Licensee has complied with the applicable regulatory requirements. Given that no violations or previously unidentified regulatory issues have been raised by the Petitioner, the NRC Staff sees no reason to undertake additional reviews of the maintenance, unloading, and decommissioning processes and procedures or to initiate public hearings.

Regarding the Petitioner's request for an opportunity to comment on draft findings after the requested NRC "investigation," the request is rendered moot by the NRC Staff's determination that additional reviews or "investigations" are unnecessary. In addition, the NRC Staff does not, as a matter of general policy, release draft or predecisional information to its licensees or to the public for review and comment.

Item 11. Order Modification of the Licensee's ISFSI Technical Specifications

The Petitioner requests that the NRC issue an order to modify the TSs for the Prairie Island ISFSI to ensure a demonstrated ability to, in fact, safely maintain, unload, and decommission TN-40 casks.

Although the TSs for the Prairie Island ISFSI require that TN-40 casks be unloaded if certain events or conditions defined in the TSs are satisfied, the TSs do not include specific requirements for the unloading process. Likewise the TSs do not detail maintenance or decommissioning procedures or processes. The content of the TSs for the Prairie Island ISFSI is typical in this respect since neither section 72.44 nor the associated regulatory guidance documents specify that technical specifications should include special requirements for these procedures.⁵ Instead, the functional and operating limits, limiting conditions, administrative controls, and other requirements included in the TSs for the Prairie Island ISFSI are intended to maintain the cask and stored spent fuel assemblies within the limits established for safe operation during storage within the ISFSI and activities such as loading and unloading of the casks. For example, TS 2.3 limits the allowable lifting heights during movement of the cask from the ISFSI and TS 3/4.2 requires a measurement of the boron concentration of the water in the spent fuel pool before water is introduced to the cask during the unloading process.

As the Staff explained in DD-97-18, the absence of specific requirements in the TSs to control the unloading process does not diminish the importance that the NRC Staff places on this activity. Likewise, specific requirements for performing routine maintenance activities and possible activities during decommissioning, although important, are not prescribed in the TSs. The TSs do, however, contain requirements for monitoring the integrity of the metallic seals and actions to be taken in the event that the pressure-monitoring system indicates a potential loss of the inert atmosphere within the cask. The NRC Staff believes that other regulatory requirements offer an equivalent level of protection to the Petitioner's request to include specific requirements in the TSs to control the maintenance and unloading of TN-40 casks and the eventual decommissioning of the ISFSI. The administrative controls in the TSs for the Prairie Island ISFSI require that the associated procedures be prepared, reviewed, and maintained in accordance with the requirements of the Prairie Island Nuclear Generating Plant facility operating licenses and associated TSs. In addition,

⁵Recent NRC Staff guidance pertaining to the appropriate content of technical specifications is provided in NUREG-1536, "Standard Review Plan for Dry Cask Storage Systems," published in January 1997. Similar guidance is provided by NRC Regulatory Guide 3.61, "Standard Format and Content for a Topical Safety Analysis Report for a Spent Fuel Dry Storage Cask," issued in February 1989, and NRC Regulatory Guide 3.48, "Standard Format and Content for the Safety Analysis Report for an Independent Spent Fuel Storage Installation (Dry Storage)," issued in October 1981.

under existing NRC requirements, the Licensee must adequately implement procedures to control loading, maintaining, and unloading of dry-storage casks (*see* 10 C.F.R. §§ 72.122, 72.150, and 72.152). For example, as indicated in the NRC inspection documented in Inspection Report 50-282/95002; 50-306/95002; 72-10/95002(DRP), and the resulting notice of violation to the Licensee, NRC's requirements in Criterion V of Appendix B to Part 50 already require the incorporation of appropriate steps and precautions into the original procedure developed to control unloading of a TN-40 cask. Thus, as demonstrated by the example, no changes to the TSs or the SAR are needed to ensure that enforceable requirements for operating controls and limits are in place to address the unloading of a cask.

Given that the unloading procedure or a similar procedure can be used during maintenance activities for the repair or replacement of seals or during the decommissioning of the Prairie Island ISFSI, no changes to the TSs or the SAR are needed to ensure that enforceable requirements for operating controls and limits are in place to address the unloading of the cask for these specific purposes.

Item 12. If Necessary, Order the Licensee To Build a Facility for Dry Transfer of Spent Fuel Assemblies

The Petitioner requests that the NRC review the Licensee's processes and procedures for maintenance, unloading, and decommissioning, and if the Licensee does not possess a capability to unload casks, order the Licensee to build a "hot shop" for air unloading of casks and transfer of the fuel. Given that the Staff has performed the level of reviews and inspections it feels are warranted and has found that the Licensee could safely unload a TN-40 cask using the spent fuel pool, it is not necessary to order the Licensee to build a facility to support the transfer of fuel assemblies under dry conditions.⁶

IV. CONCLUSION

For the reasons described above, the NRC has determined that no adequate basis exists for granting the Petitioner's request for suspension of Northern States Power Company's license for dry-cask storage of spent nuclear fuel at Prairie Island or for taking the other actions requested by the Petitioner.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c).

⁶ However, as noted in response to Item 5, the Licensee may elect to transfer fuel assemblies under dry conditions if a dry-transfer system is developed and receives appropriate NRC approval.

As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 11th day of February 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 70-7001

U.S. ENRICHMENT CORPORATION
(Paducah, Kentucky)

March 19, 1998

The Commission denies USEC's petition, submitted pursuant to 10 C.F.R. § 76.62(c), for review of the Director's Decision that partially denied USEC's request for an amendment to the Certificate of Compliance for the Paducah Gaseous Diffusion Plant. The Commission rejects all technical bases for the petition asserted by USEC and allows the Director's Decision to become final.

MEMORANDUM AND ORDER

I. INTRODUCTION

On December 16, 1997, the U.S. Nuclear Regulatory Commission published, in the *Federal Register* (62 Fed. Reg. 65,823), notice of amendment and partial denial of amendment application to the Certificate of Compliance GDP-1 for the U.S. Enrichment Corporation (USEC), Paducah Gaseous Diffusion Plant (referred to hereafter as Paducah or PGDP), located in Paducah, Kentucky. USEC, or any person whose interest may be affected and who had submitted written comments in response to the *Federal Register* (62 Fed. Reg. 41,101) notice that noticed the amendment request was eligible to file a petition to the Commission requesting review of the Director's Decision within 15 days after publication of the Director's Decision. 10 C.F.R. § 76.62(c).

NRC received one petition for review of the Director's Decision. This Memorandum and Order addresses the petition for review and the issues raised in the petition. For reasons set forth below, the petition is denied in its entirety.

II. PETITION FOR REVIEW

By letter dated December 30, 1997, USEC, holder of Certificate of Compliance for the PGDP (GDP-1), petitioned for Commission review of the Director's Decision. The petition was docketed at NRC on December 30, 1997.

III. BACKGROUND

The September 15, 1995 application from USEC for certification of the PGDP contained an analysis of the potential impacts of earthquakes that was based on a 1985 U.S. Department of Energy (DOE) Safety Analysis Report (SAR). DOE was in the process of conducting new studies and analyses to update the 1985 SAR at the time the application was submitted to the NRC. DOE concluded that two (Buildings C-331 and C-335) of four large processing buildings could suffer structural failure at relatively low seismic demand, beginning at 0.05g peak ground acceleration (PGA). DOE concluded that damage could include roof and floor collapse, and concomitant equipment damage. The principal failure mechanism identified was seismic displacement, beyond tolerance, of sliding beam roof and floor sections supported by rocker arms. DOE considered the potential for large uranium hexafluoride releases coincident with a loss of structural confinement to be an unreviewed safety question and outside the existing safety basis for plant authorization. (DOE Letter to USEC, September 22, 1995.) To address these concerns, DOE issued a "Directive for Information" to USEC on September 22, 1995. Because DOE considered USEC's initial response to be unacceptable (DOE Letter to USEC, October 31, 1995), DOE issued a "Directive for Corrective Action and Compensatory Actions for Operations in Buildings C-331 and C-335" to USEC on October 31, 1995. This second directive required USEC to "develop and initiate action(s) to ensure that the response of the rocker supported floor sections of each building can withstand the expected seismic demand. . . ." DOE subsequently performed the seismic analyses and conceptual design of the modifications to the buildings, and is funding activities associated with the seismic upgrades, including installation of the proposed modifications. (USEC Letter to NRC, June 30, 1997.)

The Commission was informed by the Staff in SECY 96-054 and during the March 22, 1996 Commission briefing concerning the status of certification,

that DOE had identified structural weaknesses in certain buildings at Paducah and that USEC would implement compensatory measures while carrying out plant structural modifications to raise the seismic capacity of these buildings (hereinafter referred to as “structural modifications”). The Commission was informed that the Staff intended to certify on the seismic issue, based on: (1) a firm commitment to upgrade to withstand a postulated 250-year earthquake event; (2) adequate justification for continued operation; (3) continuation of compensatory measures; and (4) reevaluation during future certification reviews. In SECY 96-180 and in a Commission meeting held on August 28, 1996, the Commission was informed that the structural modifications were scheduled to be completed by late 1997 and that interim compensatory measures would continue until these structural modifications are installed. The Commission was also informed about potential weaknesses in the seismic hazard analysis. The seismic hazard analysis performed by DOE to support certification did not use the most recent seismic data in the analysis which, if included, could make the resulting evaluation-basis earthquake greater than that used by DOE. Therefore, a seismic hazard analysis using updated data was required to be performed. NRC specified that if the new seismic hazard analysis reflected greater hazards than DOE’s current analysis, the need for further plant modifications would be subject to backfit evaluation. Because this issue would not be resolved by the time of initial certification, the issue was required to be addressed in the Compliance Plan. DOE agreed and prepared Compliance Plan Issue 36, “Seismic Capability of Buildings C-331 and C-335.” USEC submitted Compliance Plan Issue 36 in a letter dated July 18, 1996. The Compliance Plan called for the structural modifications to be completed by December 31, 1997, and continuation of interim, compensatory measures. The Compliance Plan also required USEC to submit the final design plans to NRC. The Compliance Plan included a commitment for USEC to perform a new seismic hazard analysis by December 1, 1997.

By letter dated April 23, 1997, USEC submitted an amendment request to obtain NRC approval of three Unreviewed Safety Questions (USQs) associated with the seismic upgrades and to extend the completion date until 15 months after approval of the amendment request. On July 31, 1997, USEC revised its amendment request to further delay completion of the seismic modifications until 18 months after: (1) USEC submits, and NRC approves, the final design of the structural modifications; (2) NRC completes its review of the three USQs; (3) NRC completes its review of the seismic analysis included in the upgraded Safety Analysis Report (SARUP); and (4) NRC approves an updated seismic hazard analysis. In the July submittal, USEC also requested NRC approval of: (1) the resolution of three USQs it had identified; (2) revising the Compliance Plan to reference only sheltering concerning emergency preparedness; (3) revising the Compliance Plan to reflect that the final design of the modifications

is complete; and (4) revising the Compliance Plan to reference a report prepared by Lawrence Livermore National Laboratory (LLNL) entitled “Paducah Gaseous Diffusion Plant Seismic Risk Study (UCRL-ID-126275),” hereinafter referred to as the LLNL report, or the LLNL study. DOE had contracted with LLNL to produce this study of the PGDP seismic risk to verify the justification for continued operation (JCO) on the Compliance Plan seismic issue.

NRC and DOE signed a Memorandum of Understanding (MOU), which was published in the *Federal Register* on November 5, 1997 (62 Fed. Reg. 59,910). The NRC/DOE MOU requires that all modifications to the Compliance Plan be approved by DOE before submitting any such changes to NRC. By letter dated October 23, 1997, USEC was informed of the need to obtain DOE approval before submitting Compliance Plan changes. However, in that letter, NRC stated that, for all pending Compliance Plan amendments, it would coordinate with DOE in lieu of requiring their resubmittal, and delaying consideration of such pending amendments, while USEC sought DOE approval. In accordance with this process, NRC discussed the proposed Compliance Plan changes that resulted from the NRC Staff’s review of USEC’s amendment request with DOE. DOE supported NRC’s position on the changes (NRC Letter to USEC, December 8, 1997) and indicated that it believes that the modifications should be made without further delay. DOE also described the limitations of the LLNL report submitted by USEC.

The Director’s Decision on the amendment appeared in the *Federal Register* on December 16, 1997 (62 Fed. Reg. 65,823). The decision announced the intention to approve in part, and deny in part, USEC’s request. The decision approved resolution of the USQs; approved revising the Compliance Plan to reference only sheltering; approved revising the Compliance Plan to reflect that the final design of the modifications is complete; denied revising the Compliance Plan to reference a report prepared by LLNL; and denied delaying completion of the structural modifications until 18 months after the Staff completes reviews of all other seismic material requested by USEC. Instead, the Staff established a completion date for the structural modifications of June 30, 1999 (approximately 18 months after issuance of the Director’s Decision).

On December 30, 1997, USEC submitted to the Commission a “Petition Requesting Commission Review of Director’s Decision Denying in Part USEC Certificate Amendment Request Regarding Paducah Plant Seismic Upgrades.” In the petition, USEC requested that the Commission review only that portion of the Director’s Decision that denied parts of USEC’s July 31, 1997 application for amendment to its Certificate of Compliance for the PGDP. Specifically, USEC requested that the Commission extend the deadline for completion of the structural modifications until 18 months after NRC has completed the reviews and approvals described in USEC’s July 31, 1997 certificate amendment application.

IV. ANALYSIS AND RESPONSE TO ISSUES RAISED IN THE USEC PETITION

The USEC petition enumerated five supporting reasons for submitting the petition, which we will refer to as USEC Issues 1 through 5. In USEC Issues 2, 3, 4, and 5, the Petitioner requests that NRC complete a review of seismic information submitted by USEC before installation of the modifications is begun. The Petitioner requests NRC review of four documents. The effects of a delay in installing the structural modifications, which would result from reviewing all four documents, are addressed in USEC Issue 6, separately from other issue-specific information. USEC Issues 1 through 6 are addressed below.

A. USEC Issue 1: The Structural Modifications Were Originally Ordered by DOE Based on Incomplete Technical Information

The Petitioner argues that the DOE issued a directive to install the modifications based on work being performed as part of its site-wide SARUP effort before it had performed the SARUP consequence analysis to determine what the impact of such a structural failure might be on workers or the offsite public. The Petitioner further argues that DOE had not yet completed all its planned SARUP structural analyses to fully assess the seismic capacity of the other buildings at the PGDP site before ordering the modifications. The Petitioner believes that, although the result of a seismic hazard analysis, required by NRC, indicates that consequences in excess of the existing SAR are possible, they do not justify installation of the structural modifications being planned based on the recently completed seismic risk analysis conducted by LLNL.

The fact that DOE had not completed all of its planned SARUP structural analyses to fully assess the seismic capacity of the other buildings at PGDP, before ordering the modifications, has no bearing on the currently planned modifications. DOE had completed the seismic structural analyses for the buildings in question — C-331 and C-335. The DOE review of the SARUP information indicated that the two buildings would begin to fail at an 0.05g earthquake (approximately 80-year return period) instead of failing at an 0.15g earthquake (with a return period of approximately 250 years),¹ as assumed in the current SAR. Therefore, DOE issued a directive to USEC that ordered USEC to modify the buildings. DOE has since completed the SAR upgrade analyses and DOE's belief that these modifications are needed remains unchanged (DOE Letter to NRC, January 5, 1998). It is possible that the NRC review of the

¹The annual probability of occurrence of an 80-year-return-period earthquake is 1.25×10^{-2} ; the annual probability of occurrence of a 250-year-return-period earthquake is 4×10^{-3} .

SARUP could result in the requirement for modifications to other buildings and equipment at PGDP. However, the need for additional structural modifications to other buildings does not alter the need for the structural modifications to Buildings C-331 and C-335.

USEC also argues that the LLNL report provides justification for not installing the structural modifications at all. In a January 5, 1998 letter to NRC, DOE documented that it contracted with LLNL to perform a review of the PGDP seismic analysis to verify the content of the JCO that was required for the Compliance Plan seismic issue. The review was intended as a scoping analysis to provide a general overall risk perspective and was performed to ensure that PGDP could continue to operate in a safe manner for a limited period of time until the appropriate modifications could be performed. In the letter, DOE states that the LLNL review was never intended to support continued operation for an indefinite period of time without the proposed modifications, and the methodology and rigor used in the study were inconsistent with this intention. DOE reviewed the report and identified four limitations. We conclude that the LLNL report contains limitations and does not support eliminating installation of the modifications. The LLNL report and its limitations are further discussed in Section C, USEC Issue 3.

We find that the Petitioner has not substantiated that DOE's technical basis for ordering the structural modifications was based on incomplete information. Therefore, we reject this basis for challenging the Director's Decision.

B. USEC Issue 2: The Updated Seismic Risk Analysis That Was Required by NRC Indicates a Higher Evaluation Basis Earthquake (EBE) Than the Modifications Are Based Upon

The Petitioner is concerned that NRC may require a level of seismic risk management to be applied to the C-331 and C-335 buildings that will not be met by the planned structural modifications. The planned structural modifications were designed to meet an earthquake with a peak ground acceleration of 0.15g, which, at the time of certification, was thought to have a recurrence interval of approximately 250 years. The results of a recently completed USEC seismic hazard study for the Paducah site indicate that a 250-year-recurrence-period earthquake has a peak ground acceleration of 0.165g. The Petitioner believes that any modifications should await an NRC determination of a final earthquake acceleration value because the cost of backfitting more stringent requirements to these modifications after they are begun may significantly exceed the cost of incorporating them into the initial design and could force substantial rework.

This issue was already addressed during the certification process. One of NRC's concerns during certification was that DOE had not used the most recent seismic data to conduct the seismic hazard analysis (DOE used the 1985

data — more recent information after 1985 was not considered). NRC believed that the actual seismic event might be greater than the 0.15g used by DOE. For this reason, it insisted that the Compliance Plan include a USEC commitment to perform a new seismic hazard analysis by December 1, 1997. During USEC/DOE discussions of the draft Compliance Plan, USEC suggested delaying the modifications until after the new seismic hazard analysis was complete. Both DOE and NRC found this approach to be unacceptable. NRC agreed that if the new seismic hazard analysis reflected greater hazards than DOE's current analysis, the need for further plant modifications would be subject to backfit evaluation.

The effect of the delay in installing the structural modifications caused by the additional time required to review the seismic hazard study, in conjunction with all the other seismic documents requested by USEC, is discussed in USEC Issue 6.

Petitioner's concern that the cost of backfitting to a higher earthquake acceleration value, after the current modifications are begun, may exceed the cost of incorporating them into the initial design, is without merit since any modifications necessary to meet an incremental increase in earthquake level, above the compliance level of 0.15g for which the modifications are designed, will be subject to backfit evaluation, in accordance with NRC regulations, where cost — including cost of any rework — will be a factor. Petitioner fears a threat that has yet to materialize, and may never do so. If, in the future, Staff imposes a requirement for additional seismic upgrade work which USEC seeks to contest, USEC will have an opportunity to do so at that time. Therefore, we reject this issue as a basis for challenging the Director's Decision.

C. USEC Issue 3: A Recent Study Shows Actual Health Risks from a Postulated Seismic Event To Be Low

The Petitioner believes that the LLNL report that it has submitted calls into question the justification for the planned structural modifications and therefore, before the modifications are undertaken, NRC should consider the results of the report and determine whether the expenditure of funds to undertake the modifications is appropriate or necessary. Elsewhere in the petition, the Petitioner states "that it would be compelled to make plant modifications, incurring competing risks identified in the USQs, even though the modifications may be determined to be inadequate or perhaps even unnecessary."²

²Note that the Compliance Evaluation Report (NRC Letter to USEC, December 8, 1997) concluded that the risks associated with the USQs would be minimized and acceptable as a result of preventive and mitigative measures that USEC would implement.

DOE commissioned the LLNL study to verify the justification for continued operation (JCO) in Compliance Plan Issue 36. Compliance Plan Issue 36 required that the modifications be installed by December 31, 1997. The LLNL report was provided to DOE on March 17, 1997, after NRC assumed regulatory oversight. The LLNL report was submitted to NRC, for information, on June 30, 1997 — USEC did not, however, request NRC to review the report. We also note that USEC has not requested the NRC Staff to approve elimination of the requirement for the seismic upgrade modifications.

The LLNL report concludes, as stated in USEC's petition, that "even though the probability of earthquake damage to Buildings C-331 and C-335 is relatively high in their current condition, the health risk is low." However, the report further concludes that

[t]he risk model includes a very approximate model of the on-site population exposure to UF_6 and therefore, the model is not an accurate predictor of the total risk to the worker. For example, the risk model only includes the risk due to UF_6 release, but the workers in buildings are also exposed to the risks from falling structures, which have not been considered.

The report also concludes,

[i]f a severe earthquake were to occur, some on-site fatalities are likely because of the concentration of people. The analysis does not indicate this result because it does not model the high concentrations of toxic materials near the point of release, nor is there any consideration given to "normal" earthquake hazards, such as falling debris.

In a January 5, 1998 letter to NRC, DOE documented that it contracted with LLNL to perform a review of the PGDP seismic analysis to verify the content of the JCO that was required for the Compliance Plan seismic issue. The review was intended as a scoping analysis to provide a general overall risk perspective and was performed to ensure that PGDP could continue to operate in a safe manner for a limited period of time until the appropriate modifications could be performed. In the letter, DOE states that the LLNL review was never intended to support continued operation for an indefinite period of time without the proposed modifications, and the methodology and rigor used in the study were inconsistent with this intention. DOE reviewed the report and identified four limitations in the report as follows: (1) The review did not include the full matrix of contributors to risk from all the potential failure modes and effects — only those considered more significant; (2) the review approximated the sliding beam failure with a modified S-shaped typical building fragility curve instead of the actual PGDP Building C-331 and C-335 sliding beam fragility curve, which exhibits abrupt failure; (3) the review did not address the risk to all onsite workers; and (4) the review did not address long-term, ground-hugging releases. (DOE Letter to NRC, January 5, 1998.) DOE concluded, in summary, that the LLNL review

was prepared for a specific purpose and would require substantial additional effort to resolve regulatory questions and concerns if applied for uses other than to support a JCO for a short period of time. It should be noted that when the LLNL study was prepared, completion of the modifications was scheduled for December 31, 1997. DOE further concluded that it does not consider the elimination of the proposed seismic upgrades for PGDP as a viable option and that it pursued an accelerated schedule for completion of the modifications when it had regulatory authority over PGDP.

DOE, which requested this report, believes that the LLNL report contains limitations that would prevent its use other than for its intended purpose, to support a JCO for a short period of time. Therefore, we find the report cannot be used to support elimination of the modifications altogether. The seismic modifications needed to meet a 0.15g earthquake are necessary to satisfy the current approved Compliance Plan and are not subject to backfit evaluation. Regarding the Petitioner's concern about the expenditure of funds, modifications needed to resist an earthquake above 0.15g are subject to backfit evaluation where cost — including the cost of any rework — is a consideration. Further, the cost of any modifications necessary to meet a 0.15g earthquake is fully reimbursable by DOE (USEC Letter to NRC, June 30, 1997) — and DOE has indicated, in its January 5 letter, that the currently planned structural modifications should be installed.³

We find that the limitations in the scope and content of the LLNL report as discussed earlier prevent reliance on this report as a basis for reconsideration of the denial of portions of the amendment to the Compliance Plan. Therefore, we reject this basis for challenging the Director's Decision.

D. USEC Issue 4: NRC Has Not Yet Reviewed or Approved Final Design Information Provided by USEC

The Petitioner believes that final design information submitted by the Petitioner should be reviewed by NRC before the modifications are installed. The Petitioner believes that there is a significant risk that NRC could later require expensive changes.

USEC correctly states, in its petition, that NRC has not yet reviewed or approved final design information provided by USEC. The Compliance Plan, as noted by USEC in its petition, does not require the Staff to review the final design information before requiring USEC to proceed with actual modifications.

³In accordance with a Memorandum of Understanding (MOU) (62 Fed. Reg. 59,910) with DOE, in mid-November 1997, the Staff discussed with DOE the proposed Compliance Plan changes from USEC's amendment request. DOE supported NRC's position on the changes, as reflected in the Staff's Compliance Evaluation Report (CER) on USEC's amendment request.

NRC, in making an informed safety decision, relies extensively on the technical competence and integrity of licensees and certificate holders. NRC, in issuing certificates to USEC, has determined that USEC, as the organization responsible for safety at the gaseous diffusion facilities, is competent and has the technical expertise to operate and maintain the facility. Although NRC did not review the final design in detail, DOE performed the initial conceptual design of the structural modifications, before NRC assumed regulatory oversight of the GDPs and is funding USEC's activities associated with the seismic modifications (USEC Letter dated June 30, 1997).

NRC did require USEC, the certificate holder, to provide the proposed structural modification design information, thus allowing the Staff to make a detailed review if the Staff's initial overview indicated it was warranted. NRC selectively reviews submittals to allow Staff to continue to assess the status of safety at a facility. NRC would perform a detailed computational validation for the type of seismic calculations used to implement modifications such as those proposed by USEC, if it were determined that a detailed review were necessary because of readily evident or perceived inadequacies or if the Staff concludes that the review is necessary to support its safety decision. NRC, based on a limited overview of the proposed modification, has not raised any concerns with respect to the final design information supplied by USEC. Consequently, a detailed prior NRC review of the proposed structural modification was not performed, and is not planned.

Petitioner's request for NRC to review final design information before the modifications are installed because of the risk that NRC may later require expensive changes is without merit. USEC, as the certificate holder, bears the responsibility for the accuracy of the modifications and, if the modifications contain errors, USEC will be required to correct any errors, regardless of when they are discovered. If the upgraded seismic hazard analysis is eventually found to support an increase above 0.15g and the current modifications are found to be insufficient to resist an earthquake greater than 0.15g, then any additional modifications needed to increase the resistance from 0.15g to the higher value will be subject to backfit evaluation (*see* Section B, USEC Issue 2). Therefore, we reject this basis for challenging the Director's Decision.

E. USEC Issue 5: The NRC Has Not Yet Reviewed PGDP Building and Equipment Seismic Capacity Information Submitted by USEC as Part of the Required SARUP Submittal

The Petitioner believes that the SARUP information submitted to NRC in accordance with the requirements of the Compliance Plan should be reviewed by NRC before any seismic modifications proceed. According to USEC, the SARUP information indicates that areas of two other buildings (i.e., two

product withdrawal buildings, Buildings C-310 and C-315) are also susceptible to seismic-induced damage. The Petitioner argues that the SARUP information shows that the planned modifications are not, by themselves, effective in reducing the seismic risk at PGDP since the C-331 and C-335 failures do not dominate seismic risk at the site. The Petitioner asserts that the SAR analysis shows that only a modest risk reduction would be achievable by a comprehensive set of modifications to harden the plant to resist an EBE. The Petitioner further states that the LLNL report demonstrates that even onsite consequences of a seismic event constitute a low seismic risk.

It is possible that the Staff's review of the SARUP could result in the requirement for modifications to other buildings and equipment; however, this has no bearing on the currently planned modifications. Any requirement for new modifications to other buildings that may result from the Staff's review of the SARUP would not change the need for the currently planned structural modifications to Buildings C-331 and C-335. Furthermore, Petitioner's assertion that the SARUP analysis demonstrates that the structural modifications in Buildings C-331 and C-335 would not be effective in reducing seismic risk at PGDP, since the C-331 and C-335 failures do not dominate risk, ignores the fact that the SARUP analysis assumes that the seismic upgrades to C-331 and C-335 have already been completed. As stated above, the presence of greater risks from other sources would not obviate the need for the already planned upgrades. NRC is reviewing the SARUP analysis and will take actions, as appropriate. Regarding the Petitioner's reliance on the LLNL report, we find that the limitations in the scope and content of the LLNL report prevent reliance on this report (*see* Section C, USEC Issue 3).

We find that Petitioner's request that the Staff review the SARUP information before installation of the modifications, is without merit. There is no linkage between the currently planned modifications and any other future modifications to other buildings. We also find that the limitations in the scope and content of the LLNL report as discussed earlier prevent reliance on this report as a basis for reconsideration of the denial of portions of the amendment to the Compliance Plan. Therefore, we reject this basis for challenging the Director's Decision.

F. USEC Issue 6: Public Health and Safety Will Be Protected During the Requested Delay

The Petitioner believes that the actual risk of harm is low, based on the LLNL report. Further, the Petitioner believes that, since NRC approved an 18-month extension to complete installation of the modifications in its CER, an additional 3- to 4-month delay (Petitioner estimate) for the Staff to review the information requested by the Petitioner is acceptable, based on the current JCO.

According to DOE, the LLNL review

was intended as a scoping analysis to provide a general overall risk perspective and was performed to ensure that PGDP could continue to operate in a safe manner for a limited period of time until the appropriate modifications could be performed. The LLNL review was never intended to support continued operation for an indefinite period of time without the proposed modifications. . . .

(See Section C, USEC Issue 3 and DOE Letter dated January 5, 1998.) At the time the LLNL review was being performed, it was expected that the modifications would be completed by December 31, 1997, according to the commitment date in the Compliance Plan.

The currently planned modifications, as designed, will substantially improve the seismic resistance of the buildings above the current level of 0.05g, substantially decreasing the risk to the health and safety of the workers, and could begin to be installed immediately. In addressing each of the Petitioner's issues above, we have discussed why the reviews requested by the Petitioner are not needed prior to beginning the structural modifications.

Moreover, the Petitioner's estimate of delay is inaccurate. The delay in completing installation of the modifications resulting from having the Staff complete the reviews requested by USEC in the amendment request (i.e., USEC's final design of the structural modifications, seismic analyses in USEC's SARUP, and the seismic hazard analysis submitted by USEC on December 1, 1997) could range from at least several months, if the modifications were found to be acceptable, to several years, if the Staff concludes that the modifications are not completely accurate, either because of USEC design errors or because a higher earthquake level is appropriate (encompasses the time while new modifications are designed by USEC, reviewed and approved by NRC, and then fabricated and installed by USEC). NRC believes that the risk associated with operating and working in the buildings, in their current condition, warrants beginning the structural modifications without further delay.

The Petitioner's characterization that NRC approved an 18-month extension in the absence of structural modifications is inaccurate. The Staff approved an 18-month extension to complete the modifications, with the knowledge that the structural resistance of the buildings would gradually improve, over the 18 months, as the modifications are installed.

Petitioner's argument that public health and safety will be protected during the requested delay has not been substantiated. Therefore, we reject this basis for challenging the Director's Decision.

In summary, having addressed the individual arguments of USEC in detail above, the Commission finds that USEC has offered no sustainable basis for its request for review of the Director's Decision. The Commission finds that the interest of protecting public and worker health and safety at Paducah dictates that the seismic modifications required by the Compliance Plan be implemented

without delay as stated in the Director's Decision published in the *Federal Register* on December 16, 1997.

For the foregoing reasons:

The petition for review, dated December 30, 1997, from the United States Enrichment Corporation, of Bethesda, Maryland, is denied in its entirety.

It is so ORDERED.

For the Commission⁴

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of March 1998.

⁴ Commissioner Diaz was not available for the affirmation of this Order. Had he been present, he would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-443
(License No. NPF-86)

NORTH ATLANTIC ENERGY SERVICE
CORPORATION
(Seabrook Station, Unit 1)

March 17, 1998

The Director of the Office of Nuclear Reactor Regulation denied a petition filed by The Seacoast Anti-Pollution League. The petition requested that the NRC: (1) suspend the operating license for Seabrook Station until such time as a thorough root-cause analysis of the reasons underlying the development of leaks in piping of the "B" train of the residual heat removal (RHR) system is conducted; (2) review weld documentation and inspection documentation in the leakage area; (3) review the qualification of the piping involved; (4) review the plant's quality assurance procedures for welds and piping; (5) address past allegations of improper welding and installation of substandard piping at Seabrook Station in its review and relate the alleged piping and weld deficiencies to other plant systems; and (6) delay the restart of Seabrook Station following repairs to the RHR piping system, pending completion of all requested actions. The Director concluded that no evidence was found of improper welding practices or substandard piping that contributed to pipe leakage or that would result in generic implications to other plant systems and that would require suspension of Seabrook's operating license.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On December 18, 1997, Ms. Jane Doughty submitted a petition to the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC) on behalf of The Seacoast Anti-Pollution League requesting that the operating license for Seabrook Station be suspended until such time as a thorough root-cause analysis of the reasons underlying the development of leaks in piping of the "B" train of the residual heat removal (RHR) system is conducted. The leakage was reported by North Atlantic Energy Service Corporation, the Licensee for Seabrook Station, on December 5, 1997.

The petition requested that the restart of the Seabrook Station following repairs to the RHR system piping be delayed until all such actions requested by the petition are taken. On January 15, 1998, the NRC informed the Petitioner in an acknowledgment letter that on the basis of the Licensee's preliminary analysis of the cause of the pipe leakage, the NRC Staff found no reason to prevent the plant from restarting. The acknowledgment letter further informed the Petitioner that her petition had been referred to the Office of Nuclear Reactor Regulation pursuant to 10 C.F.R. § 2.206 for preparation of a Director's Decision and that action would be taken within a reasonable time regarding the specific concerns raised in the petition.

II. DISCUSSION

The petition requests, in part,

that the operating license for the Seabrook Station Nuclear Power Plant [Seabrook Station] be suspended until such time as a thorough root cause analysis of the reasons underlying the development of leaks . . . in piping in the "B" train of the Residual Heat Removal (RHR) system is conducted, including but not limited to a review of documentation associated with welds in the area of the leakage and their associated inspection documentation, a review of the qualification of the piping involved, and a review of the procedures for ongoing assurance of weld and piping quality at the plant.

The petition asserts that there have been past allegations of improper welding practices and documentation, and installation of substandard piping at Seabrook Station and requests that the investigations of the RHR system pipe leakage include findings related to these past allegations and the implications of this incident for other plant systems. Each of these concerns is addressed below.

A. Root-Cause Analysis

The Licensee has concluded that the cause of the RHR piping leak was chloride-induced transgranular stress-corrosion cracking initiated from the outside diameter of the pipe. The stress-corrosion cracking was the result of repeated wettings and dryings of a protective covering attached to the pipe with red duct tape during construction of the facility. The covering was installed to prevent other welding activities from damaging the pipe after it was installed and should have been removed prior to placing the RHR system in service. After being wetted the protective covering and tape leached chlorides, allowing the chlorides to concentrate on the outer surface of the pipe over time. The chlorides provided an agent to initiate stress-corrosion cracking of the stainless steel pipe material. The Licensee has conducted an inspection of accessible areas both inside and outside containment for similar instances of unapproved materials being attached to stainless steel piping and none were found.

The NRC Staff has reviewed the Licensee's conclusions, including observations of the failed pipe section and a review of the relevant metallurgical and chemistry reports. The NRC Staff found that the metallurgical and chemistry reports provide an adequate basis for the Licensee's conclusion that the leaks were the result of stress-corrosion cracking initiated from the outside diameter of the pipe that progressed through the pipe wall to the inside surface. The NRC Staff's findings are documented in Inspection Report 50-443/97-08.

B. Review of Weld Documentation

The Licensee conducted a review of the original radiographs of the affected welds and found no anomalies in the weld or the base metal. This finding indicates that the cause of the leakage was the result of service-induced conditions and not a weld or piping defect originating from the original construction.

The NRC Staff's review of the radiographs confirmed that there were no adverse construction weld quality problems, such as cracks, porosity, or weld slag shown on the pipe weld radiographs in the vicinity of the leaks or on the similar welds on the "A" train of the RHR system. No defective welds were found. The NRC Staff's findings are documented in Inspection Report 50-443/97-08.

C. Review of Pipe Qualification

The Licensee reviewed the original material test reports and purchase specification documentation for the affected piping sections. Chemical analysis of the removed piping sections confirmed that the material met the specification for SA312 Type 304 stainless steel pipe.

The NRC Staff's review of the chemistry analysis and photomicrographs showed the pipe material to be Type 304 stainless steel. The NRC Staff's findings are documented in Inspection Report 50-443/97-08.

D. Review of the Procedures for Ongoing Assurance of Weld and Pipe Quality

In conjunction with the most recent refueling outage at Seabrook Station, the NRC Staff conducted a review of the Licensee's American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code) section XI inservice inspection program plan for ensuring structural and leaktight integrity of systems important to safety. The NRC inspector found the implementation of all elements of the program to be on schedule and in accordance with the rules of section XI of the ASME Code.

The NRC inspector observed and/or reviewed the results of inservice inspections conducted by the Licensee on plant equipment, including several piping welds. The NRC inspector found that the inspections were performed in accordance with the rules of section XI of the ASME Code and NRC regulations. The NRC Staff's findings are documented in Inspection Report 50-443/97-03.

E. Review of Past Allegations of Improper Welding Practices

On March 27, 1990, the NRC's Executive Director for Operations established an independent review team to conduct an assessment of the adequacy of the construction welding and nondestructive examination (NDE) practices at Seabrook Station. The team's findings are documented in NUREG-1425, "Welding and Nondestructive Examination Issues at Seabrook Nuclear Station." The independent review team concluded that the pipe welding and NDE programs were generally consistent with applicable codes and NRC requirements and resulted in technically acceptable pipe welds.

In investigating the leaks in the "B" train of the RHR system reported on December 5, 1997, the NRC Staff did not identify any factors that would provide a basis for disagreeing with the Licensee's conclusion that the cause of the leakage was the result of service-induced conditions and not a weld or piping defect originating from the original construction. Likewise, the investigation of this issue did not provide any information that would question the validity of NUREG-1425. Therefore, no further action by the NRC Staff is warranted with respect to the past allegations of improper welding practices and substandard quality piping in response to the Petitioner's request.

F. Implications for Other Plant Systems

The Licensee has concluded that the cause of the leakage in the “B” train of the RHR system reported on December 5, 1997, was the result of a service-induced condition and not a defect originating from the original construction. The NRC Staff has reviewed the Licensee’s activities related to the root-cause analysis and subsequent repair in response to the RHR system pipe leakage. The NRC Staff found no evidence of improper welding practices or substandard piping that contributed to the RHR system pipe leakage and that would result in generic implications to other plant systems.

III. CONCLUSION

The NRC Staff has reviewed the information submitted by the Petitioner, and the Petitioner’s request to suspend the operating license of the Seabrook Station is denied. As described above, the NRC Staff has found that the cause of the leaks in the piping in the “B” train of the RHR system was the result of service-induced degradation. There were no deficiencies identified in the fabrication of the original piping or welds that would have generic implications for other plant systems and that would require the operating license of the facility to be suspended.

As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission’s review. This Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 17th day of March 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 70-3070-ML

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

April 3, 1998

The Commission defers to and affirms the Board's finding in LBP-96-25, 44 NRC 331 (1996), that the proposed facility is unlikely to have a significant effect upon market prices for enrichment services, but also directed the Board not to give excessive weight to the price-effects finding, given the uncertainties of the future uranium enrichment market. The Commission further directed that the Board, in performing its ultimate cost-benefit balancing under NEPA, consider not only the facility's effects on market prices, but also the other benefits of the facility that are cited in the FEIS. The Commission affirms the Board's holding that the FEIS "no-action" section should be revised. Lastly, the Commission reverses the Board's holding that the FEIS not include any discussion of socioeconomic or "secondary" benefits, and instead holds that the NEPA cost-benefit analysis appropriately may consider and balance both negative and positive socioeconomic effects.

The Commission also reverses in part and affirms in part the Atomic Safety and Licensing Board's Final Initial Decision, LBP-97-8, 45 NRC 367 (1997), ruling on environmental justice contentions. The Commission reverses the Board's requirement for a further investigation into racial discrimination in siting, and affirms the Board's requirement for further analysis of the disparate impacts on two impoverished African-American communities.

NEPA: ENVIRONMENTAL IMPACT STATEMENT

The principal goals of an EIS are twofold: to compel agencies to take a “hard look” at the environmental consequences of a proposed project, and to permit the public a role in the agency’s decision-making process. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). The EIS is intended to foster both informed decision-making and informed public participation, and thus ensure that the agency does not act upon incomplete information. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

NEPA: COST-BENEFIT ANALYSIS

Although the statute itself does not mandate a cost-benefit analysis, NEPA is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technological, or other public benefits of a proposal. *See, e.g., Idaho By and Through Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994); *Calvert Cliffs’ Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). The EIS need not, however, always contain a formal or mathematical cost-benefit analysis. *See, e.g., Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974), *cert. denied*, 422 U.S. 1049 (1975). *See also* Council on Environmental Quality (CEQ) Regulations, 40 C.F.R. § 1502.23.

NEPA: COST-BENEFIT ANALYSIS

NRC regulations direct the Staff to consider and weigh the environmental, technological, and other costs and benefits of a proposed action and its alternatives, and, to the “fullest extent practicable, quantify the various factors considered.” 10 C.F.R. § 51.71(d). If important factors cannot be quantified, they may be discussed qualitatively. *Id.*

NEPA: COST-BENEFIT ANALYSIS

Misleading information on the economic benefits of a project could skew an agency’s overall assessment of a project’s costs and benefits, and potentially result in approval of a project that otherwise would not have been approved because of its adverse environmental effects. *See, e.g., Hughes River Watershed Conservancy v. Glickman*, 81 F.3d at 446.

NEPA: COST-BENEFIT ANALYSIS

In assessing how economic benefits are portrayed, a key consideration of several courts has been whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of the project's adverse environmental effects. *Id.* at 466 (citing *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980)).

NEPA: RECORD OF DECISION

In NRC licensing adjudications, it is the licensing board that compiles the final environmental "record of decision," balances a proposed facility's benefits against its costs, and ultimately decides whether to license the facility. The adjudicatory record and board decision, and any Commission appellate decision, become, in effect, part of the FEIS. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985).

NEPA: ENVIRONMENTAL IMPACT STATEMENT (NEED)

To assist the NEPA cost-benefit analysis, the NRC ordinarily examines the need a facility will meet and the benefits it will create. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 346-47 n.5 (1996) (and cases cited therein).

COMMISSION APPELLATE REVIEW: FACTUAL FINDINGS

Although the Commission has the authority to reject or modify a licensing board's factual findings (*see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403-05 (1976)), it will not do so lightly (*see Catawba*, 4 NRC at 403).

NEPA: NO-ACTION ALTERNATIVE

Under NEPA, the FEIS must include a statement on the alternatives to the proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii). Generally, this includes a discussion of the agency alternative of "no action" (*see* 40 C.F.R. § 1502.14(d)), which is most easily viewed as maintaining the status quo. *Association of Public Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158, 1188 (9th Cir. 1997).

NEPA: NO-ACTION ALTERNATIVE

The extent of the “no-action” discussion is governed by a “rule of reason.” *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991). The discussion need not be exhaustive or inordinately detailed. *Farmland Preservation Association v. Goldschmidt*, 611 F.2d 233, 239 (8th Cir. 1979). Such discussions typically are relatively short. *See, e.g., id.; Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990).

NEPA: NO-ACTION ALTERNATIVE

The “no-action” analysis should contain a concise, descriptive summary comparing the advantages and disadvantages of the no-action alternative to the proposed action. *See* CEQ “Memorandum to Agencies: Answers to 40 Most Asked Questions on NEPA Regulations,” 46 Fed. Reg. 18,026 (Mar. 1, 1981); *see also* 40 C.F.R. § 1502.14 (CEQ guidance). The section should state the principal reasons why the no-action option was eliminated from consideration.

NEPA: SECONDARY BENEFITS

Socioeconomic benefits such as new jobs and tax revenues are frequently termed “secondary” benefits because they ordinarily are not the primary reason cited to justify a project. NEPA does not bar an examination of secondary benefits.

NEPA: SECONDARY BENEFITS

A NEPA cost-benefit analysis, for either reactor or nonreactor facilities, appropriately may consider and balance socioeconomic effects, both negative and positive.

NEPA: ENVIRONMENTAL JUSTICE

Executive Order 12898, 3 C.F.R. 859 (1995), on environmental justice, by its own terms, established no new rights or remedies. *See* E.O. 12898, § 6-609. Its purpose is to merely “underscore certain provision[s] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment.” *See* Memorandum for the Heads of All Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

NEPA: ENVIRONMENTAL JUSTICE

An inquiry into racial discrimination in siting would go well beyond what NEPA has traditionally been interpreted to require. No agency or judicial decision has invoked NEPA to consider claims of racial discrimination. The Council for Environmental Quality's draft guidance focuses exclusively on identifying and adequately assessing impacts of the proposed action on minority populations, low-income populations, and Indian Tribes. It makes no mention of a NEPA-based inquiry into racial discrimination.

NEPA: ENVIRONMENTAL JUSTICE

An agency inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest: "the physical environment — the world around us, so to speak." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983).

NEPA: AGENCY AUTHORITY TO LIMIT ENVIRONMENTAL INQUIRY

Were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, "available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources." *Id.* at 776. *See also Public Utilities Commission v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990). NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries. *See South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d at 1011.

NEPA: LICENSE APPLICANT'S SITING PROCESS

The site screening process is used by a license applicant to identify sites that may meet the stated goals of the proposed action. It is not uncommon for only one of many possible sites to be deemed reasonable. *See, e.g., Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1141-42 (D.C. Cir. 1991).

NEPA: CONSIDERATION OF ALTERNATIVES

CEQ's implementing guidance provides that an EIS must "[r]igorously explore . . . all *reasonable* alternatives." 40 C.F.R. § 1502.14(a) (emphasis added). For those alternatives that have been eliminated from detailed study, the EIS is required merely to "briefly discuss" why they were ruled out. *Id.*

Where (as here) “a federal agency is not the sponsor of a project, the federal government’s consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.” *City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994) (internal quotation marks omitted).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Agency adjudications require advance notice of claims and a reasonable opportunity to rebut them. Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions. *See, e.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) (plurality opinion of Marshall, J.); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978).

NEPA: ENVIRONMENTAL JUSTICE (DISPARATE IMPACTS)

Adverse impacts that fall heavily on minority and impoverished citizens call for particularly close scrutiny.

NEPA: ENVIRONMENTAL JUSTICE (DISPARATE IMPACTS)

“Disparate impact” analysis is our principal tool for advancing environmental justice under NEPA. The NRC’s goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities.

MEMORANDUM AND ORDER **(Addressing NEPA Contentions)**

This proceeding involves an application by Louisiana Energy Services (LES) for a license to construct and operate the Claiborne Enrichment Center (CEC) near Homer, Louisiana. The NRC Staff and an *amicus curiae*, the Nuclear Energy Institute (NEI), support issuance of the license. A local group, the Citizens Against Nuclear Trash (CANT), opposes it on environmental and safety grounds.

On May 1, 1997, the Atomic Safety and Licensing Board issued a decision in CANT’s favor on several “environmental justice” issues and denied the license, “albeit without prejudice.” *See* LBP-97-8, 45 NRC 367, 412 (1997). In denying the license, the Board pointed not only to its environmental justice ruling

but also to two earlier Board decisions finding “insufficiencies” in the Final Environmental Impact Statement (FEIS) for the CEC. *See id.*, citing LBP-96-25, 44 NRC 331 (1996),¹ and LBP-97-3, 45 NRC 99 (1997). We granted review to consider the environmental justice question. *See* CLI-97-7, 45 NRC 437 (1997). We previously had granted review to consider three other environmental issues concerning the adequacy of the FEIS: the “need” for the CEC, the CEC’s “secondary benefits,” and the “no-action alternative.” *See* CLI-97-3, 45 NRC 49 (1997).

For the reasons we give below, we reverse in part and affirm in part the various Board environmental rulings now before us on previously granted petitions for review. In a forthcoming separate decision, we will address three still-pending petitions for review (one by LES and two by CANT) attacking Board environmental decisions on waste disposal costs. *See* LBP-97-3, 45 NRC 99 (1997), and LBP-97-22, 46 NRC 275 (1997).

BACKGROUND

I. Facts

LES seeks an NRC license to construct and operate the CEC, which would be the first privately owned uranium enrichment facility in the United States. The 30-year license sought by LES would authorize it to possess and use byproduct, source, and special nuclear material to enrich uranium using a gas centrifuge process. At full production, the CEC would annually possess approximately 4700 metric tons of UF₆, and generate 870 metric tons of enriched uranium and 3800 metric tons of depleted uranium tails.

If licensed, the CEC would be constructed on the central 70 acres of a wooded 442-acre site juxtaposed between two unincorporated African-American communities in Louisiana, Center Springs and Forest Grove. The site, referred to by the parties as LeSage, is located approximately 5 miles north of the town of Homer, in Claiborne Parish. Construction of the CEC would necessitate the closing and relocation of Parish Road 39, which currently bisects the LeSage site from North to South.

At the time the Commission received the LES application (in 1991), Congress had recently enacted legislation that modified the licensing procedures for uranium enrichment facilities. The new legislation provided that enrichment facilities would be licensed pursuant to NRC regulations applicable to special nuclear materials, and not pursuant to NRC reactor regulations, as would

¹The Commission has already considered, and reversed, the Licensing Board’s ruling in LBP-96-25 that LES lacked sufficient financial qualifications to build the CEC. *See* CLI-97-15, 46 NRC 294 (1997). In this Decision the Commission will review the environmental aspects of LBP-96-25.

have been required without the legislation. *See* CLI-97-15, 46 NRC at 296-97. The Commission did not have in place regulations specifically addressing the licensing of enrichment facilities in accordance with this new legislation. Therefore, the Commission published a Notice of Hearing and a Commission Order setting forth standards to evaluate LES's application and instructions for the hearing. *See* 56 Fed. Reg. 23,310 (May 21, 1991). The hearing order directed the Board to conduct the LES licensing proceeding pursuant to the adjudicatory procedures set out in 10 C.F.R. Part 2, Subparts G and I. *See id.*

The hearing order also instructed the Licensing Board to apply various regulations, including 10 C.F.R. Part 51, which addresses the NRC's duties under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1994). *See* 56 Fed. Reg. at 23,310. The order required the Board to make findings of fact and conclusions of law on all admitted contentions, including NEPA contentions under Part 51. *See id.* As for NEPA issues not covered by admitted contentions, the order directed the Board not to conduct "a *de novo* evaluation of the application," but to determine whether "the review conducted by the NRC staff under 10 C.F.R. part 51 has been adequate." *Id.*

Part 51 sets forth a two-step process for meeting NEPA's mandate. First, it requires a license applicant to file a detailed Environmental Report (ER) containing specific information to aid the NRC in preparing its independent analysis of the environmental effects of the proposed licensing action. *See* 10 C.F.R. §§ 51.60 and 51.45. Second, it requires the NRC Staff to issue its own FEIS based on a review of information provided by the applicant, information provided by commenters on the Staff's draft EIS, and information and analysis that the Staff itself obtains. *See* 10 C.F.R. § 51.97(c).

2. *The Licensing Board's NEPA Decisions*

In this proceeding, CANT filed most of its environmental contentions on the basis of LES's ER. But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In LBP-96-25 and LBP-97-8, therefore, the Board appropriately deemed all of CANT's environmental contentions to be challenges to the FEIS. On this appeal the Commission considers Contentions J.4, K, and J.9, all of which relate to whether the NRC has adequately considered the environmental costs and benefits of constructing and operating the CEC.

a. Licensing Board Decision in LBP-96-25

1. LBP-96-25 first considered Contention J.4, where CANT alleged that the costs of the CEC "far outweigh" its benefits. 44 NRC at 336. In

particular, CANT challenged the FEIS's claim of a need for an "additional market competitor in the U.S." *Id.* at 350. The Board began its analysis by stating that the asserted "need" for a facility is "merely a shorthand expression" for the principal benefit expected from the facility. *Id.* at 348. Here, according to the Board, "the central benefit of the CEC identified by the Applicant in its ER and the Staff in the FEIS is that LES will bring real price competition to the enrichment market as a domestic supplier." *Id.* at 366. "[P]rice competition," stressed the Board, is the "quintessence of economic competition and . . . that asserted benefit is quantifiable." *Id.*

Citing NRC regulations that require NEPA reviews to quantify cost-benefit analyses when possible, the Board next concluded that the FEIS must quantify the benefit of "price competition," to permit it to be weighed against the costs of the facility in a cost-benefit analysis. *Id.* at 366-67. The Board found the original FEIS deficient for failure to quantify the CEC's likely effect on the price of enrichment services. After reviewing the parties' various economic analyses projecting supply, demand, and prices, the Board in effect performed its own quantitative analysis and concluded that instead of bringing "the benefit of significant price competition to the enrichment services market as an additional domestic supplier . . . the CEC will have little, if any, effect on price competition." *Id.* at 369. The Board deemed "not credible" any claim of a price differential "greater than \$2 to \$3" per separative work unit (SWU). *Id.* at 368. Lastly, the Board ordered that its discussion of the CEC's market price effect be added as a supplement to the FEIS's section on need for the facility. *Id.* (citing 10 C.F.R. § 51.102).

2. LBP-96-25 then turned to CANT's Contention K, which the Board deemed a challenge to the adequacy of the FEIS discussion of the no-action alternative. The Board found the five-paragraph "no-action" description "sparse" and "minimal" overall, and specifically deficient on several grounds. In particular, the Board found that the section fails to "even mention, much less address, the numerous avoided environmental impacts to, inter alia, surface and groundwater and air quality from not building the facility." 44 NRC at 372. Instead, the Board stressed, the FEIS discussion of "no action" speaks only of the "supposed negative environmental and socioeconomic consequences of *not* building the project." *Id.* at 373 (emphasis added). By not specifically "identifying and analyzing" the environmental costs of building the facility, the Board concluded, the "no-action" section did not permit a proper comparison of the effects of having the facility with the effects of not having it. *Id.* The Board ordered the NRC Staff to supplement the FEIS or otherwise remedy the various identified deficiencies. *See id.* at 375.

3. Finally, LBP-96-25 found the FEIS's discussion of the CEC's so-called "secondary benefits," such as new jobs and increased tax revenues, inconsistent with Commission precedent refusing to consider such benefits in reactor

licensing cases. *See id.* 374-75. The Board stated that the NRC Staff should either delete consideration of secondary benefits from its cost-benefit analysis, or explain why it was departing from past precedent. *See id.* at 375. The Board ordered the Staff to supplement the FEIS accordingly. *See id.*

b. Licensing Board Decision in LBP-97-8

LBP-97-8 considered CANT's Contention J.9, its "environmental justice" contention. CANT's contention (filed after LES's ER but before the NRC Staff's FEIS) alleged that LES's discussion of the impacts of the CEC was deficient because it failed to fully assess the disproportionate socioeconomic impacts of the proposed CEC on the adjacent African-American communities of Forest Grove and Center Springs. *See* 45 NRC at 372-73; *see also* LBP-91-41, 34 NRC 332, 353 (1991) (admitting Contention J.9). In 1994, well after admission of Contention J.9, President Clinton issued Executive Order 12898, which addressed environmental justice. *See* 59 Fed. Reg. 7629 (Feb. 16, 1994), codified at 3 C.F.R. 859 (1995). The Executive Order directs each federal agency to "identif[y] and address[] disproportionately high and adverse human health and environmental effects of its programs, policies, or activities on minority populations and low-income populations" in the United States. In a March 31, 1994 letter to President Clinton from the then-Chairman of the NRC, Ivan Selin, the Commission stated that the NRC would carry out the measures in the Executive Order. *See* LBP-97-8, 45 NRC at 375.

The NRC Staff issued the FEIS for the CEC some months later, in August 1994. It contains a section entitled "Environmental Justice," in which the Staff found "no specific evidence that racial considerations were a factor" in the CEC site selection process. *Id.* at 390 (quoting the FEIS). The FEIS also found (as described by the Licensing Board) that "because the impacts of the CEC will be relatively small and there will not be a disproportionate adverse impact on minority or low-income populations, operating the LES facility will not promote environmental injustice." *Id.* at 398. In LBP-97-8, the Board disagreed with these environmental justice findings.

The Board first held that to give "real meaning" to the President's "nondiscrimination directive," the NRC Staff cannot limit its inquiry to a facial review of LES's ER — which is what the Staff said it did in the FEIS — but must conduct "a thorough and in-depth investigation." *Id.* at 390. Here, according to the Board, CANT's "evidence, the most significant portions of which are largely un rebutted or ineffectively rebutted, is more than sufficient to raise a reasonable inference that racial considerations played some part in the site selection process." *Id.* at 391. While making no "specific findings on the current record that racial discrimination did or did not" occur, the Board stated that the NRC Staff must "lift some rocks and look under them." *Id.* The Board emphasized

“statistical evidence” suggesting possible racial bias in the siting process (i.e., the increasing percentage of African-Americans in affected populations as the site selection process progressed), *id.* at 392, and LES’s decision to reject the largely white “Emerson” site near a lake, *id.* at 395-96. The Board concluded that “a thorough Staff investigation of the CEC site selection process is essential to determine whether racial discrimination played a role in that process, thereby ensuring compliance with the nondiscrimination directive contained in Executive Order 12898.” *Id.* at 412.

In addition to its ruling on racial discrimination, the Board questioned two aspects of the FEIS’s analysis of “disparate impacts.” First, according to the Board, the FEIS did not deal adequately with the impact on those “who must regularly make the trip on foot” of relocating Parish Road 39 and “[a]dding 0.38 mile to the distance between the Forest Grove and Center Springs communities.” *Id.* at 406. Second, the Board criticized the FEIS’s failure to “identify the location, extent, or significance” of property-value impacts on the local community. *Id.* at 409. The Board ordered the NRC Staff to revise the FEIS to deal with the road closure and property-value issues adequately. *Id.* at 412.

DISCUSSION

I. NEPA Overview

NEPA establishes a “broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), *citing* 42 U.S.C. § 4331. To ensure that this commitment is “infused into” the actions of the federal government, NEPA mandates particular “action-forcing” procedures. *Id.*, *quoting* 115 Cong. Rec. 40,416 (1970) (remarks of Sen. Jackson). Chief among these procedures is the environmental impact statement (EIS), which NEPA requires federal agencies to prepare for all proposals that would “significantly affect[] the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The EIS must describe the potential environmental impact of a proposed action and discuss any reasonable alternatives. *See* 42 U.S.C. § 4332.

The principal goals of an FEIS are twofold: to force agencies to take a “hard look” at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency’s decision-making process. *See Robertson*, 490 U.S. at 349-50; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). This latter information disclosure function of the EIS “gives the public the assurance that the agency has indeed considered environmental concerns . . . and perhaps more significantly, provides a springboard for public comment.”

Robertson, 490 U.S. at 349 (citation omitted). The EIS, then, should provide “sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors and to make a reasoned decision.” *Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1140 (D.C. Cir. 1991) (quoting *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)). It is intended to “foster both informed decision-making and informed public participation,”² and thus ensure that the agency does not act upon “incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

As the Licensing Board emphasized repeatedly in LBP-96-25, NEPA does not require agencies to select the most environmentally benign option. *See, e.g.*, 44 NRC at 341-42. “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson*, 490 U.S. at 350.

Although the statute itself does not mandate a cost-benefit analysis, NEPA is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal. *See, e.g., Idaho By and Through Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994); *Calvert Cliffs’ Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). The EIS need not, however, always contain a formal or mathematical cost-benefit analysis. *See, e.g., Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974) (“NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula”), *cert. denied*, 422 U.S. 1049 (1975). *See also* Council on Environmental Quality (CEQ) Regulations, 40 C.F.R. § 1502.23. NRC regulations direct the Staff to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, “to the fullest extent practicable, quantify the various factors considered.” 10 C.F.R. § 51.71(d). If important factors cannot be quantified, they may be discussed qualitatively. *Id.*

The appeals currently before us involve the proposed CEC’s social and economic costs and benefits. It bears mention, therefore, that NEPA’s “theme . . . is sounded by the adjective ‘environmental’: NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment.” *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). An agency’s “primary duty” under NEPA is to take a “hard look” at environmental impacts. *See Public Utilities*

² *City of Carmel-By-the-Sea v. DOT*, 123 F.3d 1142, 1150-51 (9th Cir. 1997) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

Commission v. FERC, 900 F.2d 269, 282 (D.C. Cir. 1990). “Determination of economic benefits and costs that are tangential to environmental consequences are within [a] wide area of agency discretion.” *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980).

Necessarily, however, agencies frequently do consider proposed projects’ social and economic effects, even if only to a limited extent, given that NEPA generally calls for at least a broad and informal balancing of the environmental costs of a project against its technical, economic, or other public benefits. Misleading information on the economic benefits of a project, therefore, could skew an agency’s overall assessment of a project’s costs and benefits, and potentially “result in approval of a project that otherwise would not have been approved because of its adverse environmental effects.” *See, e.g., Hughes River Watershed Conservancy v. Glickman*, 81 F.3d at 446. In assessing how economic benefits are portrayed, a key consideration of several courts has been whether the economic assumptions of the FEIS “were so distorted as to impair fair consideration of the’ project’s adverse environmental effects.” *Id.* at 466 (citing *South Louisiana Environmental Council*, 629 F.2d at 1011).

In NRC licensing adjudications, both generally (10 C.F.R. §§ 51.102, 51.103) and in this particular case (Hearing Order, 56 Fed. Reg. at 23,310), it is the Licensing Board that compiles the final environmental “record of decision,” balances a proposed facility’s benefits against its costs, and ultimately decides whether to license the facility. The adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS. *See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 705-07 (1985). Intervenors are free to litigate the adequacy of the discussion of environmental issues in the FEIS. *See* 10 C.F.R. § 51.104(a)(2). Although the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered, intervenors must file their environmental contentions as soon as possible, even before issuance of the draft EIS, if the contested issue is addressed in the applicant’s ER. *See* 10 C.F.R. § 2.714(b)(2)(iii). To the extent that the FEIS may differ from the ER, an intervenor is provided a second opportunity to file contentions on environmental issues. *Id.*

With this NEPA background in mind, we now turn to the particular environmental issues in dispute on this appeal.

2. Need for CEC

To assist the NEPA cost-benefit analysis, the NRC ordinarily examines the need a facility will meet and the benefits it will create. *See Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-96-25, 44 NRC 331, 346-47 n.5 (1996) (and cases cited therein). In this case, the Board found that the

CEC would not bring “the benefit of significant price competition,” but instead would have “little, if any, effect” on prices. *Id.* at 369. LES and the NRC Staff request the Commission to reverse the Board’s ruling. They raise three principal arguments: (1) the Board inappropriately focused upon the “benefit” of significantly lower prices, a benefit that was never actually claimed in the FEIS or by LES; (2) in discounting the CEC’s likely effects on price, the Board made incorrect assumptions about the uranium enrichment market; and (3) the Board improperly ignored or minimized other benefits of the CEC that *were* claimed in the FEIS. We agree with these arguments in part, but do not disturb the Board’s core factual finding that the CEC is unlikely to have a major beneficial price effect.

1. LES and the NRC Staff first argue that the Licensing Board, by focusing only upon significant price effects, simply mischaracterized the FEIS’s statement on need for the facility. LES states that “nowhere did [it] assert that its competition with domestic or international suppliers would result in substantially lower prices, or even that minor LES price reductions constitute the principal benefit of licensing the CEC.” LES Appeal Brief on LBP-96-25 (3/13/97) at 10. According to LES, the Board “created a ‘straw man’ by postulating a benefit never advanced by LES or the NRC Staff, and then found the benefit unrealized because neither LES nor the Staff tried to prove the posited benefit.” *Id.* at 14. The NRC Staff also maintains that the Board mischaracterized the FEIS by laying such heavy stress on the possibility of lower prices. *See* NRC Staff Appeal Brief on LBP-96-25 (3/13/97) at 4, 7.

We frankly confess some puzzlement over the Board’s exclusive focus upon the CEC’s potential price effects as the sole possible benefit of the project. *See, e.g.*, 44 NRC at 369-70. The FEIS on its face discusses other benefits, never addressed by the Board in LBP-96-25, including, for example, creation of a reliable American supplier of enriched uranium in addition to the United States Enrichment Corporation (USEC).³ We will return to this point later in this opinion.

Nonetheless, it was appropriate for the Board to inquire into economic benefits, i.e., price effects, that *were* suggested by the FEIS. Although the FEIS never actually uses terms considered by the Board, such as “price” or “real price competition,” the FEIS does imply that the CEC will have a beneficial effect on market prices. By stating that the CEC as an “additional market competitor” will

³CANT filed its contention on the need for the CEC well before the FEIS was issued, and therefore initially addressed only LES’s ER and later supplemental responses. The Board perhaps set out to scrutinize LES’s own optimistic claims on price benefits and, in doing so, may have failed to note that the FEIS did not simply adopt all LES claims part and parcel. The Board repeatedly equates the FEIS discussion of “need” with LES’s earlier treatment of need in its ER and related documents. *See, e.g.*, 44 NRC at 350 (“[i]n the FEIS, the NRC Staff adopts the Applicant’s assertion of need for the CEC”); *see also id.* at 346, 352. Not surprisingly, then, the Board’s emphasis on “real price competition” may be more rooted in the language of LES’s letters supplementing its ER than in the FEIS itself.

put “pressure on other enrichment suppliers to maintain a competitive position in the world enrichment market,” the FEIS suggests a beneficial marketplace impact, which the Board was not out of line in seeking to clarify. *See* FEIS at 4-77.

Moreover, the record before the Board included numerous specific claims of beneficial market price effects, although they were made by LES, not directly in the FEIS. In letters supplementing its ER, and in its adjudicatory pleadings and testimony, LES has maintained that the CEC’s presence in the market would help moderate or suppress future price increases, perhaps to a significant degree. *See, e.g.*, Transcript at 387, 442 (testimony of LES expert witness Michael H. Schwartz). On appeal, LES continues to offer price moderation as one benefit of establishing an additional market competitor, despite an already oversupplied market. *See, e.g.*, LES Appeal Brief on LBP-96-25 at 15 (“avoiding or moderating price increases that would otherwise take place is beneficial, independent of price reduction”).

With LES having repeatedly advanced in this proceeding the argument that the CEC would act to “suppress” or “moderate” future SWU price increases, perhaps significantly, and with the FEIS at least implying a beneficial effect on prices, it was legitimate for the Board to evaluate this claimed economic benefit against CANT’s vigorous challenge. Although the language in the Board’s decision is frequently ambiguous, the Board appears to have recognized that LES’s basic price claim was not that prices would significantly *decrease* upon LES’s entry into the market, but that the additional supply and competition from the CEC would help forestall or moderate price *increases*. *See* 44 NRC at 362, 364.

2. After conducting a pricing analysis, the Board found that any beneficial price effect, whether in the form of price reductions or avoided price increases, would be “little, if any.” 44 NRC at 369. LES urges the Commission to reexamine the factual evidence presented and to reach a different conclusion about LES’s potential to “stabilize world-wide prices.” *See* LES Appeal Brief on LBP-96-25 at 14-15, 17-19. LES cites as an historical example the “moderating effect” that European uranium enrichment suppliers had on the prices of the only existing American supplier, the United States Enrichment Corporation (USEC). *Id.* at 14. “USEC might raise its prices in the absence of a domestic competitor,” LES emphasizes, particularly “[g]iven the escalating costs of power [for the gaseous diffusion plants] and the possible retirement of [USEC’s] older plants as well as the concern for reliable supplies that may limit foreign competition in the United States.” *Id.* at 15.

Before addressing LES’s request that we reassess evidence on the uranium enrichment market, it may be helpful at this point to clarify the numerous “economics” or “market” issues upon which the parties apparently agree. The parties agree, for example, that the market for uranium enrichment services

is, and likely will remain for the foreseeable future, both international and highly competitive. They acknowledge that the worldwide supply of enrichment services exceeds demand. They also agree that because the supply of enrichment services outstrips demand, LES would need to take away business from other competitors to obtain its targeted 15% to 17% share of the U.S. market. The parties further agree that the market has become increasingly international as European suppliers gradually have obtained ever greater portions of USEC's American and world market share. In addition, they agree that the competition from the European suppliers, which broke USEC's former monopoly position, has led overall to reduced prices and more flexible contract terms. And they agree that even without LES, the worldwide market likely will remain intensely competitive.

Where the parties continue to disagree is on how LES's entry into the market would affect prices. At the Board hearing, CANT's counsel asked LES's expert witness to quantify the amount by which the CEC might suppress prices. In response, the LES expert witness predicted that without the additional supply from the CEC, market prices after the year 2000 would be "at a minimum" \$2 to \$3 higher per SWU, but could be "substantially higher." Transcript at 442. LES adheres to that position on appeal. *See* LES Appeal Brief on LBP-96-25 at 11, 15.

The Board rejected the possibility of the CEC having any market price effect over \$2 to \$3 per SWU. *See* 44 NRC at 368. LES's basic disagreement with the Board's price-effects finding, then, is that the Board accepted *at most* a possible price-moderating effect of \$2 to \$3 per SWU, while LES argued that the effect would be *at least* \$2 to \$3 per SWU, but could be "even higher." This \$2 to \$3 figure, the LES expert explained, represents what "[m]athematically one would come up with," if "one simply took an approach which said that production costs and supply and demand lead algebraically to a result." Transcript at 387, 442.

The LES expert added, however, that this "algebraic" or "mathematical" calculation does not take into account potential enhanced price effects from competition — from other suppliers seeking to retain their market share in light of added competition from the CEC. Such competitive reactions could result "in prices that go beyond what the mathematics dictate," he claimed, and therefore might lead to an "even higher" price-moderating effect than merely \$2 to \$3. Transcript at 442; *see also* Transcript at 387. He stressed that "each increment of competition is very important, and it is the willingness of individual suppliers to go after enrichment services that is what keeps prices from rising." Transcript at 416; *see also* LES Proposed Findings of Fact at 107-08 (lack of competition from the CEC "could allow existing suppliers to include more profit in their pricing").

Pointing to the “fiercely competitive” market, the Board found “not . . . credible the Applicant’s assertions that the market price differential could be greater than \$2 or \$3 because of the lack of competition without the CEC.” See 44 NRC at 368. In the Board’s view, the CEC’s advantage of newer, more cost-efficient technology — compared with, for example, USEC’s older and more energy-intensive gaseous diffusion plants — would not prove a significant competitive advantage, because the CEC’s “total costs of producing SWUs, which includes operating and capital cost, [are] comparable with gaseous diffusion enrichers.” *Id.* at 367. Given the abundant oversupply of enrichment services, reasoned the Board, the proposed facility poses “substantial investment risks,” which will “raise[] the investment return (i.e., interest rate) the project must provide to attract financing.” *Id.* These high interest rates “in turn, raise[] the proposed project’s costs, thereby lessening the likelihood that the CEC will bring real price competition to the enrichment market,” the Board concluded. *Id.*

Although the Commission has the authority to reject or modify a licensing board’s factual findings,⁴ it will not do so lightly.⁵ The Commission in this instance is not inclined to second-guess the Board’s complex findings on supply, demand, and pricing. The hearing record contains extensive and detailed arguments on pricing and hypothesized world market scenarios. At bottom, the Board’s view — that LES at most might impact SWU prices by \$2 to \$3 — does not fall beyond the possibilities presented to the Board. LES itself put forward the potential \$2 to \$3 effect ultimately embraced by the Board (although LES also maintains that the effect could be “even higher”⁶). See LES Appeal Brief on LBP-96-25 at 11. None of the parties has challenged on appeal the Board’s acceptance of up to a possible \$2 to \$3 price moderating effect, although they continue to disagree on whether the price effect might be more significant.

It is no doubt possible to analyze the record here differently, and to argue that significant price effects are possible or even likely. But the Board’s analysis led it to a more modest finding. “[W]e . . . attach significance to a licensing board’s evaluation of the evidence and to its disposition of the issues.” *Catawba*, 4 NRC at 404. “[W]e will not overturn the hearing judge’s findings simply because we might have reached a different result.” *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473

⁴ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403-05 (1976).

⁵ See *Catawba*, 4 NRC at 403.

⁶ LES, though, has never suggested how *much* “higher” it believes the price effect might be. In fact, LES has made clear that it expects to compete “in the same price range” as USEC and the foreign suppliers. LES Appeal Brief at 13. LES also has stressed that for the CEC to remain a viable enterprise, SWU prices generally should fall within the price range the LES expert has forecast for after the year 2000 — a range of \$100 to \$115 per SWU. It stands to reason, therefore, that LES neither desires nor expects its competitors to respond to the CEC by slashing prices. Plummeting market prices seemingly are not in LES’s own best interests.

(1987). Therefore, we will not disturb the Board's core price-effects finding, and accede to the Board's decision to add its pricing analysis as a supplement to the FEIS. *See* 44 NRC at 369-70. This makes the Board's finding part of the environmental "record of decision" and a factor in the Board's ultimate cost-benefit accounting. Our holding is consistent with NEPA's "full disclosure" purpose. *See* NEPA Overview, *supra*, at 8.

We are concerned, though, that the Board not give excessive weight to its price-effects finding when it comes time to balance the cost-benefit ledger for the CEC. The Board's discussion on occasion takes on a categorical tone that may suggest more certainty about price effects than the record warrants. *See, e.g.*, 44 NRC at 369 (emphasis added) ("the evidence . . . clearly shows that, when quantified, the CEC will have little, if any, effect on price competition"). In actuality, much testimony in the record, particularly the testimony of CANT's expert, David E. Osterberg, stresses the inherent unpredictability of future market conditions and prices. *See, e.g.*, Transcript at 486-87, 494-95, 530-34, 541-42. In addition, the Board appears to discount LES's prospects in the marketplace, in part on the ground that its principal competitor, USEC, has fixed (and comparatively low) capital costs. *See* 44 NRC at 365, 367-68. But the Board does not address record evidence suggesting that USEC's capital costs, including the costs of seismic and other upgrades, electricity, and bringing new technology on line, may increase substantially in the future.⁷ Whether such costs would be borne by a privatized USEC and might bear on LES's competitive posture is left unclear by the Board's analysis, which focuses upon current market conditions.

In short, the Board's price projections reflect not ineluctable truth, but rather a plausible scenario that in the Board's view, with which we agree, should be added to the environmental record of decision. Giving disproportionate significance to the Board's numerical price projections could prove misleading. "[T]he appearance of precision . . . tends to divert scrutiny from the difficult judgmental decisions involved in performing an accurate cost-benefit analysis and, specifically, in determining whether a genuine need for the facility exists." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 172 (1974).

3. Although we agree that the Board's price-effects finding should be added to the environmental record of this case, we do not accept the Board's view that "the benefit of competition as we have described it," i.e., the Board's price-effects finding, "is *the* benefit that must be weighed against the various costs of the project in the NEPA-mandated cost-benefit analysis." *See* 44 NRC at 370

⁷ *See, e.g.*, FEIS at 1-5; Written Testimony of James T. Doudiet and W. Howard Arnold (2/24/95) at 33-34; Written Testimony of Michael Schwartz and Peter LeRoy (2/24/95) at 12-13, 18-19; Hearing Transcript at 426-27 (Michael Schwartz for LES), 503-04 (Merri Horn for NRC Staff); CANT Exhibit I-DO-33, Attachment D, at D-5 through D-8; LES Exhibit 10, Letter from Peter LeRoy, LES, to Charles Haughney, NRC (4/30/92) Attachment A at A-3 through A-7.

(emphasis added). We think that LES and the NRC Staff are right in pointing out that the Board's price-driven approach entirely overlooks other benefits of the CEC discussed in the FEIS and elsewhere in the record.

The FEIS asserts, indeed features, several benefits of the CEC in addition to possible price effects. These include helping to offset dependence upon foreign suppliers, lessening reliance upon USEC's older and more energy-intensive gaseous diffusion plants, providing the United States with a more technologically advanced and more energy efficient uranium enrichment technology, and creating an alternative technology should the atomic vapor laser isotope separation (AVLIS) technology, to which USEC owns exclusive rights, run into technical problems as it is scaled up. The FEIS itself and the adjudicatory record are replete with references to these nonprice benefits of the CEC.⁸

Indeed, it might fairly be said that not only the FEIS, but also national policy, establishes a need for "a reliable and economical *domestic* source of enrichment services." See USEC Privatization Act, 42 U.S.C. § 2243(f)(2)(B) (1996 & Supp. 1997) (emphasis added).⁹ Over recent years, Congress, its committees, and key legislators have referred to uranium enrichment as a "strategically important domestic industry" of "vital national interest,"¹⁰ "essential to the national security and energy security of the United States,"¹¹ and necessary "to avoid dependence on imports."¹² Congress also has promoted the identification and study of "alternative" enrichment technologies — defined as "methods other than the gaseous diffusion process"¹³ — under the assumption that "[t]he ultimate success of the domestic uranium enrichment industry could hinge on the decision to build a new plant using a more economical technology."¹⁴ Although these

⁸ See, e.g., FEIS at xviii, 1-5, 2-1, 4-77; Written Testimony of Michael Schwartz and Peter LeRoy on "Need" (Feb. 24, 1997) at 13-14, 28-29 (CEC will add to security of supply and be more energy "efficient" and "environmentally benign"); Hearing Transcript at 426, 437 (Schwartz for LES); LES Exhibit 10, Letter from Peter LeRoy, LES, to Charles Haughney, NRC (Apr. 30, 1992) Attachment A at A-5 through A-7 (energy efficiency and environmental advantages); LES Exhibit 11, Letter from Peter LeRoy, LES, to John Hickey, NRC (July 23, 1992), Attachment A at A-2 through A-5 (energy efficiency and environmental advantages); LES Exhibit 17, Attachment B, "Responses to DEIS Comments" at B-4 (citing not only price, but also technological, environmental, and security of domestic supply considerations).

⁹ See also Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2924, 42 U.S.C. § 2297a(8); H.R. Rep. No. 102-474, 102d Cong., 2d Sess., pt. 1, at 144 (1992) ("a valuable objective of this legislation" is to maintain a domestic source of enriched uranium, which would "contribute jobs and balance of trade benefits directly to the American economy").

¹⁰ S. Rep. No. 101-60, 101st Cong., 1st Sess. 8, 43 (1989); see also *id.* at 20 ("some domestic enrichment capability is essential for purposes of maintaining energy security").

¹¹ S. Rep. No. 101-470, 101st Cong., 2d Sess. 2 (1990).

¹² Energy Policy Act of 1992, 42 U.S.C. § 2296b-6. See also, e.g., S. Rep. No. 102-72, 102d Cong., 1st Sess. 144-45 (1991) (national security and defense interests require assurance that "the nuclear energy industry in the United States does not become unduly dependent on foreign sources of uranium or uranium enrichment services"); 101 Cong. Rec. S8321, S8323 (daily ed. July 20, 1989) (statement of Sen. Domenici) ("[t]o the extent that utilities go abroad for enrichment services, they are more likely to buy foreign uranium as well," which could in turn devastate domestic uranium industry).

¹³ See, e.g., Energy Policy Act, 42 U.S.C. §§ 2297, 2297a, 2297e (1992).

¹⁴ H.R. Rep. No. 102-474, 102d Cong., 2d Sess., pt. 1, at 144 (1992).

congressional and NRC policy statements have come in a variety of contexts, they bear, in our view, on any evaluation of the “need” for the CEC and its potential benefits.¹⁵

CANT argues that the various benefits claimed for the CEC — energy efficiency, additional domestic supply, etc. — will never materialize and therefore are “illusory” because LES will be unable even to enter the uranium enrichment market. *See* CANT Appeal Brief on LBP-96-25 (4/30/97) at 16. “It is unnecessary to examine the environmental benefits of a facility that has no hope of competing,” states CANT. *Id.* But the Commission does not understand the Board’s decision as altogether rejecting the possibility that LES will enter the market. Although ambiguous in places, the Board decision ultimately finds that the CEC will become a “fifth producer” in the enrichment services market. *See* 44 NRC at 369.

In any event, we find that the record demonstrates a potential for LES entering the market, even without the “significantly lower prices” that CANT believes necessary. LES has provided a strategy for capturing market share. Those plans include, among other things, obtaining a large percentage of its sales contracts through exploiting existing relationships in the industry (i.e., from its partners and affiliates, both domestic and European), a strategy that is not exclusively dependent upon significantly lower prices. Moreover, in our recent “financial qualifications” decision, CLI-97-15, 46 NRC 294 (1997), we *required* that LES obtain advance funding commitments, including sales contracts, prior to building or operating the CEC. Thus, “if the market does not allow LES to raise sufficient capital for construction or to obtain the promised advance purchase contracts, LES will not build or operate the CEC,” in which case neither adverse nor beneficial effects would ensue. *See id.* at 308. But at this stage the Commission is unable to find, as a factual matter, that LES lacks the potential even to enter the enrichment services market.

In sum, we hold that the Board had sufficient reason to examine the likely competitive price effects of the CEC, that the Board’s price-effects finding should be added to the environmental record of decision, and that the Board, in performing its ultimate cost-benefit balancing under NEPA, must consider, in addition to price effects, the other benefits of the CEC.

¹⁵The fact that USEC already exists to serve national security interests does not entirely obviate a role for LES in helping to ensure a reliable and efficient domestic uranium enrichment industry, particularly when USEC currently is the *only* domestic supplier. *See* H.R. Rep. No. 102-474, 102d Cong., 2d Sess., pt. 1, at 143 (1992) (acknowledging that reliable sources of enrichment services “are already available from longtime allies of the United States and could become increasingly available from former Soviet republics,” yet affirming that “facilities located in the U.S., such as the Louisiana Energy Services (LES) project, could offer additional, secure possibilities”); *see also* Final Rule, Certification of Gaseous Diffusion Plants, 59 Fed. Reg. 48,944, 48,951 (Sept. 23, 1994) (citing USEC’s concern that a denial of a certificate of compliance for the gaseous diffusion plants “may have potential implications for national and public policy” because the gaseous diffusion plants “are currently the sole domestic source of enrichment services”).

3. *No-Action Alternative*

Under NEPA, the FEIS must include a statement on the alternatives to the proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii). Generally, this includes a discussion of the agency alternative of taking “no action.” *See* 40 C.F.R. § 1502.14(d). The “no-action” alternative is most easily viewed as simply maintaining the status quo. *Association of Public Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158, 1188 (9th Cir. 1997). In this case, then, “no action” would mean denial of the license to construct and operate the CEC.

The Board found the “no-action” discussion in the FEIS inadequate. The Board pointed out that the discussion was “set forth on three-quarters of a page in five brief paragraphs” (44 NRC at 370) and discussed the costs but not the benefits of not building the project. This omission, said the Board, “fatally undermin[ed] the very purpose of the no-action alternative.” *See* 44 NRC at 373. LES and the NRC Staff argue that it was legitimate for the FEIS to take that approach, because the benefits of not building the CEC are obvious: inaction would avoid the environmental costs of building the CEC, costs that the FEIS already discusses at length. The “no-action” discussion need not, according to LES and the NRC Staff, recite the mirror-image of information contained elsewhere in the FEIS.

The extent of the “no-action” discussion is governed by a “rule of reason.” *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991). It is clear that the discussion “need not be exhaustive or inordinately detailed.” *Farmland Preservation Association v. Goldschmidt*, 611 F.2d 233, 239 (8th Cir. 1979). Overall length, therefore, is not of special significance, and such discussions frequently are relatively short. *See, e.g., id.* (two-paragraph discussion adequate because “[t]here was not much to say about that alternative . . . adoption of the alternative would simply have left things as they were”); *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990) (brevity of “no-action” section may reveal only that agency thought “concept of no-action plan was self-evident”).

Here, the “no-action” discussion does acknowledge, albeit in broad-brush fashion, the benefit of avoiding the environmental costs associated with the CEC. Instead of re-enumerating the CEC’s environmental costs, and labeling them “benefits of no-action,” the “no-action” discussion simply cross-references an earlier FEIS chapter on environmental consequences, and declares that all of the impacts described there would not occur if the license were denied. The referenced chapter, in turn, details the expected adverse environmental impacts of the CEC’s construction and operation, including anticipated effects on area hydrology, biotic resources, traffic, and air pollution. The chapter also describes potential accident scenarios, atmospheric releases, and the radiological impacts from facility operation and from tails disposal.

We do not find the FEIS's incorporation by reference approach unreasonable as such. We agree with LES and the NRC Staff that it was not necessary for the "no-action" discussion to repeat lengthy assessments of adverse environmental impacts contained elsewhere in the FEIS. *See* CEQ's "Memorandum to Agencies: Answers to 40 Most Asked Questions on NEPA Regulations," 46 Fed. Reg. 18,026 (Mar. 1, 1981) (Question No. 7).

The Board's primary concern, however, was not merely a lack of detail in the "no-action" discussion, but a lack of evenhandedness; that is, the discussion included an extensive description of the benefits of building the CEC, but was virtually silent on the benefits of not building it. We think the Board's criticisms were well founded. An FEIS should "briefly discuss" the reasons why an alternative was rejected and not further studied. *See Tongass Conservation Soc'y v. Cheney*, 924 F.2d at 1141. These reasons "shall be written in plain language . . . so that decisionmakers and the public can readily understand them." *Id.* at 1142. The "no-action" discussion should contain a comparative analysis, "a concise, descriptive summary" comparing the advantages and disadvantages of the no-action alternative to the proposed action. *See* CEQ "Memorandum to Agencies," *supra*, 46 Fed. Reg. 18,026; *see also* 40 C.F.R. § 1502.14 (CEQ guidance).

The "no-action" discussion at issue in this case does not measure up to these standards. Lacking balance and analysis, it merely lists various benefits of the project without delineating the principal reasons why the "no-action" option was eliminated from consideration. While directing the reader to another FEIS chapter for any information on the CEC's costs, it meticulously identifies virtually all of the CEC's expected benefits, from positive local environmental effects, to the creation of jobs and generation of new tax revenues, to various national policy goals. It offers no comparative reasoning whatever. By merely reciting all of the benefits expected from the CEC, the "no-action" section does not indicate how the agency evaluated the relative significance of these individually cited benefits. In short, the reader cannot readily discern how the agency weighed the various benefits and costs of not building the facility. As the Board held, the "no-action" discussion requires reworking to provide a fair accounting of the costs and benefits of no action and how the NRC Staff evaluates them.

The Board also found that the "no-action" discussion inaccurately depicted the adverse environmental effects predicted to occur if the CEC site were returned to its former use, logging. *See* 44 NRC at 373 n.9. The Board suggested that the discussion accorded undue weight to the environmental consequences of potential logging at the site, considering that much of the site was already clear-cut in 1990. Neither the Staff nor LES addresses this issue in their briefs. In the absence of an appellate challenge, the NRC Staff accordingly must comply with the Board decision and reassess the significance and accuracy of what the

original “no-action” discussion stated about logging.¹⁶ See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

In sum, we hold that the NRC Staff must revise the current FEIS “no-action” discussion to reflect an evaluation of both the costs and the benefits of not building the CEC and that the Staff must reconsider the FEIS’s current discussion of resumed logging.

4. *Secondary Benefits*

The Board concluded that the FEIS for the CEC inappropriately considered the facility’s so-called “secondary benefits,” i.e., the jobs, tax revenues, and related economic benefits the CEC is expected to generate. See 44 NRC at 374-75. LES and the NRC Staff argue on appeal that it is entirely proper for the FEIS to take secondary benefits into account. We agree, and reverse the Board decision on this point.

Socioeconomic benefits such as added jobs and tax revenues are frequently termed “secondary” benefits because they ordinarily are not the primary reason cited to justify a project. Nevertheless, it has become commonplace for NEPA statements and reviewing courts to consider the socioeconomic benefits expected from a project. See, e.g., *Citizens Against Burlington*, 938 F.2d at 197-98 (reasons for cargo hub included creation of jobs and stimulation of local economy). NEPA does not bar an examination of secondary benefits. Indeed, a CEQ guideline suggests their consideration, as do our own regulations. See 40 C.F.R. § 1508.8(b) (CEQ guideline); 10 C.F.R. § 51.71 (NRC regulation). We do not think it logical or balanced for an FEIS to catalogue and weigh likely socioeconomic *costs* (in this case, for example, adverse effects on pedestrian traffic and local property values), but to ignore expected socioeconomic *benefits*.

The Board does not seriously contend otherwise, but felt bound by a series of reactor decisions issued by our Appeal Board in the 1970s that arguably disclaimed authority to consider secondary benefits under NEPA. See 44 NRC at 374 (citing cases). These cases apparently rested on the proposition that

¹⁶The Board also questioned the FEIS’s failure to specifically discuss “the avoided impact of not generating depleted uranium tails.” 44 NRC at 372. The Board faults the FEIS for “assuming that tails not generated by the CEC would be produced by some other facility” in the United States. *Id.* The Commission, however, does not understand where the Board found such an “assumption.” The FEIS provides repeated descriptions relating to tails accumulation and disposal. And the logical understanding gleaned from the “no-action” discussion is that all of the adverse environmental effects the facility is expected to generate — including the tails — would be “eliminated” if the CEC were not built. See FEIS at 4-77. The FEIS suggests no additional scenarios about another domestic facility producing the same amount of tails. The Board’s desire to see further discussion, to include, presumably, rather speculative predictions of how much of the CEC’s potential share of the market would — in the event of no action — be provided instead by foreign suppliers or domestic suppliers using blended down HEU, seems excessive. The FEIS need not document every problem “from every angle.” *Anson v. Eastburn*, 582 F. Supp. 18, 21 (S.D. Ind. 1983). We therefore do not believe that the NRC Staff need undertake a further inquiry into the tails question.

an agency ought not find that a nuclear power reactor's benefits outweigh its environmental costs on the sole ground that it would create local jobs and tax revenues. See *Vermont Yankee*, ALAB-179, 7 AEC at 177. But the Appeal Board at the same time recognized that "such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 509 n.58 (1978). In recent years several NRC environmental impact statements for materials facilities have included discussion of socioeconomic benefits, particularly when a particular project also involves socioeconomic costs.¹⁷ Insofar as some early Appeal Board cases might suggest a blanket prohibition against considering such benefits, we hereby overrule them.

In sum, we hold that a NEPA cost-benefit analysis, for either reactor or nonreactor facilities, appropriately may consider and balance socioeconomic effects, both negative and positive.

5. *Environmental Justice*

We turn now to the portion of our decision that presents the thorniest and most sensitive issues, with profound implications of both a legal and a policy nature: environmental justice. Resting its decision largely on President Clinton's executive order on environmental justice, E.O. 12898, 3 C.F.R. 859 (1995), the Board in LBP-97-8 found the NRC Staff's environmental review of the CEC inadequate on two grounds: (1) it failed to investigate thoroughly the possibility that "racial considerations" affected the facility's siting; and (2) it failed to account fully for the CEC's "disparate impact" on two nearby African-American communities. See 45 NRC at 390-412. The Board called for a new and complete NRC Staff investigation into the racial discrimination issue and for a revised NEPA discussion of the CEC's disparate impact on the local communities. *Id.* We reverse the Board's requirement of an inquiry into racial discrimination in siting, but affirm its disparate impact ruling. "Disparate impact" analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities.

¹⁷ For example, the cost-benefit analysis in the recent FEIS for the Crownpoint Uranium Solution Mining Project, NUREG-1508 (Feb. 1997) at 5-1 through 5-6, details expected effects on employment, income, and tax revenues. See also NUREG-1476, FEIS to Construct and Operate a Facility to Receive, Store, and Dispose of 11e.(2) Byproduct Material Near Clive, Utah (Aug. 1993) at 6-1; NUREG-0925, FEIS, Teton Uranium ISL Project (Aug. 1983) at 4-57.

a. *Racial Discrimination in Siting*

The Board decision reflects an earnest effort to apply and give meaning to the executive order in the case of the proposed LES facility. It declared, in words we fully endorse, that “racial discrimination [is] a persistent and enduring problem in American society.” 45 NRC at 391. It therefore directed the NRC Staff to conduct an “objective, thorough, and professional investigation” of the site selection process that led to the choice of the LeSage site, an area with a population more than 97% African-American, to permit a determination whether “the selection process was tainted by racial bias.” *Id.* The Board made no finding one way or the other on whether intentional racism in fact had tainted the decisional process, nor did it make clear the legal basis for its decision to order an investigation of possible racism in the selection of the site.

As the Board itself implicitly recognized, a search for evidence of racial motivation would likely prove an exercise in futility. *See* 45 NRC at 391 (“direct evidence of racial discrimination is seldom found”). We note, moreover, that in the present case, the testimony of CANT’s expert, Dr. Robert Bullard, does not hinge on claims of a deliberate and conscious intent to discriminate against African-Americans in the site-selection process, but rather on the claim that the result of the process and the siting criteria were discriminatory. Special impacts of the CEC on the local African-American communities will be considered, to the extent that NEPA requires it, in the evaluation of the environmental and socioeconomic impacts of the siting decision in this case. (We will address below the nature of the evaluation of socioeconomic impacts. *See* Section 5.b, *infra.*)

What the Board in this case seems to envision is a free-ranging NRC Staff inquiry into the motives of LES (and perhaps state and local) decisionmakers,¹⁸ with only the broad instruction that the Staff should “lift some rocks and look under them.” 45 NRC at 391. With no clear legal basis or clearly discernible objective, the Board’s approach cannot in our view be sustained, notwithstanding the worthy intentions that motivated it.

Under NEPA, agencies are required to consider not only strictly environmental impacts, but also social and economic impacts ancillary to them. But nothing in NEPA or in the cases interpreting it indicates that the statute is a tool for addressing problems of racial discrimination. Our view is fortified by the position taken by the agency with the greatest expertise in interpreting NEPA, the Council on Environmental Quality (CEQ). In recently issued draft “Guidance for Considering Environmental Justice under NEPA,” CEQ calls for a close

¹⁸LES, with the assistance of the Louisiana Department of Environmental Quality, solicited community leaders across northern Louisiana to determine whether the communities had an interest in the CEC. In answer to the solicitation, “21 communities in 19 parishes with over 100 sites responded and expressed an interest in hosting the project.” 45 NRC at 382.

NEPA examination of a proposed project's impacts on minority and disadvantaged communities, but neither states nor implies that if adverse impacts are found, an investigation into possible racial bias is the appropriate next step.

For these and other reasons, which we detail below, we reverse the Board's requirement of a further NRC Staff investigation into racial discrimination.

1. The Board apparently felt bound by President Clinton's executive order, and by a former NRC Chairman's commitment to abide by that order, to inquire on its own into racial discrimination, so as to "give meaning" to the executive order. *See* 45 NRC at 374-76. But the Board's effort to enforce what it saw as a "nondiscrimination directive" in the executive order (*e.g., id.* at 396) was misplaced. The executive order, by its own terms, established no new rights or remedies. *See* E.O. 12898, § 6-609. Its purpose was merely to "*underscore* certain provision[s] of *existing* law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment" (emphasis added). *See* Memorandum for the Heads of All Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).¹⁹

The only "existing law" conceivably pertinent here is NEPA, a statute that centers on environmental impacts. The Board's proposed racial discrimination inquiry goes well beyond what NEPA has traditionally been interpreted to require. Despite nearly 30 years of extensive NEPA litigation on countless putative impacts and effects of federal actions we are unaware of a single judicial or agency decision that has invoked NEPA to consider a claim of racial discrimination. Moreover, the Board's approach is incompatible with the directives in the CEQ's recently issued draft guidance for implementing the President's environmental justice executive order. The draft guidance focuses exclusively on identifying and adequately assessing the *impacts* of the proposed actions on minority populations, low-income populations, and Indian Tribes. It makes no mention of a NEPA-based inquiry into racial discrimination. An agency's environmental impact statement "must be evaluated for what it is, not for why the drafter may have made it so." *City of Grapevine v. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994).

An agency inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest: "the physical environment — the world around us, so to speak." *Metropolitan Edison Co.*, 460 U.S. at 772. Were NEPA construed broadly to require a full examination

¹⁹The Environmental Protection Agency (EPA) agrees with the view we express today that the executive order establishes no new legal rights or remedies. The EPA has held in a series of cases that the executive order grants the agency no independent authority to act, but is to be implemented within the constraints of EPA's existing enabling statutes and associated regulations. *See In re Shintech Inc.*, Petition on Permit Nos. 2466-VO, 2467-VO, 2468-VO (EPA Sept. 10, 1997) (Clean Air Act); *In re Envotech, L.C.*, UIC Appeal Nos. 95-2 through 95-37 (EAB Feb. 15, 1996) (Underground Injection Control Act); and *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3 (EAB June 29, 1995) (Resource Conservation and Recovery Act).

of every conceivable aspect of federally licensed projects, “available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.” *Id.* at 776.²⁰ *See also Public Utilities Comm’n v. FERC*, 900 F.2d at 282. NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries. *See South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d at 1011. “[T]here must be an end to the process somewhere.” *Providence Road Community Association v. EPA*, 683 F.2d 80, 83 (4th Cir. 1982).

Here, the Board would have the NRC Staff engage in a highly complex racial bias study with no obvious stopping point. To perform what the Board requires — an “objective, thorough, and professional investigation that looks beneath the surface” (45 NRC at 391) — the Staff (among other tasks) presumably would have to retrace the CEC’s entire history and determine, largely through inference and indirect evidence, whether an invidious racial animus infected the siting process or motivated any of the numerous federal, state, local, or corporate officials involved in it. The Board-ordered racial inquiry, in short, might in the end dwarf the core NEPA environmental inquiry. The effort would come with no guaranty of an accurate or useful result and would consume enormous NRC Staff resources.

The Commission process would not end with the new NRC Staff investigation. In this contested proceeding, resolving the racial discrimination issue fully and fairly, and completing the record, presumably would require the Commission to authorize a reopened discovery and hearing process on the results of the Staff study. This would lead ultimately to renewed Board proceedings to resolve what are likely to be disputed racial discrimination findings. In a nutshell, we would be embarking upon a second major litigation, possibly taking months or years to resolve, on an issue well outside NEPA’s principal concern, the “physical environment,” and far afield from the NRC’s experience and expertise.²¹

2. The Board’s contemplated free-ranging inquiry into the site selection process would go well beyond what the CEQ has stated is required of an agency considering a license application. The site screening process is used by a license applicant to identify sites that may meet the stated goals of the proposed action.

²⁰ Similarly, devoting substantial resources to racial discrimination would divert funds away from the Commission’s primary function under the Atomic Energy Act (AEA) to protect the public health and safety. Intervenor do not contend, nor do we find, that the allegations of discrimination here are related to the NRC’s responsibilities pursuant to the AEA. We best serve the public good by devoting our efforts to areas where Congress has assigned us responsibilities and where our agency has developed expertise.

²¹ Under a variety of state and national civil rights laws, local communities can (and frequently do) bring court actions challenging land use decisions alleged to be racially discriminatory. *See, e.g., Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997); *R.I.S.E. v. Kay*, 977 F.2d 573 (4th Cir. 1992), *aff’d* 768 F. Supp. 1144 (E.D. Va. 1991); *East-Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Commission*, 896 F.2d 1264 (11th Cir. 1989); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d mem.*, 782 F.2d 1038 (5th Cir. 1986). We are aware of no lawsuit of this type, however, that invokes NEPA as a cause of action.

It is not uncommon for only one of many possible sites to be deemed reasonable. *See, e.g., Tongass Conservation Soc’y v. Cheney*, 924 F.2d at 1141-42. CEQ’s implementing guidance provides that an EIS must “[r]igorously explore . . . all *reasonable* alternatives.” 40 C.F.R. § 1502.14(a) (emphasis added). For those alternatives that have been eliminated from detailed study, the EIS is required merely to “briefly discuss” why they were ruled out. *Id.* Where (as here) “a federal agency is not the sponsor of a project, the federal government’s consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.” *City of Grapevine v. DOT*, 17 F.3d at 1506 (internal quotation marks omitted).

Here, the only site identified by the Licensee as suiting its stated goals was the LeSage site, and as a result, it was the only site rigorously examined by the NRC Staff in the FEIS. *See* FEIS at p. 2-3. In accordance with NEPA, the Staff discussed the process used by LES to select a suitable site, and found it reasonable. Though required to do no more than “briefly discuss” why other sites were not chosen, the Staff in this case provided a detailed discussion, occupying 17 pages in the FEIS. *See* FEIS at 2-3 through 2-20. It identified more than twenty-five facility and site characteristics used by LES. The Board did not find, and CANT did not contend, that the criteria discussed in the FEIS showed overt signs of racism. Nor did CANT “offer tangible evidence” of an “obviously superior site” sufficient to call for a more thorough site-by-site NEPA review. *See Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982).

Exploring whether the LES siting criteria might perpetuate institutional racism, as CANT has contended, or might have been manipulated purposefully to discriminate, as the Board suggests, would require the NRC Staff to do much more than “briefly discuss” the reasons for eliminating the many other sites (79) initially considered. We are aware of no NEPA principle, and the Board cites none, requiring an elaborate comparative site study to resolve allegations of racial discrimination.

3. The Board’s decision to address the racial discrimination issue not only stretches NEPA to its breaking point, but also is questionable from a procedural standpoint. CANT’s original (and never amended) environmental justice contention (J.9) relied on NEPA and pointed simply to LES’s failure “to avoid or mitigate the *disparate impact* of the proposed plant on this minority community” (emphasis added). *See* 45 NRC at 372-73. It stressed the pernicious environmental effects of society-wide institutional racism. Similarly, prehearing discovery centered on the CEC’s allegedly disproportionate environmental and socioeconomic effects, not on racial discrimination as such. CANT’s pleadings before the Board developed no comprehensive legal theory of racial discrimi-

nation and did not advert to the seminal Supreme Court cases establishing the form and quality of proof necessary to sustain such a charge.²²

As the Board quite correctly noted, racial discrimination has proved “a persistent and enduring problem in American society,” “is rarely, if ever, admitted,” and is “difficult to ferret out.” See 45 NRC at 391. For these reasons, Congress and the Supreme Court have crafted a carefully woven system of legal remedies, and modes of proof and rebuttal, for the fair and equitable resolution of racial discrimination claims. See note 22, *supra*. Here, the Board gleaned from the record various pieces of evidence that it viewed as creating an “inference” of racial discrimination (*e.g.*, 45 NRC at 494, 395), but did not consider or even mention the customary allocation of burdens or standards of proof for such claims. No effort was made prior to the hearing to direct the parties’ attention to the issue or to the established means for adjudicating it. It therefore is hardly surprising that the evidence relied on by the Board entered the record “largely un rebutted or ineffectively rebutted.” See 45 NRC at 391.

Under these circumstances, we would not sustain the Board’s decisional process, even if (contrary to our view) NEPA did countenance an inquiry into racial discrimination in siting. Agency adjudications require advance notice of claims and a reasonable opportunity to rebut them. See, *e.g.*, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) (plurality opinion of Marshall, J.); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978). Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions, which in this case focused on mitigating impacts, not on uncovering racial discrimination. See, *e.g.*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988), *petition for review denied sub nom. Commonwealth of Massachusetts v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991). We think that the

²²The Board appeared most concerned with the possibility of racially motivated decisions, an area where the Supreme Court frequently has spoken. See, *e.g.*, *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Intentional racial discrimination requires a showing that the decisionmaker took action “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects on an identifiable group.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). In some statutory settings, the Supreme Court has considered a different racial discrimination question: whether seemingly neutral selection criteria may have discriminatory effects. See, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Again, however, the Court has carefully set out the means for evaluating such claims (concentrating largely on the necessity for the particular selection criteria). See *id.* Here, whether viewed from the perspective of discriminatory motives or from the perspective of discriminatory effects, neither the Board nor CANT made any pretense of meeting the Supreme Court standards.

Board decision here, insofar as it addressed racial discrimination, departs from these hallmarks of fair decisionmaking.²³

4. Our decision today does not reduce our commitment to the environmental justice goals set out in President Clinton's executive order. We hold only that NEPA is not a civil rights law calling for full-scale racial discrimination litigation in NRC licensing proceedings. We are aware from the record of this proceeding that the community surrounding the proposed CEC is 97% African-American and lives in poverty. The Board's decision outlines the unique burdens faced by this community: e.g., 31% of the population have no motor vehicles, over 10% of the houses lack complete plumbing, and 58% of the population lacks a high school education. *See* 45 NRC at 371. These communities also face housing barriers that white residents in Claiborne Parish do not. *Id.* at 409-10. We are confident that the Board, having identified these facts in the first place, will remain cognizant of them when it finally reviews the Staff's discussion of the impacts of the CEC, as well as mitigation measures, and arrives at the ultimate decision on the cost/benefit balance.

b. Disparate Impact

We turn now to an issue that lies close to the heart of NEPA: whether the CEC will have significant special impacts on the two nearby, overwhelmingly African-American, communities of Center Springs and Forest Grove. As President Clinton's executive order on environmental justice reminds us, adverse impacts that fall heavily on minority and impoverished citizens call for particularly close scrutiny.

The Board determined that the FEIS adequately considered all but two of the claimed local impacts: the need to relocate Parish Road 39 and diminution of property values. *See* 45 NRC at 397-411. As to the former, it found that the discussion of relocating the road did not consider the interference with pedestrian traffic between Center Springs and Forest Grove. The Board also

²³The Board justified its racial discrimination inquiry, in part, as a means "to avoid the constitutional ramifications of the agency becoming a participant in any discriminatory conduct through its grant of a license." 45 NRC at 391. "However, it is well established that a licensing relationship is insufficient in itself to give rise to wholesale governmental responsibility for the actions taken by a private licensee." *Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61, 67 (3d Cir. 1990), citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Under *Washington v. Davis*, *supra*, and its progeny, a federal agency must itself engage in intentional racial discrimination to trigger constitutional responsibility.

A more plausible reason, perhaps, for approving the Board's requirement of a further investigation into racial discrimination is to ensure a full review of the accuracy of the NRC Staff's own FEIS, which found "no specific evidence that racial considerations were a factor" in the CEC siting process. But the Board itself found no direct evidence of racial discrimination. *See, e.g.*, 45 NRC at 392, 394, 395, 396. The Board explicitly declined to "make specific findings on the current record that racial discrimination did or did not influence the site selection process." *Id.* at 391. Thus, in our view, the FEIS's "no specific evidence" statement does not demand reopening the agency's NEPA review for a new investigation into racial discrimination and a new round of litigation on it.

found that the FEIS failed to consider particularized adverse effects on property values in Forest Grove and Center Springs. We affirm the Board's findings.

1. *Relocation of Parish Road 39.* The FEIS states that closing and relocating Parish Road 39 will increase the length of the road between the two communities by 0.38 mile. *See* 45 NRC at 403. The FEIS found that this extra distance will increase driving time and therefore "inconvenience" community residents traveling by car between the two communities. *See id.* The FEIS does not mention the impact that the increased distance will have on pedestrians.

Despite LES's argument to the contrary, the record supports the Board's finding that Parish Road 39 is frequently used by pedestrians who would be adversely impacted by its relocation. CANT's expert witness, Dr. Bullard, testified that he interviewed residents of Forest Grove and Center Springs and was informed that Parish Road 39 is a vital and frequently used pedestrian link between the two communities. *See* 45 NRC at 405-06. The Board found Dr. Bullard's testimony on this point to be supported by Bureau of Census statistics and un rebutted by other parties. *Id.* at 406. The Board pointed out that many residents of the two impoverished communities have no choice but to travel by foot. *Id.* Further, some of the residents whom Dr. Bullard interviewed are elderly.²⁴ In these circumstances, the Board reasonably found that adding an extra 0.38 mile each way to a pedestrian commute would be more than a mere inconvenience, especially for elderly or infirm residents. *Id.*

The NRC Staff and LES argue that the Board erred in even considering the issue of impacts on pedestrian traffic from relocating the existing Parish Road 39. We disagree. From the outset of this proceeding CANT has contended that the communities of Forest Grove and Center Springs rely on Parish Road 39 and that closing the existing road would result in larger impacts on these communities than are reflected in the ER and FEIS. Relocation of the road arose as an issue only because the road as it exists today would be closed if the CEC were built. Thus, the impacts from relocation may fairly be said to be within the impacts of closing the existing road, and within the terms of CANT's Contention J.9, which alleged impacts on "families who use the road" and listed numerous joint community activities including "sports-related activities that involve children living in both communities, and church services that are divided between the two communities." *See* CANT's Contentions on the Construction Permit/Operating License Application for the CEC (October 3, 1991) at 40-41. Although CANT never stated or implied that all travel between

²⁴ *See* Transcript of Hearing (March 16, 1995) at 860 (Dr. Bullard remarked that he interviewed two community residents who were 75 and 84 years old).

the two communities would be by car, the FEIS inexplicably focused exclusively on car traffic. Under these circumstances, the Board sensibly concluded that the FEIS should also consider the impacts on pedestrian travelers.

2. *Impact on Property Values.* We also agree with the Board that the NRC Staff should revise the FEIS to analyze local property-value effects more thoroughly.

The current FEIS gives only cursory attention to the property-values issue. It recognizes that “to the extent the CEC affects the environment, those living closest will be the most affected,” FEIS at 4-35, and that the CEC will have “some negative” impact on property values. FEIS at 4-86. But it does not specify where, why, or to what extent the impacts on property values would be likely felt. Because Forest Grove and Center Springs are adjacent to the CEC’s proposed site, the negative impact on property values predicted by the Staff would presumably fall heaviest on these two communities. CANT’s expert witness, Dr. Bullard, whom the Board found “both credible and convincing” (45 NRC at 410), presented what the Board characterized as “a reasoned, persuasive, and unchallenged explanation why the CEC will negatively affect property values in these minority communities.” *Id.* In these circumstances, we defer to the Board’s view that the NRC Staff should explain its conclusion in the current FEIS that property values will be negatively impacted.

To be sure, the Board also found that two or three parcels of property near the CEC may increase in value, as possible sites for new business ventures supporting LES (e.g., food service and equipment vendors). It found, however, that the new business ventures would not create an overall increase in property values in the adjacent communities. *See* 45 NRC at 410-11. We believe the Board’s finding was reasonable. Moreover, since Forest Grove and Center Springs receive almost no parish services, their property values would not necessarily benefit from the influx of new tax money into the parish from the CEC. *See id.* at 409-10. In short, nothing we have identified in the record undermines the Board’s finding that the CEC would likely affect property values in Forest Grove and Center Springs adversely.

LES argues on appeal that property values in Center Springs and Forest Grove may actually *increase*. This argument is wholly untenable. In support of its position, LES points to testimony by its experts that the value of property adjacent to certain nuclear power plants had increased after siting of the facility. But the sites of the two nuclear power plants LES offered as examples could not be more different in terms of demographics from Forest Grove and Center Springs. The allegedly analogous nuclear power plants lie adjacent to prestigious resort communities. *See* LBP-97-8, 45 NRC at 411. Forest Grove and Center Springs, on the other hand, “receive almost no parish services, . . . and are

inhabited by some of the most economically disadvantaged people in the United States.” *Id.* at 409. Factors that may tend to increase the value of property near nuclear facilities, such as increased demand for homes by migrating employees, do not apply to Forest Grove and Center Springs, because new employees probably would choose to live in communities with more amenities.²⁵

LES and the NRC Staff argue on appeal that the Board never should have inquired into property values, because earlier in the proceeding the Board had turned down, for lack of “facts or expert opinion,” property value as a “basis” for CANT’s general NEPA contention (Contention J). *See* LBP-91-41, 34 NRC 332, 352 (1991). While the Board’s unexplained decision to allow CANT to revive and litigate its previously rejected property-value claim was questionable at best, we do not set aside the Board’s decision to require a fresh analysis of adverse property-value effects.²⁶ The Commission’s hearing order gave the Board independent responsibility to determine whether the NRC Staff’s NEPA review was “adequate.” *See* 56 Fed. Reg. 23,310 (May 21, 1991). Here, the FEIS was issued well after the Board’s original property-values ruling. As discussed above, the FEIS’s property-value discussion is deficient on its face. It offers merely a conclusory statement on “some negative” impact on property values, without explanation or analysis. In these circumstances, it was no abuse of discretion for the Board to require the NRC Staff to take the simple step of adding a more thoroughgoing analysis to the FEIS.²⁷

3. *Mitigating Impacts.* The Board directed the NRC Staff to consider whether actions can be taken to mitigate the impacts of relocating Parish Road 39. *See* 45 NRC at 406. We concur in that direction, and also direct the NRC Staff to consider whether actions can be taken to mitigate the impacts on property values. Dr. Bullard describes roads in Forest Grove and Center Springs as generally “either unpaved or poorly maintained.” *See* Bullard Prefiled Testimony, dated Feb. 24, 1995, at 18. There may well be simple and relatively

²⁵ *See* FEIS at 4-19 (During construction, “the ultimate residence of incoming migrants within the 24-parish region [surrounding the CEC] is likely to depend on amenities. A review of the amenities in the region suggests that workers are likely to migrate to one of the large parishes and commute to Claiborne Parish”); FEIS at 4-34 (during operation “most immigrants are expected to reside throughout the area, not just Claiborne Parish”).

²⁶ Consideration of the CEC’s negative impacts on local property values does not conflict with NRC case law or with *Metropolitan Edison Co. v. People Against Nuclear Energy*, *supra*. There, the Supreme Court upheld the NRC’s position that NEPA did not require consideration of the psychological effects resulting from fear of resuming operation at the Three Mile Island Unit 1 nuclear power plant. Here, the Board decision does not turn on psychological effects stemming from a fear of nuclear power. According to the Board, property devaluation will flow directly from radiological and environmental impacts associated with a “heavy industrial facility nearby, making them [the communities of Forest Grove and Center Springs] even more undesirable.” *See* 45 NRC at 409. The FEIS itself recognized impacts such as “possible increased crime, changes in quality of life” and “minimal” radiological and chemical impacts. *See* FEIS at 4-86.

²⁷ The NRC Staff need not prepare an elaborate or lengthy analysis. *Cf. Tongass Conservation Soc’y v. Cheney*, 924 F.2d at 1143-44 (reasonable for the Navy to refuse to conduct survey to determine the seriousness of the effects of a submarine testing range on local tourism where EIS discussed likely effects); *Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985) (extended discussion of secondary impacts not necessary).

inexpensive measures that could be taken to improve existing driving and walking conditions (e.g., improving current roads and footpaths). This in turn could mitigate property devaluation in these communities by improving overall living conditions. It is also possible that enhancing other community amenities or addressing a general housing concern may be appropriate to mitigate further any devaluation in property values. The FEIS must be revised to include a discussion of possible mitigating measures. We encourage LES and the NRC Staff to discuss these matters with CANT in an attempt to put these issues to rest prior to the Staff completing the revised FEIS.

CONCLUSION

For the foregoing reasons, the Board decisions in LBP-96-25 and LBP-97-8 are affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Chairman Jackson disapproved Section 5.a of the Commission order, titled Racial Discrimination in Siting. She would have affirmed in part and reversed in part the Board's requirement of a further NRC Staff investigation into the CEC's siting. In light of the alleged irregularities, gaps, and inconsistencies in the siting process, it was her preference that the NRC Staff should further investigate the siting process, without focusing on LES's alleged intentional racial motives, to ensure that the siting criteria were reasonable and were applied equitably.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

April 16, 1998

The Commission temporarily stays the effectiveness of the Presiding Officer's Memorandum and Order, LBP-98-5, 47 NRC 119 (1998), thereby staying the effective date of the materials license that the NRC Staff issued to Hydro Resources, Inc.

RULES OF PRACTICE: STAY OF ORDER; TEMPORARY STAY

The Commission may issue a temporary stay to preserve the status quo without waiting for the filing of an answer to a motion for stay. 10 C.F.R. § 2.788(f). The issuance of a temporary stay is appropriate where petitioners raise serious questions that, if petitioners are correct, could affect the balance of the stay factors set forth in 10 C.F.R. § 2.788(e).

MEMORANDUM AND ORDER

On April 2, 1998, the Presiding Officer issued a Memorandum and Order (LBP-98-5, 47 NRC 119) in this proceeding denying a motion for full stay filed by Southwest Research and Information Center and Eastern Navajo Diné Against Uranium Mining (collectively "Petitioners") and lifting a temporary stay

that the Presiding Officer had previously issued on January 23, 1998 (LBP-98-3, 47 NRC 7). The subject of the Petitioners' motion for full stay and the Presiding Officer's order granting temporary stay was the Staff's issuance of a materials license to Hydro Resources, Inc. ("Hydro"), for an *in situ* leach mining and milling operation in Church Rock and Crownpoint, NM.

On April 11, 1998, Petitioners filed with the Commission a petition for review of LBP-98-5 and a motion for both a full and temporary stay of the effectiveness of LBP-98-5 pending the Commission's review of that order. Our regulations provide that the Commission may issue a temporary stay to preserve the status quo without waiting for the filing of an answer to a motion for stay. 10 C.F.R. § 2.788(f). Petitioners have, in our view, raised serious questions that, if Petitioners are correct, could affect the balance of the stay factors. We therefore issue the requested temporary stay, pending our consideration of the Intervenors' petition for review and motion for a full stay.¹ This grant of Petitioners' motion should not, however, be construed as an indication of the Commission's views on the merits of Petitioners' motion for full stay or petition for review.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of April 1998.

¹ See, e.g., *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3 & 50-425-OLA-3, unpublished decision (Sept. 13, 1995) (granting temporary stay to preserve status quo pending the Commission's consideration of petition for review).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 70-3070-ML

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

April 30, 1998

The Commission grants the motion filed by the applicant, Louisiana Energy Services, to permit it to withdraw its license application and terminate the proceeding. This renders moot all remaining issues in this case. The Commission therefore dismisses the pending petitions for Commission review of the Atomic Safety and Licensing Board Orders, LBP-97-3, LBP-97-22, and the Board's March 3, 1995 unpublished order ruling on LES's decommissioning funding estimate. The Commission also vacates these three Board orders.

RULES OF PRACTICE: VACATUR

While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. *Cf. Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (1996).

RULES OF PRACTICE: RES JUDICATA

The *res judicata* or other preclusive effect of a previously decided issue is appropriately decided at the time the issue is raised anew.

ORDER

Louisiana Energy Services, L.P. (LES), has filed a motion to grant its request to withdraw its application for a combined construction permit and operating license for the Claiborne Enrichment Center (CEC), near Homer, Louisiana, and to terminate the proceeding. Pending before the Commission are three petitions for review concerning decommissioning funding and waste disposal. Two of the petitions, one filed by Citizens Against Nuclear Trash (CANT) and the other by LES, seek review of a published Partial Initial Decision issued by the Atomic Safety and Licensing Board, LBP-97-3, 45 NRC 99 (1997). CANT's petition also challenges a supplemental Board decision, LBP-97-22, 46 NRC 275 (1997). The third petition, also filed by CANT, seeks review of an unpublished Board Memorandum and Order, dated March 3, 1995, that denied CANT's petition for waiver of certain waste disposal regulations.

LES's motion to withdraw its license application and terminate the proceeding is granted. This renders moot all remaining issues in this case. The Commission therefore dismisses the pending petitions for review and vacates LBP-97-3, LBP-97-22, and the Board's March 3, 1995 unpublished order. While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. *Cf. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, CLI-96-2, 43 NRC 13, 15 (1996). Our decision to vacate the Board orders "does not intimate any opinion on their soundness." *Id.*

CANT's response to LES's motion calls for vacating several of the Commission and Board rulings in LES's favor, and giving *res judicata* effect to rulings in CANT's favor. These requests, except for vacating the unreviewed decommissioning rulings described above, are denied. CANT seeks a sweeping *vacatur* order because LES's withdrawal has stripped CANT of any immediate opportunity to seek judicial review of the rulings in LES's favor. CANT in this instance is no different from a party that finds itself at the end of the proceeding with exactly what it asked for, in this case no license. CANT will have an opportunity to seek judicial review when and if rulings issued in this proceeding are used against it in a future case. Similarly, the *res judicata* or other preclusive effect of a previously decided issue is appropriately decided at the time the issue is raised anew.¹

¹ We deny CANT's request for a Commission order requiring service of future documents exchanged between the Staff and LES after the proceeding is terminated. This seems to us unnecessary and would run counter to

(Continued)

In addition to the motion filed here, LES filed an identical motion with the Board to withdraw its license application and to terminate the proceeding. Our order terminating the proceeding renders unnecessary any further Board proceedings, either on the motion to withdraw and terminate or on the issues we recently remanded to the Board in CLI-98-3, 47 NRC 77 (1998).

The proceeding is hereby terminated.²

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April 1998.

NRC practice. *See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-3, 37 NRC 135, 152 n.46 (1993). We also deny CANT's request for special notice if LES were to refile its application. The Commission's existing notice requirements are adequate to ensure that CANT has an opportunity to seek participation in any future licensing proceeding.

²In its capacity as *amicus curiae*, the Nuclear Energy Institute (NEI) has filed a letter asking that the Commission "clarify that Executive Order 12898 does not, as a matter of law, apply to NRC licensing proceedings." No clarification is necessary, as the Commission has already held that the executive order "by its own terms, established no new rights or remedies. *See* E.O. 12898, § 6-609. Its purpose was merely to '*underscore* certain provision[s] of *existing* law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment' (emphasis added)." CLI-98-3, 47 NRC at 102. NEI cannot, in any event, advance arguments or bring motions not pursued by any party to the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 40-8681-MLA
(Alternate Feed Material)

INTERNATIONAL URANIUM (USA)
CORPORATION
(White Mesa Uranium Mill)

April 30, 1998

The Commission denies three Petitioners' appeal of two orders by the Licensing Board which found that Petitioners lacked standing to participate in the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE
(MATERIALS LICENSE)

Proximity alone does not suffice for standing in materials licensing cases. *See, e.g.,* Final Rule, "Informal Hearing Procedures for Materials Licensing Cases," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989); *see generally Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115-17 (1995).

RULES OF PRACTICE: STANDING TO INTERVENE

For Petitioners to qualify for standing, their asserted injuries from the action that would be approved by the license amendment must be distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016

(1998); *Warth v. Seldin*, 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

RULES OF PRACTICE: STANDING TO INTERVENE

If Petitioners fail to respond to a Presiding Officer's reasonable and clearly articulated requests for more specific information regarding Petitioners' claims of standing, the Presiding Officer is fully justified in rejecting the petitions for intervention.

RULES OF PRACTICE: STANDING TO INTERVENE; APPELLATE REVIEW (DEFERENCE TO PRESIDING OFFICER)

The Commission generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion. *See Georgia Tech, supra*, 42 NRC at 116.

MEMORANDUM AND ORDER

In LBP-97-12, 46 NRC 1 (1997), and LBP-97-14, 46 NRC 55 (1997), the Presiding Officer concluded that three Petitioners (the Native American Peoples Historical Foundation Inc.'s Great Avikan House Project, Ms. Lula Katso, and the late Mr. Norman Begay) had failed to demonstrate standing in this source materials license amendment proceeding. On appeal, Petitioners challenge the Presiding Officer's conclusions. We affirm LBP-97-12 and LBP-97-14.

Petitioners were provided clear and extensive guidance by the Presiding Officer (and also by the NRC Staff) on what additional showings were necessary to demonstrate standing. *See Energy Fuels Nuclear, Inc.* LBP-97-10, 45 NRC 429, 430-32 (1997). *See also* NRC Staff's Response to the Request for Hearing (May 21, 1997). Petitioners repeatedly ignored almost all of this guidance — not only at the hearing stage but also on appeal.¹ In particular, they failed to show that their asserted injuries from the action that would be approved by the license amendment are distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Warth v. Seldin*, 422 U.S. 490, 501,

¹However, contrary to the Presiding Officer's finding (LBP-97-12, 46 NRC at 6), Petitioners did provide him with the distance between their homes or headquarters and the White Mesa Mill property. But proximity alone does not suffice for standing in materials licensing cases. *See, e.g.,* Final Rule, "Informal Hearing Procedures for Materials Licensing Cases," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989); *see generally Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115-17 (1995).

508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

As we recently indicated in *Atlas Corp.* (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997), if a petitioner fails to respond to a "Presiding Officer's reasonable and clearly articulated requests for more specific information," the Presiding Officer is fully justified in rejecting the petition for intervention. Moreover, the Commission generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion. See *Georgia Tech, supra* note 1, 42 NRC at 116. We see no such error or abuse here.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April 1998.

* * * * *

Chairman Jackson did not approve this Memorandum and Order. She would have reversed LBP-97-12 and LBP-97-14 and remanded the proceeding to the Presiding Officer to determine whether Petitioners have raised any areas of concern that are germane to the license amendment. In her view, Petitioners (Avikan, Ms. Katso, and the late Mr. Begay) have claimed some risk of injury from the Cotter material, albeit not in precise or detailed terms, that would be avoided if the amendment were rejected. Thus, in her view, Petitioners have demonstrated enough for standing.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

B. Paul Cotter, Jr., Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

April 2, 1998

MEMORANDUM AND ORDER
(Denying Motion for Stay and Request for Prior Hearing,
Lifting of Temporary Stay, Denying Motions
To Strike and for Leave To Reply)

INTRODUCTION

On January 5, 1998, the Nuclear Regulatory Commission (NRC or Commission) issued Source Materials License SUA-1508 to Hydro Resources, Inc. (HRI), for the company's Crownpoint Uranium Project authorizing HRI to conduct *in situ* leachate mining at Crownpoint and Church Rock, New Mexico. On January 15, 1998, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (Petitioners) moved the Presiding Officer to stay the effectiveness of HRI's license, to rule that a hearing is required prior to the issuance of the license, and to grant a temporary stay to preserve the *status quo*. An interim stay was granted in LBP-98-3, 47 NRC 7 (1998).

REGULATORY CRITERIA FOR THE GRANT OF STAY MOTION

The regulatory criteria for the granting of a stay request in Subpart L proceedings is found in 10 C.F.R. § 2.1263 which incorporates 10 C.F.R. § 2.788 (1997) by reference. Specifically, the Presiding Officer must determine whether to grant or deny a stay request upon consideration of:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

See 10 C.F.R. § 2.788(e). The Commission has determined that factors 1 and 2 are the most important; should these factors be shown not to favor a stay, factors 3 and 4 are of lesser importance. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994). Irreparable injury is the most important of the four factors set forth in section 2.788(e). *Id.* at 7 citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990), *aff'd on other grounds sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir), *cert. denied*, 112 S. Ct. 275 (1991). Consequently, where a movant fails to show irreparable harm, then it must make an overwhelming showing that it is likely to succeed on the merits. See, e.g., *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) (absent a showing of irreparable harm, movant must demonstrate that the reversal of the licensing board is a “virtually certainty”). *Sequoyah Fuels Corp.*, 40 NRC at 7. The four factors listed above are addressed below, *seriatim*.

1. A Strong Showing That the Movant Is Likely To Prevail on the Merits

Petitioners argue in their Motion for Stay that the NRC has violated section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (1994), by issuing the license before completing the section 106 review process. They assert that section 106 and implementing regulations of the Advisory Council on Historic Preservation require federal agencies to take into account the effect of any “undertaking,” such as the issuance of a license on historic sites. They also assert that agencies must consult with the State Historic Preservation Officer (SHPO), Indian tribes, and other interested parties “prior to issuance of any license” and provide the Advisory Council on Historic Preservation “a reasonable opportunity to comment” on the effects of the proposed undertaking. Petitioners

cite 16 U.S.C. § 470f and 36 C.F.R. § 800.3 (1997) to support this argument and present several affidavits to buttress this argument and others. They allege that the NRC has failed to comply with the NHPA prior to issuing the HRI license by failing to consult with appropriate tribes, interested parties, and the Navajo Nation Historic Preservation Officer; by improperly excluding from review areas that will be disturbed by activities authorized by the license; and by relying on cultural resource reports that do not comply with the requirements of section 106 of the NHPA and other regulatory requirements. Stay Motion at 3-4, nn.2 & 3.¹

Petitioners rely on the Affidavit of William A. Dodge, attached to their Motion, ¶¶ 23-29. Mr. Dodge by education and experience is qualified to give testimony as to cultural resource management and resource preservation. In his affidavit, Mr. Dodge gives his opinion that the cultural resources review conducted by HRI

is inadequate to ensure that properties eligible for listing in the National Register of Historic Places are not destroyed or disturbed before they have been properly identified and subjected to the procedural protections of the NHPA. . . . [In his] professional judgement, the section 106 process for this project is in its earliest stage and is far from completion.

Dodge Affidavit ¶¶ 2, 29. Moreover, in Mr. Dodge’s opinion, the review process conducted so far is “far from complete” because other interested officials and parties have not been consulted by HRI or the NRC in its review process. *Id.* ¶¶ 30-44. Mr. Dodge concludes:

In sum, the NRC’s granting, prior to completing the Section 106 process, a license to HRI to engage in construction and mining activities at Crownpoint and Church Rock, New Mexico, poses a serious threat of irreparable harm to archeological sites and [traditional cultural properties] TCPs. Well before mining begins, building of access roads, construction of well pads, and development of facilities to support the actual mining activity are substantially likely to damage, destroy, and intrude upon archeological sites and TCPs and thereby have grave adverse effects on the cultural lifeways of both Navajo and Pueblo peoples.

Id. ¶ 44.

Petitioners also filed the Affidavit of Klara B. Kelley, Ph.D. Dr. Kelley is qualified by education and experience to give expert opinion concerning cultural resources and resource preservation. Dr. Kelley states in her professional opinion that HRI’s cultural resources documentation is an inadequate and

¹Petitioners attempt to incorporate by reference arguments found in their Second Amended Request for Hearing. While the Presiding Officer referenced these documents in the determination to grant a temporary stay, they do not carry any weight here. The grounds for a temporary stay are different from those prescribed by the Commission for a permanent stay. The Commission’s regulations specifically limit a request for a permanent stay to 10 pages, exclusive of affidavits. *See* 10 C.F.R. § 2.788(b). Incorporating the Petitioners’ hearing petition by reference is an inartful attempt to bypass this page limitation.

incomplete basis for determining how the project, and licensing it, may affect significant cultural resources according to applicable federal and Navajo Nation laws, regulations, and policies. Kelley Affidavit ¶3. She claims that HRI's documentation of Navajo and other tribal traditional cultural properties is particularly fragmented, unstandardized, and incomplete, and does not comply with professional standards. *Id.* ¶7. She states that HRI researchers failed to consult both individuals and literature concerning Navajo culture and land use that is necessary for assessing the significance of specific cultural resources and recommending measures to mitigate the ways the project might adversely affect them. *Id.* ¶¶10-20. Dr. Kelley also finds the HRI report to be incomplete because it does not treat the cultural landscape as a whole, with specific notice of the intricacies of cultural land use over extended lengths of time. *Id.* ¶¶21-30.

In HRI's Response to Petitioners' Motion for Stay dated January 26, 1998, Applicant argues that Petitioners have placed too much emphasis on possible harm to sites that will not be affected by mining activities in the immediate future. Under HRI's NRC license, the company must develop its mining operation in a phased approach. It must first obtain permits from the U.S. Environmental Protection Agency (EPA) and the State of New Mexico before it can begin its mining operations. Moreover, HRI states that it may only begin activities at Section 8 of its Church Rock properties, and it is prohibited from proceeding with mining activities at other locations until it has completed a full-scale restoration demonstration at Section 8. According to Applicant, Section 8 is the only property that HRI can begin mining under its NRC license any time in the near future. HRI asserts in its pleading that its proposed mining project is still in the planning stages. HRI Response at 3 n.8. Applicant implicitly admits in its response that its cultural resource review process, as required by the NHPA, may be incomplete. However, it interprets section 106 of the NHPA to allow the NRC flexibility in implementation of the review process. Since Applicant's proposed mining activities may only take place in a phased approach, it argues that the requirements of the NHPA will be complied with by instituting a phased approach to implementation of its review requirements. It also agrees that its license "requires the NRC to complete the section 106 review before HRI undertakes any actual construction activities." *Id.* at 4. Section 9.12 of the HRI license requires the NRC to find that

[a]ll disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act of 1966, as amended, and its implementing regulations (36 C.F.R. Part 800), and the Archeological Resources Protection Act of 1979, as amended, and its implementing regulations (43 C.F.R. Part 7).

Id. at Attachment G.

Along with its response, Applicant includes affidavits from Eric Blinman and Lorraine Heartfield, both qualified by education and professional experience to provide expert opinion in the area of cultural resources and historic preservation. Dr. Blinman states that the Petitioners' Motion "ignores the concurrence of the New Mexico State Historic Preservation Officer ("NMSHPO") with the NRC requirement that cultural resources be evaluated within an NHPA § 106 review process for *each phase* of the proposed mining development." Affidavit of Eric Blinman ¶7 (emphasis in original). Dr. Blinman goes on to detail the resource inventories that have been conducted on the land areas that will be affected by near-term surface construction activities. *Id.* ¶¶8-10. In Dr. Blinman's opinion, "[w]ithin the framework of the phased development of HRI mining facilities, all requirements for compliance with the NHPA § 106 process are being met" (*Id.* ¶ 11) and "no mining developments can occur on lands other than those addressed in [surveys] until the NHPA § 106 process is completed for cultural resources on those specific lands." *Id.* ¶12. Dr. Blinman also states that consultations have taken place concerning visual and noise intrusions produced by mining activities and that all disputes concerning eligibility of specific cultural resources would have to be resolved before the NHPA § 106 process is complete. Dr. Blinman concludes that Mr. Dodge's statements in his affidavit "have merit only in the absence of a phased approach to NHPA § 106 compliance. Since the NRC and the NMSHPO have concurred on pursuing a phased approach, the substantive criticisms of his affidavit are irrelevant." *Id.* ¶20. Dr. Blinman also addresses Dr. Kelley's assertion that too little emphasis has been placed on the totality of the cultural landscape when the site review was conducted. Dr. Blinman explains that Dr. Kelley's interpretation

is not applied during the routine evaluation of cultural resource information by the NNHPD [Navajo Nation Historic Preservation Department] as part of the NHPA § 106 review process for other less controversial development projects (such as highway improvements, coal mining, utility installation).

Id. ¶29.

Applicant also submits the Affidavit of Lorraine Heartfield in support of its position. Dr. Heartfield's affidavit specifically addresses the acceptance of the phased approach to resource inventories and NHPA compliance in large-scale mining activities, and she provides examples where the phased approach has been used. Heartfield Affidavit ¶¶7-12. Her affidavit lists specific cultural resources inventoried on the land included in the proposed first phase of HRI's mining development. *Id.* ¶¶13-20. She also details the efforts HRI made to include a broad spectrum of Native American groups in the review process. *Id.* ¶¶21-36. In Dr. Heartfield's opinion:

The phased review of the proposed development by Hydro Resources, Inc. (“HRI”) pursuant to Section 106 of the National Historic Preservation Act (“NHPA”) was proposed by the . . . (“NRC”) and accepted by the New Mexico State Historic Preservation Division . . . and the Navajo Nation Historic Preservation Department [P]hased Section 106 review is a common practice. I strongly affirm that the cultural resources review of HRI’s proposed development fully complies with NHPA § 106 and is proceeding in a proper manner as required by Condition 9.12 of the NRC operating license for HRI.

Id. ¶ 3.

NRC Staff’s Response also asserts that both the New Mexico State Historic Preservation Office and Navajo Nation Historic Preservation Department concur in the phased approach to cultural resource inventory. Staff Response at 3. The response further details efforts to include other Indian people as interested parties in the process. Staff offers strong legal support for the phased approach to resource inventories as being in compliance with NHPA § 106 and a rebuttal of the legal arguments advanced by the Petitioners. *Id.* at 5-6. Staff filed the affidavit of Robert D. Carlson in support of its arguments. Mr. Carlson is the NRC project manager for the proposed HRI mining project, and he has first-hand knowledge of HRI’s effort to comply with the NHPA. Mr. Carlson details the efforts to consult with interested parties on the part of the individuals involved with the HRI resource inventory, most specifically the Navajo Nation Historic Preservation Department. *Id.* at 6-10. Mr. Carlson disputes the Petitioners’ allegations of noncompliance.

ANALYSIS

The brunt of the irreparable harm Petitioners allege is that the NRC has issued a license to HRI to conduct mining activities without having complied with the provisions of section 106 of the National Historic Preservation Act. Because of this noncompliance, Petitioners allege that construction activities will irreparably harm cultural resources that have great meaning and importance in the history and day-to-day lives of the various Indian people of the region. However, Petitioners’ motion, legal citations, and accompanying affidavits largely ignore HRI’s phased approach to compliance with NHPA § 106 in its mining development. Petitioners are silent on the acceptability of the phased approach in complying with the requirements of the NHPA. Applicant’s approach is to complete cultural resource inventories and preservation plans on various sections of the development prior to each section being developed instead of the whole inventory being completed on the whole development before mining commences. In essence, Petitioners argue that HRI fails to comply with the NHPA unless the whole resource inventory and protection plan is established before any mining development can begin. However, for the purposes of meeting the Commission’s requirements for a stay, the focus is not on methodology

but on whether construction activities could wreak actual damage on cultural resources that have not been inventoried and adequately addressed in mining plans. It is this type of damage the NHPA was intended to prevent. Applicant's arguments and support affidavits establish at this stage of the proceeding that Applicant's phased approach to compliance with the terms of section 106 of the NHPA ensures that actual damage will not occur.

Applicant and NRC Staff adequately address the appropriateness of the phased approach to compliance with section 106 of the NHPA with regard to cultural resources. HRI states that it may only begin activities at Section 8 of its Church Rock properties, and it is prohibited from proceeding with mining activities at other locations until it completes a full-scale restoration demonstration at Section 8. Staff proffers evidence that resource inventories have been conducted on the only area Applicant can mine in the immediate future. Staff Exhibit 2 at 159-60. Moreover, as noted above, section 9.12 of the HRI license requires the NRC to find that all disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act of 1966 and the Archeological Resources Protection Act of 1979.

The weight of the evidence of record at this point clearly favors Applicant. First, phased compliance with section 106 of the NHPA does not appear to violate the statute. Staff has offered evidence that this approach to compliance with the NHPA has been successfully employed at other mining projects, and Petitioners have not demonstrated a legal or practical bar to this approach. Second, the State Historic Preservation Officer and the Navajo Nation Historic Preservation Department have agreed to this approach of phased compliance, and other interested parties have not objected. Third, there appears from the affidavits to be no disagreement that the only parcel of land that Applicant may develop under the conditions of its NRC license has been satisfactorily inventoried and is in compliance with the NHPA. In short, Petitioners have failed to make a strong showing at this juncture that they are likely to prevail on the merits. Having failed in its attempt to demonstrate that it is likely to succeed on the merits, it becomes mandatory for Petitioners to demonstrate the threat of irreparable injury from the Staff's licensing action for the granting of a stay.

2. Irreparable Injury

Petitioners allege four types of irreparable injury upon commencement of mining activities by HRI: (1) destruction of historic and cultural resources; (2) contamination of groundwater; (3) irradiation due to wastewater; and (4) harmful health effects from premining construction activities. As set out above, construction activities under the HRI license may only take place on those land

parcels where there is compliance with the requirements of the NHPA. Hence, there is no threat of irreparable injury with regard to Item 1, historic and cultural resources, due to noncompliance with the NHPA.

The second alleged injury involves the contamination of groundwater that is either currently a drinking water source or is of sufficient quality to provide a future drinking water source. According to Petitioners, members of ENDAUM and SRIC will suffer irreparable injury to their health from drinking the contaminated water. Petitioners claim that Applicant's proposed groundwater restoration is inadequate and will leave contaminants in the groundwater at concentrations exceeding both their existing low concentrations and drinking water standards. They claim that such harm to their drinking water source and environment is irreparable. Stay Motion at 6.

The third alleged injury involves the application of wastewater on certain lands within the Applicant's project area. Petitioners claim that this process poses a threat of irreparable injury to the health of one of ENDAUM's members and to his property. The ENDAUM member allegedly resides in the Church Rock project area and grazes his cattle within the Church Rock mining site upon which HRI intends to apply wastewater. According to Petitioners, contrary to Staff's analysis, the radiation dose from land application of wastewater to local residents, such as the ENDAUM member, is likely to exceed regulatory limits. *Id.* at 6-7.

Petitioners allege a fourth injury, although it is less defined. They argue that premining construction activities that disturb the ground will release "soil contamination from previous mining" and thereby cause injury to the health and property of the ENDAUM member in question. *Id.* at 7-8.

a. Groundwater Contamination

Petitioners rely on the conclusion of Richard J. Abitz, a geochemist, and Michael G. Wallace, a hydrologist, that there is inadequate geologic modeling of lixiviant injected into the Westwater Canyon Formation aquifer at the Unit 1 and Crownpoint sites. Petitioners contend that the geologic aquifer contains thinner, more permeable geologic channels than modeled by HRI and, therefore, that sand channeling may occur. Petitioners allege that because of this channeling in the aquifer, potential contaminants will flow into the municipal water supply of Crownpoint at a rate faster than projected by HRI. In addition, HRI's operating procedures and monitoring plan, including the frequency and placement of monitoring wells, are not adequate to detect movement through and potential excursions into the aquifer. Mr. Wallace also argues that there may be hydraulic connection vertically to the Dakota aquifer, also a source of drinking water for Crownpoint residents. Petitioners postulate that Crownpoint residents will drink contaminated water exceeding standards. Dr. Abitz argues that Staff and

HRI should not use a combination of ore-body and non-ore-body samples to determine a premining baseline for establishing concentrations for restoration standards in the ore body. Finally, Dr. Abitz argues that the existing HRI and NRC chemical monitoring criteria (including the use of uranium as a monitoring parameter) are inadequate for detecting excursions and groundwater restoration standards. In Dr. Abitz's judgment, the groundwater restoration standard proposed by the NRC is not protective of the public health and safety and is not consistent with EPA drinking water standard. For these reasons, Dr. Abitz postulates that elevated contamination in groundwater from excursions into aquifers supplying the Crownpoint water supply will pose an immediate and irreparable threat to the health of the Crownpoint residents. Abitz Affidavit ¶¶ 7-13, 20-40; Wallace at 7-30; FEIS at 3-24.

Applicant counters Petitioner's groundwater allegation of irreparable harm by simply claiming that before HRI can begin *in situ* leachate mining, it must obtain an approved underground injection control permit and an aquifer exemption from the EPA. Applicant avers that it already possesses an aquifer exemption for Section 8 of Church Rock. Before it can begin mining at Unit 1 and Crownpoint, it must obtain an underground injection control permit and an aquifer exemption for those sites; and it must meet the NRC license conditions including the movement of the Crownpoint town water wells. HRI Response at 6; Clement Affidavit at 9. Applicant argues that EPA regulations provide that an exempted aquifer is one that "does not currently serve as a source of drinking water" and "cannot and will not in the future serve as a source of drinking water." 40 C.F.R. § 146.4; HRI Response at 6 & n.18. In addition, Mr. Clement points out that the NRC has approved this project as a phased development requiring as one of the first activities a groundwater restoration demonstration at Section 8 of the Church Rock site. Clement Affidavit ¶ 10. Craig S. Bartels, a petroleum engineer and Vice President of HRI, counters Petitioners' concerns about aquifer characteristics by stating that a more detailed analysis of aquifer characteristics will be performed as part of the uranium recovery operations and the concurrent monitoring process. HRI will monitor water levels in the various aquifers to detect vertical movement of water from one aquifer to another. Bartels Affidavit at 6.

Staff responds with the opinion of William H. Ford, an NRC geohydrologist, that the license already contains conditions that adequately ensure that groundwater will be sufficiently protected from contamination once *in situ* leachate mining begins. Staff response at 7; Ford Affidavit at 7. The Staff asserts that there is adequate geologic information to describe the mining sites. Ford Affidavit ¶¶ 7-10. Mr. Ford does not find the proposed monitoring of potential excursions inadequate. He argues that arrangements for monitoring wells meet current NRC guidance and that license conditions will ensure that a hydraulic connection exists between the monitoring wells and the injection and production

wells. Therefore, these wells will adequately monitor the Westwater aquifer and ensure that *in situ* leachate mining will not be a threat to public water supplies. Mr. Ford also opines that NRC license conditions require sufficient monitoring wells between Unit 1 and Crownpoint to detect any vertical excursions and to protect groundwater. Staff addressed Petitioners' concern that groundwater flows into Crownpoint drinking water well would be faster than projected by HRI by requiring HRI to perform a sensitivity analysis varying all parameters such as pumping rates of the town wells, aquifer thickness, porosity, and rates between lateral and transverse permeability. These values showed a minimum of 698 years for groundwater to flow from Unit 1 to Crownpoint wells, a value considered unrealistically conservative by the Staff. *Id.* ¶¶20-26. Staff argues that in their opinion the risk of vertical excursions is low and that Petitioners' challenge to the models does not establish that a geologic and hydrologic vertical connection exists between aquifers. Staff agrees that existing mine shafts may become vertical pathways between aquifers and has required license conditions to address these issues. Since information must be collected prior to lixiviant injection, the use of the planned chemical indicators for detecting these excursions will be effective without the use of uranium as an indicator. Responding to Petitioners' allegations of an inadequate groundwater restoration standard, Staff points to license conditions that require a stringent standard for restoration of the ore-body water quality. *Id.* ¶¶17-40. Staff also disagrees with Dr. Abitz, asserting that the radiologic standard used by the NRC is consistent with 10 C.F.R. § 20.1301, the annual dose limit for individual members of the public. McKenney Affidavit ¶¶5-10. Staff did not address whether the EPA drinking water standard or the NRC effluent standard should be used.

ANALYSIS

Petitioners' presentation concerning groundwater, and consequently drinking water, contamination is not persuasive. Petitioners concentrate their concerns on the Unit 1 and Crownpoint sites, but do not explain why the license condition requiring a groundwater restoration demonstration at the Church Rock site is not protective of the groundwater in Crownpoint. NRC License ¶10.28. Licensed operations will commence at Section 8 at the Church Rock site. Clement Affidavit at 4. The only resident near the site of this demonstration, Larry J. King, has a residence on the Section 17 portion of the Church Rock site and did not profess injury from the groundwater demonstration at Section 8 of the Church Rock site. King Affidavit at 2, 4-5. He appears to suffer no immediate threat from that demonstration.

Staff and Applicant adequately address the concerns of Petitioners in their explanation of the phased development and licensing approach. As discussed above, the concern about speed of flow of groundwater from the Unit 1 site

toward Crownpoint, vertical excursion monitoring, and groundwater restoration standards are adequately addressed by Staff as license conditions. NRC License ¶¶ 10.14-.15, 10.17-.29, 10.31. Finally, before any lixiviant can be pumped at Crownpoint, NRC requires that the public wells serving Crownpoint be moved. NRC License ¶ 10.27. Regarding the dispute concerning the use of the drinking water or the effluent standard, Staff is persuasive that the standard used by NRC will ensure that there will be no immediate or irreparable harm from the proposed licensed activities. For all the foregoing reasons, I find that Petitioners fail to demonstrate irreparable injury on the basis of groundwater concerns sufficient to require that a stay be granted at this time.

b. Wastewater Application

Petitioners claim that the radiation dose from land application of wastewater is likely to exceed regulatory limits and poses a threat of irreparable injury to the health and property of Larry J. King, an ENDAUM member. While Mr. King has read the Draft Environmental Impact Statement, he has not read the Final Environmental Impact Statement. He is concerned that HRI will dispose of wastewater from its Church Rock operation on land near his residence on Section 17, Township 16 North, Range 16 West, McKinley County, New Mexico. Declaration of King ¶¶ 4, 6. Mr. King fears that such wastewater disposal would contaminate land and water ponds he now uses for grazing his cattle and harm him, his family, and his cattle. Mr. King also objects to *in situ* leachate mining activities planned for Section 17 of the Church Rock site. *Id.* ¶¶ 7-11.

Petitioners cite the professional judgment of affiant Marvin Resnikoff, a physicist, who opines that HRI is most likely to use groundwater sweep and land application as the most likely groundwater restoration alternative. Affidavit of Martin Resnikoff, Ph.D., ¶ 10. Dr. Resnikoff's view is that it will require more pore volumes to remediate the aquifer after mining than estimated by HRI or NRC. Therefore, HRI and Staff underestimate the volume of contaminated wastewater generated during mine groundwater restoration. Dr. Resnikoff also contends that Staff ignores the ingestion of well water. He believes that the radiation dose to an adult individual and a child on that land will be above regulatory limits, resulting in immediate and irreparable harm to residents in the area. He also supports Mr. King's concern about contamination of livestock. Resnikoff ¶¶ 12-24.

Applicant responds that the assumptions Dr. Resnikoff uses in his calculations are erroneous. The decision on how to handle wastewater among the possible options of deep-well disposal, brine concentration, evaporation, irrigation (land application), or some combination will not be made until Applicant has the necessary licenses, permits, and approvals in place. Applicant further opines that

it is most likely to use a combination groundwater sweep and reverse osmosis technology and that groundwater application is the least likely option because of the severe winters at the site. Clement ¶ 12; Pelizza ¶¶ 10-13.

Staff rebuts Dr. Resnikoff's opinion that disposal of wastewater will result in exceeding radiation dose limits with an affidavit from Christopher A. McKenney, a nuclear engineer. McKenney agrees with Applicant that Dr. Resnikoff's calculation is extremely conservative. In addition, McKenney believes that Dr. Resnikoff's calculation includes exposure from radon and cannot be properly compared with the dose standard for unrestricted release. Staff contends that even Dr. Resnikoff's conservative calculation would meet the standards when the radon pathway is not included, as allowed by the regulation. Affidavit of Christopher A. McKenney ¶¶ 11-15. With respect to Petitioners' concern about higher doses to children, Staff's opinion is that they will be lower than adult doses. *Id.* ¶¶ 16-20. Staff calculates that with the restoration of groundwater to secondary restoration standards, and using Dr. Resnikoff's dose calculations, a resident drinking well water on the site used for land application of wastewater would be exposed to a total dose less than the dose limit. *Id.* ¶¶ 21-22. It is Staff's judgment that dose to residents from livestock contamination at the site has already been considered in Staff's analysis. *Id.* ¶¶ 23-25. Finally, Staff states that a license amendment and NRC approval will be required in order for HRI to dispose of wastewater by land application.

ANALYSIS

Applicant and Staff argue convincingly that Dr. Resnikoff's conservative calculation of radiation doses to residents of the site after wastewater application is not adequate to support a finding of immediate and irreparable harm from that source. Both Staff and Applicant postulate alternative wastewater treatment processes that could reduce the impact of radiation doses on the resident population. In addition, this possible issue is not even ripe for discussion because Applicant has not yet decided, much less submitted, how it will address the matter in its required application for an amendment to its existing license prior to any treatment of wastewater. Consequently, no immediate and irreparable harm from wastewater treatment has been shown, thus obviating the need for a stay pending completion of this proceeding based on this issue.

c. Release of Soil Contamination from Previous Mining Activities

Petitioners allege that ground-disturbing activities such as ground clearing, access road construction, and digging trenches in preparation for mining will release *existing* soil contamination and thereby cause irreparable injury to the health and property of ENDAUM member Mr. King. In support of this

contention, Dr. Resnikoff cites a 1987 survey at the mining site in the NE corner of Section 17 which detected elevated gamma radiation levels. Dr. Resnikoff postulates that the disturbance of these areas will result in the resuspension of radioactivity in the air resulting in an unquantified additional and potentially significant risk to Mr. King, his family, and livestock. Resnikoff ¶ 27.

Applicant counters this concern by stating that: (1) the cited portion of Section 17 is the only area with existing soil contamination; and (2) HRI has no intention of performing any significant earth-disturbing activities other than the installation of wells and some trenching. Hence, HRI argues it will cause little if any soil disturbance above the level normally found in ranching or farming. HRI Response at 7; Affidavit of Mark S. Pelizza ¶ 21.

Staff disagrees with Dr. Resnikoff's conclusion on two grounds: First, he overestimates the amount of construction activity on Section 17; and, second, whatever activity will occur at that site will be limited in time to a few weeks. Staff conservatively calculates a dose to an individual downwind of the site to be a small fraction of the dose the individual would receive from natural background radiation. McKenney ¶¶ 27-28.

ANALYSIS

Here again, Petitioners are not persuasive that their concern about radiation dose from resuspension of existing radioactive contamination will cause immediate and irreparable harm. Dr. Resnikoff did not quantify the postulated injury from resuspension of radioactive dust from construction activities. Staff offers a seemingly conservative calculation showing that such activities would result in additional radiation doses only a small fraction of background for a 3-month period.

Petitioners have failed to demonstrate that they will be irreparably harmed unless a stay is granted. Most of the activities cited by Petitioners are prospective and do not present the immediate harm necessary to warrant a stay. Other technical concerns have been adequately rebutted by HRI and the Staff and also fail to demonstrate the need for a stay to issue.

3. Harm to Other Parties by Granting a Stay

Where the party seeking a stay has failed to meet its burden on the two most important factors, irreparable injury and likelihood of success on the merits, the Commission need not give lengthy consideration to the other two factors, public interest and harm to other parties. *Sequoyah Fuels Corp.*, 40 NRC at 8.

Petitioners claim that a stay pending completion of this adjudication would cause no undue harm to HRI. Petitioners buttress this argument with an analysis of the financial impact on HRI of not being able to mine in the near future.

However, this impact is based on the financial harm that may or may not enure to HRI's parent corporation, Uranium Resources, Inc (URI). Petitioners claim that URI can meet all of its contractual needs through its other mines without need for production from HRI. Stay Motion at 9-10. Next, Petitioners argue that before HRI can commence mining and hence generate revenue, it must first obtain several additional permits and approvals. They claim that such additional permits are either still being processed or are in litigation. *Id.* at 10 n.11. Thus, according to Petitioners, issuance of a stay until completion of this proceeding will not cause immediate harm to HRI.

Applicant counters these arguments by saying that Petitioners ignore the substantial harm a stay would cause to HRI's ability to attract investors. Applicant offers the affidavit of Richard F. Clement, Jr., to support their claim of potential harm. Mr. Clement is President of HRI and he has been involved with the Crownpoint project for over 25 years. Mr. Clement gives a brief description of what HRI has done in that time period to prepare for production at the Church Rock and Crownpoint sites. "With sufficient margin for profit, the company can receive financing from a lending institution or raise capital from the equity markets." Clement Affidavit ¶8. He states that the value of HRI's holdings would be reduced if a stay were to issue and it would make it very difficult for HRI to raise capital from outside investors. Moreover, Mr. Clement believes that a stay would make it more difficult to finalize other necessary approvals for the project, one that he alleges has already cost HRI over \$6.5 million for the licensing process alone. *Id.* ¶¶ 14-15.

Staff asserts that Petitioners have focused on the wrong entity with respect to injury. According to Staff, HRI, not URI, is the applicant in this proceeding and Petitioners have failed to show that HRI would not be harmed by a further stay pending completion of this hearing. Therefore, Staff concludes that Petitioners have failed to sustain their burden of proof regarding this stay criterion. Staff Response at 9.

ANALYSIS

Petitioners urge a derivative impact claim in support of its stay request, namely that a stay pending completion of this adjudication would cause no undue harm to HRI because HRI's parent corporation, Uranium Resources, Inc. (URI), can meet all of its contractual needs through its other mines without need for production from HRI. Stay Motion at 9-10. Petitioners' emphasis on URI is clearly misplaced. HRI is the Applicant in this proceeding, not its parent corporation URI. Petitioners have offered an annual report to support their claim that URI will not be harmed by a stay, but it is URI's annual report, not HRI's. While URI may be able to weather a continued delay of production by HRI, Petitioners have failed to even address the potential harm that could befall HRI's

considerable investment if a stay were to issue. URI's annual report simply does not address this issue.

Petitioners next argue that before HRI can commence mining and hence generate revenue, it must first obtain several additional permits and approvals. They claim that such additional permits are either still being processed or are in litigation. Thus, according to Petitioners, issuance of a stay until completion of this proceeding will not cause immediate harm to HRI. This argument carries no weight. Neither the Presiding Officer nor NRC can control the timing of other permitting processes involving other federal or state agencies, nor the timing of litigation. Petitioners have failed to carry their burden with respect to a showing that a stay pending completion of this proceeding will not potentially harm Applicant.

4. Where the Public Interest Lies

Petitioners argue that a stay is needed to protect the public interest because the quality of the drinking water for 5,000 to 15,000 people is in jeopardy due to HRI's planned mining activity. Further, Petitioners want the Presiding Officer to be "mindful" "that advancement of the public interest" lies in preserving cultural and archeological resources. Stay Motion at 8. Petitioners also make the unique argument that section 189 of the Atomic Energy Act and the due process clause of the Constitution grant Petitioners absolute rights to a prelicensing hearing on the HRI application, citing language in the Notice of Proposed Rules for Subpart L hearings to support this claim. In addition, Petitioners argue that the NRC has a "special duty under its trust obligation" to make sure Petitioners receive a meaningful hearing before a license takes effect. *Id.* at 2-3.

Applicant counters these arguments by stating that it is in compliance with the NHPA, or will be in compliance as mining activities proceed under its phased approach, so therefore it will not cause the harm to archeological resources that Petitioners claim. Applicant also cites the language in the Notice that the Rules of Practice "do . . . not preclude, *and in fact contemplate*, the grant of a license by the NRC Staff prior to any initial decision in any proceeding convened as a result of a hearing request.'" Applicant cites the Commission's recognition of a "right" to prompt administrative assessment and determination on its application and the acknowledged interest in avoiding administrative delay. Applicant Response at 9-10. Staff offers a general argument that Petitioners' public interest concerns have been addressed adequately under the "irreparable injury" criterion and need no further consideration as public interest concerns. Staff Response at 9.

ANALYSIS

Petitioners' arguments concerning potential harm to drinking water and archeological resources have been addressed in previous portions of this Decision and have been found wanting. They will not be addressed further. Suffice it to say that the Presiding Officer finds the claims of immediate irreparable injury to be unsupported by the evidence and arguments presented by Petitioners.

Petitioners assert² that section 189 of the Atomic Energy Act and the due process clause of the Constitution entitle Petitioners to a *prelicensing* hearing on the HRI application under the circumstances of this case, namely that "the licensing action poses a significant threat to the health, safety, and property of Petitioners' members. . . ." Petitioners' Motion at p. 2-3. The foregoing analysis clearly establishes that there is no such threat at this time and that a prelicensing hearing is not warranted on that ground.

However, Petitioners also assert that the NRC has a

special duty under its trust obligation to Native Americans and Executive Order 12898 on Environmental Justice . . . to ensure that Native Americans, such as the members of ENDAUM and SRIC, receive a meaningful hearing before a license authorizing activities that threaten their health, environment, and property takes effect.

Stay Motion at 2-3. While these allegations are not fleshed out in Petitioners' motion and supporting affidavits, the seriousness of their implications warrants an answer sufficient to dispel their effect on this proceeding.

RIGHT TO A PRIOR HEARING

Section 189 of the Atomic Energy Act of 1954, as amended, states in relevant part that in any proceeding for the granting of a license the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding. However, the Commission has recognized in the case of materials licenses that a prelicensing hearing is not always justified. *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982). "The [Subpart L] rule . . . contemplates the grant of a license by the NRC staff prior to any initial decision in any proceeding convened as a result of a hearing request." See Notice of Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,090 (May 29, 1987). The Commission's decision in *Kerr-McGee* was upheld in *City of West*

²Petitioners again reference extended arguments found in their Second Amended Hearing Request. See note 1, herein.

Chicago, Illinois v. NRC, 701 F.2d 632 (7th Cir. 1983). In that decision, the Seventh Circuit stated:

Even if we were to find a protected liberty or property interest in this case, we would hold that Commission procedures constituted sufficient process. The City received a meaningful opportunity to submit statements and data explaining why the amendment should not be granted.

Id. at 645, citation omitted. Unlike *Kerr-McGee*, Petitioners here are not requesting a formal hearing, the subject of the due process analyses in *Kerr-McGee* and *West Chicago*. Indeed, Petitioners have not objected to the Subpart L informal hearing they are petitioning to have. Petitioners raise their due process argument to support their request for a stay of the Staff licensing action until a hearing on the action is completed. The question becomes what, if any, due process is owed at this point in the proceeding?

The due process clause of the Constitution offers a person procedural protection from the actions of a governmental entity that have the effect of denying his or her recognizable liberty or property interests. Here Petitioners argue that they will be denied due process unless all activities associated with the Applicant's mining are stayed until the completion of the hearing. However, the *immediate* irreparable injury Petitioners claim at this point in the proceeding has been found to be nonexistent in prior parts of this Decision. Simply stated, if there is no threat of immediate irreparable injury to their property, there is no basis upon which to grant a stay, the denial of which Petitioners claim is denial of due process.

Petitioners also allege a "special trust relationship" between Native Americans and the NRC which they assert requires the Presiding Officer to afford them a prelicensing hearing. Over the course of the last century and a half, courts have invoked or used the trust relationship doctrine to signify a special relationship between Native Americans and the federal government, the origins of which seem to have been established in two opinions of Chief Justice Marshall. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). While the doctrine of the trust relationship has gone through permutations associated with moral benevolence on the part of the federal government, the Supreme Court has in recent times addressed the doctrine in connection with federal *control* over Indian property. According to one legal commentator:

A theory of the trust doctrine more popular in recent times maintains that the United States' trust obligations arise from its control over tribal property. This principal was first enunciated in *Navajo Tribe of Indians v. United States* in which the Court of Claims insisted that "where the Federal Government takes on or has control or supervision over tribal monies

or properties, the fiduciary relationship normally exists with respect to such monies or properties. *Navajo Tribe of Indians v. United States*, 624 U.S. 981 (Ct. Cl. 1980).

See Note, Rethinking the Trust Doctrine In Federal Indian Law, 98 Harv. L. Rev. 422 (1984).

In *United States v. Mitchell*, 463 U.S. 206 (1983), addressing the trust relationship between the various Indian tribes and the agencies of the federal government, the Court said:

[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [Footnote omitted]. “[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). . . .

. . . .
. . . . This Court has previously emphasized “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” *Seminole Nation v. United States*, 316 U.S. 286, 296 . . . (1942). This principle has long dominated the Government’s dealings with Indians. *United States v. Mason*, 412 U.S. 391, 398 . . . (1973); [further citations omitted].

463 U.S. at 225-26.

In this proceeding, Petitioners have not identified any nexus between the act of granting an NRC license to a private entity such as HRI and the exercise of any federal control over Petitioners’ property which would give rise to any fiduciary relationship on the part of the NRC. Petitioners’ attempted invocation of the special trust relationship in this context has no basis in law and clearly does not mandate that the Presiding Officer afford the Petitioners a precicensing hearing on the basis of a trustee relationship. Petitioners have therefore failed to demonstrate that the public interest requires either that a stay motion should issue or that they are deserving of a precicensing hearing.

Similarly, Petitioners invoke Executive Order 12898 on Environmental Justice, 59 Fed. Reg. 7629, 7630 (1994), as creating a special duty to provide a meaningful hearing before the license is granted. Not only does that Executive Order fail to create any substantive or procedural rights or any right of judicial review in any person or entity, there is no connection between the Executive Order and the grant of stays in administrative proceedings. *See, generally, Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-97-8, 45 NRC 367, 374-76 (1997). In addition, Petitioners’ reliance on both the trust doctrine and the Executive Order is conditioned on a threat to their health, en-

vironment, and property. Since no such threat cognizable under the Regulation governing stays has been shown, neither principle is of any help to Petitioners.

MOTION TO STRIKE NRC STAFF RESPONSE

By Motion dated February 23, 1998, Petitioners sought to have the Presiding Officer strike the NRC Staff's Response to the Petitioners' Stay Motion. The basis of this request was that Petitioners received the Staff's Response 2 days later than specified in a previously unpublished scheduling Order. However, the only "meaningful" harm cited by Petitioners was that Petitioners anticipated at the time that they would seek permission to file a reply to HRI's Response, at minimum. Motion to Strike at 4-5.

The Staff, on its part, acknowledges its mistake in not reading the Presiding Officer's Order more closely. Staff counsel made every effort to correct the mistake within 2 days and Petitioners' counsel acknowledged receipt of the Staff's Response 2 days following the Order's deadline.

ANALYSIS

The prejudice suffered by Petitioners from a 2-day delay in receiving the Staff's Response appears inconsequential. Petitioners have filed a Motion to File a Reply in a timely manner which did not raise the issue of prejudice again. There appears to be no harm suffered by Petitioners upon which to grant some form of relief. Moreover, by striking the whole of the Staff's Response to the Stay Motion, the Presiding Officer would be diminishing the quality of the record in the proceeding and would constitute a sanction not warranted under the circumstances. Therefore, the Petitioners' Motion to Strike the Staff's Response is denied.

MOTION FOR LEAVE TO REPLY

By motion dated March 6, 1998, Petitioners ENDAUM and SRIC sought the Presiding Officer's leave to reply to HRI's and the NRC Staff's Responses to their Stay Motion. Movants recognize that 10 C.F.R. § 2.788 governs the grant or denial of a stay request and admit that section 2.788(d) provides that replies to answers to stay motions will not be entertained. However, according to Petitioners, case law and a Presiding Officer's duty under 10 C.F.R. § 2.1209 require the Presiding Officer to authorize a reply in this proceeding. Motion to Reply at 5. In further support of their motion, Petitioners argue that "the procedural context of a § 2.1263 motion for a stay of license issuance also warrants more flexibility in allowing replies than does the procedural context

of a motion to stay the effectiveness of a decision by the Presiding Officer pending review by the Commission” under section 2.788. *Id.* This is so, because “[s]ection 2.788 generally comes into play after conclusion of a hearing in which the Intervenor has had an opportunity to present evidence regarding its concerns.” *Id.* at 5-6. Here, Petitioners argue, they have had neither the opportunity to present evidence supporting their concerns, nor has the Applicant been required to satisfy its burden of proving that Petitioners’ concerns are unjustified. In this light, the Presiding Officer has no record before it that could assist it in evaluating the competing claims of the parties regarding the merits of the Stay Motion. *Id.* at 6. In the alternative, the Petitioners would have the Presiding Officer treat their Stay Motion as if it were a motion for a temporary injunction. *Id.* at 7 n.3.

The Applicant and the Staff were given an opportunity to file answers to this Motion and both argue that there is neither precedent nor reason to abandon the Commission’s prohibitions against the filing of replies to motions for stay under 10 C.F.R. § 2.788(d).

ANALYSIS

A stay motion filed under the provisions of 10 C.F.R. § 2.1263 to stay any action by the NRC Staff in issuing a license is therefore governed by the provisions of 10 C.F.R. § 2.788 which is incorporated in section 2.1263 by reference. 10 C.F.R. § 2.1263. There is nothing in the language of either provision to form the basis for a finding that a prehearing stay warrants a more liberal reading than a posthearing stay based on the procedural context in which it arises. Moreover, there is no authority in the Commission’s regulations for a Presiding Officer to grant a motion for stay under section 2.788 according to standards applicable to federal courts when granting a request for a temporary injunction.

When the Presiding Officer granted the temporary stay in the proceeding, LBP-98-3, 47 NRC 7 (1998), it was in response to the Petitioners’ allegations that natural, historic, and religious resources warranted protection from ground-clearing activities until such time as the Petitioners could be offered an opportunity to explain why they deserved such protection on a more permanent basis. The record indicated that the bulldozers were at the ready to cause damage to unsurveyed cultural and religious resources. However, since that time Petitioners have been afforded ample opportunity to explain their concerns. Petitioners’ Motion for Stay encompasses more than 200 pages of arguments and affidavits outlining their position with regard to irreparable injury. However, based on the entire record, a decision has been reached that the claim of a threat of irreparable harm is, *at this point in the proceeding*, without merit. If it is found in subsequent decisions in this proceeding that Petitioners have succeeded

in demonstrating that they have standing and are entitled to a hearing on the issuance of the HRI license, they may succeed on the merits of proving irreparable injury from the Applicant's mining activities. But it is not necessary to go further here. Unlike a decision on the merits, a stay motion necessarily contemplates *immediate* injury requiring judicial intervention to keep it from occurring. Applicant and Staff have demonstrated by the weight of the evidence so far that the type of immediate irreparable injury of which the Petitioners complain will not take place within the near future. There appears no need for judicial intervention now. The Motion for Leave to Reply is denied.

Order

For all the foregoing reasons and based on the entire record of this motion, it is, this 2d day of April 1998, ORDERED:

1. That Petitioners' Motion for Stay and Request for Prior Hearing shall be and it hereby is denied;
2. That the temporary stay granted by the Presiding Officer in LBP-98-3 (January 23, 1998) shall be and it hereby is revoked;
3. That Petitioners' Motion to Strike the Staff's Response is hereby denied; and
4. That Petitioners' Motion for Leave to Reply to HRI's and NRC Staff's Responses to Stay Motion is hereby denied.

Petitioners ENDAUM and SRIC may appeal this decision within fifteen (15) days after its service.

B. Paul Cotter, Jr., Presiding Officer
CHIEF ADMINISTRATIVE JUDGE

Rockville, MD
April 2, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Richard F. Cole
Frederick J. Shon

In the Matter of

Docket No. 30-20644-CivP
(ASLBP No. 98-737-02-CivP)
(Re: Order Imposing
Civil Monetary Penalty)

POWER INSPECTION, INC.

April 20, 1998

MEMORANDUM AND ORDER
(Dismissing Case)

Pursuant to a request filed by the Staff on April 9, 1998,¹ this case is *dismissed*.

*Re-served April 21, 1998.

¹ Staff of the United States Nuclear Regulatory Commission, "Response to Answer to Notice of Violation Filed by Power Inspection, Inc.," at 2. We note that Ms. Janice Hester, assistant to the Board, spoke this morning with Mr. Paul E. Chamber's lawyer, Richard K. Witchko, and ascertained that he has no objection to the entry of this Order.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

April 22, 1998

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board rules on (1) the issues of standing and admissibility of contentions relative to pending hearing requests/intervention petitions either supporting or opposing the application; (2) a 10 C.F.R. § 2.758 rule waiver petition; and (3) various administrative and procedural matters, including the use of "lead" parties and informal discovery.

RULES OF PRACTICE: INTERVENTION

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. *See* 10 C.F.R. §§ 2.714(a)(1)-(2), (b)(2). Further, the Commission

has recognized that, notwithstanding a potential party's failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. *See Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

**RULES OF PRACTICE: INTERVENTION PETITION(S)
(TIMELINESS)**

Each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) support accepting the petition. Those factors include: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

RULES OF PRACTICE: INTERVENTION (STANDING)

Relative to the question of standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary elements and who has authorized the entity to represent his or her interests.

**RULES OF PRACTICE: STANDING TO INTERVENE
(UNCONTESTED; CONSTRUCTION OF PETITION)**

In assessing a petition to determine whether the requisite standing elements are met, which the presiding officer must do even though there are no objections

to a petitioner's standing, the Commission has indicated that a presiding officer is to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)

A petitioner can be granted party status, as a matter of discretion, based upon the presiding officer's consideration of the following factors: (a) weighing in favor of allowing intervention are (1) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest; and (b) weighing against allowing intervention are (4) the availability of other means whereby petitioner's interest will be protected, (5) the extent to which the petitioner's interest will be represented by existing parties, and (6) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding. *Pebble Springs*, CLI-76-27, 4 NRC at 616.

RULES OF PRACTICE: INTERVENTION BY A STATE; STANDING TO INTERVENE (STATE)

When the facility to be licensed is to be located on a reservation of a Native American tribe that is wholly within the borders of a state, that state's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing.

RULES OF PRACTICE: INTERVENTION BY NATIVE AMERICAN TRIBE; STANDING TO INTERVENE (NATIVE AMERICAN TRIBE)

Assertion of standing based on general interests of one Native American tribe or its members in vast "aboriginal lands" that encompass tribe's existing reservation and reservation of second tribe on which facility to be licensed is to be built is inconsistent with the congressionally recognized status of the two tribes as distinct entities with separate reservations some 75 miles apart. Standing for the first tribe must, therefore, be established based on contacts of individual tribal members with the reservation of second tribe where the facility is to be located.

**RULES OF PRACTICE: STANDING TO INTERVENE
(INJURY IN FACT)**

Assertion that individual engages in activities in “the vicinity” of the location of the facility to be licensed is too general to provide him with standing as of right individually or in a representational capacity. *See Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (description of activities as “near,” in “close proximity,” or “in the vicinity” of facility in question insufficient to establish standing), *aff’d*, CLI-97-8, 46 NRC 21 (1997).

RULES OF PRACTICE: STANDING TO INTERVENE

Standing under 10 C.F.R. § 2.714 is not predicated on whether a petitioner wishes to take a position for or against a pending licensing application. Rather, it turns on the petitioner’s ability to show that it has one or more cognizable interests that will be adversely impacted if the proceeding has one outcome rather than another. *See Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

**RULES OF PRACTICE: DISCRETIONARY INTERVENTION
(LATE-FILED PETITION; TIMELINESS)**

Nothing in the general terms of 10 C.F.R. § 2.714 governing intervention petitions exempts a discretionary intervention request from its late-filing provisions.

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS
(GOOD CAUSE FOR LATE FILING)**

Under factor one of the five-factor late intervention balancing test in 10 C.F.R. § 2.714(a)(1), an attempt to justify late filing as a reasonable failure to anticipate that a state’s university community would not be willing to discuss the scientific merits of a proposed instate facility does not account for the precept that the failure of some other group to “carry the ball” does not constitute good cause for late filing. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), *reconsideration denied on other grounds*, CLI-89-6, 29 NRC 348 (1989), *aff’d*, *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), *cert. denied*, 498 U.S. 896 (1990).

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS
(LACK OF GOOD CAUSE FOR LATE FILING)**

When lacking good cause for late filing under factor one of the five-factor late intervention balancing test set forth in 10 C.F.R. § 2.714(a)(1), a petitioner must make a particularly strong showing on the other four factors. *See, e.g., Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) (citing cases).

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS
(OTHER MEANS TO PROTECT PETITIONER'S INTERESTS)**

Ability to file 10 C.F.R. § 2.715(a) limited appearance statements or otherwise provide a group's expertise to other participants generally is not pertinent under factor two of five-factor late intervention balancing test set forth in 10 C.F.R. § 2.174(a)(1) because it gives insufficient regard to the value of adjudicatory participation rights. *See Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 & n.7 (1979).

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS
(ADEQUACY OF EXISTING REPRESENTATION)**

Under factor four of the five-factor late intervention balancing test set forth in 10 C.F.R. § 2.714(a)(1), NRC Staff interests generally are assumed not to be coextensive with those of a private petitioner. *See Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-75 & n.22 (1983).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS

In the five-factor balancing test for late intervention petitions under 10 C.F.R. § 2.714(a)(1), factor two — other means to protect petitioner's interests — and factor four — adequacy of existing representation — are accorded less significance in the balance. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993).

**RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN
FACT; ZONE OF INTERESTS)**

Interest in presenting "sound science" to presiding officer is laudable, but provides no basis for standing either as an interest cognizable for standing

purposes or as one that will be the subject of actual or imminent injury upon the grant or denial of a license. *See Sheffield*, ALAB-473, 7 NRC at 743 (legal and nuclear organizations seeking to support low-level waste site renewal application lack standing because no showing that granting or denying application would injure any cognizable interest of either organization or its members); *Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976) (when no showing of injury to cognizable interests of its individual members by licensing action, asserted ability of civil liberties organization and its members to provide information and data on civil rights issues inadequate to provide basis for standing).

RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)

Of the six *Pebble Springs* factors for assessing a discretionary intervention request, factors one, four, five, and six are basically coextensive with the last four factors of the late-filing standard of 10 C.F.R. § 2.714(a)(1), with *Pebble Springs* factor one — assistance in developing a sound record — having significant sway. *See Pebble Springs*, CLI-76-27, 4 NRC at 616-17.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; SPECIFICITY AND BASIS)

For a proffered legal or factual contention to be admissible, it must be pled with specificity. In addition, the contention's sponsor must provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. *See* 10 C.F.R. § 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. *See id.* § 2.714(d)(2).

RULES OF PRACTICE: CONTENTIONS (ACCEPTANCE WHERE SUBJECT TO PENDING RULEMAKING; CHALLENGE OF COMMISSION RULE)

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.758; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See *Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

The scope of an adjudicatory proceeding is specified by the notice of hearing/opportunity for hearing and contentions that deal with matters outside that defined scope must be rejected. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

Any issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief. See 10 C.F.R. § 2.714(d)(2)(ii); 54 Fed. Reg. 33,168, 33,172

(1989). This requirement of materiality embodies the notion that an alleged error or deficiency regarding a proposed licensing action must have some significance relative to the agency's general responsibility and authority to protect the public health and safety and the environment. *See Seabrook*, LBP-82-106, 16 NRC at 1656 (safety contention "must either allege with particularity that an applicant is not complying with a specified [safety] regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent" (footnote omitted)); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *see also Connecticut Bankers Ass'n v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980). Nor does mere speculation provide an adequate basis for a contention. *See Yankee Nuclear*, CLI-96-7, 43 NRC at 267. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) ("where a contention is based on a factual underpinning in a document that has been essentially repudiated by the

source of that document, the contention may be dismissed unless the intervenor offers another independent source’); *Yankee Nuclear*, LBP-96-2, 43 NRC at 90 (“[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show”). By the same token, an expert opinion that merely states a conclusion (e.g., the application is “deficient,” “inadequate,” or “wrong”) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

In framing contentions regarding a proposed licensing action, the focus of a petitioner’s concern should be the license application. *See* 10 C.F.R. § 2.714(b)(2)(iii). In this regard, a contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal. *See Rancho Seco*, LBP-93-23, 38 NRC at 247-48; *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991), *appeal dismissed*, CLI-92-3, 35 NRC 63 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988).

RULES OF PRACTICE: CONTENTIONS (INCORPORATION BY REFERENCE)

Incorporation by reference of one or more of the contentions of other petitioners is permitted in agency proceedings, albeit subject to the five late-filing factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) if adoption by reference is sought after the time for filing contentions has expired.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

As set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Relative to the first factor set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, unavailability of proprietary documents does not provide good cause for delay in filing a contention when review of nonproprietary materials timely available indicates proprietary information was not necessary to the development of the late-filed contention. *See Catawba*, CLI-83-19, 17 NRC at 1043, 1045 (if contention's factual predicate otherwise available, unavailability of document does not constitute good cause for late filing); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY; OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTERESTS)

Relative to the first factor set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, lacking good cause for delay in filing a contention, a petitioner must make a compelling showing on the other four factors. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Factors two — no other means to protect the petitioner's interests in the contentions — and four — extent to which other parties can represent those interests — are, however, to be accorded less weight than factors three and five. *See id.* at 245.

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTION (SOUND RECORD DEVELOPMENT)**

Relative to the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, in connection with factor three — sound record development — the Commission has directed that the proponent of a late-filed contention should, with as much particularity as possible, “ ‘identify its prospective witnesses, and summarize their proposed testimony.’ ” *Id.* at 246 (quoting *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The standard for seeking a waiver of a rule or regulation in an adjudication is set forth in 10 C.F.R. § 2.758(b), which provides:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Procedurally, section 2.758(b) requires that the petition must be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the “special circumstances” alleged to justify the waiver or exception requested.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

Paragraphs (c) and (d) of section 2.758 state that a party’s failure to make a prima facie showing on the section 2.758(b) rule waiver standard precludes further consideration of the matter, while a presiding officer that finds a prima facie showing has been made must certify the petition to the Commission for its consideration.

**RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS
(SPECIAL CIRCUMSTANCES)**

In connection with a 10 C.F.R. § 2.758 rule waiver petition, a petitioner seeking to establish a prima facie case that “special circumstances” exist such that the rule would not serve the purposes for which it was adopted must make three showings. First, relative to establishing the requisite “special

circumstances” exist to support the waiver, the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989). Put another way, the circumstances alleged must be unique to the particular facility at issue. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-74 (1981). Speculation about future events is, however, an inadequate basis to establish the necessary “special circumstances.” *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 24-26, *rev’d in part on other grounds*, CLI-88-10, 28 NRC 573 (1988).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS (SPECIAL CIRCUMSTANCES)

Also with respect to the need to demonstrate “special circumstances” in requesting a rule waiver pursuant to 10 C.F.R. § 2.758, the petitioner must show application of the rule will not serve the purposes for which it was adopted. *See Seabrook*, CLI-89-20, 30 NRC at 235. Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule or regulation was adopted. *See, e.g., Seabrook*, CLI-88-10, 28 NRC at 598-600; *Seabrook*, ALAB-895, 28 NRC at 12. Further, in ascertaining a rule’s purposes and whether those purposes would be impaired, it is permissible to consider future events the agency logically would have anticipated in promulgating its rules. *See Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, in seeking to establish that the rationale for the rule has been undercut, conjectural statements that merely highlight the uncertainty surrounding future events are not, in and of themselves, sufficient. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301, *rev’d*, ALAB-920, 30 NRC 121, *rev’d*, CLI-89-20, 30 NRC 231 (1989). Moreover, it has been established that a valid purpose for which the rule or regulation was adopted, within the meaning of 10 C.F.R. § 2.758, includes eliminating Staff case-by-case review of a generic issue in individual applications and removing such an issue from adjudication in any operating license proceeding. *See Seabrook*, ALAB-895, 28 NRC at 14, 16-17; *see also Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986).

**RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS
(SIGNIFICANT SAFETY PROBLEM)**

The third showing that must be made by a 10 C.F.R. § 2.758 rule waiver petition is that the circumstances involved are “unusual and compelling” such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a “significant safety problem” relative to the rule at issue. *Seabrook*, CLI-89-20, 30 NRC at 235. Justifying a waiver, therefore, requires that a petitioner establish the issue raised is a significant safety problem, even if there clearly are special circumstances that undercut the rationale for the rule. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 129 (1989). Safety issues that are “conceivable” or “theoretical” do not fulfill this requirement, however. *See Seabrook*, CLI-89-20, 30 NRC at 243-44. Further, any claim of significance must be viewed in the context of any other protective measures that are in place to prevent safety problems. *See id.* at 244.

**LICENSING BOARD(S): DISCRETION IN MANAGING
PROCEEDING (LEAD INTERVENORS OR PARTIES)**

**RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS
OR PARTIES)**

In accordance with 10 C.F.R. § 2.714(f)-(g), a presiding officer is authorized to control the general compass of the hearing by consolidating issues and limiting party participation to avoid the presentation of irrelevant, duplicative, or repetitive evidence. When some of a petitioner’s admitted contentions challenging an application have been adopted by other intervenors, other contentions proposed by different parties challenging the application have been consolidated because of their related subject matter, and one of the parties has filed a single contention expressing general support for the application, it is appropriate to designate “lead” parties for the litigation of the various admitted contentions.

**RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS
OR PARTIES)**

The party assigned the role of lead party has primary responsibility for litigating a contention. Absent some other presiding officer directive, the party with the lead role in support of a contention is to conduct all discovery on the contention; file or respond to any dispositive or other motions regarding the contention; submit any required prehearing briefs on the issue; prepare prefiled direct testimony, conduct any redirect examination, and provide any surrebuttal

testimony regarding the contention; and prepare posthearing proposed findings of fact and conclusions of law on the contention. The party that has the lead role in opposing a contention has similar duties, with its hearing responsibilities including conducting witness cross-examination and recross-examination and preparing rebuttal testimony as appropriate. For any given contention, the lead party is responsible for consulting with the other “involved” parties (i.e., any party that adopted its contention, filed a contention that has been consolidated, or has opposed the same contention) regarding litigation activities, but the ultimate litigating responsibility for the contention rests with the lead party.

RULES OF PRACTICE: DISCOVERY (INFORMAL DISCOVERY)

During an informal discovery process that includes the exchange of relevant documents and interviews with individuals with relevant information, parties are expected to be *specific* in their information requests and provide access to requested information and knowledgeable individuals to the *maximum* degree possible. Failure to participate in the informal discovery process consistent with the presiding officer’s directives may result in appropriate Board sanctions.

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MEMORANDUM AND ORDER
(Rulings on Standing, Contentions, Rule Waiver
Petition, and Procedural/Administrative Matters)

Responding to a July 21, 1997 notice of opportunity for a hearing, 62 Fed. Reg. 41,099 (1997), the State of Utah (State or Utah); three Native American entities, Ohngo Gaudadeh Devia (OGD), Confederated Tribes of the Goshute Reservation (Confederated Tribes), and Skull Valley Band of Goshute Indians (Skull Valley Band); three ranching, farming, and land investment companies, Castle Rock Land and Livestock, L.C. (Castle Rock Land), Skull Valley Co., Ltd. (Skull Valley), and Ensign Ranches of Utah, L.C. (Ensign Ranches); and one Native American individual, Confederated Tribes Chairman David Pete

have filed five separate timely hearing requests/petitions to intervene that are before the Licensing Board. In addition, pending with the Board is a late-filed intervention petition submitted by the group Scientists for Secure Waste Storage (SSWS). Each Petitioner seeks to be heard on a variety of issues in connection with the June 1997 application of Private Fuel Storage, L.L.C. (PFS), for a license under 10 C.F.R. Part 72 to possess and store spent nuclear reactor fuel in an independent spent fuel storage installation (ISFSI) located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. In addition, Petitioners Castle Rock Land/Skull Valley/Ensign Ranches have invoked the provisions of 10 C.F.R. § 2.758 seeking a waiver of the application of the Commission's rules under (1) 10 C.F.R. Part 72, as it might be applicable to the proposed PFS ISFSI facility; and (2) 10 C.F.R. § 51.23, as that rule (i) makes a generic finding of Commission confidence that a repository will be built and available to accept high-level nuclear waste (HLW) in the first quarter of the next century, and (ii) excuses the need for any discussion of ISFSI spent fuel environmental impacts following the term of the ISFSI license.

For the reasons set forth below, we find Petitioners State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and Skull Valley Band have established their standing to intervene. In addition, each of these Petitioners has presented at least one admissible contention concerning the PFS application. We thus admit these Petitioners as parties to this proceeding. On the other hand, as is explained below, Petitioners Pete and SSWS have failed to establish their standing to intervene while Ensign Ranches, although having standing, lacks an admissible contention. We therefore deny these participants' hearing requests/intervention petitions. We also conclude that, having failed to establish a basis for waiver of 10 C.F.R. Part 72 or 10 C.F.R. § 51.23, the section 2.758 petition of Intervenors Castle Rock Land/Skull Valley/Ensign Ranches must be denied. Finally, we outline certain procedural and administrative rulings, including the designation of 'lead' parties and the use of informal discovery, that will apply to the litigation of the parties' admitted contentions.

I. BACKGROUND

A. The PFS Application and Proposed ISFSI

To obtain a 20-year Part 72 license for its proposed ISFSI, in June 1997 PFS filed with the agency an application consisting of, among other things, a safety analysis report (SAR), an environmental report (ER), an emergency plan (EP), a physical security plan (PSP), and a preliminary decommissioning plan (PDP). According to its application, PFS is a limited liability corporation owned by eight American utilities. Each of these utilities has one or more operating nuclear facilities. PFS intends to obtain the funds necessary to construct, operate,

and decommission the Skull Valley ISFSI through equity contributions from its owners, preshipment customer payments pursuant to service agreements that commit PFS to store customer spent fuel, and annual storage fee payments under those service agreements. *See* [PFS], License Application [for] Private Fuel Storage Facility at 1-1 to -4, 3-1 (rev. 0 June 1997) [hereinafter License Application].

The application also indicates that the ISFSI, which is to be on a one-quarter mile square site leased by PFS from the Skull Valley Band, will be used for aboveground dry cask storage of up to 40,000 metric tons uranium (MTU) of spent nuclear fuel from commercial nuclear plants in the United States. The spent fuel is to be loaded into canisters at the originating reactors, which are then welded shut and placed into shipping casks for transport to Utah by rail. Because the PFS facility is located some 25 miles from the existing main rail line, the shipping casks containing the canisters would be moved to the PFS facility either by truck or a newly constructed rail spur. Once at the PFS site, the canisters would be removed from the shipping casks and placed in storage casks that would be placed vertically on concrete pads in a protected area at the site. *See id.* at 1-1 to -4, 3-1 to -2.

B. Timely Hearing Requests/Intervention Petitions

In response to the NRC Staff's July 1997 notice of opportunity for a hearing regarding this application, a number of petitioners filed requests for hearings and petitions to intervene asking that they be made a party to any adjudicatory proceeding conducted in connection with the application. First filed was the joint request of the Confederated Tribes, which seeks to intervene either as a party under 10 C.F.R. § 2.714(a) or as an interested governmental entity under section 2.715(c), and Tribal Chairman Pete, who appears both as a tribal leader and in his individual capacity. *See* Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete (Aug. 29, 1997) [hereinafter Confederated Tribes/Pete Petition]. The Confederated Tribes/Pete oppose granting the application.

Thereafter, the State, which seeks either party or interested governmental entity status, and three ranching, farming, and land investment companies, Castle Rock Land, Skull Valley, and Ensign Ranches (collectively Castle Rock), submitted hearing requests. *See* [State] Request for Hearing and Petition for Leave to Intervene (Sept. 11, 1997) [hereinafter State Petition]; [Castle Rock] Request for Hearing and Petition to Intervene (Sept. 11, 1997) [hereinafter Castle Rock Petition]. The State and Castle Rock oppose the application as well.

Also seeking party status under section 2.714(a) are the Skull Valley Band and OGD. *See* Verified Petition for Leave to Intervene (Sept. 12, 1997) [hereinafter Skull Valley Band Petition]; [OGD] Request for Hearing and Petition to

Intervene (Sept. 12, 1997) [hereinafter OGD Petition]. The Skull Valley Band is a federally recognized Indian tribe that leased tribal land to PFS for construction and operation of the proposed ISFSI. It supports the PFS application. OGD, on the other hand, is an organization that consists primarily of members of the Skull Valley Band who oppose the PFS application and its plan to construct and operate an ISFSI on reservation land.

In response to the Confederated Tribes/Pete petition, both Applicant PFS and the NRC Staff filed pleadings contesting both the standing of the Confederated Tribes and Mr. Pete to intervene as parties and the Confederated Tribes' purported status as an interested governmental entity. *See* Applicant's Answer to Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Sept. 15, 1997) [hereinafter PFS Confederated Tribes/Pete Petition Response]; NRC Staff's Response to Request for Hearing and Petition to Intervene Filed by [Confederated Tribes/Pete] (Sept. 18, 1997) [hereinafter Staff Confederated Tribes/Pete Petition Response]. In contrast, both PFS and the Staff did not contest the standing of the State, Castle Rock, OGD, and the Skull Valley Band to intervene as parties, and the Applicant asserted the Skull Valley Band also would qualify as an interested governmental entity. *See* Applicant's Answer to Request for Hearing and Petition to Intervene of [Utah] (Sept. 26, 1997) [hereinafter PFS State Petition Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [Castle Rock] (Sept. 26, 1997) [hereinafter PFS Castle Rock Petition Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [OGD] (Sept. 26, 1997) [hereinafter PFS OGD Petition Response]; Applicant's Answer to Petition to Intervene of [Skull Valley Band] (Sept. 29, 1997) [hereinafter PFS Skull Valley Band Petition Response]; NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) [Utah], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock] (Oct. 1, 1997) [hereinafter Staff Hearing Petitions Response]. Both PFS and the Staff made the point, however, that these Petitioners must present litigable contentions in order to be admitted as parties.

C. Supplements to Timely Hearing Requests/Intervention Petitions

1. Schedule for Filing Supplements

In this connection, in an initial prehearing order issued September 23, 1997, the Licensing Board established an October 1997 date for these Petitioners to file supplements to their hearing/intervention requests that would include their contentions, with supporting bases. That directive also established a tentative schedule for a Board visit to the Applicant's proposed ISFSI site and a prehearing conference to entertain participant presentations on whether the Petitioners have proffered information sufficient to establish they have standing and admissible

contentions. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) (unpublished). Within a week, however, the State filed two motions seeking to delay or suspend this schedule. In one, Utah asked that we suspend this proceeding pending the establishment of a local public document room (LPDR) and the Applicant's submission of a "complete" application. *See* [Utah] Motion to Suspend Licensing Proceedings Pending Establishment of a[n LPDR] and Applicant's Submission of a Substantially Complete Application, and Request for Re-notice of Construction Permit/Operating License Application (Oct. 1, 1997). Petitioners Confederated Tribes/Pete, OGD, and Castle Rock supported both State motions. In the other motion, the State asked that the time for filing hearing request/intervention supplements be extended by 45 days. *See* [State] Motion for Extension of Time to File Contentions (Oct. 1, 1997).

Applicant PFS and Petitioner Skull Valley Band opposed the State's motions. The Staff opposed the State's suspension motion, but declared it had no objection to a 30-day extension of time for the filing of contentions. In an October 17, 1997 ruling, the Board denied the State's suspension request, but provided an additional 30 days to file intervention petition supplements, including contentions and supporting bases. *See* Licensing Board Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions) (Oct. 17, 1997) (unpublished). Thereafter, the Board rescheduled the site visit and prehearing conference for the week of January 26, 1998.

Then, 10 days before its petition supplement was due, the State filed a motion for a protective order to gain access to the Applicant's physical security plan and to extend the time for filing contentions relating to that plan. *See* [State] Motion for a Protective Order to Review and File Contentions on the Applicant's [PSP] (Nov. 14, 1997). Both PFS and the Staff filed responses declaring they had no objection to the State's protective order request. In a November 21 issuance, the Board granted the State's requests for a protective order and an extension of the filing deadline for security plan-related contentions. *See* Licensing Board Memorandum and Order (Ruling on [State] Motion for Protective Order) (Nov. 21, 1997) (unpublished). After obtaining a proposed order from the participants, the Board issued the protective order on December 17, 1997. *See* Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) (unpublished); *see also* Licensing Board Memorandum and Order (Protective Order Amendment) (Dec. 22, 1997) (unpublished); Licensing Board Memorandum and Order (Additional Amendments to Protective Order) (Dec. 23, 1997) (unpublished).

2. Supplemental Filings

Petitioners OGD and Castle Rock filed their supplemental petition with contentions on November 24, 1997. *See* [OGD] Contentions Regarding the Materi-

als License Application of [PFS] in an [ISFSI] (Nov. 24, 1997) [hereinafter OGD Contentions]; Contentions of Petitioners [Castle Rock] on the License Application for the [PFS] Facility (Nov. 24, 1997) [hereinafter Castle Rock Contentions]. In the Castle Rock filing, Petitioner Ensign Ranches indicated it was only joining in the first five contentions. *See* Castle Rock Contentions at 1. That same date, the State filed its non-security plan-related contentions. *See* [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 24, 1997) [hereinafter State Contentions]. Petitioners Confederated Tribes/Pete filed an initial supplement on October 15 in which they addressed the standing aspects of their petition, with a second filing on November 24 that presented their contentions. *See* Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Oct. 15, 1997) [hereinafter Confederated Tribes/Pete First Supplemental Memorandum]; Statement of Contentions on Behalf of [Confederated Tribes/Pete] (Nov. 24, 1997) [hereinafter Confederated Tribes/Pete Contentions]. Likewise, the Skull Valley Band submitted a supplemental petition setting forth its sole contention in support of the facility application. *See* Supplemental Petition to Intervene (Nov. 24, 1997) [hereinafter Skull Valley Band Contention].

This was not the end of the Petitioners' standing and contention-related pleadings, however. On December 23, 1997, the State filed a request to accept two late-filed contentions asserted to deal with proprietary material on cask seismic stability and radiation shielding. *See* [State] Request for Consideration of Late-Filed Contentions EE and FF (Dec. 23, 1997) [hereinafter State Contentions EE and FF]. Six days later, Confederated Tribes/Pete filed a second supplemental memorandum on the matter of standing. *See* Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Dec. 29, 1997) [hereinafter Confederated Tribes/Pete Second Supplemental Memorandum]. The State then timely filed its security plan contentions on January 3, 1998. *See* [State] Contentions Security-A through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998). The State thereafter sought admission of an additional late-filed contention in the issue of cask seismic stability, which again was asserted to be based on proprietary information. *See* [State] Request for Consideration of Late-Filed Contention GG (Jan. 8, 1998) [hereinafter State Contention GG].

3. Responses to Supplemental Filings

Not unexpectedly, these pleadings were the subject of various participant responses and replies. Applicant filed responses to the various Petitioners' contentions, opposing all but two of the timely filed nonsecurity contentions submitted by the Petitioners opposing the application. *See* Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) [hereinafter PFS Contentions Response];

Applicant's Supplemental Answer to [State] Contentions Z to DD (Jan. 6, 1997) [hereinafter PFS Supplemental Contentions Response].¹ PFS also filed responses opposing the State's security plan contentions and its three late-filed contentions. *See* Applicant's Answer to [State] Request for Consideration of Late Filed Contentions EE and FF (Jan. 9, 1997) [hereinafter PFS State Contentions EE and FF Response]; Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998); Applicant's Answer to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998) [PFS State Contention GG Response]. Along with the Skull Valley Band, PFS also continued to oppose the admission of Petitioners Confederated Tribes/Pete based on lack of standing. *See* Applicant's Answer to [Confederated Tribes/Pete] Supplemental Memorandum in Support of Petition to Intervene and for a Hearing (Dec. 12, 1997) [hereinafter PFS Confederated Tribes/Pete First Supplemental Memorandum Response]; Response of [Skull Valley Band] to Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Jan. 13, 1998) [hereinafter Skull Valley Band Confederated Tribe/Pete Second Supplemental Memorandum Response].

The Staff responded to the Petitioners' contentions as well, asserting that, with the exception of Ensign Ranches that joined only in the first five Castle Rock contentions, each had submitted at least one litigable contention. *See* NRC Staff's Response to Contentions Filed by (1) [State], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock], and (5) [Confederated Tribes/Pete] (Dec. 24, 1997) [hereinafter Staff Contentions Response]. The Staff nonetheless opposed the admission of the State's three late-filed contentions and declared that only three of the State's nine security plan contentions were admissible in full or in part. *See* NRC Staff's Response to [State] Request for Consideration of Late-Filed Contentions EE and FF (Jan. 9, 1998) [hereinafter Staff State Contentions EE and FF Response]; NRC Staff's Response to [State] Security Plan Contentions (Jan. 20, 1998) [hereinafter Staff State Security Plan Contentions Response]; NRC Staff's Response to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998) [hereinafter Staff State Contention GG Response]. In addition, in response to the supplemental filings of Confederated Tribes/Pete regarding their standing, the Staff ultimately declared there was an adequate basis for admitting the tribe, but not Chairman Pete. *See* NRC Staff's Response to the Supplemental Memorandum Filed by [Confederated Tribes/Pete] in Support of Their Petition to Intervene (Dec. 23, 1997) [hereinafter Staff Confederated

¹The Board granted PFS leave to file a supplemental answer regarding the last six State contentions because PFS apparently was served inadvertently with a copy of the State's contentions that did not contain those six contentions. *See* Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) (unpublished).

Tribes/Pete First Supplemental Memorandum Response]; NRC Staff's Response to "Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing" (Jan. 14, 1998) [hereinafter Staff Confederated Tribes/Pete Second Supplemental Memorandum Response].

Acting in response to requests from the State and Castle Rock Land/Skull Valley, the Licensing Board also permitted those participants to file replies to the PFS and Staff responses to their contentions. *See* Licensing Board Memorandum and Order (Granting Leave to File Reply Pleadings and Requesting Information) (Jan. 6, 1998) (unpublished). The State and Castle Rock made those filings on January 16, 1998. *See* [State] Reply to the NRC Staff's and Applicant's Response to [State] Contentions A Through DD (Jan. 16, 1997) [hereinafter State Contentions Reply]; Reply of Petitioners [Castle Rock] to the Responses of the NRC Staff and the Applicant (Jan. 16, 1998) [hereinafter Castle Rock Contentions Reply].

Finally, the State submitted a response to the contentions of OGD, Confederated Tribes/Pete, and Castle Rock in which it supported all these contentions and sought to adopt each as part of its contentions. *See* [State] Response to Contentions of [OGD, Confederated Tribes/Pete, and Castle Rock] (Dec. 19, 1997) [hereinafter State Adopted Contentions Response]. In response, PFS labeled this filing an unsupported attempt to submit late-filed contentions. *See* Applicant's Answer to [State] Late-Filed Contentions (Dec. 31, 1997) [hereinafter PFS State Adopted Contentions Response].

D. Late-Filed Intervention Request and Castle Rock Rule Waiver Petition

To add to these filings, one week before the scheduled prehearing conference, and some four months after the period for filing timely intervention requests had expired, a group of individuals represented by Dr. Richard Wilson filed a petition to intervene. In that petition, which they acknowledged was untimely, they sought an opportunity to participate in support of the PFS application as of right under 10 C.F.R. § 2.714 or by means of limited appearance statements pursuant to section 2.715(a). *See* Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 20, 1998) [hereinafter SSWS Late-Filed Intervention Petition]; *see also* Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 22, 1998) [hereinafter SSWS Revised Intervention Petition]. Also, in the last week before the prehearing conference, Castle Rock submitted a petition pursuant to 10 C.F.R. § 2.758(b) asking for a waiver of two Commission rules: (1) 10 C.F.R. Part 72 to the extent it would permit the licensing of a privately operated ISFSI such as that proposed by PFS; and (2) 10 C.F.R. § 51.23, the so-called Waste Confidence Decision, under which the Commission has declared that, for purposes of preparing an ER and

an environmental impact statement (EIS) relative to agency licensing actions, including a Part 72 ISFSI, it has made a generic determination that a permanent repository will be built and available for HLW within the first quarter of the next century. *See* Petition of [Castle Rock] for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Jan. 21, 1998) [hereinafter Castle Rock Waiver Petition].

E. Site Visit and Initial Prehearing Conference

On January 26, 1998, accompanied by representatives of the various participants, the Board took a bus tour of the eastern Tooele County, Utah area. This tour included views of or stops at various sites in and around Skull Valley the Petitioners had identified as potentially relevant to the issues in this proceeding. Among these were (1) Rowley Junction, the highway interchange at the intersection of Interstate 80 and Skull Valley Road where PFS would locate an intermodal transfer point (ITP) for transfer of waste transportation casks from the Union Pacific rail line to trucks or a railroad spur for transport south to the proposed Skull Valley ISFSI site; (2) the Skull Valley Band's reservation from along Skull Valley Road, the paved access road that runs approximately 35 miles south from Interstate 80 through the reservation and passes about 2 miles to the east of the proposed ISFSI; (3) the English Village at the United States Army's Dugway Proving Grounds, which is located 10 miles south of the Skull Valley Band's reservation near the end of Skull Valley Road; and (4) State Roads 199 and 36, which connect Skull Valley Road with Tooele, Utah, the Tooele County seat, and afford views of the United States Department of Defense Tooele Chemical Agent Disposal Facility and the Tooele Army Depot.

Beginning the next day, the Board conducted a 3-day prehearing conference during which it heard oral presentations regarding the standing of Petitioners Confederated Tribes/Pete and the admissibility of most of the Petitioners' ninety or so contentions. To avoid any discussion of nonpublic safeguards or proprietary information, the Board limited presentations regarding the State's nine security plan contentions and three late-filed contentions to the issues of the expertise of the witness sponsoring the State's security plan contentions and whether the State satisfied the five late-filing standards of 10 C.F.R. § 2.714(a)(1), while permitting the State, PFS, and the Staff to make additional post-prehearing conference filings on the substance of those contentions' admissibility.

F. Post-Prehearing Conference Filings

Following the prehearing conference, pursuant to a Board directive, Dr. Wilson filed an intervention petition supplement that denominated the group of

individuals he was representing as the Scientists for Secure Waste Storage and indicated at least one member resided in Salt Lake City, Utah. *See* Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Feb. 2, 1998) [hereinafter SSWS First Intervention Petition Supplement]. The State, OGD, and the Staff filed responses opposing intervention by SSWS, while PFS and the Skull Valley Band submitted answers supporting its participation as of right or as a discretionary intervenor. *See* [State] Opposition to Amended Petition to Intervene (Feb. 13, 1998) [hereinafter State SSWS First Intervention Petition Supplement Response]; OGD's Response to Wilson/ALF Amended Petition and Order Dated 2/2/98 Allowing Participant Responses to Said Petition (Feb. 13, 1998) [hereinafter OGD SSWS First Intervention Petition Supplement Response]; NRC Staff's Response to Petition for Leave to Intervene Filed by Richard Wilson and [SSWS] (Feb. 13, 1998) [hereinafter Staff SSWS First Intervention Petition Supplement Response]; Response of [Skull Valley Band] to Petition of [SSWS] (Feb. 13, 1998) [hereinafter Skull Valley Band SSWS First Intervention Petition Supplement Response]; Applicant's Answer to Amended Petition of [SSWS] (Feb. 13, 1998) [hereinafter PFS SSWS First Intervention Petition Supplement Response]. Thereafter, in accordance with a further Board directive, SSWS filed a final intervention petition supplement setting forth its "contentions" for litigation, which consisted of one "general" contention and a series of responses to other Petitioners' contentions. In addition, it provided further information concerning its Salt Lake City member and asserted that, if SSWS was not entitled to intervention as of right, it should be granted discretionary intervention status. *See* Amended and Supplemental Petition of [SSWS] to Intervene (Feb. 27, 1998) [hereinafter SSWS Second Intervention Petition Supplement]. The State and the Staff again opposed SSWS's participation, while PFS and the Skull Valley Band continued to support its admission. *See* [State] Response to [SSWS] Amended and Supplemental Petition to Intervene (Mar. 9, 1998) [hereinafter State SSWS Second Intervention Petition Supplement Response]; NRC Staff's Response to "Amended and Supplemental Petition of [SSWS]" (Mar. 9, 1998) [hereinafter Staff SSWS Second Intervention Petition Supplement Response]; Applicant's Answer to Amended and Supplemental Petition of [SSWS] (Mar. 9, 1998) [hereinafter PFS SSWS Second Intervention Petition Supplement Response]; [Skull Valley Band] Memorandum in Support of Petition of [SSWS] and the Atlantic Legal Foundation to Intervene (Mar. 9, 1998) [hereinafter Skull Valley Band SSWS Second Intervention Petition Supplement Response].

Also following the prehearing conference, the State, PFS, and the Staff submitted a series of Board-approved pleadings concerning the admissibility of the State's nine security contentions and its three late-filed contentions. *See* [State] Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I (Feb. 11, 1998) [hereinafter

State Security Plan Contentions Reply]; [State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF (Feb. 11, 1998) [hereinafter State Contentions EE and GG Reply]; NRC Staff's Response to "[State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF" (Feb. 23, 1998) [hereinafter Staff State Contentions EE and GG Surreply]; Applicant's Answer to [State] Reply Concerning Late-Filed Contentions EE and GG (Feb. 23, 1998) [hereinafter PFS State Contentions EE and GG Surreply]. These three participants also submitted responses to the Castle Rock rule waiver petition, with the State supporting the petition and PFS and the Staff opposing it. *See* [State] Response to [Castle Rock] Non-Application or Waiver of Commission Regulations, Rules and General Determinations (Feb. 18, 1998) [hereinafter State Castle Rock Waiver Petition Response]; Applicant's Answer to Castle Rock's Petition for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [PFS Castle Rock Waiver Petition Response]; NRC Staff's Response to Petition of [Castle Rock] for Non-Application of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [hereinafter Staff Castle Rock Waiver Petition Response].

G. Designation of Separate Board to Consider Physical Security Contentions

On March 26, 1998, the Chief Administrative Judge issued a notice establishing a separate three-member Atomic Safety and Licensing Board to consider and rule on all matters concerning the PFS physical security plan. *See* 63 Fed. Reg. 15,900, 15,900 (1998). Under the terms of that notice, this Board retains jurisdiction over all other issues relating to the PFS application. *See id.*

State contentions Security-A through Security-I fall within the jurisdiction of the recently established PSP Board. As a consequence, that Board will rule on the admissibility of those nine contentions.²

With the materials described above before us, we turn to the questions of the intervening participants' standing, the admissibility of their proffered, non-PSP contentions, and the efficacy of the Castle Rock rule waiver petition.

²Currently pending with the Chief Administrative Judge is a PFS motion seeking reconsideration of his action creating the new PSP Board. *See* Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters (Apr. 6, 1998).

II. ANALYSIS

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene “as of right” as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. *See* 10 C.F.R. §§ 2.714(a)(1)-(2), (b)(2). Further, the Commission has recognized that, notwithstanding a potential party’s failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. *See Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976). In this instance, the different intervening participants have sought to establish they meet these requirements for party status.³

A. Late Intervention/Standing

1. Standards Governing Late Intervention and Standing

At the threshold, each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) support accepting the petition. Those factors include: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner’s interest will be protected; (3) the extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner’s interest will be represented by existing parties; and (5) the extent to which the petitioner’s participation will broaden the issues or delay the proceeding.

Relative to the question of standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that

³In addition, agency rules of practice afford states, counties, and municipalities that do not seek or qualify for full party status the opportunity to participate in proceedings in which they have an interest. As interested governmental entities, they are afforded the opportunity to introduce evidence or interrogate witnesses, albeit without any requirement to take a position regarding any of the issues that are the subject of litigation. *See id.* § 2.715(c).

Both Confederated Tribes and the Skull Valley Band have argued, in the alternative, they are entitled to participate as an interested governmental entity. *See* Confederated Tribes/Pete Petition at 2; Skull Valley Band Petition at 2-3. Because we find both the Confederated Tribes and the Skull Valley Band have standing, and neither has expressed any interest in participating regarding any issue without taking a position on that issue, we see no reason to reach the issue whether, as a federally recognized Native American tribe, either is entitled to interested governmental entity status under section 2.715(c).

require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, when, as here, an entity such as the Confederated Tribes or OGD seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

Even if a petitioner fails to comply with these requirements to demonstrate its standing as of right, it is not necessarily deprived of the opportunity to obtain party status in an agency adjudicatory proceeding. The Commission has recognized that a petitioner can be granted party status, as a matter of discretion, based upon the presiding officer's consideration of the following factors:

- (a) Weighing in favor of allowing intervention —
 - (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- (b) Weighing against allowing intervention —
 - (4) The availability of other means whereby petitioner's interest will be protected.
 - (5) The extent to which the petitioner's interest will be represented by existing parties.
 - (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Pebble Springs, CLI-76-27, 4 NRC at 616.

We apply these general guidelines in looking to each of the Petitioners' standing presentations and the argument of SSWS as to why its January 1998 petition for intervention should be accepted even though late-filed.

2. *State of Utah*

DISCUSSION: State Petition at 9-18; PFS State Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: The reservation of the Skull Valley Band upon which the PFS facility is to be constructed is located wholly within the borders of the State of Utah. The State's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing in this proceeding.

3. *Castle Rock*

DISCUSSION: Castle Rock Petition at 6-14; PFS Castle Rock Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: Castle Rock Land, Skull Valley, and Ensign Ranches are all business entities involved in farming and ranching in the Skull Valley area. Castle Rock owns, and Ensign Ranches leases and operates, a farm/ranch that is adjacent to the Skull Valley Band reservation less than 2000 feet from the boundary of the proposed PFS facility. Skull Valley owns, and Ensign Ranches leases and operates, a farm/ranch that is located within 4 miles of the north boundary of the Skull Valley Band reservation. These properties also are located along the proposed road transportation route to the facility. These entities' asserted health, safety, and environmental interests relative to this property are sufficient to establish their standing in this proceeding.

4. *OGD*

DISCUSSION: OGD Petition at 7-17; PFS OGD Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: OGD is a group consisting of members of the Skull Valley Band or other Native Americans who oppose the PFS proposal. Attached to the group's petition are the affidavits of 4 members of the Skull Valley Band, each of whom states that OGD is authorized to represent his or her interests. All four reside on the Skull Valley Band reservation between 4000 feet and 2½ miles from the proposed PFS facility. These individuals' asserted health, safety, and environmental interests and their agreement to permit OGD to represent their interests are sufficient to establish OGD's standing to intervene in this proceeding.

5. Confederated Tribes/Pete

DISCUSSION: Confederated Tribes/Pete Petition at 5-10; PFS Confederated Tribes/Pete Petition Response at 14-20; Staff Confederated Tribes/Pete Petition Response at 8-14; Confederated Tribes/Pete First Supplemental Memorandum at 2-5; PFS Confederated Tribes/Pete First Supplemental Memorandum Response at 4-15; Staff Confederated Tribes/Pete First Supplemental Memorandum Response at 2-9; Confederated Tribes/Pete Second Supplemental Memorandum at 1-2; Skull Valley Band Confederated Tribes/Pete Second Supplemental Memorandum Response at 1-3; Staff Confederated Tribes/Pete Second Supplemental Memorandum Response at 2-4; Tr. at 10-26.

RULING: In their initial petition, the Confederated Tribes and Mr. Pete describe the Confederated Tribes as a federally recognized sovereign entity that consists of approximately 450 members. About half its membership resides on the Tribe's reservation, which straddles the Utah/Nevada border approximately 75 miles west of their Skull Valley Band "cousins" reservation that is to be the PFS ISFSI site. Most of the remainder of Confederated Tribes members live in communities surrounding the Confederated Tribes' reservation.

In his affidavit accompanying the petition, Mr. Pete states he is Chairman of the Confederated Tribes Business Council, its governing body, and seeks admission both in his official capacity and as an individual. Mr. Pete describes a vast 7.2 million acre area that includes both the Confederated Tribes and the Skull Valley Band reservations as the Goshute's aboriginal area in which Goshutes have hunted, fished, gathered, and lived for some time. He also states that activities such as hunting, fishing, and gathering are undertaken by Confederated Tribes members, including himself, in "the vicinity" of the Skull Valley Band reservation. Confederated Tribes/Pete Petition, Affidavit in Support of Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Aug. 28, 1997) at 16. He asserts that his health, safety, and environmental interests as well as those of the Confederated Tribes would be adversely impacted by the planned PFS facility in Skull Valley.

In their subsequent supplemental memoranda on standing, these Petitioners provide affidavits from two additional Confederated Tribes members, Genevieve Fields and Chrissandra Reed, who describe various contacts Confederated Tribes members have with the Skull Valley Band reservation; express concern about the health, safety, and environmental impacts of the proposed PFS facility; and authorize the Confederated Tribes and Chairman Pete to represent their interests in this proceeding. More specifically, Ms. Reed states that her 3-year-old granddaughter, who resides with her and is a member of the Confederated Tribes, visits Ms. Reed's cousins who live on the Skull Valley Band reservation approximately every other week. These visits last from one night to up to two weeks. Ms. Reed asserts that, as her granddaughter's legal guardian,

she is concerned about the health and safety impacts of the facility upon her granddaughter during the child's visits. Ms. Reed further declares that she visits the Skull Valley Band reservation eight to ten times a year herself.

In resolving the question of standing for Confederated Tribes and Mr. Pete, any assertion of standing based on the general interests of Confederated Tribes or its members in Goshute "aboriginal lands" is inconsistent with the congressionally recognized status of the Confederated Tribes and the Skull Valley Band as distinct entities with separate reservations. Standing must, therefore, be established based on contacts of individual Confederated Tribes members with the Skull Valley Band reservation and the PFS facility located there. Chairman Pete's assertion he engages in activities in "the vicinity" of the Skull Valley reservation is too general to provide him with standing as of right individually or in a representational capacity.⁴ *See Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (description of activities as "near," in "close proximity," or "in the vicinity" of facility in question insufficient to establish standing), *aff'd*, CLI-97-8, 46 NRC 21 (1997). The affidavit of Confederated Tribes member Genevieve Fields suffers from a similar deficiency because it fails to describe any recent activities she personally engages in on the Skull Valley Band reservation.

In contrast, Ms. Reed's two affidavits describe a pattern of visits onto the Skull Valley Band reservation by her and her granddaughter, for whom she acts as legal guardian, that bring one or both of them within distances of the facility we have found sufficient to provide standing for other participants. *See supra* p. 169. The record does contain information suggesting the visits by Ms. Reed and her granddaughter are not as frequent as she described. *See* PFS Confederated Tribes/Pete First Supplemental Memorandum Response, Exh. 1, at 1-2. There also are conflicting claims about whether Ms. Reed's granddaughter will continue to visit her relatives on the Skull Valley Band reservation, albeit with the representation that such visits have not been terminated by the Skull Valley Band or any Band member. *See* Tr. at 23-26.

After reviewing all this information "in the light most favorable to the petitioner," we are unable to conclude that the pattern of familial association that brings Ms. Reed and her minor granddaughter onto the Skull Valley Band reservation to visit Ms. Reed's cousins has become so attenuated as to provide an insufficient basis for standing for Ms. Reed or her minor granddaughter, whose legal interests Ms. Reed represents as guardian. Having been authorized to represent Ms. Reed's interests, Confederated Tribes thus has standing to participate in this proceeding.

⁴ Chairman Pete has made no attempt to seek discretionary intervention status.

6. *Skull Valley Band*

DISCUSSION: Skull Valley Band Petition at 1-3; PFS Skull Valley Band Petition Response at 4-7; Staff Hearing Petitions Response at 4-5.

RULING: The Skull Valley Band, a federally recognized American Indian tribe, owns and will lease the land upon which the PFS facility is to be built. The Skull Valley Band's verified petition, which is signed by the three-member tribal Executive Committee that is elected by all adult voting members of the Skull Valley Band and is authorized to conduct the tribe's daily business, declares the Band seeks to participate as a party in any proceeding that may be convened to protect its legal, health, safety, cultural, and financial interests.

Standing under 10 C.F.R. § 2.714 is not predicated on the position a petitioner wishes to take vis a vis a pending licensing application. Rather, it turns on the petitioner's ability to show that it has one or more cognizable interests that will be adversely impacted if the proceeding has one outcome rather than another. *See Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). In this instance, the Skull Valley Band has shown it and its members residing on the reservation have cognizable interests that will be affected adversely by one of the possible outcomes of this proceeding. The Skull Valley Band therefore has established its standing.

7. *SSWS*

a. *Late-Filing Standards*

DISCUSSION: SSWS Intervention Petition at unnumbered 1; SSWS Revised Intervention Petition at unnumbered 1; SSWS First Intervention Petition Supplement at unnumbered 1; State SSWS First Intervention Petition Supplement Response at 4-8; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2; Staff SSWS First Intervention Petition Supplement Response at 4-12; SSWS Second Intervention Petition Supplement at unnumbered 21-26; State SSWS Second Intervention Petition Supplement Response at 3-8; Skull Valley Band SSWS Second Intervention Petition Supplement Response at 5; Staff SSWS Second Intervention Petition Supplement Response at 5-9.

RULING: Of the participants now before us, only SSWS filed its intervention petition out of time. Its intervention petition was submitted more than 4 months beyond the deadline specified in the agency's July 21, 1997 notice of opportunity for hearing. *See* 62 Fed. Reg. at 41,099. SSWS therefore must demonstrate that a balancing of the five factors in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of permitting late filing as it seeks to intervene either as of right or a matter of

discretion.⁵ For the reasons outlined below, we find SSWS has failed to meet its burden in this regard.

On the first and most important factor — good cause for filing late — SSWS fails to make a convincing showing. SSWS makes no assertions regarding the adequacy of the agency’s notice. This is not surprising. Putting aside the fact that *Federal Register* notice generally is considered constructive notice to all residents of the United States, *see* 44 U.S.C. § 1508, any SSWS claim regarding a lack of actual notice would be problematic in the face of the State’s showing in its first responsive pleading, which SSWS does not controvert, that one of SSWS’s members, as a Utah Radiation Control Board official, received a copy of the *Federal Register* hearing opportunity notice on the PFS application shortly after the notice was issued.

SSWS instead attempts to justify its late filing as a reasonable failure to anticipate that members of the Utah university community would not be willing to discuss the scientific merits of the PSF facility. This assertion, however, does not account for the precept that the failure of some other group to “carry the ball” does not constitute good cause for late filing. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), *reconsideration denied on other grounds*, CLI-89-6, 29 NRC 348 (1989), *aff’d*, *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), *cert. denied*, 498 U.S. 896 (1990).

Thus lacking good cause for its late filing, SSWS must make a particularly strong showing on the other four factors. *See, e.g., Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) (citing cases). Regarding factor two — other means to protect the petitioner’s interests — despite the general rule that the ability to file 10 C.F.R. § 2.715(a) limited appearance statements or otherwise provide a group’s expertise to other participants is not pertinent because it gives insufficient regard to the value of adjudicatory participation rights, *see Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 & n.7 (1979), in this instance, as the Staff points out, the existence of those outlets has more resonance given the interests SSWS purports to champion.

As is outlined below relative to SSWS’s standing, the interests of SSWS and its members are not rooted in any particular concern about the health, safety, or environmental impacts of the PFS ISFSI upon those members. Instead, theirs is an academic and professional interest in bringing to bear SSWS members’

⁵ Although there apparently is no definitive authority on whether a filing seeking discretionary intervention submitted beyond the deadline for filing intervention petitions must meet the late-filing standards, we find nothing in the general terms of 10 C.F.R. § 2.714 governing intervention petitions that would exempt a discretionary intervention request from its late-filing provisions.

scientific expertise to assure that record development is “correct” and proceeds in a manner that does not “misrepresent and demean science and the scientific community.” SSWS First Intervention Petition Supplement at unnumbered 2. So too, under factor four — the extent to which the petitioner’s interest will be represented by other participants — while Staff interests generally are assumed not to be coextensive with those of a private petitioner, *see Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-75 & n.22 (1983), in this instance SSWS’s interest in ensuring the Board has “an objective presentation of the scientific evidence” by those without a “financial or political interest in the outcome,” SSWS Second Supplemental Petition at unnumbered 25, 28, suggests SSWS sees itself fulfilling a role that, at least in part, mirrors the Staff’s general pursuits. Accordingly, these two factors, which in any event are accorded less significance in the balance, *see Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993), are, at best, minor in terms of the weight they afford to the “acceptance” side of the balance.

Factor three — assistance in developing a sound record — appears initially to be the strongest item supporting late acceptance of this petition. In its “contentions” provided in its last supplemental filing, SSWS states its position with respect to a number of the pending contentions filed by other participants, identifies prospective witnesses for those issues from among its members, and provides professional qualification statements for most of those witnesses that demonstrate considerable expertise in a variety of scientific and engineering disciplines that are relevant to the issues raised in this proceeding. As the State points out, however, this SSWS showing is flawed because it all too often reflects a lack of knowledge, understanding, or concern about the particulars of the PFS application, the focal point of this proceeding. This, in turn, suggests that the group’s input will not be useful in helping to resolve the issues in this proceeding, which fundamentally deal with adequacy of the PFS proposal. Thus, this factor is, at best, also minor in terms of the weight it provides in favor of accepting the petition.

Finally, we look to factor five — extent to which a late petitioner’s participation will broaden the issues or delay the proceeding — which, like factor three, generally is accorded more significance among the four “non-good cause” factors. At first blush, this factor too would appear to weigh in favor of accepting the late-filed application. Albeit 4 months late and filed only a week before the long-scheduled initial prehearing conference, the SSWS petition nonetheless was submitted before contentions were admitted. Consequently, the timing of the actual litigation of this proceeding up to this point has not been substantially affected, other than the additional time it has taken this Board to rule on the SSWS petition in conjunction with those that were timely filed. Moreover, given the scope of SSWS’s proffered “contentions,” in which it provides its views on a

number of the other Petitioners' contentions, and the group's repeated assertion it intends only to provide clarity and perspective to existing issues, its petition would not appear to "broaden" the issues, at least in the conventional sense.

At the same time, we perceive a not insubstantial risk that by the very nature of its more "academic" interest in this proceeding and its own organizational structure, SSWS will "broaden" the issues in or otherwise delay this proceeding as it goes forward. For instance, SSWS has asked to be allowed "to participate in the preparation (and peer review) of the Commission's Safety and Environmental reports to the extent consistent with this intervention." SSWS First Intervention Petition Supplement at unnumbered 3. This suggests a desire to cut a somewhat wider swath across this proceeding than simply responding to admitted contentions. SSWS also declares that in addressing any issues in the proceeding, it will prepare and circulate the proposed written comments among the twenty or so members of the group with the intent of arriving at a "group report" and circulate any oral comments by its spokesman for "subsequent checking." *Id.* at 1. Such "litigation by committee" could broaden or delay the proceeding by creating the potential for differing views from the same participant and by forcing the Board, if it wants the input of the "group," to set schedules that will accommodate group consultation.

Utilizing its authority to structure intervenor participation, the Board could attempt to mitigate these potential broadening and delay elements by, for instance, requiring SSWS to present only a single, organizational position under strict deadlines. But to do so may well impair SSWS's chosen "peer review" style of record development in ways that would be administratively and substantively deleterious to its stated goals. Given the uncertainty created by SSWS's own organizational structure, we conclude that factor five likewise provides little if any weight in favor of accepting the SSWS late-filed petition.

Considering in sum all five factors, we find the attenuated showings under factors two, three, four, and five do not provide the type of "compelling" demonstration that is necessary to overcome the total lack of good cause for the late filing of the SSWS intervention petition. SSWS thus has failed to establish that, on balance, its late-filed intervention petition should be accepted.

b. Standing as of Right

DISCUSSION: SSWS Intervention Petition at unnumbered 2-3; SSWS Revised Intervention Petition at unnumbered 2-3; SSWS First Intervention Petition Supplement at unnumbered 2-3; State SSWS First Intervention Petition Supplement Response at 9-14; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2-4; Staff SSWS First Intervention Petition Supplement Response at 16-20; State SSWS Second Intervention Petition Supplement at 8-9; Staff SSWS Second Intervention Petition Supplement Response at 9-10.

RULING: Even if SSWS had established that its late-filed intervention petition should be accepted, it still would not be entitled to party status in this proceeding as of right because, as we describe below, it has failed to establish its standing to intervene.

Because it seeks representational standing, SSWS must show that one or more of its members who has authorized it to represent him or her in this proceeding has or will suffer cognizable injury in fact as a result of the proposed PFS licensing action.⁶ Unlike the other Petitioners, however, SSWS has not alleged there is any injury in fact to any of its members by reason of their proximity to the proposed facility. Indeed, the only PFS member listed as residing in the State of Utah lives and works in Salt Lake City, more than 50 miles from the PFS site. This is well beyond the range within which we have found impacted health, safety, or environmental interests. *See supra* p. 169. Nor has there been any showing that he, or any other member of SSWS, engages in recreational or other activities anywhere near the PFS site.

In fact, while expressing support for the application, SSWS has made no showing that the grant or denial of the PFS request would have any impact on any interests of its members, even financial, that are normally put forth as a basis for standing in agency proceedings. Rather, the primary interest SSWS and its members seek to espouse is the desire as “nuclear scientists and administrators” with considerable expertise and experience but without a “financial or political interest in the outcome” of this proceeding to “inform the citizens of the state [of Utah] and this licensing board” about scientific and engineering principles that may be pertinent to the matters at issue. SSWS Second Intervention Petition Supplement at unnumbered 2, 28. This interest in presenting “sound science” is laudable, but it provides no basis for SSWS’s standing either as an interest cognizable for standing purposes or as one that will be the subject of actual or imminent injury upon the grant or denial of the license. *See Sheffield*, ALAB-473, 7 NRC at 743 (legal and nuclear organizations seeking to support low-level waste site renewal application lack standing because no showing that granting or denying application would injure any cognizable interest of either organization or its members); *Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976) (when no showing of injury to cognizable interests of its individual members by licensing action, asserted ability of civil liberties organization and its members to provide information and data on civil rights issues inadequate to

⁶The State makes the point that the SSWS petition, as supplemented, is not accompanied by any affidavits of members declaring the organization has the right to represent their interests. The closest thing, the State asserts, is a February 3, 1998 affidavit of Robert J. Hoffman that appoints SSWS spokesman Wilson as his representative and was not timely filed. *See* State SSWS First Intervention Petition Supplement Response at 3 n.1. Because we find SSWS has failed to demonstrate any of its members has the requisite injury in fact to provide it with organizational standing as of right, we need not determine whether this affidavit is adequate.

provide basis for standing). SSWS thus lacks standing to intervene as of right in this proceeding.

c. Discretionary Standing

DISCUSSION: SSWS Intervention Petition at unnumbered 1; SSWS Revised Intervention Petition at unnumbered 1-2; SSWS First Intervention Petition Supplement at unnumbered 1-2; State SSWS First Intervention Petition Supplement Response at 15-17; OGD SSWS First Intervention Petition Supplement Response at unnumbered 4-5; Skull Valley Band SSWS First Intervention Petition Supplement Response at 3-4; PFS SSWS First Intervention Petition Supplement Response at 1-5; SSWS Second Intervention Petition Supplement at unnumbered 26-28; State SSWS Second Intervention Petition Supplement Response at 9-12; PFS Second Intervention Petition Supplement Response at 1-9; Skull Valley Band SSWS Second Intervention Petition Supplement Response at 5; Staff SSWS Second Intervention Petition Supplement Response at 10-12.

RULING: Even without standing as of right, however, SSWS asserts it could become a party if it can fulfill the requirements for discretionary standing set out in the Commission's *Pebble Springs* decision. After analyzing the guidelines in that decision, we again conclude SSWS is not eligible for party status.

Of the six *Pebble Springs* factors for assessing a discretionary intervention request, factors one, four, five, and six are basically coextensive with last four factors of the late-filing standard of 10 C.F.R. § 2.714(a)(1), with *Pebble Springs* factor one — assistance in developing a sound record — having significant sway. See *Pebble Springs*, CLI-76-27, 4 NRC at 616-17. We assess these four individually as we did in section II.A.7.a above, likewise concluding they provide little, if any, support for admitting SSWS as a party.

This leaves factor two — nature and extent of Petitioner's interest in the proceeding — and factor three — possible effect of any order entered on the Petitioner's interest — to be considered. In both instances, these are not positive factors relative to SSWS. As we have noted above, although expressing support for the application, the interests SSWS champions are primarily academic, tied to its concern about ensuring the dissemination of "correct" scientific and engineering information. The generalized interests of SSWS in overseeing the record simply are not of the type that support permitting discretionary intervention.

In summary, given SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the

proceeding (factor six), we find discretionary intervention is not appropriate in this instance.⁷

B. Contentions

1. Contention Admissibility Standards

a. Pleading Requirements

i. GENERAL REQUIREMENTS

For a proffered legal or factual contention to be admissible, it must be pled with specificity. In addition, the contention's sponsor must provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. *See* 10 C.F.R. § 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. *Id.* § 2.714(d)(2).

From these general principles, agency case law and regulations suggest there are a number of more specific corollaries regarding contention admissibility, which can be summarized as follows:

⁷ Both PFS and SSWS seek to support SSWS's discretionary admission by reference to the Appeal Board's decision in *Sheffield*, ALAB-473, 7 NRC at 743-44, remanding to the Licensing Board the petition of a local chapter of the American Nuclear Society (ANS) for consideration of whether it should be afforded discretionary intervention. This intervenor subsequently was admitted to the proceeding. *See Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 300 n.1 (1978). Although there is no published opinion providing the basis for the Licensing Board's ruling admitting the local ANS chapter, SSWS has quoted a portion of the Board's unpublished decision in its final intervention petition supplement. *See* SSWS Second Intervention Petition Supplement at unnumbered 30.

Besides being of questionable significance as an unpublished decision, the quoted portion of the Licensing Board's *Sheffield* ruling tells us nothing about the Board's analysis of the *Pebble Springs* factors. Lacking any knowledge of the exact basis for that Board's determination on remand, we simply note that any number of factors, such as a further showing about the nature of the organization's interest, may have counseled a different result there. *See Sheffield*, ALAB-473, 7 NRC at 741 & n.3 (many of local ANS organization's members assertedly involved in work utilizing the facility in question and whether they would be harmed by license termination or conditions would depend on nature of work and availability of other similar facilities).

ii. CHALLENGES TO STATUTORY REQUIREMENTS/REGULATORY PROCESS/REGULATIONS

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rule-making, is inadmissible. See 10 C.F.R. § 2.758; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See *Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

iii. CHALLENGES OUTSIDE SCOPE OF PROCEEDING

The scope of an adjudicatory proceeding is specified by the notice of hearing or of opportunity for hearing and contentions that deal with matters outside that defined scope must be rejected. See, e.g., *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

iv. MATERIALITY

Any issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief. See 10 C.F.R. § 2.714(d)(2)(ii); 54 Fed. Reg. 33,168, 33,172 (1989). This requirement of materiality embodies the notion that an alleged error or deficiency regarding a proposed licensing action must have some significance

relative to the agency's general responsibility and authority to protect the public health and safety and the environment. *See Seabrook*, LBP-82-106, 16 NRC at 1656 (safety contention "must either allege with particularity that an applicant is not complying with a specified [safety] regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent" (footnote omitted)); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, contentions concerning alleged deficiencies in a decommissioning plan must not only allege and provide sufficient bases to show the deficiencies but also show that the purported deficiencies have "some independent health and safety significance" such that reasonable assurance of the public health and safety with respect to decommissioning is no longer assured. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75, *aff'd*, CLI-96-7, 43 NRC 235 (1996); *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258 ("Petitioners must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke"). In this same vein, when challenging the adequacy of a decommissioning funding plan cost estimate, a contention lacks materiality absent an additional showing there is not reasonable assurance the amount in dispute can be paid, thereby avoiding a mere formalistic redraft of the funding plan. *See Yankee Nuclear*, CLI-96-1, 43 NRC at 9. Similarly, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

**v. NEED FOR ADEQUATE FACTUAL INFORMATION OR EXPERT OPINION
AS CONTENTION BASIS**

The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *see also Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980). Nor does mere speculation provide an adequate basis for a contention. *See Yankee Nuclear*, CLI-96-7, 43 NRC at 267. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41

NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995).

With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) (“where a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source”); *Yankee Nuclear*, LBP-96-2, 43 NRC at 90 (“[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show”). By the same token, an expert opinion that merely states a conclusion (e.g., the application is “deficient,” “inadequate,” or “wrong”) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

vi. FAILURE PROPERLY TO CHALLENGE APPLICATION

In framing contentions regarding a proposed licensing action, the focus of a petitioner’s concern should be the license application. *See* 10 C.F.R. § 2.714(b)(2)(iii). In this regard, a contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal. *See Rancho Seco*, LBP-93-23, 38 NRC at 247-48; *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991), *appeal dismissed*, CLI-92-3, 35 NRC 63 (1992).

b. *Scope of Contentions*

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). In this instance, Applicant PFS in an effort to provide greater specificity

to the various Petitioners' contentions restated them by incorporating many of the contention bases as subparts of the contentions. In a number of instances a Petitioner objected to these redrafts, but in a several other instances, often after further negotiations and revision, the changes were adopted by the Petitioner. As set forth below, the language of the Petitioners' contentions reflects those agreed-upon changes. Moreover, as is outlined below, exercising our authority under 10 C.F.R. § 2.714(f), we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more Petitioners appear related or when redrafting would clarify the scope of the contentions.

c. Adoption/Incorporation by Reference

Three of the Petitioners, Castle Rock Land/Skull Valley, the Confederated Tribes, and the State, have sought to incorporate by reference one or more of the contentions of other participants. As the Staff points out, such adoption has been permitted in other proceedings. *See* Staff Contentions Response at 133 n.82 (citing cases).

We likewise will permit adoption here by Castle Rock Land/Skull Valley and the Confederated Tribes, with two caveats. First, if the language of the adopted contention was revised as a result of the process described in section II.B.1.b above, that is the language that will be considered to be adopted.⁸ Second, as is set forth more fully in section III.A below, for any contention subject to adoption, a "lead" party is appointed with primary responsibility for marshaling the parties' case relative to that contention.

As to the State, it sought to incorporate by reference all the other participants' contentions in a filing submitted well after the November 24, 1997 deadline for filing contentions. *See* State Adopted Contentions Response at 2. As PFS points out, the State has not addressed the late-filing factors in seeking to add these to the list of contentions it is sponsoring. *See* PFS State Adopted Contentions Response at 1-2. Because we agree with the Applicant, we deny the State's late-filed contentions request.

d. Criteria for Admitting Late-Filed Contentions

Of the contentions discussed below, two (Utah EE and GG) were submitted after the time for filing intervention petition supplements had expired. As such, they must be assessed under a five-factor test to determine whether, on balance,

⁸ Applicant PFS apparently did have discussions with the Confederated Tribes concerning language changes in contentions it had adopted and was told the Confederated Tribes would advise the Board on its position. *See* Applicant's Response to Revised Contentions and Proposed Transcript Corrections (Feb. 17, 1998) at 3. We, however, have heard nothing from the Confederated Tribes in this regard.

they should be considered even though late filed. As set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. *See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).*

With these general precepts before us, we turn to each of the Petitioners' claims regarding their contentions.

2. *State Contentions*

UTAH A — Statutory Authority

CONTENTION: Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

DISCUSSION: State Contentions at 3-9; PFS Contentions Response at 22-25; Staff Contentions Response at 6-14; State Contentions Reply at 9-15; Tr. at 45-64.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's existing regulatory provisions or rulemaking-associated generic determinations. *See* section II.B.1.a.ii above. Nothing in the language of the 10 C.F.R. Part 72 provisions describing an ISFSI and the "persons" authorized to apply for and be issued a license to construct and operate an ISFSI indicates PFS is ineligible to seek such permission. *See* 10 C.F.R. § 72.2(b); *id.* § 72.3 (definitions of "Independent spent fuel storage installation" and "Person"); *id.* § 72.6(a). Indeed, when adopting Part 72 in 1980 the Commission specifically contemplated the possibility of stand-alone, "away from reactor" sites as well as the possibility that there could be "large" installations. *See* 45 Fed. Reg. 74,693, 74,696, 74,698-99 (1980). Thereafter, when the Commission revised Part 72 following the passage of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 5841, 10101-10270 — the lodestone for the State's assertion the Board lacks jurisdiction — it made revisions to accommodate the statutory provisions for a monitored retrievable storage (MRS) installation to be constructed and operated by the Department of Energy (DOE). It did not, however, make changes to the original scope of Part 72 that would preclude the creation of an installation such as that now contemplated by PFS.

In these circumstances, in which the Commission clearly has established the scope of Part 72, inquiry into that determination is beyond our authority.⁹

UTAH B — License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that:

1. The Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel for extended periods of time.
2. The anticipated volume and quantity of fuel shipments that will pass through Rowley Junction is a large magnitude that is unlike the intermodal transfer operations that previously occurred with respect to shipments of spent nuclear fuel from commercial nuclear power plant sites.
3. The volume of fuel shipments will not be capable of passing directly through Rowley Junction and some type of temporary storage of casks will be necessary at the site of the ITP, thus making Rowley Junction a spent nuclear fuel storage facility. Further PFS fails to discuss the number of heavy haul trucks that will be available to haul casks, the mechanical reliability of these units, and their performance under all weather conditions which is necessary to analyze the amount of queuing and storage that will occur at Rowley Junction.
4. Because the ITP is stationary, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

DISCUSSION: State Contentions at 10-15; PFS Contentions Response at 25-42; Staff Contentions Response at 14-19; State Contentions Reply at 15-19; Tr. at 133-63.

RULING: Paragraphs two and three of this contention are inadmissible in that they and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility. *See* section II.B.1.a.ii above. Regarding paragraphs one and four, as is relevant here, the Part 71 regulations authorize transportation of spent fuel under a general license for a Commission licensee or "carrier," which is defined as a "common, contract, or private carrier," that complies with the general controls and procedures requirements, quality assurance measures, and other provisions of Subparts A, G, and H of Part 71. 10 C.F.R. §§ 71.0(d), 71.4,

⁹ Although we agree with Petitioner Confederated Tribes' point that an adjudicatory body generally has the authority to consider its own jurisdiction, *see* Tr. at 100, in this instance we do not find sufficient ambiguity in the Commission's regulatory declaration of its jurisdiction (and concomitantly ours) to permit further inquiry into that question consistent with the dictates of 10 C.F.R. § 2.758.

71.12. In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. *See* State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62.

This contention is admitted, albeit limited to paragraphs one and four.¹⁰ Revised language reflecting this ruling is set forth at p. 251 of Appendix A to this Memorandum and Order.

UTAH C — Failure to Demonstrate Compliance with NRC Dose Limits

CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. § 72.106(b) can and will be complied with in that:

1. License Application uses data for HI-STORM and TranStor casks that have not been fully reviewed or approved by the NRC.
2. License Application erroneously states that the loss of confinement accident is not credible.
3. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.
4. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
5. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.
6. In the dose calculation, PFS appears to assume local residents will be evacuated until contamination is removed, although this is not expressly discussed in the License Application.
7. PFS fails to calculate doses to children.
8. PFS uses the ICRP-30 dose model which is outdated and inadequate. PFS should be required to use the new ICRP-60 dose model.

DISCUSSION: State Contentions at 16-21; PFS Contentions Response at 42-58; Staff Contentions Response at 19-23; State Contentions Reply at 20-28; Tr. at 165-203.

¹⁰ Although PFS suggests the issue of license authority over the Rowley Junction ITP is outside the scope of this proceeding, *see* PFS Contentions Response at 158-59, this seemingly runs contrary to the Staff's apparent belief that it may, in the context of acting on the PFS license, exert regulatory authority relative to PFS activities at Rowley Junction, *see* Staff Contentions Response at 19 n.29.

RULING: Paragraph one of this contention is inadmissible in that it and its supporting basis impermissibly challenge the Commission's regulatory scheme, provisions, or rulemaking-associated generic determinations, which establish a separate cask design approval process under rulemaking procedures and cask design approval prior to licensing of the PFS facility.¹¹ *See* section II.B.1.a.ii above. Paragraph two also is inadmissible in that it and its supporting basis lack materiality; lack adequate factual and expert opinion support; and/or impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, by seeking to litigate transportation-related sabotage matters. *See* section II.B.1.a.i, ii, iv, v above. Paragraph six is inadmissible in that it and its supporting basis fail to provide any support, from the application or otherwise, for its assertion there is an evacuation assumption in the PFS application. *See* section II.B.1.a.i, v, vi above. Finally, paragraphs seven and eight are inadmissible in that they and their supporting bases impermissibly challenge the agency's regulatory standards or rulemaking-associated generic determinations, including 10 C.F.R. Part 20, and make no showing that, even taking into account dose rates to children and/or the ICRP-60 dose model, the Part 20 standards will not be met. *See* section II.B.1.a.i, ii, iv, v.

Paragraphs three, four, and five are admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. A revised contention reflecting these rulings is set forth at p. 251 of Appendix A to this Memorandum and Order.

UTAH D — Facilitation of Decommissioning

CONTENTION: The proposed ISFSI is not adequately designed to facilitate decommissioning, because PFS has not provided sufficient information about the design of its storage casks to assure compatibility with DOE repository specifications. Moreover, in the reasonably likely event that PFS's casks do not conform to DOE specification, PFS fails to provide any measures for the repackaging of spent fuel for ultimate disposal in a high level radioactive waste repository. Moreover, PFS provides no measures for verification of whether the condition of spent fuel meets disposal criteria that DOE may impose.

DISCUSSION: State Contentions at 22-26; PFS Contentions Response at 58-68; Staff Contentions Response at 23-26; State Contentions Reply at 28-33; Tr. at 189-219.

RULING: As this contention and its supporting basis allege incompatibility with DOE repository specifications, it is inadmissible because it seeks to

¹¹ In discussing this paragraph of the contention, the State asserts that a central concern is that any Part 72 license not be issued until the certification process is completed for the storage casks PFS proposes to use at its facility. *See* State Contentions Reply at 20-21. The Staff agrees that this will not happen. *See* Tr. at 174-75, 183-84. As a consequence, we find nothing to litigate regarding this paragraph.

challenge the Commission's regulatory program, regulations, or rulemaking-associated generic determinations under which DOE cask criteria, admittedly incomplete at present, need only be addressed as they become available, and has not demonstrated any specific inadequacy in the application's discussion of any existing DOE specifications that creates a genuine dispute. *See* section II.B.1.a.i, ii, vi above. As this contention and its supporting basis assert the need for a facility "hot cell" for spent fuel canister inspection to ensure compatibility with future DOE spent fuel acceptance limits, avoid storage removal operational safety problems, or provide a fuel repackaging capability for fuel transfer to casks compatible with later DOE requirements or for transfer of degraded fuel prior to shipment to a HLW repository, the contention also is inadmissible as impermissibly challenging the agency's regulations or rulemaking-associated generic determinations and lacking the necessary factual information or expert opinion support. *See* section II.B.1.a.i, ii, v.

UTAH E — Financial Assurance

CONTENTION: Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license.

DISCUSSION: State Contentions at 27-38; PFS Contentions Response at 69-83; Staff Contentions Response at 26-27; State Contentions Reply at 34-38; Tr. at 222-32.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. We note, however, that while differences between the financial qualifications requirements of 10 C.F.R. Part 50, including Appendix C, and those in 10 C.F.R. Part 72 suggest the Part 50 provisions are not applicable in toto to Part 72 applicants, we agree with the Staff that Part 50 should be used as guidance in reviewing PFS's financial qualifications. *See* Staff Contentions Response at 108 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997)).

Because of the similarity of this contention with Castle Rock 7 and Confederated Tribes F, *see infra* pp. 215, 236, we consolidate those issue statements as set forth in the revised contention specified at pp. 251-52 of Appendix A to this Memorandum and Order.

UTAH F — Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.

DISCUSSION: State Contentions at 39-41; PFS Contentions Response at 84-91; Staff Contentions Response at 28; State Contentions Reply at 38-40; Tr. at 261-64.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the second portion of the contention's basis concerning physical and mental condition of operators has been resolved/withdrawn. *See* State Contentions Reply at 39; Tr. at 261-62.

In addition, as is noted below, *see infra* p. 194, the portion of Utah P (subparagraph b of paragraph seven) that deals with training for the PFS radiation protection program, is consolidated with this contention. A revised contention reflecting this ruling is set forth on p. 252 of Appendix A to this Memorandum and Order.

UTAH G — Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

DISCUSSION: State Contentions at 42-51; PFS Contentions Response at 92-101; Staff Contentions Response at 28-30; State Contentions Reply at 40-43; Tr. at 269-80.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, but limited to its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program. The contention's basis two regarding inadequate QA descriptions for PFS quality control over spent fuel canister packaging operations and materials and handling at originating reactor sites, shipping cask materials and construction, and welding on shipping casks and spent fuel canisters is inadmissible as impermissibly challenging the agency's regulatory program, standards, and/or rulemaking-associated generic determinations. *See* section II.B.1.a.ii above. So too, the contention's basis three concerning inconsistency between the QA program description and the SAR is inadmissible as lacking materiality. *See* section II.B.1.a.i, iv above.

UTAH H — Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110°F.

2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.
3. PFS's projection that average daily temperatures will not exceed 100°F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.
4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.
5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.
6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.
7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

DISCUSSION: State Contentions at 52-59; PFS Contentions Response at 101-20; Staff Contentions Response at 30; State Contentions Reply at 43-47; Tr. at 280-90.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

UTAH I — Lack of a Procedure for Verifying the Presence of Helium in Canisters

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. §§ 72.122(f) and 10 C.F.R. § 72.128(a), and poses undue risk to the public health and safety, because it lacks a procedure, or any evidence of a procedure, for verifying the presence of helium inside spent fuel canisters.

DISCUSSION: State Contentions at 60-62; PFS Contentions Response at 121-31; Staff Contentions Response at 30-31; State Contentions Reply at 47-49; Tr. at 291-300.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning the need for canister inspection and testing; and/or lack adequate factual information or expert opinion support. *See* section II.B.1.a.i, ii, v above.

UTAH J — Inspection and Maintenance of Safety Components, Including Canisters and Cladding

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. §§ 72.122(f) and 72.128(a), and poses undue risk to the public health and safety, because it lacks a hot cell or other facility for opening casks and inspecting the condition of spent fuel.

DISCUSSION: State Contentions at 63-71; PFS Contentions Response at 131-46; Staff Contentions Response at 32-33; State Contentions Reply at 49-53; Tr. at 204-19.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning canister inspection and repair; and/or lack adequate factual information or expert opinion support. *See* section II.B.1.a.i, ii, v above.

UTAH K — Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, intermodal transfer site, and transportation corridor along Skull Valley Road, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity.

DISCUSSION: State Contentions at 72-79; PFS Contentions Response at 146-65; Staff Contentions Response at 32-33; State Contentions Reply at 54-58; Tr. at 300-17.

RULING: Relative to the State's assertions regarding the impact on the PFS facility of accidents involving materials or activities at or emanating from the Tekoi Rocket Engine Test facility, Dugway Proving Ground, Salt Lake City International Airport, Hill Air Force Base, and the Utah Test and Training Range, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. Further, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry regarding the State's assertions concerning the impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from the facilities specified above, or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill.¹² Finally, in connection with the State's assertions regarding lack of consideration of accidents involving trucks or railcars transporting spent fuel casks as they travel to the ITP facility from reactor sites and thereafter along Skull Valley Road, these are inadmissible as impermissibly challenging the basic structure of the agency's regulatory processes, requirements, or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, which places

¹² In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

such matters within the ambit of DOT regulation and control.¹³ See section II.B.1.a.ii above.

A revised contention reflecting this ruling, as well as the consolidation of this contention with Castle Rock 6 and a related portion of Confederated Tribes B, see *infra* pp. 214, 235, is set forth at p. 253 of Appendix A to this Memorandum and Order.

UTAH L — Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

DISCUSSION: State Contentions at 80-95; PFS Contentions Response at 165-68; Staff Contentions Response at 33-34; State Contentions Reply at 58-59; Tr. at 331-33.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁴

UTAH M — Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.
2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

DISCUSSION: State Contentions at 96-97; PFS Contentions Response at 168-69; Staff Contentions Response at 34; State Contentions Reply at 59; Tr. at 333-34.

¹³ In considering this contention, we agree with the Staff that the State has not provided any basis for challenging the PFS determination that its facility is sufficiently far from Skull Valley Road that an explosion involving Dugway military ordinance being transported on the road will not exceed the 1 pound per square inch (psi) overpressure requirement at the facility. See Staff Contentions Response at 33. Further, although the Staff observes that portions of the bases for Utah K could be construed as a challenge to the discussion of transportation accident risk in the PFS ER, see *id.*, we do not interpret it that way. Even if it is, however, that same issue is considered below in the context of Utah V.

¹⁴ In response to a Staff concern regarding a portion of the basis for this contention, the State agreed that its contention should not be construed as asking for evaluation of faults other than "capable faults" as they are defined in 10 C.F.R. Part 100, App. A. See Tr. at 332.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

UTAH N — Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.

DISCUSSION: State Contentions at 98-99; PFS Contentions Response at 169-72; Staff Contentions Response at 34-35; State Contentions Reply at 59-60; Tr. at 334-39, 350.

RULING: Admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry.¹⁵

UTAH O — Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation and decommissioning of the ISFSI and the potential impacts of transportation of spent fuel on groundwater, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the applicant's sewer/wastewater system, the retention pond, facility operations and construction activities.
2. Potential for groundwater and surface water contamination.
3. The effects of applicant's water usage on other well users and on the aquifer.
4. Impact of potential groundwater contamination on downgradient hydrological resources.

DISCUSSION: State Contentions at 100-08; PFS Contentions Response at 172-86; Staff Contentions Response at 35-36; State Contentions Reply at 59-60; Tr. at 339-60.

RULING: Except as it seeks to litigate the groundwater impacts of spent fuel shipments on transportation routes, which is inadmissible as an impermissible challenge to the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, *see* section II.B.1.a.ii above, this

¹⁵ In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

contention is admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁶

In addition, as is noted below, *see infra* pp. 216, 217, the similarity of this contention and Castle Rock 8 and 10 warrants consolidating this contention and its supporting bases with those issue statements. The consolidated contention is set forth at p. 254 of Appendix A to this Memorandum and Order.

UTAH P — Inadequate Control of Occupational and Public Exposure to Radiation

CONTENTION: The Applicant has not provided enough information to meet NRC requirements of controlling and limiting the occupational radiation exposures to as low as reasonably achievable (ALARA) and analyzing the potential dose equivalent to an individual outside of the controlled area from accidents or natural phenomena events in that:

1. The Applicant has failed to provide detailed technical information demonstrating the adequacy of its policy of minimizing exposure to workers as a result of handling casks, nor does it describe the design features that provide ALARA conditions during transportation, storage and transfer of waste. Specifically, if the design has incorporated ALARA concepts, the storage casks used at the ISFSI should have the lowest dose rate.
2. The Applicant has failed to provide an analysis of alternative cask handling procedures to demonstrate that the procedures will result in the lowest individual and collective doses.
3. The Applicant has failed to adequately describe why the Owner Controlled Area boundaries were chosen and whether the boundary dose rates will be the ultimate minimum values compared to other potential boundaries.
4. The Applicant has failed to indicate whether rainwater or melted snow from the ISFSI storage pads will be collected, analyzed, and handled as radioactive waste.
5. The Applicant has failed to provide design information on the unloading facility ventilation system to show that contamination will be controlled and workers will be protected in a manner compatible with the ALARA principle. In addition, procedures to maintain and ensure filter efficiency and replace components are not provided.
6. The Applicant has failed to provide adequate or complete methods for radiation protection and failed to provide information on how estimated radiation exposures values to operating personnel were derived to determine if dose rates are adequate.
7. The Applicant has failed to describe a fully developed radiation protection program that ensures ALARA occupational exposures to radiation by not adequately describing:
 - a. the management policy and organizational structure to ensure ALARA;

¹⁶In admitting this contention, we include its bases relating to construction-related groundwater impacts and groundwater impacts relative to the Rowley Junction ITP. We note, however, that further litigation on this contention's merits relative to the ITP may be subject to any merits disposition of Utah B.

- b. a training program that insures all personnel who direct activities or work directly with radioactive materials or areas are capable of evaluating the significance of radiation doses;
 - c. specifics on personnel and area, portable and stationary radiation monitoring instruments, and personnel protective equipment, including reliability, serviceability, equipment limitation specifications;
 - d. a program for routine equipment calibration and testing for operation and accuracy;
 - e. a program to effectively control access to radiation areas and movement of radiation sources;
 - f. a program to maintain ALARA exposures of personnel servicing leaking casks;
 - g. a program for monitoring and retaining clean areas and monitoring dose rates in radiation zones to ensure ALARA; and
 - h. specific information on conducting formal audits and review of the radiation protection program.
8. The Applicant has completely failed to include an analysis of accident conditions, including accidents due to natural phenomena, in accordance with 10 C.F.R. §§ 72.104 and 72.126(d).
9. The Applicant has failed to control airborne effluent which may cause unacceptable exposure to workers and the public, Contention T, Basis 3(a) (Air Quality) is adopted and incorporated by reference.

DISCUSSION: State Contentions at 109-13; PFS Contentions Response at 187-206; Staff Contentions Response at 37-39; State Contentions Reply at 61-66; Tr. at 367-80.

RULING: Inadmissible as to all paragraphs except subparagraph b of paragraph seven in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the applicable ALARA provisions; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iv, v, vi above. With regard to subparagraph b of paragraph seven, this portion of the contention is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry and is incorporated into Utah F, which deals generally with PFS training program adequacy. *See supra* p. 188. The revised contention is set forth at p. 252 of Appendix A to this Memorandum and Order.

UTAH Q — Adequacy of ISFSI Design to Prevent Accidents

CONTENTION: The Applicant has failed to adequately identify and assess potential accidents, and, therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

DISCUSSION: State Contentions at 114-15; PFS Contentions Response at 207-15; Staff Contentions Response at 39-40; State Contentions Reply at 66; Tr. at 390-94.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine material dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iii, v, vi above.¹⁷

UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site, at the transfer facility, or offsite during transportation in that:

1. PFS has not adequately described the facility, the activities conducted there, or the area in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan, nor has PFS considered specific impediments to emergency response such as flooding, ice, snow, etc.
2. PFS has not identified adequate emergency and medical facilities and equipment to respond to an onsite emergency.
 - a. Tooele County capabilities and equipment are not addressed adequately.
 - b. No provision for extra onsite preparedness giving time for Tooele County to respond, particularly in adverse weather conditions.
3. The plan was not adequately coordinated with the State or other government (local, county, state, federal) agencies.
 - a. PFS has not supported its claim regarding absence of extremely hazardous substances and that no assistance will be required external to Tooele County.
 - b. PFS does not address transportation accidents or accidents at the intermodal transfer point.

¹⁷ Some of the bases for this contention rely upon the possibility of accidents at the Rowley Junction ITP, which we have found to be a permissible subject for other State contentions. In this instance, however, the basis for the contention concerns purported accidents involving storage casks rather than shipping casks, the latter being the casks that would be handled at the ITP.

4. PFS has not adequately described means and equipment for mitigation of accidents, because it:
 - a. Does not address how it would procure a crane within 48 hours for a tip over cask accident.
 - b. Does not adequately support capability to fight fires.
5. The Emergency Plan does not provide adequate detail to meet provisions of Reg. Guide 3.67, § 5.4.1 regarding equipment inventories and locations.

DISCUSSION: State Contentions at 116-22; PFS Contentions Response at 215-36; Staff Contentions Response at 40-49; State Contentions Reply at 66-69; Tr. at 792-803.

RULING: Admitted with regard to paragraph one and subparagraph b of paragraph three as they relate to the Rowley Junction ITP and subparagraph b of paragraph four relating to onsite firefighting capabilities as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁸ Inadmissible as to all other portions of paragraph one, paragraph two, subparagraph a of paragraphs three and four, and paragraph five in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iv, v, vi above.

A revised contention reflecting this ruling is set forth at p. 254 of Appendix A to this Memorandum and Order.

UTAH S — Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 70.3(b).

DISCUSSION: State Contentions at 123-30; PFS Contentions Response at 236-56; Staff Contentions Response at 49-52; State Contentions Reply at 69-74; Tr. at 394-409.

RULING: Admitted as it is supported by bases one, two, four, five, ten, and eleven, which are sufficient to establish a genuine material dispute adequate

¹⁸ In admitting this contention as it relates to the Rowley Junction ITP, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

to warrant further inquiry,¹⁹ with the caveat that for the decommissioning cost estimates at issue under basis four, the costs of nonradiological solid and hazardous waste disposal are a consideration only to the extent necessary for license termination, *see* 53 Fed. Reg. 24,018, 24,019 (1988). Inadmissible as to the matters specified in bases three, six, seven, eight, and nine provided in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 51.23; lack materiality; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, iv, v above.

Because of the similarity of the issues raised in this contention and Castle Rock 7, *see infra* p. 215, the portions of that contention and their supporting bases that specifically relate to decommissioning (i.e., paragraphs c and f) are hereby consolidated with this contention, which is revised as set forth at p. 255 of Appendix A to this Memorandum and Order.

UTAH T — Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. § 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has failed to show that it is entitled to use the land for the ISFSI site and if it does have such right whether there are any legal constraints imposed on the use and control of the land: the NRC must require the Applicant to fully disclose all provisions of the Applicant's lease with the Skull Valley Band in order to fully evaluate under what conditions that Applicant is entitled to use and control the site.
2. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there; nor has it identified the number of casks expected on each shipment, or explained the effects of rail congestion or whether Rowley Junction has the capacity of handling the expected number of casks; nor has it shown that Union Pacific is willing and capable to handle shipments to Rowley Junction.
3. The Applicant has shown no ability or authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.
4. The Applicant has shown no basis that it is entitled to widen Skull Valley Road or that the proposed 15-foot roadway would satisfy health, safety and environmental concerns nor does the application describe and identify State and local permits or approvals that are required.

¹⁹ Further litigation on the merits of this contention relative to basis eleven regarding the ITP may be subject to any merits disposition of Utah B.

5. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. § 51.45 in that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts in ER 4.3.3 is inadequate; and a state air quality approval order under Utah Code Ann. § 19-2-108 will be required.
6. The Applicant has not addressed the requirement to obtain a Utah groundwater discharge permit.
7. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements in that the Applicant merely states that it "might" need a Clean Water Act Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor and that it will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.
8. The Applicant must show legal authority to drill wells on the proposed ISFSI site and that its water appropriations will not interfere with or impair existing water rights and identify and describe state approvals that are required.

DISCUSSION: State Contentions at 131-43; PFS Contentions Response at 256-82; Staff Contentions Response at 52-53; State Contentions Reply at 74-83; Tr. at 467-94.

RULING: Admissible as to paragraphs two through eight and their supporting bases, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.²⁰ Inadmissible as to paragraph one and its supporting basis, which fail to establish with specificity any genuine dispute and impermissibly challenge the Commission's regulatory processes, regulations or rulemaking-associated generic determinations, including those relating to site ownership.²¹ See section II.B.1.a.i, ii above.

A revised contention reflecting this ruling, as well as the consolidation of all or parts of Castle Rock 10, 12, and 22, *see infra* pp. 217, 218, 224, is set forth at pp. 255-56 of Appendix A of this Memorandum and Order.

²⁰ Further litigation on the merits of this contention relative to paragraph two regarding the ITP may be subject to any merits disposition of Utah B. In this regard, however, we are unable to find admissible the language of paragraph two that relies on rail shipment volume as a basis for the contention. As with Utah B, *see supra* p. 184, we consider this an insufficient basis to merit the admission of paragraph two. Accordingly, we appropriately revise paragraph two of Utah T, which is set forth at p. 255 of Appendix A to this Memorandum and Order.

²¹ Regarding this contention, the Board also notes that an allegation concerning compliance with the requirements of 10 C.F.R. Part 75 was withdrawn. *See* Tr. at 486-87.

UTAH U — Impacts of Onsite Storage Not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

DISCUSSION: State Contentions at 142-43; PFS Contentions Response at 282-92; Staff Contentions Response at 53-54; State Contentions Reply at 83-84; Tr. at 525-50.

RULING: Admissible as to basis one, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry.²² Inadmissible as to bases two, three, and four proffered in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

UTAH V — Inadequate Consideration of Transportation-Related Radiological Environmental Impacts

CONTENTION: The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that:

1. In order to comply with NEPA, PFS and the NRC Staff must evaluate all of the environmental impacts, not just regional impacts, associated with transportation of spent fuel to and from the proposed ISFSI, including preparation of spent fuel for transportation to the ISFSI, spent fuel transfers during transportation to the ISFSI, transferring and returning defective casks to the originating nuclear power plant, and transfers and transportation required for the ultimate disposal of the spent fuel.
2. PFS's reliance on Table S-4 is inappropriate and inadequate. 10 C.F.R. § 51.52 applies only to light-water-cooled nuclear power plant construction permit applicants, not to offsite ISFSI applicants. Even if 10 C.F.R. § 51.52 applied, PFS does not satisfy the threshold conditions for using Table S-4, and its reliance on NUREG-1437 is misplaced. Since the conditions specified in 10 C.F.R. § 51.52(a) for use of Table S-4 are not satisfied, the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. § 51.52(b).
3. The SAR is inadequate to supplement Table S-4 in that:
 - a. The Applicant fails to adequately address the intermodal transfer point in that the analysis utilizes unreasonable assumptions regarding rail shipment volume and its associated effects.

²² Further litigation on the merits of this contention relative to basis one regarding the ITP may be subject to any merits disposition of Utah B.

- b. The Applicant fails to calculate impacts of the return of substandard or degraded casks to the originating nuclear power plant licensees, including additional radiation doses to workers and the public.
 - c. The Applicant fails to address the environmental impacts of any necessary intermodal transfer required at some of the originating nuclear power plants due to lack of rail access or inadequate crane capability.
4. New information shows that Table S-4 grossly underestimates transportation impacts in that:
- a. WASH-1238, which is the basis for Table S-4, uses poor and outdated data, and hence the Applicant's reliance on WASH-1238 and Table S-4 is inadequate to demonstrate compliance with NEPA;
 - b. WASH-1238 does not quantify the risks of spent fuel transportation. 10 C.F.R. § 51.45(c) requires that, to the extent practicable, the cost and benefits of a proposal should be quantified;
 - c. WASH-1238 does not address accidents caused by human error or sabotage;
 - d. WASH-1238 does not include up-to-date analyses of maximum credible accidents;
 - e. WASH-1238 does not address the potential for degradation of fuel cladding caused by dry fuel storage;
 - f. WASH-1238 does not address the greater release fraction from severe accident consequences demonstrated in recent analyses;
 - g. WASH-1238 does not address specific regional characteristics of impacts on the environment from transportation and therefore is inadequate to satisfy 10 C.F.R. § 72.108;
 - h. WASH-1238 does not address circumstances and consequences of a criticality event of a representative rail transportation cask with a large capacity (capacity greater than a critical mass of fuel);
 - i. WASH-1238 does not contain information from the more recent and more accurate dose modeling RADTRAN computer program;
 - j. WASH-1238 does not address a representative transportation distance for the shipment of spent fuel from the originating nuclear power plants. WASH-1238 assumes an approximate distance of 1000 miles. The PFS acknowledges that the distance may be more than twice that amount. ER at 4.7-3.

DISCUSSION: State Contentions at 144-61; PFS Contentions Response at 292-310; Staff Contentions Response at 54-63; State Contentions Reply at 84-88; Tr. at 551-93, 600-03.

RULING: Admissible as to paragraph two and its supporting basis as it alleges the weight for a loaded PFS shipping cask is outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4), which is sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to para-

graph one, the balance of the assertions in paragraph two, and paragraphs three and four and their supporting bases,²³ which fail to establish with specificity any genuine dispute; impermissibly challenge the applicable Commission regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.52, 72.108, and “Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants,” WASH-1238 (Dec. 1972), as supplemented, NUREG-75/038 (Supp. 1 Apr. 1975); lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

A revised version of this contention that incorporates this ruling is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH W — Other Impacts Not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that:

1. The Applicant has not discussed the cumulative impacts of this facility in relationship to hazardous and industrial facilities/activities located in the region of the ISFSI site and the intermodal transfer point.
2. The Applicant has not evaluated the potential for accidents from the heavy haul trucks that could make up to 400 trips per year along the Skull Valley Road, a secondary two-way paved road.
3. The Applicant has not considered the impact of flooding on its facility or the intermodal transfer point.
4. The Applicant has not adequately discussed the degradation of air quality and water resources due to construction, operation, and maintenance of the ISFSI.
5. The Applicant has not fully assessed the environmental impact of placing 4,000 casks over a site with such complex seismicity, capable of faults and potentially unstable soils.
6. The Applicant has not adequately considered the cost of the visual impact of the proposed ISFSI and of the transportation of spent fuel by heavy haul trucks along Skull Valley Road on the public’s use and enjoyment of the area.

DISCUSSION: State Contentions at 162-64; PFS Contentions Response at 310-23; Staff Contentions Response at 63-64; State Contentions Reply at 88-89; Tr. at 604-21.

²³ Notwithstanding our admission of Utah B dealing with the need for licensing of the Rowley Junction ITP and our general agreement with the State’s observation that “where the intermodal transfer facility constitutes part of the storage facility for purposes of compliance with safety regulations, its environmental impacts must nevertheless be addressed by the Applicant and the NRC,” State Contentions Reply at 88, we are unable to find that paragraph 3.a of this contention is admissible because it relies on rail shipment volume, a consideration we consider insufficient to support the admission of Utah B or this contention.

RULING: Admissible as to paragraph three as it asserts a failure to consider the impact of flooding at the Rowley Junction ITP, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry.²⁴ Inadmissible as to paragraphs one and two, paragraph three as it relates to the PFS facility, and paragraphs four, five, and six in that they and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

A revised contention reflecting this ruling is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH X — Need for the Facility

CONTENTION: The Applicant fails to demonstrate there is a need for the facility as is required under NEPA.

DISCUSSION: State Contentions at 165-66; PFS Contentions Response at 323-30; Staff Contentions Response at 64-65; State Contentions Reply at 89-90; Tr. at 652-57.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual and expert opinion support. *See* section II.B.1.a.i, ii, v above.

UTAH Y — Connected Actions

CONTENTION: The Applicant fails to adequately discuss the link between this proposal and the national high level waste program, a connected action, as is required under NEPA.

DISCUSSION: State Contentions at 167-68; PFS Contentions Response at 330-35; Staff Contentions Response at 65-68; State Contentions Reply at 90-95; Tr. at 122-33.

RULING: Inadmissible in that this contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.23, 51.61; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i., ii., v above.

²⁴ Further litigation on the merits of this contention relative to paragraph three regarding the ITP may be subject to any merits disposition of Utah B.

UTAH Z — No Action Alternative

CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the “no action” alternative.

DISCUSSION: State Contentions at 169-70; PFS Supplemental Contentions Response at 2-13; Staff Contentions Response at 68; State Contentions Reply at 95-96; Tr. at 658-64.

RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry.

UTAH AA — Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

DISCUSSION: State Contentions at 172-74; PFS Supplemental Contentions Response at 13-20; Staff Contentions Response at 69; State Contentions Reply at 96-98, Tr. at 675-84.

RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of the contention is limited to the issue of the adequacy of the PFS alternative site analysis.

As is explained below, this contention is consolidated with a portion of Castle Rock 13. *See infra* p. 219. The revised contention is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH BB — Site Selection and Discriminatory Effects

CONTENTION: The Applicant’s site selection process does not satisfy the demands of the President’s Executive Order No. 12,898 or NEPA and the NRC staff must be directed to conduct a thorough and in-depth investigation of the Applicant’s site selection process.

DISCUSSION: State Contentions at 175-77; PFS Supplemental Contentions Response at 20-32; Staff Contentions Response at 69; State Contentions Reply at 98-99; Tr. at 693-707, 716-29.

RULING: Inadmissible, in that the contention and its supporting bases seek to litigate the issue of “discrimination in the site selection process,” State Contentions at 177, which is not a cognizable subject for agency licensing proceedings relative to compliance with NEPA. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998).

UTAH CC — One-Sided Cost-Benefit Analysis

CONTENTION: Contrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification in that:

1. Applicant's Environmental Report makes no attempt to objectively discuss the costs of the project.
2. Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P, against the alleged benefits of the facility.
3. Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.
4. Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design.
5. Applicant makes no attempt to quantify the costs associated with the impacts of the facility, many of which are amenable to quantification in that:
 - a. costs related to accidents and contamination may be quantified in terms of health effects and dollar costs;
 - b. decommissioning impacts can be quantified;
 - c. visual impacts can be quantified in terms of lost tourist dollars; and
 - d. emergency response costs can be quantified based on the cost of those services.

DISCUSSION: State Contentions at 178-79; PFS Supplemental Contentions Response at 32-43; Staff Contentions Response at 70-71; State Contentions Reply at 99-101; Tr. at 739-45.

RULING: Inadmissible as the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

UTAH DD — Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and NEPA in that:

1. The License Application does not discuss the long term impacts of construction activities on the overall ecological system in Skull Valley.
2. The License Application fails to address adverse impacts of contaminated ground or surface waters on various species, and fails to provide for sampling of the retention pond for contaminants.

3. The License Application fails to include both protective and mitigation plans in conjunction with appropriate authorities for Horseshoe Springs, Salt Mountain Springs, Timpie Springs Waterfowl Management Area, and raptor nests.
4. The License Application has not estimated potential impacts to ecosystems and “important species” in that:
 - a. The License Application does not discuss the importance of the variety of species found in the Skull Valley ecological system, including aquatic organisms, and does not discuss the interdependence of various species on one another or impact on the ecological system as a whole.
 - b. The License Application fails to assess the individual and collective impacts on various species, including wetland species, aquatic organisms, plants, fish, and birds from additional traffic, fugitive dust, radiation and other pollutants.
 - c. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.
 - d. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.
 - e. The License Application fails to determine whether “culturally or medically (scientific) significant” plant species may be impacted by the PFSF.
 - f. The License Application fails to identify aquatic plant species which may be adversely impacted by the proposed action.
 - g. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two “high interest” plants, Pohl’s milkvetch and small spring parsley.
 - h. License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.
5. License Application fails to assess the potential impacts on Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs.
6. License Application fails to include the results of detailed site-specific surveys and analyses to determine species in the vicinity of the PFSF. 10 C.F.R. §§ 72.100(b) and 72.108 require that detailed surveys of species plus mitigation or prevention plans be prepared now.

DISCUSSION: State Contentions at 180-87; PFS Supplemental Contentions Response at 43-70; Staff Contentions Response at 71-75; State Contentions Reply at 101-04; Tr. at 766-83.

RULING: Admissible as to subparagraphs c, d, g, and h of paragraph four, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraphs one through three, subparagraphs

a, b, e, and f of paragraph four, and paragraphs five and six in that these paragraphs and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

A revised contention reflecting this ruling, as well as the consolidation of this contention with a portion of Castle Rock 16 that raises similar issues, *see infra* p. 221, is set forth at pp. 256-57 of Appendix A to this Memorandum and Order.

UTAH EE — Failure to Demonstrate Cask-Pad Stability During Seismic Event

CONTENTION: The Applicant has failed to demonstrate that storage casks and pads will remain stable during a seismic event. Accordingly, the Applicant fails to satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a) in that:

1. The Holtec analysis is inadequate to support the safety of Applicant's proposed design during a seismic event at the PFS facility.
 - a. The Applicant has not provided enough information about inputs to the model to support the credibility of the analysis.
 - b. The Holtec analysis is not based on an adequate inquiry into site conditions and how they affect the stability of the casks.
2. It is impossible to verify from the Holtec Seismic Report if the three independent components of seismic time histories have been properly and conservatively evaluated such that three statistically independent time histories were used in the Holtec report.
3. The Applicant's cask-pad model oversimplifies the behavior of the dynamic loads at the PFS facility, by failing to sufficiently consider the potential for bending, structural deterioration of the concrete surface, translation, and rotation of the pad.
 - a. In the Holtec report, the Applicant has not considered the effects of simultaneous rotation and translation of the pad, in conjunction with the movement of the casks in the Holtec report.
 - b. In the Holtec report, the Applicant, by assuming that the casks move uniformly in the same direction oversimplifies or ignores the phenomena that the casks may move in different directions and at different speed from each other as a result of the differences in movement of the pad and casks.
 - c. In the Holtec report, the Applicant did not consider that the coefficient of friction (i.e., the resistance of the surface of the pad to movement of the casks) may vary over the surface of the pad. There is no indication that the shift from the static friction case to the kinetic case was considered.
 - d. The assumption that the 30' × 64' pad will remain rigid is unreasonable and oversimplified. Thus, in the Holtec report, the Applicant failed to provide sufficient information about the soil structure and characteristics at the PFS facility site to rule out the potential for differential upheaval and subsidence

- of the soil beneath the concrete which may cause the pad to bend, crack, and possibly spall.
- e. In the Holtec report, the Applicant failed to consider the effects of the embedment of the pad in the compacted granular soil on the site or its destabilizing effect on the casks.
4. In the Holtec report, the Applicant fails to adequately consider site-specific soil characteristics.
 - a. A reliable seismic analysis should be based on more comprehensive knowledge of soil types; soil features; such as stratigraphy; and measurements of each soil type's ability to respond to dynamic loading, such as dynamic passive resistance, damping, Young's modulus, and Poisson's ratio.
 - b. In the Holtec report, the Applicant fails to account for the differences in strata beneath the pad, or the impacts on the cask/pad system of different acceleration rates and directional movements for each of the different strata.
 - c. In the Holtec report, the Applicant fails to account for the potential for cemented and/or collapsible soil on the site, which may also have an effect on the rate and direction of movement of the cask/pad system.
 - d. State Contention L (Geotechnical) whose basis 4, Soil Stability and Foundation Loading, regarding the failure to consider collapsible soils, is adopted and incorporated herein by reference.
 5. In the Holtec analysis, the Applicant does not consider the impact of dynamic loads on the structural integrity of the pad which may cause damage to the concrete surface, including cracking, spalling, and crushing of the concrete which may become a contributing factor to instability of the casks.
 6. In the Holtec report, it does not appear that the Applicant performed uncertainty or sensitivity analyses on the various soil-pad interaction aspects of its seismic analysis.
 7. In the Holtec report, the Applicant's earthquake analysis for the Canister Transfer Building is inadequate. The report does not contain any analysis of the seismic response of the cask, transfer cask, and overhead bridge crane. The Applicant must provide an analysis of earthquake impacts on this facility, under postulated accident conditions.
 8. It is impossible to evaluate the adequacy of the computer codes used in the Holtec analysis unless the codes are adequately identified.

DISCUSSION regarding Late-Filing Standards: State Contentions EE and FF at 1-3; PFS State Contention EE and FF Response at 1-8; Staff State Contentions EE and FF Response at 3-6; State Contentions EE and GG Reply at 2-9, 11-13; PFS State Contentions EE and GG Surreply at 2-20; Staff State Contentions EE and GG Surreply at 3-6; Tr. at 419-44.

RULING: We dismiss this contention, which concerns the site-specific seismic stability of one of the two PFS-designated cask systems that is to be used

at the PFS facility, for failure to meet the late-filing requirements of 10 C.F.R. § 2.714(a)(1). Concerning the first factor — good cause for failing to file on time — the State’s assertion that good cause exists for late filing because it needed to await receipt of the proprietary information is misplaced. The State acknowledges it received a nonproprietary version of Holtec International’s cask-pad seismic stability report for its HI-STORM 100 system on September 22, 1997. It nonetheless maintains two proprietary portions of the report not available to it until mid-November were integral to its contention preparation so as to justify filing Utah EE in late December, nearly a month late. *See* State Contentions EE and GG Reply at 8-9 (citing Holtec Int’l, Multi-Cask Seismic Response at the PFS ISFSI for PFS, Holtec Report No. HI-971631 (Proprietary Version) (May, 19, 1997) Fig. 4-1 (Hi-Storm 100 Dynamic Model); *id.* Attach. A (Theoretical Equations of Motion for a Single Cask)). After reviewing both documents and the pertinent nonproprietary materials timely available to the State, we conclude neither proprietary document was necessary to the development of Utah EE, in whole or in part, such that the delay was justified. *See Catawba*, CLI-83-19, 17 NRC at 1043, 1045 (if contention’s factual predicate otherwise available, unavailability of document does not constitute good cause for late filing); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Lacking good cause for the one-month delay in filing Utah EE, the State must make a compelling showing on the other four factors. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). It fails to do so, however. Factors two and four support the late-filing in that there appear to be no other means to protect the State’s interests in this contention or other parties to represent those interests. This duo are, however, to be accorded less weight than factors three and five. *See id.* at 245.

And as to these two elements, factor three — sound record development — and factor five — broadening and delaying the proceeding — provide, at best, only lukewarm support for late-admission. In connection with factor three, notwithstanding the Commission’s directive that the proponent of a late-filed contention should, with as much particularity as possible, “‘identify its prospective witnesses, and summarize their proposed testimony,’” *id.* at 246 (quoting *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)), the State has done little more than point to the two affiants supporting the contention, without providing any real clue about what they would say to support the contention beyond

the minimal information they provide for admitting the contention.²⁵ Further, regarding factor five, while submitted before contentions have been admitted and having some alleged relationship to admitted issue Utah L so as not to portend a protracted delay in the proceeding, as the Staff points out, this contention involves the use of proprietary information so that litigation on its merits carries the likelihood of some delay simply because of the additional procedures that must be utilized to ensure nondisclosure.²⁶ Accordingly, while the other four factors all support late-filed admission, whether taken individually or in concert, we do not find them sufficiently compelling to warrant the admission of Utah EE given the lack of good cause for its late filing.

UTAH FF — Inadequate Analysis of Radiation Shielding

CONTENTION: PFS has not demonstrated satisfaction of NRC dose limits at 10 C.F.R. § 72.104, because its analysis of radiation shielding for the proposed PFS facility is inadequately documented or explained.

DISCUSSION: State Contentions EE and FF at 13-17; PFS State Contentions EE and FF Response at 45-66; Staff State Contentions EE and FF Response at 7-11; State Contentions EE and GG Reply at 1.

RULING: This contention was withdrawn by the State. *See* State Contentions EE and GG Reply at 1.

²⁵ In this regard, while our decision to reject Utah EE as late-filed means we need not address its admissibility, we note that based on our review of the parties' submissions, *see* State Contentions EE and FF at 4-12; PFS State Contentions EE and FF Response at 8-45; Staff State Contentions EE and FF Response at 7; State Contentions EE and GG Reply at 13-27, even if timely filed, the bases for the contention, as supported by the witness affidavits, would have been sufficient to gain admission only for portions of the contention, in particular, subparagraph d of paragraph three and paragraph seven. The other portions (paragraphs one and two, subparagraphs a through c and e of paragraph three, paragraphs four through six, and paragraph eight) would have been inadmissible as failing to establish with specificity any genuine dispute; impermissibly challenging the Commission's regulations and/or generic rulemaking-associated determinations; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

²⁶ While not requiring the same level of protection that must be afforded the safeguards information involved in the contentions that are before the PSP Licensing Board, dealing with proprietary information nonetheless requires the use of separate, closed hearing sessions, and potentially separate, public and nonpublic versions of any Board issuances.

In this regard, responding to our inquiry, the parties have advised us that the terms of Utah EE and Utah GG do not include proprietary information. *See* Letter from Ernest L. Blake, Counsel for PFS, to Licensing Board 1 (Mar. 18, 1998); NRC Staff's Response to Memorandum and Order (Request for Information Regarding Contentions Involving Proprietary and Safeguards Material) Dated March 9, 1998 (Mar. 18, 1998) at 1 n.1; *see also* [State] Response to the Board's Request for Information Regarding Contentions Involving Proprietary and Safeguards Information (Mar. 18, 1998) at 1-2.

UTAH GG — Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a) in that:

1. The Sierra Nuclear site-specific analysis gives inadequate consideration to site-specific soil characteristics.
2. Insufficient information is provided about the input to the model of the PFS site soil characteristics to support the credibility of the analysis.
3. Sierra Nuclear's analysis demonstrates there is a potential stability problem with the casks during a design basis seismic event. Applicant's conclusion that the cask will not topple is inconsistent with Sierra Nuclear's recommendation that the possibility of tipover should be analyzed using the ANSYS finite element code.
4. The conclusion reached in the Sierra Nuclear Report demonstrates that the Holtec analysis is not based on an adequate inquiry into the vertical acceleration of the casks, tipover analysis, and soil site conditions and how these factors affect the stability of the casks.
5. Sierra Nuclear's consultant, Advent Engineering Services, Inc. did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

a. Late-Filing Standards

DISCUSSION: State Contention GG at 1-3; PFS State Contention GG Response at 2-4; Staff State Contention GG Response at 4; State Contentions EE and GG Reply at 2-7, 9-13; PFS State Contentions EE and GG Surreply at 21-25; Staff State Contentions EE and GG Surreply at 1-2; Tr. at 419-44.

RULING: Relative to Utah GG, the State has identified two proprietary reports, *see* State Contention GG at 1 (citing Sierra Nuclear Corp., Soil-Structure Interaction Analysis for Evaluation of TranStor™ Storage Cask Seismic Stability, SNC No. PFS01-10.02.04 (Proprietary) (rev. 0 July 1997); Sierra Nuclear Corp., TranStor™ Storage Cask Seismic Stability Analysis for PFS Site, SNC No. PFS01-10.02.05 (Proprietary) (rev. 0 July 1997)), it timely sought and did not receive until some 3 weeks after the November 24, 1997 contention-filing deadline. We conclude those documents are relevant to the development of paragraphs three, four, and five so as to provide good cause for the delay in filing these portions of the contention less than a month later. In contrast, after reviewing the two proprietary documents and the germane nonproprietary documents timely available to the State, we conclude neither proprietary report was necessary to the development of paragraphs one and two, in whole or in part,

such that the 7-week delay in submitting these concerns was justified. *See supra* p. 208 (citing cases).

As to the other four factors, our analysis parallels that we outlined in connection with Utah EE in which we concluded these elements support late-filing, albeit only moderately so. *See supra* pp. 208-09. In the case of paragraphs three, four, and five, in light of the good cause for late filing, the overall balance clearly favors further consideration, late-filing notwithstanding. For paragraphs one and two, however, these factors are not sufficient to provide the compelling showing needed to offset the lack of good cause for the filing delay. *See Braidwood*, CLI-86-8, 23 NRC at 244. We thus conclude that balancing the five late-filing standards only sanctions further consideration of the admissibility of paragraphs three, four, and five, which we do below.²⁷

b. Admissibility

DISCUSSION: State Contention GG at 4-8; PFS State Contention GG Response at 5-13; Staff State Contention GG Response at 6-9; State Contentions EE and GG Reply at 27-32.

RULING: Regarding paragraphs three, four, and five of this late-filed contention, the admissibility of which we have concluded appropriately can be considered, we find paragraphs three and four inadmissible because these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above. Paragraph five is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry. The contention as revised to reflect this ruling is set forth at p. 257 of Appendix A to this Memorandum and Order.

3. Castle Rock Contentions

CASTLE ROCK 1 — Absence of NRC Authority

CONTENTION: The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed PFSF.

²⁷ Although we need not reach the issue, we note that paragraphs one and two would have been inadmissible as failing to establish with specificity any genuine dispute; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

DISCUSSION: Castle Rock Contentions at 2-10; PFS Contentions Response at 336-40; Staff Contentions Response at 99; Castle Rock Contentions Reply at 7-17; Tr. at 65-86.

RULING: For the reasons given in our discussion regarding Utah A, *see supra* p. 183, we find this contention inadmissible in that the contention and its supporting basis impermissibly challenge the agency's regulatory provisions or rulemaking-associated generic determinations. *See also* section II.B.1.a.ii above.

CASTLE ROCK 2 — Noncompliance with Regulations

CONTENTION: PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72 in that:

- a. In order to harmonize the NRC regulations with the NWSA and Atomic Energy Act, the regulation defining ISFSI must be interpreted to exclude the proposed PFSF.
- b. NRC regulations must be construed to require PFS to demonstrate maximization of the use of existing storage capability at reactor sites.
- c. NRC regulations must be construed to require PFS to demonstrate that DOE has exhausted all means for providing off-site storage capacity.
- d. NRC regulations must be construed to require a showing that DOE has attempted to establish a cooperative program for on-site storage under 42 U.S.C. § 10198.

DISCUSSION: Castle Rock Contentions at 10-15; PFS Contentions Response at 340-43; Staff Contentions Response at 99-101; Castle Rock Contentions Reply at 17-19; Tr. at 65-86.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge the agency's regulatory structure, provisions, or rulemaking-associated generic determinations. *See* section II.B.1.a.ii above.

CASTLE ROCK 3 — Conflict with DOE Duties and Prerogatives

CONTENTION: The Application must be denied because the proposed PFSF interferes with DOE duties and prerogatives under the NWSA.

DISCUSSION: Castle Rock Contentions at 15-18; PFS Contentions Response at 343-46; Staff Contentions Response at 102-04; Castle Rock Contentions Reply at 19-20; Tr. at 65-85.

RULING: Inadmissible in that the contention and its supporting basis fails to establish with specificity any genuine dispute; impermissibly challenge the agency's regulatory structure, provisions, or rulemaking-associated generic de-

terminations; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, v above.

CASTLE ROCK 4 — Attempts to Evade the Requirements of the NWPA

CONTENTION: The status of the Application suggests that DOE has either tacitly or directly agreed with PFS and its member utilities to allow the Application to proceed in an attempt to evade the statutory mandates of the NWPA.

DISCUSSION: Castle Rock Contentions at 18-22; PFS Contentions Response at 346-49; Staff Contentions Response at 104-05; Castle Rock Contentions Reply at 20-22; Tr. at 77-86.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, v above.

CASTLE ROCK 5 — Application for Permanent Repository

CONTENTION: The proposed PFSF is properly characterized as a *de facto* permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository in that:

- a. no repository or other storage facilities capable of absorbing the 40,000 MTU of spent fuel to be stored at the PFSF exist, or likely will exist at the time PFS proposed to decommission the PFSF; the PFSF will function as a *de facto* permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.
- b. even if a permanent repository is operational at the time the PFSF is proposed to be decommissioned, such repository will not be able to absorb 40,000 MTU at once or at a rate that will permit decommissioning of the PFSF; the PFSF will function as a *de facto* permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.

DISCUSSION: Castle Rock Contentions at 22-26; PFS Contentions Response at 349-53; Staff Contentions Response at 105-07; Castle Rock Contentions Reply at 22-29; Tr. at 100-19.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's regulatory provisions or rulemaking-associated generic determinations. *See* section II.B.1.a.ii above.

CASTLE ROCK 6 — Emergency Planning and Safety Analysis Deficiencies

CONTENTION: The Application does not provide for reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF.

DISCUSSION: Castle Rock Contentions at 26-30; PFS Contentions Response at 353-66; Staff Contentions Response at 107-08; Castle Rock Contentions Reply at 29-33; Tr. at 317-25, 686-87.

RULING: Relative to the Castle Rock's assertions regarding the impact on the PFS facility of fires in Skull Valley or accidents involving materials or activities at or emanating from the Dugway Proving Ground, the Department of Defense Chemical Weapons Incinerator, the Tooele Army Depot, Wendover Air Force Bombing Range, Hill Air Force Bombing Range, APTUS Hazardous Waste Incinerator, Laidlaw Hazardous Waste Incinerator and Landfill, and Envirocare of Utah Low Level Waste Disposal Facility, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. The contention's basis regarding the effect of the 2002 Olympic Winter Games was withdrawn. *See* Tr. at 686-87.

Because of the similarity of this contention and its supporting bases to Utah K, which Castle Rock Land/Skull Valley have adopted by reference, and a portion of Confederated Tribes B dealing with wildfires, *see supra* p. 191, *infra* p. 235, this contention and its bases are consolidated with Utah K and Confederated Tribes B, as is specified at p. 253 of Appendix A to this Memorandum and Order.

CASTLE ROCK 7 — Inadequate Financial Qualifications

CONTENTION: The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. § 72.22(e) in that:

- a. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license;
- b. the Application does not adequately account for possible shortfalls in revenue if customers become insolvent, default on their obligations, or otherwise do not continue making payments to the proposed PFSF;
- c. the Application does not provide assurance that PFS will have sufficient resources to cover nonroutine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel;

- d. the Application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the Service Agreements to be entered with customers, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS;
- e. the Application fails to describe the legal obligations of the Skull Valley Band of Goshute Indians and provide assurance that third parties will have adequate legal remedies if injured as a result of its acts or omissions; and
- f. the Application fails to itemize cost estimates and otherwise provide enough detail to permit evaluation of the tenability of such estimates.

DISCUSSION: Castle Rock Contentions at 30-40; PFS Contentions Response at 366-77; Staff Contentions Response at 108; Castle Rock Contentions Reply at 33-40; Tr. at 232-38.

RULING: Admissible with regard to paragraphs a through d and f in that these portions of the contention and their supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraph e in that this portion of the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 72.22; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, v above.

As we noted above, *see supra* pp. 187, 197, because of the similarity of the admitted portions of this contention to Utah E and Utah S, both of which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate some aspects of this contention with those issue statements. In the case of Utah E, which concerns financial assurance generally, at pp. 251-52 of Appendix A to this Memorandum and Order the Board has set forth a revised contention that incorporates the issues raised by Castle Rock in paragraphs a through d and f. With regard to Utah S, which concerns decommissioning, the Board finds that the specific concerns expressed in paragraphs c and f of Castle Rock 7 relating to decommissioning costs are covered in bases four and five of Utah S, and thus should be litigated in conjunction with that contention as it is set forth at p. 255 of Appendix A to this Memorandum and Order.

CASTLE ROCK 8 — Groundwater Quality Degradation

CONTENTION: The Application, including the ER, is defective and therefore raises the issue of risk to public health and safety because the proposed site of the PFSF will not, or cannot, be adequately protected against ground water contamination due to facility design, its location, contaminants it will generate, and the nature of the soils and bedrock of the area.

DISCUSSION: Castle Rock Contentions at 40-41; PFS Contentions Response at 377-81; Staff Contentions Response at 109; Castle Rock Contentions Reply at 40-41; Tr. at 360-66.

RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

As we noted above, *see supra* p. 193, because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate this contention and its supporting basis into that issue statement. The Board sets forth the consolidated contention at p. 254 of Appendix A to this Memorandum and Order.

CASTLE ROCK 9 — Regional and Cumulative Environmental Impacts

CONTENTION: The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. §§ 72.98(b) & (c) and 72.100, and NEPA, in that:

- a. the SAR and ER fail to address the cumulative regional health and safety impact of the ISFSI and other dangerous facilities in Tooele County, including without limitation issues regarding the cumulative impact to the regional environment and population;
- b. the SAR and ER fail to address the cumulative quantitative risk to the public of numerous dangerous facilities in one area and the interrelated transportation, sabotage, and accident risks arising from concentration of such facilities.

DISCUSSION: Castle Rock Contentions at 41-44; PFS Contentions Response at 381-86; Staff Contentions Response at 109-11; Castle Rock Contentions Reply at 41-43; Tr. at 621-34.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 72.122; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 10 — Retention Pond

CONTENTION: The Application, including the ER, is defective and therefore raises public health and safety risks because it does not adequately address the potential of overflow and groundwater contamination from the retention pond and the environmental hazards created by such overflow, in that

- a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.

- b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
- c. The ER should address the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.

DISCUSSION: Castle Rock Contentions at 44-45; PFS Contentions Response at 386-90; Staff Contentions Response at 111; Castle Rock Contentions Reply at 43-44; Tr. at 360-66.

RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, with one exception the Board consolidates this contention and its supporting basis into that issue statement. *See supra* p. 193. The exception is paragraph c, which is consolidated into Utah T, also incorporated by reference by Castle Rock Land/Skull Valley. *See supra* p. 198. The Board has set forth the consolidated contentions at pp. 254 and 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 11 — Radiation and Environmental Monitoring

CONTENTION: The Application poses undue risk to the public health and safety and fails to comply with 10 C.F.R. § 72.24, § 72.122(b)(4), and § 72.126 because it fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning, and notification, including systematic baseline measurements of soils, forage, and water either near the PFSF site, or at Petitioners' adjoining lands in that:

- a. PFS has taken no background radiological samples of nearby vegetation and groundwater.
- b. PFS has provided no radioactive effluent monitoring system to detect radioactive contamination in surface runoff water that collects in a retention pond on the PFSF site.

DISCUSSION: Castle Rock Contentions at 45-47; PFS Contentions Response at 390-96; Staff Contentions Response at 112-13; Castle Rock Contentions Reply at 44; Tr. at 381-85, 388.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, v above.

CASTLE ROCK 12 — Permits, Licenses, and Approvals

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to address adequately the status of compliance with all Federal, State, regional and local permits, licenses and approvals required for the proposed PFSF facility (*see, e.g.*, 10 C.F.R. §§ 51.45(d) and 51.71(d)) in that:

- a. The ER does not contain a list of all permits, etc. which must be obtained as required by 10 C.F.R. § 51.45(d).
- b. The ER fails to include a discussion of the status of compliance with applicable environmental quality standards and requirements as required by 10 C.F.R. § 51.45(d) in that:
 - i. the discussion of the Army Corps of Engineers permitting requirements for construction along the new corridor is inadequate;
 - ii. the discussion of requirements at the Site is inadequate; and
 - iii. the conclusory sentence that no air quality permitting requirements apply is inadequate.
- c. Section 9.2 of the ER discussing Utah permitting requirements is inadequate.
- d. Sections 4.1.3 and 4.2.3 of the ER concerning Utah air quality permits are inadequate.
- e. ER discussion of widening Skull Valley Road is inadequate.

DISCUSSION: Castle Rock Contentions at 47-50; PFS Contentions Response at 397-407; Staff Contentions Response at 114; Castle Rock Contentions Reply at 44-45; Tr. at 494-503.

RULING: Admissible in that the contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.

As we noted above, *see supra* p. 198, because of the similarity of this contention to Utah T, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at pp. 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 13 — Inadequate Consideration of Alternatives

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to alternatives, including alternative sites, alternative technologies, and the no-action alternative, *see* 10 C.F.R. § 51.45(c), in that:

- a. There is no discussion in the ER on the required topics of environmental effects and impacts, economic, technical and other costs and benefits of the alternatives.

- b. The evaluation and comparison of the no build or no action alternative is inadequate.
- c. The analyses of alternatives ignores every potential negative factor with respect to the PFSF. Such an analysis must include:
 - i. the environmental and safety benefits associated with maintaining and expanding a decentralized, onsite storage system;
 - ii. the environmental and safety impacts and risks associated with the proposed privately operated, centralized system;
 - iii. the state-by-state, plant-by-plant facts which create the need PFS asserts is present for moving the spent fuel to another location;
 - iv. the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location; and
 - v. the environmental benefits of a combination of expanded onsite storage and regional ISFSIs.

DISCUSSION: Castle Rock Contentions at 50-52; PFS Contentions Response at 407-19; Staff Contentions Response at 114-15; Castle Rock Contentions Reply at 45-47; Tr. at 684-89, 692-93.

RULING: Admissible as to paragraph a, in that this portion of the contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of this portion of the contention is limited to the issue of the adequacy of the PFS alternative site analysis. Inadmissible as to paragraphs b and c in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above. We also note that the lack of any ER discussion of a HLW storage legislative solution and the 2002 Winter Olympic games as bases were withdrawn. *See* Tr. at 684-85, 686-87.

As we noted above, *see supra* p. 203, because of the similarity of the admitted portion of this contention to Utah AA, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting basis into that issue statement. The Board has set forth the consolidated contention at p. 256 of Appendix A to this Memorandum and Order.

CASTLE ROCK 14 — Inadequate Consideration of Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to the adverse impacts of the proposed PFSF, including the risk of transportation accidents, the risks of contamination of human and livestock food sources, the risks of contamination of water sources (including ground water

contamination arising from leaching of contaminated soils), the risks of particulate emissions from construction and cement activities and similar risks (10 C.F.R. § 72.100) in that:

- a. Section 5.2 discussing transportation accidents contains no site specific information on the “effects on populations in the region” as required by the rule.
- b. Chapter 4 of the ER contains no meaningful evaluation of impact of unlined retention pond and other PFSF operations on surrounding subsoils and ground water.
- c. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of contamination of human and livestock food sources.
- d. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of particulate emissions from construction and cement activities.

DISCUSSION: Castle Rock Contentions at 52-53; PFS Contentions Response at 420-25; Staff Contentions Response at 115-16; Castle Rock Contentions Reply at 47; Tr. at 621-34.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 15 — Cost-Benefit Analysis

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not contain a reasonable and legitimate comparison of costs and benefits, 10 C.F.R. § 51.45(c), in that:

- a. ER Chapter 7 cost-benefit analysis is overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley.
- b. Cost-benefit analysis fails to account for the “loss of property values, economic opportunities and other business and economic losses” imposed by mere existence of PFSF.
- c. Chapter 7 of the ER fails to discuss applicant’s financial arrangements with the Skull Valley Band which is essential to the cost-benefit analysis.
- d. The Castle Rock Petitioners intend to offer evidence on true costs of the proposed facility.

DISCUSSION: Castle Rock Contentions at 53; PFS Contentions Response at 425-30; Staff Contentions Response at 116-17; Castle Rock Contentions Reply at 47; Tr. at 745-50.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, v above.

CASTLE ROCK 16 — Impacts on Flora, Fauna, and Existing Land Uses

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately address the impact of the proposed PFSF upon the agriculture, recreation, wildlife, endangered or threatened species, and land quality of the area, *see* 10 C.F.R. § 72.100(b), in that:

- a. the ER fails to evaluate both usual and unusual site characteristics throughout all of Northwestern Utah;
- b. the ER fails to provide sufficient facts to enable one to understand the true impacts of the PFS on the environment, including without limitation information from a survey of endangered or threatened species in the area (including small spring parsley, Pohl's milkvetch, peregrine falcon, and the Skull Valley Pocket gopher);
- c. the precise transportation corridor has not been identified, and thus the Application does not contain specific information about affected species in the transportation corridor.

DISCUSSION: Castle Rock Contentions at 54-55; PFS Contentions Response at 430-37; Staff Contentions Response at 117-18; Castle Rock Contentions Reply at 47-48; Tr. at 783-90.

RULING: Admissible as to paragraph b in that this portion of the contention and its supporting basis is sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that it is limited to the small spring parsley, Pohl's milkvetch, and pocket gopher. Inadmissible as to paragraphs a and c in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, v above.

As we noted above, *see supra* p. 206, because of the similarity of the admitted portions of this contention to portions of Utah DD, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contention at pp. 256-57 of Appendix A to this Memorandum and Order.

CASTLE ROCK 17 — Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities,

all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, *see, e.g.*, 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

- a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;
- b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;
- c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;
- d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and
- e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

DISCUSSION: Castle Rock Contentions at 56-58; PFS Contentions Response at 437-48; Staff Contentions Response at 118-19; Castle Rock Contentions Reply at 48-50; Tr. at 634-44.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

CASTLE ROCK 18 — Impacts on Public Health

CONTENTION: The Application violates NRC regulations and NEPA because the Environmental Report (ER) does not adequately consider the impact of the proposed PFSF upon the production of the agricultural products for human consumption by Petitioners, their tenants and others in the area (*see* 10 C.F.R. § 72.98(b)) in that:

- a. The ER fails to analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants or animals destined for human consumption.
- b. The ER provides no detailed description at all of the coordinated ranching, farming, and livestock production activities currently carried on by Petitioners.

DISCUSSION: Castle Rock Contentions at 58; PFS Contentions Response at 448-55; Staff Contentions Response at 119; Castle Rock Contentions Reply at 50; Tr. at 634-44.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

CASTLE ROCK 19 — Septic Tank

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of a septic tank system on the ground water and ecology of the area and the related potential of this system to injure Petitioners (*see* 10 C.F.R. §§ 72.98(b) and 72.100(b)), in that:

- a. The ER contains very little information on how sewage wastes will be managed at the proposed facility during both the construction and operation of the facilities.
- b. The ER fails to discuss in detail how the septic system will be designed so as to eliminate the risk of contamination to groundwater and Petitioner's property.

DISCUSSION: Castle Rock Contentions at 58-59; PFS Contentions Response at 455-57; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 360-66.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

CASTLE ROCK 20 — Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail spur access alternative over the other and the implications of such selection in light of such considerations. *See* 10 C.F.R. §§ 51.45(c) and 72.100(b), in that:

- a. The ER is deficient because it fails to properly analyze the transportation alternatives.
- b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.
- c. The ER is defective because PFS is considering a third option not discussed in the ER.
- d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

DISCUSSION: Castle Rock Contentions at 59-60; PFS Contentions Response at 457-60; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

CASTLE ROCK 21 — Exact Location of Rail Spur

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (*see* 10 C.F.R. § 72.90(a)), in that:

- a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.
- b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

DISCUSSION: Castle Rock Contentions at 60-61; PFS Contentions Response at 460-62; Staff Contentions Response at 120-21; Castle Rock Contentions Reply at 51-52; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

CASTLE ROCK 22 — Road Expansion Authorizations

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe adequately the nature and ownership of right-of-way that would permit PFS's contemplated improvements of the Skull Valley Road and what permits and approval from, or agreements with, the owner or owners thereof are needed for such improvements. *See* 10 C.F.R. § 72.90(a).

DISCUSSION: Castle Rock Contentions at 61-62; PFS Contentions Response at 462-64; Staff Contentions Response at 121; Castle Rock Contentions Reply at 52; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.

As we noted above, *see supra* p. 198, because of the similarity of this contention to a portion of Utah T, which Castle Rock has incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at pp. 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 23 — Existing Land Uses

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe with particularity, using appropriate maps, land use patterns and ownership as to lands in the vicinity of the proposed PFSF and along the 24-mile access route, including

without limitation, homes, outbuildings, corrals and fences, roads and trails, pastures, crop producing areas, water wells, tanks and troughs, ponds, ditches and canals. *See* 10 C.F.R. §§ 72.90(a) & (c), 72.98(b), in that:

- a. PFS fails to discuss in detail the various impacted property rights and owners around the site and along the 24-mile transportation corridor.
- b. PFS fails to discuss the legal basis for the right of way along the 24-mile transportation corridor.
- c. PFS fails to identify existing structures that would be impacted by the ISFSI and the various transportation corridors suggested by PFS.
- d. PFS fails to discuss impacts to existing grazing patterns and rights that would be impacted by the ISFSI and the various transportation corridors proposed by PFS.
- e. PFS fails to discuss all impacts to those living near to the ISFSI and the proposed transportation corridors.
- f. The PFS application has “other deficiencies.”

DISCUSSION: Castle Rock Contentions at 62-63; PFS Contentions Response at 464-73; Staff Contentions Response at 122-23; Castle Rock Contentions Reply at 52-53; Tr. at 523-25.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 24 — Adoption by Reference

CONTENTION: Petitioners Castle Rock and Skull Valley Co. by this reference adopt in its entirety each and every contention filed by the State of Utah and incorporate each herein by this reference.

DISCUSSION: Castle Rock Contentions at 63; PFS Contentions Response at 473-74; Staff Contentions Response at 123; Castle Rock Contentions Reply at 53; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.c above, the Board will permit Castle Rock to incorporate the State’s contentions, some of which we have found inadmissible, subject to the restrictions described in section III.A below.

4. OGD Contentions

OGD A — Lack of Sufficient Provisions for Prevention of and Recovery from Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for prevention of and recovery from accidents during storage resulting from such causes as sabotage, fire, cask drop and bend, lid drop damage and/or improper welds.

1. The license application does not address the full range of accidents which could occur.
2. The license application does not adequately address the accident impacts of human error or intentional human actions.
3. The license application does not include a “hot cell” and the associated remote fuel handling equipment to safely unload, replace or reload a damaged fuel canister.
4. The ever present risk of accidents will adversely impact members of OGD.

DISCUSSION: OGD Contentions at 1-5; PFS Contentions Response at 474-86; Staff Contentions Response at 76-78; Tr. at 219-22.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.²⁸ See section II.B.1.a.i, ii, v, vi above. Moreover, to the extent this contention seeks to introduce the issue of “psychological stress,” it does not have a cognizable basis. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-79 (1983).

OGD B — Emergency Plan Fails to Address the Safety of Those Living Outside of the Facility

CONTENTION: The license application, specifically the emergency plan submitted with the license application fails to address the safety provisions made for those individuals living outside of the facility within a five mile radius of the facility. The emergency plan addresses only those measures that pertain to employees and have not addressed the provisions that would apply to those people living around the facility. The emergency plan does not address a warning system such as would be implemented to put the residents on notice of an accident.

1. Adequate backup means for offsite communications for notification of emergencies or requests for assistance are not included in the license application.

²⁸ Although this contention seeks to litigate issues involving the Rowley Junction ITP, we find it inadmissible because those issues, whether raised in connection with the PFS facility or the ITP, lack a sufficient basis.

2. Means for compliance with the Emergency Planning and Community Right-To-Know Act of 1986, Title III, Pub. L. 99-499 is lacking in the license application.
3. The license application fails to meet all the requirements of 10 C.F.R. § 72.32(a)(8).

DISCUSSION: OGD Contentions at 6; PFS Contentions Response at 486-93; Staff Contentions Response at 78-79; Tr. at 803-09.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

OGD C — License Application Lacks Sufficient Provisions for Protection Against Transportation Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident.

1. The license application fails to provide sufficient protection against transportation accidents because of the design of the shipping cask.
2. The license application lacks sufficient measures for protection of shipping casks during harsh summers and sub-zero temperatures of winter.
3. The license application fails to consider the historical record and consequences of spent nuclear fuel transportation accidents and incidents as well as the number of incidents that might occur given that record.
4. The license application fails to provide sufficient information about the radiological characteristics of the spent fuel to be shipped to fully evaluate the impacts and risks of spent nuclear fuel transportation to PFS.
5. The license application fails to provide sufficient detail about the anticipated shipment characteristics necessary for evaluation of transportation impacts and risks.
6. The license application ignores the potentially severe consequences of a successful terrorist attack against a spent fuel shipping cask using a high energy explosive device or an anti-tank weapon.
7. The license application ignores the significant radiation exposures which members of OGD and other residents of Skull Valley may receive as a result of gridlock traffic incidents and other routine transportation activities.

DISCUSSION: OGD Contentions at 6-16; PFS Contentions Response at 493-514; Staff Contentions Response at 79-82; Tr. at 593-600.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the

Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4) and 10 C.F.R. Parts 71 and 73; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iii, v, vi above. Moreover, to the extent this contention seeks to include consideration of "psychological stress" as an environmental impact under NEPA, it does not have a cognizable basis. *See Metropolitan Edison Co.*, 460 U.S. at 772-79.

OGD D — License Application Lacks Procedures for Returning Damaged Casks to the Generating Reactor

CONTENTION: The license application poses undue risk to public health and safety because it has not provided procedures for returning casks to the generating reactor. The SAR indicates that the casks will be inspected for damage prior to "accepting" the cask and before it enters the Restricted Area. SAR p. 5.1-4. If the casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19 there is no provision for housing the casks prior to shipping the cask back to the generating reactor.

DISCUSSION: OGD Contentions at 16; PFS Contentions Response at 514-21; Staff Contentions Response at 82-83; Tr. at 254-58.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iii, v, vi above.

OGD E — License Application Fails to Provide Information and a Plan to Deal with Casks That May Leak or Become Contaminated During the 20 to 40 Year Storage Period

CONTENTION: The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been decommissioned, and there are no assurances that the storage will be only "interim". The license application provides no assurance that there will be an alternative location to which canisters and/or casks can be shipped if they become defective while in storage at PFS.

1. The license application provides very little procedure for dealing with defective canisters and/or casks that may leak or become contaminated.

2. No alternative location is designated in the license application should a canister become defective while in storage especially if the reactor that originally shipped the canister is decommissioned.
3. The license application does not adequately address the uncertainties about the suitability of Yucca Mountain as a repository site, and if ever, spent fuel stored at PFS should be shipped to Yucca Mountain.

DISCUSSION: OGD Contentions at 17-18; PFS Contentions Response at 521-29; Staff Contentions Response at 83-84; Tr. at 258-61.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.23; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iv, v, vi above.

OGD F — License Application Fails to Make Clear Provisions for Funding of Estimated Construction Costs, Operating Costs, and Decommissioning Costs

CONTENTION: The license application fails to make clear provisions for funding of estimated construction costs, operating costs, and decommission costs. It also fails to make clear as part of the construction costs who the contractors will be.

1. The license application does not demonstrate that PFS "either possesses the necessary funds, or . . . has reasonable assurance of obtaining the necessary funds" as required by 10 C.F.R. § 72.22(e).

DISCUSSION: OGD Contentions at 18-19; PFS Contentions Response at 529-33; Staff Contentions Response at 84; Tr. at 241.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

OGD G — License Application Fails to Provide for Adequate Radiation Monitoring

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide for adequate radiation monitoring to protect the health of the public and workers. It also fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification.

1. The license application does not meet the requirements of 10 C.F.R. § 72.32(6).
2. The license application does not address releases outside of the ISFSI site.

DISCUSSION: OGD Contentions at 19-20; PFS Contentions Response at 533-44; Staff Contentions Response at 85-86; Tr. at 385-88.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

The Board also notes that Petitioner's request for onsite radiation monitoring measures as specified in paragraphs A-D of its contention was withdrawn. *See* Tr. at 385-86.

OGD H — The License Application Poses Undue Risk to Public Health and Safety Because It Fails to Provide Adequate Protection of the Site Against Intruders

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide adequate protection of the ISFSI against intruders. The site is in such a remote area that it would take at least two (2) hours for access to the [site] to be made by emergency personnel.

DISCUSSION: OGD Contentions at 20-22; PFS Contentions Response at 544-56; Staff Contentions Response at 86-89; Tr. at 465.

RULING: As is reflected in the record, *see* Tr. at 465, this contention was withdrawn by Petitioner OGD.

OGD I — The Cask Design Is Unsafe and Untested for Long Periods of Time

CONTENTION: The license application poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time and which has not been certified for either transportation or long term storage.

1. The license application fails to meet the requirements of 10 C.F.R. § 72.22(e) because the cask design is not certified.
2. No meaningful EIS under NEPA can be completed until the cask design is certified.

DISCUSSION: OGD Contentions at 22; PFS Contentions Response at 556-62; Staff Contentions Response at 89-90; Tr. at 290-91.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a.i, ii, v above.

OGD J — The License Application Fails to Address the Status of Compliance with All Permits, Licenses, and Approvals for the Facility

CONTENTION: The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility.

DISCUSSION: OGD Contentions at 23-24; PFS Contentions Response at 562-70; Staff Contentions Response at 90-91; Tr. at 510-18.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above. Moreover, to the extent this contention is footed in a purported “trust responsibility” owed to individual members of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis.

We also note that OGD revised this contention to withdraw any portion of the contention that deals with OGD A. *See* Tr. at 510.

OGD K — There Are No Provisions for Paying for Casks That May Need to Be Returned to the Generating Facility

CONTENTION: The license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned.

DISCUSSION: OGD Contentions at 24-25; PFS Contentions Response at 570-78; Staff Contentions Response at 91-92; Tr. at 418-19.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

OGD L — Operators Will Not Be Trained for the Specific Job When Hired and Operators Will Undergo On-the-Job Training

CONTENTION: The license application poses undue risk to public health and safety because it provides that operators will not be trained for the specific job when hired and that operators will undergo on-the-job training, and classroom training leading to certification. The license application states that “of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors.” *See, License Application, LA Chapter 7 p. 7.1.* This doesn’t protect public health and safety in any manner.

1. The license application does not meet the requirements of 10 C.F.R. § 72.32, in that persons being trained on the job will not be able to carry out their responsibilities under 10 C.F.R. § 72.32(a)(7).

DISCUSSION: OGD Contentions at 25-26; PFS Contentions Response at 578-83; Staff Contentions Response at 92-93; Tr. at 264-68.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

OGD M — No Provisions for Transportation Accidents Are Made

CONTENTION: The license application poses undue risks to public health and safety because it makes no provisions for transportation accidents that might occur.

1. The license application does not adequately address the requirements of 10 C.F.R. § 72.32(a)(2) by failing to address transportation accidents near the site.

DISCUSSION: OGD Contentions at 26-27; PFS Contentions Response at 583-87; Staff Contentions Response at 93-94; Tr. at 328-31.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iii, v, vi above.

OGD N — There May Be a Leak That Contaminates the Present Water System

CONTENTION: The license application poses undue risk to public health and safety because it fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on. The application admits that several wells are going to have to be built to meet the demand that will be presented by the facility. Neither contingencies to deal with contamination nor lowering of the present water table are discussed.

DISCUSSION: OGD Contentions at 27; PFS Contentions Response at 587-91; Staff Contentions Response at 94-95; Tr. at 366-67.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above. Moreover, to the extent this contention is rooted in a purported "trust responsibility" owed to individual members

of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis.

OGD O — Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States.” It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

DISCUSSION: OGD Contentions at 27-36; PFS Contentions Response at 591-611; Staff Contentions Response at 95-97; Tr. at 664-70, 707-16.

RULING: Admissible as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the contention is limited to the disparate impact matters outlined in bases one, five, and six. Moreover, basis six is limited to the effects of the PFS facility on property values in and around the Skull Valley Goshute community as a component in the “environmental justice” assessment of any disparate impacts suffered by minority and low-income communities. It also is not admissible to permit consideration of “psychological stress” as an environmental impact under NEPA, which is not a cognizable basis for the contention. *See Metropolitan Edison Co.*, 460 U.S. at 772-79. Bases two, three, and four do not support admission of this contention because the facility cost-benefit issues they seek to raise are not relevant to this contention.

OGD P — Members of OGD Will Be Adversely Impacted by Routine Operations of the Proposed Storage Facility and Its Associated Transportation Activities

CONTENTION: The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts resulting from the physical presence of the facility are: visual intrusion, noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community. Those impacts that are not as obvious but nonetheless serious are: individual and collective social, psychological, and cultural impacts such as a sense of loss of well-being because of

the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.

The ability of OGD members to pursue a traditional Goshute life style will be adversely affected by routine transportation operations of spent nuclear fuel and/or the presence of trucks, especially very large heavy haul trucks. The other obvious and other effects include the same kind of effects that are listed above, including fear that a transportation accident might happen, fear of acts of terrorism or sabotage which could expose members of OGD and their families, their homes, the community and their ancestral land.

DISCUSSION: OGD Contentions at 36-37; PFS Contentions Response at 612-29; Staff Contentions Response at 97-99; Tr. at 644-52.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above. Moreover, to the extent this contention seeks consideration of “psychological stress” as an environmental impact under NEPA, it does not have a cognizable basis. *See Metropolitan Edison Co.*, 460 U.S. at 772-79.

5. *Confederated Tribes Contentions*

CONFEDERATED TRIBES A — Decommissioning Plan Deficiencies

CONTENTION: PFS has not provided reasonable assurance that the ISFSI can be cleaned up and adequately restored upon cessation of operations.

DISCUSSION: Confederated Tribes Contentions at 2-3; PFS Contentions Response at 619-29; Staff Contentions Response at 124-26; Tr. at 409-18.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or generic rulemaking-associated determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iv, v, vi above.

CONFEDERATED TRIBES B — Lack of Protection Against Worst Case Accidents

CONTENTION: PFS has violated both NRC regulations and NEPA requirements by not adequately dealing with certain reasonably foreseeable accidents and failing to fully evaluate their potential impacts on health and the environment, to protect against them in an adequate manner, or to provide adequate emergency response measures.

DISCUSSION: Confederated Tribes Contentions at 3-4; PFS Contentions Response at 630-43; Staff Contentions Response at 126-28; Tr. at 327-28.

RULING: Admitted as supported by the basis in paragraph five regarding wildfires, which establishes a genuine material dispute adequate to warrant further inquiry. Inadmissible as to its other supporting bases in that the contention and these supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, iii, v, vi above.

Because of the similarity of the admitted portion of this contention with Utah K and Castle Rock 6, *see supra* pp. 191, 214, the Board consolidates that portion of this contention and its supporting basis with those issue statements. The Board has set forth the consolidated contention at p. 253 of Appendix A to this Memorandum and Order.

CONFEDERATED TRIBES C — Inadequate Assessment of Costs under NEPA

CONTENTION: PFS has not adequately described or weighed the environmental, social, and economic impacts and costs of operating the ISFSI. Indeed, there is no adequate benefit-cost analysis which even demonstrates a need for the ISFSI. On the whole, Petitioners contend that the costs of the project far outweigh the benefits of the proposed action. *See, e.g., Public Service Co. of New Hampshire*, 6 NRC 33, 90 (1977).

DISCUSSION: Confederated Tribes Contentions at 5-7; PFS Contentions Response at 643-54; Staff Contentions Response at 128-30; Tr. at 750-64.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, ii, v, vi above.

CONFEDERATED TRIBES D — Inadequate Discussion of No-Action Alternative

CONTENTION: PFS has failed to satisfy the requirements of NEPA because it does not adequately discuss the alternatives to the proposed action.

DISCUSSION: Confederated Tribes Contentions at 7; PFS Contentions Response at 654-58; Staff Contentions Response at 130-31; Tr. at 669-75.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

CONFEDERATED TRIBES E — Failure to Give Adequate Consideration to Adverse Impacts on the Historic District

CONTENTION: PFS has failed to comply with NEPA in that it has not adequately discussed the impacts upon the historic district and the archeological heritage of the area.

DISCUSSION: Confederated Tribes Contentions at 7-8; PFS Contentions Response at 658-62; Staff Contentions Response at 131-32; Tr. at 790-92.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. *See* section II.B.1.a.i, v, vi above.

CONFEDERATED TRIBES F — Failure to Adequately Establish Financial Qualifications

CONTENTION: PFS has failed to demonstrate that it is financially qualified to build and operate the ISFSI.

DISCUSSION: Confederated Tribes Contentions at 8-9; PFS Contentions Response at 662-71; Staff Contentions Response at 132; Tr. at 239-40.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

Because of the similarity of this contention and its supporting bases to portions of contentions Utah E and Castle Rock 7, *see supra* pp. 187, 215, the Board consolidates this contention and its supporting bases with those issue statements. The Board has set forth the consolidated contention at pp. 251-52 of Appendix A to this Memorandum and Order.

CONFEDERATED TRIBES G — Adoption by Reference of Specified Castle Rock Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the following Contentions and the Bases stated by Castle Rock Land & Livestock, L.C.:

1. Absence of NRC Authority. The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed ISFSI.
2. Non-Compliance with Regulations. PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72.
3. Application for Permanent Repository. The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository.

4. Inadequate Financial Qualifications. The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. § 72.22(e).

5. Regional and Cumulative Environmental Impacts. The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. §§ 72.98(b) & (c), NEPA.

DISCUSSION: Confederated Tribes Contentions at 10; PFS Contentions Response at 672; Staff Contentions Response at 132-33; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.C above, however, the Board will permit Confederated Tribes to incorporate these five Castle Rock contentions, all of which we have found inadmissible, subject to the restrictions described in section III.A below.

CONFEDERATED TRIBES H — Adoption by Reference of Specified State Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the Contentions and the Bases stated by the State of Utah including without limit the following:

A. Statutory Authority. Congress has not authorized NRC to issue a license to a private entity for 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

B. License Needed for Intermodal Transfer Facility. PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point, in violation of 10 C.F.R. § 72.6(c)(1).

DISCUSSION: Confederated Tribes Contentions at 10-11; PFS Contentions Response at 672; Staff Contentions Response at 134; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.3 above, however, the Board will permit Confederated Tribes to incorporate these two State contentions, of which we have found only Utah B admissible, subject to the restrictions described in section III.A below.

6. *Skull Valley Band Contention*

CONTENTION: The License Application for the Private Fuel Storage facility filed by Private Fuel Storage, LLC is meritorious and should be granted.

DISCUSSION: Skull Valley Band Contention at 1-3; PFS Contentions Response at 20-21; Staff Contentions Response at 134-36; Tr. at 179-80.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. *See Sheffield*, ALAB-473, 7 NRC at 743. As is noted in section III.A below, the Skull Valley Band will be required to specify which of the admitted contentions of the other Intervenors it wishes to contest and will be subject to the limitation that, absent some other agreement with the Applicant, PFS is designated to serve as the ‘‘lead’’ party for litigation of all Intervenor issues that challenge the PFS application.

C. Castle Rock 10 C.F.R. § 2.758 Petition to Waive Commission Rules

1. Standards Governing Rule Waiver Petitions

Although, as we have previously observed, agency rules are not subject to challenge in adjudicatory proceedings, *see* section II.B.1.a.ii above, the Commission nonetheless has provided a procedure whereby a party to an agency hearing can seek a waiver of a regulation it believes should not be applicable. The standard for seeking such a waiver is set forth in 10 C.F.R. § 2.758(b), which provides:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Procedurally, section 2.758(b) requires that the petition must be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the ‘‘special circumstances’’ alleged to justify the waiver or exception requested. Further, paragraphs (c) and (d) of section 2.758 state that a party’s failure to make a prima facie showing on the section 2.758(b) standard precludes further consideration of the matter, while a presiding officer that finds a prima facie showing has been made must certify the petition to the Commission for its consideration.

In defining the scope and application of this rule, the Commission has further explained that a Petitioner seeking to establish a prima facie case must make three showings. First, relative to establishing the requisite ‘‘special circumstances’’ exist to support the waiver, the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989). Put another way, the circumstances alleged must be unique to the particular facility at issue. *See*

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-74 (1981). Speculation about future events is, however, an inadequate basis to establish the necessary “special circumstances.” See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 24-26, *rev’d in part on other grounds*, CLI-88-10, 28 NRC 573 (1988).

Also with respect to the need to demonstrate “special circumstances,” the Petitioner must show application of the rule will not serve the purposes for which it was adopted. See *Seabrook*, CLI-89-20, 30 NRC at 235. Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule or regulation was adopted. See, e.g., *Seabrook*, CLI-88-10, 28 NRC at 598-600; *Seabrook*, ALAB-895, 28 NRC at 12. Further, in ascertaining a rule’s purposes and whether those purposes would be impaired, it is permissible to consider future events the agency logically would have anticipated in promulgating its rules. See *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, in seeking to establish that the rationale for the rule has been undercut, conjectural statements that merely highlight the uncertainty surrounding future events are not, in and of themselves, sufficient. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301, *rev’d*, ALAB-920, 30 NRC 121, *rev’d*, CLI-89-20, 30 NRC 231 (1989). Moreover, it has been established that a valid purpose for which the rule or regulation was adopted, within the meaning of 10 C.F.R. § 2.758, includes eliminating Staff case-by-case review of a generic issue in individual applications and removing such an issue from adjudication in any operating license proceeding. See *Seabrook*, ALAB-895, 28 NRC at 14, 16-17; see also *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986).

The third showing that must be made by a rule waiver petition is that the circumstances involved are “unusual and compelling” such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a “significant safety problem” relative to the rule at issue. *Seabrook*, CLI-89-20, 30 NRC at 235. Justifying a waiver, therefore, requires that a Petitioner establish the issue raised is a significant safety problem, even if there clearly are special circumstances that undercut the rationale for the rule. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 129 (1989). Safety issues that are “conceivable” or “theoretical” do not fulfill this requirement, however. See *Seabrook*, CLI-89-20, 30 NRC at 243-44. Further, any claim of significance must be viewed in the context of any other protective measures that are in place to prevent safety problems. See *id.* at 244.

With this background, we consider Castle Rock’s request that we grant rule waivers in connection with two regulatory provisions — 10 C.F.R. Part 72 and 10 C.F.R. § 51.23, often referred to as the Waste Confidence Decision — as they otherwise might apply to the licensing of the PFS facility.

2. Waiver of Authority to License PFS Facility Under 10 C.F.R. Part 72

DISCUSSION: Castle Rock Waiver Petition at 4-17; State Castle Rock Waiver Petition Response at 2-5; PFS Castle Rock Waiver Petition Response at 12-41; Staff Castle Rock Waiver Petition Response at 4-10.

RULING: Putting aside the question of whether this portion of the petition, which is rooted in a lack of agency statutory authority to license the PFS facility under Part 72, *see* Castle Rock Waiver Petition at 17, even constitutes a legitimate section 2.758 waiver request, we find it must be denied for failing to meet the three-pronged test outlined above.

On the factor of whether special circumstances have been established by showing facts that apply uniquely to the PFS facility that were not considered in promulgating Part 72, as we observed in our analysis regarding Utah A, there was consideration of PFS-type circumstances as part of that rulemaking process. *See supra* pp. 183-84. Moreover, contrary to Castle Rock’s assertions, we find nothing in the NWPA that supports the conclusion its provisions undercut the rationale for Part 72 so as to provide the requisite special circumstances. Among other things, the passage of NWPA section 135(h), 42 U.S.C. § 10155(h), the principal provision Castle Rock relies upon to support its conclusion the Commission is statutorily precluded from licensing a private, offsite ISFSI like that proposed by PFS, did not repeal or otherwise affect the Commission’s pre-existing AEA authority to license a private ISFSI, but simply indicated that nothing in the NWPA impacted on that AEA authority.

Finally, Castle Rock has failed to demonstrate there is a significant safety problem relative to the application of Part 72 to the PFS licensing request. Castle Rock declares that licensing the PFS facility under Part 72 raises questions about transportation risks, PFS financial stability, and the ultimate removal of spent fuel from the facility. *See* Castle Rock Waiver Petition at 3 n.2. Putting aside the hypothetical nature of these asserted problems, as our various rulings in section II.B above indicate, these are all matters addressed in the context of existing protective measures, including 10 C.F.R. Part 71 dealing with transportation and various provisions of 10 C.F.R. Part 72 concerned with financial qualifications and facility decommissioning. As such, these claims do not provide the type of “significant safety problems” that support the grant of Castle Rock’s waiver petition.

3. *Waiver of Waste Confidence Decision Embodied in 10 C.F.R. § 51.23*

DISCUSSION: Castle Rock Waiver Petition at 18-24; State Castle Rock Waiver Petition Response at 6-8; PFS Castle Rock Waiver Petition Response at 41-52; Staff Castle Rock Waiver Petition Response at 10-22.

RULING: This portion of the Castle Rock petition challenges the continued applicability of the 1990 Commission generic determination in 10 C.F.R. § 51.23(a) that (1) reactor spent fuel can be safely stored without significant environmental impacts for at least 30 years beyond any current reactor's licensed operating life (as extended), and (2) at least one mined HLW geologic repository will be available within the first quarter of the twenty-first century and sufficient capacity for storage of spent fuel from operating reactors will be available at such facilities within the same 30-year "beyond operating life" time period. It also seeks a waiver of the rule's generic determination in section 51.23(b) that, in light of these findings, in a licensing proceeding such as this one there need be no EIS discussion of the impacts of ISFSI spent fuel storage following the term of the ISFSI license. In both instances, however, Castle Rock again fails to meet the three-pronged test set forth above.

Castle Rock alleges various "significant" and "unexpected" technical events provide the necessary "special circumstances" needed to support its request for a waiver of the Commission's generic repository determinations under section 51.23(a), including a 1992 earthquake near the proposed Yucca Mountain, Nevada HLW repository site and questions about Yucca Mountain groundwater percolation rates and groundwater contamination in areas surrounding the site. It also puts forth a variety of legal or policy matters, such as DOE's failure to meet mandatory NWPA deadlines, pending legislation that would provide for interim storage at the Yucca Mountain site, and official opposition from the State of Nevada. These considerations, however, are either inappropriately rooted in speculation about future events (e.g., the passage of pending legislation) or fail to present PFS-specific matters that were not considered, either explicitly or by implication, in the rulemaking proceeding for the Waste Confidence Decision, *see* 55 Fed. Reg. 38,474, 38,486 (1990) (tectonic uncertainties); *id.* at 38,488 (hydrology complexities); *id.* at 38,494-95 (DOE schedule slippage and unavailability of Yucca Mountain site); *id.* at 38,495-97 (Nevada opposition); *id.* at 38,498, 38506-07 (funding adequacy). Castle Rock also fails to make its case in connection with the "special circumstances" second prong as it requires a showing the rule will not serve the purposes for which it was adopted. The Commission has made clear the rule's generic approach was adopted to avoid just the kind of case-by-case adjudication PFS seeks. *See* 49 Fed. Reg. 34,658, 34,666 (1984). Castle Rock also does not fulfill the third prong because it does not establish a "significant safety problem" with the requisite concreteness.

To secure a waiver of the EIS analysis provision of section 51.23(b), Castle Rock asserts the inability of the proposed HLW repository to absorb the PFS fuel in a timely manner provides the requisite factor one unique “special circumstances.” Again, however, this purported circumstance is either inappropriately rooted in speculation, which seemingly is incorrect, about the rate at which PFS stored fuel can be transferred to the repository, *see* PFS Castle Rock Waiver Petition Response at 46-48, or fails to present a PFS-specific matter that was not considered, either explicitly or by implication, in the rulemaking proceeding for the rule, *see* 55 Fed. Reg. at 38,501-04. And, as with its challenge to the repository determinations portion of the rule, Castle Rock fails to show this section of the rule will not serve the “generic rather than case-by-case resolution” purpose for which it was adopted. Finally, Castle Rock’s claim that the repository’s inability to absorb the PFS stored fuel until “at least” the last quarter of the twenty-first century increases fuel removal and decommissioning costs, extends environmental impacts, and may cause funding shortfall-related safety problems, is insufficient to establish the requisite “significant safety problem” in light of the Commission’s own Waste Confidence Decision pronouncement that spent fuel can be safely stored without significant environmental impact for “at least” 100 years, if necessary, *see* 55 Fed. Reg. at 38,513.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As the foregoing discussion indicates, five Intervenors — the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band — are admitted as parties to this proceeding because they have standing and have presented at least one admissible contention. Below, we provide procedural guidance regarding further litigation of the admitted matters by these parties, taking into account the parties’ request they be provided an opportunity to present the Board with suggestions on a further schedule for litigation. *See* Tr. at 809-10.

A. Lead Parties

In accordance with 10 C.F.R. § 2.714(f)-(g), a presiding officer is authorized to control the general compass of the hearing by consolidating issues and limiting party participation to avoid the presentation of irrelevant, duplicative, or repetitive evidence. In this instance, as we have indicated above, some of the State’s admitted contentions challenging the PFS application have been adopted by other Intervenors, while other contentions proposed by different parties challenging the application have been consolidated because of their related subject matter. In addition, one of the parties, the Skull Valley Band,

has filed a single contention expressing general support for the PFS application. In these circumstances, we find it appropriate to designate “lead” parties for the litigation of the various admitted contentions.

The party assigned the role of lead party has primary responsibility for litigating a contention. Absent some other Board directive, the party with the lead role in support of a contention is to conduct all discovery on the contention; file or respond to any dispositive or other motions regarding the contention; submit any required prehearing briefs on the issue; prepare prefiled direct testimony, conduct any redirect examination, and provide any surrebuttal testimony regarding the contention; and prepare posthearing proposed findings of fact and conclusions of law on the contention. The party that has the lead role in opposing a contention has similar duties, with its hearing responsibilities including conducting witness cross-examination and recross-examination and preparing rebuttal testimony as appropriate. For any given contention, the lead party is responsible for consulting with the other “involved” parties (i.e., any party that adopted its contention, filed a contention that has been consolidated, or has opposed the same contention) regarding litigation activities, but the ultimate litigating responsibility for the contention rests with the lead party.²⁹

The party that proffered an admitted contention challenging the PFS application is the lead party for that contention if it has not been consolidated with another party’s contention. Accordingly, for each of the admitted State contentions adopted by Castle Rock Land/Skull Valley and Confederated Tribes, the State is the lead party. Further, for those contentions that have been consolidated with the contentions of other parties, we suggest that the following parties serve as the “lead”:

UTAH E/CASTLE ROCK 7/CONFEDERATED TRIBES F — Financial Assurance:
Confederated Tribes

UTAH K/CASTLE ROCK 6/CONFEDERATED TRIBES B — Inadequate Consideration of Credible Accidents: State

UTAH O/CASTLE ROCK 8 and 10 — Hydrology: State

UTAH S/CASTLE ROCK 7 — Decommissioning: State

UTAH T/CASTLE ROCK 10, 12, and 22 — Inadequate Assessment of Required Permits and Other Entitlements: State

UTAH AA/CASTLE ROCK 13 — Range of Alternatives: Castle Rock

UTAH DD/CASTLE ROCK 16 — Ecology and Species: State

²⁹The Board anticipates that consultation between the lead party and any involved parties will ensure involved parties’ litigation interests and concerns regarding any particular contention are accommodated. If an instance arises when such discussions fail to yield a resolution, the involved parties may request Board consideration of the matter. Such a request must be in writing, on the record, and presented in a time frame that will allow for Board resolution without requiring the extension of any outstanding schedules.

If, after consultation between the lead party and all involved parties, the parties agree that a party other than the one we have suggested should be the lead party for a contention, they jointly should seek Board approval for this change in the “lead” designation in accordance with the schedule set forth below.

In the case of the Skull Valley Band, as part of the schedule set out below we require that it provide us with a statement indicating which of the admitted contentions it wishes to contest. In addition, we designate PFS as the lead party in opposition to all admitted contentions that are contested by PFS and the Skull Valley Band, subject to any joint request by PFS and the Skull Valley Band to designate the Skull Valley Band as the lead party in opposition to one or more of the contentions the Skull Valley Band wishes to oppose.

In recognition of its independent status, the Staff is not the subject of a lead party designation in connection with any contention.

B. Summary Disposition/Discovery

As part of the schedule set forth below, we request that the parties provide us with their views on which, if any, of the admitted contentions are subject to summary disposition either before or after discovery, and an appropriate schedule for filing such motions. In addition, we request that the parties provide us with their views on a schedule for discovery, taking into account any pre-discovery dispositive motions, the timing of the Staff’s Safety Evaluation Report (SER) and Final Environmental Impact Statement (FEIS),³⁰ and the time needed for the following two-step discovery process:

1. An initial informal discovery process during which lead parties and the Staff are to:
 - a. Provide opposing lead parties and/or the Staff with a description of the specific types of information, including documents, data compilations, and tangible things, to which they wish to have access as being relevant to the admitted contentions and their supporting bases.
 - b. Make available to opposing lead parties and/or the Staff a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the lead party, other involved parties, and/or the Staff that have been requested by the opposing lead party and/or the Staff pursuant to paragraph 1.a above.
 - c. Make available to opposing lead parties and/or the Staff for interviews those individuals, particularly those persons whom it is anticipated may provide evidentiary hearing testimony on behalf of a lead party or the Staff, that have information relevant to the admitted contentions and their supporting bases.

³⁰During the January prehearing conference, the Board discussed the status of the Staff’s preparation of its SER and FEIS and the potential impact of those activities on the litigation schedule for this proceeding. *See* Tr. at 812-15. We anticipate that the status of these Staff activities, including any Staff decision on segmentation of the SER, would be reflected in any schedules proposed by the parties as part of the filing requested below, *see supra* section III.C.

2. A formal discovery process during which lead parties and the Staff are subject to the following requirements:
 - a. Without prior leave of the Board or written stipulation, for each admitted contention:
 - i. the lead party supporting the contention may serve on the lead party challenging the contention and the Staff,
 - ii. the lead party challenging the contention may serve on the lead party supporting the contention and the Staff, and
 - iii. the Staff may serve upon the lead party challenging the contention and the lead party supporting the contention not more than ten interrogatories per responding lead party or the Staff, including all discrete subparts, and not more than three deposition notices per responding lead party or the Staff.
 - b. As part of any motion for protective order/motion to compel filed by a lead party or the Staff in connection with a formal discovery request, counsel for the moving party shall provide a certification that he or she previously has:
 - i. provided counsel for the lead party or the Staff to whom the motion is directed a clear and concise written statement of the asserted deficiencies or objections and the requested action relative to the discovery request, and
 - ii. after providing this statement, consulted with lead counsel or Staff counsel in an attempt to resolve all the disputed matters without Board action.
- If counsel are able to resolve a potential objection on the basis of the presubmission conference, that resolution should be reduced to writing with copies provided to each counsel involved.

The Board expects that in the informal discovery process all parties will be *specific* in their information requests and provide access to requested information and knowledgeable individuals to the *maximum* degree possible. The Board anticipates monitoring the informal discovery process through a series of status reports and/or conferences. Failure to participate in the informal discovery process consistent with the outline set forth above will result in appropriate Board sanctions. In addition, the lead party is expected to coordinate informal or formal discovery requests in connection with a particular contention with all involved parties to ensure the discovery response includes all relevant materials from all parties with interests relating to the contention.

C. Joint Status Report, Other Filings, and Prehearing Conference

As was noted above, during the January 1998 prehearing conference, the parties indicated that once a determination on standing and contentions was issued, they would try to reach some agreement about future scheduling they would present to the Board. To this end, on or before *Wednesday, May 6, 1998*, the parties should file with the Board a joint status report that reflects their discussions regarding scheduling in light of this issuance.

In that report, the parties should discuss scheduling for dispositive motions and discovery in light of the requirements set forth in section III.B above. They also should provide estimates of how long will be needed to try each of the admitted contentions if those issues go to hearing.³¹ Further, they should discuss the status of any settlement negotiations relative to the admitted contentions, and indicate whether a “settlement judge” would be of assistance in connection with one or more of the admitted contentions. If the parties are unable to agree on any of these matters, separate views may be included as part of the report.

In addition to this status report, in accordance with section III.A above, on or before *Wednesday, May 6, 1998*, the Skull Valley Band should file its designation of contested issues. Also by that date, any requests should be submitted for revision of the lead party designations set forth in section III.A.

With these filings and the joint status report in hand, the Board will conduct an additional prehearing conference to discuss scheduling and other matters. That conference will be held in the *Atomic Safety and Licensing Board Hearing Room, Room T-3B45, Third Floor, Two White Flint North Building, 11545 Rockville Pike, Rockville, Maryland, on Tuesday, May 19, 1998, beginning at 1:00 p.m. EDT (11:00 a.m. MDT)*. The Board anticipates the prehearing conference will last no more than 2 hours. For this prehearing conference, counsel may appear in person or, assuming there is sufficient interest, participate by videoconference from Room 212 in Milton Bennion Hall on the University of Utah campus in Salt Lake City, Utah.³² Counsel for each party should advise the Board in writing on or before *Wednesday, April 29, 1998*, whether they intend to appear in person in Rockville or by videoconference from Salt Lake City.

D. Other Administrative Rulings

Previously, the Board has issued directives concerning same day submission of courtesy copies of filings (e.g., e-mail or facsimile transmission); a ten-page limitation on motions and responses; and requests for leave to extend a filing date, exceed the ten-page limit, or file a reply pleading. See Licensing Board Memorandum and Order (Memorializing Initial Prehearing Conference Directives) (Feb. 2, 1998) at 3-5 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) at

³¹ With regard to Utah T/Castle Rock 10, 12, and 22, concerning the assessment of required permits and other entitlements, in describing any schedule for the litigation of this contention the parties should provide their views about the propriety and efficiency of seeking an opinion/judgment in some other judicial forum relative to questions such as the scope of State regulatory authority on tribal lands. Compare *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 896 (at behest of Licensing Board, intervenors sought state court declaratory judgments on validity of state statutory limitations on utility emergency plan responses), *aff'd*, ALAB-818, 22 NRC 651, *rev'd on other grounds*, CLI-86-13, 24 NRC 22 (1985).

³² This is the same room that was used for the videoconferencing demonstration during the January 1998 prehearing conference.

1-3 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-7 (unpublished). The parties are reminded of these requirements and the Board's expectation they will be complied with.

In this connection, the filings provided for in section III.C of this Memorandum and Order should be served on the Board, the Office of the Secretary, and counsel for the other parties by e-mail, facsimile transmission, or other means that will ensure receipt by close of business (4:30 p.m. EDT) on the day of filing.

IV. CONCLUSION

For the reasons set forth above, we find that Petitioners State of Utah, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band, have established their standing to intervene and have put forth at least one litigable contention so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. We also conclude the intervention petitions of David Pete, SSWS, and Ensign Ranches should be dismissed, the first having failed to establish his standing to intervene as of right, the second having failed to show it was entitled to either standing as of right or discretionary intervention, and the third having failed to put forth an admissible contention. Finally, we deny the request of Castle Rock for a waiver of 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 as they are applicable to the PFS application, concluding Castle Rock has not made a prima facie showing that meets the standards set forth in 10 C.F.R. § 2.758 for obtaining a rule waiver.

For the foregoing reasons, it is this twenty-second day of April 1998, ORDERED,

1. Relative to the contentions specified in paragraph three below, the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band requests for a hearing/petitions to intervene are *granted* and these Petitioners are admitted as parties to this proceeding.

2. The requests for a hearing/petitions to intervene of David Pete, SSWS, and Ensign Ranches are *denied*.

3. The following intervenor contentions are *admitted* for litigation in this proceeding: Utah B (paragraphs one and four), Utah C (paragraphs three, four, and five), Utah E (as consolidated with portions of Castle Rock 7 and Confederated Tribes F), Utah F (as consolidated with a portion of Utah P), Utah G (bases one and four), Utah H, Utah K (in part, as consolidated with Castle Rock 6 and a portion of Confederated Tribes B), Utah L, Utah M, Utah N, Utah O (bases one, two (in part), three, and four, as consolidated with Castle Rock 8

and a portion of Castle Rock 10), Utah P (subparagraph b of paragraph seven, as consolidated with Utah F), Utah R (paragraph one (in part) and subparagraph b of paragraphs three and four), Utah S (bases one, two, four, five, ten, and eleven, as consolidated with a portion of Castle Rock 7), Utah T (paragraphs two through eight, as consolidated with a portion of Castle Rock 10 and Castle Rock 12 and 22), Utah U (basis one), Utah V (paragraph two (in part)), Utah W (paragraph three (in part)), Utah Z, Utah AA (as consolidated with a portion of Castle Rock 13), Utah DD (subparagraphs c, d, g, and h of paragraph four, as consolidated with a portion of Castle Rock 16), Utah GG (paragraph five), Castle Rock 6 (as consolidated with portions of Utah K and Confederated Tribes B), Castle Rock 7 (paragraphs a through d, and f, as consolidated with Utah E and a portion of Utah S), Castle Rock 8 (as consolidated with a portion of Utah O), Castle Rock 10 (as consolidated with portions of Utah O and T), Castle Rock 12 (as consolidated with a portion of Utah T), Castle Rock 13 (paragraph a, as consolidated with Utah AA), Castle Rock 16 (paragraph b, as consolidated with Utah DD), Castle Rock 17, Castle Rock 20, Castle Rock 21, Castle Rock 22 (as consolidated with a portion of Utah T), OGD O (bases one, five, and six), Confederated Tribes B (basis five, as consolidated with portions of Utah K and Castle Rock 6), Confederated Tribes F (as consolidated with Utah E and a portion of Castle Rock 7), and the Skull Valley Band contention.³³

4. The following Intervenor contentions are *rejected* as inadmissible for litigation in this proceeding: Utah A, Utah B (paragraphs two and three), Utah C (paragraphs one and two, paragraph six, and paragraphs seven and eight), Utah D, Utah G (bases two and three), Utah I, Utah J, Utah K (in part), Utah O (basis two (in part)), Utah P (paragraphs one through six, subparagraphs a and c through h of paragraph seven, and paragraphs eight and nine), Utah Q, Utah R (paragraphs one and two (in part), subparagraph a of paragraphs three and four, and paragraph five), Utah S (paragraph three and paragraphs six through nine), Utah T (paragraph one), Utah U (bases two through four), Utah V (paragraphs one and two (in part), paragraphs three and four), Utah W (paragraphs one and two, paragraph three (in part), and paragraphs four through six), Utah X, Utah Y, Utah BB, Utah CC, Utah DD (paragraphs one through three (in part), subparagraphs a, b, e, and f of paragraph four, and paragraphs five and six), Utah EE, Utah GG (paragraphs one through four), Castle Rock 1, Castle Rock 2, Castle Rock 3, Castle Rock 4, Castle Rock 5, Castle Rock 7 (paragraph e), Castle Rock 9, Castle Rock 11, Castle Rock 13 (paragraphs b and c), Castle Rock 14, Castle Rock 15, Castle Rock 16 (paragraphs a and c), Castle Rock 18, Castle Rock 19, Castle Rock 23, Castle Rock 24, OGD A, OGD B, OGD C, OGD D, OGD E, OGD F, OGD G, OGD I, OGD J, OGD K, OGD L,

³³The language of these admitted contentions is set forth in Appendix A to this Memorandum and Order.

OGD M, OGD N, OGD O (bases two through four), OGD P, Confederated Tribes A, Confederated Tribes B (bases one through four), Confederated Tribes C, Confederated Tribes D, Confederated Tribes E, Confederated Tribes G, and Confederated Tribes H.

5. The December 19, 1997 State request to adopt the contentions of the other Petitioners opposing the PFS application is *denied*.

6. The January 21, 1998 petition of Castle Rock for waiver of the Commission's rules in 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 is *denied*.

7. The parties are to make the filings required by section III.C above in accordance with the schedule established therein.

8. Motions for reconsideration of this Memorandum and Order must be filed on or before *Monday, May 4, 1998*, and are subject to the ten-page limitation described in section III.D above.

9. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon intervention petitions, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD³⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 22, 1998

³⁴ Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock, SSWS, and the State by Internet e-mail transmission; and to counsel for the Staff by e-mail through the agency's wide area network system.

Dissenting Opinion of Judge Lam on Denial of Discretionary Intervention to Petitioner Scientists for Secure Waste Storage

I join in this Memorandum and Order in all respects except the Board's denial of discretionary intervention to Petitioner Scientists for Secure Waste Storage (SSWS). After considering the arguments of the various Petitioners, Applicant Private Fuel Storage, L.L.C., and the NRC Staff, I conclude that (1) the broad knowledge and experience of the members of SSWS in nuclear science and technology would make a significant contribution to the development of a sound record; and (2) SSWS's intervention would not broaden the issues to be heard or inappropriately delay the proceeding because SSWS seeks to intervene only on issues already raised. Based on the Commission's guidelines in its *Pebble Springs* decision, see *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976), and the Appeal Board's *Sheffield* ruling, see *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978), I would have granted SSWS discretionary intervention in this proceeding.

APPENDIX A

ADMITTED CONTENTIONS

1. UTAH B — License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

2. UTAH C — Failure to Demonstrate Compliance with NRC Dose Limits

CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. § 72.106(b) can and will be complied with in that:

1. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.
2. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
3. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

3. UTAH E/CASTLE ROCK 7/CONFEDERATED TRIBES F — Financial Assurance

CONTENTION: Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license in that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. *See* 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.
2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.

3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The Applicant must submit a copy of each member's Subscription Agreement, *see* 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.
4. To demonstrate its financial qualifications, the Applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, *see* 10 C.F.R. Part 50, Appendix C, § II.
5. The Applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the "possessor" of the spent fuel casks. The Applicant must address these issues. *See* 10 C.F.R. § 72.22(e).
6. The Applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. *See* 10 C.F.R. Part 50, App. C, § II.
7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.
9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.
10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

4. UTAH F/UTAH P — Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel, including radiation protection training, fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.

5. UTAH G — Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

6. UTAH H — Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110°F.
2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.
3. PFS's projection that average daily temperatures will not exceed 100°F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.
4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.
5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.
6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.
7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

7. UTAH K/CASTLE ROCK 6/CONFEDERATED TRIBES B — Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects of wildfires.

8. UTAH L — Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

9. UTAH M — Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.

2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

10. UTAH N — Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.

11. UTAH O/CASTLE ROCK 8 and 10 — Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI and the ITP, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the Applicant's sewer/wastewater system; facility operations, including firefighting activities; and construction activities.
2. Contaminant pathways from the Applicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of Applicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

12. UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.
2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.
3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

13. UTAH S/CASTLE ROCK 7 — Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(e).

14. UTAH T/CASTLE ROCK 10, 12, and 22 — Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. § 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there.
2. The Applicant has shown no authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.
3. The Applicant has shown no basis that it is entitled to widen Skull Valley Road in that the application does not describe and identify State and local permits or approvals that are required.
4. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. § 51.45 in that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts as it relates to Utah air quality permits in ER sections 4.1.3 and 4.2.3 is inadequate; and a state air quality approval order under Utah Code Ann. § 19-2-108 will be required.
5. The Applicant has not addressed the requirement to obtain a Utah Groundwater Discharge Permit or the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.
6. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements of 10 C.F.R. § 51.45 in that the Applicant merely states that it "might" need Army Corps of Engineers and State approvals in connection with any Clean Water Act (CWA) Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor; PFS provides an inadequate discussion of Site requirements relative to the Skull Valley Band of Goshute's CWA permitting authority; and PFS will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.

7. The Applicant must show legal authority to drill wells on the proposed ISFSI site by identifying and describing the State approvals that are required.

15. UTAH U — Impacts of Onsite Storage Not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

16. UTAH V — Inadequate Consideration of Transportation-Related Radiological Environmental Impacts

CONTENTION: The Environmental Report (“ER”) fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. § 51.52(a) for use of Summary Table S-4, so that the PFS must provide “a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor” in accordance with 10 C.F.R. § 51.52(b).

17. UTAH W — Other Impacts Not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that the Applicant has not considered the impact of flooding on the intermodal transfer point.

18. UTAH Z — No Action Alternative

CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the “no action” alternative.

19. UTAH AA/CASTLE ROCK 13 — Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

20. UTAH DD/CASTLE ROCK 16 — Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and NEPA in that the License Application has not estimated potential impacts to ecosystems and “important species” as follows:

1. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.
2. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.

3. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two “high interest” plants, Pohl’s milkvetch and small spring parsley.
4. The License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

21. UTAH GG — Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a), in that Sierra Nuclear’s consultant, Advent Engineering Services, Inc., used a nonconservative “nonsliding cask” tipover analysis that did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

22. CASTLE ROCK 17 — Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, *see, e.g.*, 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

- a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;
- b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;
- c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock’s lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;
- d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock’s lands; and
- e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

23. CASTLE ROCK 20 — Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail

spur access alternative over the other and the implications of such selection in light of such considerations. *See* 10 C.F.R. §§ 51.45(c) and 72.100(b), in that:

- a. The ER is deficient because it fails to properly analyze the transportation alternatives.
- b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.
- c. The ER is defective because PFS is considering a third option not discussed in the ER.
- d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

24. CASTLE ROCK 21 — Exact Location of Rail Spur

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (see 10 C.F.R. § 72.90(a)), in that:

- a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.
- b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

25. OGD O — Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States.” It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

26. SKULL VALLEY BAND CONTENTION

CONTENTION: The License Application for the Private Fuel Storage facility filed by Private Fuel Storage, LLC is meritorious and should be granted.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Chief Administrative Judge:

B. Paul Cotter, Jr.

In the Matter of

**Docket Nos. 72-22-ISFSI
72-22-ISFSI-PSP
(ASLBP Nos. 97-732-02-ISFSI
97-732-02-ISFSI-PSP)**

**PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)**

April 23, 1998

**MEMORANDUM AND ORDER
(Denying Motion for Reconsideration)**

Applicant Private Fuel Storage, L.L.C. (PFS), has filed a motion, supported by the NRC Staff, requesting reconsideration of the Chief Administrative Judge's March 26, 1998 notice creating a separate Atomic Safety and Licensing Board to consider and rule upon all matters concerning the physical security plan for PFS's proposed Skull Valley, Utah independent spent fuel storage installation. *See* 63 Fed. Reg. 15,900 (1998). For the reasons set forth below, PFS's motion for reconsideration is denied.

The longstanding authority of the Chief Administrative Judge to establish two or more licensing boards to hear and decide discrete portions of a proceeding so that the proceeding can be resolved in the most effective, efficient, and expeditious manner is well established. The Chief Administrative Judge's authority in this regard previously has been upheld and the use of multiple boards specifically approved. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989); *see Long Island*

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 430 & n.11, *petition for review denied as moot*, CLI-88-11, 28 NRC 603 (1988); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306-08, *petition for review denied*, CLI-88-11, 28 NRC 603 (1988). Further, the exercise of the Chief Administrative Judge's authority to establish multiple boards is subject to review only for an abuse of discretion. See *Shoreham*, ALAB-901, 28 NRC at 307. Here, PFS does not even suggest, much less demonstrate, that the establishment of a second licensing board in this proceeding was an abuse of discretion.

PFS also argues that, regardless of the Chief Administrative Judge's authority to establish multiple boards in the same proceeding, the Chief Judge has no authority to terminate the jurisdiction of a duly established board over any aspect of the proceeding once that initial board is created. PFS's argument is meritless. Any time that a second board is created subsequently to hear and decide a portion of the proceeding, the jurisdiction of the initial board as to those matters assigned to the second board necessarily is terminated as to the matters assigned to the second board. See *Seabrook*, ALAB-916, *supra*, 29 NRC at 437-38. Indeed, as even PFS apparently concedes, there appears never to have been an instance in which multiple boards were established simultaneously at the outset of a proceeding; hence the authority to terminate a portion of the initial board's jurisdiction is inherent in the Chief Administrative Judge's already-recognized authority to establish multiple boards.

Finally, and contrary to PFS's assertions, it is the judgment of the Chief Administrative Judge that the Panel's docket can be most effectively managed and that this proceeding can be more efficiently and expeditiously resolved by establishing a second licensing board to hear and decide any issues concerning the PFS physical security plan.

For all the foregoing reasons, it is, this 23rd day of April 1998, ORDERED

That Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters shall be, and it hereby is, denied.*

B. Paul Cotter, Jr.
CHIEF ADMINISTRATIVE JUDGE

Rockville, Maryland

*Copies of this Memorandum and Order were sent this date to counsel for the parties by Internet e-mail transmission; and to counsel for the NRC Staff by e-mail through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)
(Re: Leach Mining License)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

May 13, 1998

Three petitioners in this 10 C.F.R. Part 2, Subpart L proceeding were admitted as parties after considering whether they had suffered injury in fact, whether they had filed timely petitions, and whether they had stated at least one valid area of concern. 10 C.F.R. § 1205(h). Other petitions for a hearing were denied.

RULES OF PRACTICE: STANDING (INJURY IN FACT; NEED FOR FURTHER INFORMATION)

Petitioners may have standing if they reside close enough to a planned project so that there is a reasonable apprehension of injury from implementation of the project. When the Staff of the Commission delays issuance of the full license that is applied for, the Staff's reluctance to act without further information is an indication of the reasonableness of petitioners' apprehensions of injury.

**RULES OF PRACTICE: STANDING (INJURY IN FACT);
CONDITIONING OF LICENSE**

Even though a license is conditioned so that certain activities cannot be taken without further Staff approval, the scope of the license is not narrowed. A petitioning organization has standing to request a hearing if any of the activities under the license may cause injury to its interests or to one of its members.

RULES OF PRACTICE: STANDING (SPECIFIC ALLEGATION)

A petitioning organization is not entitled to standing unless its member, on whom it relies for representational standing, specifies with particularity how the activities of the project will cause the member an injury.

RULES OF PRACTICE: SUBPART L (AREAS OF CONCERN)

An area of concern is relevant or germane to a proceeding if it falls within the scope of the challenged license application. The standards for admitting an area of concern are more lenient than for admitting contentions in Subpart G proceedings.

RULES OF PRACTICE: SETTLEMENT

A party may ask a judge to participate in public meetings designed to facilitate settlement of the case. If a party seeks settlement negotiations in the judge's chambers, it must ask the Commission to authorize those negotiations.

RULES OF PRACTICE: SCHEDULING FILINGS

In a Subpart L case, a presiding officer may propose ways of narrowing issues, of setting deadlines for completion of aspects of a case, of identifying issues for settlement on legal briefs, and for eliciting procedural suggestions from the parties.

RULES OF PRACTICE: STANDING (STATEMENTS OF MEMBERS)

An organization seeking standing as the representative of one of its members must submit a written statement authorizing it to be the representative and stating other facts necessary to establish standing. Unless there are special circumstances, the Presiding Officer has discretion to consider written statements that do not meet the formal requirements for an affidavit.

RULES OF PRACTICE: SUBPART L (CONSOLIDATION OF PARTIES)

A presiding officer may make reasonable arrangements to assure that the admission of multiple parties will not cause unnecessary redundancy in the presentation of the case. The parties may be required to make reasonable arrangements to coordinate their presentations.

**MEMORANDUM AND ORDER
(Ruling on Petitions and Areas of Concern; Granting
Request for Hearing; Scheduling)**

Memorandum

This Memorandum explains why the Eastern Navaho Diné Against Uranium Mining (ENDAUM), the Southwest Research and Information Center (SRIC), and Marilyn Sam and Grace Sam will be admitted as parties to this 10 C.F.R. Part 2, Subpart L proceeding. Other petitions for a hearing are denied, and determinations are made concerning whether the parties' proposed areas of concern are germane. 10 C.F.R. § 1205(h).

I. BACKGROUND

A. Description of the Project

Hydro Resources, Inc. (HRI), has been granted a license (SUA-1508, January 5, 1998) (License). Mark S. Pelizza, HRI's Vice President of Health, Safety and Environmental Affairs, describes key aspects of the licensed project as follows:¹

HRI will mine uranium at the proposed sites using a technique called "in situ leach" solution mining. Solution mining for uranium is conducted underground in an underground zone where, over millions of years, small grains of relatively insoluble uranium salts have been deposited upon and among other materials such as sand. The uranium has become fixed at these locations when, over millions of years, dissolved uranium salts moving in the ground water encountered at these specific locations other naturally-occurring chemicals (reductants) which caused the water-soluble uranium to become relatively insoluble.

To recover this uranium from a specific mine location, HRI installs two groups of water wells: wells to inject a mixture of ground water, washing soda (Na_2CO_3) or bicarbonate (NaHCO_3) and oxygen, and nearby, wells to extract the injected water solution after uranium

¹ Attachment A to "Response of Hydro Resources, Inc. to Requests for Hearing," February 25, 1995 (HRI Response). Affidavit of Mark S. Pelizza at 6-7, ¶¶ 10-11.

has dissolved in it. The injected mixture causes the relatively insoluble uranium salts to become water soluble again, and the extraction wells pull the solution of ground water and dissolved uranium to the surface, where the uranium salts are removed in something which resembles a large water softener. After the uranium salts are removed, most of the water is returned to the zone from which it was drawn.

It is economically and environmentally important for HRI to ensure that the mixture of ground water, washing soda, oxygen and uranium not leave the immediate mining area: the escape of such fluid would waste recoverable uranium and the energy required to produce it, but more important, such an escape could potentially contaminate ground water elsewhere. Many steps are taken to control the movement of these fluids:

(a) Slightly more liquid is extracted than is injected in the mining area, thus causing a cone of lower pressure, or "pressure sink," within the mining zone inside the well field.

(b) Using a ring of "monitor wells" which surround the mine zone, HRI keeps watch on the "pressure sink" in the mining zone.

(c) HRI also monitors the pressure in its injection and extraction wells; and, it can, if needed, reverse a potential "escape" (called an "excursion") of mining fluids, by quickly changing the pressures in those wells to return fluids into the "pressure sink."

B. Procedural History

On November 14, 1994, a "Notice of Availability of Draft Environmental Impact Statement: Notice of Opportunity for Hearing" ("Notice") was published in the *Federal Register* concerning an application by HRI to construct and operate an in-situ leach mining project in McKinley County, New Mexico. 59 Fed. Reg. 56,557.

The Notice in the *Federal Register* stated that: (a) the NRC, in cooperation with the U.S. Bureau of Land Management (BLM) and the U.S. Bureau of Indian Affairs, had published a Draft Environmental Impact Statement ("DEIS") that was available for inspection and comment; (b) four principal alternatives (described in the Notice) had been considered in the DEIS; and (c) any person whose interest may be affected by the application for source and byproduct material licenses of HRI may file a request for hearing within 30 days, in accordance with the provisions of 10 C.F.R. § 2.1205.

In response to the Notice, requests for hearing and/or other relief were filed by (1) Zuni Mountain Coalition ("ZMC"), (2) Diné CARE, (3) Southwest Research and Information Center ("SRIC"), (4) Water Information Network ("WIN"), (5) Mervyn Tilden, (6) Bernadine Martin, and (7) Grace and Marilyn Sam.² A presiding officer was designated on December 21, 1994, to rule on

² See Memorandum from J. Hoyle, Acting Secretary (NRC) to B. Cotter, Jr., Chief Administrative Judge (NRC), dated December 16, 1994, enclosing (1) Letter from M. Jones and M. Tilden (Zuni Mountain Coalition), to the Executive Director for Operations (NRC), dated December 12, 1994 ("ZMC 1994 Letter"); (2) Letter from L.

(Continued)

the petitions for hearing under 10 C.F.R. Part 2, Subpart L, and conduct any hearing ordered. “Hydro Resources, Inc.: Designation of Presiding Officer,” 59 Fed. Reg. 66,979 (Jan. 8, 1995). Finding that “most of the petitions are in some regard deficient [because they] do not set forth information or arguments concerning . . . judicial concepts of standing,” the Presiding Officer ordered the aforementioned Petitioners to file amended hearing requests setting forth arguments regarding standing and areas of concern to be in-hand by January 25, 1995. LBP-95-2, 41 NRC 38, 40-41 (1995).³

On January 19, 1995, SRIC, for itself and others (Diné CARE, Mr. Tilden, ZMC, and WIN), requested that the deadline for filing amended petitions be extended.⁴ The Presiding Officer granted the unopposed request for extension of the deadline for submitting amended hearing requests and ordered that the amended requests “setting forth arguments concerning standing and areas of concern as prescribed by 10 C.F.R. § 2.1205 . . . be *received* by the other participants no later than close of business on February 15, 1995.” Memorandum and Order (Revising Schedule for Filings), dated January 20, 1995 (unpublished), at 2.

By letter dated February 13, 1995, ZMC “amended” its petition and requested that the deadline for filing amended petitions be set after public meetings to be held on the DEIS. Letter from M. Jones to B. Cotter, Jr., dated February 13, 1995. In correspondence dated February 15, 1995, Diné CARE provided additional information to support its hearing request,⁵ Eastern Navajo-Diné Against Uranium Mining (ENDAUM) filed a petition to intervene, stating that it was the organization that Bernadine Martin represented in her letter of December 14, 1994,⁶ and Mervyn Tilden submitted an amended request. SRIC, WIN, and Grace and Marilyn Sam did not file “amended” requests.

HRI opposed all the hearing requests.⁷ Counsel for the Staff, however, informed the Presiding Officer that the Staff did not wish to participate as a

Goodman (Diné CARE) to Chief, High Level Waste and Uranium Recovery Branch (NRC), dated December 14, 1994 (“Diné CARE 1994 Letter”); (3) Letter from W. Robinson and C. Shuey (Southwest Research and Information Center) to Secretary and J. Holonich (NRC), dated December 14, 1994 (“SRIC Request”); (4) Letter from L. Bird (Water Information Network) to Secretary (NRC), dated December 14, 1994 (“WIN Letter”); (5) Letter from M. Tilden to Secretary (NRC), dated December 14, 1994 (“Tilden 1994 Letter”); (6) Letter from B. Martin to J. Hoyle (NRC), dated December 13, 1994 (“Martin Letter”); and (7) Letter from G. Sam and M. Sam to Secretary (NRC), dated December 14, 1994 (“Sams Letter”).

³ The order explained that “[s]tanding means that ‘they must show that the intended action will cause injury in fact to petitioner’s interests . . .’ which are protected by the Atomic Energy Act or the National Environmental Policy Act.” LBP-95-2, 41 NRC at 40, *citing Umetco Minerals Corp.*, LBP-94-18, 39 NRC 369, 370 (1994).

⁴ Letter from C. Shuey, SRIC, to B. Cotter, NRC, dated January 19, 1995 (“Five Petitioners Extension Request”) (extension requested for SRIC, Diné CARE, Tilden, ZMC, and WIN).

⁵ Letter to B. Cotter from Lori Goodman, Diné CARE, dated February 15, 1995 (Diné CARE Amendment).

⁶ “Petitioner Eastern Navajo Diné Against Uranium Mining Request for Evidentiary Hearing and Petition for Leave to Intervene,” dated February 15, 1995 (ENDAUM Petition).

⁷ “Response of Hydro Resources, Inc. to Requests for Hearing,” dated February 25, 1995 (HRI Response).

party in the proceeding and, thus, would not respond to the various requests. Letter from S. Turk to B. Cotter, dated March 8, 1995.

ZMC subsequently responded to HRI's assertions that its petition was deficient. Letter from M. Jones to B. Cotter, dated March 2, 1995. ENDAUM, attaching affidavits on standing, filed a motion to permit its response to HRI's assertion that all hearing requests be denied. "Motion of Eastern Navajo Diné Against Uranium Mining to Respond to the Request of Hydro Resources Inc. to Deny all Petitions for an Evidentiary Hearing," dated March 20, 1995 ("ENDAUM Motion/Response").

On September 13, 1995,⁸ the Presiding Officer concluded that there was little merit in going forward in the proceeding until the Staff review of the application and the hearing file were complete, and ordered that the proceeding be held in abeyance until completion of the Staff's review. Subsequently, ENDAUM and SRIC retained counsel and jointly filed a second amended request for hearing, accompanied by a motion requesting that its filing replace any of the previous requests filed by the two organizations. "Petitioners ENDAUM and SRIC's Second Amended Request for Hearing, Petition to Intervene, and Statement of Concerns," dated August 19, 1997 ("E/S Second Amended Request"); "Petitioners ENDAUM and SRIC's Motion for Leave to Amend Request for Hearing, Petition to Intervene, and Statement of Concerns and Brief in Support of Motion," dated August 19, 1997 ("Joint Motion to Amend").⁹

In correspondence dated March 14, 1997, December 5, 1997, and January 5, 1998, the Staff forwarded copies of the Final Environmental Impact Statement ("FEIS"), the Safety Evaluation Report ("SER"), and the source material license (SUA-1508, dated January 5, 1998) (License), for the above-captioned facility.¹⁰

In September 1997, the Staff requested leave to participate as a party to the proceeding pursuant to 10 C.F.R. §§ 2.1213 and 2.1237. "NRC Staff's Request for Leave to Participate as a Party to the Proceeding," dated September 4, 1997. The Staff was admitted as a party to the proceeding with respect to all issues. Memorandum and Order (Admission of Staff and Scheduling), dated September 19, 1997 (unpublished), at 4-6. In addition, the Presiding Officer found that

⁸ Memorandum and Order (Proceeding Status), dated September 13, 1995 (unpublished).

⁹ The Presiding Officer denied HRI's motion to strike the appearance of counsel on behalf of SRIC because of SRIC's failure to file an amended petition by February 15, 1995, and indicated that its failure to amend would result in "no greater consequence than to have [SRIC]'s original petition serve as the basis" for intervention. Memorandum and Order (Denying Motion to Strike), dated January 29, 1997 (unpublished), at 3. The amended petition presented, for the first time, affidavits by Raymond Morgan and LaLora Charles to support SRIC's standing, alleging that they would be injured by trucks hauling yellowcake and that their water supply would be adversely affected. *See, e.g.*, Joint Motion to Amend at 31-32.

¹⁰ NRC Staff's Supplemental Status Report Concerning Its Review of the In Situ Leachate Mine Application Filed by Hydro Resources, Inc., dated March 14, 1997, forwarding Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508, dated February 1997 ("FEIS"). Letter from J. Hull to Judge Cotter, December 5, 1997; Letter from J. Hull to Judges Cotter and Murphy, January 5, 1998; Letter from J.J. Holonich to R.F. Clement, HRI, January 8, 1998.

the August 19, 1997 joint motion to amend, and a second amended ENDAUM and SRIC petition, were premature until the issuance of the SER. *Id.* at 3. The Presiding Officer later ruled that the issuance of the SER on December 5, 1997, was a basis to lift the 2-year suspension of the proceeding and allowed all Petitioners, including ENDAUM and SRIC, “to amend their hearing requests on the basis of any new information found in the SER, the . . . FEIS . . . and other documents exchanged between the Applicant and the NRC Staff,” stating that

Amended hearing requests shall adhere strictly to the requirements of 10 C.F.R. § 2.1205(e) and should address the determinations the Presiding Officer is required to make by 10 C.F.R. § 2.1205(h) in deciding whether to admit a petitioner as a party to this proceeding.

LBP-97-23, 46 NRC 311, 311-12 (1997). The Presiding Officer also made it clear that any petition filed by the Eastern Navajo Allottees Association (“Allottees”) would be late under 10 C.F.R. § 2.1205(d) and (k) and would have to meet the late-filing criteria of 10 C.F.R. § 2.1205(l)(1)(i) and (ii). *Id.* at 3.

Subsequently, the Eastern Navajo Allottees Association (Allottees) filed a “Petition to Intervene,” dated January 5, 1998 (“Allottees Petition”). ENDAUM and SRIC jointly filed another amended petition,¹¹ as did Mervyn Tilden.¹² At HRI’s and the Staff’s request, the Board extended the deadline for submission of responses to intervention petitions and further stated that the Staff’s response to original and amended petitions should, to the extent possible, avoid addressing duplicate points in original and amended petitions. LBP-98-4, 47 NRC 17, 19-20 (1998).

Responses to the requests for a hearing were filed by HRI and the Staff: HRI, “Response to Petitions to Intervene,” February 19, 1998; Staff, “Response to Requests for Hearing and/or Other Relief Filed by [named parties],” March 5, 1998 (Staff Response).

¹¹ ENDAUM’s and SRIC’s Third Amended Hearing Request and Petition to Intervene,” dated January 16, 1998 (“ENDAUM/SRIC Third Request”). The Staff does not object to this request to amend ENDAUM’s and SRIC’s previous hearing requests given (1) the explanation provided as to the relationship between the initial and amended concerns and (2) that they have addressed the Commission’s late-filing criteria. *See* Joint Motion to Amend at 11-31.

¹² “Petitioner Mervyn Tilden’s Notice of Submission of Second Amended Petition to Intervene, Statement of Concerns, Position Statement, and Request for Temporary Restraining Order (TRO),” dated January 16, 1998.

II. ANALYSIS OF STANDING AND PARTICIPATION

A. Legal Requirements for Standing¹³

Pursuant to 10 C.F.R. § 2.1205(c), interested persons may request a hearing on the grant of a proposed source or byproduct materials license under the Commission's informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L. Such requests for hearing are to be filed within 30 days following publication of a *Federal Register* notice, where (as here) a notice has been published. 10 C.F.R. § 2.1205(c)(1).

It is fundamental that any person who wishes to request a hearing or to intervene in a Commission proceeding must demonstrate that he or she has standing to do so. Section 189a(1) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), provides that:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . , the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding.

Id. (emphasis added).

In addition, pursuant to 10 C.F.R. § 2.1205(e), where a request for hearing is filed by any person other than the applicant in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

- (1) The interest of the requestor in the proceeding;
- (2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in [§ 2.1205(h)];
- (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and
- (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(d)].

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the Presiding Officer is to determine "that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely." The rule further provides as follows:

The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors—

¹³This section leans heavily on the Staff Response, which offered me a scholarly discussion of the law. I have not taken exception to any of the Staff's views in this section.

- (1) The nature of the requestor's right under the [AEA] to be made a party to the proceeding;
- (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

In order to determine whether a petitioner has met these standards and is entitled to a hearing as a matter of right under section 189a of the Act, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); *Envirocare of Utah, Inc.*, LBP-92-8, 35 NRC 167, 172 (1992).

Further, it has been held that in order to establish standing, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding.¹⁴ *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993); *Envirocare, supra*, 35 NRC at 173.

The United States Supreme Court has recently iterated the "irreducible constitutional minimum" requirements for standing are that the litigant suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991). In addition to this constitutional component of standing, there are "prudential" (i.e., judicially self-imposed) standing requirements, one of which is that the litigant's asserted interests must arguably fall within the "zone of interests" of the governing law. *See Bennett*, 117 S. Ct. at 1167. *See also Port of Astoria v. Hodel*, 595 F.2d 467, 474 (9th Cir. 1979).

The Commission applies the constitutional and prudential aspects of the standing doctrine. *See, e.g., Vogtle*, CLI-93-16, 38 NRC at 32 (to show an interest in the proceeding sufficient to establish standing, a petitioner must

¹⁴ A presiding officer has the authority to approve, deny, or condition any licensing action that comes under his or her jurisdiction. *See, e.g., Sequoyah Fuels Corp.*, LBP-96-12, 43 NRC 290, 296 (1996).

show that the proposed action will cause “injury in fact” to its interest and that its interest is arguably within the “zone of interests” protected by the statutes governing the proceeding); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (citing *Three Mile Island, supra*, 18 NRC at 332).

Requirements for standing have been applied to requests for hearing in numerous informal Commission proceedings held under Subpart L. *See, e.g., Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 66-67 (1994); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 49 (1994); *Babcock and Wilcox*, LBP-93-4, *supra*, 37 NRC at 80-81; *Umetco Minerals Corp.*, LBP-92-20, 36 NRC 112, 115 (1992); *Sequoyah Fuels Corp.*, LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989).

Purely economic interests (i.e., interests not related to harm from adverse environmental impacts of a proposed action are not within the zone of interests protected by the AEA or the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4231 *et seq.*) do not confer standing. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984).

A petitioner must have a “real stake” in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff’d*, ALAB-549, 9 NRC 644 (1979). While the petitioner’s stake need not be a “substantial” one, it must be “actual,” “direct,” or “genuine.” *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *id.*, LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff’d in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

A person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority*

(Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

An organization may meet the injury-in-fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it “derivative” or “representational” standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff’d*, LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member (with standing in an individual capacity) has authorized the organization to represent his or her interests in the proceeding. *Id.*; *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-94, 396 (1979); *Babcock and Wilcox*, LBP-94-4, *supra*, 39 NRC at 50. Finally, an individual who files a request for hearing on behalf of an organization must show that he or she has been expressly authorized by the organization to represent its interests in the proceeding. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); *see also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).¹⁵

The question of whether proximity to a nuclear facility (or a site at which the possession of nuclear materials is authorized) is sufficient to confer standing upon an individual or entity has been addressed in numerous Commission decisions. While residence within 50 miles of a nuclear power reactor often has been sufficient to confer standing in construction permit or operating license proceedings, such distance is not necessarily sufficient to confer standing in other types of proceedings. In reactor license amendment proceedings and materials license proceedings, a petitioner must demonstrate that the risk of injury resulting from the contemplated action extends sufficiently far from the facility so as to have the potential to affect his interests. *See, e.g., Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 99 (1985), *aff’d on other grounds*, ALAB-816, 22 NRC 461 (1985) (risk of injury from proposed

¹⁵ It has also been held that the alleged injury in fact to the member must fall within the purposes of the organization. *Curators of the University of Missouri*, LBP-90-18, 31 NRC 559, 565 (1990).

spent fuel pool expansion was not demonstrated where petitioner resided 43 miles from the facility); *cf. Sequoyah Fuels Corp.*, LBP-94-5, *supra*, 39 NRC at 67-91 (residence adjacent to contaminated fuel fabrication facility might not be sufficient to confer standing if the proposed action has no potential to affect the requester's interests); *Babcock and Wilcox*, LBP-94-4, *supra*, 39 NRC at 51-52 (standing and injury in fact can be inferred in some cases by proximity to the site, but a greater demonstration of injury may be required where the activity has no obvious offsite implications); *Babcock and Wilcox*, LBP-93-4, *supra*, 37 NRC at 83-84 & n.28 (petitioners' residences within one-eighth of a mile to approximately 2 miles from a fuel fabrication facility were insufficient to confer standing in a decommissioning proceeding, absent "some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests"); *see also Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 44-45 (1990) (person who regularly commutes past the entrance to a nuclear facility once or twice a week possessed the requisite interest for standing).¹⁶

While Native Americans have a unique relationship with the federal government,¹⁷ they must satisfy NRC requirements for standing in order to be admitted as a party to an NRC proceeding. *See, e.g. Umetco Minerals Corp.*, LBP-94-18, 39 NRC 369 (1994). The policy that greater participation be afforded minority or low-income groups, Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629, 7630 (Feb. 16, 1994), 3 C.F.R. § 859 (1995), requires that an EIS analyze social and environmental impacts on minority and disadvantaged communities. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-02, 109 (1998), *passim*.

In reviewing affidavits with respect to standing, a decision maker should "avoid 'the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits,'" *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994) (citing *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted)), *aff'd*, CLI-94-12, 40 NRC 64 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 n.10 (1993) (standing

¹⁶ In adopting Subpart L, the Commission considered whether proximity to a materials license facility is sufficient to establish standing. Noting that it had already rejected the 50-mile rule for materials licensing, the Commission further rejected a suggested presumption that persons who reside and work outside a five-mile radius of a materials site would not have standing. The Commission stated, "[t]he standing of a petitioner in each case should be determined based upon the circumstances of that case as they relate to the factors set forth in [10 C.F.R. § 2.1205(g)]." Statement of Consideration, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269 (Feb. 28, 1989); *see also id.*, Proposed Rule, 52 Fed. Reg. 20,089, 20,090 (May 29, 1987).

¹⁷ This unique relationship has limited applicability to this case. This ruling is consistent with the Presiding Officer's Memorandum and Order, LBP-98-5, 47 NRC 119, 136 (1998), *appeal pending*.

requires more than general interests in the cultural, historical, and economic resources of a geographic area), *citing Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

In cases without obvious offsite implications, a petitioner must allege some specific “injury in fact” will result from the action taken. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1980); *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). Petitioners need not specify their concerns in detail until they have been given access to a hearing file. *Babcock and Wilcox*, LBP-94-4, *supra*, 39 NRC at 52.

B. Conclusions About Some Aspects of Standing

It is important to define the scope of this proceeding before determining whether Petitioners suffer from an “injury in fact” or whether “areas of concern” are germane to this proceeding. The Staff’s suggestion concerning the scope of the hearing is:

This proceeding involves the application of HRI to construct and operate facilities for in situ leach uranium mining (also called solution mining) and processing at Church Rock, Unit 1 and Crownpoint sites in McKinley County, New Mexico, in accordance with both a source and byproduct material license issued by the NRC.¹⁸

This is consistent with the Notice of Opportunity for Hearing, 59 Fed. Reg. 56,557 (Nov. 14, 1994). That notice stated, in relevant part:

HRI’s proposal is to lease areas near Crownpoint and Churchrock, New Mexico, and to use existing and new surface facilities in processing plants for extracting uranium from aqueous mining solutions. . . . As documented in the DEIS, the review group determined that the applicant’s proposal to conduct solution mining to extract uranium in the lease areas is generally acceptable. . . . Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing. . . .¹⁹ [Emphasis supplied.]

Because this definition of the proposal includes all the sites, despite restrictions contained in the license, a petitioner may gain standing by alleging that injury in fact will occur from mining conducted at any of the sites.

HRI has taken a different position on standing than the one I have adopted. HRI concludes that the licensing process, which it describes in detail, provides assurance that “there must be no degradation in the safety or environmental

¹⁸ Staff Response at 20.

¹⁹ 59 Fed. Reg. at 56,558.

commitments made in the [COP] or in the approved reclamation plan.”²⁰ It buttresses this argument by pointing to the role of the Environmental Protection Agency under the Safe Drinking Water Act, and it concludes that “*by definition*, HRI’s proposed . . . operations will not harm sources of drinking water.” Thus, HRI takes credit for the regulatory process, even though that process will operate in the future. It is no wonder then that, when HRI applies this standard, it concludes that no petitioner has demonstrated “injury in fact.”

I have concluded that this proceeding must examine the HRI application. It therefore includes *all* the sites at which in situ leach mining is to be conducted, including sites on which radioactive wastes may be discharged. It is my responsibility to determine whether petitioner’s interests are adequately protected. I may not properly delegate that responsibility to the Staff or to the EPA. If necessary facts are not now available because the site has not yet been adequately characterized, then there is a lack of assurance about the impact of this project and there is reason to find injury in fact.

The license sought by HRI (SUA-1508, January 5, 1998) (License) was filed with the Presiding Officer on January 8, 1998, with a cover letter written by Joseph J. Holonich. The license contains conditions imposed by the Staff. Those conditions are binding on HRI

Some of the license conditions imposed by the Staff indicate information the Staff must still be provided before the requested license activities may be authorized. In this regard, I note that Staff has required:

- The licensee shall submit an NRC-approved surety arrangement to cover the estimated costs of decommissioning, reclamation and groundwater restoration;²¹
- Injection well operating pressures shall be maintained at less than formation fracture pressures, and shall not exceed the well’s mechanical integrity test pressure;²²
- Prior to injection of lixiviant in a well field, groundwater pump tests shall be performed to determine if overlying aquitards are adequate confining layers, and to confirm that horizontal monitor wells for that well field are completed in the Westwater Canyon aquifer;²³
- *Prior to injecting lixiviant at a site, or processing licensed material at the Crownpoint site, HRI shall provide and receive NRC acceptance — for that site — information, calculations and analyses to document the adequacy of the design of waste retention ponds and their associated embankments (if applicable), liners, and hydrologic site characteristics. . . .*²⁴ [Emphasis added.]

²⁰ HRI Response at 10-11.

²¹ License at 2; *see also id.* at 3 (updated surety arrangement also required).

²² *Id.* at 4 (§ 10.3).

²³ *Id.* at 8 (§ 10.23).

²⁴ *Id.* (§ 10.26).

- *Prior to the injection of lixiviant at the Crownpoint site, the licensee shall . . . [make changes in the water supply system for Crownpoint. These changes include capping existing water wells and finding replacement wells that will provide the same quality of water.]*²⁵ [Emphasis added.]

I note that these licensing conditions, particularly the last two, indicate that the experts working for the Staff have not yet been persuaded by the licensee that it already has the information with which to design and implement safe, environmentally appropriate operations. The Staff is waiting for further information about this site before it exercises its discretion about whether to permit either injecting lixiviant at a site or the processing of licensed material.

Petitioners are not confident that the Crownpoint water supply will be adequately protected, as the design of the project is far from complete. Petitioners are not required to rely on the good will of HRI, the future decisions of the Staff of the Nuclear Regulatory Commission, or the staff of the Environmental Protection Agency. Petitioners who demonstrate that they rely on water supplies adjacent to the in situ leach mining project have a right to a hearing. They may challenge this project based on reasonably specific operating plans, which are not yet developed. Because knowledge of the relevant rock formations is still rudimentary and plans are incomplete, there are enough reasonable doubts to establish “injury in fact.” I have determined that, for the purpose of determining standing, anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites has suffered an “injury in fact.”

In making a determination of standing, I have exercised my discretion not to examine whether Petitioners have complied with state affidavit requirements concerning their statements of residence or injury in fact. It is enough that individuals and groups have filed these pleadings, whose veracity is assured both by the honor of the people making the statements and by legal penalties for false statements to a government agency. Thus, I have determined that these statements satisfy the requirement that groups disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979) (at 396, the Appeal Board required a “specific representational authority” without mentioning a need for an affidavit); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 23 (1996) (accepting a list of members’ names and addresses — part of the “Corrected

²⁵ *Id.* at 9 (§ 10.27A). This section also requires coordination with all the appropriate agencies and regulatory authorities.

Request'' — as the basis of standing for one party, without mentioning that the list was in affidavit form).

The following Table summarizes my determinations about the admission of parties:

**REASONS GOVERNING STANDING OF PARTIES
(Preliminary to Examining Areas of Concern)**

| Party | Organizational Purpose | People Represented | Injury in Fact²⁶ (one or more) | Admit?²⁷ |
|--------------|---|---|--|----------------------------|
| ENDAUM | To protect drinking water and livestock from radiological and nonradiological contaminants ²⁸ | Larry King Mitchell Capitan Herbert Enrico Grace A. Tsosie Calvin Murphy [Bernadine Martin: no finding about injury in fact] ²⁹ | Use water, live 1/2 mile from uranium processing, graze livestock on land abutting Churchrock and Unit 1 | Yes |
| SRIC | Provides public information on the environment, including development of uranium under Indian lands ³⁰ | Raymond Morgan LaLora Charles ³¹ | Use water | Yes |
| ZMC | Environmental group | None (no authorization to represent anyone ³²) | — | No |

(Continued)

²⁶I have determined that an "injury in fact" is suffered by anyone using water from the Crownpoint water supply or grazing animals in close proximity to one of the areas used for injection mining or application of waste.

²⁷My determinations are based solely on injury to represented individuals. HRI would not have me admit any parties. Staff agrees with my determinations except with respect to SRIC and to Marilyn Sam and Grace Sam; Staff would not admit those Petitioners as parties.

²⁸E/S Second Amended Request at 7.

²⁹See Letter of Bernadine Martin, December 13, 1994, Exhibit B, ENDAUM Response (March 20, 1995); Exhibits Attached to the Motion of Eastern Navajo Diné Against Uranium Mining to Respond to the Request of Hydro Resources Inc. to Deny All Petitions for an Evidentiary Hearing (ENDAUM's Motion/Response).

³⁰E/S Second Amended Request at 8.

³¹*Id.* at 9-11.

³²Zuni Mountain Coalition (ZMC), February 13, 1995. This letter mentions that Mr. Mervyn Tilden is a ZMC board member, but it does not contain Mr. Tilden's authorization to represent him.

REASONS GOVERNING STANDING OF PARTIES (Continued)
(Preliminary to Examining Areas of Concern)

| Party | Organizational Purpose | People Represented | Injury in Fact²⁶ (one or more) | Admit?²⁷ |
|--|--|--|--|----------------------------|
| WIN ³³ | Environmental organization | None | — | No |
| Diné CARE | The purposes of the organization are not described | None (no authorization to represent anyone ³⁴) | | No |
| Mervyn Tilden ³⁵ | N.A. | Self | Vague claims of water use (discussed below) | No |
| Eastern Navajo Allottees ³⁶ | To promote and preserve mineral leases with Licensee | Many people filed affidavits of authorization | Injury if the license is denied | No (not timely) |
| Marilyn Sam, Grace Sam | N.A. | Selves | Use of water | Yes ³⁷ |

The Eastern Navajo Allottees represent individuals who have sold mineral rights to Licensee. I have decided to deny them standing in this proceeding because their petition is untimely. *See* pp. 278 ff.

Mr. Mervyn Tilden made vague claims of use of water. Specifically, as the Staff accurately summarized in its Response,

On February 15, 1995, Mr. Tilden submitted an amended hearing request.³⁸ Together, [Mr. Tilden's] . . . December 1994 and February 1995 letters make the following factual claims relevant to Mr. Tilden's standing: (1) Mr. Tilden lives in a house he owns in Church Rock, New Mexico, about five miles south of HRI's Churchrock mining site (on land held in trust by the United States for the Navajo Nation); (2) he uses the areas in which HRI proposes to

³³ Water Information Network Letter of December 14, 1994, attached to the Memorandum from John C. Hoyle to B. Paul Cotter, Jr., December 16, 1994.

³⁴ Letter for Diné CARE, December 14, 1994. It is not clear whether Diné CARE is seriously interested in participating in a formal proceeding.

³⁵ Mr. Tilden's letter of February 15, 1995, was sent by facsimile transmission from the Zuni Mt. Coalition, but it does not state that Mr. Tilden authorizes the coalition to appear for him. Mr. Tilden appears to want to appear for himself. For reasons discussed below, I find that Mr. Tilden does not have standing.

³⁶ Eastern Navajo Allottees Association, Petition for Leave to Intervene, January 5, 1998.

³⁷ Marilyn Sam and Grace Sam filed a letter on December 14, 1994. I find that the letter presents sufficient ground for standing. However, these people have not filed any documents since the SER and EIS were filed, and they may not be interested in appearing as a party in a public hearing. Consequently, I will require them to state in writing whether or not they choose to participate in the hearing.

³⁸ The letter from Mr. Tilden, dated February 15, 1995, was not made part of the formal files until March 4, 1998.

mine for recreational, occupational,³⁹ and spiritual purposes, and on occasion he eats “meat from animals that may graze on and around the Church Rock site” (Tilden 1994 letter, at 1); and (3) he uses drinking water from “area aquifers.”

After reviewing Mr. Tilden’s areas of concern, I agree with the Staff that Mr. Tilden has not shown any “plausible or realistic way by which radiological harm could occur specifically to Mr. Tilden.” Had Mr. Tilden demonstrated that he would continue to use water from the Crownpoint water supply, that would be enough to provide a basis for standing. However, much of the area Mr. Tilden says he has used will be fenced off by HRI and it is not at all clear that he is personally at risk because he or his livestock will continue to drink or use water from Crownpoint or another arguably affected well.

I have determined that individuals who use water nearby to the HRI site have established standing because of the personal risk to them. Accordingly, it was not necessary to determine whether any petitioner should be considered to have suffered injury in fact due to any other interest. Failure to consider these additional grounds is not a commentary on their sufficiency. One application of this rule is that ENDAUM’s standing was affirmed because four individuals used water that could be affected by in situ injection mining. Since these individuals met the tests for standing, it became irrelevant whether or not Bernadine Martin was considered to have established grounds for standing. Consequently, there is no purpose in analyzing more closely some of her assertions, which go beyond safe drinking water. There is no current controversy concerning whether Bernadine Martin suffered injury in fact. If her standing becomes relevant at some later time, it may be considered on another day.

C. Timeliness

I find that the petitions of ENDAUM, SRIC, and Grace and Marilyn Sam are timely. As the Staff has indicated, at 33 n.31, of its Response to Requests for Hearing:

ENDAUM and SRIC requested permission to replace all of their previously filed petitions and concerns in order to avoid confusion (E/S Second Amended Request at 1-2). They alleged that their previous request was filed by Bernadine Martin in December 1994 (on behalf of citizens who later adopted the name ENDAUM), by the SRIC Request and the ENDAUM Motion/Response late-filed on February 15, 1995. Inasmuch as ENDAUM was organized after the deadline for hearing requests, a member filed timely, the proceeding was held in abeyance, and the second amended filing was after consultation with counsel and experts, the Staff does not oppose these filings on lateness grounds since it is apparent

³⁹In this regard, he travels on local roads in his duties as a journalist and local community activist.

the delays were excusable and did not unduly prejudice HRI or the Staff. *See* 10 C.F.R. § 2.1205(k)(1).

For reasons stated by the Staff, I find that ENDAUM is a successor in interest to Bernadine Martin, who filed a timely petition. Subsequent amendments, including amendments to describe injuries to other members, do not make these petitions late. In addition, I find that the second amended filing may be received; it represents changes made after conferring with counsel and experts and it has not delayed the proceeding.

Of the participants now before us, only the Eastern Navajo Allottees Association (Allottees) filed its intervention petition out of time. Its intervention petition was submitted more than 3 years beyond the deadline specified in the agency's November 14, 1994 notice of opportunity for hearing. *See* 59 Fed. Reg. at 56,557. Allottees therefore must demonstrate that *both* factors in 10 C.F.R. § 1205(l)(1) weigh in favor of permitting late filing.⁴⁰ For the reasons outlined below, we find Allottees has failed to meet its burden in this regard.

On the first factor — excusable delay — Allottees fail to make a persuasive showing. Allottees make no assertions regarding the adequacy of the agency's notice in the *Federal Register*. That notice generally is considered constructive notice to all residents of the United States. *See* 44 U.S.C. § 1508. Allottees claim that they “recently became aware of bulky filings made on behalf of ENDAUM and Southwest Resource Information Center (“SRIC”) which . . . greatly distort and misrepresent the record established by the FEIS for HRI's project.” Although Allottees do not mention it, the filing to which they refer appears to have been made on August 19, 1997, fully 5 months prior to the Allottee's filing. Thus, neither the 3-year delay nor the 5-month delay has been adequately explained. Under 10 C.F.R. § 2.1205(l)(1), that is the end of my inquiry. Allottees may not be admitted as a party. Accordingly, under 10 C.F.R. § 2.1205(l)(2), Allottees' request will be treated as a petition under 10 C.F.R. § 2.206 and referred for appropriate disposition.

III. CONCLUSIONS ABOUT “AREAS OF CONCERN”

Pursuant to 10 C.F.R. § 2.1205(e), where a request for hearing is filed by any person other than the applicant in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

⁴⁰ Although there apparently is no definitive authority on whether a filing seeking discretionary intervention submitted beyond the deadline for filing intervention petitions must meet the late-filing standards, we find nothing in the general terms of 10 C.F.R. § 2.714 governing intervention petitions that would exempt a discretionary intervention request from its late-filing provisions.

(3) The requestor's area of concern about the licensing activity that is the subject matter of the proceeding; . . .

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the Presiding Officer is to determine “that the specified areas of concern are germane to the subject matter of the proceeding” Any area of concern is germane if it is relevant to whether the license should be denied or conditioned. For example, a concern about the quality of water is germane if HRI's project, including activities that require further NRC or EPA approval, could affect it. If a petitioner alleges a deficiency in the EIS, then that concern is germane. If a petitioner alleges a deficiency in the method for monitoring to detect excursions, then that concern is germane. It is not necessary to determine the merits of a concern in order to determine that it is germane.

Assuredly, this standard differs from assessments of “contentions” in formal proceedings. The informal standard is far easier to meet. In this regard, I consider HRI to be too rigorous in its arguments about the admission of areas of concern.⁴¹

At this stage of the proceeding, the admission of an area of concern is fairly straightforward. The consequence of admitting an area of concern may be limited because I will propose that, after the Staff makes the Hearing File available and, subsequently, after substantial relevant information becomes available, Intervenors must demonstrate that they have identified contentions that would be admissible under 10 C.F.R. § 2.714(b)(2) before they will be permitted to make full written filings offering proof. Accordingly, I will briefly analyze areas of concern presented by the parties, beginning with the following table, which summarizes the areas of concern of ENDAUM and SRIC and states whether they appear to be germane to this proceeding:

Areas of Concern

Germane?

License application is disjointed, incoherent, and contradictory⁴²

No. This is not an objection to the action that will be licensed. This concern may be discussed with the Staff, which may consider how to improve the orderliness of the hearing record that it will assemble and file.

Deferrals of important safety issues⁴³

No. This may be a reason for keeping our record open or for other procedural relief.

⁴¹ See HRI's Response at 33-34.

⁴² ENDAUM and SRIC's Motion for Leave to Amend, etc., August 19, 1997 (ENDAUM Petition to Amend) at 17-28.

⁴³ *Id.* at 29-30.

| Areas of Concern | Germane? |
|--|--|
| Performance-based licensing ⁴⁴ | Yes. See footnote. ⁴⁵ |
| Degradation of the Crownpoint and Church Rock water supplies, threatening public health and violating the Safe Drinking Water Act (SDWA) ⁴⁶ | Yes. |
| Inadequate monitoring for excursions, not in compliance with Staff Technical Position WM-8102 and speculative because of uncertain ore body geometry ⁴⁷ | Yes. |
| Improper guidance defining excursions, resulting in inadequate protection of drinking water ⁴⁸ | Yes. |
| Inadequate groundwater restoration standards (restore to baseline water quality or ‘‘as close as feasible’’) ⁴⁹ | Yes. |
| Failure to demonstrate that adequate restoration (particularly for U-236 and uranium) can be achieved ⁵⁰ | Yes. |
| Failure to protect groundwater from liquid waste disposal ⁵¹ | Yes. |
| Improper uranium drinking water standards ⁵² | Yes. This appears to be solely a legal question requiring briefing. |
| Failure to obtain proper permits from the Navajo nation ⁵³ | Yes. Proper local permits must be obtained. 10 C.F.R. § 20.2007; Materials License § 9.14. |

⁴⁴*Id.* at 30-32.

⁴⁵*Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-94 (1993). (An injury alleged to occur because of a change in agency procedure may be the basis for a contention or, by inference, an area of concern.)

⁴⁶ENDAUM Petition to Amend at 33-48, 70-75.

⁴⁷*Id.* at 49-53, 54-58, 60-61.

⁴⁸*Id.* at 53.

⁴⁹*Id.* at 59-60, 61-67.

⁵⁰*Id.* at 67-69.

⁵¹*Id.* at 76-95.

⁵²*Id.* at 89.

⁵³*Id.* at 90, 92, *passim*.

| Areas of Concern | Germane? |
|--|--|
| Failure to “clearly demonstrate” that groundwater will be protected from liquid waste disposal facilities (Appendix A to 10 C.F.R. Part 40) ⁵⁴ | Yes. |
| Inadequate financial surety for the proposed restoration and reclamation plan ⁵⁵ | Yes. |
| HRI not qualified by experience and training ⁵⁶ | Yes. ⁵⁷ |
| Failure to comply with regulations and with Regulatory Guide 3.46 concerning shipping radioactive or hazardous materials ⁵⁸ | Yes. |
| Inadequate air emissions control and the effect of recirculating radon in the mining solution ⁵⁹ | Yes. |
| Violation of the National Historic Preservation Act by not identifying historic properties or consulting with the Navajo Nation Historic Preservation Department ⁶⁰ | Yes. This issue is primarily legal, not factual. |
| Violation of the Native American Graves Protection Act by failing to comply with consultation and concurrence requirements ⁶¹ | Yes. This issue is primarily legal, not factual. |
| Incomplete information in the EIS on the risk of adversely affecting drinking water ⁶² | Yes. |
| Incompleteness of the EIS because of the lack of detailed design information ⁶³ | Yes. |

⁵⁴ *Id.* at 90-95.

⁵⁵ *Id.* at 96-101.

⁵⁶ *Id.* at 102-05.

⁵⁷ The SER, of December 4, 1997, at 3-8, appears to rely on an organizational plan and a set of minimum position qualifications to assure qualification by experience or training. The information presented by ENDAUM does not specify why this is inadequate. Its information appears to be relevant to some of its other concerns, such as the difficulty of adequate restoration, but it may have to find more specific evidence in order to support its claim about lack of qualifications or character. In particular, its allegations about URI do not seem to be adequately documented to justify adjudicating that complex collateral issue.

⁵⁸ ENDAUM Petition to Amend at 106-08.

⁵⁹ *Id.* at 109-15.

⁶⁰ *Id.* at 116-26.

⁶¹ *Id.* at 127-31.

⁶² *Id.* at 132-39, 141-51.

⁶³ *Id.* at 140-41.

Areas of Concern

Failure of the EIS to consider the risk of adverse impacts on the project from a downturn in the market for uranium, failure to complete adequate cost/benefit analysis, and miscellaneous matters⁶⁴

Violation of U.S. trust obligations to the Navajo Nation and its members.⁶⁵

Germane?

Yes.

No. This area of concern is redundant. On its face, it rests on each of the other concerns. By handling the other concerns, this area is resolved.⁶⁶

Marilyn and Grace Sam (the Sams) have been admitted as parties, subject to their confirming their interest by letter. To the extent that the concerns of the Sams are identical to ENDAUM's, those concerns have been found to be germane.

The Sams allege that, "The Project's transportation of contaminated materials by truck over long distances threatens the safety of people living, working, and traveling in the area, including us."⁶⁷ This area of concern is germane. After the hearing record is filed, the Sams will need to show either that the EIS does not adequately cover this issue or that there are ways that the protection of the public is not adequate even though the shipping containers, which must conform with government safety regulations, are designed to withstand accidents without releasing radioactive materials.

The Sams are concerned that this proposal "does not address how existing contamination of the area on and around the Church Rock site will be cleaned up."⁶⁸ That concern is not germane to this proceeding. HRI may not unduly damage the environment. Unless there is some project-related reason, a licensee is not required to clean up problems that it did not create.

The Sams also allege that, "Accidents during mining and processing of the uranium would pose a threat to people present in the area around the Project site."⁶⁹ This area of concern is germane but undocumented. After the Hearing File is made available, the Sams will need to show that there are one or more problems in the Licensee's procedures that unnecessarily create radiation risks to people around the Project site. I do not now know of any problems of this nature.

³³ *Id.* at 152-83.

³³ *Id.* at 184-86.

³³ This ruling is consistent with the Presiding Officer's Memorandum and Order, LBP-98-5, 47 NRC at 136.

⁶⁷ Letter of Grace Sam and Marilyn Sam, December 14, 1994 (attached to Memorandum from John C. Hoyle to B. Paul Cotter, Jr., December 16, 1998).

⁶⁸ *Id.* at 2.

⁶⁹ *Ibid.*

Finally, the Sams allege that, “Approval of the Project would further complicate the jurisdictional dispute between the Navajo Nation . . . [and others].”⁷⁰ This concern is not germane. This project will be completed if it is appropriate under the law. It is not acceptable for me to reject or modify a project because it will cause controversy.

In this proceeding, I may consolidate parties. 10 C.F.R. § 2.1205(m). Pursuant to this authority, I suggest to Marilyn and Grace Sam that, if they desire to continue as a party, they confer with the other Intervenors so that their efforts may be coordinated in order to avoid unnecessary duplication.

IV. PLAN FOR THIS PROCEEDING

This proceeding has the potential to be complex, contentious, and expensive. The purpose of this section of this Memorandum is to provide a blueprint, which may be improved by motion, to make this proceeding both fair and effective.

I have identified the following ways that the parties may cooperate in avoiding unnecessary expense and simplifying my task so that I can effectively attend to the merits of this controversy:

- Individual parties, or a group of parties who have consulted together, may nominate legal issues that may be decided by legal briefs rather than by factual presentations. To facilitate decisions based on legal briefs, the parties may consider reaching brief factual stipulations.
- Intervenors may confer to decide how they can best cooperate to present their case to the Presiding Officer clearly and without unnecessary redundancy or duplication. They should provide the Presiding Officer with the result of their conference.
- The parties may confer with the Staff about the ENDAUM and SRIC “concerns” about having an orderly record, so that the Staff may organize the record in a manner that is useful to the parties. Whenever feasible, the record should be made available in a form that can be searched by computer by the parties and the Presiding Officer.
- Whenever feasible, the parties should make their filings available in a form that can be searched by computer by the parties and the Presiding Officer.
- HRI and the Staff will file a schedule providing that, subsequent to the time the Hearing File is made available, the Presiding Officer and the parties will be informed as early as feasible about substantial new information that is developed by HRI or the Staff. If necessary, Licensee

⁷⁰ *Ibid.*

and Staff may propose the use of a protective order covering early release of information.

- The parties may confer on a realistic set of targets for completing the different phases of this case and for completing the entire case.
- The parties may conduct exploratory talks to determine whether their interests may be met through a settlement of this case.⁷¹ I would be pleased to facilitate these discussions, providing they will be held in a public forum. If the parties prefer to negotiate in private, they may request the appointment of a settlement judge to assist them in their efforts; or they may request special permission from the Commission for me to assist them in private discussions. I assure the parties that I can participate in mediation and then, if the negotiations fail, disregard all facts that are not in the record.
- I encourage the parties to confer together to develop innovative ideas that may increase the fairness and efficiency of this proceeding.
- A telephone prehearing conference will be held at 2:00 p.m. EDT on May 28, 1998. Parties may present agreements or separate views on the scheduling of the case or on procedures suggested in this Memorandum. The telephone conference is scheduled to last for 2 hours, subject to change as required.
- After the hearing record is made available, I plan to come to New Mexico for a site visit and second prehearing conference concerning the narrowing of litigable issues. In the evening after the first session of the prehearing conference, I plan to ask members of the public to address me for no more than 6 minutes each. These presentations will not be on the record and cannot be considered in the determination of this case, but they will permit me to become familiar with local sentiment. If important substantive concerns come to my attention, I may ask that a party provide a response for the record.
- The following schedule specifically relates to facts contained in the hearing record. Additionally, the schedule contains time spans that are proposed for implementation as significant additional facts are added to the hearing record. These deadlines and steps are established tentatively, subject to discussion with the parties at the telephone prehearing conference:

⁷¹In HRI's Response to the Navajo Nation's Motion, filed before the Commission on May 4, 1997, HRI acknowledged on pages 3-4:

. . . HRI understands that it is embarking on a long-term project that will require the continued support of New Mexico and the Navajo Nation, and therefore [HRI] plans to cooperate fully with both sovereigns on *all regulatory issues*, not just those involving cultural resources.

Thus, HRI acknowledges a possible basis for fruitful settlement negotiations both with interested governments and with its neighbors who have become parties to this case.

Tentative Schedule for Case

| | |
|--|--|
| June 13, 1998 ⁷² | The service list shall <i>receive</i> the hearing file from the Staff. |
| 28 days after facts become available ⁷³ | <i>Proposed for discussion as a case management tool:</i> The service list shall receive from Intervenors contentions that are based on the hearing record, in its present state, and that meet the requirements of 10 C.F.R. § 2.714(b)(2). Intervenors may also file on this date a clear statement concerning alleged deficiencies in the hearing record or questions they request the Presiding Officer to ask of Licensee or the Staff. |
| 49 days after facts become available | The service list shall receive from the Licensee its response to Intervenor filings and questions it may wish the Presiding Officer to ask of the Intervenors. |
| 56 days after facts become available | The service list shall receive from the Staff its response to Intervenor filings. |
| 77 days after facts become available | The service list shall receive from the Presiding Officer his rulings on Intervenor filings |
| 107 days after facts become available | The service list shall receive from the Intervenors their written filings, in conformance with 10 C.F.R. § 2.1233. |
| 128 days after facts become available | The service list shall receive from the Licensee its written filings, in conformance with 10 C.F.R. § 2.1233. |
| 135 days after facts become available | The service list shall receive from the Staff its written filings, in conformance with 10 C.F.R. § 2.1233. |
| 165 days after the last significant facts become available | The service list shall receive from the Presiding Officer his decision deciding this case. (This date is, of course, subject to extension for cause.) |

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 13th day of May 1998, ORDERED, that:

1. The following parties are admitted:
 - Eastern Navaho Diné Against Uranium Mining (ENDAUM),
 - Southwest Research and Information Center (SRIC),
 - Marilyn Sam and Grace Sam.

⁷²Filings should be received on the first business day following a deadline that falls on a nonbusiness day.

⁷³The first available facts will be in the Hearing File. That file will be supplemented from time to time as substantial new information becomes available.

2. The following petitions are denied: the Zuni Mountain Coalition (ZMC), Diné CARE, Mervyn Tilden, Water Information Network (WIN), and the Eastern Navajo Allottees.

3. Marilyn Sam and Grace Sam shall, on or before May 26, serve their statement that they wish to participate as a party to this proceeding. If they do not serve a timely statement, I will assume that they are not interested in participating as a party. If they are not a party, they may participate in making a limited appearance before me when that becomes appropriate.

4. A prehearing conference will be held by telephone at 2:00 p.m. EDT on May 28, 1998. The parties are required to notify the Presiding Officer in advance of the telephone number to use in reaching them and they are required to attend. Parties may present agreements or separate views.

5. Ruling on Areas of Concern, set forth beginning on p. 280, are adopted.

6. The petition of the Eastern Navajo Allottees is referred to the Staff of the Nuclear Regulatory Commission for appropriate disposition under 10 C.F.R. § 2.206.

7. The Staff shall make the Hearing File available pursuant to 10 C.F.R. § 2.1231(a).

8. Motions for reconsideration of this Order may be filed no later than 10 days from the date stamped on the first page of this Memorandum and Order as the date of service.

9. Within 10 days of the service of this Order, appeals may be filed by parties that have been dismissed or by parties objecting to the granting of a petition to intervene pursuant to 10 C.F.R. § 2.1205(o). Parties filing motions for reconsideration regarding their dismissal as parties may defer filing an appeal until after the motion for reconsideration has been determined.

BY THE PRESIDING OFFICER

Peter B. Bloch
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

May 18, 1998

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board rules on motions for reconsideration and/or clarification of its decision in LBP-98-7, 47 NRC 142 (1998), admitting parties and contentions.

LICENSING BOARD(S): RESPONSIBILITIES (EXPLANATION OF REASONS FOR DECISION OR RULING)

RULES OF PRACTICE: CONTENTIONS (EXPLANATION OF REASONS FOR RULING ON ADMISSIBILITY); DECISIONS OR RULINGS (EXPLANATION OF REASONS)

In the context of the record before the presiding officer, including the arguments of the participants, if the presiding officer's reasons for rejecting an intervenor's contentions "may reasonably be discerned," *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transportation, Inc. v.*

Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974)), the presiding officer has provided an adequate explanation for that decision.

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR FIRST TIME

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING MATTERS FOR FIRST TIME)

If a party seeks to rely on information as a basis for admitting or rejecting a contention that clearly falls outside the stated scope of its original arguments, this is an impermissible ground for seeking reconsideration. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) (reconsideration motions may not rest on a “new thesis”).

MOTION FOR RECONSIDERATION: RAISING INHARMONIOUS RULINGS

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING INHARMONIOUS RULINGS)

When similar aspects of other contentions have been rejected, consistency concerns counsel that the presiding officer consider a renewed argument regarding a comparable component of an admitted contention to ensure the presiding officer has not overlooked a similar matter. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983) (reconsideration asks that the deciding body take another look at existing evidence because evidence has been misunderstood or overlooked).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION; NEED TO EXPLAIN SIGNIFICANCE OF SUPPORTING DOCUMENTS)

Attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991).

MEMORANDUM AND ORDER
(Ruling on Motions for Reconsideration of LBP-98-7)

Four of the parties to this proceeding, Intervenors Ohngo Gaudadeh Devia (OGD) and the State of Utah (State or Utah), Applicant Private Fuel Storage, L.L.C. (PFS), and the NRC Staff have filed motions requesting reconsideration and/or clarification of portions of our rulings in LBP-98-7, 47 NRC 142 (1998). *See* Motion and Memorandum of [OGD] Requesting Reconsideration of Contentions (Apr. 29, 1998) [hereinafter OGD Reconsideration Motion]; [State] Motion for Clarification and Reconsideration of LBP-98-7 (May 6, 1998) [hereinafter State Reconsideration Motion]; Applicant's Motion for Reconsideration and Clarification (May 6, 1998) [hereinafter PFS Reconsideration Motion]; NRC Staff's Motion for Partial Reconsideration of LBP-98-7 (May 6, 1998) [hereinafter Staff Reconsideration Motion]. In addition, these parties, as well as Intervenors Castle Rock Land & Livestock, L.C., and Skull Valley Co., Ltd. (collectively Castle Rock), have filed pleadings in response to these motions. *See* [OGD] Response to Applicant's Motion for Reconsideration of Contentions (May 11, 1998) [hereinafter OGD Reconsideration Response]; State's Response to Motions for Reconsideration (May 13, 1998) [hereinafter State Reconsideration Response]; [Castle Rock] Response to Motion for Reconsideration (May 13, 1998) [hereinafter Castle Rock Reconsideration Response]; Applicant's Response to NRC Staff, [State], and OGD Motions for Reconsideration and Clarification (May 13, 1998) [hereinafter PFS Reconsideration Response]; NRC Staff's Response to Motions for Reconsideration of LBP-98-7, Filed by the Applicant, the [State] and [OGD] (May 13, 1998) [hereinafter Staff Reconsideration Response].

As is detailed below, we grant in part and deny in part the reconsideration/clarification request of PFS, and deny the requests of OGD, the State, and the Staff.

I. COMMON ISSUES

A. Licensing Board's Contention Admissibility Explanations

In their motions, various parties raise two "common" issues. Both OGD and the State assert, with the Staff's apparent acquiescence, that the Board's explanation of its reasons for rejecting some of their contentions is too terse and requires further explication. *See* OGD Reconsideration Motion at 2 n.1; State Reconsideration Motion at 2-6; Staff Reconsideration Response at 3-4. We do not agree. In the context of the record before us, including the arguments of the participants, our reasons for rejecting their contentions "may reasonably be

discerned,''' *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974)), from our April 22, 1998 issuance and so are adequate. We also note in this regard that their reliance on authority relating to "initial decisions" is not applicable to our nonmerits determination of whether their contentions meet the agency's procedural admissibility threshold.

B. Utah B

For their part, both PFS and the Staff assert that our admission of contention Utah B relating to licensing of the Rowley Junction intermodal transfer point (ITP) was in error. *See* PFS Reconsideration Motion at 2-5; Staff Reconsideration Motion at 2-10. They contend that, notwithstanding the unresolved question of the PFS role in operating the ITP, there is no basis for concern because the coverage afforded under 10 C.F.R. Part 71 to Commission "licensees" and common or contract "carriers" relative to the transportation of nuclear materials will not leave a regulatory gap. The State disagrees, asserting the contention raises unresolved legal and factual issues. *See* State Reconsideration Response at 2-8.

We see nothing in the arguments of PFS and the Staff that gives us cause to dismiss what appears to be essentially a legal contention at this nonmerits stage of the proceeding.¹ Accordingly, as they relate to Utah B, their reconsideration requests are denied.

II. INDIVIDUAL PARTY ISSUES

In addition to these "common" issues, OGD, the State, and PFS also seek reconsideration or clarification of matters relating to the Board's rulings on certain specific contentions whose admission they either sponsored or opposed. We address these matters below.

A. OGD Reconsideration Requests

OGD seeks reconsideration of our decision rejecting three of its contentions, OGD B, OGD J, and OGD N. As to each, it again asserts there was sufficient basis to support admission. *See* OGD Reconsideration Motion at 2-6. The Applicant opposes all three requests as does the Staff, notwithstanding its original position that OGD J was admissible. *See* PFS Reconsideration Response at 23-30; Staff Reconsideration Response at 6-11.

¹ They are, of course, free to renew their arguments in summary disposition motions at the appropriate time.

1. OGD B

With regard to OGD B, to the extent OGD now seeks to rely on emergency planning at the ITP as a basis for its contention, this clearly falls outside the stated scope of its original contention, making it an impermissible ground for seeking reconsideration. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) (reconsideration motions may not rest on a “new thesis”). And as to its assertions the Applicant is not in compliance with the offsite notification and coordination requirements of 10 C.F.R. § 72.32 and the provisions of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050, OGD provides nothing that causes us to change our initial ruling that in this regard the contention and its supporting bases failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. *See LBP-98-7, 47 NRC at 226-27.*

2. OGD J

Regarding OGD J, which concerns the purported failure of PFS to comply with all permits, licenses, and approvals required for the facility, the only stated basis for the contention other than the purported “trust responsibility” rationale rejected by the Board is found in the first sentence of the contention’s basis. OGD has presented nothing that leads us to revise our conclusion the contention and this stated basis failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. *See LBP-98-7, 47 NRC at 231.*

3. OGD N

As for OGD N, which involves allegations of water supply contamination and water table depletion, as the Staff points out, much of the information cited by OGD is new and thus cannot provide the appropriate basis for a reconsideration request. *See Claiborne, CLI-97-2, 45 NRC at 4.* Moreover, nothing presented in the reconsideration motion, whether old or new, gives us pause to change our ruling that the contention and its supporting bases failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. *See LBP-98-7, 47 NRC at 232.*

B. State of Utah Reconsideration Requests

As with OGD, the State seeks reconsideration of our rejection of three of its contentions, Utah J, Utah W, and Utah CC. *See* State Reconsideration Motion at 6-20. PFS and the Staff oppose all three requests. *See* PFS Reconsideration Response at 8-23; Staff Reconsideration Response at 4-5.

1. Utah J

In connection with Utah J, which concerns canister and fuel cladding inspection and maintenance, the State asserts that in finding this contention inadmissible as an impermissible challenge to agency regulatory requirements or generic determinations, the Board's reliance on PFS arguments regarding canister inspection and repair, in particular its citation of 59 Fed. Reg. 65,898, 65,901 (1994), was misplaced. Also, the State declares PFS has failed to comply with the requirements of 10 C.F.R. §§ 72.122(f), 72.128(a)(1) by not proposing a "design" feature that would allow onsite inspection and maintenance of canisters and cladding.

While significant portions of the State's reconsideration claims appear to be based on new materials, and thus inappropriate, *see Claiborne*, CLI-97-2, 45 NRC at 4, ultimately nothing it presents gives us cause to revise our determination regarding this contention. As both PFS and the Staff have documented, the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations and/or lack adequate factual or expert opinion support. *See* LBP-98-7, 47 NRC at 189-90.

2. Utah W, Paragraphs One, Three, Four, and Five

The State seeks reconsideration of our rejection of paragraphs one, three, four, and five of contention Utah W, which asserts generally that the PFS facility creates other adverse impacts not considered in the Applicant's Environmental Report, on the grounds that our rejection of these paragraphs is inconsistent with our rulings admitting other contentions. Indeed, the bases for these paragraphs reference other contentions we have admitted, specifically Utah K, Utah L, Utah N, and Utah T.

The fatal flaw in the State's original claim was its apparent assumption that the admission of a safety issue concerning the adequacy of specific portions of the Applicant's Safety Analysis Report or the need for permits or approvals that may relate to safety or other matters a fortiori creates a companion environmental issue. With regard to each of these paragraphs, having failed to make a specific, adequately supported showing that an admissible safety or other issue portends unanalyzed (or inadequately analyzed) but cognizable environmental

impacts, they were inadmissible as failing to establish with specificity any genuine dispute; lacking adequate factual or expert opinion support; and/or failing properly to challenge the PFS application. *See* LBP-98-7, 47 NRC at 201-02. The State presents nothing in its reconsideration request that causes us to revise this ruling.

3. *Utah CC*

In seeking reconsideration of Utah CC, which asserts the PFS Environmental Report presents a one-sided cost benefit analysis, in addition to relying on the type of a fortiori “admission of other contentions” analysis we have rejected in section II.B.2 above, the State also asserts that the Commission’s discussion of the adequacy of a “no-action alternative” analysis in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97-99 (1998), requires admission of this contention.

Whatever relevance the Commission’s *Claiborne* analysis of the “no-action alternative” has for the State’s admitted no-action alternative contention, Utah Z, we are unable to find it provides any basis for the admission of this contention. As we noted in LBP-98-7, 47 NRC at 204, the problem for the State with regard to this contention is its failure to establish with specificity any genuine dispute; to provide adequate factual or expert opinion support; and/or to properly challenge the PFS application. Once again, nothing in the State’s reconsideration request gives us any reason to question our ruling in this regard.

C. PFS Reconsideration Requests

For its part, PFS seeks reconsideration or clarification relative to seven contentions, some of which encompass consolidated portions of contentions from other parties.

1. *Utah E/Castle Rock 7/Confederated Tribes F, Paragraphs Seven and Ten*

PFS first asks for reconsideration of the admission of two paragraphs, seven and ten, of consolidated contention Utah E/Castle Rock 7/Confederated Tribes F, which concerns the adequacy of PFS’s financial qualifications to construct and operate the proposed Skull Valley facility. *See* PFS Reconsideration Motion at 5-9. The State, Castle Rock, and the Staff oppose the first request, while the Staff, which originally did not oppose the portions of the unconsolidated Utah, Castle Rock, and Confederated Tribes contentions we admitted, now supports the Applicant’s request regarding paragraph ten. *See* State Reconsideration

Response at 8-13; Castle Rock Reconsideration Response at 1-5; Staff Reconsideration Response at 12-13.

We deny the reconsideration request for paragraph seven concerning the Applicant's showing regarding the service agreements it will obtain from customers. In light of the facial difference between the financial qualifications standards of 10 C.F.R. Parts 70 and 72, *compare* 10 C.F.R. § 70.23(a)(5) *with* 10 C.F.R. § 72.22(e), and what, at this juncture, are seeming distinctions regarding the scope of the commitments at issue, we are unable to say, as PFS asserts, that the Commission's decision in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 306-08 (1997), is controlling such that this portion of the contention should be dismissed *ab initio*.

With regard to paragraph ten, as far as we can ascertain, the PFS arguments regarding the provisions of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10131(a)(5), 10222(a)(5)(b), and the Price-Anderson Act, 42 U.S.C. § 2210, are not ones it made previously in challenging this portion of the contention, which was derived from Castle Rock 7, paragraph c. They thus constitute an inappropriate basis for a reconsideration. *See Claiborne*, CLI-97-2, 45 NRC at 4. This PFS request is denied.²

2. Utah H, Paragraphs Three Through Seven

The Applicant's next request is for clarification of our ruling admitting Utah H, paragraphs three through seven, concerning inadequate cask thermal design. PFS declares this should be limited to "site-specific issues — i.e., whether the [PFS facility] site conditions fall within the envelope of the cask vendors' designs" PFS Reconsideration Motion at 10. The Staff does not oppose this request, while the State offers its own interpretation of the contention. *See* State Reconsideration Response at 13-15; Staff Reconsideration Response at 13. We find the Applicant is correct in this regard, with the understanding that the site conditions at issue may include conditions resulting from the effects of the site specific cask interactions specified in the contention.

3. Utah V

PFS also asks for reconsideration of our admission of Utah V, concerning environmental consideration of transportation-related impacts. PFS asserts that, consistent with 10 C.F.R. § 72.108, our decision to admit the contention relative to the "weight" component of Table S-4, 10 C.F.R. § 51.52(c), should be circumscribed to include only consideration of regional impacts. *See* PFS

²PFS is, of course, free to renew its arguments in a summary disposition motion at the appropriate time.

Reconsideration Motion at 11-12. We do not agree. As the Staff points out in opposing this PFS request, *see* Staff Reconsideration Response at 13-14, this siting regulation does nothing to circumscribe the agency's responsibility under the National Environmental Policy Act of 1969 (NEPA) to consider reasonably foreseeable environmental impacts, included the potentially extra-regional impacts reflected in Table S-4.

4. *Utah Z*

In connection with our admission of Utah Z, concerning the no-action alternative, PFS declares that we should exclude consideration of the impacts of "sabotage" and "cross-country transportation" as litigable bases. *See* PFS Reconsideration Motion at 13. The State opposes both these requests, while the Staff, which originally did not oppose admission of the contention, now supports dismissal of the contention's sabotage basis. *See* State Reconsideration Response at 19-21; Staff Reconsideration Response at 14-15.

Having rejected the sabotage-related aspects of other contentions, including Utah U and Utah V, consistency concerns counsel that we consider PFS's renewed argument regarding this component of the contention to ensure we have not overlooked a similar matter with respect to Utah Z. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983) (reconsideration asks that the deciding body take another look at existing evidence because evidence has been misunderstood or overlooked). And in doing so, we find this aspect of the contention likewise is an impermissible challenge to the Commission's regulations or generic rulemaking-associated determinations. *See* LBP-98-7, 47 NRC at 179.

The same result is not appropriate for "cross-country transportation," however. As the Staff notes, *see* Staff Reconsideration Response at 15, because averting the transportation of spent fuel to the Skull Valley site is a reasonably foreseeable consequence of the no-action alternative, this is an impact that merits consideration under this contention.

5. *Utah DD/Castle Rock 16, Paragraphs One and Three*

With respect to Utah DD/Castle Rock 16, which concerns the PFS Environmental Report's discussion of species and ecology impacts, the Applicant asks for clarification that the Board intended to limit paragraphs one and three simply to the specific species identified. *See* PFS Reconsideration Motion at 13-15. Although, as the Staff points out, *see* Staff Reconsideration Response at 15, this

seemingly was clear from the Board's action on the contention, we nonetheless verify that this is the intended limitation.³

6. Castle Rock 17, Paragraphs b and e

Paragraphs b and e of Castle Rock 17, which concern the adequacy of the PFS Environmental Report's discussion of the Salt Lake Valley population and the potential impacts on a national wilderness area in the vicinity of the proposed PFS facility, also are the subject of the PFS reconsideration request. In both instances, PFS renews its assertions there was an inadequate basis for the admission of these portions of the contention. *See* PFS Reconsideration Motion at 15-19. Castle Rock opposes these requests, while the Staff, which initially supported admission of both paragraphs, now agrees with PFS's position. *See* Castle Rock Reconsideration Response at 5-8; Staff Reconsideration Response at 15-16.

Again, given our rejection of related assertions relative to Castle Rock 9 and Utah W, considerations of consistency warrant further consideration of PFS's arguments. And after reviewing the particular parts of the contention's basis that supported these paragraphs, which constituted only two sentences, we conclude the Applicant is correct with regard to the admissibility of both paragraphs.

Relative to paragraph b, Castle Rock's claims concerning the adequacy of the consideration of regional population impacts in the PFS Environmental Report hinge on the otherwise unsupported allegation that the 50-mile radius used by PFS in reliance on the Staff's standard review plan for independent spent fuel storage installations, *see* Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Comm'n, Standard Review Plan for Spent Fuel Dry Storage Facilities, NUREG-1567, app. B, at § B.4.2.2 (Draft Oct. 1996), is "misleading." Looking again at the basis for this paragraph, we find it fails to establish with specificity any genuine dispute; impermissibly challenges the Commission's regulations or generic rulemaking-associated determinations; lacks adequate factual or expert opinion support; and/or fails properly to challenge the PFS application. *See* LBP-98-7, 47 NRC at 178-79, 180-81.

In connection with paragraph e, although Castle Rock in its reconsideration response provides a discussion of the potential impacts of the PFS facility on the Deseret National Wilderness area, this clearly is new material that is not

³In addition, the State asks that we reword paragraph one of the contention to make it clear the contention is not limited to only one peregrine falcon with a nest or nests on the Timpie Springs Wildlife Management Area. *See* State Reconsideration Response at 22-23. We adopted the existing contention language based on our understanding it reflects the negotiated agreement of the State and PFS. *See* Tr. at 822; Licensing Board Memorandum and Order (Contention Revisions and Transcript Corrections) (Feb. 9, 1998) at 1-2 & attach. 1 (State of Utah Contentions A through DD at 16) (unpublished). At this point, we are not inclined to make any further revisions to the language of this contention absent an additional agreement between the parties.

appropriate grist for the reconsideration mill.⁴ See *Claiborne*, CLI-97-2, 46 NRC at 4. As to the original contention, upon reconsideration we find its conclusory discussion regarding impacts at the national wilderness area was inadequate to support admission as failing to establish with specificity any genuine dispute; lacking adequate factual or expert opinion support; and/or failing properly to challenge the PFS application. See LBP-98-7, 47 NRC at 178-79, 180-81.

Appendix A to this Memorandum and Order includes the language of Castle Rock 17, as revised per these rulings.

7. OGD O

In seeking reconsideration of OGD O, which is an “environmental justice” contention, PFS renews its claims regarding a lack of basis. Specifically, it asserts there is no basis whatsoever for consideration of two of the facilities listed in the contention because, unlike the other listed facilities, the Petitioner failed to provide any information on hazardous wastes or other harmful substances on those sites. See PFS Reconsideration Motion at 19-20. The OGD and the Staff oppose this request. See OGD Reconsideration Response at 4; Staff Reconsideration Response at 16. Premised on ensuring that this lack of supporting information is not overlooked, PFS’s point is valid. Accordingly, we delete the references to the Utah Test and Training Range South and the Utah Test and Training Range North from the contention.⁵ Appendix A to this Memorandum and Order sets forth the language of the revised contention.

Also with respect to this contention, again seeking to ensure a lack of supporting information is not overlooked, PFS asserts, with the Staff’s support and in the face of OGD opposition, that Environmental Protection Agency (EPA) sites on a map referenced without further explanation in basis five of the contention and attached as Exhibit 20 to OGD’s November 24, 1997 contentions pleading should not be considered as within the litigable scope of this contention. See PFS Reconsideration Motion at 20; OGD Reconsideration Response at 3-4; Staff Reconsideration Response at 16. The Board agrees that attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338

⁴Castle Rock may, however, wish to submit this information as part of any comments it may make to the Staff regarding the scope and substance of the Staff-prepared environmental impact statement. See 63 Fed. Reg. 24,197, 24,198 (1998).

⁵The Staff opposes this request on the basis of Exhibits 25 and 26 attached to OGD’s November 24, 1997 contentions pleading. These exhibits, which OGD does not reference in its reconsideration response, appear applicable to the Tooele Army Depot rather than the north and south Utah Test and Training Ranges. If there remains some question in this regard, the matter should be brought to the Board’s attention promptly.

(1991). Thus, the impact of the EPA sites is not a matter subject to litigation within the scope of this contention.

III. CONCLUSION

We reject the reconsideration/clarification requests of (1) OGD and the State for a further explication of the reasons for our rejection of certain of their contentions; (2) PFS and the Staff for dismissal of Utah B; (3) OGD for admission of OGD B, OGD J, and OGD N; (4) the State for admission of Utah J, paragraphs one, three, four, and five of Utah W, and Utah CC; (5) PFS for dismissal of paragraphs seven and ten of consolidated contention Utah E/Castle Rock 7/Confederated Tribes F; (6) PFS for the limitation of Utah V, to the environmental consideration of transportation-related regional impacts; and (7) PFS for dismissal of the cross-country transportation-related aspects of Utah Z. Further, we grant the PFS reconsideration requests for dismissal of (1) the sabotage-related aspects of Utah Z; (2) Castle Rock 17, paragraphs b and e; and (3) certain facilities or sites from consideration in connection with the environmental justice claims of OGD O. We also provide the clarification requested by PFS regarding our rulings admitting (1) Utah H, paragraphs three through seven; and (2) Utah DD/Castle Rock 16, paragraphs one and three.

For the foregoing reasons, it is, this 18th day of May 1998, ORDERED,

1. That the April 29, 1998 and May 6, 1998 reconsideration/clarification motions of OGD, the State, and the Staff are *denied*.

2. That the May 6, 1998 reconsideration/clarification motion of PFS is *granted in part and denied in part* in accordance with the rulings in sections I.B and II.C above.

THE ATOMIC SAFETY AND
LICENSING BOARD⁶

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 18, 1998

⁶Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Petitioners Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Castle Rock, and the State by Internet e-mail transmission; and to counsel for the Staff by e-mail through the agency's wide area network system.

ATTACHMENT A

CONTENTIONS REVISED PER RULINGS ON REQUESTS FOR RECONSIDERATION OF LBP-98-7

1. CASTLE ROCK 17 — Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, *see, e.g.*, 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

- a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;
- b. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development; and
- c. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conducted on Castle Rock's lands.

2. OGD O — Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, and Grassy Mountain Hazardous Waste Landfill.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)
(Re: Leach Mining
and Milling License)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

May 26, 1998

An administrative judge rules that he should not be disqualified as a judge because of employment negotiations that had been terminated over 6 months previously with the law firm that represents Licensee in this case. He states that the motion for disqualification inappropriately relies on 5 C.F.R. § 2635.604(a), which bars a government employee from serving in a matter if it will have a “direct and predictable effect on the financial interests” of an employee that “*is seeking*” employment.

MEMORANDUM AND ORDER
(Denial of Motion to Disqualify Presiding Officer)

Memorandum

On April 29, 1998, the Eastern Navaho Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC) filed

a “Motion for Disqualification or, in the Alternative, Full Disclosure” (Motion). The Staff of the U.S. Nuclear Regulatory Commission (Staff) opposed this motion in its “Response to Motion for Disqualification,” May 15, 1998¹ (Staff Response). The Presiding Officer has decided that he should not be disqualified, but he also chooses to make some additional voluntary disclosure.

The motion relies on the following voluntary disclosure made by the Presiding Officer in a Memorandum of April 14, 1998:

The purpose of this memorandum is to inform the parties that I have in the past had employment discussions with Shaw, Pittman, Potts and Trowbridge, which is appearing as a lawyer for Hydro Resources, Inc. Those discussions terminated some time in August or September, 1997, and do not affect my impartiality in serving as Presiding Officer in this case. Compare 5 C.F.R. §§ 2652.604, 2635.606.

The motion does not provide any further factual basis for disqualifying the Presiding Officer.

I. Legal Precedent Suggested in the Motion

A. Case Law

The motion relies on a series of cases, none of which supports disqualification of a Presiding Officer on the current facts.²

First is *Public Service Electric and Gas Co.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984). In that case Administrative Judge James H. Carpenter was disqualified from judging the Hope Creek project because he had previously served as a consultant on that project, even though the work he had done was irrelevant to the admitted contentions. The Hope Creek case cites another case in which Administrative Judge Ernest E. Hill of the Nuclear Regulatory Commission was reinstated as judge after being disqualified by the Appeal Board. The Commission found that a judge should not be disqualified for a statement he had made in the course of a proceeding. The Commission limited disqualification to bias arising from extrajudicial sources. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982).

Intervenors cite two Supreme Court cases in support of their argument. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-61 (1988), Judge Robert Collins had been a trustee of a university that stood to benefit from the judgment he had entered in a case. In *Liteky v. United States*, 510 U.S. 540,

¹Hydro Resources, Inc., has not filed a response and takes no position on the motion. Telephone conversation with Anthony Thompson, Shaw, Pittman, Potts, and Trowbridge, May 21, 1998.

²See Staff Response at 2.

548, 553 n.2 (1994), the court determined that a judge should *not* be recused for decisions he made in the course of a case. Neither of these cases supports the proposition for which they are cited, dismissal for a “mere appearance” of personal bias or prejudgment of factual issues.

Similarly, *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992), was a case in which a law firm hired a judge 2 months after it had asked the judge to join the firm. The day the firm first made an offer to the judge was *the day following the day when the judge awarded the firm \$700,000 in legal fees*. That case involved inappropriate conduct on the part of a judge, not just a “mere appearance” of personal bias. Another case resulting in the disqualification of a judge for improper employment discussions with a litigant is *Pepsico Inc. v. McMillen*, 764 F.2d 458, 460-61 (7th Cir. 1985). In *Pepsico*, a headhunter made an employment inquiry *to a party* on the judge’s behalf during the course of a case.

Hall v. Small Business Administration, 695 F.2d 175, 178, 180 (5th Cir. 1983) required that a judge be recused because his principal law clerk, whom he permitted to participate in the matter, had been eligible to be a member of the plaintiff class in the litigation. This involves an actual conflict of interest by an active member of the Judge’s staff. Another case involved an even more direct conflict of interest. In *Amos Treat & Col. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962), a Commissioner of the Securities and Exchange Commission (SEC) was barred from acting in the capacity of a judge on a case in which he had previously been director of the SEC branch that served as the prosecutor in the case.

B. Regulatory Authority

The motion inappropriately relies on 5 C.F.R. § 2635.604(a), which bars a government employee from serving in a matter if it will have a “direct and predictable effect on the financial interests” of an employee that “*is seeking*” employment.³ (Emphasis supplied.) In this case, the Presiding Officer is not seeking employment with the law firm involved in the case. Discussions of employment were terminated over 7 months prior to the assignment of the Presiding Officer to this case. The Presiding Officer no longer has an interest in being employed by the firm.

The motion also relies on 28 U.S.C. § 455(a), which states that “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned.” (Emphasis supplied.) It is clear that this provision does not extend to all

³ See Staff Response at 2-3.

dissatisfaction with a judge. It is implicit in being a judge that parties become dissatisfied with judges' actions. Emotion runs high. Judges are subject to harsh judgment. What is required for disqualification is not just a suspicion of partiality but a reasonable basis for questioning the judge's impartiality.

Under the circumstances, I do not sustain the argument that there is a reasonable appearance of bias in favor of the party represented by Shaw, Pittman, Potts & Trowbridge.⁴ It is important that a judge consider a recusal motion carefully and deliberately and that he refrain from improperly granting or denying such motions. Granting motions too easily is improper, for this might encourage motions for disqualification by parties who prefer a different judge. If overdone, such motions may seriously impact the efficient and timely processing of cases.

The motion to disqualify shall be denied.

II. Additional Disclosure

In order to provide additional assurance to the Intervenors in this case, I have decided to make an additional disclosure. I do not think this disclosure is required by law,⁵ but I prefer to operate in as public a manner as possible. I make this statement in order to clear away doubts, reasonable or unreasonable:

In the Spring of 1997, I began looking for employment. I made many contacts both within and outside the Nuclear Regulatory Commission. Shaw, Pittman, Potts and Trowbridge was one of several potential employers with whom I spoke. I had several contacts with Mr. Ernest Blake and one lunch with Mr. Campbell Killifer of Shaw, Pittman. Although I made no notes, there were a total of about four luncheons and about six phone calls to these two gentlemen. While I was at the firm's offices, I recall speaking to two other employees who have appeared before me in other cases. I have never met any of the attorneys working on the Hydro Resources, Inc. other than in the course of this case.

At no time did I accept anything of value, including lunch. The discussions with Shaw, Pittman were terminated in August or September by a phone call from Mr. Ernest Blake, stating that his firm was not interested in my services. There are no further employment discussions and I have no intention of seeking employment with that firm.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 26th day of May 1998, ORDERED that:

⁴ It is not clear why a person who has been denied employment by a law firm would be biased in favor of that law firm in a future case.

⁵ See Staff Response at 2.

The motion filed by ENDAUM and SRIC on April 29, 1998, “Motion for Disqualification or, in the Alternative, Full Disclosure,” is *denied*. The Presiding Officer does not disqualify himself. He does make an additional voluntary disclosure beginning on p. 305 of the Memorandum.

Peter B. Bloch
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

**Docket Nos. 72-22-ISFSI
72-22-ISFSI-PFS**

**PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)**

June 5, 1998

The Commission grants the petition filed by the applicant, Private Fuel Storage, L.L.C., for interlocutory review and reversal of the Chief Judge's ruling to create a separate board to consider all issues concerning its Physical Security Plan. While the Commission agrees with the Chief Judge that he has sufficient authority to establish multiple boards to adjudicate a single license application, and also agrees that assigning discrete issues to multiple boards may sometimes prove a useful tool for resolving proceedings expeditiously, it concludes that a second board was not called for here, given the procedural posture of the case. Once the initial Board rules on the admissibility of all pending contentions, including the security contentions, the Chief Judge may reconsider whether a second board would be desirable.

**RULES OF PRACTICE: PETITIONS FOR INTERLOCUTORY
REVIEW**

The Commission does not readily review interlocutory licensing board rulings, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10

C.F.R. § 2.786(g)(1) and (2); *see Oncology Services Corp.*, CLI-93-13, 37 NRC 419 (1993).

LICENSING BOARDS: ASSIGNMENT OF RESPONSIBILITY

“[T]he Chief Administrative Judge of the Licensing Board Panel is empowered both (1) to establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989) (footnote omitted).

LICENSING BOARDS: ASSIGNMENT OF RESPONSIBILITY

The Commission expects the Chief Judge to exercise his authority to establish multiple boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not burden the parties unduly.

MEMORANDUM AND ORDER

This proceeding concerns an application for a license to store spent nuclear fuel at an independent spent fuel storage installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. The Petitioner, Private Fuel Storage, L.L.C. (PFS), seeks interlocutory Commission review of a determination by the Chief Judge of the Atomic Safety and Licensing Board Panel to divide the proceeding and establish a second licensing board to “consider and rule on all matters concerning the [Applicant’s] physical security plan.” 63 Fed. Reg. 15,900 (Apr. 1, 1998). PFS argues for reversal of the Chief Judge’s ruling on the grounds that the Chief Judge lacked jurisdiction to divide the proceeding and that dividing it may lead to conflicting decisions and consume additional resources with little likelihood of expediting the ultimate merits decision. The NRC Staff agrees with PFS that establishing a second board was inappropriate. No other party has taken a position on the matter.

For the reasons stated below, we grant interlocutory review and reverse the Chief Judge’s ruling. While we agree with the Chief Judge that he has sufficient authority to establish multiple boards to adjudicate a single license application, and we also agree that assigning discrete issues to multiple boards may sometimes prove a useful tool for resolving proceedings expeditiously, we

conclude that a second board was not called for here, given the procedural posture of the case. Once the initial Board rules on the admissibility of all pending contentions, including the security contentions, the Chief Judge may reconsider whether a second board would be desirable.

I. BACKGROUND

The initial three-member Board designated to preside over this proceeding was established on September 15, 1997, with Judge G. Paul Bollwerk, III, as its chairman. *See* 62 Fed. Reg. 49,263 (Sept. 19, 1997). It received numerous petitions for intervention, including a petition from the State of Utah, seeking admission of a total of approximately ninety contentions. Of the ninety contentions, Utah filed nine that concerned the Applicant's physical security plan; they were designated "Security-A through Security-I." In January, Judge Bollwerk's Board held a site visit in Utah and also convened a prehearing conference where it heard the parties' oral arguments on standing and on the admissibility of the ninety contentions. The Board permitted only a limited presentation on the nine security contentions "to avoid any discussion of nonpublic safeguards or proprietary information." LBP-98-7, 47 NRC 142, 164 (1998). The Board subsequently permitted the State, PFS, and the NRC Staff to file postargument pleadings on the admissibility of the security contentions. *Id.*

Two months later, on March 26, before Judge Bollwerk's Board had ruled either on standing or on the admissibility of any contentions, the Chief Judge established a second board, chaired by Judge Thomas S. Moore, to rule on all matters concerning Utah's nine security plan contentions. *See* 63 Fed. Reg. 15,900 (Apr. 1, 1998). PFS promptly sought reconsideration of the decision to establish a second board. The NRC Staff supported PFS's petition for reconsideration.

In the meantime, while the petition for reconsideration of the Chief Judge's ruling was still pending, Judge Bollwerk's Board issued a lengthy Memorandum and Order on standing and on the admissibility of the approximately eighty remaining contentions. LBP-98-7, *supra*. The Bollwerk Board did not rule on the nine security contentions that the Chief Judge had reassigned to the Moore Board. LBP-98-7, 47 NRC at 166. Twenty-five contentions were admitted, and several parties, including the State of Utah, were accorded standing. Several parties subsequently filed motions for reconsideration.

The next day, on April 23, the Chief Judge denied PFS's request for reconsideration of his determination to establish a second board to handle the security contentions. Rejecting PFS's claim that he lacked jurisdiction to establish a second board, the Chief Judge pointed to prior precedent where the Chief Judge had established two or more boards to decide separate issues in

one proceeding. The Chief Judge further reasoned that inherent in the authority to establish multiple boards is the authority to terminate the jurisdiction of the first board with respect to the issues that are given to the second. As for the circumstances here, the Chief Judge stated that “the Panel’s docket can be most effectively managed and that this proceeding can be more efficiently and expeditiously resolved by establishing a second licensing board.” LBP-98-8, 47 NRC 259 (1998).

On May 6, Judge Moore’s Board issued a scheduling order that set June 17 as the date for a prehearing conference on the security plan issues. That Board indicated that it deemed the State of Utah’s physical security plan contentions and all parties’ pleadings relating to those contentions, previously filed with Judge Bollwerk’s Board, to be part of the record before the new Board.¹

II. INTERLOCUTORY REVIEW

The Commission does not readily review interlocutory licensing board rulings, but will do so if a particular ruling (1) “[t]hreatens the party adversely affected by it with immediate and serious irreparable impact” or (2) “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.” 10 C.F.R. § 2.786(g)(1) and (2); see *Oncology Services Corp.*, CLI-93-13, 37 NRC 419 (1993). PFS invokes the second prong of our standard.

The decision to create a second board is not unheard of in our practice, but it is certainly an unusual event, particularly where, as here, the Chief Judge reassigns to a second board threshold admissibility questions that already are ripe for decision by the initial Board. We agree with PFS and the NRC Staff that a ruling of this sort “affects the basic structure of the proceeding,” by arguably mandating duplicative or unnecessary litigating steps, and therefore is reviewable now. Cf. *Rockwell International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989).

III. AUTHORITY OF THE CHIEF JUDGE TO CREATE A SECOND BOARD

PFS (but not the NRC Staff, which takes no position on the matter) insists that the Chief Judge lost all authority to establish a second board once he initially assigned the entire proceeding to Judge Bollwerk’s Board. We disagree.

¹On May 18, Judge Bollwerk’s Board ruled on the parties’ motions for reconsideration of its decision on the admissibility of contentions. See LBP-98-10, 47 NRC 288 (1998).

As a general matter, dividing discrete issues between two boards has the potential to expedite proceedings. It would therefore make little policy sense for the Commission to bar this practice. As a matter of law, nothing in our rules withholds from the Chief Judge the authority to manage the Panel's docket efficiently by dividing work between two boards. Such authority follows from the Chief Judge's broad authority to establish boards in the first place. *See* 10 C.F.R. §§ 2.704, 2.721. Largely for these reasons, the former Atomic Safety and Licensing Appeal Board found that there is

no room for serious doubt that . . . the Chief Administrative Judge of the Licensing Board Panel is empowered both (1) to establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989) (footnote omitted).

We agree with the Appeal Board. It is true, as PFS points out, that 10 C.F.R. § 2.717 specifically states that a board's jurisdiction ceases at the end of the proceeding or upon the disqualification of an individual judge. However, the rule does not state or imply that these are the only circumstances under which a board's jurisdiction may be terminated. In our view, section 2.717 does not abrogate the Chief Judge's inherent authority to manage the Panel's caseload efficiently through reassignments of pending adjudications in whole or in part.

Although establishing multiple boards can be an effective tool for expediting proceedings, the Commission recognizes that it also creates a risk of conflicting decisions and duplicative work for the boards and parties. The Commission therefore expects the Chief Judge to exercise his authority to establish multiple boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not burden the parties unduly. We do not believe that this test was met in the present case.

IV. TIMING OF ESTABLISHMENT OF A SECOND BOARD

In our judgment, under the current posture of this proceeding, it is inefficient to have a second board presiding over the issues related to the security contentions. Those contentions may or may not be admissible; it may be appropriate to combine some or all of them, or to litigate one or more of them together with a previously admitted contention. We believe that Judge Bollwerk's Board, having acted on all other standing and admissibility questions in this proceeding, including motions to reconsider, and having already held a

site visit and prehearing conference on the security contentions, is better positioned than the newly established board to act quickly on these admissibility issues. Had the Chief Judge not stepped in, we have every reason to believe that by now Judge Bollwerk's Board, which resolved the admissibility of the other eighty contentions with admirable dispatch, would also have determined the admissibility of the security contentions.

The newly established second Board, by contrast, intends to conduct its own prehearing conference, currently set for June 17, before resolving the admissibility of the contentions. It also is not in a position to combine any of the security contentions with the twenty-five previously admitted contentions, because it has jurisdiction over only the former. Given these circumstances, we think it would invite delay to establish a second board at this time. We therefore reverse Judge Cotter's ruling and reinstate the initial Board's jurisdiction to decide the admissibility of the security contentions.

We do not mean to suggest that establishing a second board for the security contentions, or for any other discrete set of contentions, might not at some later date be a prudent means to expedite this adjudication. But the Chief Judge should not address that question until the first Board decides the pending admissibility issues.

PFS and the NRC Staff argue that the separate board contemplated here is inherently unworkable because the security contentions are so intertwined with other contentions that duplicative or conflicting rulings, arguments, and pleadings are inevitable. We agree that, as a general principle, a separate board should not be established if it would likely result in duplicative work or conflicting rulings, but we do not here rule on whether the security contentions are so intertwined with other contentions that such duplication or conflict would be inevitable. Instead, as part of its ruling on admissibility, we expect Judge Bollwerk's Board to decide, as it did with respect to numerous other issues raised in this proceeding, whether the security plan contentions overlap with any others in such a way that they should be combined or litigated with other contentions. *See, e.g.,* LBP-98-7, 47 NRC at 206. Then, keeping in mind the three principles we set forth in Section III of this Decision, the Chief Judge could reconsider whether to establish a second board to handle the security (or any other) contentions, in the interest of expedition and efficiency.

V. CONCLUSION

For the foregoing reasons, we reverse the Chief Judge's decision to establish a second board to handle the security contentions. Instead, those contentions will remain under the jurisdiction of the initial Board until that Board rules on their admissibility and on any motions for reconsideration of that determination.

Subsequent to those rulings, the Chief Judge may consider, consistent with the discussion contained in this opinion, whether to establish a second Board to further adjudicate any of the admitted contentions.

IT IS SO ORDERED.

For the Commission²

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June 1998.

²Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

June 5, 1998

The Commission denies a petition for review of a Presiding Officer's order denying a stay request that Petitioners filed with the Presiding Officer, dismisses as moot a stay request that Petitioners filed directly with the Commission, and lifts a temporary stay that the Commission had issued in CLI-98-4, 47 NRC 111 (1998).

RULES OF PRACTICE: INTERLOCUTORY REVIEW; INFORMAL HEARINGS; DISCRETIONARY INTERLOCUTORY REVIEW; STANDARD OF REVIEW

The Commission is willing to entertain petitions for review of interlocutory rulings in Subpart L cases in the rare situations where such rulings (1) threaten a party with serious, immediate, and irreparable harm or (2) affect the basic structure of the proceeding in a pervasive or unusual manner.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW;
DISCRETIONARY INTERLOCUTORY REVIEW**

ADJUDICATORY HEARINGS: SCOPE OF REVIEW

The Commission has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW;
DISCRETIONARY INTERLOCUTORY REVIEW; STANDARD OF
REVIEW**

The mere issuance of important rulings does not, without more, merit interlocutory review. *See Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-11, 40 NRC 55, 63 (1994). Even legal error does not necessarily justify interlocutory review. Instead, Petitioners need to demonstrate that they are threatened with “immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision.” 10 C.F.R. § 2.786(g)(1).

**RULES OF PRACTICE: STAY PENDING APPEAL; INFORMAL
HEARINGS**

Section 2.1263 of the Commission’s Informal Hearing Regulations provides that any request for a stay of Staff licensing action pending completion of an adjudication under Subpart L must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the Staff’s action, whichever is later. The Commission does not, however, construe section 2.1263 to preclude participants from later renewing their stay request, which was timely filed under this section, if they are subsequently threatened with serious, immediate, and irreparable harm.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW; STANDARD
OF REVIEW; DISCRETIONARY INTERLOCUTORY REVIEW**

For purposes of interlocutory review, irreparable harm does not qualify as “immediate” merely because it is likely to occur before completion of the hearing. Such a reading of the word “immediate” would stretch the definition of that word quite beyond recognition.

RULES OF PRACTICE: INTERLOCUTORY REVIEW; STANDARD OF REVIEW; DISCRETIONARY INTERLOCUTORY REVIEW

The Commission (and, earlier, the Appeal Board) have granted interlocutory review in situations where the question or order must be reviewed “now or not at all.”

RULES OF PRACTICE: INTERLOCUTORY REVIEW; STANDARD OF REVIEW; DISCRETIONARY INTERLOCUTORY REVIEW

NATIONAL HISTORIC PRESERVATION ACT: REQUIREMENTS

An alleged failure by the NRC Staff to comply with section 106 of the National Historic Preservation Act does not “imply” the “irreparable” injury necessary for interlocutory review. To obtain such review, Petitioners are required to *show* the threat of irreparable harm, not merely to “imply” it.

NATIONAL HISTORIC PRESERVATION ACT: REQUIREMENTS

RULES OF PRACTICE: STAY REQUESTS

Absent a clear congressional statement, adjudicatory tribunals should not infer that Congress intended to alter equity practices such as the standards for reviewing stay requests. The National Historic Preservation Act contains no such clear congressional statement.

RULES OF PRACTICE: STAY REQUESTS

A plaintiff seeking injunctive relief must prove irreparable harm; a mere violation of NEPA or other environmental statutes is insufficient to merit an injunction.

NATIONAL HISTORIC PRESERVATION ACT: REQUIREMENTS

The National Historic Preservation Act contains no prohibition against taking a “phased review” of a property. Section 470(f) of that statute provides, in relevant part, only that a federal agency shall, “prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” Nor does federal case law suggest any such prohibition. The regulations implementing section 470(f) are ambiguous on the matter.

RULES OF PRACTICE: STAY REQUESTS; STANDARD OF REVIEW; APPELLATE REVIEW

LICENSING BOARD: DISCRETION IN MANAGING PROCEEDINGS

In such a fact-specific area of disagreement as the necessity for a stay, and at such an early stage of the proceeding, the appellate forum's deference to the trier of fact is quite high.

RULES OF PRACTICE: INTERLOCUTORY REVIEW; STANDARD OF REVIEW; DISCRETIONARY INTERLOCUTORY REVIEW; MOTIONS (REPLIES TO RESPONSES); APPELLATE REVIEW

Just as procedural rulings involving discovery and admissibility of evidence or the scheduling of hearings rarely meet the standard for interlocutory review, likewise the Presiding Officer's denial of Petitioners' motion for leave to file a reply brief does not rise to the level meriting the Commission's interlocutory review. On such interlocutory matters, the Commission generally defers to the Presiding Officer.

MEMORANDUM AND ORDER

This proceeding under 10 C.F.R. Part 2, Subpart L, concerns a materials license application that Hydro Resources, Inc. ("HRI") filed under Part 40 of our regulations, seeking authority to conduct an *in situ* leach uranium mining and milling operation in Church Rock and Crownpoint, New Mexico.¹ The NRC Staff issued the requested license (SUA-1508) on January 5, 1998. Ten days later, the Southwest Research & Information Center and the Eastern Navajo Diné Against Uranium Mining (collectively "Petitioners") requested the Presiding Officer to stay the effectiveness of HRI's license pending both a health-and-safety hearing on the application pursuant to section 189 of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239 *et seq.*, and an historic property review pursuant to section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470(f). This latter statutory section and its implementing regulations (36 C.F.R. Part 800) provide that, prior to issuing a license, an agency must take into account the effects of the license issuance on historic properties.

¹According to HRI, the *in situ* leach process begins with the injection of groundwater fortified with oxidizing agents (lixiviant) into a body of uranium ore, causing the uranium to dissolve. The resulting solution is then pumped from the ore body to the surface, where it is processed into a dried form of uranium.

On January 23, 1998, the Presiding Officer temporarily stayed the license's effectiveness (LBP-98-3, 47 NRC 7), but subsequently lifted the temporary stay and denied Petitioners' motion for a full stay. LBP-98-5, 47 NRC 119 (1998). In addition to rejecting Petitioners' stay argument that the license should not go into effect prior to the completion of a hearing, the Presiding Officer in LBP-98-5 also denied Petitioners' motions to strike the Staff's response to Petitioners' stay motion, and denied Petitioners' motion for leave to reply to both the Staff's above-mentioned response and HRI's response to Petitioners' stay motion.

Petitioners filed with the Commission a petition for review of LBP-98-5 and also a request for both a temporary stay of that order and a longer stay until the Commission has ruled upon their petition for review of LBP-98-5. On April 16, 1998, we granted a temporary stay of LBP-98-5, thereby effectively reinstating the Presiding Officer's temporary stay of the license. CLI-98-4, 47 NRC 111. We now turn to the petition for review and the request for a longer stay. For the reasons set forth below, we deny the former, dismiss the latter,² and lift the temporary stay imposed in CLI-98-4.

I. BACKGROUND

In 1988, HRI applied for a materials license to conduct *in situ* leach uranium mining and processing in Church Rock, New Mexico, and later amended the application to include similar activities in two other locations — Crownpoint, New Mexico, and Unit 1 (near Crownpoint). HRI plans to locate some of the mines and processing facilities near residential areas and existing drinking water wells. HRI's activities also have the potential for disturbing historic and architectural sites.

The development and operation of HRI's facilities are scheduled to occur over a 20-year period. In January 1997, the NRC Staff proposed to limit its initial review under the NHPA to the first 5 years of this period, thereby taking a "phased review" approach under the NHPA. The Staff considered this approach appropriate because HRI intends to develop this project incrementally, the project's potential area of disturbance is vast, and the resource methodologies and interpretations could change during the proposed 20-year license term. Five months later, the Staff announced its intent to defer the NHPA section 106 review of Unit 1 and Crownpoint, because the Crownpoint site would allegedly not be developed during the first 5-year period and because access to the Unit 1 site was difficult.

²On April 22, 1998, the Navajo Nation filed a motion for leave to file a brief *amicus curiae* regarding Petitioners' petition for review of LBP-98-5 if we grant the petition for review. Because we are denying the petition for review, we dismiss the Navajo Nation's motion as moot.

On January 5, 1998, the Staff issued the requested license to HRI for a 5-year term, subject to renewal. The licensed operations are expected to begin in Section 8 at Church Rock. The license prohibits HRI from injecting lixiviant at either Unit 1 or Crownpoint prior to successfully demonstrating groundwater restoration at Section 8 of Church Rock. However, the license does permit HRI to commence preinjection activities associated with the construction and operation of a processing facility at either Crownpoint or Unit 1. It also permits ground-disturbing activities at all three sites (e.g., ground clearing, construction of access roads, and the digging of trenches for installation of well field process fluid trunk lines and gathering lines).

II. PETITIONERS' ARGUMENTS TO THE COMMISSION

Petitioners' NHPA arguments assert that HRI's premining activities will irreparably harm archaeological sites and traditional cultural properties that have great meaning to the history and day-to-day lives of the Navajo and Pueblo peoples. Petitioners also criticize as inadequate HRI's documentation of traditional cultural properties. Petitioners further object to the Staff's "phased review" approach and assert instead that HRI must defer all its activities until after the NRC has completed the NHPA review for the entire geographical area covered under HRI's license application. According to Petitioners, "irreparable damage may be implied from the Staff's issuing the license without completing the NHPA § 106 process and without adequately conditioning the license to prevent harm to historic properties before the process is completed." Petition for Review, dated April 11, 1998, at 7. Petitioners also assert that the irreparable "[h]arm must be considered 'immediate' . . . if it is likely to occur before completion of the hearing." *Id.* at 8.

Petitioners' AEA arguments assert that the grant of the license will, before the end of the hearing, cause irreparable harm to their health, safety, and property in general and to their drinking water from the mining at Unit 1 in particular. More specifically, they claim that contaminants released by the mining of Unit 1 will escape detection by HRI's allegedly inadequate monitoring system, will quickly migrate into Crownpoint's drinking water wells, and will cause the wells' water to exceed safe concentrations of uranium and other contaminants. *Id.* at 7-8; Motion for Stay, dated April 11, 1998, at 5-6 & n.9.

Finally, Petitioners challenge certain procedural rulings by the Presiding Officer and seek a stay pending the Commission's consideration of their petition for review.

III. DISCUSSION

A. Criteria for Reviewing a Petition for Interlocutory Review

Our Subpart L regulations governing informal hearings in materials licensing proceedings do not explicitly provide for a petition for review of an interlocutory order (*see* 10 C.F.R. § 2.1253, providing for petitions for review only of initial decisions), nor do they contain provisions establishing criteria for judging such petitions. But, as we do under our more formal Subpart G process, we are willing to entertain petitions for review of interlocutory rulings in Subpart L cases in the rare situations where such rulings (1) threaten a party with serious, immediate, and irreparable harm or (2) affect the basic structure of the proceeding in a pervasive or unusual manner.³

Petitioners seek interlocutory review of LBP-98-5 under the first of these two criteria. *See* Petition for Review at 1 n.2. Petitioners complain that the Presiding Officer departed from established NHPA law, made erroneous findings of fact, improperly denied Petitioners' request for a preclicensing hearing, and committed prejudicial procedural error in denying Petitioners' motion for leave to reply to the Staff's response to Petitioners' motion for stay. *Id.* at 1.

The Presiding Officer's rulings in LBP-98-5 were undoubtedly significant. However, the mere issuance of important rulings does not, without more, merit interlocutory review. *See Sequoyah Fuels*, CLI-94-11, 40 NRC at 63. Even legal error does not necessarily justify interlocutory review.⁴ Instead, Petitioners need to demonstrate that they are threatened with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision." 10 C.F.R. § 2.786(g)(1). As we rule in sections B, C, and D, *infra*, Petitioners have not shown that their alleged harm under the AEA and NHPA is either irreparable or immediate. We therefore deny their request for interlocutory review of the Presiding Officer's denial of a stay. If circumstances change in such a way that the harm becomes irreparable and immediate as well as serious, Petitioners are free to renew their

³ 10 C.F.R. § 2.786(g). *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991). The Commission of course has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review. Indeed, its now-defunct Appeal Board occasionally did so in the certified-question context where the ruling at issue involved a question of law, had generic implications, and had not been addressed previously on appeal. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990), and cited authority. However, we see no reason to exercise our plenary review authority in this instance.

⁴ *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994) (declining interlocutory review even though a licensing board ruling may be "incorrect" and even though "aspects of the Licensing Board's decision . . . appear highly questionable"); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983) ("the fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review").

motion for a stay before the Presiding Officer.⁵ Such a motion must be filed promptly, and the words “immediate” and “irreparable” are to be construed in a way that is consistent with our discussion of them below.

B. Immediacy of Harm — NHPA and AEA

We do not agree with Petitioners’ general statement that irreparable “[h]arm must be considered ‘immediate’ . . . if it is likely to occur before completion of the hearing.” Petition for Review at 8. Such a reading of the word “immediate” stretches the definition of that word quite beyond recognition.⁶ Given the early stage of this case, it would not be unusual if the “completion of the . . . hearing” to which Petitioners refer occurs months from now. By contrast, the Commission (and, earlier, the Appeal Board) have granted interlocutory review in situations where the question or order must be reviewed “now or not at all.”⁷ The Commission faces no “now or never” situation here. Petitioners make no compelling case under the AEA that HRI’s preliminary activities will result in immediate health and safety harms. And both the presence of protective conditions in the license⁸ and HRI’s own oft-repeated commitment to

⁵ As Petitioners correctly point out, section 2.1263 of our Informal Hearing Regulations provides that “any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff’s action, whichever is later.” Stay Request at 6, *citing* 10 C.F.R. § 2.1263. We do not, however, construe section 2.1263 to preclude participants such as these Petitioners from later renewing their stay request if they are subsequently threatened with serious, immediate, and irreparable harm.

⁶ *The Random House Dictionary of the English Language* at 712 (Unabridged ed. 1973) defines that word as “(1) occurring or accomplished without delay; instant . . . ; (2) of or pertaining to the present time or moment . . . ; (3) following without a lapse of time”

⁷ *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) (“Because the adverse impact of [the] release [of a report by the NRC’s Office of Investigations] would occur *now*, the alleged harm is immediate Unlike most discovery orders, the instant order must be reviewed now or not at all” under section 2.786(g)) (emphasis in original); *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981) (Licensing Board’s order to disclose names of individuals who had been promised anonymity “must be examined now or not at all”); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976) (Licensing Board’s order denying protective order “must be reviewed now or not at all”). *Cf. Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (“Although, typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review, here an erroneous disclosure of documents ruled later to be absolutely privileged could prove irreparable”).

⁸ *See, e.g.*, Condition 9.12, which provides that:

Before engaging in any construction activity not previously assessed by the NRC, the licensee shall conduct a cultural resources inventory. All disturbances associated with the proposed development will be completed in compliance with the [NHPA].

In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with [NHPA regulations], and no disturbance shall occur until the licensee has received written authorization to proceed from the State and Navajo Nation Historic Preservation Offices.

“comply fully with the NHPA *prior to conducting any land disturbance*”⁹ make us skeptical of whether the alleged NHPA injury will occur at all, much less immediately.

C. Irreparability of Harm — NHPA

We do not agree with Petitioners that the NRC Staff’s alleged failure to comply with section 106 of the NHPA “implies” the “irreparable” injury necessary for interlocutory review.¹⁰ To obtain such review, Petitioners are required to *show* the threat of irreparable harm, not merely to “imply” it.

The only case that Petitioners cite in support of their “implication” argument, *Colorado River Tribes v. Marsh*, 605 F. Supp. 1425, 1439-40 & n.11 (C.D. Calif. 1985) (where the court reached its conclusion by analogizing NHPA to the National Environmental Policy Act (“NEPA”)), is insufficient to support their claim of irreparable injury. The plaintiffs in that case had established probable success on the merits and had submitted evidence that “unquestionably” indicated the importance of the historical and archaeological sites at issue in the case. Here, by contrast, the Presiding Officer found that Petitioners had failed to establish likelihood of success on the merits (LBP-98-5, 47 NRC at 124-25). Moreover, the petition for review, stay motion, and accompanying documents have all been quite vague as to both the identity and importance of any historically and archaeologically significant sites at Unit 1 and Crownpoint.¹¹

More fundamentally, *Colorado River’s* holding that a statutory violation equates to a showing of irreparable injury cannot be squared with the current state of the law as reflected in two Supreme Court environmental law decisions, *Weinberger v. Romeo-Berkeley*, 456 U.S. 305 (1982), and *Amoco Production*

⁹HRI’s Response to Petitioners’ Application for Review of LBP-98-5, dated April 23, 1998, at 6 (emphasis in original). *See also id.* at 8 (HRI “is committed to full compliance with the letter and spirit of the NHPA and therefore *will not* engage in any land disturbance that does not comply with the NHPA”) (emphasis in original); HRI’s Response to Petitioners’ Application for Stay, dated April 23, 1998, at 3 n.9 (“the NRC staff and HRI will complete Section 106 review for each phase of the proposed project before initiating any actual construction”), 4 (“HRI has no intention of conducting any land disturbance activities in any part of the [Crownpoint Uranium Project] properties until the NHPA process has been completed for that piece of property”), 6 (“HRI’s license would require the company to refrain from land disturbing activities until the NHPA process is complete [N]o cultural resources will be disturbed in violation of the NHPA”), and 7 (“HRI’s license *forbids* any ground disturbing activities that would violate the NHPA HRI has no intention of performing any ground disturbing activities in violation of the NHPA”) (emphasis in original); HRI’s Response to the Navajo Nation’s Motion for Leave to File a Brief Amicus Curiae . . . , dated May 4, 1998, at 3 & n.6 (“HRI’s license prohibits the company from conducting any land disturbing activities that are not in full compliance with the . . . NHPA”; “the company’s commitment to a policy of ‘total avoidance’ of archaeological resources ensures that there will be *no disturbance* that will harm any cultural or archaeological resources” (emphasis in original)).

¹⁰Petition for Review at 7. We do not reach on the merits the question whether the Staff has complied with section 106.

¹¹Petitioners provide the Commission with only a few general claims that many traditional cultural properties may be affected and instead focus the bulk of their comments on the alleged shortcomings of HRI’s and the Staff’s efforts to comply with the NHPA. *See, e.g.*, Affidavit of William A. Dodge, dated Jan. 9, 1998, *passim*; Affidavit of Dr. Klara B. Kelley, dated Jan. 8, 1998, *passim*.

Co. v. Village of Gambell, 480 U.S. 531 (1987). The more recent of these two decisions, *Amoco*, expressly rejected a Ninth Circuit holding — essentially identical to Petitioners’ argument — that “[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action” and “only in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation.”¹² Absent “a clear Congressional statement,” adjudicatory tribunals “should not infer that Congress intended to alter equity practices” such as the standards for reviewing stay requests.¹³ The NHPA contains no such “clear Congressional statement.”¹⁴

Finally, as to the irreparability of NHPA harm, we are not convinced by Petitioners’ argument that the NRC and HRI are prohibited from taking a “phased review” approach to complying with the NHPA — the legal position that forms the foundation of Petitioners’ NHPA arguments regarding severe, immediate, and irreparable injury. The statute itself contains no such prohibition,¹⁵ federal

¹² *People of Village of Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985) (emphasis added; internal quotation marks omitted).

¹³ *Natural Resources Defense Council v. Texaco Refining & Marketing, Inc.*, 906 F.2d 934, 939 n.6 (3d Cir. 1990) (regarding Federal Water Pollution Control Act Amendments of 1972), *citing Flynn v. United States By and Through Eggers*, 786 F.2d 586, 591 (3d Cir. 1986).

Numerous other cases hold that a plaintiff seeking injunctive relief must prove irreparable harm, and that mere violation of NEPA or other environmental statutes is insufficient to merit an injunction. *See Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995) (NEPA; Forest and Rangeland Renewable Resources Planning Act of 1974); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (NEPA); *Town of Huntington v. Marsh*, 884 F.2d 648, 651-54 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (NEPA; where the Second Circuit held that, in the area of environmental statutes, an injunction does not follow as a matter of course upon a finding of statutory violation, but rather “a threat of irreparable injury must be proved, not assumed and may not be postulated *eo ipso* on the basis of procedural violations of NEPA”); *Town of Huntington v. Marsh*, 859 F.2d 1134, 1143 (2d Cir. 1988) (NEPA); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157-58 (9th Cir. 1988) (NEPA; Federal Coal Leasing Amendment Act of 1976); *National Wildlife Federation v. Burford*, 835 F.2d 305, 318, 323-24 (D.C. Cir. 1987) (Federal Land Policy and Management Act of 1972); *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) (Federal Water Pollution Control Act Amendments of 1972; environmental lawsuits are not exempt from the four-pronged test for injunctive relief). Even the First Circuit, which has held repeatedly that a violation of NEPA does constitute irreparable injury, does not go so far as to conclude that this kind of irreparable injury *necessarily* requires an injunction. *See Conservation Law Foundation v. Busey*, 79 F.3d 1250, 1272 (1st Cir. 1996), *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989), and *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983), in all three of which cases the First Circuit stated that “[t]his is not to say that a likely NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way.” (Emphasis in originals.)

¹⁴ Compare NHPA, 16 U.S.C. § 470(f) with, e.g., 39 U.S.C. § 3007 (“the United States district court . . . shall . . . upon a showing of probable cause to believe [that 39 U.S.C. § 3005] is being violated, enter a temporary restraining order and preliminary injunction . . .”). *See Natural Resources Defense Council*, 906 F.2d at 940.

¹⁵ Section 470(f) of the statute provides, in relevant part, only that a federal agency shall, “prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”

case law suggests none,¹⁶ and the supporting regulations are ambiguous on the matter, even when read in the light most favorable to Petitioners.¹⁷

D. Irreparability of Harm — AEA

We cannot conclude that Petitioners have shown a threat of irreparable and immediate harm to their well water. As the Presiding Officer held, Petitioners have not explained why the license's conditions (*see* License Conditions 10.12-10.32), together with the assurances presented in the Staff's and HRI's affidavits, are inadequate to prevent contamination of the well water supply. *See* LBP-98-5, 47 NRC at 128-29. It was Petitioners' burden to show irreparable injury sufficient for a stay. *See Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Petitioners here have presented their evidence and arguments favoring a stay, but the Presiding Officer was not convinced. In such a fact-specific area of disagreement, and at such an early stage of the proceeding, the appellate forum's deference to the trier of fact is quite high. We see nothing in the appeal documents that convinces us to second-guess the Presiding Officer on this matter, particularly given his greater familiarity with the record and the thoroughness of his decision.

E. Other Arguments

Finally, we reject Petitioners' request that we intervene to reverse the Presiding Officer's denial of their motion for leave to reply to Staff's and HRI's response to Petitioners' motion for stay. LBP-98-5, 47 NRC at 139. Just as procedural rulings involving discovery and admissibility of evidence or the scheduling of hearings rarely meet the standard for interlocutory review,¹⁸ likewise the Presiding Officer's denial of Petitioners' motion for leave to file a reply brief does not rise to the level meriting the Commission's interlocutory review. On

¹⁶*See City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1508-09 (D.C. Cir.), *cert. denied*, 513 U.S. 1043 (1994) (rejecting claims that completion of the NHPA review process was required prior to agency approval of a project, where the agency's approval was conditioned on its subsequent completion of that process).

¹⁷Although section 800.3(c) of the Advisory Council on Historic Preservation's ("ACHP") regulations states that "Section 106 requires [a federal agency] to complete the section 106 process . . . prior to issuance of any license or permit," the next sentence in the same section provides that the ACHP "does not interpret this language . . . [as] prohibit[ing] phased compliance at different stages in planning." 36 C.F.R. §§ 800.3(c). Moreover, the immediately preceding subsection (800(b)) states that the ACHP "regulations may be implemented . . . in a flexible manner . . . as long as the purposes of section 106 . . . and these regulations are met." 36 C.F.R. § 800.3(b).

¹⁸*See, e.g., Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 74 (1987) (discovery); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981) (admissibility); *United States Department of Energy* (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474 (1982) (scheduling).

such interlocutory matters, we generally defer to the Presiding Officer.¹⁹ Moreover, the arguments proffered by Petitioners regarding leave to reply (i.e., that their response was necessary to correct misstatements of fact and law, and that Petitioners in their stay motion could not anticipate that the Staff and HRI would misrepresent facts and law, *see* Petition for Review at 9-10) could be expected to be raised in many, if not most, challenges to a Presiding Officer's denial of a motion for leave to reply.

F. Motion for Stay

Finally, Petitioners have sought to stay LBP-98-5 for only so long as the Commission needs to consider their petition for review of that order. Because we have denied the petition for review, Petitioners' stay motion is moot.

IV. CONCLUSION

For the reasons set forth above, we deny the petition for interlocutory appeal, dismiss as moot the motion for stay, and lift the temporary stay that we issued on April 16, 1998.

It is so ORDERED.

For the Commission²⁰

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June 1998.

¹⁹ *See generally Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994), and *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995), both of which stated that, in the absence of a clear misapplication of the facts or misunderstanding of the law, the Licensing Board's judgment at the pleading stage that a party has standing is entitled to substantial deference.

²⁰ Commissioner Dicus was not available for the affirmation of this Memorandum and Order. Had she been present, she would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

June 5, 1998

The Commission affirms the Presiding Officer's decision not to recuse himself from the proceeding.

COMMISSION PROCEEDING: APPELLATE REVIEW

RULES OF PRACTICE: INTERLOCUTORY REVIEW; APPELLATE REVIEW; DISCRETIONARY INTERLOCUTORY REVIEW; STANDARD OF REVIEW; INTERLOCUTORY APPEALS (REFERRAL OF RULING)

This agency has an established practice of refusing to use procedural technicalities to avoid addressing disqualification motions.

ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION (STANDARD)

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR RECUSAL (OR DISQUALIFICATION)

Section 2.704(c) of the Commission's Subpart G regulations is meant to ensure both the integrity and the appearance of integrity of the Commission's

formal hearing process. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-907, 28 NRC 620, 623 (1988) (“parties in an adjudicatory proceeding have a right to an impartial adjudicator, both in reality and in appearance to a reasonable observer”), quoting *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568-69 (1985). Because this rationale applies with equal force to Subpart L informal proceedings, section 2.704(c) should be applied to those proceedings as well.

**RULES OF PRACTICE: AFFIDAVITS; DISQUALIFICATION;
MOTIONS FOR RECUSAL (OR DISQUALIFICATION)**

LICENSING BOARD: RECUSAL OF MEMBER

Where the Presiding Officer himself revealed all the facts on which Petitioners based their motion to disqualify him, and where the scope of Petitioners’ challenge calls into question neither his probity nor objectivity, the Commission does not believe that the failure to file an affidavit as required by 10 C.F.R. § 2.704 is fatal to the motion. This conclusion is also consistent with the Commission’s practice of refusing to use procedural technicalities as a means to avoid reaching the merits of a disqualification motion.

**ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION
(STANDARD)**

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

**RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR
RECUSAL (OR DISQUALIFICATION)**

Where a Presiding Officer’s job discussions with a law firm representing a party to this proceeding ended more than 6 months before he was designated to sit in this proceeding, and where the firm toward which he is supposedly biased rejected his job application, the Commission sees no reason to conclude that the Presiding Officer’s impartiality might reasonably be questioned under 28 U.S.C. § 455(a).

**ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION
(STANDARD)**

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

**RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR
RECUSAL (OR DISQUALIFICATION)**

The Commission generally applies a very high threshold for disqualification when considering recusal motions. *Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 92 n.5 (1989).

**ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION
(STANDARD)**

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

**RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR
RECUSAL (OR DISQUALIFICATION)**

Where the Presiding Officer was not “seeking employment” with the law firm at or after the time he was designated as Presiding Officer in this proceeding, he did not violate 5 C.F.R. § 2635.604 of the Standards of Ethical Conduct promulgated by the Office of Government Ethics, which section applies only to executive branch employees seeking employment.

**ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION
(STANDARD)**

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

**RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR
RECUSAL (OR DISQUALIFICATION)**

Section 2635.606(b) of 5 C.F.R. of the Standards of Ethical Conduct provides that, even where an offer of employment is rejected or not made, an agency “may determine that an employee” who has sought but is no longer seeking employment “shall nevertheless be subject to a period of disqualification upon the conclusion of employment negotiations.” However, this regulation merely gives “the agency designee” (here, Chief Judge Cotter) the *option* of disqualifying an

employee of his office from working on a matter, even though the employee had not run afoul of any specific provision of the Office of Government Ethics' regulations.

**ADJUDICATORY BOARDS: BIAS; DISQUALIFICATION
(STANDARD)**

DISQUALIFICATION: STANDARDS

LICENSING BOARD: RECUSAL OF MEMBER

**RULES OF PRACTICE: DISQUALIFICATION; MOTIONS FOR
RECUSAL (OR DISQUALIFICATION)**

NRC: SUPERVISORY AUTHORITY

The Commission could exercise its inherent supervisory authority to disqualify the Presiding Officer. However, in the absence of any information that would present a concern as to the integrity of the process, the Commission declines to take such action.

MEMORANDUM AND ORDER

On April 14, 1998, the newly appointed Presiding Officer in this proceeding issued a Memorandum informing the parties that, prior to August or September 1997, he had applied for a job with Shaw, Pittman, Potts & Trowbridge ("Shaw Pittman"), the law firm representing Hydro Resources, Inc. ("HRI") in this proceeding. Based on this information, two Petitioners (the Eastern Navajo Diné Against Uranium Mining and the Southwest Research and Information Center) filed on April 29, 1998, a "Motion for Disqualification or, in the Alternative, Full Disclosure." Petitioners base their motion for disqualification on the "appearance of impropriety" associated with the Presiding Officer's employment discussions. In Petitioners' alternative motion, they seek full disclosure of the timing and nature of those discussions. Specifically, they seek to know the duration and seriousness of the discussions, the identity of the person who initiated and terminated them, the basis on which they were terminated, and the possibility of future employment.

On May 26, 1998, the Presiding Officer issued a Memorandum and Order, LBP-98-11, 47 NRC 302, declining to disqualify himself but providing the requested additional information regarding his employment discussions. The Presiding Officer revealed that, prior to August or September of 1997, he had met with four Shaw Pittman attorneys (none of whom represents HRI in this

proceeding), that he had twice met with two of those attorneys for lunch (at which he paid for his own meals), and that he had spoken with them about six times on the phone. These discussions ended when Shaw Pittman informed the Presiding Officer that they did not wish to employ him. The Presiding Officer further indicated in his May 26th Memorandum and Order that he has no further interest in seeking employment from Shaw Pittman.

In his May 26 order, the Presiding Officer capsulized why he declines to recuse himself: “It is not clear why a person who has been denied employment by a law firm would be biased in favor of that firm in the future.” 47 NRC at 305 n.4. Also on May 26th, the Presiding Officer referred the disqualification motion to the Commission “pursuant to 10 C.F.R. § 2.704(c)” which provides that “[i]f the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred [by the Licensing Board] to the Commission which shall determine the sufficiency of the grounds alleged.”

The Commission could avoid addressing the disqualification issue at all, on the grounds that Petitioners expressly posed their disqualification and disclosure motions “in the alternative,” suggesting that they would be satisfied with a grant of either one,¹ and that the Presiding Officer’s May 26th order, by all appearances, fully addressed all issues on which Petitioners sought disclosure.² However, given this agency’s established practice of refusing to use procedural technicalities to avoid addressing disqualification motions, we will consider the recusal issue.

This is the first time the Commission has itself been faced with a disqualification motion in a Subpart L proceeding. The Subpart L procedural regulations do not address the issue of disqualification of presiding officers, and the regulatory history of the subpart is silent as to the reason for this omission. It is therefore unclear whether the Commission intended that the subject be covered instead by 10 C.F.R. § 2.704(c). That regulation is meant to ensure both the integrity and the appearance of integrity of the Commission’s formal hearing process.³ Because this rationale applies with equal force to Subpart L informal proceedings, we conclude that section 2.704(c) should be applied to those proceedings as well.

¹ This interpretation finds support in Petitioners’ assertion that “if the presiding officer refuses to recuse himself, he should make full disclosure regarding his employment contacts with Shaw, Pittman.” Motion at 8.

² Specifically, he addresses the duration of the employment discussions (beginning as early as the Spring of 1997 and lasting until August or September of that same year), their seriousness (serious enough to merit two lunches and six phone calls), the identity of the person who initiated and terminated those discussions (the Presiding Officer and the law firm, respectively), the basis on which the discussions were terminated (Shaw Pittman decided not to offer the Presiding Officer a job), and the possibility of future employment (the Presiding Officer precludes this possibility).

³ See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-907, 28 NRC 620, 623 (1988) (“parties in an adjudicatory proceeding have a right to an impartial adjudicator, both in reality and in appearance to a reasonable observer”), quoting *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568-69 (1985).

Before dealing with the merits of the motion, we must first address Petitioners' failure to support their motion with an affidavit as required by section 2.704(c). Under quite similar circumstances to those in this proceeding, the Commission's Appeal Board considered such an affidavit unnecessary:

[T]he absence of an affidavit here is not crucial. The Illinois motion is founded on a fact to which the Board itself had called attention in its March 1, 1978, order ruling upon various intervention petitions Further, in light of the narrow scope of the State's challenge to Dr. Remick's continued participation, an affidavit was not needed to reduce "the likelihood of an irresponsible attack upon the probity or objectivity of the Board member . . . in question."⁴

Here too, the Presiding Officer himself revealed all the facts on which Petitioners based their motion, and the scope of Petitioners' challenge calls into question neither the probity nor objectivity of the Presiding Officer. Under these circumstances, we do not believe that the omission of an affidavit is fatal to the motion. This conclusion is also consistent with our practice of refusing to use procedural technicalities as a means to avoid reaching the merits of a disqualification motion.

We now turn to the merits of Petitioners' disqualification motion. Petitioners seek the Presiding Officer's recusal under three legal standards. The first is 28 U.S.C. § 455(a), which requires recusal whenever a federal justice's, judge's, or magistrate's "impartiality might reasonably be questioned." Licensing Board members are governed by the same disqualification standards (actual or perceived bias or prejudice) that apply to federal judges. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982). We see no reason to conclude that the Presiding Officer's impartiality "might reasonably be questioned" in this proceeding. His job discussions ended more than 6 months before he was designated to sit in this proceeding, and the firm toward which he is supposedly biased *rejected* his job application. We do not believe that this situation comes even remotely close to the "very high threshold for disqualification" that the Commission applies generally to recusal motions. *Joseph J. Macktal*, 30 NRC at 92 n.5 (referring to motions alleging actual bias).

The second legal standard on which Petitioners rely is found in the executive-wide Standards of Ethical Conduct, 5 C.F.R. § 2635.604, promulgated by the Office of Government Ethics. Subsection (a) of that regulation provides that

⁴*Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978). See also *Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 91 (1989) (where the Commission addressed a motion to disqualify all Commissioners, despite Mr. Macktal's failure to submit supporting affidavits); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), LBP-74-80, 8 AEC 770, 772 n.1, *aff'd*, ALAB-239, 8 AEC 658 (1974) (because the facts on which the disqualification motion was based were uncontested, the Board did not base its denial of the motion upon the absence of an affidavit).

an executive branch employee “seeking employment” shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment. . . .” This standard is inapplicable to the instant factual situation. The Presiding Officer was not “seeking employment” with Shaw Pittman at or after the time he was designated as Presiding Officer in this proceeding. Therefore, he did not violate section 2635.604.⁵

Section 2635.606(b) of 5 C.F.R. sets forth the third legal standard on which Petitioners rely. It provides that, even where an offer of employment is rejected or not made, an agency “*may* determine that an employee” who has sought but is no longer seeking employment “shall nevertheless be subject to a period of disqualification upon the conclusion of employment negotiations.” (Emphasis added.) This regulation gives “the agency designee” (here, Chief Judge Cotter) the *option* of disqualifying an employee of his office from working on a matter, even though the employee had not run afoul of any specific provision of the Office of Government Ethics’ regulations. The Commission could, of course, exercise its inherent supervisory authority to disqualify the Presiding Officer. However, in the absence of any information that would present a concern as to the integrity of the process, we decline to take such action here.

For these reasons, we affirm the Presiding Officer’s order of May 26, 1998, LBP-98-11.

It is so ORDERED.

For the Commission⁶

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June 1998.

⁵ See generally 5 C.F.R. § 2635.604(c), Example 4:

A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effects of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel’s review, the employee would not have to take any action to effect disqualification.

⁶ Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

Docket Nos. 11004997
11004998
(License Nos. XSNM-3012
XSNM-3013)

TRANSNUCLEAR, INC.
(Export of 93.3% Enriched Uranium)

June 5, 1998

The Commission denies the Nuclear Control Institute's request for intervention and a hearing on two applications of Transnuclear, Inc., for licenses to export highly enriched uranium (HEU) to Canada. The Commission determines that the Petitioner is not entitled to intervene as a matter of right under the Atomic Energy Act, and that a hearing as a matter of discretion would not be in the public interest or assist the Commission in making the determinations required by the Atomic Energy Act of 1954, as amended, for issuance of the export licenses.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

Institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

The third criterion under section 134a(3) requires that the United States government have in place an active program to develop a low-enriched uranium

(LEU) fuel or target for use in the particular reactor to which the HEU exports are being made.

ATOMIC ENERGY ACT: EXPORT LICENSE

The requirement under section 134a(3) of an active program for the development of an LEU fuel or target that can be used in the particular reactor to which the HEU exports are being made may be met where the Commission determines that the principals are acting in good faith toward concluding a formal agreement to complete the development of such a program.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

Judgments of the Executive Branch regarding the common defense and security of the United States involve matters of foreign policy and national security, and the Commission can properly rely upon those judgments.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Nuclear Control Institute (NCI) has requested leave to intervene and a hearing on two separate applications of Transnuclear, Inc. (Transnuclear), filed on October 27, 1997, for licenses to export highly enriched uranium (HEU) to Canada.¹ For the reasons discussed in this Memorandum and Order, we deny NCI's intervention and hearing request.

II. BACKGROUND

Transnuclear seeks a license from the Commission for authorization to export to Canada 3.005 kilograms of HEU for use as target material in the production of medical molybdenum (Mo-99) in the new MAPLE research reactors, to be operated by Atomic Energy of Canada, Limited (AECL). Transnuclear also seeks a license for authorization to export to Canada 26.738 kilograms of HEU for use as targets in the production of Mo-99 at the existing NRU reactor operated by AECL. By letter dated March 13, 1998, the Executive Branch informed the

¹NCI's initial intervention and hearing petition and subsequent pleadings in response to Transnuclear's opposition pleadings (*see infra*) were filed Dec. 29, 1997 (Petition), Feb. 12, 1998 (Pet. Reply), and Feb. 26, 1998 (Pet. Rejoinder), respectively.

Commission of its judgment that all applicable criteria under the Atomic Energy Act of 1954 (AEA), as amended, had been met and that it supported issuance of the requested licenses.

NCI asserts that it is a nonprofit, educational corporation based in the District of Columbia and, *inter alia*, is actively engaged in disseminating information to the public concerning the proliferation and other risks associated with the use of weapons-useable nuclear materials. Petition at 2-3. NCI seeks intervention to argue that: (1) the proposed export would be inconsistent with section 134 of the AEA (commonly known as the “Schumer Amendment”) (Petition at 17-18), which sets forth three conditions that must be met before the Commission can authorize the export of HEU for use as target or fuel in a research or test reactor²; and (2) the proposed export, if authorized, would be inimical to the common defense and security of the United States. *Id.* at 18-20. NCI requests that the Commission grant NCI’s petition for leave to intervene and order a full and open public hearing at which interested parties may present oral and written testimony and conduct discovery and cross-examination of witnesses. *Id.* at 25-30.

Transnuclear, on behalf of AECL, opposes NCI’s intervention and hearing request.³ It asserts that NCI lacks standing to invoke any hearing right afforded to persons whose interest may be affected under section 189a of the AEA and that all applicable statutory criteria for the export have been satisfied.⁴

² Section 134 of the AEA, which was added to the AEA by the Energy Policy Act of 1992, Pub. L. No. 102-486 (Oct. 24, 1992), permits the issuance of a license for export of uranium enriched to 20% or more in the isotope-235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to other requirements of the AEA, the NRC determines that “(1) there is no alternative nuclear reactor fuel or target enriched in the isotope-235 to a lesser percent than the proposed export, that can be used in that reactor [section 134a(1)]; (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium [section 134a(2)]; and (3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor [section 134a(3)].” Pursuant to section 134b, “a fuel or target ‘can be used’ in a nuclear research or test reactor” if “the fuel or target has been qualified by the Reduced Enrichment Research and Test Reactor [RERTR] Program of the Department of Energy and use of the fuel or target will permit the large majority of ongoing and planned experiments and isotope production to be conducted in the reactor without a large percentage increase in the total cost of operating the reactor.” The RERTR program, a program to develop LEU fuel and targets for research and test reactors, is run by Argonne National Laboratory under contract with the Department of Energy.

³ Transnuclear’s pleadings in opposition to NCI’s intervention and hearing requests were filed Feb. 2, 1998 (Appl. Opposition) and Feb. 23, 1998 (Appl. Reply).

⁴ Transnuclear also argues that NCI’s petition should be denied as untimely with respect to License No. XSNM-3013. Opposition at 9-13. Under 10 C.F.R. § 110.82(c)(2), intervention petitions and hearing requests are due within 15 days after notice of receipt in the Public Document Room. Transnuclear’s application for License No. XSNM-3013 was received in the Public Document room on Nov. 12, 1997; NCI’s Petition was filed on Dec. 29, 1997 (which was within 30 days of the *Federal Register* publication of notice of the application for License No. XSNM-3012 and therefore timely filed as to that application). Since we are denying NCI’s petition on other grounds, we need not reach the question of whether the petition should be denied on grounds of untimeliness. We note, however, that NCI’s Petition was filed at an early stage in the proceeding, several months before the Commission had received the Executive Branch’s views on the application. In fact, briefing on the issues raised

(Continued)

III. THE PETITIONER'S STANDING

A. NCI Does Not Have Standing to Intervene as a Matter of Right

In another export licensing proceeding, CLI-94-1, 39 NRC 1, 4-6 (1994), NCI asserted a claim of interest for standing under section 189a of the AEA based on essentially the same institutional interests it asserts now with respect to the current license application. The Commission in CLI-94-1 denied NCI's request for hearing as a matter of right under section 189a, explaining that it "has long held that institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a." 39 NRC at 5. In reply to Transnuclear's Opposition to NCI's intervention request, NCI "concedes" that the Commission has already determined that it "did not meet the judicial standing tests which the Commission has consistently applied in export licensings." Pet. Reply at 3. NCI also clarifies in its reply that it "does not intend . . . to argue that it has an 'interest' which the Commission has found it does not" and that it is seeking a hearing as a matter of Commission discretion under 10 C.F.R. § 110.84(a) (discussed *infra*). Pet. Reply at 3.

The rationale employed by the Commission in CLI-94-1 in denying NCI intervention and a hearing as a matter of right applies equally with respect to NCI's current intervention and hearing request. The Commission in that case amply reviewed the applicable legal principles and case law supporting its decision. We see no reason to repeat that discussion here, particularly since NCI has acknowledged that it is unable to meet the Commission's longstanding criteria for intervention as of right under section 189a. *See* 39 NRC at 4-5.

B. A Discretionary Hearing Would Not Assist the Commission or Be in the Public Interest

Even though NCI has not established a basis on which it is entitled to intervene as a matter of right under section 189a of the AEA, the Commission's regulations under 10 C.F.R. §§ 110.84(a)(1) and (2) provide for a discretionary hearing if the Commission finds that a hearing would assist it in making the statutory determinations required by the AEA and be in the public interest. NCI maintains that a hearing should be held on two issues: (1) whether the proposed exports would be in compliance with the Schumer Amendment; and (2) whether

in NCI's Petition was completed before the Commission's receipt of the Executive Branch's views. Therefore, the lateness *per se* of NCI's intervention request, had it been granted, would have resulted in minimal, if any, disruption or delay in the proceeding.

the proposed exports would be inimical to the common defense and security of the U.S.

1. Schumer Amendment

a. NCI's Contention

Regarding compliance with the Schumer Amendment, NCI is primarily concerned with the third criterion, set forth in section 134a(3) of the AEA. NCI asserts that the United States Government is not currently “actively developing” an “alternative nuclear reactor . . . target” — i.e., a low-enriched uranium (LEU) target as defined under section 134b(1) — that can be used for the production of medical isotopes in the MAPLE and NRU reactors. *See, e.g.*, Petition at 15; Pet. Reply at 19; Pet. Rejoinder at 3. The crux of NCI’s position is that an active program to develop alternative LEU targets for the Canadian reactors could not currently be under way because, based on information it has gleaned from informal contacts with officials of Argonne National Laboratory, neither the Canadian government nor the commercial entities involved in producing Mo-99 in the Canadian reactors, AECL and MDL Nordion, have been providing Argonne with the requisite information and cooperation necessary for it to adapt the LEU targets developed under the RERTR program for specific use in the Canadian reactors. *See, e.g.*, Petition at 17; Pet. Reply at 19. NCI also asserts that, given the lack of Canadian cooperation with Argonne in undertaking an active development of LEU targets for the Canadian reactors, the Commission cannot find that Canada has provided sufficient assurances that it will use an alternative target in lieu of highly enriched uranium as required under the second Schumer Amendment criterion in section 134a(2). Petition at 18.

In its final pleading, NCI makes clear that its opposition to the requested exports hinges on the alleged lack of Canadian cooperation with the United States in undertaking an active LEU development program for the Canadian reactors. Pet. Rejoinder at 4. NCI concedes that, “[o]nce the needed cooperation for such a program is forthcoming, impediments to export will be removed.” *Id.* In its reply pleadings, Transnuclear disputes NCI’s contention that the Canadian government and/or AECL have refused to cooperate with Argonne. *See, e.g.*, Appl. Opposition at 16; Appl. Reply at 7.

b. Discussion

We acknowledge that, at the time NCI filed its pleadings with the Commission, the nature and existence of an active program to develop LEU targets for use in the MAPLE and NRU reactors may not have been apparent. However,

as explained below, any outstanding concerns have been sufficiently allayed by new information received from the Executive Branch subsequent to its initial letter of March 13, 1998.

Upon review of the Executive Branch's March 13, 1998 letter and the pleadings of NCI and AECL, the Commission staff concluded that it should seek additional information from the Executive Branch before making a recommendation on the requested licenses. While the Commission staff was satisfied that the Schumer Amendment criteria under sections 134a(1) and (2) had been met,⁵ it had concerns regarding the criterion under section 134a(3), particularly in light of the significant issue raised by NCI regarding the alleged lack of Canadian cooperation with Argonne. The third criterion under section 134a(3) requires that an active LEU development program be linked to the particular reactor to which the HEU exports are being made. The Executive Branch's March 13, 1998 letter, however, stated only that "Argonne National Laboratory has an active DOE-funded program underway for the development of low-enriched uranium targets for production of medical isotopes."

Inasmuch as the Executive Branch's letter was ambiguous on its face regarding the linkage between the existing DOE-funded program and the Canadian reactors, the Commission staff, by letter dated May 6, 1998, sought clarification from the Executive Branch as to whether the "active DOE-funded program underway at Argonne National laboratory . . . is aimed specifically at developing [LEU] targets that can be used for the production of [Mo-99] in both the MAPLE and NRU reactors." The Executive Branch, by letter dated May 7, 1998, responded unequivocally that "there is currently an active DOE-funded program underway at Argonne National Laboratory aimed specifically at developing LEU targets for production of Mo-99 in both the MAPLE and NRU reactors." The Executive Branch also offered that, "[t]o further [the active LEU development] effort, a series of meetings has been initiated between Argonne and AECL/Nordion of Canada to establish a framework for the exchange of technical information and LEU target development cooperation on a commercial basis."⁶ Finally, the Commission recently received a classified Department of State cable, dated April 24, 1998, which confirms that formal bilateral consultations between official U.S. and Canadian representatives were initiated on April 9, 1998, to further discussions as to the exchange of technical data and

⁵The Executive Branch's March 13, 1998 letter conveyed the Department of Energy's confirmation that no LEU target for use in the MAPLE or NRU reactors had been qualified by the RERTR program, which satisfies section 134a(1). The Executive Branch also provided us with copies of diplomatic notes exchanged between the Embassy of the United States in Canada and the Canadian Ministry of Foreign Affairs which, consistent with section 134a(2), reflect Canada's assurance that it will use LEU targets once such targets become available and such use does not result in a large percentage increase in the total cost of operating a reactor.

⁶The Commission staff's May 6, 1998 letter and the Executive Branch's May 7, 1998 response were placed in the Commission's Public Document Room and served upon the participants in this proceeding.

commercial nondisclosure issues pertinent to Argonne's development of LEU targets for the Canadian reactors.

Based upon our assessment of the new information that the Commission has received from the Executive Branch, we are satisfied that an active program is under way for the development of LEU targets for the MAPLE and NRU reactors, as required under section 134a(3). For several years, AECL had an Mo-99 production program, with a long-term goal to phase out use of fresh HEU and eventually use LEU targets; but in the early 1990s, AECL determined that the program would not be commercially viable and discontinued it. AECL and MDS Nordion have no requirement that would lead them to undertake the development and use of an LEU target. They are nevertheless prepared to provide on a commercial basis, to the extent of their capabilities, information and services to Argonne in its LEU target research and development efforts. While the dialogue and exchanges toward this effort may be in the early stages, we believe that the U.S. and Canadian principals are acting in good faith toward concluding a formal agreement to complete the LEU target development program linked to the Canadian reactors.

2. Common Defense and Security

NCI also seeks a discretionary hearing to assess the impact of the proposed HEU exports on the common defense and security of the United States. NCI essentially argues that a positive Commission licensing action on the proposed HEU exports would imply United States' approval of foreign and domestic use of HEU in research and test reactors and consequently discourage foreign reactor operators that still use HEU from participating in the RERTR program to convert to LEU as well as encourage other countries to export HEU. Petition at 18-19. NCI also maintains that approval of the pending applications would increase the nuclear proliferation and terrorism risks associated with placing HEU in international commerce. *Id.*

The Commission believes that it already has ample information to make a determination regarding the common defense and security impact of the proposed HEU exports. As reflected in the March 13, 1998 transmittal of views, the Executive Branch has determined that "the proposed exports in no way would be inimical to the common defense and security of the United States." Judgments of the Executive Branch regarding the common defense and security of the United States involve matters of foreign policy and national security, and the Commission can properly rely upon those judgments. *See Natural Resources Defense Council v. NRC*, 647 F.2d 1345, 1364 (D.C. Cir. 1981). Moreover, contrary to NCI's position that permitting the proposed exports would signal to the international community a United States' sanction of the use of HEU, approval of the exports conditioned on Canadian assurances to use LEU targets

once they are developed and the existence of an active program to develop such LEU targets for the Canadian reactors furthers, rather than undermines, the objective reflected in the Schumer Amendment and various United States policy initiatives to reduce the world commerce in bomb-grade nuclear material.

In sum, although we are denying NCI's request for a discretionary hearing, NCI has, in effect, obtained the end result — Canadian cooperation permitting an active LEU target development program for the Canadian reactors — that it appears ultimately to be seeking. We wish also to point out that our review of these export applications was significantly aided by NCI's participation, albeit not in a formal hearing context. Indeed, our decision regarding the consistency of the proposed exports with the statutory criteria was made only after requesting additional information — prompted in large part by the concerns highlighted by NCI — from the Executive Branch.

III. CONCLUSION

For the reasons stated in this Decision, we find that NCI has not established a basis on which it is entitled to intervene as a matter of right under the AEA, and that a hearing as a matter of discretion is not necessary in light of the recent information provided to the Commission by the Executive Branch as to the existence of an active program and Canadian cooperation in developing LEU targets for the MAPLE and NRU reactors.

IV. ISSUANCE OF LICENSES

The Commission has determined that the export licensing criteria set forth in the AEA are satisfied and directs the Office of International Programs to issue licenses XSNM-3012 and XSNM-3013 to Transnuclear, Inc. Specifically the Commission finds that the export licensing criteria set forth in sections 127, 128, and 134 of the Atomic Energy Act have been met. Moreover, pursuant to sections 53 and 57 of the AEA, issuance of these licenses would not be inimical to the common defense and security or constitute an unreasonable risk to the health and safety of the public.

With respect to the issuance of XSNM-3013, the Commission notes that Transnuclear seeks this license as a contingency to allow production of Mo-99 at the NRU reactor in the period 2000-2002 if extended delays are experienced in starting up the MAPLE reactors and shifting MO-99 production to those reactors. To ensure that this material is exported only if needed, the license should be conditioned to require the Licensee to inform the NRC in writing 30 days prior to each export under the license, specifying the amount of material

to be shipped and a statement from AECL explaining its need for the material in the context of its then-current inventory and the projected rate and durations of its HEU use to produce medical isotopes at the NRU reactor.

It is so ORDERED.

For the Commission⁷

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June 1998.

Concurring Opinion of Commissioner Nils J. Diaz:

I concur in the Commission's decision to deny the hearing request and to authorize the issuance of the two export licenses to Canada. The applicable licensing criteria have been satisfied and Canada's commitment to nonproliferation is exemplary. Nonetheless, I believe it is important that substantial progress be made toward developing LEU targets for use in the MAPLE reactors before those reactors become fully operational. Therefore, I would have required, as a condition of our approval, that the Executive Branch, in consultation with Argonne National Laboratory, provide the Commission with a schedule for the development of LEU targets that could be used in the MAPLE reactors and with periodic status reports thereafter until the program has been successfully completed.

⁷Commissioner Dicus was not available for the affirmation of this Memorandum and Order. Had she been present, she would have affirmed the Memorandum and Order. The concurring opinion of Commissioner Diaz is attached.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Thomas D. Murphy
Dr. Thomas S. Elleman

In the Matter of

Docket No. 50-029-LA
(ASLBP No. 98-736-01-LA)

**YANKEE ATOMIC ELECTRIC
COMPANY**
(Yankee Nuclear Power Station)

June 12, 1998

In this Memorandum and Order concerning the application of Yankee Atomic Electric Company for approval of its license termination plan, the Licensing Board denies petitions for hearing and intervention on grounds of lack of standing.

RULES OF PRACTICE: STANDING

Setting forth specific aspects of subject matter of the proceeding for which intervention is sought is not related to establishing standing requirements.

RULES OF PRACTICE: FILING OF DOCUMENTS

Filings not authorized by rules of procedure or leave of the Board are not considered in decisions.

**RULES OF PRACTICE: STANDING TO INTERVENE
(PARTICIPATION OF GOVERNMENTAL AGENCY)**

Not all governmental or quasi-governmental entities are entitled to participate in NRC adjudicative proceedings.

**MEMORANDUM AND ORDER
(Decision on Standing)**

The Board herein renders a decision on amended petitions for a hearing and intervention on Yankee Atomic Electric Company's (Licensee) amendment application which requests Nuclear Regulatory Commission approval of its License Termination Plan (LTP). Petitioners are the New England Coalition on Nuclear Pollution, Inc. (NECNP), the Citizens Awareness Network (CAN), and the Franklin Regional Planning Board (FRPB).¹ Based on the Board's review of the amended petitions and opposing responses from the Licensee and Staff,² we hold that none of the requestors meets the Agency's standards for admission and the petitions are consequently denied.

A termination plan from NRC's licensees is required to enable the Agency to make decisions on: (a) the adequacy of funds available for final site release, (b) the radiation release criteria for license termination, and (c) the adequacy of the final survey to verify that the release criteria have been met. *See* 61 Fed. Reg. 39,278, 39,288 (July 29, 1996). The LTP is required to be filed at least 2 years prior to terminating the license. It calls for the Licensee to produce: (A) a site characterization; (B) identification of remaining dismantlement activities; (C) plans for site remediation; (D) detailed plans for the final radiation survey; (E) a description of the end use of the site, if restricted; (F) an updated site-specific estimate of remaining decommissioning costs; and (G) a supplement to the environmental report describing any new information or significant environmental change associated with the proposed termination activities. 10 C.F.R. § 50.82(a)(9)(ii). Subsequent to the filing of the Licensee's application, the Commission, pursuant to 10 C.F.R. § 50.92, made a proposed determination that the amendment involves no significant hazards consideration. This determination means that the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously

¹NECNP Amended Petition in Licensee Proceeding (April 6, 1998); CAN Amended Petition to Intervene in Licensee Proceeding (April 6, 1998); FRPB Amended Petition of Request for Hearing (April 6, 1998). Another Petitioner, the Nuclear Information and Resource Service, has withdrawn from the proceeding. Notification to All Parties Announcing Withdrawal (April 6, 1998).

²Licensee Response to Amendments of Petitions (April 13, 1998); Staff Response to FRPB (April 14, 1998); Staff Response to NECNP (April 17, 1998); Staff Response to CAN (April 20, 1998).

evaluated; (2) create the possibility of a new or different kind of accident from any previously evaluated; or (3) involve a significant reduction in a margin of safety.

Inasmuch as there are similar allegations in the amended petitions of NECNP and CAN, their submissions are treated here together where appropriate. Both Petitioners attempt to demonstrate their eligibility for standing through representation and authorization of a member of their organizations.³ These individuals claim injuries that are supported by the declaration of CAN's technical expert, David Lochbaum, a nuclear safety engineer with the Union of Concerned Scientists. Mr. Lochbaum states that he has examined the LTP, the Final Safety Analysis Report (FSAR) for the facility, and relevant NRC regulations, bulletins, and information notices.⁴ In addition to the members' and the Lochbaum declarations concerning injuries, NECNP and CAN set forth numerous aspects of the proceeding on which Petitioners seek to intervene. These are illuminated by descriptive allegations that appear to be similar in nature to contentions.

NECNP and CAN register concerns regarding several matters that, being outside the jurisdiction of the Board, cannot be considered here. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976). These involve the proposed NRC determination that the amendment request involves no significant hazards consideration and that, allegedly, inadequate procedures were followed relating to a public meeting required to be held to review the LTP. *See* CAN Amended Petition at 2-6; NECNP Amended Petition at 3-7. *See also* FRPB Amended Petition Request at 11-12. Redress for these matters, if requested, can only be obtained from the Commission.

In an unpublished Order of March 25, 1998, the Board authorized amended petitions that were submitted by each Petitioner. Responses to those petitions were filed by the Licensee and the Staff. Subsequent to that date, a large number of unauthorized pleadings were filed in this proceeding without leave of the Board.⁵ These filings, which were not characterized as amendments to

³ NECNP Amended Petition, Exh. A; CAN Amended Petition, Exh. A.

⁴ NECNP Amended Petition, Exh. B; CAN Amended Petition, Exh. B.

⁵ CAN's Reply to Staff's Answer to Amended Petition to Intervene; CAN's Reply to YAEC's Answer to Amended Petition to Intervene (April 22, 1998); Motion of YAEC to Strike Unauthorized FRPB Pleading & Conditional Motion for Leave to Reply Thereto (April 30, 1998); FRPB's Reply to YAEC & Staff's Answers to FRPB's Amendment (April 28, 1998); Reply of NECNP to YAEC & Staff's Answers to Amended Petitions (April 28, 1998); Motion of YAEC to Strike Unauthorized NECNP Pleading & Conditional Motion for Leave to Reply Thereto (May 1, 1998); FRPB's Conditional Motion for Leave to Reply & Motion to Strike YAEC's Unauthorized Motion to Strike (May 2, 1998); CAN's Reply to Staff's Answer to Amended Petition to Intervene (May 4, 1998); Motion of YAEC for Leave to Reply to New FRPB Evidence (May 5, 1998); Letter from Franklin Regional Council of Governments Support FRPB's Participation Before ASLB (May 7, 1998); NECNP's Opposition to YAEC Motions to Strike & for Conditional Leave to Reply & a Proposed Order Relating to the Motions & Related Issues Before ASLB (May 7, 1998); FRPB's Conditional Reply & Support for NECNP's Opposition & Proposed Order & Motion for Leave to Reply to YAEC's New Evidence Filing (May 11, 1998); CAN's Support

(Continued)

petitions, are not provided in the Commission's rules of procedure. *See* 10 C.F.R. § 2.714(a)(3). Not having been authorized by leave of the Board, such additional filings have not been considered in this Decision. NRC adjudicative procedures do not permit an endless stream of pleadings to evolve. *See id.*; *see also* 10 C.F.R. § 2.730(c) (replies to petitions not permitted without leave of the presiding officer).

In view of lengthy submissions on "aspects" provided in both Petitioners' submissions, we first set forth the Board's understanding of this procedural prerequisite of 10 C.F.R. § 2.714 before addressing the Agency's standing requirements.

Throughout NRC's history, and that of its predecessor agency, the Atomic Energy Commission, adjudicative procedural rules have required requests for intervention to set forth the specific aspect of the subject matter of the proceeding on which petitioners desired to intervene. Prior to 1978, such aspects were required to be supported by affidavits and include facts pertaining to the interests submitted and the basis for contentions connected to each aspect. A direct nexus existed then between aspects and contention. In 1978, changes in the Agency's procedures opened the possibility of petitioners filing contentions with their bases separately in a supplement filed prior to a first prehearing conference, and in 1989, changes *inter alia* required that petitions establish a foundation for each contention. The objective of this requirement was to demonstrate that a material issue of law or fact existed between the applicant and intervenor. For some time then, there has been a separation between aspects and contentions, leaving the aspect requirement only necessary to demonstrate that the areas of the intervenor's interest are within the scope of the particular proceeding. It is not viewed as a foundation for standing requirements.

To participate as a party in Commission proceedings, standing requirements based on judicial concepts call for a demonstration that the proposed action will cause an injury in fact to the petitioner's interests and that the injury is within the zone of interests protected by statute. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). An organization may establish "organizational" or "representative" standing by demonstrating an injury to its organizational interests or injury to one of its members who has individual standing and has authorized the organization to represent his or her interest. *See Georgia Institute of Technology* (Georgia Tech

for NECNP's Opposition to YAEC's Motions to Strike & for Conditional Leave to Reply & a Proposed Order Relating to the Motions & Related Issues Before ASLB (May 11, 1998); Answer of YAEC to NECNP and CAN Motions (May 12, 1998); Staff's Response to YAEC Motions to Strike Unauthorized Pleadings (May 12, 1998); Staff's Response to CAN's Reply to Staff's Answer to Amended Petition to Intervene (May 19, 1998); Staff's Notice That They Do Not Intend to File a Response to YAEC's Motion for Leave to Reply to FRPB's Evidence (May 20, 1998); Staff's Intention Not to File Responses to CAN's May 11 Support for NECNP's Opposition to YAEC's Motions to Strike & FRPB's May 11 Conditional Reply & Support for NECNP's Opposition and Proposed Order & Motion for Leave to Reply to YAEC's New Evidence Filing (May 21, 1998).

Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the scope of interests of the Atomic Energy Act or the National Environmental Policy Act. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).⁶ Where an organization seeks to establish its right to participate in the Agency's proceedings through a member who authorizes its representation, the injuries complained of must be particularized and capable of being redressed by a favorable decision. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). Redressability is a required element in standing for it must be demonstrated that there is a likelihood of an injury being redressed if petitioner is to obtain the relief requested. *Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).

NEW ENGLAND COALITION ON NUCLEAR POLLUTION, INC. (NECNP)

The NECNP petition is supported by a declaration of an authorizing member, Jean-Claude van Italie, who expresses a concern for his health and safety through “long term environmental effects of low-level radiation” and “the long term effects of an ineffectual cleanup . . . or an irradiated fuel accident” on his property value. Mr. van Italie, who lives within 6 miles of the Licensee's facility, also expresses a somewhat diffuse concern that the “final site condition projected under the LTP . . . satisfy the NRC's criteria for general release.” *See* Declaration of Jean-Claude van Italie at 1-3. The Licensee and Staff assert that the above concerns are not relevant to the LTP and, not being redressable by the proceeding, are outside its scope. We agree.

The van Italie declaration raises several matters related to fuel management and issues connected to it that are activities previously licensed and considered in the Licensee's decommissioning plan and approved therein. *See* Declaration of Jean-Claude van Italie at 3-4. As the Commission noted in adopting the Agency's final rule on decommissioning, “[t]he existing rule, as well as the proposed rule, consider the storage and maintenance of spent fuel as an operational consideration and provide separate part 50 requirements for this

⁶The Franklin Regional Planning Board seeks intervention based on organizational standing even though it admits that it is a governmental entity. We disregard the implications of its governmental identity for the purposes of our analysis of its organizational standing.

purpose.’’ 61 Fed. Reg. 39,278, 39,292 (July 29, 1996). *Infra* at pp. 350-51. The same is true for the claimed concern that the final site conditions ‘‘satisfy . . . NRC’s criteria for general release’’ of the property. The Licensee’s LTP advises that the site release criteria comply with NRC’s Site Decommissioning Management Action Plan of April 16, 1992 (57 Fed. Reg. 13,389) and with 10 C.F.R. § 20.1401(b). *See* LTP, Revision 1, A-7 (December 1997). Accordingly, there is nothing that can be redressed here on the Petitioner’s concern.

The NECNP petition alleges that Mr. van Italie would suffer adverse consequences from the release of radiation due to the kinds of accidents described by its consultant expert, David A. Lochbaum. Our review of the Lochbaum declaration reaches a similar conclusion as the opinion expressed above concerning spent fuel matters. His declaration is concerned exclusively with spent fuel management matters which, as indicated, is a subject beyond the scope of a proceeding considering a license termination plan. Accordingly, reliance on this declaration provides no relief for Petitioners on standing requirements.

We provide here some discursive comments on the lengthy outline and descriptive ‘‘aspects’’ included in NECNP’s petition. As indicated, *supra*, aspects are not evaluated in the consideration of alleged injuries to substantiate standing rights. However, in the absence of case authority and in light of some possible confusion that may exist related to the procedural changes over the years and their impact on the aspects requirement, we measure here whether NECNP’s petition in this regard receives any substance on standing from the assertions in the aspects. In doing so, we again reach a judgment that the aspect allegations provide no substantiation to verify claims that the LTP threatens injury to Petitioner’s interests.

In the outline aspects of a possible hearing on the LTP, both Petitioners, NECNP and CAN, submit a number of nonconclusory generalized statements on the validity or adequacy of the elements of the LTP that are not particularized to any claimed injury.⁷ Accordingly, they contribute nothing to substantiate the Petitioner’s claim for standing and need not be addressed further. However, the *descriptive* aspects submitted by Petitioner NECNP provide allegations regarding deficiencies in the LTP and have been judged by the Board as follows:

1. *General deficiencies* — There is no claim for injury founded here on broad statements that the LTP contains ‘‘vague and conditional language’’ and is ‘‘impervious to technical or practical assessment.’’ *See* NECNP Amended Petition at 23.

2. *Inadequacies in dealing with High-Level Waste* — Management of spent fuel is outside the domain of the LTP. *See id.* at 23-26.

⁷NECNP Amended Petition at 18-23 (April 6, 1998); CAN Amended Petition at 17-21 (April 6, 1998).

3. *Inadequacies in dealing with environmental issues* — There is no requirement in the regulations for the LTP to comply with NEPA and since Licensee notes in the LTP a compliance on environmental issues with its decommissioning plan, no injury can be supported by matters outside the scope of the proceeding. *See id.* at 26-28.

4. *Licensee's trustworthiness to conduct accurate analysis* — Allegations of prior mistakes in conducting analytical surveys to reveal levels of contamination cannot be considered within the scope of the present proceeding or as a foundation for injury. *See id.* at 28-31.

5. *Hazards unanalyzed in the LTP* — This aspect again treats of spent fuel pool management which is outside the scope of the proceeding. *See id.* at 31-32.

6. *Inadequate evaluation of likely accidents* — Same conclusion as above. *See id.* at 32-33.

7. *No compliance with ALARA concerning residual radiation* — The premise of assertions here is that instead of the LTP's site release criterion of 15 mrem/yr for the Total Effective Dose Equivalent (TEDE) that might be received by the average member of the critical population group of persons exposed to residual contamination at the site, ALARA requires a worst-case scenario in determining residual radioactivity that results in "doses many orders of magnitude above background." NRC's regulations do not require a worst-case scenario and the Licensee's response to CAN's petition makes clear that they will be in compliance. *See id.* at 34; *see also* Licensee Response to Amendments to Petitions to Intervene at 25-29.

8. *LTP does not adequately define crucial terms* — The regulatory requirement for the LTP is found in 10 C.F.R. § 50.82 and does not include a definition of license termination. The Petitioner does not state how the lack of such a definition injures its interests. *See* NECNP Amended Petition at 35.

9. *LTP lacks adequate funding assurance* — This assertion lacks particularity and alleges no injury to NECNP. *See id.*

10. *LTP's site characterization and final survey plan are inadequate* — There is no requirement for the LTP to investigate offsite landfills and, accordingly, this concern is outside the scope of the proceeding. *See id.* at 35-36.

11. *LTP's proposed contamination sampling is inadequate* — This assertion also lacks particularity and provides no demonstration of harm to the Petitioner. *See id.* at 36.

12. *LTP has questionable bases for determining background radiation* — The NRC's regulations provide that background radiation includes nuclear weapons-testing fallout and, consequently, no criticism can be levied — and no injury assumed — for its measurement by the Licensee. *See id.* at 36; *see also* 10 C.F.R. § 20.1003.

13. *LTP inadequately addresses possible continuing contamination* — The assertions concerning soil near the spent fuel (waste) pit building and designation

of nonimpacted areas in the final survey plan allege no injury to the Petitioner. *See* NECNP Amended Petition at 36-37.

CITIZENS AWARENESS NETWORK (CAN)

CAN's member, Deborah B. Katz, has authorized CAN to represent her in this proceeding. CAN Amended Petition at 8, 9; Katz Declaration at 1.

Ms. Katz lives within 6 miles of YNPS and claims concerns about the long-term environmental effects of low-level radiation; that the final site condition projected under the LTP will satisfy the NRC's criteria for general release; that the LTP appears to permit release of the site for public use at levels much higher than the Commonwealth of Massachusetts standard of 10 millirem⁸ per year above background radiation levels; and that the LTP is vague about cleaning up the spent fuel pool and ion exchange pits. CAN is concerned about the migration of radioactive tritium into Sherman pond. *See* Katz Declaration at 2-5. CAN argues that the threat to Ms. Katz is not speculative but is supported by Mr. Lochbaum's declaration. CAN Amended Petition at 12.

In the Licensee and Staff responses to NECNP and CAN's amended allegations, both parties argue that the Petitioner's reliance on fuel management issues does not present a claim of a cognizable injury that will be adversely affected by the outcome of this proceeding.⁹ The Licensee claims it already has a license for the spent fuel pool under Part 50 and is not seeking an ISFSI under Part 72. It further contends that CAN's concern about not meeting the Commonwealth of Massachusetts' standards is misplaced and that the Board must observe the standards promulgated in 10 C.F.R. § 20.1402. The Licensee also argues that the language used to describe tritium contamination in Sherman Pond neither claims injury in fact nor is adequate to demonstrate injury in fact. *See* Licensee Response at 18-24 & n.32.

The Staff avers that although Ms. Katz's interests fall within the zone of interests protected by the AEA and NEPA, those interests could not be affected by the outcome of this proceeding and thus do not constitute injury in fact. It confirms that the Licensee is given a general license to store fuel under 10 C.F.R. § 72.210 and expresses an uncertainty over what CAN means by being troubled by the notion that the final [radiological] condition of the site will meet the NRC criteria. The Staff meets this challenge by saying that if she means that the Licensee's performance in meeting the criteria or if she means that the criteria itself is inadequate, neither will be affected by the outcome of this

⁸Throughout this Memorandum and Order we use the units of radiation dose as used by the parties. To convert to SI units, 1 millirem equals 0.01 milliSievert; one μ R is assumed to equal 0.01 μ Sv.

⁹Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene (April 13, 1998); NRC Staff's Response to Citizens Awareness Network's Amended Petition to Intervene (April 20, 1998).

proceeding. In the Staff's opinion, similar to the Licensee's, Ms. Katz has failed to establish an injury in fact. Staff Response at 3-6.

Ms. Katz also appears to base her injury-in-fact argument primarily on the notion that she will be harmed by the storage of spent fuel on the site or the threat of a potential irradiated spent fuel accident, the analysis of which has not been presented in the LTP. Ms. Katz's claim that spent fuel management is to be considered as part of the LTP submission does not agree with our understanding of the regulations. Section 72.210 of 10 C.F.R. clearly provides for a general license for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites authorized to possess or operate nuclear power reactors under Part 50. The Board finds nothing in 10 C.F.R. § 50.82(a)(9)(ii) that requires a submission of information concerning spent fuel management in the LTP and no evidence that the management of spent fuel is a subject of this proceeding. Mr. Lochbaum's declaration provides expert opinion concerning spent fuel handling, storage, and spent-fuel-related accidents. Since any injury claimed by CAN, like NECNP, originating with an accident from or activities with spent fuel cannot be remedied by the denial of the license amendment sought in this proceeding, we cannot grant standing on the basis of any consequences from spent fuel management. We find that CAN's primary basis for standing does not meet the accepted test described above to demonstrate injury in fact.

In addition, CAN does not convince us that Ms. Katz will be affected, much less harmed by long-term residual contamination from the site. She offers no expert opinion in this area. CAN provides no basis to convince us that Massachusetts law, providing for more stringent site release criteria than the NRC's, should prevail in this case. Nor does CAN's argument that the projected radioactive contamination levels calculated by CAN to result in doses to the public of 43 or 87 millirem per year persuade us that CAN has demonstrated an injury in fact. CAN claims that Licensee's site release criteria of 15 millirem per year (*see* LTP at 1-1, 4-1, and A-7) will be exceeded by the radiation exposure rates also allowed by the site release criteria (*id.* at A-7) of 5-10 μ R per hour. Licensee's criteria state that the Total Effective Dose Equivalent (TEDE) is applied to the average member of the critical group. Our review of the Commission's Radiological Criteria for License Termination (62 Fed. Reg. 39,058) confirms the Licensee's and Staff's view that it is not necessary to calculate the doses from the residual levels of radioactivity in a site using worst-case assumptions. CAN does not demonstrate that this should not be so or provide us with a credible argument that the Licensee will not meet the 15 millirem per year criteria regardless of the proposed average hourly or maximum dose rate limits of 5 and 10 μ R. CAN's argument that Licensee's site release may not be ALARA because of inadequate soil remediation and monitoring does not explain how the requirements in the LTP for soil and groundwater

monitoring fail to meet standards or will harm Ms. Katz. LTP at A-30. We note that the criteria for site release in the LTP are well within the 10 C.F.R. § 20.1402 NRC regulatory standard of 25 millirem per year. 62 Fed. Reg. at 39,088. As discussed above, NRC decommissioning regulations do not require worst-case assumptions in calculating release levels. CAN's purported injury from the site residual radioactivity appears hypothetical and speculative relative to Ms. Katz. CAN has not demonstrated that its postulated injury from the site release criteria is distinct and palpable, particular and concrete.

The descriptive aspects submitted by CAN, like those of NECNP, are also evaluated for any substantive support for Petitioner's standing arguments. Although some of the specific aspects CAN proposes to litigate may be germane to the subject matter of this proceeding, we found none that rise to the level to justify injury in fact:

1. *Failure to maintain ALARA standards* — CAN claims release criteria are not ALARA since the calculated doses could be between 43 and 87 millirem per year by assuming a family farmer would inhabit the area 24 hours a day, 365 days per year. Although not stated, CAN appears to arrive at these values by using the LTP's additional site release criteria of 5 to 10 μ R per hour. The standards for site release are 25, 15, or 10 millirem per year (NRC, EPA, or MA). CAN Amended Petition at 22, 23. We agree with the Licensee and the Staff that CAN has not made a case that it is necessary to postulate an incredible worst-case scenario in order to demonstrate that the Licensee will not meet its required release limits of 15 millirem per year. It is also well-established NRC law that a state does not have the power to set radiological standards for NRC nuclear power plant licensees. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651, 662-64 (1985) [federal government has exclusive jurisdiction with regard to radiological health and safety matters], citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 207-12 (1983). To the extent that this aspect challenges the release criteria, it is not germane to this proceeding. See CAN Amended Petition at 22-23.

2. *Soil remediation figures are faulty and may not meet ALARA considerations* — The Staff points out that NRC regulations in 10 C.F.R. §§ 20.1402 and 20.1003 only require analysis of the critical group and it is not necessary to include all half million visitors a year to the Deerfield River Valley in the control group. CAN has not convinced us that a worst-case analysis is required for determining if an activity is ALARA. This aspect is not germane. Nor has CAN demonstrated that the prospective monitoring as outlined in the LTP (*see* LTP at A-29 to A-32) is inadequate. See CAN Amended Petition at 23-25.

3. *The site release plan does not adequately describe planned decommissioning activities in violation of 10 C.F.R. § 50.82(b). The NRC should have created an EIS and required an ISFSI under Part 72. The Staff is violating*

NEPA and claims that the removal of the spent fuel pool is part of the decommissioning activities. CAN is also concerned that Greater Than Class “C” waste will be stored on site as well as fuel. Again, the Board agrees with the Licensee and Staff that decommissioning activities and spent fuel storage activities are beyond the scope of what is required by 10 C.F.R. § 50.82(a)(9) to be submitted in an LTP. This aspect is not germane. See CAN Amended Petition at 25-26.

4. *The LTP does not detail how the Licensee plans to protect the public from access to the ISFSI.* As discussed above, spent fuel management activities are not a germane aspect of this proceeding. See *id.* at 27-28.

5. *No cost comparison is provided between establishing an ISFSI and leaving the fuel in a fuel pool.* Same conclusion as above. See *id.* at 28.

6, 7 and 8. *The Staff violated NEPA by not writing an EIS for the cleanup of the site and to investigate documented and undocumented groundwater contamination; there has been illegal moving and dumping of radioactive fill on the site of a spill that took place in the 1960s and an investigation needs to be performed about the dispersal of tritium and the extent of a plume of radioactive contamination under the site; claims that H-3 has not been studied in sediments.* Each of the Petitioner’s aspects raise issues that cannot be remedied by the LTP and are, accordingly, outside the scope of this proceeding. See *id.* at 28-32.

FRANKLIN REGIONAL PLANNING BOARD (FRPB)

The FRPB seeks standing on three bases: (1) organizational or representational; (2) as an interested governmental agency; and (3) discretionary. FRPB identifies itself as a “broad-based coalition.” It states that it is one of three bodies that comprise the Franklin Regional Council of Governments, with the Executive Committee and the Council (the representative body) being the other two. According to the FRPB, “[a]ll three bodies shall jointly have and may exercise any and all authority for *regional planning* as may be authorized by current and future federal and state laws.” FRPB Amended Petition at 2 (emphasis supplied). FRPB states, without citation, that its purpose and objective “shall be to promote and protect public health, safety and welfare and the natural and cultural resources of the Regional Planning district.” *Id.* According to FRPB, this “purpose” mandates that the Board protect not only the people and property at the Yankee Rowe site, but also the people and property within the 10-mile evacuation zone, the Deerfield River Basin, and the entire downwind population that could be affected by activity at the site. *Id.* at 3. FRPB also states that it is

“mandated by law to promote economic development while protecting the county’s natural and cultural resources.”¹⁰ *Id.* at 6. “Not only does the Board do long range economic planning but also resource conservation, preservation, and development as well.” *Id.* at 7.

The Franklin Regional Planning Board’s primary purpose appears to be solely related to regional planning. Without more, its “mandate” to “promote” the public health, safety, and welfare and the natural and cultural resources appears to reflect a mandate to plan for the region’s future with those objectives to guide its planning efforts. As the Staff and the Licensee point out, FRPB does not explain how its responsibilities are interests that are within the zones of interests protected by either the Atomic Energy Act or the National Environmental Policy Act. Staff Response at 7; Licensee Response at 7. Moreover, there is no attempt to explain how it meets the injury requirement for standing. FRPB has not established how its purported organizational interests [planning for the district within its mandate to protect the public health and safety] would be adversely affected by the acceptance of the LTP. Nor does it allege that it would be inhibited from carrying out its planning activities. The FRPB’s amended petition alleges that “if the site of the Yankee Nuclear Power Station is not decommissioned in a complete and proper fashion, the citizens of Franklin county can be impacted by radioactivity and radionuclides present in the air and water proximate to and in the area of the plant’s operation.” FRPB Amended Petition at 5. It also claims potential harm from the proximity of a nuclear site on its tourist and economic base. *Id.* at 6-7. But these allegations are far from particularized and appear to be offsite concerns that are tied to the plant’s past operation and current decommissioning, both activities that are already licensed and are not within the scope of this proceeding. The Staff and the Licensee agree with this assessment. Staff Response at 7; Licensee Response at 7-8 & n.8. It is the Board’s judgment that FRPB has failed to establish standing based on injury to its organizational interests.

An organization may also invoke representational standing by (1) identifying at least one of its members by name and address; (2) demonstrating how that member may be affected by the licensing action; and (3) showing (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 NRC 1, 6 (1996). An organization must provide a description of the nature of the injury *to the person*, and demonstrate that the person to be

¹⁰The Staff argues that as a general matter, broad economic interests with respect to economic injury to the general community are insufficient to establish standing, citing *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 78 n.6, 94 n.64 (1993). We believe the Staff’s analysis is applicable here.

represented has in fact authorized such representation. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).

In this regard, FRPB submitted the affidavit of Daniel B. Hammock attached to its amended petition. The Affidavit states (1) that Mr. Hammock lives in Franklin County; (2) that he has been involved in Franklin county government for 8 years; (3) that he currently serves as one of five members of the Executive Committee; and (4) that he declares that the FRPB is representing the *interests of Franklin County* on the “issues pertinent to the above-entitled matter” and not Hammock’s own interest. However, to establish standing, an organization seeking to intervene on behalf of the member must show that the *individual member* can fulfill all the standing elements. *Yankee*, 43 NRC at 6. Mr. Hammock must demonstrate that (1) he has suffered or will suffer a distinct and palpable injury that constitutes injury in fact within the zone of interests arguably protected by the AEA or NEPA; (2) that the injury is fairly traceable to the Staff’s action of accepting the LTP; and (3) that the injury is likely to be redressed by a favorable decision. None of which has been done.

Nor is Mr. Hammock automatically entitled to a presumption of standing based on his living in proximity to the plant. Even if he lived and worked and had property interests within a 50-mile radius of the power plant, there is no presumption of standing because this amendment proceeding does not involve an obvious potential for offsite consequences. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989). Here, FRPB has failed to show the requisite elements to establish standing based on representational interests.

In its Amended Petition, FRPB also alleges that it has standing under 10 C.F.R. § 2.715(c) because it is “an interested County [body].” The cited provision of the Commission’s regulations reads in pertinent part:

The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue.

As originally worded, 10 C.F.R. § 2.715(c) only allowed participation by the representative of a state, but the provision has been amended to include counties and municipalities and “agencies thereof.” 43 Fed. Reg. 17,798, 17,800 (1978). While states, counties, and municipalities are commonly recognized forms of representative government, the Commission, when it added the wording “agencies thereof,” did not expound on their limitations. However, it would be unprecedented to suggest that any and all governmental or quasi-governmental entities could invoke the provision for participation in a proceeding. This

Licensing Board is confident, even without such guidance, that the Commission did not intend to allow participation by agencies that neither had standing on their own nor had legal authorization from a recognized government with a sufficient interest in the proceeding.

The ability to participate in an NRC proceeding is offered only to “units of the government which . . . have an interest in the licensing proceeding.” 43 Fed. Reg. 17,798, 17,800 (1978). The words “interest” and “interested” as they are used in 10 C.F.R. § 2.714 and 10 C.F.R. § 2.715 appear to be synonymous with the term “standing.” See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). Given jurisprudential standing requirements, it is appropriate to require a representational government, or an agency thereof, to have a foundational element of directly representing the citizens of the area affected. Such representation is not validated by delegation to an advisory body, like the FRPB. To find otherwise would be to dismiss the “interest” requirement out of 10 C.F.R. § 2.715.

Even assuming the FRCG could be considered a section 2.715(c) governmental entity, we do not find the affidavit attached to the FRPB Amended Petition to be a delegation of authority to the FRPB to represent the interest of the Franklin Regional Council of Governments. The Licensing Board received a letter, dated March 26, 1998, from Brad C. Councilman, Chair, Franklin Regional Council of Governments, which informed the Board that the FRPB is an advisory board and is not acting on behalf of the Council of Governments. Such a delegation of authority would require a clear and convincing showing that the delegation was legal and within the power of the delegating authority to delegate. No such showing has been made here and, accordingly, the Board denies standing under this provision of the regulations.

Finally, it is important to understand that this provision does not entitle an interested government agency to standing or the right to convene a hearing. The provision is captioned “Participation by a person not a party.” The mere filing by an interested government agency to participate in an amendment application process is not cause for ordering a hearing. *Northern States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980). The provision only allows *participation* in a convened proceeding. This means that interested governmental bodies can only participate where proceedings have already been authorized. In this instance, given the Board’s findings that NECNP and CAN lack standing, no proceeding has been authorized.

The FRPB also seeks intervention in this proceeding based on “discretionary standing.” Although a petitioner may lack standing to intervene as a matter of right under judicial standing concepts, he may be admitted to the proceeding in the Licensing Board’s discretion. In determining whether discretionary intervention should be permitted, the Commission has stated that the Licensing

Board should be guided by the factors enunciated in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Those factors include:

- (a) Weighing in favor of allowing intervention —
 - (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- (b) Weighing against allowing intervention —
 - (4) The availability of other means whereby petitioner's interest will be protected.
 - (5) The extent to which the petitioner's interest will be represented by existing parties.
 - (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

The primary factor to be considered is the significance of the contribution that a petitioner might make. *Id.* at 614-17. The need for a strong demonstration that the Petitioner can make a valuable contribution to the decisionmaking process is especially pressing where no Petitioners have established standing as of right (as the situation exists here) and where, absent such a showing, no hearing would be held. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977).

The burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the Petitioner's ability to contribute to development of a sound record include:

- (1) a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;
- (2) the specificity of such ability to contribute on those substantial issues of law or fact;
- (3) justification of time spent on considering the substantial issues of law or fact;
- (4) provision of additional testimony, particular expertise, or expert assistance;
- (5) specialized education or pertinent experience.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981).

FRPB's petition is devoid of the necessary showing that it would aid in the development of a sound record. It states that it has the "intent" to develop a strong record and that it is well versed in the "matters at stake" (FRPB Amended

Petition at 4) but FRPB fails to demonstrate its prowess to develop meaningful issues. Instead, FRPB has requested the NRC to provide it with \$100,000 for it to be able to intervene in this proceeding and further admits that it does not have the ability to make a substantial contribution at the present time. *Id.* at 10. NRC does not possess authority to provide FRPB with these requested funds. FRPB also confuses the implications of the grant of discretionary intervention when it states that it is “not required by C.F.R. § 2.715(c) ‘to take a position with respect to the issue,’” “and in this section of this filing, has no interest in taking any position” and furthermore, “wants and requested a full, fair and open proceeding and not an adversarial one.” *Id.*

As to the second and third factors to be considered (the nature and extent of property, financial, or other interests in the proceeding and the possible effect any order might have on the Petitioner’s interest), the Commission has held that interests that do not establish a right to intervention because they are not within the “zone of interests” to be protected by the Commission should not be considered as positive factors for the purposes of granting discretionary intervention. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, *aff’d*, ALAB-470, 7 NRC 473 (1978). As stated before, FRPB claims that its purpose is planning for the protection of the health and welfare of the citizens of the region and the conservation of its cultural and natural resources. FRPB Amended Petition at 4. FRPB has not provided, besides this broad and unspecific information, any argument or information upon which a finding can be made that its interests are within the zone of interests protected by the AEA or NEPA. We do not find that FRPB has sufficiently defined its interests to weigh the second or the third factors of the Commission’s test for discretionary intervention in its favor. Pursuant to the above, the Board finds that the Franklin Regional Planning Board has failed to demonstrate that it can or has a significant ability to contribute to the development of a strong record or that it has particular expertise or experience to comment on the License Termination Plan which is the focus of this proceeding. Without this demonstration, discretionary intervention must be and is denied.

As a final comment the Board desires to emphasize that determinations of standing adverse to Petitioners, as is the case here, should not be considered as reflecting unfavorably on any organization seeking participation in NRC adjudications. Standing requirements are simply essential for the sole purpose of determining whether there is a legitimate role for adjudication in dealing with a particular grievance.¹¹

¹¹ *Westinghouse*, 39 NRC at 331.

In accordance with the provisions of 10 C.F.R. § 2.714a, this Decision may be appealed to the Commission within 10 (ten) days after service of the Order.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 12, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

June 29, 1998

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation, the Licensing Board rules on the admissibility of contentions concerning the Applicant's physical security plan (PSP).

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY;
SPECIFICITY AND BASIS)**

For a proffered legal or factual contention to be admissible, it must be pled with specificity. In addition, the contention's sponsor must provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the Applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for

the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. *See* 10 C.F.R. § 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. *See id.* § 2.714(d)(2).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

An improperly based challenge to a license application includes one that is rooted in a misreading or misinterpretation of the license application. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part on other grounds*, CLI-95-12, 42 NRC 111 (1995).

RULES OF PRACTICE: SECURITY PLANS (ACCESS); CONTENTIONS (ADMISSIBILITY)

There are two distinct inquiries involved in connection with the formulation of Intervenor PSP contentions: (1) whether to provide access to the security plan so the Intervenor can use it to draw up its contentions; and (2) what is the information — documentary, expert opinion, or otherwise — necessary to support the admission of the Intervenor’s proffered contentions.

RULES OF PRACTICE: SECURITY PLANS (ACCESS)

The Board-mandated requirements in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982), that an intervenor group obtain the services of a security expert and subject itself to a protective order as conditions of obtaining access to a security plan so it could then “develop” more specific contentions are prudent precautions in light of the potential sensitivity of the information in a security plan. Without those requirements, a Board would lack assurance that the individuals reviewing a plan on behalf of a petitioner both understand the need to afford the plan confidential treatment and are serious about formulating and pursuing contentions relating to the plan, as opposed to simply seeking access as a matter of curiosity.

RULES OF PRACTICE: SECURITY PLANS (ACCESS)

An intervening State fulfills the *Catawba* preconditions for access when it (1) subjects itself to a Board-approved protective order governing its access to and disclosure of the information in the PSP; and (2) for access purposes provides the functional equivalent of a security plan “expert” by proffering one of the NRC-approved State officials designated by the State Governor under 10 C.F.R. § 73.21(c)(1)(iii), as having a “need to know” such that he or she should have PSP access and thereby become responsible for maintaining the requisite “information protection system” that will protect against unauthorized disclosures from the plan. *See id.* § 73.21(a).

RULES OF PRACTICE: SECURITY PLANS (ACCESS)

In assessing whether to give an intervenor access to a security plan, there is no question about the seriousness of the intervenor’s interest in challenging the plan when it commits, in the event the individual supporting its contentions is found not to be an expert, to obtain such an expert for the litigation of any admitted contentions (or to withdraw those contentions).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; SPECIFICITY AND BASIS; SUPPORTING INFORMATION OR EXPERT OPINION); SECURITY PLANS (CONTENTION ADMISSIBILITY; CONTENTION SPECIFICITY AND BASIS; CONTENTION SUPPORTING INFORMATION OR EXPERT OPINION)

Once having PSP access, any contention an intervenor formulates is then subject to the same basis and specificity requirements as other contentions. Expert opinion support is not required for a contention, at least as long as there is other supporting information sufficient to provide the contention with an admissible basis.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; SPECIFICITY AND BASIS; SUPPORTING INFORMATION OR EXPERT OPINION)

When the individual put forth by an intervenor as sponsoring a contention is found not to provide “expert” support for the contention, in assessing the contention the presiding officer must then consider whether the other supporting information provided is sufficient to establish that the contention is admissible.

RULES OF PRACTICE: CONTENTIONS (ACCEPTANCE WHERE SUBJECT TO PENDING RULEMAKING; CHALLENGE OF COMMISSION RULE)

Although a revised rule will not become effective for six months, for the purpose of determining the admissibility of an intervenor's contention, the rule's adoption by the Commission gives it a regulatory force a presiding officer cannot disregard. *See Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

MEMORANDUM AND ORDER
(Ruling on State of Utah Physical Security Plan Contentions)

Pending before the Licensing Board are nine contentions filed by Intervenor State of Utah (State or Utah) regarding the adequacy of the physical security plan (PSP) filed by Applicant Private Fuel Storage, L.L.C. (PFS), as part of its application under 10 C.F.R. Part 72 for authority to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band) in Skull Valley, Utah. For the reasons set forth below, we find that (1) expert sponsorship of the State's PSP contentions is not an absolute prerequisite to their admission; and (2) only one of those contentions — Security-C — is admissible as it raises the question whether the Tooele County sheriff's office, the local law enforcement agency (LLEA) with which PFS has response arrangements, will provide a "timely" response to any unauthorized activities at the PFS facility.

I. BACKGROUND

As we previously noted in LBP-98-7, 47 NRC 142, 160 (1998), shortly before the November 1997 deadline for submitting contentions in this proceeding the State sought a protective order to gain access to the Applicant's PSP. The Board issued the requested protective order, which was necessary because the PSP contains "safeguards information" that is not subject to public disclosure under 10 C.F.R. Part 73, and established a separate filing schedule for any State PSP contentions. The contentions now at issue, designated Security-A through Security-I, were timely filed by the State in early January 1998, and subsequently were the subject of responses by PFS and the NRC Staff. *See* LBP-98-7, 47 NRC at 161, 162; *see also* [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998)

[hereinafter State PSP Contentions]; Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998) [hereinafter PFS PSP Contentions Response]; NRC Staff's Response to [State] Security Plan Contentions (Jan. 20, 1998) [hereinafter Staff PSP Contentions Response]. During a late January 1998 initial prehearing conference, to avoid closing the proceeding to the public for security reasons, the Board limited arguments from these parties on the PSP contentions to the issue of the expertise of the witness sponsoring the State's contentions. *See* Tr. at 442-65. Thereafter, the Board permitted the State to make an additional reply filing on the substance of those contentions' admissibility. *See* LBP-98-7, 47 NRC at 165-66; *see also* [State] Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I (Feb. 11, 1998) [hereinafter State PSP Contentions Reply].

Prior to any ruling by this Board on the admissibility of these nine contentions, the Chief Administrative Judge issued an order designating a separate Licensing Board with jurisdiction over PSP matters, including the admissibility of the State's nine contentions. *See* LBP-98-7, 47 NRC at 166. Subsequently, in ruling on the State's request for party status in this proceeding, this Board found the State had standing as of right and had submitted a number of admissible contentions concerning non-PSP matters. *See id.* at 247-48. Following that ruling, and after consulting with the parties, the PSP Licensing Board scheduled a prehearing conference for June 17, 1998, to hear oral argument on the admissibility of the State's PSP contentions. Applicant PFS and the Staff, however, had objected to the Chief Administrative Judge's action establishing a second Board, and in a June 5, 1998 decision, the Commission reversed the Chief Administrative Judge's action. *See* CLI-98-7, 47 NRC 307 (1998). Consequently, the State's PSP contentions once again have come before us for a ruling on admissibility.

In a June 8, 1998 directive, we offered the State the opportunity to make an oral presentation on the previously scheduled date concerning the admissibility of its PSP contentions. *See* Licensing Board Memorandum and Order (Request for Election Regarding Oral Argument on Security Plan Contentions) (June 8, 1998) (unpublished). The State accepted that offer and we conducted an in camera prehearing conference on June 17, 1998, at which the State, PFS, and the Staff made presentations concerning the admissibility of the nine PSP contentions. *See* Tr. at S-1 to S-106.¹

¹ Citations to the transcript for the Board's June 17, 1998 in camera session have the designation "S-". Transcript citations without this prefix refer to public Board sessions.

II. ANALYSIS

A. Standards for Admission of Contentions

In LBP-98-7, 47 NRC at 178-81, we provided an extensive discussion of the standards that govern the admission of contentions in agency licensing adjudications. We will not repeat that exposition here. Instead, we simply note that the general requirements in 10 C.F.R. § 2.714(b)(2)(i)-(iii) mandate that a contention's sponsor provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the Applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. A contention that fails to meet any one of these standards must be dismissed,² as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. *Id.* § 2.714(d)(2).

As we also noted in LBP-98-7, 47 NRC at 179-81, under the agency's existing case law interpreting these section 2.714 requirements, a number of more specific corollaries have developed regarding contention admissibility. Thus, a contention is subject to dismissal if it (1) improperly challenges applicable statutory requirements, the agency's regulatory process, or its regulatory requirements; (2) seeks to raise matters outside the scope of the proceeding as defined by the notice of hearing or opportunity for hearing; (3) lacks materiality; (4) lacks adequate factual information or expert opinion support; or (5) fails properly to challenge the licensing application at issue.³

B. Expert Support for the State's PSP Contentions

DISCUSSION: PFS PSP Contentions Response at 2-6; State PSP Contentions Reply at 2-4; Tr. at 452-65.

²The Board's use of the conjunctive "and/or" in connection with its rulings on these PSP contentions and the non-PSP contentions filed by the State and the other Petitioners is intended to reflect the fact that a failure relative to any one of the requirements of section 2.714(b) is sufficient grounds for dismissal of a contention.

³With regard to this last precept, an improperly based challenge to a license application includes one that is rooted in a misreading or misinterpretation of the license application. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part on other grounds*, CLI-95-12, 42 NRC 111 (1995).

RULING: Before considering each of the State's nine PSP contentions against these standards, we must resolve an overarching issue regarding the factual information or expert opinion needed to support an admissible PSP contention. Citing the language in the Licensing Board's decision in *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, LBP-82-51, 16 NRC 167, 177 (1982), that "an Intervenor must have a qualified expert and must submit to a protective order if he wishes to pursue a security plan contention," PFS asserts (1) a security plan contention can be admitted only if sponsored by an expert witness; and (2) the individual who has provided an affidavit supporting the State's contentions, Utah radiation control program head William J. Sinclair, is not a physical security expert. As a consequence, PFS declares, the State's PSP contentions must be dismissed *ab initio*. See PFS PSP Contentions Response at 2-6; Tr. at 455-57. Both the State and the Staff disagree. The State asserts Mr. Sinclair's experience and training are sufficient to qualify him as an expert for the purposes of contention admissibility. See Tr. at 452-55. In addition, both the State and the Staff maintain that the issue of Mr. Sinclair's expertise is irrelevant to the degree there is documentary or other information sufficient to support a PSP contention's admission. See State PSP Contentions Reply at 2-4; Tr. at 458-65.

In reviewing this matter, we conclude there are two distinct inquiries involved in Intervenor PSP contention formulation: (1) whether to provide access to the security plan so the Intervenor can use it to draw up its contentions; and (2) what is the information — documentary, expert opinion, or otherwise — necessary to support the admission of the Intervenor's proffered contentions. We also find the *Catawba* case cited by PFS goes only to the first question and, in this instance, providing Mr. Sinclair (and other designated State officials) with access to the Applicant's PSP is consistent with that decision.

In *Catawba*, under the heading "Access to the Catawba Security Plan," the focus of the Board discussion cited by PFS was on whether an intervenor group would be allowed to review the facility PSP so the group could "pursue" specific security contentions in the case.⁴ See LBP-82-51, 16 NRC at 176. The Board there required that the group obtain the services of a security expert and subject itself to a protective order as conditions of obtaining the plan so it could then "develop" more specific contentions. See *id.* The *Catawba* Board's "expert retention" condition thus was directed at providing security plan access rather than assessing security plan contention adequacy and admissibility, an issue the Board did not even reach.

⁴The *Catawba* Board had "conditionally" admitted a security plan contention conditioned on the intervenor's complying with the Board's requirements for access to the plan, after which the intervenor was to have the opportunity to "develop specific contentions." LBP-82-51, 16 NRC at 176. Shortly thereafter, conditional admission of contentions for any reason was banned. See *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 467 (1982), *rev'd on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

These conditions for facility security plan access are a prudent precaution in light of the potential sensitivity of the information in a security plan. Without those requirements, a Board would lack assurance that the individuals reviewing a plan on behalf of a petitioner both understand the need to afford the plan confidential treatment and are serious about formulating and pursuing contentions relating to the plan, as opposed to simply seeking access as a matter of curiosity.⁵

Here, the State has subjected itself to a Board-approved protective order governing its access to and disclosure of the information in the PFS security plan. Moreover, fulfilling the *Catawba* Board's other precondition, for access purposes the State has provided the functional equivalent of a security plan "expert" with Mr. Sinclair. As the designee of the Governor of the State of Utah under 10 C.F.R. § 73.21(c)(1)(iii), Mr. Sinclair is one of the NRC-approved State officials with a "need to know" such that he has PFS security plan access. By accepting this designation, he becomes responsible for maintaining the requisite "information protection system" that will protect against unauthorized disclosures from the plan. *See id.* § 73.21(a). And there is no question about the seriousness of the State's interest in the PSP plan given its commitment, in the event Mr. Sinclair is found not to be a physical security "expert," to obtain such an expert for the litigation of any admitted contentions (or to withdraw those contentions). Tr. at 460-61, 463. We have no difficulty, therefore, in concluding that the State has provided the requisite assurance of its commitment to protecting safeguards information and of its genuine concern about the adequacy of the Applicant's PSP to meet the requirements for security plan access outlined in *Catawba*.

Once having plan access, any contentions the State formulates are then subject to the same basis and specificity requirements as other contentions. Expert opinion support is not required for a contention, at least as long as there is other supporting information sufficient to provide the contention with an admissible basis. Thus, contrary to the Applicant's assertions, Mr. Sinclair's purported lack of physical security expertise would not be a basis for rejecting the State's PSP contentions out of hand.

Having found that Mr. Sinclair's credentials are sufficient to merit providing access to the PFS security plan, we also note that, on the basis of the record before us, the State has failed to establish he has the requisite knowledge, skill, training, education, or experience to be considered an expert on physical security matters. His education, training, and experience in environmental health and hazardous substances does not support a finding he has the necessary expertise in physical security matters. Nor does his NRC health physics training, his

⁵In the *Catawba* case, by imposing these access requirements the Board discovered the petitioner was unwilling to commit to giving appropriate treatment to safeguards information. *See* LBP-82-51, 16 NRC at 176.

position and activities as Director of the State Division of Radiation Control, or his status as the Governor's designee for receiving the PFS security plan, *see* Tr. at 452-55, 460-63, provide him with the requisite credentials for designation as a physical security expert. Because his sponsorship of those contentions does not provide "expert" support relative to their admissibility, in assessing the contentions below we must consider whether the other supporting information provided is sufficient to establish that the State's PSP contentions are admissible.

C. State Security Plan Contentions⁶

SECURITY-A — Security Force Staffing

CONTENTION: The Applicant has failed to establish a detailed plan for security measures for physical protection of the proposed ISFSI as required by 10 C.F.R. § 72.180, including failure to demonstrate that it has adequate staffing capability to cope with or respond to safeguards contingency events.

DISCUSSION: State PSP Contentions at 2-3; PFS PSP Contentions Response at 7-14; Staff PSP Contentions Response at 10-12; State PSP Contentions Reply at 5-8; Tr. at S-38 to S-48.

RULING: Inadmissible, in that (1) the contention and its basis regarding the adequacy of the number of security personnel at the PFS facility impermissibly challenge the Commission's regulations and/or rulemaking related generic determinations, including the recently revised 10 C.F.R. § 73.51(d), *see* 63 Fed. Reg. 26,955, 26,957, 26,959 (1998);⁷ and/or lack adequate factual support; and (2) the contention and its basis regarding the availability of local housing for off-duty security personnel to supplement the on-duty security force impermissibly challenge the Commission's regulations and/or rulemaking related generic determinations; lack adequate factual support; and/or fail properly to challenge the PFS application. *See* LBP-98-7, 47 NRC at 179, 180-81. Moreover, to the extent the State seeks to rely on the question of the designated LLEA's lack of jurisdiction and law enforcement authority on the Skull Valley Band's reserva-

⁶ Although the State, PFS, and Staff filings regarding the PSP contentions have not been placed in the public record of this proceeding, the Board previously obtained the agreement of those parties that the language of the State's contentions do not include safeguards information so as to permit public disclosure of those contentions. *See* Licensing Board Memorandum and Order (Memorializing Prehearing Conference Directives) (June 18, 1998) at 2 n.1. The Board likewise has attempted to craft this Memorandum and Order to avoid any discussion of safeguards information, thereby permitting this decision to become a public issuance in toto. Nonetheless, we initially are according it confidential treatment by providing it only to the PSP parties with the request that they advise us whether its public release would involve the disclosure of any protected safeguards information. *See infra* p. 374.

⁷ Although this revised rule will not become effective until November of this year, for the purpose of determining the admissibility of the State's PSP contentions, its adoption by the Commission gives it a regulatory force we cannot disregard. *See Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

tion as a basis for this contention, that assertion lacks adequate legal or factual support. *See id.* at 180-81; *see also infra* p. 370.

SECURITY-B — Equipment and Training

CONTENTION: The Applicant has not described the type or location of security equipment available to security force personnel, nor has the Applicant described adequate training for fixed site guards or armed response personnel.

DISCUSSION: State PSP Contentions at 3; PFS PSP Contentions Response at 14-19; Staff PSP Contentions Response at 12-13; State PSP Contentions Reply at 8-10; Tr. at S-48 to S-54.

RULING: Inadmissible, in that the contention and its supporting basis lack materiality; and/or lack adequate factual or expert opinion support in that the State has failed to make a sufficient showing the referenced requirements for security equipment and training for fixed site guards and armed response personnel under 10 C.F.R. Part 73, App. B., Criterion V.A, which generally do not apply to security force members at an off-site ISFSI, *see* 63 Fed. Reg. at 26,957, should be applied to the PFS facility. LBP-98-7, 47 NRC at 179-80, 180-81. Moreover, to the extent the State seeks to rely on the issue of the designated LLEA's lack of jurisdiction and law enforcement authority on the Skull Valley Band's reservation as a basis for this contention, that assertion lacks adequate legal or factual support. *See id.* at 180-81; *see also infra* p. 370.

SECURITY-C — Local Law Enforcement

CONTENTION: The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance.

DISCUSSION: State PSP Contentions at 4-7; PFS PSP Contentions Response at 19-31; Staff PSP Contentions Response at 13-14; State PSP Contentions Reply at 10-14; Tr. at S-7 to S-38.

RULING: Admissible as sufficient to establish a genuine material dispute adequate to warrant further inquiry in connection with its basis alleging PFS has not described the estimated response times for the principal LLEA relied upon for security assistance at the PFS facility so as to establish compliance with the requirements of both existing 10 C.F.R. Part 73, App. C, § 3.d, *see* Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1497, Interim Licensing Criteria for Physical Protection of Certain Storage of Spent Fuel § 4.9.2 (Sept. 1994) (physical protection plan "should describe [LLEA] estimated response times") (supporting 10 C.F.R. § 73.50(g)(2)) [hereinafter NUREG-1497], as well as the recently adopted 10 C.F.R. § 73.51(d)(6), *see* 63 Fed. Reg. at 26,959; Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1619,

Standard Review Plan for Physical Protection Plans for the Independent Storage of Spent Fuel and High-level Radioactive Waste § 4.9.2 & Guidance (May 1998), that a designated LLEA will provide a “timely” response to an unauthorized entry.⁸

Because a cooperative law enforcement agreement has been shown to exist between the LLEA, the Bureau of Indian Affairs of the United States Department of the Interior, and the Skull Valley Band, *see* Letter From Jay E. Silberg, Counsel for PFS, to Licensing Board encl. (June 24, 1998), which has not been subjected to an adequately supported legal or factual challenge by the State, this contention is inadmissible relative to its bases alleging (1) a failure to provide such an agreement in the application; (2) the difference between security plan and emergency plan statements about the LLEA agreement; and (3) lack of jurisdiction and law enforcement authority by the LLEA on the Skull Valley Band’s reservation.⁹ *See* LBP-98-7, 47 NRC at 180-81. Further, this contention is inadmissible relative to its bases regarding mutual aid agreements between the LLEA and other local governments and the availability of special weapons and tactics (SWAT) teams in that these assertions impermissibly challenge the Commission’s regulations or generic rulemaking-associated determinations; and/or lack adequate factual or expert opinion support. *See id.* at 179, 180-81.

SECURITY-D — Power Supply

CONTENTION: The Applicant’s discussion of the security power system does not ensure that the security system provides the protection required by 10 C.F.R. Part 73.

DISCUSSION: State PSP Contentions at 7-9; PFS PSP Contentions Response at 31-44; Staff PSP Contentions Response at 14-15; State PSP Contentions Reply at 14-16; Tr. at S-55 to S-64.

RULING: Inadmissible, in that the contention and its supporting bases impermissibly challenge the Commission’s regulations or generic rulemaking-associated determinations (bases one, four, and five); lack adequate factual support (bases one, two, three, and five); and/or fail properly to challenge the PFS application (bases two, three, four, and five).¹⁰ *See id.* at 179, 180-81.

⁸To the degree the State’s claim regarding helicopter use has some relevance to the question of a “timely” LLEA response, it is within the scope of this contention as admitted.

⁹The State has suggested that the legal question of the jurisdiction of federal, state, and local law enforcement agencies on Native American reservations is “very murky.” Tr. at S-8; *see* Tr. at S-32 to S-33. In light of the State’s own discussion of this issue, *see* State PSP Contentions Reply at 12-13, nothing on the face of the cooperative agreement gives us cause to question its validity as it provides such jurisdiction on the Skull Valley Band’s reservation for the designated LLEA.

¹⁰In its reply pleading, the State questions the Applicant’s compliance with a provision of the Staff’s interim licensing criteria that requires standby power duration to equal or exceed twice the LLEA response time. *See* State PSP Contentions Reply at 16 (citing NUREG-1497, at § 4.6.3). Putting aside the question of whether this is

(Continued)

SECURITY-E — Alarm System Performance

CONTENTION: The Applicant has not demonstrated that the performance of the alarm systems described in its Security Plan are adequate to assess the detection of intruders at the site in that:

- (a) The Applicant has only generally discussed the perimeter intrusion detection systems in its Security Plan and has failed to give minimum specifications for the system in accordance with 10 C.F.R. § 73.50(b)(4) and Regulatory Guide 5.44.
- (b) The Applicant's closed circuit television (CCTV) system and coverage plan description are too limited to show the logic for the location of the devices or their operational capability nor does the Applicant's description of the CCTV system confirm the assumptions relied on by the Applicant in the Security Plan to show that the CCTV system is adequate to detect intrusions.

DISCUSSION: State PSP Contentions at 9-10; PFS PSP Contentions Response at 44-50; Staff PSP Contentions Response at 15; State PSP Contentions Reply at 16-19; Tr. at S-64 to S-78.

RULING: Inadmissible in that this portion of the contention and its supporting bases impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations (paragraphs (a) and (b)); lack adequate factual support (paragraph (a)); and/or fail properly to challenge the PFS application (paragraphs (a) and (b)). *See id.* at 179, 180-81.

SECURITY-F — Intermodal Transfer at Rowley Junction

CONTENTION: The Security Plan fails to address the performance objectives and requirements of 10 C.F.R. §§ 73.25, 73.26, 73.45, 73.46, 73.50, and Part 73, App. C for fixed site physical protection of the intermodal transfer facility at Rowley Junction or to adequately protect transit of spent fuel into and out of Rowley Junction in that:

- (a) The Security Plan must address the applicable requirements of Part 73 and 10 C.F.R. § 72.180 for transportation to and from the proposed ISFSI.
- (b) The Security Plan must address physical protection at the intermodal transfer point because the intermodal transfer point could be considered a fixed site subject to the requirements of 10 C.F.R. §§ 73.45, 73.46, and 73.50.
- (c) The Security Plan fails to address essential regulatory components for providing security at the intermodal transfer facility.
- (d) The intermodal transfer facility represents a high risk for unauthorized access or activities because of its proximity to Interstate 80.

an attempt to amend the contention without meeting the late-filing criteria of 10 C.F.R. § 2.714(a)(1), although we admit that portion of State's contention Security-C that concerns LLEA response times, *see supra* p. 369, we are unable to find this power duration concern has an adequate basis given the backup generator operation duration and the potential for extending that operation duration. *See* Tr. at S-56, S-64.

DISCUSSION: State PSP Contentions at 10-12; PFS PSP Contentions Response at 50-59; Staff PSP Contentions Response at 16-18; State PSP Contentions Reply at 19-20; Tr. at S-78 to S-90.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71, 72, and 73 as they govern physical security for the off-site transportation of spent fuel.¹¹ *See id.* at 179.

SECURITY-G — Terrorism and Sabotage

CONTENTION: The Applicant has failed to adequately assess and describe procedures that will protect spent fuel from unauthorized access or activities, such as terrorism and sabotage, as required by 10 C.F.R. §§ 73.25, 73.45, and Part 73, App. C.

DISCUSSION: State PSP Contentions at 13-16; PFS PSP Contentions Response at 59-72; Staff PSP Contentions Response at 18-20; State PSP Contentions Reply at 20-21; Tr. at S-90 to S-92.

RULING: Inadmissible in that the contention and its supporting bases lack materiality; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 72.184(a) concerning the submission of procedures and 10 C.F.R. Parts 71, 72, and 73 as they govern physical security for the off-site transportation of spent fuel; lack adequate factual support; and/or fail properly to challenge the PFS application. *See id.* at 179-81.

SECURITY-H — Transportation of Spent Fuel to and from the ISFSI

CONTENTION: The Applicant has failed to demonstrate how it plans to comply with applicable physical protection requirements during transportation to and from the proposed ISFSI in accordance with 10 C.F.R. § 72.180 in that:

- (a) The Security Plan is inadequate to demonstrate how the Applicant will comply with 10 C.F.R. § 73.37, including monitoring spent fuel movements, reacting to unforeseen situations, or communicating with necessary individuals, and other applicable portions of Part 73, as required by 10 C.F.R. § 72.180.
- (b) The Security Plan does not provide adequate in-transit physical protection to protect the health and safety of the public because the Applicant does not describe route conditions or designate transportation routes and alternatives, or describe

¹¹ Our ruling on Security-F is based on the State's reliance upon rail transportation volume/queuing and transportation-related sabotage as the bases for this contention, which we previously rejected as appropriate bases for admitted contentions Utah B and Utah C. *See* LBP-98-7, 47 NRC at 184, 186, 198 n.20. It should be noted, however, that our ruling here has no impact on the admissibility or scope of Utah B, which states with respect to the Rowley Junction intermodal transfer point that "it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan" LBP-98-7, 47 NRC at 251.

security measures for each of the potential in-transit routes and evaluate any natural conditions or man-made characteristics which may impact security procedures.

DISCUSSION: State PSP Contentions at 16-18; PFS PSP Contentions Response at 72-79; Staff PSP Contentions Response at 20-21; State PSP Contentions Reply at 21-22; Tr. at S-92 to S-99.

RULING: Inadmissible in that this contention and its supporting bases impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including the recently revised 10 C.F.R. § 72.180 as it limits stand-alone ISFSI security measures to onsite transportation, 63 Fed. Reg. at 26,961-62; *see* 60 Fed. Reg. 42,079, 42,082 (1995), and 10 C.F.R. Parts 71 and 73 as they govern physical security for the off-site transportation of spent fuel. *See* LBP-98-7, 47 NRC at 179.

SECURITY-I — Establishment of a Central Communications Center

CONTENTION: The Applicant has failed to identify the establishment of an adequate communications center as required by 10 C.F.R. § 73.37(b)(4) in that:

- (a) The Applicant makes the statement that the status of spent fuel during transit will be monitored; however, nowhere in the Security Plan does the Applicant describe a designated communications center with the capability of tracking spent fuel shipments from any or all of the 110 reactor sites.
- (b) Neither the Applicant's Central or Secondary Alarm Stations nor the Applicant's Alarm Station Communications Center appear to have the ability to track spent fuel shipments across the country.

DISCUSSION: State PSP Contentions at 19; PFS PSP Contentions Response at 79-81; Staff PSP Contentions Response at 21-22; State PSP Contentions Reply at 22-23; Tr. at S-99 to S-105.

RULING: Inadmissible in that this contention and its supporting bases impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71, 72, and 73 as they govern physical security for the off-site transportation of spent fuel. *See* LBP-98-7, 47 NRC at 179.

III. CONCLUSION

With regard to the nine PSP contentions proffered by Intervenor State of Utah, we find that only its PSP contention Security-C is admissible to the extent it concerns the issue whether, in accordance with applicable regulatory requirements, *see* 10 C.F.R. Part 73, App. C, § 3.d, *see also* 63 Fed. Reg. at

26,963 (to be codified at 10 C.F.R. § 73.51(d)(6)), the designated LLEA will provide a “timely” response to any unauthorized activities at the PFS facility.

For the foregoing reasons, it is this twenty-ninth day of June 1998, ORDERED that:

1. Intervenor State of Utah’s physical security plan contention Security-C is *admitted* for litigation in this proceeding.¹²

2. The following State physical security plan contentions are *rejected* as inadmissible for litigation in this proceeding: Security-A, Security-B, Security-D, Security-E, Security-F, Security-G, Security-H, and Security-I.

3. On or before *Monday, July 6, 1998*, the State, PFS, and the Staff should advise the Board in a joint filing whether they have any objection to the public release of any part of this Memorandum and Order because it would involve the disclosure of 10 C.F.R. Part 73 “safeguards information.”¹³

4. Motions for reconsideration of this Memorandum and Order must be filed on or before *Friday, July 10, 1998*, and responses to such motions must be filed on or before *Wednesday, July 22, 1998*. Both reconsideration motions and

¹²The language of this admitted contention is as set forth in the text above. *See supra* p. 369.

¹³Unless they contain proprietary or safeguards information, the filings required or permitted under this Memorandum and Order should be served on the Board, the Office of the Secretary, and counsel for the other participants by facsimile transmission, e-mail, or other means that will ensure receipt by close of business (4:30 p.m. EDT) on the day of filing. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-6 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) (unpublished).

If a filing required or permitted under this Memorandum and Order includes proprietary or safeguards information, it should (1) be served in the manner and on the individuals described in paragraphs I.H.1.a-b of the Board’s December 17, 1997 memorandum and order, as amended, and include a cover letter or memorandum that shall be served on all other participants as described in paragraph I.H.2 of that issuance, *see* Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) at 8, 9 (unpublished); Licensing Board Memorandum and Order (Additional Amendments to Protective Order) (Dec. 23, 1997) at 2 (unpublished); and (2) be served so as ensure receipt by the individuals described in paragraph I.H.1.a of the Board’s December 17, 1997 memorandum and order by the next business day.

responses are subject to the previously established ten-page limit. *See* LBP-98-7, 47 NRC at 246.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 29, 1998

[*Editor's Note:* After receiving a July 6, 1998 filing indicating that the State, PFS, and the Staff had no objection to public issuance of this decision, on July 7, 1998, the Licensing Board made this issuance publicly available. *See* Licensing Board Memorandum and Order (Making Decision on Admissibility of [PSP] Contentions Publicly Available) (July 7, 1998) at 2 (unpublished).]

¹⁴Copies of this Memorandum and Order were sent this date to counsel for Applicant PFS and for intervenor State of Utah by overnight/express mail, and to Staff counsel through the agency's internal mail system. In addition, this date a memorandum was sent by e-mail to all the parties in this proceeding advising them of the issuance of this decision and the Board's determination to afford it confidential treatment pending a response by the State, PFS, and the Staff to the Board's inquiry under ordering paragraph three above. *See* Licensing Board Memorandum (Notice Regarding Issuance of Decision on Admissibility of Physical Security Plan Contentions) (June 29, 1998) (unpublished).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)
(Re: Leach Mining
and Milling License)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

June 30, 1998

Intervenors' Motion for Reconsideration is denied.

RULES OF PRACTICE AND PROCEDURE: SUBPART L; AREAS OF CONCERN

In a Subpart L proceeding in which there are many areas of concern, the completeness of an application can be determined in the context of the areas of concern rather than as a separate area of concern. Incompleteness or contradictions in the application may be part of intervenor's case for its other areas of concern.

RULES OF PRACTICE AND PROCEDURE: SUBPART L; AREAS OF CONCERN

A Presiding Officer determines areas of concern. During the proceeding, proof may be submitted to supplement the application. Hence, the Presiding

Officer's determination does not depend solely on whether an application is complete or orderly.

**RULES OF PRACTICE AND PROCEDURE: SUBPART L;
MATERIAL ISSUES**

Material issues will be considered in a Subpart L proceeding, even if there must be some delay because some of the information concerning those issues is not yet available. The method of managing a case and scheduling the determination of issues is within the discretion of the Presiding Officer, who may choose to use a prehearing conference to obtain information relevant to this responsibility.

**MEMORANDUM AND ORDER
(ENDAUM and SRIC's Motion for Reconsideration of LBP-98-9)**

MEMORANDUM

ENDAUM and SRIC (Intervenors) submitted a "Motion for Reconsideration of LBP-98-9" on June 5, 1998 (Motion).¹ The motion is denied.

The first issue raised in the motion is the allegedly improper exclusion of an area of concern that HRI's application is "disjointed, incoherent and self-contradictory." The motion does not provide any reason to reverse the prior ruling. In LBP-98-9, I suggested that ENDAUM and SRIC speak with the Staff about how to ensure that the hearing record is orderly and useful. Now that record has been filed.² It may be used by SRIC and ENDAUM to build their case. To the extent that material may be "disjointed, incoherent and self-contradictory," SRIC and ENDAUM may take advantage of those aspects of the record. Intervenors have not demonstrated why it is necessary or appropriate to litigate this as a separate area of concern when it is already litigable with respect to admitted areas of concern. 10 C.F.R. § 2.1209(a).

A possible implication of the Intervenors' concerns is that they expect the Presiding Officer to determine the adequacy of the application, as filed and amended. Pursuant to established NRC practice, however, the Presiding Officer

¹ See HRI's "Response to ENDAUM's and SRIC's Motion for Reconsideration," June 15, 1998, and the Staff's "Response to ENDAUM/SRIC Joint Motion for Reconsideration," June 22, 1998. *See also* ENDAUM and SRIC's Motion to Partially Strike the NRC Staff's Response to Motion for Reconsideration or, in the Alternative, Motion to Respond (Expedited Review Requested), June 24, 1998.

² Hearing File, attached to a letter to the administrative judges from John T. Hull, Counsel for NRC Staff, June 11, 1998.

determines the validity of admitted areas of concern, not of the application. In the course of that determination, the entire record is considered, including material added to the record when it is filed by a party (10 C.F.R. § 2.1233(d)) or developed by the Presiding Officer (10 C.F.R. § 2.1235).

Intervenors' second concern is that "the deferral of HRI's submission of material licensing information *until sometime after license issuance* deprives Intervenors of their right to a public hearing on all material licensing issues . . ." (emphasis added). However, Commission regulations do not provide for a hearing prior to issuance of a license. Furthermore, Intervenors have tried and failed to obtain a stay of the effectiveness of the license. CLI-98-8, 47 NRC 314 (1998).

The tentative plan that I have proposed for this proceeding defers the determination of certain issues but will not deprive Intervenors of anything. As the Court stated in *Union of Concerned Scientists v. United States Nuclear Regulatory Commission*, citing 5 U.S.C. §§ 554 and 557, 735 F.2d 1437, 1447 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) (*UCS* case):

we believe Congress vested in the public, as well as the NRC staff, a role in assuring safe operation of nuclear power plants. In sum, we find no basis in the statute or legislative history for NRC's position that Congress granted it discretion to eliminate from the hearing material issues in its licensing decision.

Although the *UCS* case involved the licensing of a nuclear power plant, the principle is applicable here. Material issues must be determined in the licensing proceeding. See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

The tentative plan for this hearing would permit the immediate examination of HRI's current operations, using the supporting information that should already be available. The general principal governing this hearing is that HRI must demonstrate an adequate assurance of safety and protection of the environment. 10 C.F.R. § 40.32. At the upcoming prehearing scheduling conference, we may examine the readiness of HRI to demonstrate compliance with 10 C.F.R. § 40.32, both with respect to current operations and future operations. All scheduling issues will be considered at that conference. (The conference will be more fully defined in my determination of HRI's Motion for Reconsideration and for Bifurcation.)

By way of clarification, let me state that there is no need to decide whether to change my determination that the area of concern related to Performance Based Licensing (PBL) is germane, as suggested by the Staff. This case is governed by the NRC regulations. The substantive regulation appears to require that HRI demonstrate an adequate assurance of safety and protection of the environment with respect to the areas of concern submitted by Intervenors and found to be

germane. 10 C.F.R. § 40.32. Although the area of concern related to PBL is germane, it may subsequently be dismissed if it is shown to be either without a basis or contrary to Commission regulations, which may not be challenged in this proceeding.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 30th day of June 1998, ORDERED that:

1. ENDAUM and SRIC's Motion for Reconsideration of LBP-98-9, June 5, 1998, is *denied*.
2. Appeals may no longer be deferred because of the pending motion for reconsideration.

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-245
50-336
50-423
(License Nos. DPR-21
DPR-65
NPF-49)NORTHEAST UTILITIES
(Millstone Nuclear Power Station,
Units 1, 2, and 3)

June 1, 1998

By a petition dated February 2, 1998, submitted by the Citizens Awareness Network (CAN) and the Nuclear Information and Resource Service (NIRS) (Petitioners), Petitioners requested that the NRC take immediate action to revoke Northeast Utilities' (NU's or Licensee's) license to operate the Millstone nuclear power plants Units 1-3 due to both ongoing NU management intimidation and harassment of the NU workforce, as well as persistent NU defiance of NRC regulations and directives to create a questioning attitude that would allow NU employees to challenge NU management on safety issues without fear of harassment or reprisal. Petitioners also requested that the NRC refer the Nuclear Oversight Focus 98 List (list), the existence of which Petitioners believed buttressed their above claims, and reported NU management attempt to destroy the list to the Department of Justice (DOJ) due to a potential coverup.

In a Director's Decision dated June 1, 1998, the NRC denied Petitioners' requests as described above. With regard to the request for license revocation, the Decision stated that, based on the NRC Staff's examination of NU's responses to NRC requests for information as well as independent NRC investigative efforts, the NRC Staff concluded that the wording at issue in the list was due to poor word choice rather than an effort by NU management to in-

hibit or suppress NU employees' ability to speak out on safety concerns. The Staff also concluded that the recall and destruction of the list by NU was an attempt to avoid continued dissemination of a document widely viewed to have been misinterpreted. The Staff noted the extensive efforts NU has made in the area of employee concerns, including the NRC-ordered use of an independent third-party organization to oversee NU efforts in this area. Petitioners' request for license revocation was therefore denied. Finally, the Decision explained that NU's recall of the list was not inappropriate given the facts, and that NU had no obligation to provide the list to the NRC. Accordingly, Petitioners' request to refer the list's recall to DOJ was also denied.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On February 2, 1998, Ms. Deborah Katz, Ms. Rosemary Bassilakis, and Mr. Paul Gunter filed a petition, pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), on behalf of the Citizens Awareness Network (CAN) and the Nuclear Information and Resource Service (NIRS) (Petitioners).

The Petitioners requested that the NRC take the following immediate actions: (1) revoke Northeast Utilities' (NU's or the Licensee's) license to operate Millstone Units 1, 2, and 3 as the result of ongoing intimidation and harassment of its workforce by NU management; (2) revoke NU's license to operate Millstone Units 1, 2, and 3 as the result of persistent Licensee defiance of NRC regulations and directives to create a "questioning attitude" for its workers to challenge management on nuclear safety issues without fear of harassment, intimidation, or reprisals by NU; and (3) refer the Nuclear Oversight Focus 98 List and the reported NU management attempt to destroy the list to the Department of Justice for investigation of a potential coverup.

As bases for the Petitioners' assertions, the petition states that an NU document (Nuclear Oversight Department's Focus 98 List, dated January 11, 1998) directs the Nuclear Oversight group to address areas needing improvement by focusing on the "inability to 'isolate' cynics from the group culture" and "pockets of negativism." The petition further states that the list demonstrates the sustained and unrelenting policy of NU's senior management to undermine a safety-conscious workplace at Millstone, and that despite 2 years of increased regulatory scrutiny of the managerial mistreatment of its workers and the corporation's mismanagement of its employees' safety concerns program, a "chilled atmosphere" remains intact and entrenched.

As a basis for the Petitioners' request for a Department of Justice investigation, the petition states that

[s]ince it has been reported that NU management employees attempted to destroy the list, NRC has a duty to refer this apparent deliberate attempt to evade the otherwise lawful exercise of authority by NRC to the Department of Justice for complete investigation. This alleged attempt to cover up wrong doing by NRC's licensee is a potential obstruction of justice that should be fully and fairly investigated.

On March 11, 1998, the NRC acknowledged receipt of the petition and informed the Petitioners that the petition had been assigned to the Office of Nuclear Reactor Regulation to prepare a response and that action would be taken within a reasonable time regarding the specific concerns raised in the petition. The Petitioners were also informed that their request for immediate action to revoke the operating license and refer the incident to the Department of Justice was denied because, due to the three Millstone units being shut down, protection of public health and safety did not warrant immediate action. The Petitioners were also informed that the NRC would consider the Licensee's response to the Staff's February 10, 1998 request for information concerning the incident before the Commission allows restart of any Millstone unit. To this extent, the Petitioners' request for immediate action was partially granted.

II. DISCUSSION

The NRC Staff has completed its evaluation of the Petitioners' requests. The following discussion is based on information provided by the Licensee and information independently obtained by the NRC Staff. The Petitioners' first two requests are similar in nature and are addressed in Section II.A. The third request is addressed in Section II.B.

A. Request to Revoke the Operating License for Millstone Units 1, 2, and 3

The Petitioners based this request on their assertion of ongoing intimidation and harassment of the workforce by NU management and persistent Licensee defiance of NRC regulations and directives to create a "questioning attitude" for its workers to challenge management on nuclear safety issues without fear of harassment, intimidation, or reprisals. As support for their assertions, the Petitioners referred to the wording in a document prepared by NU's Nuclear Oversight Department titled "Focus 98: Director/VP View of Nuclear Oversight (1/11/98)." The document listed seven "Positive Qualities of Nuclear Oversight" and seven "Areas Needing Improvement." Within "Areas Needing

Improvement’ was a category entitled ‘‘Current SCWE [safety-conscious work environment] and issues.’’ One of the six areas listed in this category was ‘‘inability to ‘isolate’ cynics from group culture.’’

On January 29, 1998, the U.S. Nuclear Regulatory Commission (NRC) became aware of the Nuclear Oversight Department’s Focus 98 document. The NRC was concerned that language contained in the document was not consistent with encouraging a questioning attitude necessary for fostering a safety-conscious work environment. As a result, the NRC required the Licensee, in a February 10, 1998 letter, to describe in writing, under oath or affirmation (1) the circumstances surrounding the creation and distribution of the document and whether the events constitute a violation of 10 C.F.R. § 50.7; (2) how this document came into existence, in light of NU’s efforts to create a safety-conscious work environment, and NU’s assessment of the document’s effect on the willingness of employees to raise concerns with the company; and (3) any remedial actions needed to prevent recurrence.

NU responded to the NRC’s request in March 12, March 26, and April 24, 1998 letters. NU’s March 12, 1998 response included reference to an NU-directed investigation into the circumstances surrounding the creation and distribution of the Focus 98 document. The March 12, 1998 response also contained a redacted copy of a survey conducted in February 1998 by consultants Nilsson and Associates to determine whether the events that the Petitioners complained about negatively impacted the Millstone workforce and had created any reluctance to raise safety issues at the Millstone facility. The investigation report was transmitted to the NRC by the March 26, 1998 letter. The April 24, 1998 letter provided additional information regarding the collection of the Focus 98 document. In its submittals, NU described two Nuclear Oversight Department meetings relevant to the development of the Focus 98 document, its use, and its distribution.

The first meeting was held on January 11, 1998, and involved the Vice President– Nuclear Oversight, his three Directors, the Executive Assistant to the Vice President, and a consultant to the Vice President. The meeting was held to prepare for an upcoming Nuclear Oversight management team-building session and explore the strengths and weaknesses of the Nuclear Oversight organization for discussion at that meeting. Each of the six participants brought to the meeting approximately three strengths and three weaknesses that each considered applicable to Nuclear Oversight, and it was from these inputs that the Focus 98 document list of ‘‘Positive Qualities of Nuclear Oversight’’ and ‘‘Areas Needing Improvement’’ was developed. The inputs from the meeting participants were recorded and grouped, and the Licensee’s consultant used this information to prepare the one-page Focus 98 document. Prior to the January 21, 1998 team-building session, the Focus 98 document had been distributed to the January 11, 1998 meeting participants for review and had generated no comments. NU

concluded from its investigation, including interviews with each of the meeting participants, that the participants did not intend for the wording to convey the notion that Nuclear Oversight management should seek to isolate individuals who have raised concerns in the past, nor did management intend to send the signal that it views people who raise concerns as “cynics” or bad influences on the organization. NU concluded that the phrases in the document “isolation of ‘cynics,’” “too much negative energy (personnel issues),” and “pockets of negativism” were poorly chosen words that were intended to convey the belief that the Nuclear Oversight organization recognizes that there are people who have ill feelings toward NU and who are seeking to impose their views on others who may disagree, and that this imposition was affecting the organization. NU pointed out in its submittal that the document was intended to generate discussion and did not represent policy or direction of Nuclear Oversight management.

The second meeting was held on January 21, 1998, and involved Nuclear Oversight management ranging from first-line supervisors to the Vice President–Nuclear Oversight. The purpose of the meeting was Nuclear Oversight team building and one topic on the agenda was a discussion of the organization’s strengths and weaknesses. The Focus 98 document was distributed when the organization’s strengths and weaknesses were to be discussed. NU states that soon after the Focus 98 document was distributed, several managers/supervisors objected to the included phrase “inability to ‘isolate’ cynics from group culture.” NU further states that the Vice President and Directors were initially surprised by the reaction, and ultimately agreed that the words had been poorly chosen and were not reflective of management’s position.

On the basis of its investigation, NU concluded that the circumstances of the creation of the Focus 98 document indicated that no one in management intended to encourage any form of discrimination against anyone engaging in protected activity. NU also responded that no action took place because of the document’s existence and, thus, no person who had engaged in protected activity suffered any adverse employment action.

The NRC Staff reviewed NU’s responses to the NRC’s February 10, 1998 letter, including the investigation report, and separately interviewed eight people involved in the preparation, use, and distribution of the Focus 98 document. The Staff determined that the Focus 98 document had been developed as material for establishing talking points for a then-upcoming January 21, 1998 management team-building session. The Staff also determined that points listed in the Focus 98 document under “Areas Needing Improvement” were intended by those participating in the January 11, 1998 meeting to convey potential organizational weaknesses as points for discussion, and not to represent current or future management policy. The Staff also found that the Focus 98 document had been developed informally, with no formal review and approval process, for use as a handout at an upcoming Nuclear Oversight Department team-building session.

The NRC Staff's reviews, including interviews with NU staff involved in the incident, confirmed that the general purpose of the Nuclear Oversight management team meeting on January 21, 1998, was to improve Nuclear Oversight organizational interactions. Furthermore, the NRC Staff found that the Focus 98 document was intended to facilitate the discussion of one of many topic areas to be covered at the all-day meeting. The NRC Staff's inquiries confirmed that Nuclear Oversight management was surprised by the immediate reaction and concern of the January 21, 1998 meeting participants regarding certain language in the Focus 98 document, and that following a discussion of the wording, management recognized the unintended implication of the words. After reviewing the available information, the NRC Staff concludes that the wording at issue used in the Focus 98 document was no more than poorly selected terminology intended to convey a perceived Nuclear Oversight organizational weakness.

In its March 12, 1998 response, NU stated that once it became apparent that nonsupervisory employees in the Nuclear Oversight Department, who had not attended either the January 11 or January 21, 1998 meetings, knew about the troubling language in the Focus 98 document, NU took several actions to mitigate and assess the potential consequences to ensure that the release of the Focus 98 document and surrounding circumstances did not cause a chilling effect on the organization. On January 29, 1998, the Vice President– Nuclear Oversight held an all-hands meeting with members of his organization at which he apologized for the language in the document and assured the organization that he and the Directors were not trying to discourage anyone from voicing concerns. That same day, the President and Chief Executive Officer of Millstone and the Vice President– Nuclear Oversight met with the Millstone leadership team and described the circumstances surrounding the document. On January 30, 1998, NU issued a site-wide communication discussing the two meetings in detail. NU also assessed the effect of the document on the workforce through investigations and surveys. NU directed the consulting firm Nilsson and Associates to conduct an in-depth assessment of the document's effect on Nuclear Oversight Department employees and on employees who interact with the Nuclear Oversight Department. The assessment found that none of the fifty-six people interviewed indicated that the document has made them reluctant to raise concerns.

The Petitioners also refer generally, as a basis for their request, to ongoing NU intimidation and harassment of its workforce and persistent Licensee defiance of NRC regulations and directives to create a safety-conscious work environment. NU performance in these areas has been extensively assessed. An NRC Order issued on October 24, 1996, required NU to take specific actions to resolve problems in its processes for handling employee safety concerns at the Millstone Station. As required by the Order, NU developed and implemented a

comprehensive plan for reviewing and dispositioning safety issues raised by its employees, and for ensuring that employees who raise safety concerns can raise them without fear of retaliation. NU's plan included elements to (1) improve the operation of its Employee Concerns Program organization; (2) enhance management and employee training related to establishing and maintaining a safety-conscious work environment; (3) form an Employee Concerns Oversight Panel; and (4) identify and respond to organizational safety-conscious work environment challenges. NU began implementing the plan in February 1997, and substantially completed implementation by January 1998. As required by the Order, NU also submitted for NRC approval a proposed independent third-party oversight program organization to oversee implementation of its comprehensive plan. Little Harbor Consultants Inc. (LHC) was approved by the NRC as the third-party oversight organization and has been performing that function since April 1997.

LHC's assessments of NU's programs to improve the safety-conscious work environment at Millstone Station have noted significant improvements in the past year. Based on information gained from interviews with NU staff, program reviews, and assessment of Licensee responses to emerging personnel issues, LHC concluded at an April 7, 1998 meeting with NRC and NU that programs have improved and are at an acceptable level. As reported in an LHC quarterly report for the first 3 months of 1998, transmitted to the NRC on April 22, 1998, LHC's interviews with 298 NU employees, conducted in February 1998, showed an improved work environment. LHC concluded from the results of these interviews that at Millstone improvements have been made regarding the willingness of the workforce to raise concerns, the confidence of the workforce that safety concerns will be handled properly, the existence of a questioning attitude, and the lack of any chilling effect.

The NRC has monitored and assessed LHC's oversight activities and independently assessed NU's actions to upgrade its Employee Concerns Program and improve the safety-conscious work environment at the Millstone Station. The NRC's April 21, 1998 letter to John Beck, President, LHC, documents the NRC Staff's evaluation of LHC's oversight of NU's programs for handling employee concerns. The Staff found that LHC's oversight activities have been thorough and complete and that LHC has effectively carried out its oversight activities. The NRC's April 20, 1998 letter to NU forwarded the results of the NRC Staff's evaluation of the Employee Concerns Program and safety-conscious work environment at the Millstone Station. The NRC Staff's assessment of these NU programs found that they were improved and functioning effectively.

Based on the above, the Petitioners' request that the NRC revoke Millstone's operating licenses for workforce intimidation and actions to prevent the establishment of a "questioning attitude" with regard to employees voicing safety concerns is denied.

B. Request for Investigation of NU Attempt to Destroy Focus 98 Document

The Petitioners also request that the NRC refer the Focus 98 document and NU's attempt to destroy the document to the Department of Justice for investigation of a potential coverup. The Petitioners base this request on reports that NU management attempted to destroy the document. The Petitioners consider the NRC to have a duty to refer this apparently deliberate attempt to evade the otherwise lawful exercise of authority by the NRC to the Department of Justice for a complete investigation.

In its March 12, 1998 letter to the NRC, NU states that participants at the January 21, 1998 management team meeting agreed that the words in the document were poorly chosen and, at the suggestion of a consultant who was facilitating the meeting, the participants agreed that the Focus 98 document should not be distributed further because of the deficient wording. NU states that most meeting participants dropped off their copy of the document with the consultant when the meeting was over at the end of the day, and others left it on tables in the room before they left. NU stated that no one attempted to ensure that all the Focus 98 documents were returned, counted the returned documents to determine if some had not been turned in, or ordered the participants to turn in the documents.

The NRC Staff reviewed NU's responses to the NRC's February 10, 1998 letter, including NU's investigation report, and conducted separate interviews of individuals involved with the distribution and collection of the Focus 98 document. Information from interviews conducted by the Staff confirmed that meeting participants generally concluded that certain wording in the Focus 98 document was inappropriate and susceptible to misinterpretation. Also, the Staff's information was consistent with NU's report that there was general agreement by meeting participants to leave the document at the meeting. The Staff concludes that NU's actions to address the Focus 98 document were not inappropriate. Therefore, the Petitioners' request to refer the Focus 98 document and its recall and destruction to the Department of Justice is denied.

III. CONCLUSION

The NRC Staff has determined, for the reasons provided in the above discussion, that the incident involving preparation and distribution of the Focus 98 document does not represent action by NU to discriminate against persons in the Nuclear Oversight Department. Although wording in the document may have been inappropriate, the process for preparation of the document, the informal nature of the document, and the use of the document as discussion points on organizational strengths and weaknesses all indicate that the language in question

in the document involved a matter of poor word choice. The NRC Staff also has determined that efforts to collect the Focus 98 document after its distribution at the end of the January 21, 1998 Nuclear Oversight Department team-building session were not inappropriate, and that NU, given the nature and use of the document, had no regulatory obligation to provide it to the NRC or inform the NRC of its existence. As discussed previously, the NRC was concerned that a document prepared for use at an NU organizational function could contain such inappropriate language, even if unintended. The NRC was further concerned that the document could have a "chilling effect" on the NU workforce. The NRC's February 10, 1998 letter to NU required NU to respond to these NRC concerns. Based on the NRC Staff's review of NU's response and the NRC's own independent assessment of the event, the NRC Staff is satisfied with the actions taken by the Licensee to assess the chilling effect of the incident and to prevent recurrence. Accordingly, the Petitioners' requests for revocation of NU's license to operate Millstone Units 1, 2, and 3 for reasons associated with development of the Focus 98 document are denied. The Petitioners' request that the NRC refer the matter of the document's collection and destruction to the Department of Justice for investigation is also denied.

As provided for in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission's review. This Decision will constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 1st day of June 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-361
50-362

SOUTHERN CALIFORNIA EDISON
COMPANY, et al.
(San Onofre Nuclear Generating
Station, Units 2 and 3)

June 5, 1998

The Director, Office of Nuclear Reactor Regulation, denies a petition filed by Patricia Borchmann requesting that the Nuclear Regulatory Commission (NRC) take immediate action to prevent the San Onofre Nuclear Generating Station (SONGS) Units 2 and 3 from restarting. In support of the requested action the Petitioner asserted a variety of safety issues concerning the SONGS units, including the adequacy of the emergency evacuation plans for SONGS, the size of the SONGS pressurizers, the condition of the SONGS Unit 1 membrane under the spent fuel pool (SFP) and SFP leak detection monitoring, loss-of-coolant accident dose calculations, the potential for criticality accidents due to the use of high-density storage racks in the SFP, the NRC's failure to comprehensively address issues that have been raised and the withholding of certain data, the production of tritium, and the cumulative effects of low-level radiation.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By petition dated June 23, 1997, and supplemented by letters of June 28, July 11, and October 21, 1997, Patricia Borchmann (Petitioner) requested that the Nuclear Regulatory Commission (Commission or NRC) take action with

regard to San Onofre Nuclear Generating Station (SONGS) Units 2 and 3. The Petitioner requested that the NRC take immediate action to prevent the SONGS units from restarting until all the issues she raised were resolved. In support of the requested action the Petitioner asserted a variety of safety issues concerning the SONGS units. The issues raised included those concerning the emergency evacuation plans for SONGS, the size of the SONGS pressurizers, the condition of the SONGS Unit 1 membrane under the spent fuel pool (SFP) and SFP leak detection monitoring, loss-of-coolant accident dose calculations, the potential for criticality accidents due to the use of high-density storage racks in the SFP, the NRC's failure to comprehensively address issues that have been raised and the withholding of certain data, the production of tritium, and the cumulative effects of low-level radiation. In its letter dated September 22, 1997, acknowledging the petition, the NRC informed the Petitioner that there was insufficient basis to warrant the immediate action requested and that as a result of an evaluation of the issues raised, only two issues would be considered pursuant to 10 C.F.R. § 2.206 for preparation of a Director's Decision. The first issue involves whether, when responding to issues regarding SONGS, the NRC has fragmented responses and failed to comprehensively address issues in total and whether issues identified at SONGS when considered as a whole, reveal trends or systemic problems in the operation of the SONGS units. The second issue involves the SONGS analysis of evacuation time in the emergency preparedness plan. The Petitioner stated that the evacuation time estimates and the traffic capacity analysis for SONGS underestimated the actual number of vehicles that would be on the road and were based on the flawed assumption of only one vehicle per household. Further, the Petitioner was concerned that the analysis did not assume lane closures of major roads, which have been observed during natural events in the past.

My Decision in this matter follows.

II. DISCUSSION

A. Assessment of Whether SONGS Issues Considered as a Whole Reveal Trends or Systemic Problems

In the Petitioner's June 28 letter, the Petitioner asserted that NRC responses to another individual's concerns reflected a tendency to fragment issues and isolate responses, and that the NRC failed to comprehensively address the "big picture." In the October 21 letter, the Petitioner asserted that the NRC responses to concerns related to a SONGS Unit 1 SFP plastic membrane further reinforced the Petitioner's concerns related to the NRC fragmenting issues. In the NRC's September 22, 1997, and February 17, 1998 responses to the Petitioner, the NRC indicated that an assessment would be performed to determine if issues considered as a whole reveal trends or systemic problems associated with the

safe operation of the SONGS units. The NRC further informed the Petitioner that it would review the handling of the Unit 1 SFP membrane to determine if issues considered as a whole indicated systemic problems or trends associated with the operation of the SONGS units.

In order to effectively respond to concerns related to SONGS, the Staff has maintained documentation of the issues raised and the NRC responses to these issues. To ensure that NRC responses to SONGS Units 1, 2, and 3 issues are consistent and that previously raised issues are taken into consideration, the NRC has designated a manager to serve as the NRC point of contact for responding to these issues.

Furthermore, the process for evaluation and determination of the safety significance of issues raised includes reviewing previously identified issues regarding SONGS. The previously identified concerns and responses are evaluated to determine if they are similar, if they have an impact on the issues under review, if they should be included in the evaluation of the issue under review, and if the response to the issue under review changes previous evaluations.

The Staff performed an independent review of the previous SONGS issues together with those noted in the petition. This review determined that there was no indication of trends or systemic problems affecting the safe operation of the SONGS units or affecting the validity of existing conclusions. Moreover, the Staff did not find any evidence that issues had not been fully considered or that relationships with other issues had been ignored. In sum, the Staff has concluded that issues identified regarding the SONGS units have been satisfactorily reviewed and that there is no basis for the Petitioner's assertion.

B. Analysis of the SONGS Traffic Capacity Analysis

Title 10 of the *Code of Federal Regulations* (C.F.R.), section 50.54(q), states, in part, that “[a] licensee authorized to possess and operate a nuclear power reactor shall follow and maintain in effect emergency plans which meet the standards in § 50.47(b) and the requirements in appendix E of this part.” Part 50 of 10 C.F.R., Appendix E, § IV, “Content of Emergency Plans,” states, in part, that “[t]he nuclear power reactor operating license applicant shall also provide an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway EPZ [emergency planning zone] for transient and permanent populations.” Guidance on developing an evacuation time estimate (ETE) study is given in Appendix 4 of NUREG-0654/FEMA-REP-1, Rev. 1, “Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants.” The analysis of the time required to evacuate the transient and permanent population from various areas within the plume exposure pathway EPZ at San Onofre is set forth in Appendix G of the SONGS Emergency Plan.

The ETEs in the San Onofre Emergency Plan are also reflected in the emergency plans for the offsite jurisdictions located in the plume exposure pathway EPZ for San Onofre, which is about 10 miles in radius.

As indicated in the September 22, 1997 response to the Petitioner, the NRC requires nuclear power plant licensees to study the population distribution relative to the transportation network in the vicinity of a nuclear power plant and to develop ETEs on the basis of the results of the study. However, NRC regulations do not specify any preset minimum evacuation time that must be met in order for a site to be acceptable or for emergency plans to be approved. The objective of an ETE study is to have ETEs that reasonably reflect the evacuation times for the various sectors and distances surrounding a nuclear power plant site for a number of evacuation scenarios for use by emergency planners and decisionmakers in the emergency planning process. ETEs are used primarily during the planning process to identify potential traffic bottlenecks so that effective traffic control and management measures can be developed. In the event of a serious accident requiring offsite protective actions such as evacuation, plant conditions are the primary indicators used by the NRC and Licensee to determine protective actions rather than offsite dose calculations and estimates of evacuation times.

Guidance on protective actions for severe reactor accidents is given in draft Supplement 3 to NUREG-0654, "Criteria for Protective Action Recommendations for Severe Accidents," issued in July 1996. This guidance states that in the event of a severe reactor accident involving actual or projected core damage with potential for offsite consequences, plant operators should recommend prompt evacuation of the area near the plant. In this case, the decision to evacuate is based on plant conditions, including the status of the reactor core and the systems intended to protect the core, and not on the amount of time it may take to evacuate the nearby areas.

The NRC Staff took the Petitioner's concerns into consideration during a review of an updated ETE analysis for San Onofre submitted by the Licensee on July 25, 1997, in Revision 7 to the SONGS Emergency Plan. The Petitioner asserted that the emergency plans for SONGS underestimated the actual number of vehicles projected to be used during an emergency event, resulting in an overestimated assumption about traffic system capacity. The Petitioner stated that the evacuation and traffic capacity analysis for SONGS was based on the flawed assumption that only one vehicle per household would be used during an evacuation following an emergency event at SONGS. The Petitioner indicated that this was not a realistic assumption and that many more vehicles would be used during an emergency evacuation because parents working at separate locations would need more than one vehicle to evacuate with children attending different schools or daycare centers or engaged in other activities.

Although the use of one vehicle per household is often assumed in ETE studies, the NRC found, based on a review of the ETE study in Revision 7 to the SONGS Emergency Plan (section 3.4 at 12-13), that the San Onofre ETE analysis assumes a higher number of vehicles. Different numbers of vehicles are used in daytime and nighttime scenarios to reflect different conditions. All the scenarios assume more than one vehicle per household. Based on its review, the NRC concludes that the methodology used to generate the number of evacuating vehicles reasonably reflects the number of potentially evacuating vehicles for an emergency at San Onofre.

The Petitioner asserted that even under worst-case scenario assumptions, such as flooding, the current ETE analysis assumes there would be no lane closures, such as occurred during flooding and mudslides in 1994 in Laguna Beach. On the basis of a review of the ETE analysis in Revision 7 of the SONGS Emergency Plan, the NRC found that the ETE study contains a comprehensive analysis of road closures after earthquakes (Chapter 11 at 66-80), and that the road closures in the analysis were very severe and provide a very clear understanding of the sensitivity of the ETE analysis to road closures (section 5.4 at 17). Thus, the NRC concludes that ETEs can be used by emergency planners to aid in decisionmaking for a wide range of adverse conditions, including lane and road closures caused by flooding and mudslides.

The Petitioner expressed a concern for the need for an updated traffic capacity analysis and evacuation time study to evaluate capacity and levels of service on Interstate 5 (I-5) at the Via de la Valle exit at peak hours during summer when both Del Mar Fair and Del Mar Race Track are operating. The Via de la Valle interchange is about 30 miles to the south of San Onofre. This is well beyond the influence area of the EPZ¹ evacuation traffic. Furthermore, areas to the south of San Onofre generally have lighter evacuation traffic since the population in the EPZ is more concentrated to the north. Thus, the NRC finds that there is no reason that the ETE needs to consider traffic congestion in the Via de la Valle Interchange area on I-5 as it is well beyond the EPZ and outside the EPZ perimeter traffic control area.

Finally, on January 27, 1998, FEMA informed the NRC that on the basis of the results of the full-participation exercise conducted at San Onofre on October 28, 1997, FEMA found that the offsite radiological emergency response plans and preparedness for the State of California and the jurisdictions specific to

¹Regarding the Petitioner's comment that an evacuation zone limited to only 10 miles is "sorely inadequate," the size of the EPZs for commercial nuclear power plants in the United States is established by NRC regulations, and the NRC has consistently found that a plume exposure EPZ of about 10 miles in radius provides an adequate planning basis for radiological emergency planning. See NUREG-1251, Vol. 1, "Implications of the Accident at Chernobyl for Safety Regulation of Commercial Nuclear Power Plants in the United States" (April 1989), and see *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987), where the Commission ruled that 10 C.F.R. § 50.47(c)(2) precludes adjustments on safety grounds to the size of an EPZ that is "about 10 miles in radius."

the San Onofre site can be implemented and provide reasonable assurance that appropriate measures can be taken off site to protect the health and safety of the public in the event of a radiological emergency at San Onofre.

III. CONCLUSION

The NRC Staff has conducted a review of the previous SONGS issues together with the issues raised by the Petitioner and determined that there is no basis for concluding that the NRC has fragmented issues and there is no indication that issues reveal trends or systemic problems with the conduct of reviews of these concerns or operation of the SONGS units. As a result, I find that the NRC has evaluated the issues appropriately and find no trends or systemic flaws that would invalidate those reviews.

As discussed above, the NRC Staff has evaluated the emergency planning concerns raised by the Petitioner and found that the current emergency plans and preparedness at San Onofre adequately address the Petitioner's concerns. On the basis of FEMA's findings on offsite emergency preparedness and the NRC's findings on the adequacy of onsite emergency preparedness, the NRC continues to find that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the SONGS facility.

For the reasons discussed above, no basis exists for taking the action requested by the Petitioner. Accordingly, the Petitioner's request for action pursuant to section 2.206 is denied. A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with section 2.206 of the Commission's regulations. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 5th day of June 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-361
50-362

SOUTHERN CALIFORNIA EDISON
COMPANY, et al.
(San Onofre Nuclear Generating
Station, Units 2 and 3)

June 11, 1998

The Director, Office of Nuclear Reactor Regulation, denies a petition filed by Stephen Dwyer requesting that an investigation be conducted to determine if San Onofre Nuclear Generating Station (SONGS) Unit 2 has experienced degradation in the steam generator supports similar to that found in Unit 3, that further seismic analysis be performed for the SONGS steam generators, and that a retrofitting upgrade of the steam generator supports be accomplished at this time. As basis for the requests, the Petitioner stated that the ability of the SONGS steam generators to withstand a major seismic event is seriously compromised by the degradation observed in the SONGS Unit 3 steam generator internal tube supports during its 1997 refueling outage.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By e-mail dated April 25, 1997, Stephen Dwyer (Petitioner) requested that the Nuclear Regulatory Commission (NRC) take action with regard to San Onofre Nuclear Generating Station (SONGS) regarding his concerns about the ability of

the SONGS steam generators to withstand a major seismic event.¹ Specifically, the Petitioner stated that the ability of the SONGS steam generators to withstand a major seismic event is seriously compromised by the degradation observed in the SONGS Unit 3 steam generator internal tube supports (eggcrate supports) during its 1997 refueling outage. The Petitioner requested an investigation to determine if Unit 2 has experienced degradation similar to that found in Unit 3 and also stated that further seismic analysis should be performed for the SONGS steam generators and that a retrofitting upgrade of the steam generator supports could be accomplished at this time. On June 26, 1997, the NRC Staff acknowledged receipt of the petition as a request pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206) and informed the Petitioner that there was insufficient evidence to conclude that immediate action was warranted. Notice of the receipt of the petition indicating that a final decision with respect to the requested action would be forthcoming within a reasonable time was published in the *Federal Register* on July 3, 1997 (62 Fed. Reg. 36,085).

My Decision in this matter follows.

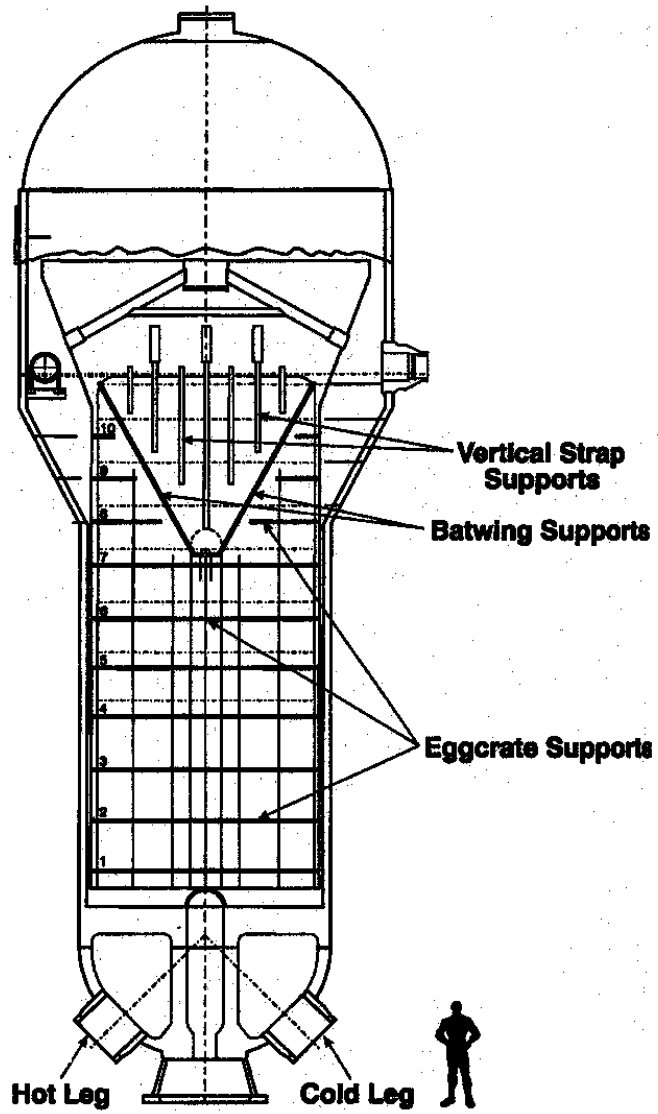
II. DISCUSSION

A. Request for an Investigation to Determine if SONGS Unit 2 Has Experienced Eggcrate Degradation Similar to Unit 3

1. Background

The SONGS units utilize Combustion Engineering Model 3410 recirculating steam generators. This model of steam generator contains 9,350 Inconel 600 (ASME Material Specification SB-163) U-tubes with a nominal diameter and wall thickness of 0.75 and 0.048 inch, respectively. Secondary-side tube support structures consist of seven horizontal full eggcrate supports, three horizontal partial eggcrate supports, and upper bundle supports (i.e., two batwing diagonal supports and seven vertical supports). The materials used for fabrication of the steam generator vessels and internals (including tube supports) are low-alloy and carbon steels, respectively. Figure 1 is a simplified cross-sectional diagram

¹The Petitioner sought to add this concern to his petition dated September 22, 1996, wherein he requested the NRC to shut down the SONGS facility "as soon as possible" pending a complete review of the seismic design of the SONGS units based on information gathered from the Landers and Northridge earthquakes. By letter dated June 26, 1997, the NRC advised the Petitioner that his e-mail request dated April 25, 1997, concerning the ability of the SONGS steam generators to withstand a major seismic event, would be treated as a separate 10 C.F.R. § 2.206 petition. The Director's Decision (DD-97-23, 46 NRC 168) issued by the NRC on September 19, 1997, denied the Petitioner's September 22, 1996 request to shut down the SONGS units, providing a detailed discussion of the adequacy of the seismic licensing basis for the SONGS facility.



**Steam Generator
Eggcrate Location**

Figure 1

of the SONGS steam generators that clearly displays the ten eggcrate support levels, and Figure 2 is a three-dimensional representation of the steam generators that gives additional structural detail.

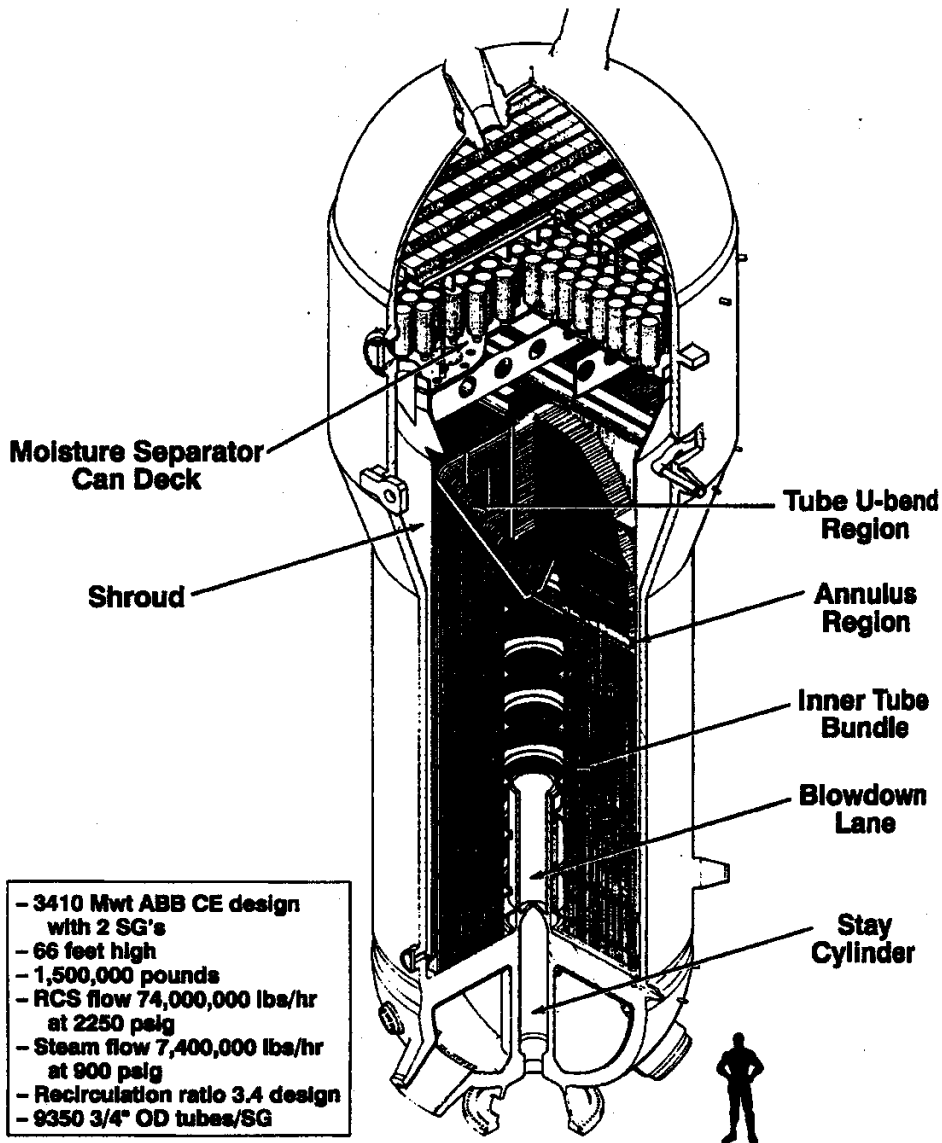
The eggcrate supports consist of 1- and 2-inch carbon steel strips interlocked perpendicular to each other as shown in Figure 3. The eggcrate supports limit lateral motion of the tubes and, at the same time, allow free flow of fluid around the tubes.

During the 1997 refueling outage for SONGS Unit 3, the Licensee discovered that portions of the eggcrate supports had experienced degradation, ranging from minor wastage of the eggcrate material to severe thinning in localized areas. The significant degradation observed during this refueling outage was confined mainly to the periphery locations of the eggcrate supports. The secondary sides of the steam generators in both units were inspected during their 1997 refueling outages and during their 1998 midcycle outages and, as discussed below, significant degradation was limited to the periphery locations of the SONGS Unit 3 eggcrate supports.

The Licensee has extensively researched the cause of the eggcrate degradation and has concluded that the degradation was caused by a form of flow-accelerated corrosion (FAC), a general term describing processes that use assistance from fluid flow to remove the protective oxide layer from base material. Removal of the protective oxide layer exposes the base material to the fluid environment, allowing further material removal through corrosion and/or erosion processes. The carbon steel eggcrate material utilized in the SONGS steam generators can be susceptible to FAC in the presence of sufficiently high fluid velocities.

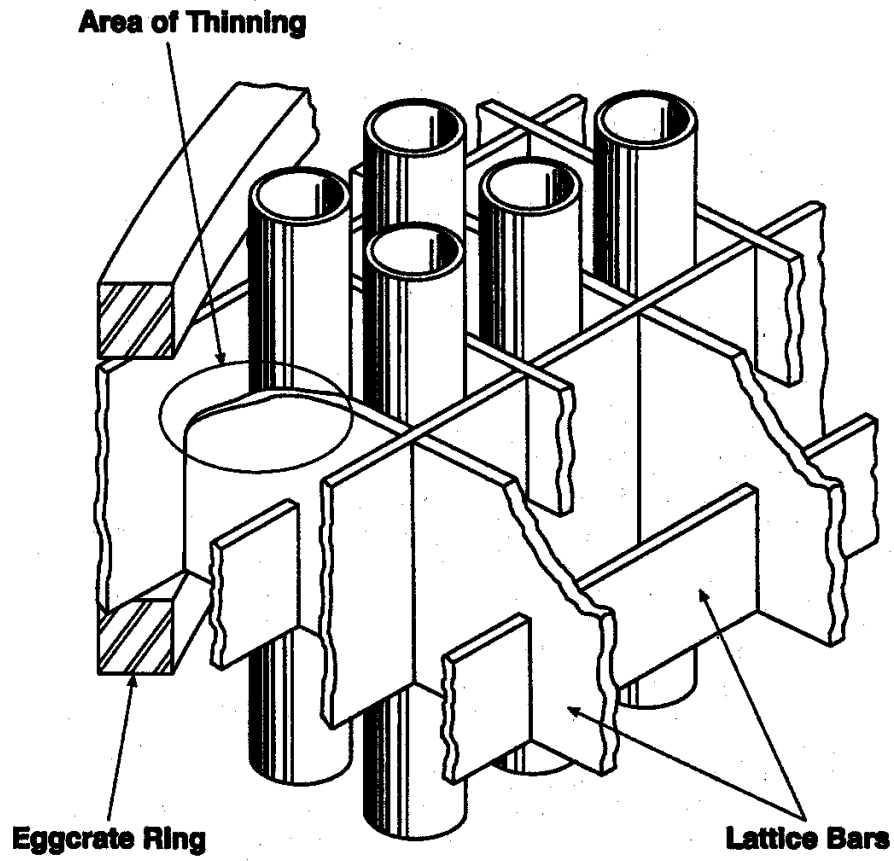
The Licensee concluded that the FAC occurred during recent operation of Unit 3 primarily as a result of steam generator secondary-side increased fluid velocities caused by the buildup of deposits on the steam generator tubes. This buildup of deposits on the tubes significantly reduced the available flow area within the tube bundle, causing flow diversion to the periphery of the tube bundle. The flow diversion to the periphery was also affected by the increased steam quality of the fluid within the tube bundle. The buildup of deposits on the tubes changed the heat transfer characteristics of the tubes, causing the steam quality to increase in the central region of the steam generators. This resulted in an increase of the flow resistance in the central portions of the steam generator, forcing more flow to the peripheral regions, with resulting higher velocities. The resulting large velocity gradients at the periphery initiated vortices which further elevated local velocities that were capable of dislodging the protective oxide layer of the eggcrate material and initiating erosive FAC.

The chemical cleaning of the SONGS Units 2 and 3 steam generators during the 1997 refueling outages removed the deposit buildup and restored fluid flow to their original design values (i.e., nominal conditions). The Licensee stated in its October 17, 1997 letter that with the flow area restored to nominal



Typical CE Steam Generator

Figure 2



Eggcrate Arrangement

Figure 3

conditions, the high fluid velocities that lead to FAC would no longer exist, thus stabilizing eggcrate support degradation. The Licensee has also made changes to the chemistry control program for the secondary system at SONGS Units 2 and 3 to reduce the feedwater iron transport. This is expected to prevent the level of deposit buildup observed in the steam generators before chemical cleaning was done in 1997. The Staff concurs with the Licensee's evaluation that FAC was caused by deposit buildup on the steam generator tubes and that removal of the deposits should restore the steam generator secondary fluid flow to within nominal design values, thereby eliminating continued significant eggcrate degradation. To confirm that FAC has been stopped by the chemical cleaning of the steam generators, and to ensure that no significant degradation of the eggcrate support structures goes undetected, the Licensee has committed to conduct periodic inspections of the secondary side of the steam generators in both units during future outages. The Licensee will conduct periodic inspections of the secondary side of the steam generators to check the level of deposit buildup on the tubes and to verify that future degradation of the eggcrates, if any, remains within the assumptions used in the analysis to demonstrate continued operability of the steam generators (discussed later in this Decision).

2. Description of the Eggcrate Inspections

The SONGS Licensee inspected the steam generator secondary-side support structures, which include the eggcrate supports, in both SONGS units during their 1997 refueling outages and during their 1998 midcycle outages. The results of these inspections are contained in the Licensee's letters dated May 16, 1997, and June 5, 1997 (SONGS Unit 2 and Unit 3 refueling outage inspections results, respectively), and letters dated March 10, 1998, and April 15, 1998 (SONGS Unit 2 and Unit 3 1998 midcycle outages, respectively).

The objective of the inspections for both units was to provide video documentation of all areas in which indications of support-bar degradation was suspected and to verify that other areas did not exhibit these same characteristics. The extent and results of these video inspections are summarized below.

The inspection of the secondary side of each steam generator was divided into six areas: (1) general inspection, (2) inner tube bundle, (3) batwings and vertical straps, (4) eggcrate periphery, (5) eggcrate interior (blowdown lane), and (6) stay cylinder. Each of these areas was inspected to the extent necessary to understand, with a high degree of confidence, the amount of degradation present. The majority of these areas did not exhibit any significant degradation and therefore the design function of the support structures was not adversely impacted.

The general inspections were performed in the steam generators from the top of the moisture separator can deck and included the general area, U-bend,

and annulus regions. The areas inspected included I-beams, I-beam-to-shroud attachments, drains, vertical supports, batwings and the batwing hoop, and baffle antirotational keys. These inspections identified no significant degradation in either unit in these areas.

The inner tube bundle consists of that area between the outer or peripheral tubes to the inner tubes of the stay cylinder. The inner bundle inspections were performed in both steam generators from the can deck. A small camera was dropped down between the tubes in a number of different locations to assess the general material condition of the eggcrates away from the periphery area. For the steam generators in both units, the inspections indicated that the inner bundle did not exhibit the degraded characteristics of the periphery eggcrates found in the Unit 3 steam generators during the 1997 refueling outage.

No indications of thinning were detected during the inspections of the interior batwing and vertical strips on either unit.

Comprehensive peripheral eggcrate inspections were performed in both steam generators in the two units from the can deck. This included the lattice bars and tube-to-lattice bar interfaces at each eggcrate. The area near the periphery of the eggcrate supports in the Unit 3 steam generators experienced the maximum thinning, as shown in Figure 3 and discussed above. As stated earlier, minor isolated instances of thinning were observed in the peripheral eggcrate locations in the SONGS Unit 2 steam generators, but overall the thinning was considerably less than that observed on SONGS Unit 3.

Inspections of the blowdown-lane eggcrates were performed in the steam generators through the 6-inch handhole at the secondary face of the tubesheet from the handhole to the stay cylinder. This included the lattice bars and the eggcrate rings. The inspection scope was to sample the eggcrate area nearest the tubes on both the hot- and cold-leg sides of the blowdown lane. Minor amounts of eggcrate degradation were found in the steam generators of both units, with the Unit 3 steam generators exhibiting the larger amount of degradation in this area.

For the inspection of the overall condition of the eggcrates and ring in the stay cylinder, a support-plate inspection device was used. Little or no degradation was found in this area in either unit.

3. Summary of SONGS Unit 2 Eggcrate Inspection

The Licensee's initial assessment of the Unit 2 steam generator eggcrate supports, conducted after the degradation issue was identified in the SONGS Unit 3 steam generators, was reported in its letter dated May 16, 1997. The Licensee concluded that the Unit 2 eggcrate supports were in very good to excellent overall condition, based on the limited video examinations of the eggcrates performed in support of the chemical cleaning process. Although

the Licensee considered operation for the normal period of operation between refueling intervals to be acceptable on the basis of this limited examination, the Licensee conservatively performed a more extensive video examination of the eggcrates during a midcycle outage that began on January 24, 1998. As reported in its March 10, 1998 letter, the Licensee observed minor isolated instances of thinning in the periphery areas of the eggcrate supports, but overall the thinning was considerably less than that observed on SONGS Unit 3.

The NRC reviewed the program established by the Licensee to conduct the video examinations of the eggcrate supports during the SONGS Unit 2 midcycle outage and reported its findings in Inspection Report 50-361/98-01; 50-362/98-01, dated May 29, 1998. This program was similar to the Licensee's program for inspecting the Unit 3 eggcrate supports during its midcycle outage. The primary difference between the inspection programs for the two units was that a larger portion of the Unit 3 eggcrate structures was inspected. The Staff concluded in its inspection report that the scope of the SONGS Unit 2 secondary-side visual inspections was satisfactory and the results supportive of the Licensee's conclusion that no steam generator tubes needed to be removed from service due to insufficient support from any secondary-side support structures, which includes the eggcrate support structures.

4. Actions Taken as a Result of Observed Eggcrate Degradation

Following the secondary-side inspection activities conducted during the SONGS Unit 3 1997 refueling outage and 1998 midcycle outage, the Licensee plugged and stabilized (by insertion of a steel cable inside the subject tube) some Unit 3 steam generator tubes as a precautionary measure due to the degradation observed in certain eggcrate supports. No tubes in the Unit 2 steam generators were removed from service. Once the tube is removed from service in the above-described manner, support from the eggcrate structures is no longer needed. The criterion established by the Licensee for removing tubes from service is described in detail below.

B. Concern About the Seismic Adequacy of the SONGS Steam Generators

The Petitioner asserts that the degradation of the steam generator eggcrate supports could seriously weaken the supports and make the steam generators vulnerable to seismic events.

In its letter of May 16, 1997, the Licensee committed to perform an evaluation of the effect of the degraded eggcrates on steam generator tube integrity in the SONGS Unit 3 steam generators before return to power from the Unit 3 1997

refueling outage. This initial evaluation was provided by the Licensee in its letter of June 5, 1997, and included the effects of a postulated design-basis earthquake. The Licensee submitted the final version of the degraded eggcrate support evaluation for SONGS Unit 3 on October 17, 1997. As stated in the previous section, the amount of eggcrate support degradation observed in SONGS Unit 2 was considerably less than that observed in Unit 3. Therefore, the Staff concludes that demonstrating the ability of the SONGS Unit 3 steam generators to withstand a design-basis seismic event will demonstrate the adequacy of the Unit 2 steam generators as well.

The Staff's review of the seismic adequacy of the SONGS Unit 3 steam generators is detailed below.

1. Methodology and Acceptance Criteria

The Petitioner did not specifically request the Staff to evaluate the eggcrate supports assuming other design loads concurrent with earthquake loads. However, to provide additional conservatism, and to conform with General Design Criterion (GDC) 2 of 10 C.F.R. Part 50, Appendix A, the Licensee, in its October 17, 1997 letter, evaluated the ability of the eggcrate supports to perform their intended safety function, assuming the most limiting combination of load conditions.

GDC 2 requires, in part, that the design bases for structures, systems, and components important to safety reflect appropriate combinations of the effects of normal and accident conditions with the effects of natural phenomena such as earthquakes. The earthquake for which these plant features are designed is defined as the safe-shutdown earthquake (SSE).² The Petitioner's concerns on the adequacy of the seismic design of the SONGS units, based on information gathered from the Landers and Northridge earthquakes, were addressed previously by the Staff in DD-97-23 (*see note 1*).

Appendix A of Standard Review Plan³ (SRP) § 3.9.3, "[American Society of Mechanical Engineers] ASME Code Class 1, 2, and 3 Components, Component Supports, and Core Support Structures," delineates acceptable design limits and appropriate combinations of loadings associated with normal operation, postulated accidents, and specified seismic events for the design of Seismic Category I fluid system components (i.e., water- and steam-containing components). This

²The SSE is defined, in part, as "that earthquake which is based upon an evaluation of the maximum earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material. It is that earthquake which produces the maximum vibratory ground motion for which certain structures, systems, and components are designed to remain functional." *See* 10 C.F.R. Part 100, Appendix A, § III(c).

³The Standard Review Plan (SRP) is published as NUREG-0800, and is used as guidance for the Office of Nuclear Reactor Regulation staff responsible for the review of applications to construct and operate nuclear power plants.

appendix also provides that necessary plant features important to safety meet the appropriate design limits specified in section III of the ASME Boiler and Pressure Vessel Code (ASME Code) when the component is subjected to concurrent loadings associated with the normal plant condition, the vibratory motion of the SSE, and the dynamic system loadings associated with the faulted plant condition. Faulted plant conditions are those operating conditions associated with postulated events of extremely low probability, such as loss-of-coolant accidents (LOCAs) or main steamline break (MSLB) accidents. The design limits and loading combinations utilized by the Licensee in the October 17, 1997 evaluation of individual steam generator tubes are the same design limits and loading combinations that were reviewed and approved by the Staff at the time of plant licensing. This evaluation is contained in Chapter 3 of NUREG-0712.⁴ Therefore, the Staff finds acceptable the Licensee's use of these design limits and loading combinations in evaluating the impact of the degraded eggcrate supports on individual steam generator tubes.

The evaluation of the potential for lateral movement of the entire steam generator tube bundle (whole bundle evaluation) was not explicitly addressed during the Staff's review performed at the time of plant licensing. Also, the ASME Code does not provide specific design limits for the whole bundle evaluation. The whole bundle evaluation contained in the October 17, 1997 letter was performed by the Licensee to verify that the structural integrity of the eggcrate is maintained to ensure that it does not shift in a way that could damage the tubes. This is not an ASME Code evaluation; however, ASME Code techniques were used by the Licensee to generate and assess the results. The Staff has reviewed the specific ASME Code techniques utilized by the Licensee, and concludes that they provide conservative results, and are, therefore, acceptable for the whole bundle evaluation.

Furthermore, the loading combinations used in the Licensee's whole bundle evaluation are the same loading combinations used in the individual tube evaluations, and are the same loading combinations that were reviewed and approved at the time of plant licensing.

2. Degraded Eggcrate Support Assumptions

The Staff reviewed the assumptions used in the Licensee's October 17, 1997 evaluation regarding the amount of eggcrate support judged to be available, and verified that these assumptions were supported by the results of the Licensee's inspections.

⁴ NUREG-0712, "Safety Evaluation Report related to the Operation of San Onofre Nuclear Generating Station, Units 2 and 3," Chapter 3, February 1981.

For the individual steam generator tube analysis, the Licensee calculated the maximum loads that could occur, assuming that adequate support was not available at two consecutive eggcrate levels (*see* Figure 1). The Staff finds this assumption conservative and acceptable because the Licensee has removed from service all tubes where two consecutive eggcrate levels were found degraded to the point where adequate support could not be ensured.

For the whole bundle analysis, the Licensee used the inspection results to sort the eggcrates into categories based on a conservative estimate of the remaining thickness of the eggcrate lattice bars. The Staff reviewed the sorting criteria used by the Licensee, and concluded that the material strength assumptions established by the Licensee for the degraded eggcrate supports are conservative, and appropriate for evaluating the ability of the eggcrate structures to perform their intended function.

The visual inspections performed by the Licensee during the 1998 midcycle outages for both units confirmed the appropriateness of these assumptions pertaining to the amount of eggcrate support degradation used in the Licensee's evaluation.

3. Evaluation Results

Using the above-described methodology and assumptions, the Licensee determined that the peak calculated loads on the individual steam generator tubes would remain below the allowable design limits approved by NUREG-0712 during and following a postulated design-basis earthquake.

The results of the Licensee's whole bundle evaluation confirmed that the eggcrate structure will provide sufficient support to ensure that the tube bundle will not impact the eggcrate support ring during and following a postulated design-basis earthquake.

The Staff finds these results acceptable, and as detailed above, also finds acceptable the methodology and assumptions used by the Licensee in the generation of these results. The Staff concludes, therefore, that the amount of degradation observed in the eggcrate supports will not prevent the SONGS Units 2 and 3 steam generators from performing their intended safety functions.⁵

4. Confirmatory Actions

The Licensee's 1998 midcycle inspection of the SONGS Unit 3 steam generators confirmed that the condition of the Unit 3 eggcrate internal supports

⁵Since the amount of support degradation in SONGS Unit 2 was observed to be considerably less than that observed in Unit 3, the NRC Staff concludes that the Licensee's October 17, 1997 evaluation of SONGS Unit 3 steam generator structural integrity and the Staff's review of that evaluation support the adequacy of SONGS Unit 2 steam generators to withstand a design-basis event and perform their intended safety function.

remained within the analytical assumptions used in the Licensee's evaluation contained in its October 17, 1997 letter and also supported the Licensee's contention that the phenomenon (FAC) that led to the degradation of the eggcrates had been arrested by the chemical cleaning of the steam generators.

Furthermore, the Licensee has committed in its letters to the NRC (April 15, 1998, for Unit 2 and October 17, 1997, for Unit 3) to inspect the eggcrate supports during future outages to ensure that their condition remains within the analytical assumptions used in the Licensee's evaluation. These inspections will continue to be conducted until it is established that further inspections are not required.

In summary, on the basis of the video inspection results for the steam generators in both units, and the Staff's review of the detailed evaluations performed by the Licensee, the Staff concludes that the SONGS steam generators are fully capable of performing their intended safety function during and following a postulated SSE, and no retrofitting upgrade of the steam generators is required.

III. CONCLUSION

As explained above, there is no evidence of significant degradation of the SONGS Unit 2 steam generator eggcrate supports, and the extensive analyses demonstrate the ability of the steam generators in both SONGS units to perform their intended safety function. Accordingly, the Petitioner's requested action, pursuant to section 2.206, is denied.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c) of the Commission's regulations. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 11th day of June 1998.

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