

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

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

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PREFACE

This is the fifty-ninth volume of issuances (1–403) 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, 2004, to June 30, 2004.

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.

Between 1969 and 1990, the AEC 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 from the AEC to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represented the final level in the administrative adjudicatory process to which parties could appeal. Parties, however, were permitted to seek discretionary Commission review of certain board rulings. The Commission also could 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. Since then, the Commission itself reviews 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

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8027-MLA-5

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site)

January 8, 2004

Sequoyah Fuels Corporation applied for a materials license amendment to possess byproduct material at its site near Gore, Oklahoma. The Commission affirms the Presiding Officer's denial of the State of Oklahoma's hearing request.

RULES OF PRACTICE: STANDING TO INTERVENE

INTERVENTION: STANDING

Petitioner lacks standing, where a requested materials license amendment authorizes no new activity and threatens no injury to any person or entity.

MATERIALS LICENSE AMENDMENTS

The appropriate vehicle for Sequoyah Fuels Corporation's request to reclassify wastes is 10 C.F.R. § 40.44, which governs amendment of materials licenses, not 10 C.F.R. § 40.31, which governs applications for specific licenses.

MEMORANDUM AND ORDER

The State of Oklahoma appeals the denial of its request for a hearing in this materials license amendment proceeding. We affirm.

I. BACKGROUND

Sequoyah Fuels Corporation (SFC) produced uranium hexafluoride from yellowcake at its facility in Gore, Oklahoma, from 1970 until 1993 and, for a portion of this time, converted depleted uranium hexafluoride to uranium tetrafluoride. The operations produced radioactive waste. Since it ceased operations at the Gore site, SFC has been exploring decommissioning possibilities. To facilitate decommissioning of the site, the NRC Staff recommended to the Commission that SFC's front-end wastes, generated during the yellowcake solvent extraction process, be classified as byproduct material under section 11e(2) of the Atomic Energy Act.¹ The Commission approved the NRC Staff's reclassification recommendation.² Thereafter, SFC requested a materials license amendment to possess 11e(2) byproduct material. The State of Oklahoma, among others, submitted a hearing request after notice³ of SFC's license amendment request.

The Presiding Officer initially sought guidance from the Commission. He reasoned that the viability of Oklahoma's claim rested on whether the Commission's SRM, an internal decision, precluded Oklahoma from asserting that the SFC waste does not qualify as section 11e(2) byproduct material.⁴ Because Oklahoma's position challenged the Commission's SRM, the Presiding Officer asked us to decide whether Oklahoma could raise the 11e(2) issue in this adjudication.⁵ We agreed to examine the classification issue afresh in an adjudicatory setting and requested briefs from the parties.⁶ We recently decided that SFC's front-end waste may be considered byproduct material under section 11e(2) of the AEA and remanded this matter to the Presiding Officer for action consistent with our decision.⁷

On remand, the Presiding Officer denied Oklahoma's hearing request and terminated the proceeding.⁸ Oklahoma appeals that decision.

¹ "The term 'byproduct material' means . . . (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2). The Staff made its recommendation in SECY-02-0095, "Applicability of Section 11e.(2) of the Atomic Energy Act to Material at the Sequoyah Fuels Corporation Uranium Conversion Facility" (June 4, 2002).

² See Staff Requirements Memorandum Responding to SECY-02-0095 (July 25, 2002) ("SRM").

³ See 67 Fed. Reg. 69,048 (Nov. 14, 2002).

⁴ See LBP-03-7, 57 NRC 287, 288 (2003).

⁵ See *id.* at 291-92.

⁶ See CLI-03-6, 57 NRC 547 (2003).

⁷ See CLI-03-15, 58 NRC 349 (2003).

⁸ See LBP-03-25, 58 NRC 392 (2003).

II. DISCUSSION

The license amendment application is to “authorize SFC to possess 11e(2) byproduct material in any physical or chemical form generated by the past operations authorized under [SFC’s source materials license] SUB-1010, and to continue to conduct activities with such materials to the same extent as currently authorized by the license for source material.”⁹ Because of the “limited scope of the proposed license amendment,” the Presiding Officer found it apparent that Oklahoma could not make a showing of an actual or threatened injury as required to demonstrate standing in this proceeding.¹⁰ The Presiding Officer noted that the “license amendment application at bar . . . does little more than to permit the possession of the Gore waste under a classification that the Commission has decided is legally acceptable.”¹¹

Oklahoma’s viewpoint, and the gravamen of its appeal, is that the license amendment application at issue is in reality a request for a new specific license under 10 C.F.R. § 40.31. Effectively, says Oklahoma, the license amendment grants SFC a license for uranium recovery without requiring SFC to demonstrate compliance with regulations applicable to issuance of such licenses, *e.g.*, preparation of a Safety Evaluation Report and an Environmental Assessment. Oklahoma argues that it has standing to raise issues related to SFC’s and the Staff’s compliance with the governing statutes and regulations.

The NRC Staff asserts that Oklahoma lacks standing in this proceeding, for there is no actual or imminent injury-in-fact associated with the amendment. The amendment, the Staff says, will result in no increase in radiological exposure or risk. According to the Staff, future licensing actions will address substantive

⁹Letter from John H. Ellis to Larry W. Camper, Enclosure 1, “Application for Possession of Byproduct Material” at 1 (Sept. 30, 2002).

¹⁰*See* LBP-03-25, 58 NRC at 393. Standing in an NRC adjudicatory proceeding requires that the hearing requestor allege genuine harm:

“(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . and (4) is likely to be redressed by a favorable decision.”

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001), *citing Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001). *See also* 10 C.F.R. § 2.1205(h).

¹¹LBP-03-25, 58 NRC at 394. The Presiding Officer noted that the license amendment application “also seeks the deletion, revision, or addition of several license conditions said to conform the license to current NRC practices with respect to section 11e(2) byproduct material licenses. It does not appear, however, that any of those changes would authorize any new activities. Nor does it appear that any of them might possibly pose a concrete threat of injury to [a hearing requestor].”

Id. at 393 n.2.

issues, such as the stability and sufficiency of the prospective onsite disposal cell. Indeed, after the Staff approved the license amendment at issue in this proceeding, SFC applied for three other decommissioning-related license amendments — seeking approval of its reclamation plan, its groundwater corrective action plan, and its groundwater monitoring plan.¹²

SFC acknowledges that its source materials license has expired but points out that 10 C.F.R. § 40.42(c) gives SFC continuing authority over the materials so long as it limits its actions to those related to decommissioning. In the current license amendment request, seeking the 11e(2) classification, SFC maintains that it does not seek authorization to conduct any activities not already authorized.

The Commission agrees with the Staff and the Presiding Officer that this license amendment threatens no injury to Oklahoma, or, for that matter, to any other person or entity. It simply authorizes *no new activity*. The appropriate vehicle for SFC's reclassification request is 10 C.F.R. § 40.44, which governs amendment of materials licenses, not section 40.31, as Oklahoma insists. SFC has not asked for a license to engage in a uranium recovery enterprise; rather, it has taken a step toward decommissioning after earlier cessation of nuclear fuel cycle activities at its Oklahoma site.

The Commission also finds no merit in Oklahoma's other points on appeal. Accordingly, we affirm the Presiding Officer's decision to terminate this proceeding.

III. CONCLUSION

We *affirm* the Presiding Officer's order denying Oklahoma's hearing request. We specifically approve both the Presiding Officer's reasoning and his result.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of January 2004.

¹² See Docket Numbers 40-8027-MLA-6, 40-8027-MLA-7, and 40-8027-MLA-8, respectively. Oklahoma filed hearing requests in all three of these license amendment proceedings.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 40-8027-MLA-7
40-8027-MLA-8**

**SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site)**

January 14, 2004

Sequoyah Fuels Corporation applied for two materials license amendments seeking approval of its groundwater plans for decommissioning its Gore, Oklahoma facility. The Commission affirms the Presiding Officer's denial of the Cherokee Nation's untimely hearing request in the consolidated proceeding.

**RULES OF PRACTICE: HEARING REQUESTS (TIMELINESS);
UNTIMELY INTERVENTION**

To accept a late hearing request in a 10 C.F.R. Part 2, Subpart L proceeding, the Presiding Officer must determine, under the strict terms of 10 C.F.R. § 2.1205(d)(1), both that the delay in filing was excusable and that granting the request will not result in undue prejudice or undue injury to any other participant in the proceeding.

RULES OF PRACTICE: APPEALS

The Presiding Officer's decision is affirmed where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2002).

RULES OF PRACTICE: APPEALS

APPEALS: RAISING MATTERS FOR FIRST TIME

The Commission will not consider matters raised for the first time on appeal. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000).

MEMORANDUM AND ORDER

These cases arise from the applications of Sequoyah Fuels Corporation (SFC) for two materials license amendments for decommissioning its Gore, Oklahoma facility. The Presiding Officer denied the hearing requests of the State of Oklahoma and the Cherokee Nation and terminated the proceedings. The Cherokee Nation has appealed. Oklahoma has not. The Commission today affirms the Presiding Officer's order.

I. BACKGROUND

SFC's Oklahoma facility produced uranium hexafluoride from yellowcake from 1970 until 1993 and, for a portion of this time, the facility converted depleted uranium hexafluoride to uranium tetrafluoride. The operations produced radioactive waste streams. On the basis of a Commission decision during SFC's decommissioning planning,¹ SFC applied to amend its source materials license to possess byproduct material, as defined by section 11e(2) of the Atomic Energy Act.² Recently, the Commission denied a challenge to the reclassification of some of SFC's wastes as byproduct material under section 11e(2).³

Earlier, the NRC Staff had issued the requested materials license amendment to SFC.⁴ Under the terms of that amendment, SFC was to submit a reclamation plan by March 15, 2003, and a groundwater corrective action plan and a groundwater monitoring plan by June 15, 2003. SFC timely submitted a license amendment

¹ See Commission Staff Requirements Memorandum (July 25, 2002), responding to SECY-02-0095, "Applicability of Section 11e(2) of the Atomic Energy Act to Material at the Sequoyah Fuels Corporation Uranium Conversion Facility" (June 2, 2002).

² The relevant portion of the definition is that the term "byproduct material" means "(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2); AEA § 11e(2).

³ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-03-15, 58 NRC 349 (2003).

⁴ See Amendment 29 to Materials License No. SUB-1010, Approval of Request To Authorize Possession of Byproduct Material (Dec. 11, 2002).

application requesting approval of its reclamation plan, which described SFC's proposal to build a disposal cell at the Gore site. After publication of notice of the amendment request and opportunity for a hearing under 10 C.F.R. Part 2, Subpart L, the State of Oklahoma, the Cherokee Nation, and Ed Henshaw submitted timely hearing requests.⁵ The Presiding Officer recently granted the hearing requests of Oklahoma and the Cherokee Nation and denied the request of Ed Henshaw.⁶

In separate license amendment requests in June 2003, SFC requested approval of its two groundwater plans. Both the State of Oklahoma and the Cherokee Nation submitted untimely hearing requests in response to *Federal Register* notices regarding SFC's license amendment requests for approval of its groundwater corrective action plan (Docket No. 40-8027-MLA-7)⁷ and its groundwater monitoring plan (Docket No. 40-8027-MLA-8).⁸ Specifically, the deadline for service of hearing requests was Sept. 24, 2003; Oklahoma served its request on Sept. 29, 2003, and the Cherokee Nation on Oct. 2, 2003. SFC and the NRC Staff filed answers opposing the petitions as untimely.

After consolidating the two proceedings⁹ and inviting the petitioners to file replies to the NRC Staff's and SFC's answers, the Presiding Officer rejected both untimely requests and terminated the proceedings.¹⁰ The Cherokee Nation filed an appeal of LBP-03-24.¹¹

⁵ Sequoyah Fuels Corp.; Notice of Receipt of Amendment Request and Opportunity To Request a Hearing, 68 Fed. Reg. 18,268 (Apr. 15, 2003). *See also* Docket No. 40-8027-MLA-6.

⁶ *See* LBP-03-29, 58 NRC 442 (2003).

⁷ Notice of Receipt of License Amendment Request from the Sequoyah Fuels Corp. To Approve a Ground Water Corrective Action Plan for Its Gore, Oklahoma Facility, and Opportunity To Request a Hearing, 68 Fed. Reg. 51,033 (Aug. 25, 2003).

⁸ Notice of Receipt of License Amendment Request from the Sequoyah Fuels Corp. To Approve a Ground Water Monitoring Plan for Its Gore, Oklahoma Facility, and Opportunity To Request a Hearing, 68 Fed. Reg. 51,034 (Aug. 25, 2003).

⁹ *See* unpublished Memorandum and Order (Consolidating Proceedings and Authorizing Further Filings) (Oct. 29, 2003). Oklahoma filed a single pleading to request a hearing in both the MLA-7 and the MLA-8 proceedings. The Cherokee Nation also filed a combined request for hearing. Similarly, SFC and the NRC Staff each filed a single response to each unified hearing request. The Presiding Officer stated that "there appears to be good reason to consider the requests together." *Id.* at 2. NRC adjudicatory rules provide for consolidation of proceedings "if it is found that such action will be conducive to the proper dispatch of [the Commission's] business and to the ends of justice . . ." 10 C.F.R. § 2.716.

¹⁰ *See* LBP-03-24, 58 NRC 383 (2003).

¹¹ The State of Oklahoma did not appeal the decision.

II. DISCUSSION

Procedurally, the Cherokee Nation's hearing request in MLA-7 and MLA-8 was defective because it was late. Significantly, the Cherokee Nation did not avail itself of the opportunity to respond to the oppositions to its hearing request and attempt to justify its tardiness.¹² Thereafter, the Presiding Officer applied the standard set out in 10 C.F.R. § 2.1205(l)(1) and determined that the delay was inexcusable.¹³ Therefore, he rejected the requests of both the Cherokee Nation and Oklahoma, referred the requests to the NRC Staff as 10 C.F.R. § 2.206 petitions,¹⁴ and terminated the proceedings.

To accept a late hearing request in a 10 C.F.R. Part 2, Subpart L proceeding, the Presiding Officer must determine, under the strict terms of 10 C.F.R. § 2.1205(l)(1), both that the delay in filing was excusable and that granting the request will not result in undue prejudice or undue injury to any other participant in the proceeding. Although the Presiding Officer found that the late filing "cannot be said to have occasioned consequential prejudice or injury to either [SFC] or the Staff," he reasonably found the Cherokee Nation's explanation for its tardiness inadequate.¹⁵ Indeed, "[t]he simple fact is that . . . the explanations for the tardiness advanced by counsel well versed in NRC adjudicatory proceedings falls so far short of the mark that their acceptance would make a mockery of the deadline that they have failed to meet."¹⁶ Further, the Presiding Officer, noting the "relative brevity of the tardiness," observed that "[i]f such a consideration were deemed of itself to make the tardiness excusable, the deadline would be stripped of real meaning."¹⁷

The Commission agrees. The Cherokee Nation's brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of the Presiding Officer's well-considered decision.¹⁸ Accordingly, we affirm the

¹² See unpublished Memorandum and Order (Consolidating Proceedings and Authorizing Further Filings) at 3.

¹³ See LBP-03-24, 58 NRC 383.

¹⁴ "If the request for a hearing on the petition for leave to intervene is found to be untimely and the requestor or petitioner fails to establish that it otherwise should be entertained on the paragraph (l)(1) of this section, the request or petition will be treated as a petition under § 2.206 and referred for appropriate disposition." 10 C.F.R. § 2.1205(l)(2).

¹⁵ See LBP-03-24, 58 NRC at 387.

¹⁶ *Id.* at 390.

¹⁷ *Id.* at 390 n.9.

¹⁸ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2002). In a belated attempt to justify its tardiness, the Cherokee Nation included in its appellate brief new information not previously presented to the Presiding Officer. The Commission will not consider matters raised for the first time on appeal. See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000).

Presiding Officer's decision to terminate these proceedings, for the reasons he gave.

III. CONCLUSION

We *affirm* the Presiding Officer's order denying the Cherokee Nation's hearing requests for the reasons he stated in LBP-03-24.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of January 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-3103

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

January 30, 2004

**NOTICE OF RECEIPT OF APPLICATION FOR LICENSE,
NOTICE OF AVAILABILITY OF APPLICANT'S
ENVIRONMENTAL REPORT, NOTICE OF
CONSIDERATION OF ISSUANCE OF LICENSE, AND
NOTICE OF HEARING AND COMMISSION ORDER**

**I. RECEIPT OF APPLICATION AND AVAILABILITY
OF DOCUMENTS**

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or the Commission) received on December 15, 2003, an application, safety analysis report, and environmental report from Louisiana Energy Services, L.P. (LES), for a license to possess and use source, byproduct, and special nuclear material and to enrich natural uranium to a maximum of 5% U-235 by the gas centrifuge process. The plant, to be known as the National Enrichment Facility (or NEF), would be constructed in Eunice, New Mexico. LES is a limited Partnership whose general Partners are Urenco Investments, Inc. (a subsidiary of Urenco, Ltd.) and Westinghouse Enrichment Company. In addition, there are six limited Partners.

Copies of LES's application, safety analysis report, and environmental report (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390, Availability of Public Records) are available for public inspection at the Commission's Public Document Room (PDR) at

One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. These documents are also available for review and copying using any of the following methods: (1) enter the NRC's Gas Centrifuge Enrichment Facility Licensing Web site at <http://www.nrc.gov/materials/fuel-cycle-fac/gas-centrifuge.html#correspondence>; (2) enter the NRC's Agencywide Document Access and Management System (ADAMS) at <http://www.nrc.gov/NRC/ADAMS/index.htm>, where the accession number for LES's application (including LES's safety analysis report and LES's environmental report) is ML040020261; or (3) contact the NRC's Public Document Room (PDR) by calling (800) 397-4209, faxing a request to (301) 415-3548, or sending a request by electronic mail to pdr@nrc.gov. Hard copies of the documents are available from the PDR for a fee.

The NRC has now accepted LES's application for docketing and accordingly is providing this notice of hearing and notice of opportunity to intervene on LES's application for a license to construct and operate a centrifuge enrichment facility. Pursuant to the Atomic Energy Act of 1954, as amended (Act), the NRC Staff will prepare a safety evaluation report after reviewing the application and making findings concerning the public health and safety and common defense and security. In addition, pursuant to the National Environmental Policy Act of 1969 (NEPA) and the Commission's regulations in 10 C.F.R. Part 51, NRC will complete an environmental evaluation and prepare an environmental impact statement (EIS) before the hearing on the issuance of a license is completed. The preparation of the EIS will be the subject of a separate notice in the *Federal Register*.

When available, the NRC Staff's safety evaluation and its EIS (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) will also be placed in the PDR and in ADAMS. Copies of correspondence between the NRC and LES, and transcripts of prehearing conferences and hearings (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) will be similarly made available to the public.

If following the hearing, the Commission is satisfied that LES has complied with the Commission's regulations and the requirements of this Notice and Commission Order and the Commission finds that the application satisfies the applicable standards set forth in 10 C.F.R. §§ 30.33, 40.32, and 70.23, a single license will be issued authorizing: (1) the receipt, possession, use, delivery, and transfer of byproduct (e.g., calibration sources), source, and special nuclear material in the National Enrichment Facility; and (2) the construction and operation of the National Enrichment Facility. Prior to commencement of operations of the National Enrichment Facility if it is licensed, in accordance with section 193(c) of the Act and 10 C.F.R. § 70.32(k), NRC will verify through inspection that the facility has been constructed in accordance with the requirements of the license

for such construction and operation. The inspection findings will be published in the *Federal Register*.

II. NOTICE OF HEARING

A. Pursuant to 10 C.F.R. § 70.23a and section 193 of the Atomic Energy Act of 1954, as amended (Act), as amended by the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Pub. L. No. 101-575), a hearing will be conducted according to the rules of procedure in new 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I (final rule published at 69 Fed. Reg. 2182 (Jan. 14, 2004)).¹ The hearing will be held under the authority of sections 53, 63, 189, 191, and 193 of the Act. The Applicant and NRC Staff shall be parties to the proceeding.

B. Pursuant to 10 C.F.R. Part 2, Subpart C, the hearing shall be conducted by an Atomic Safety and Licensing Board (Board) appointed by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. Notice as to the membership of the Board will be published in the *Federal Register* at a later date.

C. The matters of fact and law to be considered are whether the application satisfies the standards set forth in this Notice and Commission Order and the applicable standards in 10 C.F.R. §§ 30.33, 40.32, and 70.23, and whether the requirements of 10 C.F.R. Part 51 have been met.

D. If this proceeding is not a contested proceeding, as defined by 10 C.F.R. § 2.4, the Board will determine the following, without conducting a de novo evaluation of the application: (1) whether the application and record of the proceeding contain sufficient information and whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards, with respect to the matters set forth in paragraph C of this section, and (2) whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.

E. Regardless of whether the proceeding is contested or uncontested, the Board will, in its initial decision, in accordance with Subpart A of Part 51: Determine whether the requirements of sections 102(2) (A), (C), and (E) of NEPA and Subpart A of Part 51 have been complied with in the proceeding; independently consider the final balance among conflicting factors contained in the record of proceeding with a view to determining the appropriate action to be

¹ By its terms, the new 10 C.F.R. Part 2 applies to licensing actions the notice of hearing for which was issued on or after the effective date of the new rule, February 13, 2004. See 69 Fed. Reg. 2182. By this Order, the Commission directs the application of the new 10 C.F.R. Part 2 for the LES proceeding. Accordingly, references in this Notice and Order are to the new 10 C.F.R. Part 2.

taken; and determine whether a license should be issued, denied, or conditioned to protect the environment.

F. If the proceeding becomes a contested proceeding, the Board shall make findings of fact and conclusions of law on admitted contentions. With respect to matters set forth in paragraph C of this section but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D without conducting a de novo evaluation of the application.

G. By April 6, 2004, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Petitions for leave to intervene shall be filed in accordance with the provisions of 10 C.F.R. § 2.309. Interested persons should consult the new 10 C.F.R. Part 2, section 2.309 (69 Fed. Reg. 2182, 2238), which is available at the NRC's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD (or call the PDR at (800) 397-4209 or (301) 415-4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site, at <http://www.nrc.gov>. If a petition for leave to intervene is filed by the above date, the Commission will issue an order determining standing and refer petitions from persons with the requisite standing to the Atomic Safety and Licensing Board for further processing in the proceeding.

As required by 10 C.F.R. § 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (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 that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petition must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license in response to LES's application. The petition must also include a concise statement of the alleged facts or expert opinions that support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact, including references to

specific portions of the application that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. Each contention must be one that, if proven, would entitle the petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Board will set the time and place for any prehearing conferences and evidentiary hearings, and the respective notices will be published in the *Federal Register*.

A petition for leave to intervene and proffered contentions must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff, or may be delivered to the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301-415-1101 or by e-mail to hearingdocket@nrc.gov. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Associate General Counsel for Hearings, Enforcement, and Administration, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted either by means of facsimile transmission to 301-415-3725 or by e-mail to OGCMailCenter@nrc.gov. A copy of the request for hearing and petition for leave to intervene should also be sent to James Curtiss, Esq., Winston & Strawn, 1400 L Street, Washington, DC 20005-3502, attorney for the Applicant.

Nontimely filings of petitions for leave to intervene, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission or the Atomic Safety and Licensing Board that the petition should be granted, based upon a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1)(i)-(viii).

H. A State, county, municipality, federally recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as an interested entity under 10 C.F.R. § 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by April 6, 2004. The petition must be filed

in accordance with the filing instructions in paragraph G, above, for petitions submitted under 10 C.F.R. § 2.309, except that state and federally recognized Indian tribes do not need to address the standing requirements in 10 C.F.R. § 2.309(d)(1). The Commission will rule on petitions filed under 10 C.F.R. § 2.309(d)(2). The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 C.F.R. § 2.315(c).

I. Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 C.F.R. § 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by April 6, 2004.

III. COMMISSION GUIDANCE

A. Contentions on Environmental Justice

The Commission will make the determination as to whether contentions associated with environmental justice matters will be admitted in this proceeding. Parties responding to such contentions pursuant to 10 C.F.R. § 2.309(h) shall submit their answers to the Commission's Secretary as noted above with copies to the other parties and Board. The Commission itself will rule on the admissibility of such contentions and provide appropriate guidance on the litigation of such contentions.

B. Presiding Officer Determination of Contentions

For contentions other than environmental justice (addressed in III.A, above), the presiding officer shall issue a decision on the admissibility of contentions no later than sixty (60) days after the petitions and contentions are referred to the ASLB.

C. Novel Legal Issues

If rulings on the admissibility of contentions or the admitted contentions themselves raise novel legal or policy questions, the Commission will provide early guidance and direction on the treatment and resolution of such issues. Accordingly, the Commission directs the Board to promptly certify to the Commission in

accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f) all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in this proceeding.

D. Discovery Management

1. All parties, except the NRC Staff, shall make the mandatory disclosures required by 10 C.F.R. § 2.704 within forty-five (45) days of the issuance of the order admitting that contention.

2. The presiding officer, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round for admitted contentions.

3. All discovery against the Staff shall be governed by 10 C.F.R. §§ 2.336(b) and 2.709. The Staff shall comply with 10 C.F.R. § 2.336(b) no later than 30 days after the ASLB order admitting contentions and shall update the information at the same time as the issuance of the Safety Evaluation Report (SER) or the Final Environmental Impact Statement (FEIS). Discovery under 10 C.F.R. § 2.709 shall not commence until the issuance of the particular document, i.e., SER or EIS, unless the ASLB in its discretion finds that commencing discovery against the Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

4. No later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the Staff shall make the pretrial disclosures required by 10 C.F.R. § 2.704(c).

E. Hearing Schedule

The Commission believes that a reasonably achievable schedule would result in a final NRC decision on the pending application within about 2½ years of the date the application was received, and the Commission thus will impose a 30-month milestone schedule for this proceeding. The Commission recognizes, however, that legislation currently being considered would require the NRC to issue decisions on new enrichment facility applications within 2 years of receipt of the application; consequently, the Commission will endeavor to identify efficiencies, and provide the pertinent resources, to further reduce the time the agency needs to complete reviews and reach decisions in licensing uranium enrichment facilities.

In the interest of providing a fair hearing, avoiding unnecessary delays in the NRC's review and hearing process, and producing an informed adjudicatory record that supports the licensing determination to be made in this proceeding,

the Commission directs that both the Atomic Safety and Licensing Board and the NRC Staff, as well as the Applicant and other parties to this proceeding, follow the applicable requirements contained in the new 10 C.F.R. Part 2 and the guidance in the Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998) [63 Fed. Reg. 41,872 (Aug. 5, 1998)] to the extent that such guidance is not inconsistent with specific guidance in this Order. The guidance in the *Statement of Policy on Conduct of Adjudicatory Proceedings* is intended to improve the management and the timely completion of the proceeding and addresses hearing schedules, parties' obligations, contentions, and discovery management. Consistent with that guidance, the Commission directs the Licensing Board to expeditiously decide legal and policy issues that may resolve threshold issues or expedite this proceeding. Threshold environmental legal and policy issues need not await issuance of the final EIS. In addition, the Commission is providing the following direction for this proceeding:

1. The Commission directs the Licensing Board to set a schedule for the hearing in this proceeding consistent with this Order that establishes as a goal the issuance of a final Commission decision on the pending application within 2½ years (30 months) from the date that the application was received. Formal discovery against the Staff shall be suspended until after the Staff completes its final SER and EIS in accordance with the direction provided in paragraph D.3, above.

2. The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents (SER or EIS) unless the Licensing Board in its discretion finds that starting the hearing with respect to one or more safety issues prior to issuance of the final SER² (or one or more environmental contentions directed to the Applicant's Environmental Report) will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

3. The Commission also believes that issuing a decision on the pending application within about 2½ years may be reasonably achieved under the Rules of Practice contained in the new 10 C.F.R. Part 2 and the enhancements directed by this Order. We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted on this application. We do expect,

²The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final SER is issued will serve to further the Commission's objective, as reflected in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, *supra*, to ensure a fair, prompt, and efficient resolution of contested issues. For example, it may be appropriate for the Licensing Board to permit discovery against the Staff and/or the commencement of an evidentiary hearing with respect to safety issues prior to the issuance of the final SER in cases where the Applicant has responded to the Staff's "open items" and there is an appreciable lag time until the issuance of the final SER, or in cases where the initial SER identifies only a few open items.

however, the Licensing Board to use the techniques specified in this Order and in the Commission's policy statement on the conduct of adjudicatory proceedings (CLI-98-12, *supra*) to ensure prompt and efficient resolution of contested issues. See also *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

4. If this is a contested proceeding, the Board should adopt the following milestones, in developing a schedule, for conclusion of significant steps in the adjudicatory proceeding:³

- | | |
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| <ul style="list-style-type: none"> • Within <i>10 days</i> of the Commission's order determining standing and admission of any environmental justice contentions: | <p>Persons found to have standing or entities participating under 10 C.F.R. § 2.309(d) may submit a motion for reconsideration (<i>see, below</i>, Section IV.B).*</p> |
| <ul style="list-style-type: none"> • Within <i>20 days</i> of the Commission's order determining standing: | <p>Persons found to have standing or entities participating under 10 C.F.R. § 2.309(d) may respond to any motion for reconsideration.</p> |
| <ul style="list-style-type: none"> • Within <i>60 days</i> of the Commission's order determining standing and referring the petition and contentions to the ASLB: | <p>ASLB decision on admissibility of remaining contentions.</p> |
| <ul style="list-style-type: none"> • Within <i>30 days</i> of the ASLB decision determining admission of contentions: | <p>Staff prepares hearing file.</p> |
| <ul style="list-style-type: none"> • Within <i>90 days</i> of the ASLB decision determining admission of contentions: | <p>Completion of discovery on admitted contentions, except against the Staff (including contentions on environmental issues arising under NEPA).</p> |
| <ul style="list-style-type: none"> • Within <i>110 days</i> of the ASLB decision determining admission of contentions: | <p>Deadline for summary disposition motions on admitted contentions.**</p> |

³ This schedule assumes that the SER and Final EIS are issued essentially at the same time. If these documents are not to be issued very close in time, the Board should adopt separate schedules but concurrently running for the safety and environmental reviews consistent with the time frames herein for each document.

- Within *150 days* of the ASLB decision determining admission of contentions: ASLB decision on summary disposition motions on admitted contentions.
- Date of issuance of final SER/EIS: Staff updates hearing file.
- Within *20 days* of the issuance of final SER/EIS: Motions to amend contentions; motions for late-filed contentions.
- Within *40 days* of the issuance of final SER/EIS: Completion of answers and replies to motions for amended and late-filed contentions.
- Within *50 days* of the issuance of final SER/EIS: ASLB decision on admissibility of late-filed contentions; deadline for summary disposition motions on remaining admitted contentions.***
- Within *80 days* of the issuance of final SER/EIS: Completion of discovery on late-filed contentions; ASLB decision on summary disposition motions on remaining contentions.
- Within *90 days* of the issuance of final SER/EIS: Direct testimony filed on remaining contentions and any amended or admitted late-filed contentions.
- Within *100 days* of the issuance of final SER/EIS: Cross-examination plans filed on remaining contentions and any amended or admitted late-filed contentions.
- Within *105 days* of the issuance of final SER/EIS: Evidentiary hearing begins on remaining contentions and any amended or admitted late-filed contentions.
- Within *135 days* of the issuance of final SER/EIS: Completion of evidentiary hearing on remaining contentions and any amended or admitted late-filed contentions.
- Within *180 days* of the issuance of final SER/EIS: Completion of findings and replies.

- Within 240 days of the issuance of final SER/EIS: ASLB's initial decision.

*Motions for reconsideration do not stay this schedule.

**The schedule presumes that a prehearing conference order would establish the deadline for filing of summary disposition motions 20 days after close of discovery consistent with 10 C.F.R. § 2.710(a), answers to be filed 10 days after filing of any motion, replies to be filed 10 days after any answer, and the ASLB to issue a decision on any summary disposition motion 20 days thereafter.

***No summary disposition motions on late-filed contentions are contemplated.

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date ("in-hand"). If pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in our regulations for responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.306.

In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. Although summary disposition motions are included in the schedule above, the Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions are likely to expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

5. Parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed from the proceeding.

6. The Commission directs the Licensing Board to inform the Commission promptly, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board must include an explanation of why the milestone cannot be met and the measures the Licensing

Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

F. Commission Oversight

As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

IV. APPLICABLE REQUIREMENTS

A. The Commission will license and regulate byproduct, source, and special nuclear material at the National Enrichment Facility in accordance with the Atomic Energy Act of 1954, as amended. Section 274c(1) of the Act was amended by Public Law 102-486 (Oct. 24, 1992) to require the Commission to retain authority and responsibility for the regulation of uranium enrichment facilities. Therefore, in compliance with law, the Commission will be the sole licensing and regulatory agency with respect to byproduct, source, and special nuclear material for the National Enrichment Facility, and with respect to the control and use of any equipment or device in connection therewith.

Many rules and regulations in 10 C.F.R. chapter I are applicable to the licensing of a person to receive, possess, use, transfer, deliver, and process byproduct, source, and special nuclear material in the quantities that would be possessed at the National Enrichment Facility. These include 10 C.F.R. Parts 19, 20, 21, 25, 30, 40, 51, 70, 71, 73, 74, 95, 140, 170, and 171 for the licensing and regulation of byproduct, source, and special nuclear material, including requirements for notices to workers, reporting of defects, radiation protection, waste disposal, decommissioning funding, and insurance.

With respect to these regulations, the Commission notes that this is the second proceeding involving the licensing of an enrichment facility. The Commission issued a number of decisions in an earlier proceeding regarding a proposed site in Homer, Louisiana. These final decisions, *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992), *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997), and *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998), resolve a number of issues concerning uranium enrichment licensing and may be relied upon as precedent.

Consistent with the Atomic Energy Act of 1954, as amended, and the Commission's regulations, the Commission is providing the following direction for licensing uranium enrichment facilities:

1. Environmental Issues

a. General

Part 51 of 10 C.F.R. governs the preparation of an environmental report and an environmental impact statement (EIS) for a materials license. LES's environmental report and the NRC Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative.

b. Treatment of Depleted Uranium Hexafluoride Tails

As to the treatment of the disposition of depleted uranium hexafluoride tails (depleted tails) in these environmental documents, unless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste. In addition, if such waste meets the definition of "waste" in 10 C.F.R. § 61.2, the depleted tails are to be considered low-level radioactive waste within the meaning of 10 C.F.R. Part 61 in which case an approach by LES to transfer to DOE for disposal by DOE of LES's depleted tails pursuant to section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for dispositioning the LES depleted tails. The NRC Staff may consider the DOE EIS in preparing the Staff's EIS. Alternatives for the disposition of depleted uranium tails will need to be addressed in these documents. As part of the licensing process, LES must also address the health, safety, and security issues associated with the storage of depleted uranium tails onsite pending removal of the tails from the site for disposal or DOE dispositioning.

c. Environmental Justice

As to environmental justice matters, past Commission decisions are relevant precedent. These include *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998), and *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002) that limit treatment of certain issues in NRC proceedings. In addition, the Commission notes that it recently issued for comment a draft Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 68 Fed. Reg. 62,642 (Nov. 5, 2003). As noted above in Section III, the admissibility of proffered environmental justice contentions will be determined by the Commission.

2. *Financial Qualifications*

Review of financial qualifications for enrichment facility license applications is governed by 10 C.F.R. Part 70. In *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997), the Commission held that the Part 70 financial criteria, 10 C.F.R. § 70.22(a)(8) and 70.23(a)(5), could be met by conditioning the LES license to require funding commitments to be in place prior to construction and operation. The specific license condition approved in that proceeding, which addressed a minimum equity contribution of 30% from the parents and affiliates of LES partners prior to construction of the associated capacity and having in place long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts prior to constructing or operating the facility, is one way to satisfy the requirements of Part 70.

3. *Antitrust Review*

The LES enrichment facility is subject to licensing pursuant to sections 53 and 63 of the Atomic Energy Act (Act), and is not a production and utilization facility licensed under section 103. Consequently the NRC does not have antitrust responsibilities for LES similar to the antitrust responsibilities under section 105 of the Act. The NRC will not entertain or consider antitrust issues in connection with the LES application in this proceeding.

4. *Foreign Ownership*

The LES application is governed by sections 53 and 63 of the Act, and consequently issues of foreign involvement shall be determined pursuant to section 57 and not sections 103, 104, or 193(f). Section 57 of the Act requires, among other things, an affirmative finding by the Commission that issuance of a license for NEF will not be “inimical to the common defense and security.”

5. *Creditor Requirements*

Pursuant to section 184 of the Act, the creditor regulations in 10 C.F.R. § 50.81 shall apply to the creation of creditor interests in equipment, devices, or important component parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235. In addition, the creditor regulations in 10 C.F.R. § 70.44 shall apply to the creation of creditor interests in special nuclear material. These creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not

covered by 10 C.F.R. § 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States.

6. *Classified Information*

All matters of classification of information related to the design, construction, operation, and safeguarding of the NEF shall be governed by classification guidance in “Joint NRC/DOE Classification Guide for Louisiana Energy Services Gas Centrifuge Plant (CG-LCP-1)” (1992) (Confidential — Restricted data) and any later versions. Any person producing such information must adhere to the criteria in CG-LCP-1. All decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to de novo review in this proceeding.

7. *Access to Classified Information Pursuant to 10 C.F.R. Part 25*

Portions of LES’s application for a license are classified Restricted Data or National Security Information. Persons needing access to those portions of the application will be required to have the appropriate security clearance for the level of classified information to which access is required. Access to certain classified Third Agency or Foreign Government Information may be subject to special controls and require the prior approval of the Director, Division of Nuclear Security, NSIR. Access requirements apply equally to intervenors, their witnesses and counsel, employees of the Applicant, its witnesses and counsel, NRC personnel, and others. Any person who believes that he or she will have a need for access to classified information for the purpose of this licensing proceeding, including the hearing, should immediately contact the U.S. Nuclear Regulatory Commission, Division of Facilities and Security, ADM, Washington, DC 20555, for information on the clearance process. Telephone calls may be made to Cheryl M. Stone, Chief, Security Branch. Telephone: (301) 415-7404.

8. *Obtaining NRC Security Facility Approval and for Safeguarding Classified Information Received or Developed Pursuant to 10 C.F.R. Part 95*

Any person who requires possession of classified information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC’s Division of Nuclear Security, NSIR, Washington, D.C. 20555. Telephone calls may be made to A. Lynn Silvius, Chief, Information Security Section. Telephone: (301) 415-2214.

B. Reconsideration

The above guidance does not foreclose the Applicant, any person admitted as a party to the hearing, or an entity participating under 10 C.F.R. § 2.315(c) from litigating material factual issues necessary for resolution of contentions in this proceeding. Persons found by the Commission to have standing and entities participating under 10 C.F.R. § 2.315(c) as of the date of the Commission's order on standing may also move the Commission to reconsider any portion of Section IV of this Notice and Commission Order where there is no clear Commission precedent or unambiguously governing statutes or regulations. Any motion to reconsider must be filed within 10 days after the Commission's order on standing. The motion must contain all technical or other arguments to support the motion. Other persons granted standing and entities participating under 10 C.F.R. § 2.315(c), including the Applicant and the NRC Staff, may respond to motions for reconsideration within 20 days of the Commission's Order. Motions will be ruled upon by the Commission. A motion for reconsideration does not stay the schedule set out above in Section III.E.4. However, if the Commission grants a motion for reconsideration, it will, as necessary, provide direction on adjusting the hearing schedule.

V. PENDING ENERGY LEGISLATION

The Energy Policy Act of 2003, H.R. 6, is currently pending in Congress. H.R. 6, as currently constituted, contains provisions that address the manner in which certain issues are to be dealt with and a schedule for overall Commission consideration of an application for licensing a uranium enrichment facility. In the event that H.R. 6 is enacted, the Commission may need to issue an additional order to conform guidance and schedules for the LES application to any new statutory requirements.

VI. NOTICE OF INTENT REGARDING CLASSIFIED INFORMATION

As noted above, a hearing on this application will be governed by the new 10 C.F.R. Part 2, Subparts A, C, G, and to the extent classified material becomes involved, Subpart I. Subpart I requires in accordance with 10 C.F.R. § 2.907 that the NRC Staff file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of Restricted Data or National Security Information into a proceeding. The Applicant has submitted portions of its application that are classified. The Commission notes that, since the entire application becomes part of the record of the proceeding, the NRC staff has found it impracticable for it to

avoid the introduction of Restricted Data or National Security Information into the proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of January 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Paul B. Abramson, Special Assistant

In the Matter of

Docket No. 40-8838-MLA-2
(ASLBP No. 04-819-04-MLA)

U.S. ARMY
(Jefferson Proving Ground Site)

January 7, 2004

MEMORANDUM AND ORDER
(Granting Hearing Request and Motion To Hold
Further Proceedings in Abeyance)

I. BACKGROUND

In hand is another application of the Department of the Army (Licensee) seeking an amendment to its outstanding materials license (SUB-1435). Under the auspices of that license, the Licensee had conducted over the course of several years activities on its Jefferson Proving Ground (JPG) site in Indiana that had resulted in the accumulation on the site of a substantial quantity of depleted uranium (DU) munitions.

As recently chronicled in LBP-03-28, 58 NRC 437 (2003), a prior amendment application submitted some 4 years ago called for the decommissioning of the site in accordance with a plan that had been submitted to the NRC Staff. In response to a *Federal Register* notice providing an opportunity to seek a hearing on the plan, a hearing request was filed by an organization based in the vicinity of the JPG site, Save the Valley, Inc. (Petitioner). On a determination that the Petitioner had satisfied the requirements of 10 C.F.R. § 2.1205(e) and (h), the

relevant provisions of that portion (Subpart L) of the Commission's Rules of Practice concerned with the adjudication of materials licensing proceedings, the hearing request was granted in LBP-00-9, 51 NRC 159 (2000).

LBP-03-28 went on to record that, at least for the present, for practical reasons the Licensee has now abandoned any proposal for site decommissioning. By way of a substitute, it has put before the NRC Staff a different proposal. As recited in an October 28, 2003 *Federal Register* notice, the Licensee currently seeks a 5-year, possession-only license (POLA) that would be renewable until such time as it once again became feasible to put forth a decommissioning plan. 68 Fed. Reg. 61,471.

In response to the October 28 notice, Petitioner filed a new and timely hearing request on November 26, accompanied by a motion asking that the hearing await the completion of the Staff's technical review of the POLA proposal. In the wake of that development, and given the fact that decommissioning is not now being considered by either the Licensee or the Staff, the proceeding instituted several years ago was dismissed in LBP-03-28 as moot. The dismissal was, however, expressly stated to be without prejudice to the filing by Petitioner of a motion to revive that proceeding should the decommissioning of the site once again receive active Staff consideration at the Licensee's behest.

In the present circumstances, what must be decided is whether, as was the case with regard to Petitioner's prior hearing request, the request currently on the table meets the requirements for a grant contained in subsections 2.1205(e) and (h). Specifically, has the Petitioner established its standing to question the issuance of the sought POLA and, if so, has it also advanced at least one area of concern that is germane to the subject matter of the proceeding?

Although its December 8 response is somewhat elliptical, the Licensee appears not to challenge either the Petitioner's standing or its specification of at least one germane area of concern. Moreover, in a separate filing on that date, it agreed that the proceeding should be held in abeyance pending the completion of the Staff's technical review of the POLA proposal.

For its part, in December 29 filings, the Staff announced its intention to participate in the proceeding and acknowledged that the Petitioner had met the area of concern requirement. The Staff maintained, however, that the Petitioner should be required to buttress its showing on standing. More specifically, the Staff would have it that the Petitioner should provide further particularization regarding the location of its members relative to the JPG site and should additionally be called upon to supply affidavits of members authorizing it to represent them in this proceeding. In common with the Licensee, should the hearing request be granted the Staff is agreeable to holding the proceeding in abeyance pending the completion of its technical review.

II. ANALYSIS

A. Standing

If this were the first endeavor by this Petitioner to seek a hearing with regard to the proposed disposition of the DU munitions accumulated on the JPG site, there might well be some merit to the insistence of the Staff that the current hearing request requires elaboration in the respects it suggests. As seen, however, the Petitioner was found to possess standing several years ago to challenge the site decommissioning plan then under Staff review. Although it might well be, as the Staff points out, that the POLA proposal now under consideration is not the precise equivalent of the shelved (at least for the time being) revised decommissioning plan, the fact remains that both the POLA and that plan are addressed to the same ultimate matter — what is to be done with the amassed DU munitions at this juncture to ensure that they do not pose a threat to the public health and safety. Thus, the interests potentially adversely affected by the issuance of the sought POLA are not significantly different from those associated with decommissioning.

In the circumstances, it seems enough here that the hearing request recites, among other things, that some of Petitioner's members possess property interests in the vicinity of the JPG site that might be affected by DU migration, should it take place. Given that the finding of standing in the now-dismissed earlier proceeding was based significantly upon the same concern regarding such migration, to require anything further of Petitioner at this date would clearly exalt form over substance. Stated otherwise, having once established its standing to question the proposed means of dealing with the DU munitions accumulated on the JPG site, there is no apparent good reason why Petitioner should be burdened with the need to go through the rehearsal that is now called for by the Staff. In that connection, it does not appear that the Staff is itself in real doubt that Petitioner in fact still retains members in the vicinity of the site whose interests might be affected by DU migration and who continue to desire that the Petitioner represent those interests.

B. Areas of Concern

Petitioner assigns several areas of concern, all of which appear indisputably germane to the subject matter of the proceeding. They include (1) whether the Licensee has provided an adequate factual or regulatory basis for the current proposal; (2) whether the proposal will present no undue radiation risk; (3) whether the Licensee's characterization of the site is flawed; (4) whether the Licensee's updated Environmental Radiation Monitoring Plan is inadequate in several material respects; and (5) whether additional conditions should be imposed upon the POLA.

C. Motion To Hold Proceeding in Abeyance

Given that the Staff has elected to participate in this proceeding, and in the absence of any objection thereto, the Petitioner's motion to hold the proceeding in abeyance is granted. Among other things, the conclusions reached on that review might have the effect of narrowing considerably the issues requiring adjudication.

For the reasons stated, the hearing request of Save the Valley, Inc. is hereby *granted* and further proceedings will be *held in abeyance* pending completion of the NRC Staff's technical review of the proposed possession only license. Upon completion, the Staff shall promptly file and serve upon the parties a notification to that effect. Upon receipt of that notification, an order will be entered restoring the proceeding to active status.¹

As a general rule, the grant of a hearing request triggers the Staff's obligation to provide a hearing file within 30 days. *See* 10 C.F.R. § 2.1231. In the present circumstances, however, it seems advisable to defer that obligation pending the outcome of the technical review to ensure that the file will be complete as adjudication moves forward. Accordingly, the file will be due within 30 days of the order reactivating the proceeding, to be presented in a manner consistent with the terms of that order.

It is so ORDERED.

BY THE PRESIDING OFFICER²

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 7, 2004

¹ During the course of the prior proceeding, the Licensee was required to submit quarterly status reports. That requirement is not being renewed. The Staff may, however, be called upon from time to time to report on the progress of the technical review.

² Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to the counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

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

February 5, 2004

COMMISSION PROCEEDINGS: APPELLATE REVIEW

The Commission always has discretion whether to accept review of issues raised in our licensing proceedings. NRC rules say that the Commission may grant review based on “any consideration” it “deems to be in the public interest.” Review is particularly appropriate where there is a possibility that the Board’s ruling made a clear error as to a material fact, where a legal conclusion therein is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider. *See* 10 C.F.R. § 2.786(b)(4).

REGULATIONS: APPLICABILITY

It was not error for the Board to apply rules that had been published in the *Federal Register* as final rules, but would not take effect until 5 months after the Board’s ruling (when the regulations would apply to the newly licensed facility).

SECURITY PLAN: ISFSIs

NRC regulations require only that an ISFSI have sufficient watchmen to detect intrusion and alert local law enforcement, and allow ISFSI operators to rely on

law enforcement to thwart an attack. *See* 10 C.F.R. § 73.51. *See also* Final Rule, “Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste,” 63 Fed. Reg. 26,955, 26,957 (1998). The lack of housing near the facility and the consequent inability of the Licensee to call on off-duty security personnel in the case of an emergency are therefore immaterial.

STATE STATUTES: FEDERAL PREEMPTION

After federal district court ruled that a state statute prohibiting law enforcement at an ISFSI was preempted by federal law, the Board did not err in dismissing Intervenor’s contention. Even though the matter was still under appeal to the United States Court of Appeals for the Tenth Circuit, the Board was bound to apply the law as it existed at the time of its ruling.

ATOMIC ENERGY ACT: FEDERAL PREEMPTION

Congress, in enacting the Atomic Energy Act, clearly intended the federal government to occupy the field of regulating the safety of atomic energy. *See English v. General Electric Co.*, 496 U.S. 72, 81 (1990).

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

SCOPE OF EIS: REMOTE AND SPECULATIVE EVENTS (TERRORISM)

The environmental impacts of terrorism or sabotage are not subject to review under NEPA. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

TRANSPORTATION: SPENT NUCLEAR FUEL

PFS-bound spent fuel will be in shipment, even during temporary holding at the transfer point, until it arrives at the ISFSI. It therefore falls under Department of Transportation regulations and there is no need for NRC to license the intermodal transfer facility. *See* Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127; § 5102(12) (“transportation” of nuclear materials, includes “the movement of property and loading, unloading, or storage incidental to the movement” of materials).

REGULATIONS: STRUCTURES AND SYSTEMS IMPORTANT TO SAFETY

Fuel cladding is not a “structure or system important to safety” at an ISFSI, as that term is defined in NRC regulations. *See* 10 C.F.R. § 73.3. Those structures or systems are limited to parts of “the ISFSI, MRS, or spent fuel *storage cask*” important to maintain the safe condition of the spent fuel. *See id.* The applicable regulation does not refer to the *contents* of the canister. NRC has made rulemaking-associated determinations that the fuel cladding, once encased in a canister, is no longer important to safety. *See, e.g.,* Proposed Rule Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste, 51 Fed. Reg. 19,106 (1986) “[F]or storage of spent fuel the cladding need not be maintained if additional confinement is provided . . . [T]he canister could act as a replacement for the cladding.” *Id.* at 19,108.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Complaints about the adequacy of an applicant’s ER are superseded when the issues involved are discussed in the FEIS. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA does not charge the Staff, in drafting the EIS, or the Board, in its hearing process, with answering the political question whether the country as a whole “needs” the facility or not.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

“NRC adjudicatory hearings are not EIS editing sessions.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Because Utah has not shown a connection between the PFS facility and the permanent repository to be developed by DOE, NEPA does not require the PFS EIS to consider impacts on the development of a permanent repository.

CONTENTIONS: GOOD CAUSE FOR LATE FILING

In presenting a late contention, the proponent's first duty is to demonstrate good cause to the board. *See* 10 C.F.R. § 2.724(a)(1)(i). Even if a party on review provides a credible argument that there was good cause for late filing, if the intervenor did not present that argument to the board along with the late contention, the Commission has no basis for concluding that the board erred.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): SCOPING

CONTENTIONS: GOOD CAUSE FOR LATE FILING

Commenting on the scope of the EIS does not substitute for raising a timely contention. It is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the Staff issues its environmental analysis. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994). In the interest of expedition, our rules require the filing of contentions as early as possible.

CONTENTIONS: GOOD CAUSE FOR LATE FILING

DUE PROCESS

There was no denial of due process in denying admission of a late-filed contention, where the schedule for late contentions was spelled out clearly in a Board scheduling order and the Intervenor failed to timely request an extension, even though the size of the DEIS and the timing of its release might well have justified an extension of the filing deadline.

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT OF 1986 (EPCRTKA)

The Board properly rejected the Intervenor's EPCRTKA complaint as lacking a factual basis, where the Intervenor did not show the Licensee would possess any EPCRTKA substances in reportable quantities. Although spent fuel itself is

“hazardous,” in that it requires safe handling under NRC regulations, it is not an “extremely hazardous substance” on the EPA’s EPCRTKA list.

**RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS
(CASK-DROP ACCIDENTS)**

The Board correctly found that a contention claiming that the license application should have a plan for dealing with a leaking cask or canister lacked a factual basis and constituted an attack on our regulations and rulemaking-associated determinations, and failed to show a genuine dispute. NRC has determined that even worst-case scenarios (such as drops) involving a cask would not breach it. *See* 60 Fed. Reg. 32,430, 32,438 (1995). Intervenor’s contention lacked a factual foundation because it did not present any plausible scenario requiring special planning for a breached cask.

RULES OF PRACTICE: BURDEN OF PROOF

It is the essence of NRC’s contention-pleading process that the party proffering a contention always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists. *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

MEMORANDUM AND ORDER

In response to the Commission’s order of November 13, 2003,¹ Utah and Ohngo Gaudadeh Devia (OGD) filed their petitions for review presenting numerous issues for our consideration. We have considered each issue to determine whether it meets our standards for review under 10 C.F.R. § 2.786. For the reasons we give below, we deny review for the most part, but grant review and request further briefs on two issues.

The Commission always has discretion whether to accept review of issues raised in our licensing proceedings. Our rules say that the Commission may grant review based on “any . . . consideration” it “deem[s] to be in the public interest.”² Review is particularly appropriate where there is a possibility that the Board’s ruling made a clear error as to a material fact, where a legal conclusion

¹ CLI-03-16, 58 NRC 360 (2003).

² *See* 10 C.F.R. § 2.786(b)(4).

therein is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider.³

With these standards in mind, below we consider the petitions for review filed by Utah and OGD.

II. UTAH'S POINTS OF ERROR

A. Security-Related Contentions

Utah initially challenged PFS's physical security plan with nine contentions, Utah Security A through Security I. Utah now asks review of portions of Utah Security A (inadequate staffing), Security G (inadequate protection against terrorism and sabotage), and Security J (no documented relationship with local law enforcement authority).

1. *The Board Did Not Err in Applying Not-Yet-Effective Regulations*

Utah's petition complains that the Board improperly applied regulations that were not yet effective. At the time the Board considered Utah's original security contentions, these regulations had been published in the *Federal Register* as final rules,⁴ but would not take effect until 5 months after the Board's ruling. We see no real point to Utah's argument. The rules took effect in November 1998, and will apply to the PFS facility, if licensed. It was sensible for the Board to evaluate Utah's contention under the rules that will cover the PFS facility.

2. *Utah Security A (Security Implications of Lack of Nearby Housing)*

Utah's Security A argued that the lack of housing near the PFS facility would make it impossible for PFS to call on off-duty security personnel in the case of an emergency. But as PFS's response pointed out, its security plan does not rely on off-duty security personnel to respond to an emergency or repel intruders. Our regulations provide that an ISFSI must have sufficient watchmen to detect intrusion and alert local law enforcement, but the regulations allow ISFSIs to rely on law enforcement (not the watchmen) to thwart an attack.⁵ It appears that Utah's contention results from a misinterpretation of PFS's security plan. Utah's

³ *See id.*

⁴ *See* Final Rule, "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," 63 Fed. Reg. 26,955 (1998).

⁵ 10 C.F.R. § 73.51. *See also* Statement of Considerations, 63 Fed. Reg. at 26,957.

petition for review therefore fails to raise a significant issue of law, policy, or fact for the Commission to resolve.

3. *Utah Security G (Failure To Describe Procedures for Protecting Fuel)*

Utah's Security G contended that PFS "has failed to adequately assess and describe procedures that will protect spent fuel from unauthorized access or activities, such as terrorism and sabotage." The Board found this an impermissible attack on our regulations, specifically 10 C.F.R. § 72.184(a), which states: "[p]rocedures do[] not have to be submitted for approval."⁶ Utah's petition says only that the "security plan does not adequately protect fuel from unauthorized access or activities," but does not explain how the Board's ruling on Security G constituted an error of fact or law. We see no basis for taking review of Security G.

4. *Utah Security J (Lack of Agreement with Local Law Enforcement)*

In 2002, the Board admitted late-filed Utah Security J, which claimed that recently enacted Utah legislation barring any local government from providing services (including law enforcement services) to a spent nuclear fuel storage facility rendered PFS unable to comply with various security regulations.⁷ After the United States District Court for the District of Utah ruled the Utah statutes to be preempted by federal law,⁸ the Board dismissed the contention.⁹ Utah appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, and a decision on that matter is pending.

Utah argues that the Board erred in dismissing its contention when the matter was still under appeal to a higher court. We see no error. The Board was bound to apply the law as it existed at the time of its ruling, which was as the district court ruled. In addition, the district court's legal conclusion that the Utah statutes were preempted by federal law seems reasonable. Congress, in enacting the Atomic Energy Act, clearly intended the federal government to occupy the field of regulating the safety of atomic energy.¹⁰ Utah's laws seemingly amount to an attempt to make it impossible for any applicant to obtain an NRC ISFSI license, thereby effectively prohibiting this project. If, on appeal, the law on this point changes, we can consider requests to revive this contention.

⁶ 10 C.F.R. § 72.184(a). See 10 C.F.R. § 72.184(b) (safeguards contingency procedures must be developed and maintained).

⁷ LBP-02-7, 55 NRC 167 (2002).

⁸ *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002).

⁹ LBP-02-20, 56 NRC 169 (2002).

¹⁰ *English v. General Electric Co.*, 496 U.S. 72, 81 (1990).

5. *Utah U, Basis 4 (EIS Should Describe Environmental Impact of Terrorism)*

Utah U, Basis 4, argued that the EIS is deficient in not describing the environmental impacts of a saboteur successfully breaching one or more casks. Review of this matter is denied, as the Commission has already held in this proceeding that the environmental impacts of terrorism or sabotage are not subject to review under NEPA.¹¹

B. Contentions Relating to the Intermodal Transfer Facility

PFS envisions that spent fuel will be shipped to its facility on existing rail lines to an area north of the facility. At that point, PFS proposes to either build a new rail line to ship the casks the final 32 miles to the PFS facility, or to transfer the casks onto heavy-haul trucks at an Intermodal Transfer Facility (ITF). Utah claims that the volume of traffic at the proposed ITF would necessitate some temporary storage, thereby making the facility a storage facility that must be licensed under Part 72 and conform to all applicable regulations. Both PFS and the NRC Staff believe that the ITF would not be an NRC-licensed facility at all. Rather, they argue, the spent fuel will still be in transit and would be covered by Department of Transportation (DOT) regulations that will ensure public health and safety.

The Board initially found portions of the ITF-related contentions admissible.¹² It later dismissed them as an attack on applicable NRC and Department of Transportation regulations, which hold spent fuel in transit to fall under DOT's jurisdiction.¹³ The Board cited the Hazardous Materials Transportation Act,¹⁴ which defines DOT's authority to regulate the "transportation" of nuclear materials, including "the movement of property and loading, unloading, or storage incidental to the movement" of materials.¹⁵

It appears to us that the Board reached the proper conclusion under the NRC-DOT regulatory regime. PFS-bound spent fuel will be in shipment, even during temporary holding at the transfer point, until it arrives at the PFS facility in Skull Valley. Thus it falls under DOT regulations. We see no basis for accepting review on the ITF contentions.

¹¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

¹² LBP-98-7, 47 NRC at 184-85.

¹³ LBP-99-34, 50 NRC 168 (1999).

¹⁴ 49 U.S.C. §§ 5101-5127.

¹⁵ *Id.* § 5102(12). See LBP-99-34, 50 NRC at 177 n.8.

C. Contentions Utah J and Utah U, Basis 2 (Inspection and Maintenance of Safety Components — Lack of a Hot Cell)

1. Utah J (Inspection and Maintenance of Safety Components, Including Canisters and Cladding).

Utah J argues that the ISFSI's design is inadequate to protect public safety because there is no "hot cell" or other means through which a canister may be opened to inspect the condition of the fuel. Utah argues that this deficiency violates 10 C.F.R. § 72.122(f), which provides that components important to safety (that is, the fuel cladding) must be designed to permit inspection, and 10 C.F.R. § 72.128(a), which provides that spent fuel storage facilities "must be designed with . . . [a] capability to test and monitor components important to safety."

The Board found this contention to be an attack on agency regulations and rulemaking-associated determinations and to be lacking in factual or expert support.¹⁶

Other than the general requirements that components important to safety must be capable of inspection, Utah cites no regulation requiring a hot cell at an ISFSI. The fuel cladding is not a "structure or system important to safety," as that term is defined in our regulations.¹⁷ Those structures or systems are limited to parts of "the ISFSI,¹⁸ MRS, or spent fuel *storage cask*" important to maintain the safe condition of the spent fuel. The regulation does not refer to the *contents* of the canister. NRC has made rulemaking-associated determinations that the fuel cladding, once encased in a canister, is no longer important to safety.¹⁹

We therefore see no basis for questioning the Board's determination that this contention presented an impermissible challenge to our regulations and rulemaking-associated determinations and lacked factual or expert opinion support.

2. Utah U, Basis 2 (Impacts of Onsite Storage Not Considered)

The Board rejected basis 2 of Utah U, which claimed the ER was defective in failing to "consider the safety risks and costs raised by PFS's failure to provide adequate means for inspecting and repairing the contents of spent fuel canisters

¹⁶LBP-98-7, 47 NRC at 189-90.

¹⁷10 C.F.R. § 73.3.

¹⁸That is, the "complex," or larger facility. *See id.*

¹⁹*See, e.g.,* Proposed Rule: "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste," 51 Fed. Reg. 19,106 (1986) "[F]or storage of spent fuel the cladding need not be maintained if additional confinement is provided. . . . [T]he canister could act as a replacement for the cladding." *Id.* at 19,108.

or for detecting and removing contamination on the canisters.” The Board found that this basis impermissibly attacked agency regulations or rulemaking-associated determinations. But whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA. Because we do not find the Board’s rationale for rejecting Utah U, basis 2, entirely clear, the Commission grants review of whether that basis should have been admitted.

Various portions of the FEIS discussed inspections and procedures to ensure that no contaminated canisters are stored at the PFS facility. Because Utah U, basis 2, was filed in response to the ER, it never addressed the FEIS. Among other issues the parties should address is whether the FEIS moots any of Utah’s concerns. As the Commission recently held in *McGuire/Catawba*, complaints about the adequacy of an applicant’s ER are superseded when the issues involved are discussed in the FEIS.²⁰ Therefore, Utah’s complaint may have been mooted by the FEIS.

D. NEPA/Economic Contentions

1. Contentions Utah X (Need for the Facility) and Utah Z (No Action)

In Contentions Utah X and Z, Utah claims that PFS’s ER, and, subsequently, the Staff’s EIS, overstate the need for the facility and the disadvantages of not building the facility. Utah claims that in looking at the “need” for the facility the EIS focuses on the advantages primarily to PFS and its potential customers, rather than including “an evenhanded discussion of the actual need for the proposed facility.” In support of this, Utah claims that simply storing spent fuel at reactors until a permanent repository is ready is a safe and environmentally preferable option. In addition, in looking at the “no action” alternative, Utah claims that the Board erred in looking at only environmental effects. We are not persuaded that the EIS either overstates the need for the facility or fails to adequately discuss the advantages of not building the facility.

The heart of Utah’s complaint is that the EIS fails to consider whether the country as a whole “needs” the facility or not. But that question borders on the political. We do not believe that NEPA charges the Staff, in drafting the EIS, or the Board, in its hearing process, with answering that question. Rather, the EIS enumerated certain benefits of the project, which would accrue primarily to PFS and its customers. In addition, it listed benefits to certain communities — such as the benefit of allowing early decommissioning of shutdown reactors and the economic benefit to the Skull Valley Band of Goshutes, an impoverished

²⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

Indian tribe. The EIS acknowledged that at-reactor storage was a viable option presenting no significant environmental impacts.²¹

On the other hand, the EIS examines in great detail various environmental effects of the project. Utah points to no significant environmental effect the Staff failed to consider. Similarly, Utah does not specify any advantages of the “no action” alternative that it claims the EIS ignored. It is apparent that the disadvantages of allowing the project are the mirror image of the advantages of not allowing it (the “no action” alternative), and *vice versa*. As did the Board, we see no genuine dispute here.

We recently said that “NRC adjudicatory hearings are not EIS editing sessions.”²² Neither is the Commission appeals process. We find that Utah’s complaint fails to raise any clear Board error of fact or law on the “need” and “no action” issues.

2. *Contention Utah Y (Connected Actions)*

The Board rejected Utah’s proposed Contention Y at the outset of the adjudication.²³ Utah Y contended that the environmental analyses of the project should consider its impact on the Department of Energy’s plans for a permanent waste repository at Yucca Mountain. Utah argues that storing up to 40,000 metric tons of spent fuel would reduce the pressure on DOE to pursue a permanent waste repository. It also claims that “[o]ne implication of licensing the PFS facility is to practically foreclose DOE and congressional decisions on future [spent nuclear fuel] storage.”

In a NEPA analysis it is proper for an agency to consider the overall effect of a government program involving smaller connected actions, rather than considering only the components, each of which may have only insignificant environmental effects.²⁴ But we do not agree that the logical result of approving the PFS facility is that it will affect, adversely, the development of a permanent repository. Utah believes that approval of the PFS facility will both delay the development of

²¹ See NUREG-1714, “Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah,” Vol. 1 at liii (December 2001).

²² *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

²³ LBP-98-7, 47 NRC at 202.

²⁴ In *Thomas v. Peterson*, 753 F.3d 754 (9th Cir. 1985), cited by Utah, the court held that the environmental review of the effects of building a timber road through a National Forest must also consider the effects of the timber sales the road was designed to accommodate.

a permanent repository, and “commit the federal government to one of many courses of action.”

We do not see why the availability of *private* offsite storage would affect DOE’s duties under the Nuclear Waste Policy Act. The NWPA assigns DOE a duty to develop a permanent repository, which is not discretionary or dependent on DOE’s deciding that there is a “need” for it. Further, the NWPA also requires DOE to fully investigate Yucca Mountain, and only Yucca Mountain, to determine whether it is suitable for long-term storage. The decision to go forward with the Yucca Mountain plan is to be based on scientific criteria only. Whether or not PFS is in place as an interim storage facility has no bearing at all on the Yucca Mountain decision.

Because Utah has not shown a connection between the PFS facility and the permanent repository to be developed by DOE, NEPA does not require the PFS EIS to consider impacts on the development of a permanent repository. We see no error in the Board’s finding no genuine dispute here.

3. *Contentions Utah CC (One-Sided Cost-Benefit Analysis) and Utah SS (Final EIS Revised Cost-Benefit Analysis)*

Utah argues that the cost-benefit analysis in the EIS is biased and inaccurate. Utah claims that the EIS improperly considers the benefit of a 40-year storage period, when it should only consider the benefit of storing fuel at the site for 20 years, because PFS has applied for only a 20-year license. If one assumes that spent fuel will not be stored at the facility beyond 20 years of license issuance, the net benefit, in terms of costs avoided, would be reduced, Utah says. The Board dismissed Utah CC at the contention filing stage, finding no genuine dispute.²⁵

After the FEIS was issued, Utah submitted contention SS, which again challenged the cost-benefit analysis as biased in favor of the project for failing to include a sufficient economic analysis. In a ruling from the bench, the Board found the contention timely, but rejected it for failing to state a claim for which relief could be granted. The Board held that NEPA did not require the Staff to redo the analysis.²⁶ The Board noted that Utah had not alleged that there was “gross environmental harm,” as in the cases requiring an economic analysis. Further, the Board found that the benefit put forward for the project was not economic, but “a sort of insurance policy” against late creation of a permanent repository for high-level waste.

Utah points to our decision in *Claiborne Enrichment Center*, where we said that “[m]isleading information on the economic benefits of a project . . . could

²⁵ LBP-98-7, 47 NRC at 204.

²⁶ See Oral decision at evidentiary hearing, Tr. 9213-14 (May 17, 2002).

skew an agency's overall assessment of a project's costs and benefits, and . . . result in approval of a project that otherwise would not have been approved because of its adverse environmental effects."²⁷

Because NEPA cost-benefit questions have proved troublesome in the past, as for example in the *Claiborne* case,²⁸ because the record would benefit from a written decision on these issues, and because the context of the question here is unusual, the Commission believes that review of the admissibility of Utah CC and SS is appropriate.

4. Contentions Utah HH and II (Low Rail Corridor Fire Hazards)

Utah contends that the Board improperly found its proposed contentions Utah HH and II to be impermissibly late. The issue for the Commission's review is whether the Board improperly found that Utah did not have good cause for filing these contentions late.

PFS originally proposed a rail spur to run alongside Skull Valley Road to bring the spent fuel from the existing rail line to the PFS facility. A year later, PFS amended its plan by moving the rail line to the west, through open rangeland along the edge of the Cedar Mountain range. Within 30 days of that license amendment, Utah sought to add Contention Utah HH, saying that this rail spur would cause fire hazards by providing a new ignition source and an obstacle to fire trucks attempting to cross the rail line, and Utah II, saying that the ER had failed to consider environmental impacts and costs of operating the rail line. The Board rejected this contention as impermissibly late, finding no reason that Utah could not have raised these issues with the original application.²⁹

Utah now claims that the reason it did not file the contention at the time of the original application was that only the new alignment presented the fire hazards.

The Board noted that the differences in the new alignment and the old one might be a basis to find "good cause" for late filing, but found that Utah did not explain why the original alignment would not also provide a potential ignition source, an impediment to firefighters, and so on.³⁰ Utah, however, did not present its argument with its contention to show good cause for late filing, as it is required to do by our rules of practice.³¹ Rather, the reason Utah gave for not filing its

²⁷ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) (internal quotation marks and citation omitted).

²⁸ See CLI-98-3, 47 NRC at 87-100. See also, e.g., *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-51 (2001).

²⁹ LBP-98-29, 48 NRC 286 (1998).

³⁰ See LBP-98-29, 48 NRC at 292-93 & n.2.

³¹ 10 C.F.R. § 2.714(a)(1)(i).

fire-related objections to the rail line at the outset was that the rail line was only one of many possibilities mentioned in PFS's initial application.³²

In presenting a late contention, the proponent's first duty is to demonstrate good cause to the Board.³³ Even if a party on review provides a credible argument that there was good cause, if the intervenor did not present that argument to the Board along with the late contention, we have no basis for concluding that the Board erred.

Basis 1 of Utah II challenged the ER's failure to consider environmental impacts of fires caused by the rail spur. The Board found that basis untimely for the same reason it rejected HH, that is, that this issue could have been raised with respect to the original rail spur proposal.³⁴ Utah II also listed six additional bases, arguing that the ER failed to consider the rail line's effects on species, visual impacts, noise levels, historical resources, and the impact on grazing rights. The Board found these bases timely, but inadmissible on other grounds, such as lacking factual support and impermissibly challenging NRC regulations.³⁵

Utah's petition does not discuss the Board's legal conclusions with respect to each of bases 2–7 of Utah II, making it difficult to ascertain any particular error. Rather, Utah makes a general allegation that the Commission has not complied with NEPA by evaluating the environmental impacts of the rail spur. But the FEIS does discuss the rail line's impacts on vegetation and species,³⁶ livestock,³⁷ historic resources,³⁸ noise,³⁹ visual impacts,⁴⁰ recreation,⁴¹ and wildfires.⁴² Therefore, even if the Board erred (and we see no suggestion of error), Utah's contention II appears to be insubstantial, or even moot, given the FEIS's contents.

D. Utah KK (Interference with Use of UTTR and Resulting Economic Impacts)

In July 2000, Utah filed Utah KK, which argued that the presence of the PFS facility would cause the military to restrict operations in the Utah Test and Training Range. This would both impair the nation's military readiness and

³² LBP-98-29, 47 NRC at 292-93.

³³ See 10 C.F.R. § 2.724(a)(1)(i).

³⁴ LBP-98-29, 47 NRC at 295-96.

³⁵ *Id.* at 296.

³⁶ See FEIS § 5.4.

³⁷ See *id.* §§ 5.5.1.1, 5.5.2.1, 5.5.4.

³⁸ See *id.* § 5.6.1.1.

³⁹ See *id.* § 5.8.1.

⁴⁰ See *id.* § 5.8.2.

⁴¹ See *id.* § 5.8.3.

⁴² See *id.* § 5.8.4.

possibly lead to closing Hill Air Force Base, which in turn, Utah claims, would have adverse impacts on the local economy.

The Board rejected the contention as untimely as Utah showed no good cause for the late filing.⁴³ The issue before us is whether the Board properly rejected the contention on that basis.

Utah argues that it first raised this issue in comments on the scope of the EIS, and that the Staff represented that the EIS would include all direct and indirect economic impacts. It argues that it relied on the Staff's pronouncement that it would consider these impacts, but that the DEIS did not do so.

The Board was correct in finding no good cause for Utah's late contention. Commenting on the scope of the EIS does not substitute for raising a timely contention. It is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the Staff issues its environmental analysis.⁴⁴ In the interest of expedition, our rules require the filing of contentions as early as possible. Utah did not do this and the Board rightly refused to allow Utah to bring up old grievances late in the hearing process.

Further, we reject the argument that the national significance of Utah's military concerns warrants overriding the usual requirement that intervenors show good cause for untimely filing. Utah has offered no factual support for its theory that the military will curtail training in Skull Valley if the PFS facility is built; in fact, there is evidence in the record to the contrary.⁴⁵ Thus, there appears to be little cause for concern either that the proposed facility could impact military preparedness or that it could cause the military to close Hill Air Force Base.

E. Transportation Contentions — Proposed Utah LL-00

Utah contention V complained that PFS's ER failed to discuss environmental impacts of transportation. The Board admitted a single basis, whether PFS improperly relied on Summary Table S-4, Environmental Impact of Transportation of Fuel and Waste to and from One Light Water Cooled Nuclear Power Reactor,⁴⁶

⁴³ LBP-00-27, 52 NRC 216 (2000).

⁴⁴ See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994).

⁴⁵ See FEIS §§ G.3.8.1.8, G.3.13.3.1. We also note that the parties are currently preparing for a hearing on the subject of the consequences of a military aircraft crashing into the PFS site. Last year, the Board found that, while such a crash is extremely unlikely, its probability is just within the range making it a "credible event" under the Commission's stringent safety standards. That ruling was premised on the military taking no steps to curtail flights over the site.

⁴⁶ 10 C.F.R. § 51.52.

because the shipping casks involved would be heavier than those assumed by Table S-4.

Instead of relying on Table S-4, the DEIS calculated the transportation impacts using a PFS-specific computer analysis, called the RADTRAN 4 computer model. When Utah in turn challenged this model in Contentions Utah LL-OO, the Board found the new contentions impermissibly late.⁴⁷ The Board later dismissed Contention Utah V as moot.⁴⁸ The issue before us is whether the Board erred in finding the new transportation-related contentions impermissibly late.⁴⁹

Recognizing that the DEIS could give rise to new contentions, the Board's procedural order governing the underlying proceeding required the Staff to give all parties 15 days' notice before it planned to release the DEIS and make the DEIS available to the Intervenor on an expedited basis.⁵⁰ The order explicitly provided that Intervenor would have 30 days to file new contentions.

On June 12, 2000, the Staff informed Utah that the DEIS had been completed and that a copy would be provided at the start of a June 19, 2000 evidentiary hearing. Utah filed its contentions on August 2, 2000. The Board found that, because Staff had not given a full 15 days' notice before it gave Utah a copy of the DEIS, the due date for new contentions under its order should be considered 45 days after that notice — or July 27, 2000. It ruled that Utah's amended contentions were therefore at least 5 days too late. It also found that portions of contentions Utah NN (economic effects of the maximum credible accident) and Utah OO (economic risks of a transportation accident) were nearly 3 years too late, because they could have been raised with respect to the PFS ER.⁵¹

Utah argues that, considering the timing of the DEIS's release at the start of a week-long hearing and narrow margin by which it missed the deadline, the Board's rejection of its contentions was a denial of due process. We can't agree. Although the size of the document and the timing of its release might well have justified an extension of the filing deadline, had Utah requested it, we cannot find that the Board's action amounted to a denial of due process when the schedule for late contentions was spelled out clearly in the Board's 1998 order.

In addition, we reject Utah's argument that the significance of the issues involved warrants overriding the Board's finding of no good cause for late filing. The Board noted that, had its inquiry reached the substantive stage, it would

⁴⁷ LBP-00-28, 52 NRC 226 (2000), *review denied*, CLI-01-1, 53 NRC 1 (2001).

⁴⁸ LBP-01-22, 54 NRC 155 (2001).

⁴⁹ Although Utah suggests that the dismissal of Utah V as moot denied it "due process," it does not explain how any aspect of that contention, as admitted, was still in issue after the Staff's DEIS performed a PFS-specific analysis not relying on Table S-4.

⁵⁰ Licensing Board Memorandum and Order (General Schedule for Proceedings and Associated Guidance) (June 29, 1998), at 4-5 (unpublished).

⁵¹ LBP-00-28, 52 NRC at 235.

have admitted only a single subpart of one transportation contention, Utah MM (DEIS underestimates the severity of a category 6 accident by underestimating the release of Chalk River Unidentified Deposits (CRUD)).⁵² We emphasize that our Staff analyzes the safety of license applications in their entirety, whether or not particular questions are admitted for hearing. Thus rejecting contentions as too late is not the same as ignoring safety concerns.

IV. OHNGO GAUDADEH DEVIA'S PETITION FOR REVIEW

A. OGD Contention B (Emergency Plan and EPCRTKA)

OGD's proposed Contention B contended that the emergency plan failed to address the safety of persons living outside the facility and failed to meet the requirements of the Emergency Planning and Community Right to Know Act of 1986 (EPCRTKA).⁵³ The Board found the contention inadmissible as a collateral attack on agency regulations, as lacking factual or expert support, and for failing to show any genuine dispute.⁵⁴

As the Board recognized, NRC regulations distinguish between ISFSIs that will only store packaged waste and facilities that process or reprocess waste. NRC does not require a facility like the one PFS proposes to build, which will only store prepackaged waste, to have a formal offsite emergency plan because no onsite accident is expected to have significant offsite consequences.⁵⁵ Therefore, we see no suggestion that the Board may have made a mistake of law or fact in rejecting this portion of the contention.

In addition, the Board was correct in rejecting OGD's EPCRTKA claim as lacking a factual basis. EPCRTKA imposes reporting and emergency planning requirements on facilities possessing certain listed hazardous substances in excess of prescribed quantities established by the Environmental Protection Agency. PFS's Emergency Plan stated that it will not possess any listed substance in

⁵² *Id.* at 239 n.3.

⁵³ Title III, Pub. L. No. 99-499.

⁵⁴ LBP-98-7, 47 NRC at 227.

⁵⁵ See 10 C.F.R. § 72.32(a). See also Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSIs) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,430. The statement of considerations provided:

“NUREG-1140 concluded that the worst-case accident involving an ISFSI has insignificant consequences to the public health and safety. Therefore, the final requirements to be imposed on most ISFSI licensees reflect this fact, and do not mandate formal offsite components to their onsite emergency plans.”

Id. at 32,431.

threshold quantities,⁵⁶ and OGD submitted no evidence to contradict that statement. Although the spent fuel itself is “hazardous,” in that it requires safe handling under NRC regulations, it is not an “extremely hazardous substance” on the EPA’s EPCRTKA list. The safe handling of spent nuclear fuel is NRC’s bailiwick, and our own regulations describe all necessary emergency planning procedures. Because OGD did not show PFS would possess any EPCRTKA substances in reportable quantities, the Board properly rejected OGD’s EPCRTKA complaint as lacking a factual basis.

B. OGD Contention E (Failure To Plan for Leaking or Contaminated Casks)

OGD’s proposed Contention E argued that the license application failed to provide a plan for dealing with casks that may leak or become contaminated during the 20- to 40-year storage period. OGD claimed that the license application should have a plan for dealing with a leaking cask or canister, should have an alternative location to store a canister that becomes defective, and should address “uncertainties” about whether permanent storage will ever become available at Yucca Mountain. The Board rejected this contention as lacking a factual basis and constituting an attack on our regulations and rulemaking-associated determinations, and failing to show a genuine dispute.⁵⁷

The problem with the contention is that NRC determined that even worst-case scenarios (such as drops) involving a cask would not breach it.⁵⁸ OGD’s contention lacks a factual foundation because it does not present any plausible scenario requiring special planning for a breached cask. In addition, the applicant’s response to this contention pointed out that its SAR did plan for either returning any defective cask to the shipper or enclosing it in a transportation cask at the ISFSI.⁵⁹ Other than the bald assertion that PFS does not adequately provide for contingencies, OGD did not address PFS’s proposals. Therefore, there is no error apparent in the Board’s decision that this contention lacked factual support, failed to show a genuine dispute, and amounts to an attack on NRC regulations which rest on the premise that NRC-approved casks will survive accidents without contaminating the environment or causing safety concerns.

⁵⁶ PFS Emergency Plan at 2-6.

⁵⁷ LBP-97-8, 47 NRC at 228-29.

⁵⁸ See 60 Fed. Reg. 32,430, 32,438 (1995).

⁵⁹ PFS Answer to Contentions at 524-25.

C. OGD Contention J (Licenses, Permits, and Approvals)

OGD's proposed Contention J claimed that the license application failed to discuss the compliance with all applicable permits, licenses, and approvals. It also alleged that the NRC, as a federal agency, owes a "trust responsibility" to Native Americans to ensure that their tribal lands are not contaminated.

The Board found this contention inadmissible for various reasons. We note that the FEIS discusses the permits, licenses, and approvals PFS will need for its facility, mooting any deficiency in the ER.⁶⁰

OGD's petition focuses not on any particular environmental permitting issue, but rather on the Board's conclusion that the NRC doesn't owe any heightened "trust responsibility" to Native Americans. OGD does not cite any legal basis for the proposition that the NRC owes a fiduciary duty to Native Americans to protect their land from contamination. Rather, the cases OGD cites deal with the government's fiduciary duties in handling funds owed or held in trust for Native Americans.

The NRC certainly has a statutory duty to protect all members of the public, including Indian tribes, from radiation hazards without regard to ethnic origin. The NRC is attempting to do so here both through the hearing process and through the NRC Staff's safety and environmental review process. But we see no reason to foreclose Indian tribes from possible economic opportunities (such as the PFS facility, if built) under the guise of protecting Indian tribes from environmental harm, no matter how slight.

OGD complains that the Board erred in placing the "burden of producing information" on OGD. But the party proffering a contention always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists.⁶¹ That is the essence of our contention-pleading process.

D. OGD Contention O (Environmental Justice)

OGD initially offered six bases for its environmental justice claim. The Board accepted the contention as admissible insofar as it claimed that the facility would cause disparate environmental impacts to tribe members, who are both ethnic minorities and poor.⁶² It later narrowed the issue to whether there was a subgroup within the tribe that was not receiving or would not receive any benefit from the project, thereby suffering a "disparate environmental harm" from the project.⁶³

⁶⁰ FEIS at 1.6.2.

⁶¹ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

⁶² LBP-98-7, 47 NRC at 233.

⁶³ LBP-02-8, 55 NRC 171 (2002).

The Commission reversed that ruling, finding that this agency's approach to environmental justice was to look at disparate environmental harms, not disparate economic benefits.⁶⁴

OGD now argues that the Board improperly rejected bases that claimed the license application failed to discuss the "environmental, sociological, and psychological costs" to the Skull Valley Band. The Board rejected this claim both because the cost-benefit analysis was not pertinent to the environmental justice inquiry and also because "psychological harm" resulting from fear or stigma associated with a facility is not cognizable under NEPA.⁶⁵

OGD also says the Board should have admitted, under the environmental justice rubric, its argument that the ER should have weighed the costs and benefits of operating the ISFSI against the alternative of leaving the wastes where they are until a permanent facility is available. The Board rejected that claim because it found the cost-benefit analysis had nothing to do with an environmental justice claim. Here, however, the environmental justice concern is that society at large is reaping the economic benefits of a project while imposing its costs unfairly on an economically disadvantaged minority. The EIS did discuss various environmental impacts, including visual and cultural impacts.⁶⁶ The EIS concluded, however, that the particular benefits to the Skull Valley Band of Goshutes outweigh the particular environmental harms that will be suffered by the Band.⁶⁷ Therefore, it is not apparent how factoring in the costs to society at large of allowing the PFS facility (such as transportation costs and hazards) and the benefits to society at large of operating the PFS facility would give a more accurate picture of environmental justice considerations.

We therefore deny review of OGD's environmental justice issues.

V. CONCLUSION

For the foregoing reasons, the Commission grants review in part and denies review in part. The parties are directed to file briefs, not to exceed 20 pages, on Utah U, basis 2, and on Utah CC and SS, as outlined above. Utah should file its opening brief within 21 days of this Order; the NRC Staff and PFS should file their answering briefs within 21 days after receipt of Utah's brief. Utah may file a reply brief, not to exceed five pages, within 7 days after receipt of the Staff and

⁶⁴ CLI-02-20, 56 NRC 147 (2002).

⁶⁵ LBP-98-7, 47 NRC at 233. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-79 (1983).

⁶⁶ See FEIS §§ 4.5 (Socioeconomics and Community Resources), 4.6 (Cultural Resources), 4.8.2 (Scenic Qualities).

⁶⁷ See FEIS § 6.2.1.2.

PFS briefs. All briefs should be served electronically. Any brief exceeding 10 pages shall contain a table of cases and authorities and a table of contents. Any interested *amici curiae* are authorized to file briefs as set out above, at the time of the party they support.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
This 5th day of February 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-309-OM
72-30-OM**

**MAINE YANKEE ATOMIC POWER
COMPANY
(Maine Yankee Atomic Power Station)**

February 18, 2004

The State of Maine sought a hearing on an NRC Staff order regarding increased security requirements at the independent spent fuel storage installation at Maine Yankee Atomic Power Station. The Commission affirms the Licensing Board's denial of Maine's intervention petition.

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

The only permissible question at issue in this proceeding is whether to sustain the order. The controlling law on this point is *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), which addressed the Commission's authority under section 189a of the Atomic Energy Act to define the scope of a proceeding.

ENFORCEMENT ACTIONS: AGENCY DISCRETION

The Commission has authority to limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts.

RULES OF PRACTICE: STANDING TO INTERVENE

Maine does not oppose security measures required of the Licensee, and, despite Maine's claims to the contrary, the Commission finds nothing in the order that places any requirements on the State. A person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing.

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a petitioner must show: (1) an "injury in fact" (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request. NRC licensees would be unlikely to acquiesce in enforcement actions if by doing so they subjected themselves "routinely . . . to formal proceedings possibly leading to more severe or different enforcement actions." *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980).

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

When a hearing is requested by a target of an enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because one possible outcome is that the order will not be sustained. *See Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC 64.

MEMORANDUM AND ORDER

The State of Maine sought a hearing on an NRC Staff order regarding security measures at the independent spent fuel storage installation (ISFSI) at Maine Yankee Atomic Power Station in Wiscasset, Maine. The Licensing Board denied Maine's intervention petition. The Commission today affirms the Board's decision.

I. BACKGROUND

As a result of terrorist attacks in New York City and Washington, D.C., on September 11, 2001, the Commission conducted a comprehensive review of its safeguards and security programs. The Commission determined that licensees must implement certain interim compensatory measures “to address the current threat environment in a consistent manner throughout the nuclear ISFSI community.”¹ Consequently, on October 23, 2002, the NRC Staff issued an order modifying the licenses of all 10 C.F.R. Part 50 licensees that currently stored or had near-term plans to store spent fuel in an ISFSI.² A separate attachment³ to the order described specific requirements that are to remain in effect until the Commission provides notice of a significant change in the threat environment or determines that other changes are needed.

The Commission recognized that some measures “may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at the licensee’s facility to achieve the intended objectives.”⁴ Pursuant to 10 C.F.R. § 2.202, the Commission invited any person adversely affected by the order to request a hearing. The issue to be considered at such a hearing would be “whether this Order should be sustained.”⁵

The State of Maine and Friends of the Coast—Opposing Nuclear Pollution each submitted a petition to intervene. The Maine Yankee Atomic Power Company and the NRC Staff opposed both petitions.⁶

Maine requested a broad hearing to evaluate: (1) the implications of the interim compensatory order and the costs to the public of providing resources; (2) the environmental and financial impact of storing spent fuel; and (3) the efficacy of indefinite, long-term spent fuel storage at Maine Yankee. Maine also requested that the Department of Energy (DOE) participate in the hearing. Further, Maine wanted the NRC to evaluate alternatives that will enhance the public health and safety without unreasonably taxing State resources. The State also felt that “a full

¹ See Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,150 (Oct. 23, 2002).

² See *id.* Part 50 applies to production and utilization facilities such as commercial nuclear power plants. A similar order applies to 10 C.F.R. Part 72 licensees (ISFSIs not licensed under Part 50). See Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,152 (Oct. 23, 2002).

³ The attachment contains safeguards information and thus will not be released to the public.

⁴ 67 Fed. Reg. at 65,150.

⁵ *Id.* at 65,151.

⁶ The Board denied the hearing request of Friends of the Coast. See LBP-03-23, 58 NRC 372 (2003). Specifically, the Board found the request untimely and stated that Friends of the Coast did not show any affected interest within the scope of the interim compensatory order. Friends of the Coast did not appeal.

and complete adjudicatory hearing on all the safety, technical, and environmental requirements of Maine Yankee's ISFSI is required and appropriate."⁷

The NRC Staff maintained that the disputed order does not place any new burden on the State of Maine and that Maine's challenge was outside the scope of the proceeding. Maine Yankee's position was similar. Maine Yankee added that the offsite response provisions of the order exactly reflect the commitments with State and local law enforcement agencies that have been in place for years.

In its reply Maine narrowed its hearing request and asked for a determination whether the order should be sustained in light of the burden placed on the State to provide the open-ended resources it says are mandated by the order. The State said that it wants to voice its view on whether the order should be sustained in light of indefinite spent fuel storage at the Maine Yankee ISFSI. Maine also stated that it wants the order reevaluated to tailor security requirements to the "realities" at Maine Yankee. To ensure efficacy of the interim compensatory measures, the State demanded clarification of the extent to which Maine Yankee will rely on State and local protection and emergency response capabilities and the extent to which these resources will be reasonably available. The threat of injury, said the State, is traceable to insufficient funding. Maine contended that "it is clear that the order creates a sea change in security requirements imposed on the State and dictates substantial new investments in equipment and personnel."⁸

After delays relating to illnesses and the litigants' access to the safeguards materials, the Board concluded that the central question in this proceeding is "whether Maine's petition falls within the ambit of *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)," i.e., whether the concerns Maine expressed are beyond the scope of the proceeding.⁹ The Board pointed out that Maine attempted to stay within the defined scope of the hearing by opposing the order "nominally":

Maine has indicated it opposes the order unless the order is modified to (1) define the time period during which the [interim compensatory measures] are necessary; (2) set forth what resources will be required from State and local law enforcement to implement the measures; and (3) delineate the funding mechanism that will ensure State resources are available to implement those measures.¹⁰

⁷ State of Maine's Petition for Hearing and Request for Commission Action at 10 n.4 (Nov. 15, 2002).

⁸ State of Maine's Supplemental Statement on the Impact of Interim Compensatory Measures at 5-6 (Mar. 24, 2003) ("Maine Supplement").

⁹ LBP-03-26, 58 NRC 396, 400 (2003).

¹⁰ *Id.* at 401 (citation omitted).

But the Board found that the State did not in reality oppose the substance of the order; i.e., Maine sought “additional agency action,” not the order’s retraction.¹¹ The Board concluded that Maine sought to litigate concerns outside the permissible scope of the hearing.¹² Thus, the Board denied Maine’s intervention petition and terminated the proceeding. Maine appealed. The Commission today affirms the Board’s decision.

II. DISCUSSION

As the Board recognized, the success of Maine’s petition depends on whether the concerns it seeks to litigate bear on the only permissible question at issue in this proceeding — whether to sustain the order. The controlling law on this point is *Bellotti v. NRC*,¹³ which addressed the Commission’s authority under section 189a of the Atomic Energy Act¹⁴ to define the scope of a proceeding.

In *Bellotti*, the Commission, which had found deficiencies in management of the Pilgrim nuclear power plant, issued an enforcement order to Boston Edison, amending its license for Pilgrim to require development of a plan for reappraisal and improvement of management functions and imposing a civil penalty on the utility. As in the instant case, the order in *Pilgrim* limited the scope of the proceeding to the issue whether, on the basis of matters set forth in the order, the order should be sustained. Francis X. Bellotti, the Attorney General of Massachusetts, petitioned to intervene and requested a hearing to address the adequacy of the plan, the plant’s continued operation, the nature of necessary improvements, and the adequacy of implementation of required changes. Noting its authority to limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts, the Commission denied the petition. On appeal, the court of appeals held that Massachusetts had no cognizable adverse interest in the license amendment

¹¹ *See id.*

¹² *See id.* at 398. One judge dissented, arguing that Maine provided “enough of a showing that certain provisions of the Interim Compensatory Order and measures adversely affect the State, in that they are based on the expected use of State and local law enforcement and emergency response resources” *Id.* at 403 (Young, J., dissenting) (internal quotations omitted).

¹³ *See also Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982), the case *Bellotti* affirmed on appeal.

¹⁴ 42 U.S.C. § 2239(a). “In any proceeding under this chapter . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.” 42 U.S.C. § 2239(a)(1). Thus, a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing. *See State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 868 F.2d 810, 819 (1989) (citing *Bellotti*). *See also Envirocare of Utah v. NRC*, 194 F.3d 72, 76 (D.C. Cir. 1999) (discussing AEA’s “interest” requirement).

proceeding, which involved only the issue of the Commission's order to the utility to develop a safety plan. The actual development of the plan took place outside the proceeding.

The *Bellotti* court upheld the Commission's authority under the Atomic Energy Act to limit the scope of its hearings to the precise issue at stake:

To read the statute very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations. . . . [T]he Commission's substantive discretion to decide what is important enough to merit examination would be subverted by a procedural provision requiring the Commission to consider any issue any intervenor might raise. Such a reading of the statute is plainly untenable . . .¹⁵

Like Massachusetts in *Bellotti*, Maine does not genuinely oppose the order in the instant proceeding. On appeal, Maine concentrates on the alleged imposition on the State's resources. The order, Maine argues, places an unreasonable, unfunded burden on the State. Maine likens its position to that of a licensee who opposes an order because it creates excessive obligations. Since a licensee would have standing to challenge an order on those grounds, Maine reasons that the State also has standing.¹⁶

But Maine's analogy is erroneous. Unlike a licensee that challenges an enforcement order, Maine is not arguing that any provision of the Staff's security order is unwarranted and thus ought to be relaxed. Maine nowhere suggests that the security provisions themselves are unnecessary. Instead, Maine seeks *additional* measures — in the form of new financial commitments — that it suggests are necessary “if the ICMs [interim compensatory measures] are to be effective and to achieve their intended objectives in the current threat environment.”¹⁷

Moreover, Maine's request for hearing seeks not only to add funding commitments, but also to limit the term of the Maine Yankee license or wrest a commitment from DOE to remove the spent fuel from the Wiscasset site. Again, these are additional measures well beyond the scope of the noticed opportunity for

¹⁵ *Bellotti*, 725 F.2d at 1381. See also *Sequoyah Fuels Corp.* (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 513 (1986).

¹⁶ To establish standing, a petitioner must show: (1) an “injury in fact” (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

¹⁷ Maine's Appeal of Atomic Safety and Licensing Board Panel's November 25, 2003 Order Denying Intervention and Hearing (Dec. 12, 2003) (“Maine's Appeal”) at 6.

a hearing.¹⁸ What's more, DOE's lack of a time-certain commitment to remove the spent fuel is not even a matter within the NRC's jurisdiction.

The Commission thus agrees with the Board, and with Maine Yankee and the NRC Staff, that this case falls squarely within the *Bellotti* framework. Indeed, it is difficult to imagine the State of Maine having an adverse interest in an increase in security requirements at the Maine Yankee ISFSI.¹⁹ And although Maine has mentioned "tailoring" security requirements to the "realities" at the Wiscasset site, Maine has not specified any circumstances at the Maine Yankee facility that would necessitate such "tailoring" of the order.²⁰

Bellotti, in any event, holds that NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request.²¹ As Maine Yankee argues, "[i]f a petitioner could avoid the Commission's limitation on the scope of an enforcement order simply by characterizing its petition as opposing the order unless additional measures are granted, the Commission would never be able to limit its proceedings."²² The dissent incorrectly makes much of the fact that Maine is not demanding "still more safety measures."²³ While Maine may not be proposing additional security requirements, it nonetheless seeks to add express new requirements to the Staff's order, allegedly intended to assure the order's "effective[ness]."²⁴

On appeal, Maine also argues that factual issues remain regarding how the order should be implemented and the nature of the response the order mandates. Maine's premise is that the order requires the State to commit scarce resources to support security at the Maine Yankee facility, and that a factual dispute remains over the impact of the order on the State's resources. The dissent apparently

¹⁸ Any injuries to the State resulting from DOE's failure to take the spent fuel from the Maine Yankee site are not fairly traceable to the Commission order and are not redressable by the Commission in this proceeding; i.e., the State does not have standing in this proceeding regarding any such injuries. See note 16.

¹⁹ Unlike the situation here, when a hearing is requested by a target of an enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because one possible outcome is that the order will not be sustained. See *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC 64.

²⁰ Maine Supplement at 10-12.

²¹ See also *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 & n.5 (1997). As we have pointed out, NRC licensees would be unlikely to acquiesce in enforcement actions if by doing so they subjected themselves "routinely . . . to formal proceedings possibly leading to more severe or different enforcement actions." *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980).

²² Maine Yankee Atomic Power Co.'s Brief in Opposition to the Appeal by the State of Maine (Dec. 17, 2003) at 10.

²³ See LBP-03-26, 58 NRC at 403-07 (Young, J., dissenting).

²⁴ See Maine's Appeal at 2; see also *id.* at 5; Transcript of Proceedings at 159-61, 254 (July 11, 2003).

agreed, stating that Maine “has sufficiently shown that additional resources might well be required.”²⁵

The Commission, however, discerns no lingering factual issues that prevented the Board from concluding this proceeding. Maine’s claim that the Staff’s order will require it “to spend millions of dollars”²⁶ simply does not comport with the terms of the disputed order. As the Board majority found, Maine’s financial concerns are based on “assumptions about the need to respond to a postulated threat that goes beyond that which the Staff’s October 2002 order is intended to address.”²⁷ Repeatedly before the Board, Maine presented the need to respond to a threat scenario well beyond that delineated on the face of the order.²⁸ Maine reads into the order new State obligations that simply are not there. Not only are Maine’s concerns beyond the scope of the hearing, but (contrary to Maine’s position on appeal) there also is no “factual dispute” necessitating an evidentiary hearing.

For example, Maine relies on four paragraphs of the order to support its view regarding the imposition on State resources.²⁹ But the plain words of the four paragraphs belie Maine’s premise. They are not directed at the State. Three of the disputed paragraphs require the *licensee* to ensure that it maintains the ability to *notify* local law enforcement agencies. The fourth paragraph requires the *licensee* to develop a plan (with actual development of the plan to occur outside this proceeding). These paragraphs do not place any obligations, new or otherwise, on the State.

To bolster its position, Maine also cites an August 19, 2002 letter from Richard Meserve, former Chairman of the NRC, to the governor of Maine.³⁰ Because Chairman Meserve’s letter stated that the NRC requested licensees to work with their states regarding requests for additional resources in the wake of the heightened terrorist threat, Maine infers that the order at issue here requires the State to take additional action. The letter, however, contained the express qualification that the choice of where to deploy limited State resources remained with the State. And the NRC order at issue here itself contains no provision imposing any new burden or obligation on Maine.

²⁵ LBP-03-26, 58 NRC at 405 (Young, J., dissenting).

²⁶ Maine’s Appeal at 2.

²⁷ LBP-03-26, 58 NRC at 402.

²⁸ See generally, e.g., Transcript of Proceedings (July 11, 2003); Maine Supplement.

²⁹ Specifically, Maine questions paragraphs B.1.a(1), B.1.a(2), B.1.b, and B.3.f of the unpublished safeguards attachment to the order.

³⁰ See “State of Maine’s Reply to Licensee’s Answer and NRC Staff’s Response to State of Maine’s Petition for Hearing and Request for Commission Action,” Attachment B, Letter from Richard A. Meserve to Gov. Angus King, Jr., Aug. 19, 2002 (Dec. 5, 2002).

It goes without saying that NRC regulations have always relied on local law enforcement agencies to assist licensees in responding to unauthorized activities; the order does not change this. But Maine's current demand for funding additional equipment and law enforcement personnel as a result of the order is not tenable.³¹ Maine Yankee has supplied copies of agreements with State and local law enforcement agencies regarding response times and response personnel.³² It is uncontroverted that these agreements, which predate both Sept. 11, 2001, and the disputed order, commit to numbers of responders and response times that exceed the requirements of the order.³³ Although Maine now says that it has not renewed these earlier commitments, neither has the State revoked them. What's more, Maine's counsel, commenting on what would happen if the order were nullified, said, "[W]e wouldn't expect that the state would change its activities or its response to the order, whether or not the board grants its standing in this case."³⁴

III. CONCLUSION

The Commission asks itself three questions that are fundamental to the determination whether Maine, under *Bellotti*, has standing in this enforcement proceeding. First, would the State be better off if the order were vacated? Second, would Maine's concerns about relatively long-term storage of spent fuel at the Wiscasset site be alleviated if the order were vacated? The answer to these first two questions is "no." Maine does not oppose security measures required of the Licensee, and, despite Maine's claims to the contrary, we find nothing in the order that places any requirements on the State. The third question is: Does Maine in reality seek additional measures beyond those set out in the disputed order? Based on the plain language of the safeguards attachment to the order, the

³¹ When Maine Yankee in January 2001 requested a license amendment to change the site's physical security plan to reflect the addition of provisions related to the loading and storage of spent fuel into the ISFSI, the State of Maine did not file a hearing request. The NRC published notice of an opportunity for a hearing on the amendment request. *See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 66 Fed. Reg. 13,797, 13,805-06 (Mar. 7, 2001).

³² *See* Licensee's Answer to State of Maine's Supplemental Statement on the Impact of Interim Compensatory Measures, attachments (Mar. 31, 2003).

³³ *See* Maine Yankee Atomic Power Company's Brief in Opposition to the Appeal by the State of Maine at 12 (Dec. 17, 2003).

³⁴ Transcript of Proceedings at 248 (July 11, 2003). In its appellate brief, Maine repeats this admission: "[T]he State will not change its actions in support of Maine Yankee security, regardless of the outcome of the hearing to sustain the Order." Memorandum in Support of State of Maine's Appeal of Atomic Safety and Licensing Board Panel's November 25, 2003 Order Denying Intervention and Hearing at 9-10 (Dec. 5, 2003).

answer to this question is “yes.” Therefore, under *Bellotti*, we *affirm* the Board’s decision to deny Maine’s petition and terminate this proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

February 18, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission reverses two interlocutory Licensing Board decisions regarding access of intervenors to safeguards information. The Commission also provides guidance to licensing boards for their "need to know" determinations.

LICENSING BOARDS: AUTHORITY OVER STAFF ACTION

NRC licensing boards have no power to superintend the NRC Staff's regulatory reviews or, in particular, to direct the Staff to admit particular individuals or groups to nonadjudicatory meetings.

**SAFEGUARDS INFORMATION: PROTECTION FROM
DISCLOSURE**

Safeguards information is protected from public disclosure under the authority of section 147 of the Atomic Energy Act, 42 U.S.C. § 2167. The designation covers, among other things, "security measures (including security plans,

procedures and equipment) for the physical protection” of special nuclear material, byproduct material, source material, and safety-significant equipment at nuclear reactors. NRC regulations establish specific requirements for protecting and accessing safeguards-designated information. *See* 10 C.F.R. § 73.21.

NRC: COMMISSION POLICY

COMMISSION: SUPERVISORY AUTHORITY

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The Commission’s longstanding general policy disfavors interlocutory review. But we do undertake such review when a board ruling either threatens “immediate and serious irreparable impact” or “affects the basic structure of the proceeding in a pervasive or unusual manner.” 10 C.F.R. § 2.786(g). And sometimes we review interlocutory decisions as an exercise of our inherent supervisory authority over ongoing adjudicatory proceedings. *See, e.g., Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

COMMISSION: SUPERVISORY AUTHORITY

Even absent a certified question or a referral by the presiding officer, the Commission will consider a petition for interlocutory review if one of the standards in 10 C.F.R. § 2.786(g) is met.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

SAFEGUARDS INFORMATION: ACCESS

As disclosure of the safeguards information at issue here would be effectively irreversible later, the Commission agrees that review is necessary now. Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order. A bell cannot be unrung. “Because the adverse impact of that release would occur *now*, the alleged harm is immediate.” *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) (emphasis in original).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

COMMISSION: SUPERVISORY AUTHORITY

A failure by the Commission to review the Board's order now could lead to a continuing impact on how the Staff conducts its nonadjudicatory duties related to review of the license amendment that is the subject of this proceeding. Hence, we exercise our general supervisory authority over adjudications to summarily reverse the Board's order regarding attendance of intervenors at safeguards-related meetings between the applicant and the NRC Staff.

SAFEGUARDS INFORMATION: NEED TO KNOW; ACCESS; RELIABILITY OF REQUESTOR

To obtain access to safeguards information, a person must have an "established need to know" and must provide assurance of trustworthiness. *See* 10 C.F.R. § 73.21(c).

SAFEGUARDS INFORMATION: NEED TO KNOW

NRC regulations define "need to know," in the safeguards setting, as a finding that it is *necessary* for a recipient to have the safeguards information to perform official duties (here, to participate in an NRC hearing): "*Need-to-know* means a determination made by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment." 10 C.F.R. § 73.2.

SAFEGUARDS INFORMATION: NEED TO KNOW

"Need to know" is a much narrower standard than general relevance. A party's mere desire to have information or its belief that the information is needed to provide context or background may have little or no bearing on a "need-to-know" determination, which must distinguish between "wants" and needs.

SAFEGUARDS INFORMATION: NEED TO KNOW

A party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information.

SAFEGUARDS INFORMATION: NEED TO KNOW

The Board's need-to-know determination is flawed because it succumbs to the Intervenor's general argument that it needs more information about the context, or baseline, against which it will measure Duke's security submittal. But a desire to obtain safeguards materials for "context" is an insufficient basis for access to safeguards information. Rather, the touchstone for a demonstration of "need to know" is whether the information is indispensable.

STANDARDS: REVIEW OF LICENSE APPLICATIONS

License applications are measured against regulatory standards, not against enforcement orders, such as NRC's post-September 11 general security orders.

NRC: COMMISSION POLICY

SAFEGUARDS INFORMATION: ACCESS

As a policy matter, the Commission has a strong interest in limiting access to safeguards and security information. We must limit distribution of safeguards information to those having an actual and specific, rather than a perceived, need to know. Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements. The Commission is well aware of the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission.

LICENSING BOARDS: AUTHORITY

Our licensing boards have wide powers over adjudications as, for example, when they determine who can participate in hearings, where and when such hearings should take place, and which issues are litigable. But NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards. Licensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews.

**LICENSING BOARDS: AUTHORITY; DELEGATED AUTHORITY;
JURISDICTION**

The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications. Licensing boards simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the board.

SAFEGUARDS INFORMATION: NEED TO KNOW

LICENSING BOARDS: RESPONSIBILITIES

It is appropriate for NRC Staff experts to make the initial "need to know" decisions. When a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment, should give considerable deference to the Staff's judgments.

**SAFEGUARDS INFORMATION: NEED TO KNOW; ACCESS;
PROTECTION FROM DISCLOSURE**

If a licensing board does overturn a Staff need-to-know finding, it is imperative that access to safeguards documents be as narrow as possible. The text of our regulations says that the disclosure must be "necessary" or "required." See 10 C.F.R. §§ 73.2, 73.21, 95.5. This standard entails thorough examination of safeguards materials and, at times, release of only portions of documents or redacted versions of documents, i.e., a "sanitized" version of a document. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405, *review denied*, CLI-77-23, 6 NRC 455 (1977).

SAFEGUARDS INFORMATION: RELIABILITY OF REQUESTOR

LICENSING BOARDS: RESPONSIBILITIES

It is important that the Board assure itself of the reliability of the requestor of the safeguards information. This ordinarily requires special procedures for attorneys and experts. Boards therefore should restrict access to qualified, "cleared" representatives of intervenors.

MEMORANDUM AND ORDER

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel in one of Duke Energy Corporation's Catawba commercial nuclear reactors, the Commission grants the NRC Staff's petition for interlocutory review. We reverse the Licensing Board's decision to provide a hearing petitioner, the Blue Ridge Environmental Defense League (BREDL), access to confidential NRC "safeguards" information. As we see the case, there has been no showing that BREDL has a "need to know" the information — i.e., no showing that access to the information is indispensable to BREDL's opportunity to frame litigable contentions.

We also take this opportunity to exercise our general supervisory authority to overturn a recent (unpublished) Board order, dated February 4, 2004, giving BREDL's representatives a right to attend a confidential, safeguards-related, meeting between the NRC Staff and the Licensee. NRC licensing boards have no power to superintend the NRC Staff's regulatory reviews or, in particular, to direct the Staff to admit particular individuals or groups to nonadjudicatory meetings.

I. BACKGROUND

On February 27, 2003, Duke Energy Corporation filed a license amendment request to revise the McGuire and Catawba Technical Specifications to allow insertion of four mixed oxide (MOX)¹ lead test assemblies at either the McGuire or the Catawba Nuclear Station. After publication of a notice of opportunity for hearing in the *Federal Register*,² the Nuclear Information and Resource Service and BREDL filed petitions to intervene and requests for hearing. Neither Duke nor the NRC Staff contested the standing of the two organizations to seek a hearing.

To formulate contentions about security, BREDL's counsel requested access to Duke's September 15, 2003, security-related submittal to the NRC. This

¹MOX is a mixture of uranium and plutonium oxides. As a part of the United States–Russian Federation plutonium disposition program, the U.S. Department of Energy plans to dispose of weapons-grade plutonium by converting it to MOX fuel and using the fuel in commercial nuclear reactors. Current plans are to test four assemblies by placing them into the 193-assembly core in one of the reactors at Catawba. After irradiation of the test assemblies, they will be tested to verify their properties. A later license amendment request is contemplated for "batch use" of the fuel.

²See Duke Energy Corporation *et al.*, Catawba Nuclear Station, Units 1 and 2; McGuire Nuclear Station, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing, 68 Fed. Reg. 44,107 (July 25, 2003).

document, which contains confidential safeguards information,³ includes a revision to the Duke Energy Corporation Nuclear Security and Contingency Plan and a related request for exemption from certain requirements in 10 C.F.R. Parts 11 and 73 associated with the proposed use of MOX fuel at Catawba. It contains, in effect, the special security arrangements Duke plans to put in place during the time it is storing the unirradiated MOX test assemblies at Catawba.

Duke requested the Board to enter a protective order upon execution of nondisclosure affidavits by BREDL's attorney, Diane Curran, and expert witness, Edwin Lyman.⁴ The Board entered such an order on December 15, 2003,⁵ and Ms. Curran and Dr. Lyman thereafter viewed Duke's MOX-related security submittal.

Subsequently, the present controversy developed when BREDL's attorney requested access to additional safeguards and classified documents from the NRC Staff and the NRC Staff declined to provide them. BREDL sought, among other things, certain orders the NRC issued in 2003 to modify licenses at reactor facilities,⁶ including safeguards and classified information about the design-basis threat for commercial nuclear reactors and individual Category I facilities.⁷

BREDL believes the safeguards information it requested is necessary to formulate contentions on Duke's MOX-related security plan submittal.⁸ BREDL considers the documents to contain the "law," or standard, on which to base its disputes with Duke. According to BREDL, Duke's exemption requests cannot

³ Safeguards information is protected from public disclosure under the authority of section 147 of the Atomic Energy Act, 42 U.S.C. § 2167. The designation covers, among other things, "security measures (including security plans, procedures and equipment) for the physical protection" of special nuclear material, byproduct material, source material, and safety-significant equipment at nuclear reactors. NRC regulations establish specific requirements for protecting and accessing safeguards-designated information. *See* 10 C.F.R. § 73.21.

⁴ NIRS's representative indicated that NIRS would not file any security-related contentions; thus, NIRS is not included in the protective order.

⁵ *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), unpublished Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (Dec. 15, 2003).

⁶ A public version of these orders appears in the *Federal Register*. *See, e.g.*, All Power Reactor Licensees, Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,517 (May 7, 2003). But, just as NRC regulations do not specify the precise number of intruders or type of weapons a facility must protect against (the design-basis threat), neither do the public versions of the NRC's 2003 security orders. NRC security regulations, for the most part, contain general requirements that are implemented through details contained in confidential (safeguards) licensee security plans. *See, e.g.*, 10 C.F.R. §§ 73.1, 73.55. Similarly, the NRC's security orders are accompanied by confidential, safeguards-designated attachments setting out sensitive security-related details. It is those details that BREDL seeks.

⁷ Category I facilities are licensed to possess formula quantities of strategic special nuclear material. There currently are two such facilities in the United States. *See* Final Rule: "Material Control and Accounting Requirements," 67 Fed. Reg. 78,130-31 (Dec. 23, 2002).

⁸ BREDL filed its non-security-related contentions on October 21, 2003.

be evaluated without consideration of the requirements from which the exemptions are sought or the substitute standard that Duke proposes to satisfy instead. Without obtaining access to the additional safeguards information it seeks (i.e., information besides the safeguards Duke security submittal that BREDL already has), BREDL believes that it would have to base its security contentions on a “sheer guess” of what the standards might be.

The NRC Staff and Duke opposed BREDL’s request for additional documents. The Staff maintains that it will review Duke’s security submittal on the basis of currently applicable standards only — 10 C.F.R. §§ 73.5 and 11.9 — which are available in the *Code of Federal Regulations*.⁹ The Staff represents that it will not itself use the requested safeguards documents in its planned review of Duke’s license amendment application. Thus, says the Staff, BREDL does not need the material. Duke concentrates on the information in the security submittal itself and states that BREDL should be able to formulate security contentions from that submittal and the publicly available regulatory requirements.

On motion by BREDL, a quorum of the Board¹⁰ ordered the Staff to provide access to the requested safeguards documents, but not to the classified documents, by February 2, 2004.¹¹ The Board also granted BREDL an extension of time to file its security-related contentions, allowing them to be filed no later than 14 days after the Staff makes the disputed safeguards documents available for inspection. On Jan. 30, 2004, the NRC Staff requested a temporary stay of the Board’s order pending review of a petition for interlocutory review to be filed on the same day. The Commission granted a “housekeeping stay”¹² of the order until February 13, 2004, and later extended the stay to February 18, 2004.

⁹Exemptions for regulations dealing with physical protection of plants and materials appear in 10 C.F.R. § 73.5, and exemptions from criteria and procedures for determining eligibility for access to or control over special nuclear material appear in 10 C.F.R. § 11.9.

¹⁰The nonparticipating Board member was not available to attend the oral argument on the safeguards issue.

¹¹See unpublished Memorandum (Providing Notice of Granting BREDL Motion for Need To Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan. 29, 2004) (The unredacted version of the order is sealed because it contains safeguards information.) Specifically, the Board ordered the Staff to produce the following items:

- (1) Three Orders for Modification of License that the NRC issued for Catawba on April 29, 2003, including the revised Design Basis Threat (DBT) for radiological sabotage, the training order and the fatigue order; (2) the access authorization order that the NRC issued for Catawba on January 7, 2003; and (3) any regulatory guidance associated with these orders.

Id., slip op. at 3, 16-17. (The Board also issued a public version of this order. See Memorandum (Providing Notice of Granting BREDL Motion for Need To Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan. 29, 2004)).

¹²See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 1996 WL 627, 640 (NRC) (Oct. 2, 1996).

In the meantime, on February 4, 2004, the Board issued an order (unpublished), at the request of BREDL, providing BREDL's attorney and expert access to a closed meeting between the NRC Staff and Duke to discuss requests for additional information on Duke's security submittal. In reaction to the Board's February 4 order, the Staff canceled the proposed meeting.

On January 30, 2004, the Staff filed a petition for interlocutory review of the Board's January 29 "disclosure" order. Duke supports and BREDL opposes the Staff's petition. Just last week, on February 11, the Staff also sought review of the Board's February 4 "meeting" order. We grant review and reverse both of the Board's orders.

II. DISCUSSION

A. Interlocutory Review

The Commission's longstanding general policy disfavors interlocutory review.¹³ But we do undertake such review when a Board ruling either threatens "immediate and serious irreparable impact" or "affects the basic structure of the proceeding in a pervasive or unusual manner."¹⁴ And sometimes we review interlocutory decisions as an exercise of our inherent supervisory authority over ongoing adjudicatory proceedings.¹⁵

The NRC Staff filed its petition for interlocutory review of the Board's January 29 disclosure order on the ground that the disputed ruling threatens serious and irreparable impact which could not be alleviated through a petition for review of the Board's final decision.¹⁶ The Staff states that this case warrants interlocutory review to avoid irreparable harm to the public and to the nation's common defense and security because compliance with the Board's order — unnecessarily and unlawfully — would provide BREDL access to documents that cover much of the Commission's post-September 11, 2001 work in the area of nuclear security. Further, says the Staff, the requested documents reveal sensitive information that

¹³ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

¹⁴ 10 C.F.R. § 2.786(g). See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 n.15 (2002); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

¹⁵ See, e.g., *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990).

¹⁶ See 10 C.F.R. § 2.786(g)(1). This provision applies to certified questions and rulings referred by the presiding officer. Even absent a referral or certification, the Commission will consider a petition for interlocutory review if one of the standards in 10 C.F.R. § 2.786(g) is met.

is pertinent to all operating nuclear power plants. Duke agrees with the Staff and adds that release of the documents will also have a pervasive effect on the proceeding by opening the door to contentions that will needlessly broaden the proceeding. BREDL opposes the Staff's petition for review.

As disclosure of the safeguards information at issue here would be effectively irreversible later, the Commission agrees that review is necessary now. Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order.¹⁷ A bell cannot be unrung. "Because the adverse impact of that release would occur *now*, the alleged harm is immediate."¹⁸ Accordingly, we will review the Board's decision now. The Staff's petition for review, and the parties' briefs in response to it, discuss the issues adequately. No additional briefs are necessary.

As for the Staff's petition for review of the Board's February 4 "meeting" order, we are convinced that the Board lacked authority to issue the order. That order has already had the effect of canceling the meeting to which it was originally addressed. A failure by the Commission to review the February order now could lead to a continuing impact on how the Staff conducts its nonadjudicatory duties related to review of the license amendment that is the subject of this proceeding. Hence, for the reasons we give near the end of this opinion, we exercise our general supervisory authority over adjudications to summarily reverse the February 4 order.

B. "Need To Know"

To obtain access to safeguards information, a person must have an "established need to know"¹⁹ and must provide assurance of trustworthiness. Here, BREDL's attorney and its expert have security clearances beyond the minimum requirement for access to safeguards information. Thus, the NRC Staff was not reluctant to give them access to Duke's safeguards-protected security submittal outlining Duke's security proposals for its MOX amendment. Hence, there is no question here of clearances or trustworthiness. The only issue is BREDL's "need to know" the additional safeguards information it seeks.

NRC regulations define "need to know," in the safeguards setting, as a finding that it is necessary for a recipient to have the safeguards information to perform official duties (here, to participate in an NRC hearing):

¹⁷ See *Vogtle*, CLI-94-5, 39 NRC at 193.

¹⁸ *Id.* (emphasis in original).

¹⁹ See 10 C.F.R. § 73.21(c).

Need-to-know means a determination made by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment.²⁰

Plainly, under this “necessity” definition, “need to know” is a much narrower standard than general relevance. A party's mere desire to have information or its belief that the information is needed to provide context or background may have little or no bearing on a “need-to-know” determination, which must distinguish between “wants” and needs. Also, a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information.

In this case, we have examined Duke's security submittal and we find that BREDL does not require access to the additional information it seeks to formulate security contentions. In other words, the mandatory “necessary” element of “need to know” is missing here. This proceeding has a limited scope, focusing on the lawfulness and safety of Duke's proposed MOX amendment. Duke has already provided its security plan for implementing that amendment, including safeguards information. More general security information related to the Catawba plant-at-large — the kind of information in the NRC orders that the Board has ordered disclosed to BREDL — is not, in our judgment, “necessary” to allow BREDL to participate meaningfully in this license amendment proceeding.

The current proceeding has nothing to do with the NRC's post-September 11 general security orders.²¹ It is not those orders, but Duke's MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of the MOX fuel assemblies at issue here. Duke's security submittal seeks exemptions from certain requirements of 10 C.F.R. §§ 73.45 and 73.46, and it provides explanations for those exemption proposals. Duke's MOX-related security proposal and its exemption request may be appropriate subjects for BREDL's security contentions. In requesting the amendment at issue in this proceeding, Duke has not asked for an exemption from any of the terms of the orders that are the subject of this dispute. We see no reason why BREDL cannot evaluate Duke's proposed incremental changes to its security plan related to the presence of MOX fuel assemblies and decide

²⁰ 10 C.F.R. § 73.2. In 10 C.F.R. § 95.5, “need to know” is defined, for purposes of *classified* information, as allowing access when a person “requires” it to perform or assist in a government function. The Board order that we are reviewing indicates that the Board will later have to make a decision about some classified information that BREDL has requested.

²¹ *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-5, 57 NRC 233 (2003) (license applications are measured against regulatory standards, not against enforcement orders).

whether to challenge Duke's proposed security arrangements as inadequate to accommodate the use of MOX fuel at Catawba.

The Board's need-to-know determination is flawed because it succumbs to BREDL's general argument that it needs more information about the context, or baseline, against which it will measure Duke's security submittal. But a desire to obtain safeguards materials for "context" is an insufficient basis for access to safeguards information. Rather, the touchstone for a demonstration of "need to know" is whether the information is indispensable. Here, as the pleadings before us represent, neither Duke nor the NRC Staff has any intention of measuring Duke's security arrangements for MOX against last year's general security orders issued to reactors. Indeed, those orders do not impose immutable requirements, but are subject to change depending on updated assessments of the terrorist threat. All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That's not at issue in this MOX license amendment case. At stake here is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site. While these security enhancements are safeguards information, BREDL has been given access to that information and thus is in a position to measure Duke's security proposals against the requirements of Part 73. After doing so, BREDL (or its technical expert) should be able to identify credible vulnerabilities, if any, and present corresponding contentions to the Board.

As a policy matter, the Commission has a strong interest in limiting access to safeguards and security information. We must limit distribution of safeguards information to those having an actual and specific, rather than a perceived, need to know. Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements.²² The Commission is well aware of the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission. In this case, however, we find BREDL's lack of "need to know," within the meaning of our regulations, determinative. Thus, we grant the Staff's petition for review and reverse the Board's January 29 order directing disclosure of safeguards documents.

²² See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 356 (2002).

C. Board Authority over Staff Meetings

The Board's effort, in its February 4 order, to grant BREDL a ticket of admission to a closed meeting between the NRC Staff and Duke was inappropriate. Our licensing boards have wide powers over adjudications as, for example, when they determine who can participate in hearings, where and when such hearings should take place, and which issues are litigable. But NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards. If, as the Board here apparently believed, the NRC Staff unreasonably has closed a meeting, or has acted in violation of Commission open meeting policies, that is a matter to be addressed through normal agency channels, outside the adjudication. We long have held that licensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews.²³

The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications. Licensing boards simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the Board. In this case the Commission has made no extraordinary grant of authority to the Board beyond the routine authority to oversee the adjudicatory aspects of Duke's amendment application. Accordingly, we summarily reverse the Board's February 4 order opening to outsiders a confidential meeting that the NRC Staff decided to close in order to protect safeguards information.

D. General Guidance

The Commission notes that the number and types of security issues that intervenors or hearing petitioners have raised continue to increase in the wake of the September 11, 2001 terrorist attacks. This is understandable, and we by no means wish to discourage citizens or groups from raising their security concerns before NRC licensing boards or before the Commission itself. But there is a potential for licensing boards to reach inconsistent conclusions regarding the need for dissemination of safeguards information. Accordingly, to promote both uniformity of decisions and fairness to litigants as well as to protect information, we take this opportunity to offer guidance to licensing boards (and presiding officers) in their "need to know" determinations.

²³ See, e.g., *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995).

First, as is evident from the text of our regulations,²⁴ it is appropriate for NRC Staff experts to make the initial “need to know” decisions. When a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment, should give considerable deference to the Staff’s judgments. The Commission has confidence in our Staff, which is well trained and is experienced in NRC licensing and enforcement proceedings, and intimately familiar with both NRC safeguards regulations and the licensing or enforcement matter at hand.

Second, if a licensing board does overturn a Staff need-to-know finding, it is imperative that access to safeguards documents be as narrow as possible. Again, we rely on the text of our regulations, which says that the disclosure must be “necessary” or “required.”²⁵ This standard entails thorough examination of safeguards materials and, at times, release of only portions of documents or redacted versions of documents, i.e., a “sanitized” version of a document.²⁶

Finally, it is important in some cases (although not this one) that the Board assure itself of the reliability of the requestor of the safeguards information.²⁷ This ordinarily requires special procedures for attorneys and experts. Boards therefore should restrict access to qualified, “cleared” representatives of intervenors.²⁸ And boards should stress that such representatives may handle the confidential information only under the conditions and restrictions laid out in NRC regulations.

III. CONCLUSION

For the foregoing reasons, the Commission: (1) *reverses* the Board’s January 29 order granting BREDL’s motion for “need to know” determination and the Board’s February 4 order granting BREDL access to a closed meeting; (2) *directs* BREDL to file any security-related contentions no later than March 3, 2004; and (3) *provides* that responses to any such contentions shall be filed no later than 14 days after the contentions are filed.²⁹

²⁴ See 10 C.F.R. §§ 73.2, 73.21, 95.5.

²⁵ See 10 C.F.R. §§ 73.2, 73.21, 95.5.

²⁶ See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405, *review denied*, CLI-77-23, 6 NRC 455 (1977). Facially, the Board’s disclosure order in the instant case appears overbroad, even if it were otherwise justifiable, because it directs that BREDL’s representatives be given access to entire documents.

²⁷ BREDL has requested access to the security information only for its attorney and its technical advisor, both of whom hold “L”-level security clearances.

²⁸ *Id.* at 1406.

²⁹ The NRC Staff also requested a stay pending disposition of its petition for review. Because of time constraints, we granted an emergency housekeeping stay to enable our review of the Staff’s motion and its petition for review. In view of our decision to grant the petition for review, and to reverse the Board, we need take no further action on the Staff’s stay motion.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket Nos. 70-143-MLA
70-143-MLA-2
(ASLBP Nos. 02-803-04-MLA
03-810-02-MLA)

NUCLEAR FUEL SERVICES, INC.
(Erwin, Tennessee)

February 18, 2004

MEMORANDUM AND ORDER
(Ruling on Stay Application)

Pending before this Presiding Officer is a request by several Petitioners for a stay of certain licensing action taken by the NRC Staff in this materials license amendment proceeding. For the reasons stated below, the stay request is denied.

I. BACKGROUND

A. Currently before the agency are three applications of Nuclear Fuel Services, Inc. (Licensee) for amendments to its Special Nuclear Materials License (SNM-124). All three applications relate to the Blended Low-Enriched Uranium (BLEU) Project that is to be conducted on the Licensee's Erwin, Tennessee site. In a nutshell, the project is part of a Department of Energy program to reduce stockpiles of surplus high-enriched uranium through reuse or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

The first of the three applications was filed on February 28, 2002, and sought authorization to store low-enriched uranium-bearing materials in the Uranyl Nitrate Building (UNB) on the Erwin site. A notice of opportunity for hearing on that application was published in the *Federal Register* on July 9, 2002 (67 Fed. Reg. 45,555) and, because of deficiencies in it, a revised notice was published on October 30, 2002 (67 Fed. Reg. 66,172). In response to these notices, timely hearing requests were filed by, among others, the State of Franklin Group of the Sierra Club and three other organizations based in the area (hereafter collectively Sierra).

On October 22, 2002, the Licensee submitted its second license amendment application, which sought authorization to downblend the high-enriched uranium to low-enriched uranium in the BLEU Preparation Facility (BPF). On January 7, 2003, the NRC Staff published a *Federal Register* notice of opportunity for hearing with regard to this proposed license amendment (68 Fed. Reg. 796). Sierra and one individual filed timely hearing requests with respect to this second application.

Rulings were deferred, however, on the hearing requests pertaining to these two amendment applications. This was the result of a January 21, 2003 order that was further explained 10 days later in LBP-03-1, 57 NRC 9. On a determination that there was no good reason to consider the three license amendment applications associated with the BLEU project separately, the January 21 order directed that all further action with regard to the hearing requests pertaining to the first and second applications be held in abeyance to await the filing of the third license amendment application and the submission of any timely hearing requests with regard thereto.

Although its submission was initially slated to take place in May 2003, the third license amendment application — addressed to the operation of the Oxide Conversion Building (OCB) and the Effluent Processing Building (EPB) — did not actually surface until late October 2003. Moreover, the *Federal Register* notice providing an opportunity for hearing on that application was not published until December 24, 2003 (68 Fed. Reg. 74,653). In response to it, both Sierra and the individual who had sought a hearing in connection with the earlier license amendment applications filed hearing requests on February 2, 2004, that were timely under a deadline extension that had been provided to them. On February 12, the Licensee filed its oppositions to those requests.

B. The various hearing requests pertaining to the first two license amendment applications associated with the UNB and BPF portions of the BLEU project are now ripe for consideration under the terms of the January 21, 2003 order. Additionally, it is anticipated that the hearing requests on the third application will shortly be referred to the Licensing Board Panel for designation of a Presiding Officer. Once this occurs, a decision will be rendered seasonably on whether the totality of requests satisfy the requirements imposed by Subpart L of the

Commission's Rules of Practice, which was still in effect at the time the hearing requests were filed and therefore (unless the Commission were to direct otherwise) continues to govern the conduct of this materials license proceeding. There is, however, a matter requiring more immediate attention.

On January 26, 2004, Sierra filed an application for a stay of the effectiveness of the NRC Staff's decision earlier in the month to issue at this time the second license amendment associated with the BPF portion of the BLEU project. Sierra Club *et al.*'s Application for Stay of NRC Staff Decision To Issue Second License Amendment for NFS BLEU Project (Jan. 26, 2004) [hereinafter Sierra Application]. The stay application was filed under the provisions of 10 C.F.R. § 2.1263, which authorizes the seeking of a stay of Staff licensing actions in Subpart L proceedings. That section further adopts the familiar four factors to be considered in determining whether to grant or to deny stay relief. As set forth in 10 C.F.R. § 2.788(e), those factors are:

- (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.

In Sierra's view, the application of the four factors requires the grant of a stay in this instance. In responses filed on February 5, 2004, the Licensee and the NRC Staff (which had been directed to reply to the stay request even though it had elected not to participate in the proceeding) take the opposite position. Applicant's Opposition to Sierra Club *et al.*'s Application for Stay of NRC Staff Decision To Issue Second License Amendment for NFS BLEU Project (Feb. 5, 2004) [hereinafter Licensee Response]; NRC Staff Response to Sierra Club *et al.*'s Application for Stay of NRC Staff Decision To Issue Second License Amendment for NFS BLEU Project (Feb. 5, 2004) [hereinafter Staff Response].

II. ANALYSIS

In considering whether Sierra has made a sufficiently compelling case for the grant of the extraordinary relief sought,¹ the appropriate starting point is

¹ Before addressing the competing assertions on the merits of the claim of entitlement to stay relief, one threshold matter requires attention. As the Licensee notes (Licensee Response at 4 & n.11), Sierra has not as yet been admitted to the proceeding as a party. While that consideration ordinarily might have some relevance respecting Sierra's right to seek a stay, in the unusual circumstances of this case

(Continued)

an examination of the underpinnings of the claim that, absent the grant of a stay, it will suffer irreparable injury — the second, and most important, stay factor set forth in section 2.788(e). See *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977)). For, if that claim is found to lack a firm foundation, it follows that the grant of a stay will be improvident in the absence of a convincing showing that success on the merits of the controversy is not only likely, but a “virtual certainty.” *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994) (citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). Needless to say, the making of such a merits showing at this very preliminary stage of the proceeding — when no party has as yet put forth through the mandated detailed written presentations its full case on the issues raised by the hearing requesters — is not an easy undertaking. Indeed, even after those presentations are in hand, it might well turn out that, as 10 C.F.R. § 2.1235 recognizes might prove to be the case, still further oral presentations will be required before a confident judgment will be possible on the merits of the controversy.

A. Turning first to the most crucial of the four stay factors, Sierra asserts that it will suffer irreparable injury in the form of an unacceptable risk to its health and environment if the effectiveness of the second license amendment is not stayed. Sierra Application at 9. According to Sierra, not only did the NRC Staff fail to perform an adequate environmental review of the proposed amendment but, more important, it acknowledged that an accidental uncontrolled release of the radioactive, toxic, and explosive materials that will be used at the BPF “could pose a risk to the environment as well as to workers and public health and safety.” *Id.* at 9-10 (quoting Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM-124 Regarding Downblending

it plainly does not. The Licensee’s timing in submitting the third license amendment application stands as the sole reason why there has been no action to date on Sierra’s hearing request pertaining to the second license amendment application — the one in issue here. That being so, the Licensee scarcely is in a position to endeavor to capitalize on Sierra’s present nonparty status. Moreover, although a formal ruling on the acceptability of Sierra’s several hearing requests is yet to be issued, a preliminary appraisal of the content of those requests suggests that it is not unlikely that Sierra will be admitted to this consolidated proceeding as having established, in accordance with 10 C.F.R. §§ 2.1205(e) and (h), both its standing to challenge the proposed licensing action and the specification of at least one area of concern germane to the subject matter of the proceeding.

and Oxide Conversion of Surplus High-Enriched Uranium (June 2002) at 5-7 [hereinafter June 2002 Environmental Assessment]).²

In order to have the irreparable injury factor weigh in its favor, a stay applicant must, as the District of Columbia Circuit has observed, demonstrate that “the injury claimed is ‘both certain and great.’” *Cuomo v. NRC*, 772 F.2d 972, 976 (1985) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Further, under well-settled Commission precedent, mere speculation about the potential occurrence of a nuclear accident does not constitute the requisite imminent, irreparable harm justifying a stay of a licensing decision. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259 (1990); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984).

Here, Sierra’s claim of irreparable injury — resting at bottom on little more than a Staff statement about a possible risk to the environment and to the health and safety of workers and the public should the hazardous materials involved at the BPF be accidentally released — falls far short of the demanding standard articulated by the court of appeals and the Commission. There is nothing in the relied-upon statement that might be taken as reflecting a Staff belief either that the occurrence of an uncontrolled accidental release is more than a remote possibility or that the consequences of such a release might be truly significant in terms of the public health and safety. Of itself, then, the statement fails to establish a threat of injury both “certain” and “great.”³ Given that Sierra has presented nothing beyond the Staff statement that might support the existence of such a threat, the irreparable injury factor manifestly weighs against the issuance of a stay of the licensing decision under challenge.

B. Accordingly, this all-important second factor having been found lacking, the question becomes whether Sierra has demonstrated as a matter of virtual certainty that it will prevail on the merits of the substantive claims undergirding its insistence that a stay of the issuance of the second license amendment is warranted. Those claims are (1) that the Staff’s environmental review of the second license amendment is incomplete in that the Staff has not finalized its safety evaluation of

²The Staff has prepared several environmental assessments in connection with the BLEU project, in addition to the June 2002 Environmental Assessment, which addressed the cumulative environmental impacts of all three license amendments. In September 2003, the Staff issued an environmental assessment specific to the BPF license amendment. Environmental Assessment and Finding of No Significant Impact for License Amendment Request Dated October 11, 2002, Blended Low-Enriched Uranium Preparation Facility (Sept. 17, 2003) [hereinafter September 2003 Environmental Assessment].

³In this regard, the Staff has in fact concluded that all credible intermediate-consequence accidents are unlikely to occur and all credible high-consequence accidents are highly unlikely to occur. Safety Evaluation Report for Nuclear Fuel Services, Inc. License Amendment 47 Blended Low-Enriched Uranium Preparation Facility (Jan. 2004) at 7.0-13 [hereinafter Safety Evaluation Report].

the likelihood of potential accidents and their consequences (Sierra Application at 6-7); and (2) that the Staff should have prepared an environmental impact statement for the BPF license amendment, given the significance of the impacts of the proposed project (*id.* at 7-9).

With respect to the first claim, as the Licensee and Staff correctly point out, it is settled that the Staff may complete its environmental review of a license amendment application prior to the completion of its safety evaluation. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-21 (2002); *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 247 n.46 (2003). Putting aside the issue of timing, however, the Staff's safety evaluation was completed with the issuance of the Safety Evaluation Report for the BPF amendment.⁴ Thus, regardless of the sequential timing of the Staff's environmental and safety findings, at the time the requested second license amendment was issued the Staff had in fact completed both its environmental and safety reviews. Because it has not offered anything to show that the Staff's environmental assessment is otherwise incomplete and insufficient to support its granting of the BPF license amendment, Sierra cannot prevail on this claim.

As to Sierra's second claim, that the Staff was required to prepare an environmental impact statement for the second license amendment, Sierra's twofold argument is that (1) the Staff did not perform its own independent assessment of the potential likelihood or consequences of an accident; and (2) the Staff did not assess the environmental impacts of the BPF amendment in a sufficiently specific manner. In the June 2002 Environmental Assessment (at 5-7 to 5-8), however, after describing the radioactive and hazardous materials to be used at the BPF and the potential hazards associated with those materials, the Staff concluded that operations at the facility would be safe, given the precautions the Licensee has committed to take to ensure the safe handling of chemical and radioactive materials. Further, the Staff found in the September 2003 Environmental Assessment (at 4-5) that normal operations of the BPF would be safe and would not present any adverse environmental impacts. Finally, in the Safety Evaluation Report prepared for the BPF license amendment (at 7.0-13), the Staff determined that the Licensee's items relied upon for safety, management measures, and programmatic commitments would render all credible intermediate-consequence accidents unlikely and all credible high-consequence accidents highly unlikely.

⁴As part of its review process, the Staff evaluated the Licensee's integrated safety assessment and called for certain changes to the assessment and to the BPF process design, which the Licensee has made. Safety Evaluation Report at 7.0-13. As noted above, the Staff concluded that the Licensee has put into place measures that render credible intermediate-consequence accidents unlikely and credible high-consequence accident highly unlikely.

On their face at least, its environmental assessments and Safety Evaluation Report indicate that the Staff has indeed performed an independent evaluation of the likelihood and consequences of an accident with specific reference to the environmental impacts of the BPF license amendment. Without having the benefit of full presentations by the parties, it simply cannot be concluded with the requisite degree of certainty at this very early stage of the proceeding that the Staff was at fault in not issuing an environmental impact statement for the proposed facility. Rather, a confident judgment on that matter must await the development of a complete record on it.

3. Because Sierra has failed to demonstrate either irreparable injury or a strong likelihood of success on the merits — the two most important factors of the section 2.788(e) test — detailed consideration of the remaining two factors is unnecessary. *Sequoyah Fuels*, CLI-94-9, *supra*, 40 NRC at 8. It is sufficient to note that, even if found to favor Sierra, those factors could not possibly serve to overcome Sierra's failure to meet its burden on the other factors.

For the foregoing reasons, Sierra's stay application must be, and hereby is, *denied*.

It is so ORDERED.

BY THE PRESIDING OFFICER⁵

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 18, 2004

⁵ Copies of this Order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

In the Matter of

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

HYDRO RESOURCES, INC.
(P.O. Box 15910, Rio Rancho,
NM 87174)

February 27, 2004

In response to the Intervenor's challenge to Hydro Resources, Inc.'s Restoration Action Plan for *in situ* mining at Church Rock Section 8, the Licensing Board rules that the Restoration Action Plan contains several deficiencies that must be corrected.

**STATUTORY CONSTRUCTION OR INTERPRETATION:
GENERAL RULES**

The principal regulations that govern an *in situ* leach mining materials license application proceeding, 10 C.F.R. § 40.32(c) and (d), require an applicant to demonstrate that its equipment, facilities, and planned procedures will protect the public health and will not endanger life or property in the surrounding community.

**STATUTORY CONSTRUCTION OR INTERPRETATION:
GENERAL RULES**

Criterion 9 requires an applicant to establish a surety arrangement that is adequate to ensure that sufficient funds would be available to carry out decom-

missioning and decontamination of the site. Further, Criterion 9 states that “[i]n establishing specific surety arrangements, the licensee’s cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work.” 10 C.F.R. Part 40, App. A, Criterion 9 (2004).

RULES OF PRACTICE: BURDEN OF PROOF

In demonstrating that the cost estimates for the purpose of a surety contained in the applicant’s proposed financial assurance plan are adequate for decommissioning and reclamation, the ultimate burden of proof falls upon the applicant. If, however, an intervenor indicates a specific reason that the financial assurance plan should be rejected, the intervenor bears the burden of going forward with that specific reason. Once the intervenor establishes a *prime facie* case, the applicant then bears the burden of demonstrating the adequacy of the license application as well as rebutting the specific allegations raised by the intervenor.

STATUTORY CONSTRUCTION OR INTERPRETATION: GENERAL RULES

Criterion 9 requires licensees to base their surety estimates upon the total costs of an independent contractor decommissioning the site. Requiring a surety amount adequate to cover the costs of third-party reclamation and decommissioning allows the NRC to mitigate the potentially devastating damages that could arise should a licensee become insolvent or abandon a site.

Unlike the site-specific physical factors that are evaluated during the application process, the surety estimate, based upon the total costs of an independent contractor, is designed to eliminate the need to evaluate and predict the current and future financial status of each licensee, or foresee the future physical condition of the licensee’s reclamation equipment, or to discern and address the intricacies and vagaries of bankruptcy law. Arriving at this estimate without regard to a potential licensee’s successes or failures is essential to ensure that all sites are adequately protected. *See* 10 C.F.R. Part 40, App. A, Criterion 9 (2004).

MEMORANDUM AND ORDER (Ruling on Restoration Action Plan)

In CLI-00-8, 51 NRC 227 (2000), the Commission reversed the decision of the now retired Presiding Officer, Judge Peter Bloch, LBP-99-13, 49 NRC 233 (1999), in this 10 C.F.R. Part 2, Subpart L, informal proceeding, ruling that Hydro

Resources, Inc. (HRI) is prohibited from using its Part 40 source and byproduct materials license (SUA-1508) to perform *in situ* leach (ISL) mining at its two Church Rock and two Crownpoint, New Mexico sites until a financial assurance plan is filed and approved by the NRC Staff. The Commission remanded the decision for further proceedings on the adequacy of HRI's financial assurance plan.

In response to HRI filing a financial assurance plan for Church Rock Section 8, which the NRC Staff subsequently approved, Intervenor, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC), have challenged the adequacy of the plan. For the reasons set forth below, I find, with the concurrence of Judge Brett and Judge Cole, who have been appointed as Special Assistants, that HRI's plan for Section 8 has several deficiencies that must be corrected.

I. BACKGROUND

A. Procedural History of Financial Assurance Matters

Although this proceeding has a lengthy history,¹ it suffices to note with respect to the last outstanding issue concerning the Church Rock Section 8 site

¹Over a period of years, HRI applied for, and subsequently received, a materials license to mine uranium ore at four different locations: Sections 8 and 17, contiguously located in Church Rock, New Mexico, and Unit 1 and Crownpoint, located in Crownpoint, New Mexico. *See* Letter from Joseph J. Holonich to Richard F. Clement (Jan. 5, 1998) (regarding issuance of source material license SUA-1508, for the *in situ* leach uranium mining project at Crownpoint, New Mexico) [hereinafter SUA-1508]. Soon after Judge Bloch granted the Intervenor's request for a hearing, HRI informed him that "at this time" it intended only to mine Section 8, and had not yet decided to mine the other sites. *See* HRI's Request for Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding (June 4, 1998) at 2-3. Consequently, HRI requested Judge Bloch to hold the proceedings involving Section 17, Unit 1, and Crownpoint in abeyance and to proceed only with the adjudication of Church Rock Section 8 because any decisions on the other projects were "potentially years away" and therefore "not ripe for consideration." *Id.* at 3. Judge Bloch agreed that only Section 8 was ripe for hearing and granted HRI's request to limit the proceeding to issues specific to Section 8 and those issues that challenged the overall validity of the license. *See* Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (Sept. 22, 1998) at 2-3 (unpublished). Judge Bloch concluded that after the first phase of the proceeding, he would then decide whether to proceed immediately with the rest of the case or wait until HRI had decided to mine the other sites. *See* Memorandum and Order (Oct. 13, 1998) at 4 (unpublished). The Commission denied review of the bifurcation order. *See* CLI-98-22, 48 NRC 215 (1998).

On August 20, 1999, Judge Bloch concluded the first phase of the proceeding. *See* LBP-99-30, 50 NRC 77 (1999). In that decision, he ordered the parties to file a proposed schedule for the remainder
(Continued)

that in March 1999, Judge Bloch issued a partial initial decision concerning decommissioning and financial assurance, acknowledging that HRI had failed to submit a decommissioning financial assurance plan, but holding that such a plan was not necessary until just prior to project commencement.² Intervenors SRIC and ENDAUM appealed that decision to the Commission and, in CLI-00-8,³ the Commission reversed LBP-99-13, holding that HRI was required to submit a financial assurance plan prior to licensing. Rather than revoking HRI's existing license, the Commission instead chose to add an additional license condition prohibiting HRI from using its license until its financial assurance plan was approved by the NRC Staff.⁴

Pursuant to the Commission's decision, HRI submitted its financial assurance plan, the Restoration Action Plan (RAP), for its initial mining site — Church Rock Section 8 — on November 21, 2000.⁵ Pursuant to 10 C.F.R. § 2.1233 and the direction of the Commission, ENDAUM and SRIC thereafter submitted a written presentation alleging a number of deficiencies in the RAP.⁶ In January 2001, HRI and the NRC Staff, also as ordered by the Commission, responded to the Intervenors' concerns in separate written filings.⁷

of the case. HRI filed a motion to place all issues concerning the remaining sites, Section 17, Unit 1, and Crownpoint, in abeyance until it decided to mine the sites. Judge Bloch agreed it would be wasteful to litigate the issues concerning these sites if HRI had no present intention to mine them, and therefore put the remainder of the proceeding in abeyance. *See* LBP-99-40, 50 NRC 273 (1999). He directed, however, that HRI give 8 months' advance notice before undertaking any mining activities on the sites that have not been subject to a hearing. The Intervenors appealed the abeyance order to the Commission and while it was pending, Judge Bloch retired. The Commission reasoned that because HRI's license was for all four sites, litigating one and holding the hearing on the other three sites in abeyance was illogical and unfair. *See* CLI-01-4, 53 NRC 31, 38 (2001). The Commission overturned LBP-99-40, and ruled that the hearing should resume within 6 months to litigate the issues on the remaining sites, or that HRI should accept an amendment limiting its license to the already largely litigated Section 8 site. *See id.* Since that time, however, at the request of the parties, the proceeding was held in abeyance to allow the parties to attempt to settle the remaining issues for all four sites. *See* Order (Nov. 19, 2001) (unpublished). Unfortunately, the parties' settlement efforts proved fruitless.

² *See* LBP-99-13, 49 NRC at 235.

³ *See* 51 NRC 227 (2000).

⁴ *See* CLI-00-8, 51 NRC at 238.

⁵ *See* Church Rock Section 8/Crownpoint Process Plant Restoration Action Plan (Nov. 17, 2000), revised on Mar. 16, 2001 [hereinafter RAP].

⁶ *See* Intervenors' Response to Hydro Resource Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (Dec. 21, 2000) [hereinafter Intervenors' Response].

⁷ *See* NRC Staff's Response to Intervenors' Financial Assurance Brief (Jan. 22, 2001) [hereinafter Staff Response]; Reply of Hydro Resources Inc. to Intervenors' Response to HRI's Cost Estimates for Decommissioning and Restoration Action Plan (Jan. 22, 2001) [hereinafter HRI Response].

In March 2001, HRI submitted an amended RAP for Section 8 that was approved by the NRC Staff on April 16, 2001.⁸ Thereafter, the Intervenor's request to address the amended RAP and subsequent Staff approval were granted.⁹ In May 2001, the Intervenor submitted a second written presentation alleging additional deficiencies in the amended RAP.¹⁰ In their two responses, the Intervenor raise a number of areas of concern about the Section 8 RAP, including, *inter alia*, concerns about the project scope, the groundwater restoration costs, labor costs, and the proposed method of plugging the wells.¹¹

B. Applicable Regulatory Process

As stated in an earlier decision by Judge Bloch, the principal regulations that govern this materials license application proceeding, 10 C.F.R. § 40.32(c) and (d), require an applicant to demonstrate that its equipment, facilities, and planned procedures will protect the public health and will not endanger life or property in the surrounding community.¹² In addition, because the adequacy of an applicant's proposed financial assurance plan for site decommissioning is at issue, the proceeding is also governed by 10 C.F.R. Part 40, Appendix A, Criterion 9 (Criterion 9). Criterion 9 requires an applicant to establish a surety arrangement that is adequate to ensure that sufficient funds would be available to carry out decommissioning and decontamination of the site. Further, Criterion 9 states that "[i]n establishing specific surety arrangements, the licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work."¹³

In demonstrating that the cost estimates for the purpose of a surety contained in the applicant's proposed financial assurance plan are adequate for decommissioning and reclamation, the ultimate burden of proof falls upon the applicant.¹⁴ If, however, an intervenor indicates a specific reason that the financial assurance plan should be rejected, the intervenor bears the burden of going forward with that

⁸ Letter from Daniel M. Gillen to Mark S. Pelizza (Apr. 16, 2001) (regarding acceptance of Restoration Action Plan for Hydro Resources in-situ uranium mining project, License SUA-1580 [*sic*]).

⁹ See Order (Apr. 26, 2001) (unpublished).

¹⁰ See Intervenor's Reply to the Responses of Hydro Resources Inc.'s and NRC Staff's Restoration Action Plan Presentations of January 22, 2001 and Information Generated Subsequent to Those Presentations (May 24, 2001) [hereinafter Intervenor's Second Response].

¹¹ See generally Intervenor's Response; Intervenor's Second Response.

¹² See LBP-99-1, 49 NRC 29, 32 (1999).

¹³ 10 C.F.R. Part 40, App. A, Criterion 9 (2004).

¹⁴ See *Consumer Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).

specific reason.¹⁵ Once the intervenor establishes a *prima facie* case, the applicant then bears the burden of demonstrating the adequacy of the license application as well as rebutting the specific allegations raised by the intervenor.¹⁶

In the present case, the Intervenor initially must establish the legitimacy of their specific concerns. If they do so, the ultimate burden falls upon HRI to demonstrate the adequacy of its financial assurance plan, i.e., that the estimated funds are sufficient to cover the costs for proper decommissioning and decontamination of the proposed site by an independent contractor.

II. RESOLUTION OF INTERVENORS' AREAS OF CONCERN

A. RAP Addresses Only Section 8

The Intervenor initially claim that HRI's RAP addresses only Section 8 and fails to address the decommissioning of the remaining three sections: Section 17, Unit 1, and Crownpoint. According to the Intervenor, failure to provide a RAP that addresses all four sites is a clear violation of the financial assurance regulations established in Criterion 9.¹⁷ In response, both HRI and the NRC Staff point out that HRI's RAP directly responds to the Commission's order in CLI-00-8, which instructs HRI to submit a RAP that addresses only the decommissioning of Section 8.¹⁸

As HRI and the Staff correctly note, this issue was clearly addressed by the Commission in CLI-00-8. As stated by the Commission, "[t]he plan in the first instance need only address the Section 8 site where HRI plans to begin operations first."¹⁹ Because this issue has been decided by the Commission, all arguments questioning the validity of that decision must be addressed to the Commission and cannot be raised here. Accordingly, the Intervenor's concern in this regard cannot be sustained.²⁰

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See* Intervenor's Response at 12.

¹⁸ *See* HRI Response at 2-3; Staff Response at 14.

¹⁹ 51 NRC at 242.

²⁰ Further, this issue has now been rendered moot by HRI's subsequent submissions, and NRC Staff approval, of RAPs for the remaining three sites. *See* Letter from Melvyn N. Leach to Mark S. Pelizza (Dec. 12, 2001) (approving Restoration Action Plan for Crownpoint); Hydro Resources Inc. Submittal of a Restoration Action Plan for Crownpoint (Nov. 21, 2001); Letter from Melvyn N. Leach to Mark S. Pelizza (Oct. 16, 2001) (approving Restoration Action Plan for Unit One); Hydro Resources Inc. Submittal of a Restoration Action Plan for Crownpoint Unit One (Sept. 17, 2001); Letter from Melvyn N. Leach to Mark S. Pelizza (Aug. 22, 2001) (approving Section 17 Restoration Action Plan); Hydro Resources Inc. Submittal of a Restoration Action Plan for Church Rock Section 17 (July 24, 2001).

B. HRI's Estimation of the Volume of Water and Time Needed for Restoration

As their second major area of concern, the Intervenors claim that the RAP is inadequate because HRI has seriously underestimated the volume of water and the length of time necessary to restore the groundwater of Section 8.²¹ According to the Intervenors, HRI has made significant “technical errors,” and has included several “unsubstantiated assumptions” in its restoration calculations for Section 8.²² Because the restoration costs account for such a large percentage of the entire decommissioning cost estimate, the Intervenors argue that HRI’s assumptions and errors could significantly undercut its final surety amount.²³

In estimating the quantity of water necessary for site restoration, there are two important elements: pore volume and flare factors. Although pore volume is the term used to describe “the quantity of free water in the pores of a given volume of rock,”²⁴ it is also the term used by the ISL mining industry as a unit of reference to “describe the amount of circulation that is needed to leach an ore body, or describe the times water must . . . flow[] through a quantity of depleted ore to achieve restoration.”²⁵ Flare factors are the multipliers used by the ISL mining industry to account for the inevitable horizontal and vertical spread or “flare” of the leach solution outside the specified boundaries of the calculated ore zone.²⁶ For its part, HRI increased the pore volume (i.e., the quantity of water in the pores of a given quantity of rock) by factors of 1.5 and 1.3 respectively to account for the potential horizontal and vertical flare in computing its cost estimates.²⁷ Thus, the pore volume, as a reference unit to describe the times water must be circulated through a depleted ore zone to achieve restoration, is determined by multiplying five factors: (1) the horizontal flare, (2) the wellfield area, (3) the

²¹ See Intervenors’ Response at 13.

²² See *id.*

²³ See *id.* at 13-14.

²⁴ RAP at E-2(a). When used to describe the quantity of water in the pores of a volume of rock, pore volume is calculated by “determining the three dimensional volume of rock (that is also the ore zone) and multiplying this number by the percent pore space.” *Id.* In this regard, the RAP indicates that for Section 8

“HRI used the ‘ore area’ method to determine pore volumes, where the extent of economic ore within a mine unit is outlined and digitized to provide the area. This area is then multiplied by the average ore thickness to provide the three dimensional volume of the ore that is to be leached. This volume is converted to a PV [pore volume] by multiplying the ore volume by the percent porosity and then converting to the units of measurement (i.e. gallons).”

Id.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See HRI Response, Aff. of Mark S. Pelizza Responding to Affs. of Steven Ingle and Richard Abitz at 5, ¶ 1 [hereinafter Pelizza Aff.].

vertical flare, (4) the ore thickness, and (5) the porosity.²⁸ All subsequent uses of the term pore volume in this Decision refer to the ISL mining definition. Here, as ordered by the NRC Staff, HRI then multiplied the result of its pore volume calculation by a factor of 9 (i.e., nine circulations or flushes of the pore volume) to determine water treatment and disposal volumes and costs.²⁹ The flare factors were calculated by engineers working for Uranium Resources, Inc. (URI), the parent company for HRI, based upon operating experience at other restoration demonstrations and commercial operations.³⁰ Specifically, the methods utilized to calculate the pore volumes are generally consistent with the methods used for the Mobil Section 9 Pilot Restoration Project conducted near Crownpoint, New Mexico, between 1979 and 1986.³¹

The Intervenor argue that the record contains no “technical basis” to support the values used by HRI to calculate its pore volume estimates.³² Further, the Intervenor claim that when compared with “real-world experience,” HRI’s pore volume estimates are unrealistic and unreasonable, and that more realistic estimates could more than double the cost of groundwater restoration.³³ HRI currently estimates that groundwater restoration would cost approximately 7.1 million dollars over a 5-year period.³⁴ According to the Intervenor, this number cannot be reconciled with the empirical data from other restoration projects.³⁵ The Intervenor claim that using more realistic cost estimates based on the data provided from other restoration projects, would necessitate that HRI factor in a more accurate reflection of the amount of water used over a longer period of time to restore the site.³⁶ Using these newly calculated numbers, the Intervenor argue

²⁸ *See id.* Stated otherwise, the formula for determining the pore volume of an ISL mine is defined as: Pore volume = (wellfield area) × (horizontal flare factor) × (average ore thickness) × (vertical flare factor) × (porosity).

²⁹ *See* RAP at E-2(a). The NRC Staff determined, based on the information submitted by HRI, “that practical production-scale groundwater restoration activities would at most require a 9 pore volume restoration effort” and that “surety should be maintained at this level until the number of pore volumes required to restore the groundwater quality of a production-scale well field has been demonstrated by HRI.” NUREG-1508, “Final Environmental Impact Statement To Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico,” BLM NM-010-93-02, BIA EIS-92-001, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, in cooperation with U.S. Bureau of Land Management and U.S. Bureau of Indian Affairs (February 1997) at 4-40 [hereinafter FEIS].

³⁰ *See* Pelizza Aff. at 5, ¶ 1.

³¹ *See id.* at 6, ¶ 1.

³² *See* Intervenor’s Second Response at 5.

³³ *See* Intervenor’s Response at 16.

³⁴ *See* RAP, Attach. A-1.

³⁵ *See* Intervenor’s Response at 16-17.

³⁶ *See id.*

that the overall restoration cost would increase threefold or more from HRI's original estimate, thus totaling between 20 million and 30 million dollars.³⁷

The Intervenors first challenged the NRC's designation, and HRI's subsequent use, of the 9 pore volumes in their January 11, 1999, brief in opposition to HRI's application for a materials license.³⁸ The brief primarily addressed HRI's financial assurances for decommissioning, but also included safety arguments.³⁹ The Intervenors claimed that the 9 pore volume standard established by the Staff in the FEIS as necessary to achieve groundwater restoration, and consequently as the initial baseline for determining the surety amount, was not based upon safety considerations, but rather was based upon what was convenient for the Licensee.⁴⁰

In LBP-99-13, Judge Bloch found there was no merit to the Intervenors' argument.⁴¹ He noted that the 9 pore volume estimate was based upon the Staff's professional judgment, and reflected an increase from HRI's initial estimate of 4 pore volumes.⁴² Furthermore, Judge Bloch pointed out that the number of pore volumes could be increased in the future if, at any time, it was determined that proper restoration would require greater pore volumes.⁴³

Judge Bloch's decision was appealed by the Intervenors to the Commission and upheld in CLI-00-8.⁴⁴ In its decision, the Commission noted that the arguments made by the Intervenors' expert were not convincing, and highlighted the fact that the Staff could require HRI to increase the pore volumes and surety amount prior to HRI commencing operations if necessary.⁴⁵ Because this issue has been affirmed by the Commission, any challenges must be directed to the Commission

³⁷ *See id.* at 17.

³⁸ *See* Eastern Navajo Dine Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Financial Assurance for Decommissioning (Jan. 11, 1999) at 15 [hereinafter Financial Assurance Brief]. The brief was filed in response to HRI's 1988 materials license application, as amended, and its license. *See id.* at 1. The Intervenors claimed that HRI failed to submit any of the decommissioning funding information required by 10 C.F.R. § 40.36 and Criterion 9 with its license application-related documents. *See id.* at 7. Consequently, the Intervenors argued, HRI's license application must be rejected on the grounds that it failed to satisfy the clear requirements of the regulations. *See id.* at 12.

³⁹ *See generally id.*

⁴⁰ *See id.* at 15.

⁴¹ *See* 49 NRC at 237.

⁴² *See id.* at 236.

⁴³ *See id.* at 236-37.

⁴⁴ *See* 51 NRC at 244.

⁴⁵ *See id.* at 244-45.

and cannot be raised here.⁴⁶ Thus, the Intervenor may not now challenge HRI's use of 9 pore volumes in the RAP.

⁴⁶During the informal hearing, counsel for the Intervenor argued that they had been denied the opportunity to litigate fully the number of pore volumes established by the Staff in License Condition 9.5 and that the earlier decision upholding the 9 pore volume standard was decided before all the necessary information was available to address adequately the issue. *See* Transcript of Nov. 8, 2001 (discussing the RAP) at 258 [hereinafter Tr.]. License Condition 9.5 states, in pertinent part:

“As a prerequisite to operating under this license, the licensee shall submit an NRC-approved surety arrangement to cover the estimated costs of decommissioning, reclamation, and groundwater restoration. . . . If at any time it is found that well field restoration requires greater pore-volumes or higher restoration costs, the value of the surety will be adjusted upwards. . . . Annual updates to the surety amount, required by 10 C.F.R. Part 40, Appendix A, Criterion 9, shall be provided to the NRC at least 3 months prior to the anniversary date of the license issuance.”

SUA-1508.

At the time Judge Bloch found that a 9 pore volume standard was appropriate, there was no RAP to litigate so the Intervenor attacked the 9 pore volume standard by arguing the standard was established for the convenience of the applicant rather than based on technical support. *See* Financial Assurances Brief at 15-16. In response, HRI asserted that “[t]he 9 pore volume number represents NRC’s best professional judgment based on the [S]taff’s experience that more than 9 pore volumes typically achieves negligible returns.” *See* Hydro Resources, Inc.’s Response to Intervenor’s Briefs with Respect to Hydro Resources, Inc.’s Technical and Financial Qualifications and Financial Assurance for Decommission (Feb. 11, 1999) at 19. HRI did not, however, offer any technical explanation for 9 pore volumes being adequate to restore the groundwater. Likewise, the Staff brief in response to the Intervenor’s claim that 9 pore volumes was inadequate merely cited License Condition 9.5, which allows for an adjustment to the surety should the 9 pore volumes prove inadequate. *See* NRC Staff Response to Intervenor’s Presentation on Technical Qualification, Financial, and Decommissioning Issues (Feb. 18, 1999) at 7. The Intervenor moved to file a reply to the terse responses of HRI and the Staff, although the motions did not specifically mention the 9 pore volume estimate. *See* ENDAUM and SRIC’s Motion for Leave To File a Reply Brief and Rebuttal Testimony on Issues of Financial Assurance for Decommissioning and Financial and Technical Qualifications or, in the Alternative, to Strike Documents Submitted on Those Issues (Feb. 26, 1999). This request, however, was denied. *See* Memorandum and Order (March 10, 1999) (unpublished).

While neither HRI nor the Staff provided a technical explanation for the 9 pore volumes, Judge Bloch nonetheless found the 9 pore volume estimate sufficient based on deference to the Staff’s “professional judgment” and because License Condition 9.5 allows for an adjustment, should the number prove to be inadequate. *See* 49 NRC at 236. In their appeal to the Commission, the Intervenor failed to raise specifically the Board’s decision to deny the Intervenor’s request to file a reply. Thus, to whatever degree the Intervenor may not have had an opportunity to litigate fully this issue, they failed properly to appeal this matter to the Commission. Consequently, it is too late for the Intervenor to argue here that they did not have an opportunity to litigate the 9 pore volume standard. The Commission has ruled that 9 pore volumes are sufficient with respect to Section 8, thus closing the door to any further challenge to the underlying technical issues concerning the 9 pore volumes here. *See* 51 NRC at 244.

(Continued)

C. HRI's RAP Accounts for Only One-Third of Surety for Groundwater Restoration and Well-Plugging

The Intervenor asserts that HRI proposes initially to fund only one-third of the total estimated surety amount for groundwater restoration and well-plugging costs.⁴⁷ In this regard, HRI explains that during the first year of planned operations only a "fraction" of the site will have been developed and, therefore, only a fraction of any groundwater restoration liability will have been incurred.⁴⁸ HRI points out that the same is true for the well-plugging costs because, with only a fraction of the site being developed, only a fraction of the wells will be drilled. As the project continues, HRI states, depleted areas will be restored as new areas are developed and, as a result, the annual cost of restoration will be incremental.⁴⁹ The Intervenor claims that prior experience in site reclamation demonstrates that one-third of the estimated amount will not cover the costs of restoring the site properly if financial difficulties result in the company abandoning the proposed project.⁵⁰

In response, HRI indicated that the one-third amount only applies to the groundwater restoration and well-plugging portions of the surety with the rest of the costs being fully funded.⁵¹ Furthermore, HRI's expert, Mark S. Pelizza, testified that because the license has a 5-year term, it is anticipated HRI will mine only one-fifth of the Section 8 site in the first year.⁵² Thus, he asserted, the proposed funding of one-third of the total estimated surety amount actually exceeds the anticipated liability that will be incurred.⁵³

The Intervenor's challenge is without merit. HRI's estimate is supported by the surety adjustment contained in License Condition 9.5 that requires HRI annually to recalculate the reclamation amount for the upcoming year and readjust the surety amount accordingly.⁵⁴ Further, License Condition 9.5 requires an NRC-approved updated surety before undertaking any expansion or operational change not included in the previous surety, which ensures that if HRI plans to mine

As a practical matter, however, completion of the required commercial demonstration at Section 8, *infra* pp. 95-96, will moot any challenge to the pore volume estimate because it will provide a pore volume number based on the best possible, site-specific data. Therefore, any potential unfairness to the Intervenor can be cured without now revisiting the Commission's decision in CLI-00-8 affirming the 9 pore volume standard.

⁴⁷ See Intervenor's Response at 13; *see also* RAP at F.

⁴⁸ See Intervenor's Response at 13; *see also* RAP at F.

⁴⁹ See Intervenor's Response at 13; *see also* RAP at F.

⁵⁰ See Tr. at 391; Intervenor's Response at 13.

⁵¹ See Tr. at 402-03; RAP at F.

⁵² See Tr. at 400-01.

⁵³ See Tr. at 401.

⁵⁴ See Tr. at 401-02.

more than one-fifth of the site during the first year, the surety amount will be adjusted accordingly.⁵⁵ In these circumstances, I find that HRI's estimates are reasonable. Thus, in light of License Condition 9.5, HRI's initial use of one-third of the anticipated costs for groundwater restoration and well-plugging satisfies the requirements of Criterion 9.

D. License Condition 10.28

As challenged by the Intervenor, and as I noted during the November 8, 2001, informal hearing, License Condition 10.28 allows HRI to mine both Section 8 and the neighboring Section 17 before requiring it to submit to the NRC Staff the results of a full-scale groundwater restoration project. As currently written, License Condition 10.28 states:

Prior to the injection of lixiviant at either the Unit 1 or Crownpoint site, the licensee shall submit NRC-approved results of a groundwater restoration demonstration conducted at the Church Rock site. The demonstration shall be conducted on a large enough scale, acceptable to the NRC, to determine the number of pore volumes that shall be required to restore a production-scale well field.⁵⁶

The language of License Condition 10.28 underlies the Intervenor's concern that a full-scale restoration project is needed to verify the restoration estimates contained in the RAP.⁵⁷

In addressing the Intervenor's concern, Staff expert William H. Ford, explained that License Condition 10.28 was created in response to the NRC Staff's concern that a commercial-scale restoration project was necessary at HRI's first wellfield.⁵⁸ Thus, when created, License Condition 10.28 was intended to prevent HRI from mining any additional sites prior to conducting a commercial-scale restoration project at its initial mining site. License Condition 10.28, however, was written before the Church Rock site was split into Section 8 and Section 17 and never subsequently amended.⁵⁹

When questioned about the commercial-scale groundwater restoration project, HRI's expert stated that the "Section 8 production well field demonstration [would] give us the absolute best information that we have to make all the adjustments" and that it was HRI's "intention to do the demonstration project

⁵⁵ *See id.*

⁵⁶ SUA-1508 at 9.

⁵⁷ *See* Tr. at 302-03.

⁵⁸ *See* Tr. at 304-06.

⁵⁹ *See* Tr. at 308.

right away in the first well field.”⁶⁰ Given this new information, I conclude that the Staff should amend License Condition 10.28 to read as follows:

Prior to the injection of lixiviant at the Church Rock Section 17 site, Unit 1 site, or the Crownpoint site, the licensee shall submit to the NRC for approval the results of a groundwater restoration demonstration conducted at the Church Rock Section 8 site. The demonstration shall be conducted on a scale, acceptable to the NRC, that is large enough to determine the number of pore volumes that shall be required to restore a production-scale wellfield.

E. HRI’s Proposed Number of Wells and Method of Well-Plugging

The Interveners challenge the accuracy of the number of proposed wells HRI listed in the RAP and the adequacy of the method proposed by HRI for plugging these wells during decommissioning. The Interveners assert that HRI proposed, in earlier submitted documents, to drill 1700 wells at the original Church Rock site (i.e., before it was split into Section 8 and Section 17), which means that roughly one-half (850) of those wells would be drilled on Section 8.⁶¹ HRI’s RAP for Section 8, however, allocates funding for the decommissioning of only 215 injection and 226 extraction wells, totaling 441 wells.⁶² The Interveners continue that, given this inconsistency in the number of wells, the estimated cost for well restoration could double if, in fact, the earlier estimate is correct.⁶³

The Interveners also challenge the well-plugging method proposed by HRI.⁶⁴ According to the Interveners’ expert, Dr. Richard J. Abitz, the groundwater of the proposed zone will be of poor quality and “under greater hydrostatic pressure relative to overlying groundwater in non-ore zones.”⁶⁵ For this reason, Dr. Abitz explained, the cement used for well-plugging must be placed in each well in a manner that avoids the formation of air gaps, which may jeopardize the integrity of the plugs in an occurrence called “bridging” and could lead to the migration of contaminated water.⁶⁶ In this instance, Dr. Abitz recommended the tremie line method for plugging the wells, which introduces the cement at the bottom of the well, in place of HRI’s proposed method, which introduces the cement from the

⁶⁰ Tr. at 311.

⁶¹ See Interveners’ Response at 25.

⁶² See *id.*

⁶³ See *id.* at 26.

⁶⁴ See *id.*

⁶⁵ Interveners’ Response, Exh. 2, Written Testimony of Dr. Richard J. Abitz in Support of Interveners’ Response to Hydro Resources Inc.’s Cost Estimates and Restoration Action Plan of November 21, 2000 (Dec. 19, 2000) at 15, ¶ 25.

⁶⁶ See *id.*

top of the well.⁶⁷ Due to the increased drilling required to place cement at the bottom of the well, the Intervenor's argue that the tremie method would nearly double the cost of well-plugging.⁶⁸

In response to the Intervenor's assertions, Mr. Pelizza stated that the exact number of wells that will be needed at Section 8 is unknown and will remain unknown until "delineating drilling is conducted and the wellfield is actually designed."⁶⁹ He indicated that the number of wells used to support the surety estimates in the RAP, however, is consistent with the wellfield illustration proposed by HRI in its Consolidated Operations Plan (COP).⁷⁰ Moreover, he claimed any changes that occur during the course of the project must be accounted for in the annual surety update required by License Condition 9.5.⁷¹ Further, in defense of HRI's proposed well-plugging method, Mr. Pelizza argued that HRI's proposed method (i.e., the positive placement method) will adequately seal the wells at Section 8. He asserted that the "positive placement method of plugging wells is simple, and successful plugging is easily verified."⁷² In addition, he stated that the Texas Natural Resources Conservation Commission, to which the EPA has delegated primary authority for groundwater injection program control in Texas, has accepted proposals to use this same method for well-plugging on wells of similar depth in that State.⁷³

In its response, the NRC Staff asserts that the number of wells proposed by HRI is sufficient because the Staff intends to correct any miscalculations in the RAP with the annual surety updates required by License Condition 9.5.⁷⁴ The Staff's response, however, is silent with regard to the Intervenor's claim that the proposed well-plugging methodology is inadequate.⁷⁵ Interestingly, during the application process, the NRC Staff also questioned HRI's proposed method of well-plugging.⁷⁶ Specifically, the Staff instructed HRI to demonstrate approval for its proposed well-plugging methodology from the Office of the New Mexico State

⁶⁷ See *id.* at 16, ¶ 26.

⁶⁸ See Intervenor's Response at 27.

⁶⁹ Pelizza Aff. at 17, ¶ 13.

⁷⁰ See *id.*; see also COP, Rev. 2.0 at Figure 1.4-8 (Aug. 15, 1997). The COP was submitted by HRI in response to the Staff's request for additional information. In an effort to organize over a decade's worth of filings, including information regarding several additional proposed mines, HRI created the COP. As HRI states, "[the COP] will contain all the specifications, and representations which have been articulated to NRC in the past under one cover." See *id.* at 2.

⁷¹ See Pelizza Aff. at 18, ¶ 13.

⁷² *Id.* at 18, ¶ 14.

⁷³ See *id.*

⁷⁴ See Staff Response at 10.

⁷⁵ See *id.*

⁷⁶ See Letter from Philip Ting to Mark S. Pelizza (Feb. 16, 2001) (regarding request for additional information).

Engineer prior to commencing operations.⁷⁷ In response to the Staff's request, HRI submitted the New Mexico State Engineer Rules and Regulations Governing the Drilling of Wells and Appropriation and Use of Ground Water, noting that Articles 4-19.1 and 4-20.2 require the New Mexico State Engineer to supervise all construction and well-plugging activity associated with ISL development. HRI cited the same New Mexico regulations at the informal hearing.⁷⁸

Based upon the existing record data, I find HRI has provided the best current estimate of the number of wells that will be utilized at the Section 8 site. As HRI notes, until the project has actually begun and the wellfield is designed, the precise number of wells to be drilled cannot be known. Additionally, any subsequent change in the number of wells will be resolved with the annual surety update required by License Condition 9.5. Accordingly, the Intervenor's assertions present no basis to require an amendment to the RAP.

HRI's proposed well-plugging methodology presents a different matter. The New Mexico regulations cited by HRI in response to the Staff's specific request for information do not confirm that HRI's proposed well-plugging methodology is acceptable to the New Mexico State Engineer's Office. Indeed, inquiry of this matter during the hearing revealed that HRI has yet to receive approval from the State Engineer's Office.⁷⁹ In light of the evidence the Intervenor presented demonstrating the importance of proper well-plugging, HRI's failure to obtain the necessary state approval for its proposed well-plugging methodology is critical to the acceptance of this portion of the RAP concerning appropriate surety costs. Accordingly, HRI's surety estimates for well-plugging that are based upon the use of the positive placement method, cannot be accepted for the initial surety estimate.

This deficiency in HRI's RAP is easily remedied. HRI must revise the RAP for Section 8, using the estimated costs for the tremie line method of well-plugging in calculating the surety amount for its initial mining of this section. It is noted that the tremie line method of well-plugging was previously approved by the New Mexico State Engineer's Office in conjunction with the nearby Mobil Test Project — a project that has been cited frequently by both HRI and the NRC Staff in this proceeding.⁸⁰ If the State of New Mexico subsequently approves some other method of well-plugging for Section 8, after its initial surety costs are calculated using the costs of the tremie line method of well-plugging, HRI may seek to adjust appropriately its surety amount under License Condition 9.5.

⁷⁷ See *id.*

⁷⁸ See Tr. at 359-61.

⁷⁹ See *id.* at 360-61.

⁸⁰ See *id.* at 364.

F. Independent Contractor Costs

As the Intervenor note, adequate surety arrangements under Criterion 9 require HRI to take into account the total costs that would be incurred if an independent contractor had to step in and perform the decommissioning and reclamation work.⁸¹ HRI, however, has based the surety cost estimates in the RAP upon its own estimated operating, labor, and maintenance costs.⁸² Thus, the Intervenor assert that HRI's analysis is suspect because HRI has not shown that an independent contractor will be able to: (1) use HRI-owned equipment like the brine concentrator;⁸³ (2) hire employees to wear "multiple hats" to pare costs;⁸⁴ and (3) afford tests, such as mechanical integrity tests, for proper site restoration.⁸⁵

1. Credit for Existing Onsite Equipment

A surety not based on an independent contractor's cost of reclamation gives rise to the Intervenor's concern that if significant financial difficulties arise, HRI might simply "walk away" from the site.⁸⁶ In support of this claim, the Intervenor point to the Bison Basin project in Wyoming, where the agreement state permit holder did not file for bankruptcy but simply "walked away" from the site, leaving the State of Wyoming with the job of overseeing the restoration of a degraded site.⁸⁷ The Intervenor argue that a similar situation could arise at any NRC-licensed mining facility, such as HRI.⁸⁸ And, by not filing for bankruptcy, a licensee that simply leaves the site removes the protection that HRI's counsel argues is provided by the bankruptcy court.

During the informal hearing, HRI argued that basing its surety amount on its own cost estimates is reasonable because an independent contractor likewise will save on costs in decommissioning the site by using onsite equipment and "multiple hat" laborers.⁸⁹ According to HRI, because most of the necessary equipment for restoration would already be onsite, an independent contractor could just use that equipment in the restoration of the site.⁹⁰ In the event the HRI's equipment was tied up in a bankruptcy proceeding, HRI's counsel argued that

⁸¹ See Intervenor's Second Response at 19.

⁸² See RAP at E-2(a) and (b).

⁸³ See Intervenor's Response at 23-24.

⁸⁴ See *id.* at 27-28.

⁸⁵ See *id.* at 31.

⁸⁶ See Tr. at 339.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.* at 343-48.

⁹⁰ See *id.* at 323, 327.

an NRC “cleanup claim” would have primacy over competing creditor claims, and therefore, it is reasonable for the NRC to assume the equipment would be available to an independent contractor for the purpose of determining the surety.⁹¹ According to HRI counsel, in analogous cases when licensees file for bankruptcy, courts have liquidated all the site assets and placed the proceeds in a trust to fund site cleanup.⁹² HRI further argued that, in determining the costs of an independent contractor, it is reasonable to assume its laborers would wear “multiple hats.”⁹³

For its part, the NRC Staff argued that it assumed that an independent contractor would use HRI’s equipment and adopt similar labor practices for site decommissioning.⁹⁴ In calculating whether the surety was adequate, the Staff accepted HRI’s assumption that all major equipment on the site used during operation would remain available for an independent contractor to use.⁹⁵ To support its labor analysis, the Staff pointed to the NRC’s observation of Bison Basin, Wyoming. According to the Staff, at Bison Basin, the independent contractors brought in to clean up the ISL mining operation after the owner abandoned the site were the facility’s former employees, who could wear “multiple hats” and also “knew exactly where the wells were and how it was put together.”⁹⁶

Criterion 9 requires licensees to base their surety estimates upon the total costs of an independent contractor decommissioning the site. Requiring a surety amount adequate to cover the costs of third-party reclamation and decommissioning allows the NRC to mitigate the potentially devastating damages that could arise should a licensee become insolvent or abandon a site. Unlike the site-specific physical factors that are evaluated during the application process, the surety estimate, based upon the total costs of an independent contractor, is designed to eliminate the need to evaluate and predict the current and future financial status of each licensee and foresee the future physical condition of the licensee’s reclamation equipment,⁹⁷ or to discern and address the intricacies and vagaries of bankruptcy law. Arriving at this estimate without regard to a potential licensee’s financial successes or failures is essential to ensure that all sites are adequately protected. Given the

⁹¹ See *id.* at 326-27.

⁹² See *id.*

⁹³ See RAP at E-2(d); Pelizza Aff. at 18-20, ¶ 15; Tr. at 333-34, 344-50.

⁹⁴ See Tr. at 326, 344.

⁹⁵ See *id.* at 326.

⁹⁶ *Id.* at 349.

⁹⁷ See Intervenors’ Second Response, at Attach. B-3. The Intervenors cite a report prepared by the Wyoming Department of Environmental Quality. In this report, the hydrologist notes that some of the equipment used by the State in decommissioning the site was in need of repair. *Id.* at 13. See also Staff Response, Ford Attach. A, Bison Basin Decommissioning Project, Phase 1 (Aquifer Restoration) (June 1998), at 1. In this report, prepared by the Land Quality Division of the Wyoming Department of Environmental Quality, the State of Wyoming notes that the new equipment needed for site reclamation included three osmosis units, contract pumps, well heads, and wellfield lines.

specificity of the language of Criterion 9, which unequivocally states that the surety arrangement must account for all the costs of an independent contractor to restore the site, coupled with HRI's inability to demonstrate that it has fully accounted for the costs of an independent contractor in the RAP, I conclude that the portions of the RAP based upon HRI's own estimated decommissioning costs cannot be accepted.

Once again, the deficiency in this portion of the RAP is easily remedied. HRI must submit an amended RAP, for NRC Staff approval, that provides the costs of decommissioning based upon the averaged estimates of two or more independent contractors to decommission and restore the site. In determining such costs, it cannot be assumed that the major equipment necessary for decommissioning is available, and therefore, the revised estimates for the surety should account for the cost of at least leasing the major equipment. Basing the surety on the averaged cost of two or more independent contractors and factoring in the cost of leasing the equipment meets fully the requirements of Criterion 9 by ensuring that appropriate funds for site decommissioning are not subject to the vagaries of the bankruptcy law or a host of other unforeseen circumstances. To conclude otherwise ignores the plain language of Criterion 9 that "the licensee's cost estimates must take into account the *total costs* that would be incurred if an *independent contractor* were hired to perform the decommissioning and reclamation work."⁹⁸

2. Labor Costs

The Intervenors also raise concerns about HRI's projected labor costs. According to the Intervenors' expert, Steven C. Ingle, in order to restore safely an ISL mine, the decommissioning operation must be maintained on a 24-hour basis.⁹⁹ The Intervenors contend that although the RAP proposes to operate on a 24-hour basis, the budgeted manpower hours in the RAP equate to only one 8-hour shift per day.¹⁰⁰

In addition, Mr. Ingle asserted that the RAP is unclear on the number of actual employees needed to decommission properly the site because HRI proposes to use one employee to staff five or six different positions.¹⁰¹ Mr. Ingle believes HRI's proposal to allow employees to wear "multiple hats" seriously underestimates

⁹⁸ 10 C.F.R. Part 40, App. A, Criterion 9 (2004) (emphasis added).

⁹⁹ See Intervenors' Response, Exh. 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000, at 20, ¶ 29 [hereinafter Ingle Aff.].

¹⁰⁰ See Intervenors' Response at 28.

¹⁰¹ See Ingle Aff. at 21, ¶ 29. As an example, Mr. Ingle points out that HRI's RAP does not include a full-time position for a brine concentrator operator, a position that Mr. Ingle believes is essential for any decommissioning operation. See *id.* at 22, ¶ 30.

the manpower necessary to staff a decommissioning operation on a 24-hour basis, which, in turn, seriously underestimates the labor costs for decommissioning the site.¹⁰² Furthermore, Mr. Ingle stated that for the purpose of calculating the appropriate surety, the NRC cannot assume that individual employees of an independent contractor will take on multiple responsibilities.¹⁰³ Thus, the Intervenor's argue that the RAP does not provide a sufficient surety to cover the necessary labor costs to decommission the site.¹⁰⁴

HRI responds to the Intervenor's concerns by asserting HRI will conduct restoration operations 24 hours a day, 7 days a week, as shown by the operating statistics in the RAP Section E.2, Attachment E-2-1 (row 19).¹⁰⁵ HRI proposes using a combination of manpower and unmanned automated machines with automatic shutdowns in the event of a leak or other malfunction to meet performance criteria.¹⁰⁶ HRI further reiterates its position that one employee will fill a number of positions in its operation. According to HRI, the operation will require short periods of technical expertise at various intervals throughout the decommissioning process, which will allow one person to perform multiple tasks.¹⁰⁷ The NRC Staff's response is again silent with respect to the Intervenor's concerns about the RAP's inadequate labor budget.¹⁰⁸

HRI's explanation of site restoration operating continually by using a combination of manpower and machine is satisfactorily supported in the record before me. I find that HRI's intention to rely on automated machinery with automatic shutdowns to supplement its workforce, along with a budget for a single 8-hour shift per day is sufficient to operate the decommissioning project around the clock and does not violate the surety requirements established in Criterion 9.

On the other hand, the current record does not support HRI's decision to require employees to wear "multiple hats" to decrease the costs of decommissioning as being in accord with the requirements of Criterion 9. As previously explained, Criterion 9 requires surety estimates to be based upon the total costs

¹⁰² See *id.* at 21, ¶ 29.

¹⁰³ See *id.*

¹⁰⁴ See Intervenor's Response at 27-28.

¹⁰⁵ See Pelizza Aff. at 18, ¶ 15. Mr. Pelizza asserted that the increasing availability and dependability of automated technologies will make production operations in an automated mode even more important. See *id.* at 20, ¶ 15.

¹⁰⁶ See *id.* at 20, ¶ 15.

¹⁰⁷ See RAP at E-2(d); Pelizza Aff. at 18-20, ¶ 15. In response to Mr. Ingle's example involving the brine concentrator operator, Mr. Pelizza explained that operating the brine concentrator will be one of several jobs performed by the shift operator. Mr. Pelizza also claimed that HRI does not need to maintain 24-hour shifts, because its restoration machinery is "largely automated," allowing it to run unmanned at night. See *id.* at 20, ¶ 16.

¹⁰⁸ See Staff Response.

of an independent contractor completing the decommissioning project.¹⁰⁹ HRI, however, has put forth no persuasive evidence that supports its assumption that an independent contractor will assign one employee to several tasks in the same manner as HRI intends to manage its employees. Indeed, HRI has presented no cost estimates associated with an independent contractor performing any of the functions of decommissioning. Given that Criterion 9 specifically requires that the surety amount be based upon the total costs of an independent contractor decommissioning the site and the RAP, as it currently stands, contains no independent contractor cost estimates, I find that HRI has failed to meet the requirements of Criterion 9 in this respect. Accordingly, the labor cost estimates of the current RAP cannot be accepted.

The rejection of the existing labor cost estimates does not leave HRI without a remedy. To cure this deficiency, HRI may amend its RAP with the labor costs increased to the level proposed by the Intervenor.¹¹⁰ Alternatively, HRI may submit to the NRC Staff the average of the cost estimates from at least two independent contractors and amend its RAP accordingly. These new cost estimates will bring the labor costs of the RAP in compliance with the plain language of Criterion 9.

3. *Brine Concentration Costs*

The Intervenor claims that the HRI's cost estimates in the RAP for the brine concentration system contain several deficiencies. According to the Intervenor, HRI: (a) overstates the efficiency of the brine concentration system and underestimates the brine concentration volume;¹¹¹ (b) describes a restoration flow rate in the RAP that differs significantly from the restoration flow rate described in previous documents;¹¹² and (c) relies on a price estimate for a brine concentrator designed to process the reverse osmosis unit wastewater with less total dissolved solids (TDS).¹¹³

a. Efficiency of the Brine Concentrator

The Intervenor challenges HRI's assumption in the RAP that the brine concentration system will operate with a 99.1% rate of efficiency.¹¹⁴ According to

¹⁰⁹ See 10 C.F.R. Part 40, App. A, Criterion 9 (2004).

¹¹⁰ See Intervenor's Response at 27-28.

¹¹¹ See *id.* at 20-21.

¹¹² See *id.* at 21-23.

¹¹³ See *id.* at 24-25.

¹¹⁴ See *id.* at 20.

the Intervenor, the manufacturer's description of HRI's proposed brine concentration system describes it as having a 97% efficiency rating.¹¹⁵ The Intervenor argues that the approximately 2% difference between HRI's estimate and the manufacturer's estimate will triple the amount of brine that must be processed and lead to additional disposal costs.¹¹⁶

In response to the Intervenor's claim, Mr. Pelizza admitted that HRI overstated the efficiency of the brine concentrator in the initial RAP and that, based upon further discussions with the manufacturer, one should expect 2% brine from the brine concentrator.¹¹⁷ According to Mr. Pelizza, using a 2% brine flow figure will result in a brine waste flow of approximately 2.5 gallons per minute (gpm),¹¹⁸ which was reflected in the amended version of the RAP.¹¹⁹

As admitted by Mr. Pelizza, HRI overestimated the efficiency of its brine concentrator in its original RAP and has subsequently updated the RAP to reflect a more accurate estimate. The 2.5-gpm brine flow anticipated by HRI represents an increase of approximately 1.5 gpm over the number included in the original RAP and is only a small fraction of the anticipated nominal restoration flow rate of 580 gpm. Thus, even without the subsequent corrections to the RAP, the 2% difference in the estimated efficiency rate would have little, if any, impact upon the overall operating estimates of the brine concentration system. Given, however, that HRI has already updated the RAP to reflect the corrected operating efficiency, I find that the Intervenor's claim is effectively moot. Accordingly, the Intervenor's challenge to the estimated efficiency of the brine concentration system cannot be sustained.

b. Flow Rate Discrepancies

The Intervenor challenges the 580-gpm flow rate described in the RAP because it is approximately three times greater than the flow rate of 200 gpm reported in HRI's COP and the NRC Staff's FEIS.¹²⁰ The figures originally provided in the COP and FEIS, the Intervenor notes, have 50 gpm of reject water exiting the reverse osmosis unit and entering the brine concentration system.¹²¹ In the RAP, however, HRI has adjusted these figures so that 116 gpm of reject water exit the reverse osmosis unit and enter the brine concentration system.¹²² The Intervenor

¹¹⁵ *See id.*

¹¹⁶ *See id.* at 21.

¹¹⁷ *See Pelizza Aff.* at 15, ¶9.

¹¹⁸ *See id.*

¹¹⁹ *See RAP*, Attach. E-2-1.

¹²⁰ *See Intervenor's Response* at 21.

¹²¹ *See id.* at 22.

¹²² *See id.*

express concern over this vast increase in the amount of restoration water entering the system and argue that such a large discrepancy must be explained before “any confidence can be placed in the RAP.”¹²³

In response, Mr. Pelizza stated that HRI increased the restoration equipment capacity to accommodate the 9 pore volume requirement established in License Condition 9.5.¹²⁴ The original flow rate used in the COP and FEIS was modeled on HRI’s original estimate of 4.4 pore volumes.¹²⁵ The Staff subsequently adjusted HRI’s 4.4 pore volumes to 9 pore volumes. In the RAP, therefore, the reverse osmosis unit was sized to operate at a nominal capacity of 580 gpm to accommodate the Staff’s increase in pore volumes.¹²⁶ The larger unit will allow the restoration activities to occur simultaneously at approximately the same rate as the depletion of the wellfields.¹²⁷

I find that HRI’s explanation is adequate to explain the change in the brine concentration system’s capacity. An increase in the restoration equipment capacity is necessary to accommodate the additional gallons of water being processed when the pore volumes were increased from HRI’s proposed 4.4 pore volumes to the NRC required 9 pore volumes. Accordingly, the Intervenor’s argument raises no grounds to require a modification of the RAP regarding any alleged discrepancies in the system’s capacity.

c. Actual Brine Concentration System Costs

The Intervenor’s next claim that HRI failed to account properly for the actual costs of the brine concentration system.¹²⁸ They highlight a letter HRI received from Resources Conservation Company, the brine concentrator manufacturer, providing a cost quote for the system.¹²⁹ The letter was submitted in conjunction with the RAP, and indicates that the brine concentration system is capable of handling 4800 milligrams per liter (mg/L) TDS.¹³⁰ Based upon the wording of the letter,¹³¹ Mr. Ingle theorized that HRI provided the brine concentration system manufacturer with an estimate of the wastewater quality of the reverse osmosis unit that was too low, resulting in a quote for a brine concentrator that does not have adequate capacity to treat such a concentrated and contaminated

¹²³ *Id.*

¹²⁴ *See* Pelizza Aff. at 15, ¶ 10.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.* at 15-16, ¶ 10.

¹²⁸ *See* Intervenor’s Response at 24.

¹²⁹ *See id.*

¹³⁰ RAP, Attach. E-2-4.

¹³¹ *See id.*

waste stream.¹³² While acknowledging that the estimate provided by Resources Conservation Company was for a brine concentrator capable of effectively treating wastewater with a maximum TDS of 4800 mg/L,¹³³ Mr. Ingle nonetheless believed a manufacturer estimate of 4800 mg/L TDS was too low and that the actual range of TDS will be between 1500 mg/L and 5500 mg/L.¹³⁴ Moreover, if HRI is forced to purchase a brine concentrator capable of handling a TDS level closer to the 5500-mg/L mark, which Mr. Ingle believed is likely to occur, then the brine concentration costs will significantly increase.¹³⁵

In response, Mr. Pelizza admitted that the Intervenor's claim regarding the estimate of TDS concentrated in the brine is valid.¹³⁶ He pointed out, however, that the object of the restoration project is to reduce the TDS levels and asserted they will quickly be reduced with the initial restoration efforts.¹³⁷ As support, Mr. Pelizza relied upon data from the Mobil Section 9 Pilot Restoration Project, which reduced its initial TDS level from 5500 mg/L to under 2000 mg/L with 1 pore volume.¹³⁸ Mr. Pelizza noted that the TDS levels at the Mobil Project were much higher than those anticipated at the Church Rock site.¹³⁹ Moreover, based upon the existing data and his experience with other restoration projects, Mr. Pelizza believed HRI can anticipate an initial TDS level of approximately 4000 mg/L, well below the 5500 mg/L postulated by Mr. Ingle.¹⁴⁰

Given Mr. Pelizza's experience in groundwater restoration and the corresponding Mobil data, I find that his estimate of 4000 mg/L has sufficient support. Furthermore, as correctly highlighted by Mr. Pelizza, the goal of the restoration project is to reduce the TDS level. The Intervenor's concern that a brine concentrator that can handle only 4800 mg/L clearly violates the NRC regulations governing groundwater restoration costs is severely overstated. The TDS level will likely not exceed 4800 mg/L, if at all, for more than the first pore volume. Further, License Condition 9.5 will require HRI to provide a surety update if it discovers that the original brine concentrator cannot handle the anticipated TDS levels so that a different, more expensive brine concentrator must be substi-

¹³² See Intervenor's Response, Exh. 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenor's Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000, at 18, ¶ 26 (Dec. 19, 2000) [hereinafter Ingle Aff.].

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See Pelizza Aff. at 16, ¶ 12.

¹³⁷ See *id.* at 16-17.

¹³⁸ See *id.* at 17.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

tuted. Accordingly, the Intervenor's challenge to the estimated cost of the brine concentration system cannot be sustained.

G. Lack of Cost Estimates for Fundamental Components

The Intervenor also note that HRI's RAP fails to provide cost estimates for several "crucial elements."¹⁴¹ These include the costs for: (1) replacing and disposing of the sand filter and cartridge filters, (2) an appropriate reducing agent, (3) plugging ore delineation holes, (4) leakage cleanup from evaporation ponds, (5) backup equipment, (6) contract administration and inflation, and (7) mechanical integrity testing.¹⁴² The Intervenor further argue that HRI's cost estimates for post-restoration groundwater stability testing are incorrect and HRI must establish a proper water quality baseline before commencing mining activities.

In his affidavit, Mr. Pelizza responded to each of the Intervenor's claims. First, Mr. Pelizza pointed out that the reverse osmosis disposal costs are included in the RAP.¹⁴³ As noted in Attachment E-8-1 of the RAP, the backwash solids from the reverse osmosis unit will be collected in the evaporation ponds and the costs for decommissioning of these ponds are included in the surety estimate.¹⁴⁴ Regarding the reducing agent costs, Mr. Pelizza stated that HRI does not intend to use a reducing agent and notes that NRC regulations do not specifically require the use of a reducing agent.¹⁴⁵ In response to the claim that the RAP lacks cost estimates for ore delineation holes, Mr. Pelizza explained that HRI plans to plug and abandon its ore delineation holes before leaching operations begin and, therefore, it did not provide a cost estimate for plugging these activities in the RAP as part of decommissioning activities.¹⁴⁶

In addressing the Intervenor's concern about evaporation pond leakage, Mr. Pelizza stated that HRI did not include the costs for cleanup of evaporation pond leakage because HRI plans to use a redundant liner in the evaporation ponds and does not anticipate any leakage.¹⁴⁷ Mr. Pelizza also explained that because HRI does not intend to purchase backup equipment, it did not include the costs for backup equipment. Instead, if equipment breaks down, HRI plans to shut down operations and perform the necessary maintenance on the machines.

¹⁴¹ See Intervenor's Response at 29.

¹⁴² See *id.* at 30-31.

¹⁴³ See Pelizza Aff. at 21, ¶ 21.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 21, ¶ 23.

¹⁴⁶ See *id.* at 21, ¶ 24.

¹⁴⁷ See *id.* at 22, ¶ 25.

Regarding contract administration costs and inflation, Mr. Pelizza explained that HRI will adopt the administrative contingency/profit factor required by the NRC and has included a 15% contingency/profit factor in the RAP.¹⁴⁸ He also highlighted License Condition 9.5, which requires an annual surety update that includes inflation adjustments, and stated that by requiring an inflation adjustment, License Condition 9.5 alleviates the need for long-term inflation adjustments in the initial surety amount.¹⁴⁹ Further, in response to the Intervenor's claim concerning mechanical integrity testing, Mr. Pelizza explained that the mechanical integrity testing will be conducted as part of routine operations and, therefore, is not included in the decommissioning.¹⁵⁰ Finally, Mr. Pelizza responded to the Intervenor's challenge to HRI's analytical costs by stating that the stability figures for analytical costs are correct.¹⁵¹ He noted that the stability sample budget was based on the sampling frequency described in the COP.¹⁵²

I find that Mr. Pelizza has provided an adequate explanation concerning the missing "crucial" cost estimates highlighted by the Intervenor. Accordingly, the Intervenor's concerns in this regard also cannot be sustained. Furthermore, regarding the Intervenor's concern that baseline water quality parameters need to be established, it should be noted that License Condition 10.21 requires HRI to establish "groundwater restoration goals" on a "parameter-by-parameter" basis prior to injecting lixiviant into a wellfield. This requirement in License Condition 10.21 directly addresses the Intervenor's concern. Thus, this claim also fails.

IV. CONCLUSION

For the reasons set forth above, the RAP for Section 8 contains the following deficiencies that must be corrected: (1) as stated in Section II.E, HRI, having calculated its surety using a well-plugging method for Section 8 not yet approved by the State of New Mexico, must recalculate the well-plugging costs using the same tremie line method approved by the State for the Mobil Section 9 Pilot Restoration Project for its initial surety well-plugging cost estimate; (2) as stated in Section II.F(1), HRI, having improperly assumed the availability of onsite equipment in calculating its surety estimate, must recalculate its reclamation costs based on the average costs that two or more independent contractors, without using HRI's equipment, would accrue in decommissioning; and (3) as stated in Section II.F(2), HRI, having assumed improperly that the laborers an

¹⁴⁸ See *id.* at 22, ¶ 27; RAP, Section F.

¹⁴⁹ See *id.* at 22, ¶ 28.

¹⁵⁰ See *id.* at 23, ¶ 29.

¹⁵¹ See *id.* at 23, ¶ 28.

¹⁵² See *id.*

independent contractor would use would wear “multiple hats,” can either accept the cost estimates proposed by the Intervenors in recalculating its labor costs or, alternatively, use the averaged cost estimates proposed for labor by two or more independent contractors. Further, the Staff shall amend License Condition 10.28 as indicated in Section II.D.

Therefore, in accordance with Commission’s decision in CLI-00-8 prohibiting HRI from using its license, SUA-1508, until the filing and approval of an acceptable restoration action plan for Section 8, the license prohibition is reinstated until the foregoing deficiencies in the RAP for Section 8 are corrected in conformity with this decision. Pursuant to 10 C.F.R. § 2.1253, the parties of this proceeding each may file a petition for review of this Decision in accordance with the procedures set out in 10 C.F.R. § 2.786.

Barring any reversal or remand, this Decision effectively brings to a close the informal adjudication of the Intervenors’ areas of concern dealing with the Church Rock Section 8 site. Yet to be adjudicated are the Intervenors’ ten areas of concern (i.e., ten issues and attendant subissues) with respect to each of the three remaining sites, Church Rock 17, Unit 1, and Crownpoint. In this respect, it should be noted that all parties agree that prior to conducting any mining activities, HRI must obtain an aquifer exemption from the appropriate issuing authority by demonstrating that the underlying aquifer to be contaminated by the ISL mining is not potable water.¹⁵³ Because of the substantial resource implications for all parties as well as the Presiding Officer of this remaining informal adjudication, the unique circumstances of this proceeding, and the Commission’s desire for the most efficient adjudication of proceedings, the Commission may wish in this case to reexamine the agency’s current practice of docketing and then reviewing and adjudicating ISL mining applications prior to applicants or licensees having the required aquifer exemptions.¹⁵⁴

¹⁵³ See Tr. at 202-03, 206-08.

¹⁵⁴ See *id.* at 31. In LBP-98-9, Judge Bloch admitted, as an area of concern, the Intervenors’ claim that HRI had failed to obtain proper permits from the Navajo nation. See 47 NRC 261, 281 (1998). In CLI-98-16, the Commission reversed Judge Bloch’s decision. See 48 NRC 119 (1998). It should be noted that, to date, the NRC, HRI, and the Intervenors have spent considerable resources preparing, reviewing, and adjudicating HRI’s license application for Section 8. Yet in spite of the expenditure of these resources, it is far from certain that HRI will ever be able to use its license. For example, HRI and the NRC Staff have diametrically opposed views on the continuing validity of the earlier 1989 aquifer exemption for Section 8. Tr. at 202-04. Similarly, it appears that HRI and the Intervenors have differing views on whether HRI will be successful in obtaining an aquifer exemption from the appropriate issuing authority that the Intervenors, Eastern Navajo Diné Against Uranium Mining and SRIC, claim is the Navajo nation. See generally *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000). In any event, should it be eventually determined by the appropriate federal, state, or Indian nation issuing authorities that there is not a valid exemption for Section 8 and future applications are denied, then
(Continued)

It is so ORDERED.

BY THE PRESIDING OFFICER¹⁵⁵

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 27, 2004

the NRC, HRI, and the Intervenors will have squandered significant scarce resources on this matter because the NRC license cannot be utilized without a proper aquifer exemption. The same situation exists with respect to the Church Rock Section 17, Unit 1, and Crownpoint sites, thereby further wasting substantial scarce resources should the required aquifer exemptions not be issued. Thus, the Commission, as a matter of sound administration and fiscal policy, may wish to reconsider its current position that an applicant or licensee, such as HRI, need not first obtain required aquifer exemptions before the agency will docket an initial application, a license amendment application, or a renewal application for a Part 40 license involving ISL mining. The applicant or licensee response to such an administrative docketing requirement would not be subject to challenge in the informal adjudication but would ensure that scarce agency resources are not needlessly expended in circumstances in which a license realistically may never be able to be used.

¹⁵⁵ Copies of this Memorandum and Order were sent this date by e-mail or facsimile transmission to counsel for each of the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

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

March 2, 2004

ADJUDICATORY PROCEEDINGS

A licensing proceeding is not an open forum for discussing the country's need for energy and spent fuel storage.

ATOMIC ENERGY ACT: DUTIES OF APPLICANTS

MATERIALS LICENSES UNDER PART 72

Our regulations provide procedures for qualified applicants to obtain licenses for safely operated nuclear facilities. An applicant who seeks to operate a nuclear storage or reprocessing facility must comply with those prescribed licensing procedures.

MEMORANDUM AND ORDER

This Order concerns William D. Peterson's appeal from the Board's January 30, 2004 Memorandum and Order (Dismissing Petition To License Pigeon Spur Interim Spent Fuel Storage Facility). In that order, the Board found that it has no jurisdiction to consider licensing a facility other than the proposed PFS

facility that was the subject of the proceeding before it. As such, the Board had no authority to consider Peterson's request for a license of some other facility.

In 1998, William D. Peterson filed an application for a license to store spent fuel at a site in Pigeon Spur, Box Elder County, Utah. That application was assigned a docket number, but no notice of hearing was issued. The Staff concluded in 1999 that the application was substantially inadequate and terminated its review. Therefore, no licensing board was ever constituted to review Peterson's application.

In 2000, Peterson attempted to intervene in the PFS matter but was denied entry because he did not show good cause for late filing, did not have standing, and did not offer a single litigable contention.¹ The Commission affirmed that conclusion on appeal.²

According to his appeal, Peterson proposes to build a combination 300-year storage facility and spent fuel reprocessing facility. Peterson's appeal asks the Commission to consider the country's great need for more power, specifically nuclear, and its corresponding need for more spent fuel storage.

The PFS licensing proceeding is not an open forum for discussing the country's need for energy and spent fuel storage. Our regulations provide procedures for qualified applicants to obtain licenses for safely operated nuclear facilities. If Peterson believes he is qualified to operate a nuclear storage or reprocessing facility, he must comply with those prescribed licensing procedures.

The Board, therefore, was correct in dismissing Peterson's "Petition To License Pigeon Spur Interim Spent Nuclear Fuel Storage Facility," and we affirm.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of March 2004.

¹ LBP-00-23, 52 NRC 114 (2000), *reconsideration denied*, unpublished order, Sept. 25, 2000.

² CLI-00-21, 52 NRC 261 (2000).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matters of

DOMINION NUCLEAR NORTH ANNA, LLC (Early Site Permit for North Anna ESP Site)	Docket No. 52-008
EXELON GENERATION COMPANY, LLC (Early Site Permit for Clinton ESP Site)	Docket No. 52-007
SYSTEM ENERGY RESOURCES, INC. (Early Site Permit for Grand Gulf ESP Site)	Docket No. 52-009 March 2, 2004

The Commission concludes that although intervention petitions had been filed before New Part 2 rules took effect, applying the New Part 2 rules would result in no interruption, unwarranted delay, added burden, or unfairness in these early site permit proceedings, and decides that they shall govern with the exception of the New Rule's prescribed schedule for the petition for hearing and contentions.

RULES OF PRACTICE: NEW PART 2 RULES

It is preferable to apply the New Rules in these circumstances where no previous hearing for an Early Site Permit has been held, where these hearings are still at an early stage, and where the hearings are likely to continue for a substantial period beyond the effective date of the New Rules. No person or organization

seeking intervention has yet been admitted as a party or submitted contentions. Our exercise of discretion to take this action will enable the establishment of meaningful precedent for a line of hearings to follow should subsequent early site permit applications be filed. It makes little sense to hold hearings on a new class of applications using the old Part 2, when future hearings on such applications will be conducted under the New Part 2.

RULES OF PRACTICE: CHANGES

Even parties have no vested interest in any form of procedure; the Commission may change its rules of procedure so long as there is adequate notice and no prejudice. Procedures may be altered without prejudice before the admission of parties. None of the Petitioners have established that they will not be fully able to represent their views using the full range of adjudicatory procedures set forth in the New Part 2. Application of the New Part 2 will result in no interruption, unwarranted delay, added burden, or unfairness in these proceedings.

MEMORANDUM AND ORDER

Between December 1, 2003, and mid-January 2004, the Commission issued three notices, each announcing the opportunity to petition to intervene in a hearing on one of three pending applications for an early site permit (ESP), captioned above. Separate, but overlapping, sets of Petitioners timely sought to intervene in the hearings on the applications of Dominion Nuclear North Anna, LLC (Dominion), Exelon Generation Company, LLC (Exelon), and, most recently, System Energy Resources, Inc. (SERI) for the North Anna ESP site, Clinton ESP site, and Grand Gulf ESP site, respectively.¹ In each of the proceedings, subsequent to the intervention petitions, we received the Applicant's motion to apply the Commission's newly promulgated less formal hearing procedures ("New Part 2 rules" or simply "New Rules"), which became effective on February 13, 2004, in lieu of the procedures in effect when the hearings were noticed. *See* 69 Fed. Reg. 2182 (Jan. 14, 2004) (amending 10 C.F.R. Part 2,

¹Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, and Public Citizen all sought joint intervention in both *North Anna* and *Clinton* and were joined in the latter by Environmental Law and Policy Center and Nuclear Energy Information Service. In *Grand Gulf*, Nuclear Information and Resource Service and Public Citizen were joined by the National Association for the Advancement of Colored People Claiborne County, Mississippi Branch and Mississippi Chapter of the Sierra Club. We refer hereinafter to "North Anna Petitioners," "Clinton Petitioners," and "Grand Gulf Petitioners." Grand Gulf Petitioners included an incorrect citation for the *Federal Register* notice related to the Grand Gulf application. We deem that error corrected.

the NRC Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders).

In this Order we direct that all three early site permit proceedings be conducted under the New Rules.

I. POSITIONS OF THE PARTIES IN THE NORTH ANNA PROCEEDING

Dominion's "Motion To Apply New Adjudicatory Process," dated January 16, 2004 (Dominion's motion), requested that this proceeding be governed by the Commission's New Rules. Dominion argues that application of the New Part 2 rules is permitted by the effectiveness provision of the new rule under the express terms that apply the rules to "proceedings noticed on or after the effective date, *unless otherwise directed by the Commission.*" 69 Fed. Reg. at 2182 (emphasis added). Dominion further asserts that applying the New Rules to its hearing "would promote the efficiency and other benefits intended by the new rule, and [given the early stage at which it would be applied] would result in no prejudice to any party." Dominion's Motion at 1. Dominion concludes that applying the New Rules prospectively would require some adjustment to the timing of filing contentions and recommends one.

North Anna Petitioners, whose joint petition to intervene is pending, oppose the motion. They note, in apparent agreement with Dominion's motion on this point, that the Commission "was not required to delay the effectiveness of the rule," but opined that given "the breadth and austerity of the new rules, it was fair for the Commission to provide a 30 day grace period before the rule went into effect." North Anna Petitioners' Opposition at 1. In their brief response they do not explain why the Commission should not apply the New Rules, do not elaborate on what they mean by "breadth and austerity," or describe in what way, if any, it would be unfair for the Commission to apply the New Rules.

Similarly, they fail to flesh out how the "novelty of the proceeding and the complexity of the issues" would be better served by the old rules. They simply conclude with their opinion that "a formal hearing will be a more effective and efficient means of resolving the parties' disputes."

The NRC Staff does not oppose Dominion's motion. The Staff states that the application of the New Rules would be intended to achieve "long-standing agency goals without prejudice to the substantive opportunity of any person to participate in this proceeding," noting that North Anna Petitioners had failed to identify any specific procedure in the now-superseded Rules of Practice which would be unavailable to them if it is necessary to resolve any contested issue. *See* New 10 C.F.R. § 2.310, 69 Fed. Reg. at 2240.

II. POSITIONS OF THE PARTIES IN THE CLINTON PROCEEDING

On January 28, 2004, Exelon filed a motion seeking application of the New Rules to the Clinton ESP hearing. In addition to making arguments similar to those made by Dominion, Exelon emphasizes the early stage of the proceeding, specifically that no contentions had yet been filed and that a Licensing Board had not yet been appointed. For those reasons, it maintains application of the New Rules would not “disrupt this proceeding,” and for “similar reasons,” Exelon asserts that the New Rules would not “prejudice any of the parties.” Exelon Motion at 2.

Exelon urges that the application of the New Rules would be “especially appropriate” in that no ESP hearing had ever been conducted under the old Part 2 rules and that all future applications would be conducted under the new ones. Thus there would be “particular merit” to proceeding in *Clinton* under the New Rules in order to establish appropriate precedents that will ensure consistent treatment and add predictability for future ESP proceedings. Exelon Motion at 3.

Noting that all of the North Anna Petitioners were also Petitioners in *Clinton*, Exelon addresses the argument made by Petitioners in *North Anna* that due to the “novelty of the proceeding” and “complexity of the issues” a “formal hearing” would be more effective and efficient in resolving parties’ disputes. Exelon responds that arguments for a formal hearing are inapposite because the issue is not whether to hold a formal hearing, but rather which rules to apply. Nonetheless, Exelon provides a three-pronged answer, that the matters involved in *Clinton* did not seem to raise complex issues, that the Commission had already concluded in its Part 2 rulemaking that complexity was not a sufficient basis to require a formal hearing, and that the most formal procedures (apparently referring to cross examination) are appropriate only for issues such as those that go to credibility of an eyewitness or intent or motive of a person providing testimony. Exelon Motion at 3-4.

On February 6, 2004, Clinton Petitioners responded in opposition. They argue that the New Rule “radically alters the scope and nature of hearings,” that a 30-day grace period (before the New Rules become effective) was appropriate and that the Commission should honor it.² They maintain further that the pendency of an appeal of the New Rules before the United States Court of Appeals for the First Circuit and their own evaluation of the likely success of that appeal make it senseless for the Commission to go forward under the New Rules with

²Clinton Petitioners’ point that the New Rules do not become effective until mid-February has, at the least, been overtaken by time.

a proceeding that would be at risk of requiring repetition. In evaluating the likelihood that the Commission would not be allowed to maintain its New Rules, the Petitioners cite various cases and a 1989 memorandum by the then NRC General Counsel — all allegedly to the effect that the Commission cannot depart from its current rules for formal hearings.

The NRC Staff's answer in *Clinton*, dated February 12, 2004, mirrored its response in *North Anna*, concluding that the Staff did not oppose the Applicant's motion for application of the New Rules for substantially the same reasons that it had previously provided.

III. POSITIONS OF THE PARTIES IN THE GRAND GULF PROCEEDING

System Energy Resources, Inc. (SERI) filed its motion requesting application of the New Part 2 Rules of February 19, 2004. SERI argues that the New Part 2 constitutes an improvement over the earlier version and that use of more formal adjudicatory procedures is not warranted. Applicant claims that “a less formal hearing process will avoid needless delay and unproductive litigation, focus the hearing on well-defined contentions and at the same time ease the burdens in hearing preparation and participation for *all participants*” (emphasis in original). Furthermore, use of the New Part 2 would result in “no interruption, delay, or prejudice to any participant in this proceeding.” SERI further argues that the pendency of a judicial challenge to the New Part 2 should not delay its implementation. SERI claims that this would lead to the result that the Commission must effectively stay implementation of the New Part 2 for months, while the matter is being litigated.

Grand Gulf Petitioners in a March 1, 2004 pleading oppose the use of the New Part 2 rules. Petitioners believe that use of the old Part 2 is needed to “maintain fairness and regularity in the decisionmaking process” and that use of the New Part 2 would not improve the hearing process. Petitioners argue that given the novelty of the proceeding and the potential complexity of the issues, a formal hearing will be a more effective and efficient means of resolving the parties' disputes. Petitioners, like the Petitioners in the *Clinton* proceeding, assert that the pendency of a legal challenge to the New Rule in the federal courts of appeals further weighs against retroactive application of Part 2 in this case. Petitioners state that if the NRC does not prevail in that litigation, it risks the possibility of being ordered to repeat the hearing using the old Part 2 rules.

IV. COMMISSION DECISION

On issuance of the New Part 2 Rules, the Commission provided for them to apply to proceedings noticed after February 13, 2004; however, we expressly reserved the option of making individualized decisions to do otherwise where we find that it is warranted. At that time, we did not endeavor to address potential arguments for or against application of the New Rules in any individual cases that were only commencing. As a general matter, we could not foresee all particular circumstances that might be presented and thus retained the discretion to expand or restrict the application of the New Rules. Our reservation resulted in significant part from our awareness that there might be sound reasons to apply the New Rules to earlier noticed but still incipient proceedings in any number of situations that were not immediately predictable and thus not readily definable. Some we might designate *sua sponte*, see *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10 (2004); others, as here, on consideration of the motion of a party or potential party to a hearing. There has been no argument that we lack authority to exercise that discretion and thus we proceed to consider whether to do so here.

Three Applicants for a license for an early site permit seek the efficiency and other benefits intended from applying the New Part 2 rules in the first hearings on the first applications for early site permits. On consideration, the Commission is convinced that it will be preferable to apply the New Rules in these circumstances where no previous hearing for an early site permit has been held, where these hearings are still at an early stage, and where the hearings are likely to continue for a substantial period beyond the effective date of the New Rules. No person or organization seeking intervention has yet been admitted as a party or submitted contentions. Our exercise of discretion to take this action will not only provide for the early site permit hearings the benefits sought by the Commission in promulgating the New Rules but, perhaps more importantly, will enable the establishment of meaningful precedent for a line of hearings to follow should subsequent early site permit applications be filed. It makes little sense to hold hearings on a new class of applications using the old Part 2, when future hearings on such applications will be conducted under the New Part 2. We are therefore ordering the use of the New Part 2 in all three proceedings.

As we made clear in reciting the position of the *North Anna* Petitioners, there is not sufficient development of their argument to warrant much further discussion. Essentially they oppose the application of the New Rules with an unexplained belief that the old rules will result in a better hearing and a similarly unexplained suggestion of unfairness. As to the former, a full explanation of the Commission's contrary estimate appears in the statement of considerations for the New Rules. See 69 Fed. Reg. 2182, 2190-2215. As to the latter, none of the Petitioners has specified any unfairness that would result from granting the Applicants' requests

to apply the New Rules, and we know of none. (We resolve below a minor technical difference in timing for filing contentions between the two sets of rules to avoid any disadvantage to Petitioners.) Moreover, we believe that there can be no unfairness because we are applying these procedures before any intervention petitions have been granted and before a licensing board has been appointed in any ESP proceeding. Even parties have no vested interest in any form of procedure; the Commission may change its rules of procedure so long as there is adequate notice and no prejudice. *National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983), *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Certainly, therefore, procedures may be altered without prejudice before the admission of parties. None of the Petitioners has established that they will not be fully able to represent their views using the full range of adjudicatory procedures set forth in the New Part 2. Moreover, the Commission has changed its rules in an orderly process and in full compliance with the Atomic Energy Act and the Administrative Procedure Act, and notwithstanding the pendency of a legal challenge to the New Rules, we have no expectation of being required to withdraw them.

Because we conclude that applying the New Part 2 rules would result in no interruption, unwarranted delay, added burden, or unfairness in these proceedings, we hereby decide that they shall govern with the exception of the New Rules' prescribed schedule for the petition for hearing and contentions. Petitioners in all three proceedings have 60 days from the date of this Order to submit contentions.

The Commission refers each of the petitions for hearing referenced in the foregoing discussion to the Atomic Safety and Licensing Board Panel. Pursuant to 10 C.F.R. § 2.334, the Licensing Boards established to preside over these proceedings shall establish schedules that will result in timely decisions on these applications. The Licensing Boards may also issue any orders they deem appropriate specifying the format for contentions.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of March 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

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

March 24, 2004

The Commission denies a motion to reopen the case record on an environmental justice contention.

ENVIRONMENTAL JUSTICE: EXECUTIVE ORDER

President Clinton's executive order on "environmental justice" calls upon agencies to determine whether a proposed action would have disproportionately high and adverse human health or environmental effects, not disproportionate financial effects among different "subgroups" of a minority population.

ENVIRONMENTAL JUSTICE: EXECUTIVE ORDER

President Clinton's executive order on "environmental justice" is intended only to underscore existing law. The relevant existing law is found under the National Environmental Policy Act (NEPA), which is focused on the need to take a hard look at the environmental impacts of proposed action.

NEPA: COST-BENEFIT ANALYSIS

The NRC's NEPA review does consider a project's anticipated socioeconomic benefits along with its costs, but such a broad and informal balancing of costs and

benefits does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated effects of a proposed project.

NEPA: HEARINGS

Claims of financial and political corruption inside of a Native American tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges.

RULES OF PRACTICE: MOTIONS TO REOPEN RECORD

Under our rules, a motion to reopen a record to consider additional evidence will not be granted unless it satisfies three requirements. The motion must (1) address a significant safety or environmental issue, (2) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and (3) be timely.

MEMORANDUM AND ORDER

I. INTRODUCTION

Now before the Commission is Intervenor Ohngo Gaudadeh Devia's (OGD) motion to reopen the case record on Contention O, an "environmental justice" contention. The NRC Staff, the Applicant Private Fuel Storage (PFS), and Intervenor Skull Valley Band of Goshute Indians oppose the motion. For the reasons cited below, we deny the motion.

II. BACKGROUND

In CLI-02-20, 56 NRC 147 (2002), the Commission directed the Atomic Safety and Licensing Board to grant PFS's motion for summary disposition of Contention O, an "environmental justice" contention submitted by Intervenor

OGD. Our decision explained at some length why the intratribal dispute¹ OGD sought to litigate in Contention O — over how particular Skull Valley band leaders have utilized or distributed lease payments made by PFS — fell beyond the scope of the National Environmental Policy Act (NEPA) and beyond the Licensing Board’s jurisdiction. As we stated, “unless Congress has specifically acted to abrogate a tribe’s sovereign immunity, a wholly intratribal dispute must be resolved within the tribe.”² The Licensing Board therefore lacked jurisdiction “to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments,”³ and denying OGD members a share in the financial benefits of the PFS lease.

Our decision further stressed that both NEPA and President Clinton’s Executive Order on “environmental justice” are, at bottom, concerned with *environmental* impacts.⁴ The executive order, for example, calls upon agencies to determine whether a proposed action would have “disproportionately high and adverse *human health or environmental effects*,” not disproportionate financial effects among different “subgroups” of a minority population.⁵ OGD has not claimed that its members will suffer a disproportionate or greater environmental injury from the proposed action, but that the Band leadership has used PFS lease payments “for personal gain and to bribe other Band members,” and has accused OGD of “treason” and sought to terminate their tribal membership.⁶ These are political and criminal issues, not environmental. Indeed, as we noted in CLI-02-20, the Environmental Impact Statement (EIS) for PFS found the overall impact on residents of the reservation “small to moderate.”⁷ None of the listed adverse impacts were found to pose a disproportionately high impact to the Skull

¹ OGD members oppose the PFS project. The group includes individuals who are members of the Skull Valley Band. Some OGD members live on the Skull Valley reservation and some do not. In opposing the PFS motion for summary disposition of its environmental justice contention, OGD alleged that Skull Valley Band tribal Chairman Leon Bear misappropriated funds paid by PFS under the lease PFS entered into with the Band in 1997, and used these funds for his own personal use or to bribe other tribe members into supporting his administration. OGD alleged that Chairman Bear wrongfully had denied to share money obtained from the PFS lease with tribe members that either opposed the PFS project or his chairmanship of the tribe. See CLI-02-20, 56 NRC at 150-51.

² *Id.* at 159.

³ *Id.*

⁴ *Id.* at 153-59. In 1994, President Clinton issued Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” directing federal agencies to consider “environmental justice” in their decisions. See 59 Fed. Reg. 7629 (Feb. 11, 1994).

⁵ CLI-02-20, 56 NRC at 153 (*quoting* E.O. 12898, § 1-101) (emphasis added).

⁶ OGD’s Motion To Reopen the Record on OGD Contention O (Jan. 29, 2004) (“OGD Motion”) at 2, 4.

⁷ CLI-02-20, 56 NRC at 154 (*citing* NUREG-1714, Vol. 1, Final Environmental Impact Statement (Dec. 2001) (“FEIS”) at 6-21 to 6-33).

Valley Band or to any other minority population living near the Skull Valley Band reservation.⁸

Moreover, as we earlier explained, the executive order is intended only to underscore existing law. In this case, the relevant existing law is found under NEPA, which similarly is focused on a need to take a “hard look” at *environmental* impacts of proposed actions.⁹ In CLI-02-20, the Commission acknowledged that the NRC Staff’s NEPA review does consider a project’s anticipated socioeconomic benefits along with its costs, but we stressed that such a “broad and informal balancing of costs and benefits does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated environmental effects of a proposed project.”¹⁰ In short, we declined in CLI-02-20 “to use NEPA as authority for (in effect) a corruption investigation, a major undertaking far afield from the NRC’s experience and expertise”¹¹:

Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD’s complaint.¹²

III. ANALYSIS

Under our rules, a motion to reopen a record to consider additional evidence will “not be granted” unless it satisfies three requirements.¹³ The motion must (1) address a significant safety or environmental issue, (2) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and (3) be timely.¹⁴ OGD’s motion fails to meet our standard for reopening.

OGD’s basis for reopening the record is a recent criminal indictment.¹⁵ In December 2003, a federal grand jury indicted tribal Chairman Leon Bear on two counts of theft from Indian Tribal Organizations, one count of theft concerning

⁸ *Id.* at 154 n.37. *See also* FEIS at 6-28.

⁹ CLI-02-20, 56 NRC at 153, 159; *see also, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

¹⁰ CLI-02-20, 56 NRC at 154-55 (internal quotations and citation omitted).

¹¹ *Id.* at 155 (internal quotations and citation omitted).

¹² *Id.* at 150.

¹³ 10 C.F.R. § 2.734 (2003).

¹⁴ *Id.*

¹⁵ *See* OGD’s Motion at 1, 6-9.

programs receiving federal funds, and three counts of filing false tax returns. The indictment charges Mr. Bear with embezzlement, misapplication, and conversion to his own use of funds belonging to the Skull Valley Band. It also charges Mr. Bear with knowingly filing false tax returns in the years 2000-2002.

By filing a motion to reopen the record, OGD suggests that had there been an “actual criminal indictment” of Leon Bear when we last considered OGD’s environmental justice contention, we likely would have reached a different result.¹⁶ On the contrary, however, in CLI-02-20 the Commission “*assume[d] the truth of the facts alleged*” by OGD for purposes of legal analysis.¹⁷ Moreover, the existence of an indictment has no bearing on the reasons we gave for rejecting OGD’s environmental justice claims. The indictment in no way changes the fact that OGD’s claims center upon allegations of an illegal diversion and misallocation of tribal money, and of problems with the leadership of the Skull Valley Band — financial and political matters that the NRC is neither equipped nor authorized to investigate, sort out, or in any fashion resolve.

The Commission has always recognized and acknowledged the seriousness of OGD’s charges. But the indictment itself serves only to reinforce our view that other, more legitimate and effective avenues exist for OGD to seek redress of its concerns. As we stated previously, “OGD’s charges of corruption *may prove salient* — but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers.”¹⁸

OGD seeks to portray the alleged “financial misdeeds and corruption of Leon Bear” as a significant safety and environmental issue warranting the reopening of the record.¹⁹ But neither Mr. Bear nor the Skull Valley Band will own or operate the PFS facility. OGD does not suggest how the alleged theft of tribal monies or the filing of false tax returns — even if true — would have any bearing on facility operations. Despite OGD’s unsupported claim, Leon Bear and members of his administration will have no role in “overseeing” operations.²⁰

OGD’s real complaint is that because of the Bear administration’s actions, OGD is not “enjoying the financial benefits of the [PFS] lease.”²¹ Yet as we noted previously, “[s]ubject to criminal and tribal law, the Band ultimately gets to decide how to handle its own revenues.”²² The Bureau of Indian Affairs

¹⁶ *Id.* at 8-9.

¹⁷ CLI-02-20, 56 NRC at 151 n.11 (emphasis added).

¹⁸ *Id.* at 157 (emphasis added).

¹⁹ See OGD Motion at 7.

²⁰ See *id.*

²¹ See *id.*

²² CLI-02-20, 56 NRC at 160.

recognizes Mr. Bear “as the duly elected Chairman of the Skull Valley Band.”²³ The Skull Valley Band leadership chose to enter into a land lease with PFS, and the Bureau of Indian Affairs conditionally approved the proposed lease in 1997.²⁴ For the NRC to intervene in an attempt to protect a “disaffected ‘subgroup’ of the Band, namely, OGD’s members, . . . would place [our agency] uncomfortably and unlawfully, right in the middle of an internal tribal dispute.”²⁵ Our position is consistent with that of the Bureau of Indian Affairs, which has stressed that the NRC has “no jurisdiction to investigate the [Skull Valley] Band’s internal financial affairs concerning these [PFS] payments.”²⁶

The FEIS cites the Skull Valley Band leadership’s declared intention to use PFS lease payments “for a number of beneficial purposes, including on-Reservation improvements to housing, development of schools, day-care, medical facilities, higher education opportunities, and commercial improvements to the Pony Express Convenience Store.”²⁷ NEPA, however, does not require the NRC to investigate or enforce whether the Band leadership in fact fulfills its promises — whether PFS payments indeed are spent prudently, legally, or otherwise to the satisfaction of the entire tribe. To be sure, OGD’s concerns are very serious, but they belong in another forum, not an NRC licensing proceeding. There would be no end to the NRC’s environmental review if the agency had to follow and scrutinize ongoing contract payments and the actions of tribal leaders.

Lastly, OGD’s motion claims that the Commission in CLI-02-20 “assumed the existence of an adequate tribal forum for resolution of internal tribal disputes” and that “it is now clear that no tribal court exists for the Skull Valley Band.”²⁸ OGD

²³ Indictment, *United States v. Leon Bear* (C.D. Utah filed Dec. 17, 2003) at 2, attached as Exhibit “A” to Affidavit of Margene Bullcreek in Support of OGD’s Motion (Jan. 29, 2004). Before the Licensing Board, OGD claimed that Leon Bear is not the legitimate tribal leader and that instead Mr. Blackbear is the legitimate leader of the Skull Valley Band. *See, e.g.*, OGD’s Response to PFS Motion for Summary Disposition (June 28, 2001) at 9. OGD’s motion to reopen the record references and includes a copy of a recent federal indictment of Mr. Blackbear, on 1 count of theft from an Indian tribal organization and 5 counts of bank fraud. Mr. Blackbear’s indictment states that the Bureau of Indian Affairs recognizes Leon Bear as the chairman of Skull Valley Band, and that Mr. Blackbear has no authority to act on behalf of the tribe. *See* Indictment, *United States v. Malinda Moon, Sammy Blackbear, Miranda Wash, and Duncan Steadman* (C.D. Utah filed Dec. 17, 2003) at 2-3, Exhibit “A” to Affidavit of Margene Bullcreek, *supra*.

²⁴ Final lease approval by BIA is conditioned on a finding that the lease will be in the best interest of the Band. PFS cannot begin construction of the facility until final approval has been granted.

²⁵ CLI-02-20, 56 NRC at 159-60.

²⁶ Brief of *Amicus Curiae* (April 15, 2002) at 1. Prior to our decision in CLI-02-20, the Commission invited BIA to set forth its position.

²⁷ *See* FEIS at 4-39. Other stated socioeconomic benefits include possible jobs for tribal members, a potential for increased business at the Pony Express Convenience Store, and significant payments to Tooele County.

²⁸ OGD’s Motion at 8.

argues that had the Commission “had an opportunity to consider the evidence of criminal activity and financial corruption of Leon Bear . . . together with the lack of any tribal court to resolve matters of internal tribal disputes, a materially different result would have been likely.”²⁹

But CLI-01-20 nowhere rested on the existence of a tribal court. It does not even mention a tribal court. Clearly, the decision emphasizes that the issues raised by OGD constitute an intratribal dispute, subject to tribal *and* criminal or civil law, but not NEPA. The decision describes OGD’s charges as matters “for criminal investigators, for civil lawsuits, or for voters in future tribal elections.”³⁰ And it acknowledges that tribal dissidents have filed administrative appeals with the Bureau of Indian Affairs, have sued in federal district court to challenge BIA’s approval of the PFS lease, and further, that criminal claims have been referred to the Federal Bureau of Investigation — all “more appropriate, avenues of redress . . . open to OGD.”³¹ Yet whether or not the Skull Valley Band specifically has a tribal court — the Band affirms that it *does* utilize a tribal court “from time to time”³² — makes no difference to the reasoning or result in CLI-02-20.³³

IV. CONCLUSION

The Commission denies OGD’s motion to reopen the record on Contention “O.”

²⁹ *Id.* at 9.

³⁰ CLI-02-20, 56 NRC at 157.

³¹ *Id.* at 160. For example, dissident members of the Skull Valley Band have sued in federal court challenging the PFS lease and the legitimacy of the currently recognized Band leadership. A recent decision in the United States Court of Appeals Tenth Circuit found these challenges premature, given that: (1) a challenge to the PFS lease is still pending before the Interior Board of Indian Appeals, and (2) the proper method for challenging tribal election results is first to file a complaint with the Secretary of the Interior, a remedy the plaintiffs have yet to exhaust. See *Blackbear v. Norton*, No. 02-4230 (10th Cir. Mar. 5, 2004).

³² Intervenor Skull Valley Band’s Response to OGD’s Motion (02/09/04) at 8.

³³ We need not address whether OGD’s motion is timely, for it is clear that the motion does not meet 10 C.F.R. § 2.734’s other requirements: the motion does not raise a significant safety or environmental issue, and it does not demonstrate that a materially different result would have been likely had the Leon Bear indictment been considered initially.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

March 5, 2004

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.-Russian Federation plutonium disposition program, the Licensing Board (1) finds that Petitioners Blue Ridge Environmental Defense League (BREDL) and Nuclear Information and Resource Service (NIRS) each established interests sufficient to confer standing; (2) admits three contentions of BREDL and admits BREDL as a party; but (3) finds that NIRS submitted no admissible contentions and therefore does not admit NIRS as a party.

**RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION**

A petitioner's standing, or right to participate in a Commission licensing proceeding, is grounded in section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1)(A), which requires the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding." The

Commission has implemented this requirement in its regulations, which at the time of this proceeding set forth the standing provisions at 10 C.F.R. § 2.714. Under Commission precedent, licensing boards look to judicial concepts of standing for guidance in determining whether a petitioner has established the necessary “interest” under 10 C.F.R. § 2.714(d)(1). To qualify for standing under these concepts, a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision, criteria commonly referred to, respectively, as “injury in fact,” causality, and redressability. The injury may be either actual or threatened, but must lie arguably within the “zone of interests” protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA).

**RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION**

Standing of petitioner public interest groups BREDL and NIRS is not opposed, and they are found to have established “representational” standing to proceed as intervenor parties by providing affidavits of members who live in the vicinity of the Catawba plant (generally within 20 miles) and authorize the organizations to represent them in this proceeding.

RULES OF PRACTICE: CONTENTIONS

To be admitted as a party in an NRC adjudication proceeding, a petitioner must, in addition to establishing standing, submit at least one contention meeting the admissibility requirements of the rule (then found) in 10 C.F.R. § 2.714.

RULES OF PRACTICE: CONTENTIONS

The failure of a contention to comply with any of the requirements of 10 C.F.R. § 2.714(b)(2), (d)(2), which are strict by design (having been toughened in 1989 because in prior years licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation), is grounds for dismissing the contention.

RULES OF PRACTICE: CONTENTIONS

Petitioners must do more than merely make unsupported allegations, but rather must read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and

the petitioner's opposing view, and explain why they have a disagreement with the applicant.

RULES OF PRACTICE: CONTENTIONS

Contentions must specifically state the issues a petitioner wishes to raise and, under 10 C.F.R. § 2.714(b)(2), consist of a specific statement of the issue of law or fact the petitioner wishes to raise or controvert.

RULES OF PRACTICE: CONTENTIONS

A contention must, under 10 C.F.R. § 2.714(b)(2)(i), be supported by a brief but reasonably specific and understandable explanation of its factual and/or legal bases. Such explanation must go beyond mere allegation and speculation that is open-ended, ill-defined, vague, or unparticularized. The Commission has explained that it is legitimate to screen out contentions of doubtful worth and avoid starting down the path toward a hearing at the behest of petitioners who themselves have no particular expertise or expert assistance, and no particularized grievance, but are hoping something will turn up later as a result of NRC Staff work.

RULES OF PRACTICE: CONTENTIONS

A petitioner must provide support for each contention in the form of expert opinion, document(s), and/or a fact-based argument at least. A contention must, under 10 C.F.R. § 2.714(b)(2)(ii), include a statement of the alleged facts or expert opinion (or both) that support the contention and on which the petitioner intends to rely to prove its case at a hearing, which must be stated with reasonable specificity.

RULES OF PRACTICE: CONTENTIONS

Under section 2.714(b)(2)(ii) a petitioner must include references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish the facts it alleges and/or the expert opinion it offers. These must also be stated with reasonable specificity and, at a minimum, consist of a fact-based argument sufficient to demonstrate that an inquiry in depth is appropriate, and illustrate that the petitioner has examined the publicly available documentary material pertaining to the facility(ies) in question with sufficient care to uncover any information that could serve as a foundation

for a specific contention. Mere reference to a document or documents will not provide an adequate basis for a contention.

RULES OF PRACTICE: CONTENTIONS

The Commission has stated that a petitioner has “an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.” 54 Fed. Reg. at 33,170 (quoting from *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)).

RULES OF PRACTICE: CONTENTIONS

In the Statement of Considerations to the 1989 amendments to the contention admissibility provisions, the Commission stated that the requirement of 10 C.F.R. § 2.714(b)(2)(ii) “does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion. However, a petitioner does not become entitled to an evidentiary hearing merely on request, or “on a bald or conclusory allegation” that a dispute exists, but “must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” 54 Fed. Reg. 33,168, 33,170-71 (quoting from *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980))

RULES OF PRACTICE: CONTENTIONS

A petitioner must, under 10 C.F.R. § 2.714(b)(2)(iii), provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, i.e., a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which would make a difference in the outcome of the proceeding. The information required must include either: (1) references to the specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes, and the supporting reasons for each dispute; or (2) if the petitioner believes that the application fails to contain information on a relevant

matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

RULES OF PRACTICE: CONTENTIONS

The contention rule does not require a specific allegation or citation of a regulatory violation, but an admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested licensing action.

RULES OF PRACTICE: CONTENTIONS

The Commission in its 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998), stated that it is the petitioner's obligation to formulate a contention and provide the information necessary to satisfy the basis requirement of the rule, and that a contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement of the rule.

RULES OF PRACTICE: CONTENTIONS

Contentions are necessarily limited to issues that are germane to the application pending before the Board, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission's notice of opportunity for hearing.

RULES OF PRACTICE: CONTENTIONS

For issues arising under NEPA, contentions must be based on the applicant's environmental report, and the petitioner can amend such contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

RULES OF PRACTICE: CONTENTIONS

Under section 2.714(d)(2)(ii), in ruling on a contention a licensing board must refuse to admit a contention if, assuming the contention were proven, it would be of no consequence in the proceeding because it would not entitle the petitioner to specific relief.

CONTENTIONS, ADMISSIBILITY

Consolidated and reframed contentions (1) that “the license amendment request (LAR) is inadequate because the applicant failed to account for differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs and on the DBA analysis for Catawba,” and (2) that “the LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba, as required by NEPA,” are admitted by the Licensing Board. The Board finds that the original contentions on which these reframed contentions are based present sufficiently specific statements of the issues of law and/or fact BREDL wishes to raise; provide sufficient explanation, stated with reasonable specificity; and rely on sufficient facts, references to various documents and authorities, including various portions of Duke’s LAR, and expert opinion, to support the admitted contentions at issue. With regard to the parts of these contentions that are based on late-filed contentions, the Board finds there was good cause for such lateness under factor (i) of section 2.714(a)(1), and that a balancing of the remaining factors of section 2.714(a)(1)(i)-(v) also supports the admissibility of these contentions, given that (under subsections 2.714(a)(1)(ii) and (iv)) there are no other means whereby BREDL’s interest could be protected, that (under subsection 2.714(a)(1)(iii)) BREDL’s participation may reasonably be expected to assist in developing a sound record through the testimony of its expert, and that factors (i) through (iv) clearly outweigh any disadvantage based on the extent to which BREDL’s participation will broaden the issues or delay the proceeding under section 2.714(a)(1)(v).

CONTENTIONS, ADMISSIBILITY

With regard to a contention asserting that the Environmental Report is deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire, the Licensing Board finds it has no jurisdiction to consider in this proceeding alternatives not within the control of Duke, and denies the contention to this extent. Because Duke does have control over the Oconee plant, the Board admits a reframed contention that “the Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs,” to the extent required for “brief discussion” under 10 C.F.R. § 51.30(a), and will permit evidence on this contention relating

to the comparative safety, practicability, and appropriateness of using the MOX LTAs at Catawba and Oconee.

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MEMORANDUM AND ORDER
(Ruling on Standing and Contentions)

This proceeding involves the February 2003 application of Duke Energy Corporation (Duke) to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies at the station. In August 2003, Petitioners Nuclear Information and Resource Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) filed petitions to intervene and requests for hearing in response to a July 2003 *Federal Register* notice concerning this application. Supplemental petitions and contentions were filed in October and December 2003 and March 2004. In this Memorandum and Order we rule on 17 non-security-related contentions of the Petitioners, denying some and admitting others, some in combined form. The Board will rule separately on certain security-related contentions submitted by BREDL.

I. BACKGROUND

A. License Amendment Request

Duke sought the original license amendment at issue in this proceeding, relating to both the McGuire Nuclear Station, Units 1 and 2, and the Catawba Nuclear Station, Units 1 and 2, in a February 27, 2003, letter. 68 Fed. Reg. 44,107 (July 25, 2003); Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003) [hereinafter LAR]. In September 2003, Duke revised the LAR to restrict the request to the Catawba facility. Letter from M.S. Tuckman to NRC (Sept. 23, 2003). In the LAR, Duke seeks to modify certain technical specifications (TSSs) to enable the use of four MOX fuel lead test assemblies in the Catawba plant, and also requests exemption from certain NRC regulations.

Duke has submitted its LAR as “part of the ongoing United States-Russian Federation plutonium disposition program,” a “nuclear nonproliferation program [the goal of which] is to dispose of surplus plutonium from nuclear weapons by converting the material into MOX fuel and using that fuel in nuclear reactors.” LAR at 2. Duke is part of a consortium, Duke Cogema Stone & Webster (DCS), that has contracted with the Department of Energy (DOE) to perform various functions associated with this program. LAR, Attachment 3 at 3-2. DCS, according to Duke, “will provide for the design, construction, operation, and deactivation of a [MOX] Fuel Fabrication Facility (MFFF),” in which DCS “will process PuO₂ powder supplied by [DOE], blend it with depleted UO₂ powder, and fabricate it into MOX fuel pellets,” which would then be loaded into MOX fuel assemblies. *Id.* (MOX fuel contains “a mixture of plutonium and uranium oxides (PuO₂ and UO₂) with plutonium providing the primary fissile isotopes.” *Id.* at 3-2 n.1.) Duke states that, “[f]ollowing NRC approval of required license amendments, the fuel assemblies will be used in the McGuire and Catawba Nuclear Stations with core fractions up to 40% MOX fuel.” *Id.* The latter are referred to as “batch” quantities of MOX fuel.

The four lead test assemblies at issue in this proceeding will, assuming approval of the LAR at issue herein, be manufactured, not in the planned MFFF, but “under the direction of Framatome ANP.” *Id.* Duke’s plans

call for [the] four lead assemblies to be irradiated for a minimum of two cycles to confirm acceptability of the planned MOX fuel assembly design, verify the validity of Duke’s models to predict fuel assembly performance, and confirm the applicability of the European database to Duke’s use of MOX fuel. Poolside post-irradiation examination (PIE) is planned to verify selected mechanical properties of the lead assemblies. In addition, some or all of the lead assemblies will undergo a third cycle of irradiation to assure that the lead assembly burnup bounds the planned batch fuel burnup. Examination of one or more fuel rods in a hot cell is planned at the completion of the lead assembly irradiation program.

Id. at 3-2–3-3.

The technical specification sections that would be modified if the LAR is approved include the following: two relating to storage of the MOX fuel lead test assemblies in the spent fuel storage racks (section 3.7.15, “Spent Fuel Assembly Storage,” and section 4.3, “Fuel Storage”); one that would be revised to allow the use of MOX fuel in addition to the currently specified slightly enriched uranium dioxide fuel, as well as the use of fuel rod cladding with an “M5™ zirconium alloy that has a different material specification than the materials currently referenced in the TS” (section 4.2, “Reactor Core”); one that would be revised to include additional methodologies that would be used to develop the limits included in the Core Operating Limits Report (section 5.6.5, “Core Operating Limits Report”);

and, finally, the TS Bases section, for which certain associated changes have been proposed. 68 Fed. Reg. 44,107 (July 25, 2003).

B. Filing of Initial Petitions

Following the July 2003 *Federal Register* publication of notice of opportunity for hearing on the LAR, Nuclear Information and Resources Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) submitted, on August 21 and 25, 2003, respectively, petitions to intervene and requests for hearing under the aegis of 10 C.F.R. § 2.714. *See* Nuclear Information & Resource Service's Request for Hearing and Petition To Intervene (Aug. 21, 2003) [hereinafter NIRS Petition]; Blue Ridge Environmental Defense League's Hearing Request and Petition To Intervene (Aug. 25, 2003) [hereinafter BREDL Petition]. Duke and the NRC Staff filed answers to these intervention petitions on September 9 and 15, 2003, respectively. *See* Answer of Duke Energy Corporation to the Petitions To Intervene and Requests for Hearing of [NIRS] and [BREDL] (Sept. 9, 2003) [hereinafter Duke 9/9/03 Answer]; NRC Staff's Answer to [NIRS] and [BREDL's] Petitions for Leave To Intervene and Requests for Hearing (Sept. 15, 2003) [hereinafter Staff 9/15/03 Answer]. In these answers both Duke and the Staff recognize the representational standing of NIRS and BREDL. *See* Duke 9/9/03 Answer; Staff 9/15/03 Answer.

C. Establishment of Licensing Board and Preliminary Proceedings

On September 17, 2003, an Atomic Safety and Licensing Board was established to preside over the proceeding. *See* 68 Fed. Reg. 55,414 (Sept. 25, 2003). Shortly thereafter, the Licensing Board issued a scheduling order, in which, among other things, the participants were offered several dates in November and December 2003 for the initial prehearing conference in this proceeding. Order (Setting Deadlines, Schedule, and Guidance for Proceedings) (Sept. 23, 2003). Based on the availability of all participants and a courtroom, the prehearing conference was subsequently scheduled to be held on December 3 and 4, 2003, in Charlotte, North Carolina, which is in the vicinity of the Catawba plant. Order (Setting Prehearing Conference Dates and Location) (Oct. 1, 2003). On October 3, 2003, the Board granted BREDL's request for extension of the deadlines for amended and supplemented petitions, finding that concerns for efficiency and avoidance of delay, on the one hand, and the need to ensure adequate opportunity for the Petitioners to introduce matters of safety or environmental concern, on the other, were not in conflict in this proceeding since an extension would occasion no delay in light of the December 2003 dates for oral argument. The Board also extended the deadline for responses to the amended and supplemented petitions.

Order (Granting Request for Extension of Time) (Oct. 3, 2003); *see* [BREDL's] Request for Extension of Time To File Supplemental Petition To Intervene (Sept. 29, 2003); Duke Energy Corporation's Opposition to BREDL's Request for an Extension of Time (Sept. 30, 2003); NRC Staff's Opposition to BREDL's Request for an Extension of Time (Oct. 2, 2003).

D. Supplemental Petitions

The Petitioners filed supplemental petitions, containing various non-security-related contentions, on October 21, 2003, in accordance with the deadline set in the Board's October 3 Order. *See* [BREDL's] Supplemental Petition To Intervene (Oct. 21, 2003) [hereinafter BREDL 10/21/03 Contentions]; Contentions of [NIRS] (Oct. 21, 2003) [hereinafter NIRS Contentions]. In these filings, BREDL submitted nine contentions, and NIRS proffered five contentions. Staff and Duke responses to Petitioners' supplemental petitions were received on November 10 and 11, 2003, respectively. *See* NRC Staff's Response to [BREDL's] Supplemental Petition To Intervene and [NIRS's] Contentions (Nov. 10, 2003) [hereinafter Staff 11/10/03 Response]; Answer of Duke Energy Corporation to "[BREDL's] Supplemental Petition To Intervene" and the "Contentions of [NIRS]" (Nov. 11, 2003) [hereinafter Duke 11/11/03 Answer]. The Staff opposes the admission of all but parts of two of BREDL's original, October 21, 2003, contentions (BREDL Contention 7, Inappropriate Use of SPDEIS for Conclusion That Impacts Are Significant; BREDL Contention 5, Failure To Consider New Information Showing Viability of Alternatives, to the extent of agreeing that Duke should consider the alternative of its Oconee plant in its Environmental Report), and all of NIRS's contentions. *See generally* Staff 11/10/03 Response; Tr. 456; NRC Staff's Reply to Blue Ridge Environmental Defense League's Response to Board Questions (Dec. 19, 2003) at 9 n.6 [hereinafter Staff 12/19/03 Reply]. Duke opposes all of the Petitioners' contentions. *See generally* Duke 11/11/03 Answer.

Oral argument was heard on the October contentions on December 3-4, 2003, in Charlotte, in accordance with various preliminary guidance principles established by the Board on the conduct of the argument. Tr. 71-576; Order (Regarding Provision of LAR and Other Documents, and Conduct of Oral Argument) (Nov. 20, 2003); Order (Regarding Motion for Protective Order and General Conduct of Oral Argument) (Dec. 1, 2003) [hereinafter Board 12/1/03 Order]. Meanwhile, BREDL submitted four late-filed contentions on December 2, 2003, and, pursuant to a schedule proposed by the participants at the Board's direction, various other filings, including responses to BREDL's December 2 contentions, were also submitted during December 2003, and addressed in a series of orders and conferences. *See* [BREDL's] Second Supplemental Petition To Intervene (Dec. 2, 2003) [hereinafter BREDL 12/2/02 Contentions]; Order (Regarding Telephone Conference, Deadlines, and Scheduling Issues) (Dec. 8,

2003) [hereinafter Board 12/8/03 Order]; Tr. 577-614; Blue Ridge Environmental Defense League's Response to Board Questions (Dec. 12, 2003) [hereinafter BREDL 12/12/03 Filing]; NRC Staff's Response to Board's Question Regarding Executive Order 12114 (Dec. 12, 2003) [hereinafter Staff 12/12/03 Filing]; Order (Regarding Deadlines and Scheduling Issues) (Dec. 15, 2003) [hereinafter Board 12/15/03 Scheduling Order]; Duke Energy Corporation's Reply to Responses to Board Questions (Dec. 19, 2003) [hereinafter Duke 12/19/03 Reply]; NRC Staff's Reply to [BREDL's] Response to Board Questions (Dec. 19, 2003) [hereinafter Staff 12/19/03 Reply]; [BREDL's] Reply to NRC Staff Regarding Applicability of Executive Order 12114 (Dec. 19, 2003) [hereinafter BREDL 12/19/03 Reply]; Answer of Duke Energy Corporation to "[BREDL's] Second Supplemental Petition To Intervene" (Dec. 23, 2003) [hereinafter Duke 12/23/03 Answer]; NRC Staff Opposition to BREDL's Second Supplemental Petition To Intervene (Dec. 24, 2003) [hereinafter Staff 12/24/03 Opposition].

In its December 8, 2003, order the Board, in addition to addressing various other matters, set a deadline of 30 days from the date a party receives any new information, for the filing of any late-filed or amended contentions based on such information. Board 12/8/03 Order at 3.

Oral argument was heard on BREDL's December 2, 2003, contentions on January 15, 2004, in Charlotte. *See* Order (Providing Notification of Location for January 15, 2004, Oral Argument) (Dec. 31, 2003); Tr. 615-826.

E. Related Security Matters and Contentions

In addition to the non-security-related contentions addressed in this Memorandum and Order, various security-related issues have arisen in this proceeding. The first such matter that was brought to this Board was Duke and the Staff's October 8, 2003, proposed Motion for Protective Order, relating to certain material deemed by the Staff to constitute Safeguards Information (SGI). Motion for Protective Order (Oct. 8, 2003) [hereinafter 10/8/03 Motion for Protective Order]. Because of various security-related concerns first raised by the Board upon receipt of the proposed order, and subsequently addressed by the Staff during October and November, the Board did not approve or issue the first proposed protective order submitted by the Staff and Duke.¹ On November 26,

¹Based on certain security concerns relating to the Motion for Protective Order, the Board on October 9 issued an order scheduling a telephone conference for October 10 to address these concerns. Order (Addressing Certain Security Issues and Scheduling Telephone Conference) (Oct. 9, 2003). During the October 10 conference, Tr. 1-46, the Staff indicated that, despite the October 8 motion, "there may be some concern" such that the Staff was "not ready to give . . . a final decision" on certain issues relating to the proposed protective order. Tr. 6-7. This related to the possibility of applying

(Continued)

2003, the Staff filed a new motion for a protective order. *See* NRC Staff's Motion for Protective Order (Nov. 26, 2003) [hereinafter Staff 11/26/03 Motion for Protective Order].² BREDL filed an objection to the Staff's proposed protective order on December 10, 2003; thereafter argument was heard on the proposed order and related issues both during the December 3-4 oral argument and in a December 11 telephone conference, and a revised protective order was issued December 15, 2003. [BREDL]'s Objection to Proposed Protective Order (Dec. 10, 2003); Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (Dec. 15, 2003) [hereinafter 12/15/03 Protective Order]; *see* Board 12/1/03 Order; Tr. 547-68, 577-614; Board 12/15/03 Scheduling Order.³

Category 1 facility standards to Catawba with regard to the LAR, which the Staff was not ready to decide at that point, and which, according to Staff counsel, "could cause a delay in the proceedings." Tr. 12-15.

Staff counsel indicated that it would try to provide notification of the relevant classification by October 23, and that "the 30th of October would probably be the latest date [the Staff] anticipate[d] . . . getting back to the Board." Tr. 42-44. Counsel agreed to notify the Board and all participants, no later than October 15, of when the Staff expected to make a determination on the classification level of the material in question. Tr. 36. Two tentative dates were set for another telephone conference — October 23 and 30 — the final scheduling of which would depend on when the Staff made its determination. Tr. 43-44; *see* Order (Confirming Matters Addressed at October 10, 2003, Telephone Conference) (Oct. 10, 2003). On October 15, 2003, Staff counsel sent the Board a letter, stating that the Staff expected to make its determination as to the classification level of the material in question "on or about December 5, 2003." Letter from Antonio Fernández, Counsel for NRC Staff, to Administrative Judges (Oct. 15, 2003).

Thereafter, the Board issued an Order on October 16, 2003, setting the next telephone conference for October 23, the earlier of the two tentative dates, in order to avoid further delay; and indicating that the schedule for the Staff's classification level determination, and its impact on the conduct of this proceeding, along with any other appropriate matters, would be addressed at this conference. Order (Scheduling October 23, 2003, Telephone Conference) (Oct. 16, 2003). At the October 23 conference, various scheduling matters, including those related to security issues, were addressed. Tr. 47-70.

²The Staff's new motion and proposed protective order addressed the same material as the earlier proposed order did — primarily, a September 15, 2003, document submitted by Duke in support of its LAR, describing additional security measures it proposes to implement relating to the anticipated presence and irradiation of the MOX lead test assemblies at the Catawba plant. Staff 11/26/03 Motion for Protective Order at 1; *see* 10/8/03 Motion for Protective Order. Duke's September 15 submittal, most of which has been designated by the Staff as containing Safeguards Information, consists of a transmittal letter and seven attachments, including a proposed revision to Duke's existing security and contingency plan, and a related request for exemptions from certain NRC regulations. *See* Staff 11/26/03 Motion for Protective Order at 1; Letter from M.S. Tuckman, Duke Energy Corporation, to Document Control Desk, NRC (Sept. 15, 2003) [hereinafter Duke 9/15/03 Security Submittal].

³In its December 15 Scheduling Order, among the matters addressed were deadlines for security-related contentions and dates for oral argument on them, as well as the matter of assistance with security issues for the Board and participants. The revised Protective Order issued the same date

(Continued)

Various other security-related matters were also addressed during January and February 2004, in several orders, telephone conferences, and two closed hearings held on January 21 and February 13, 2004, to address certain “need to know” and other security-related issues raised by BREDL on January 13, and considered in part during the January 15, 2003, oral argument. *See* [BREDL]’s Request for Need To Know Determination and Motion for Extension of Deadline for Filing Security Contentions (Jan. 13, 2004) (designated as “May Contain Safeguards Information”); Order (Scheduling *In Camera* Oral Argument on Blue Ridge Environmental Defense League’s Request for Need To Know Determination and Motion for Extension of Deadline for Filing Security Contentions) (Jan. 20, 2004); Memorandum (Providing Notice of Granting BREDL Motion for Need To Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan 29, 2004); [BREDL]’s Emergency Motion for Access to NRC Staff Meeting on February 6, 2004 (Feb. 3, 2004)⁴; Memorandum and Order (Ruling on BREDL Motion Regarding Staff February 6, 2004, Meeting with Duke Energy and Request for Need To Know Determination) (Feb. 4, 2004); Memorandum and Order (Ruling on BREDL Motion for Need To Know Determination Regarding Classified Documents) (Feb. 17, 2004); *see also* Tr. 621-43, 746-63, 947-1010, 1164-1217.

On February 2, in response to the Board’s request, the Commission appointed Mr. Robert B. (Barry) Manili, of the Materials, Transportation, and Waste Security Division, Division of Nuclear Security, Office of Nuclear Security and Incident Response (NSIR), to be the “representative to advise and assist the Atomic Safety and Licensing Board with respect to security classification of information and the safeguards to be observed in this proceeding, pursuant to 10 C.F.R. § 2.904.” Order (Feb. 2, 2004); *see* Request to Commission (Seeking Designation of Representative To Advise and Assist Licensing Board

contained an attached nondisclosure affidavit to be signed by all persons who would be granted access to Safeguards Information under the protective order. The information covered by the protective order and nondisclosure affidavit includes “(1) the September 15, 2003 Security Plan Submittal or any supplements or amendments thereto, including Requests for Additional Information (RAIs) or responses to RAIs relating to that submittal; and (2) any information obtained, developed, or created by virtue of these proceedings, in any form, that is not otherwise a matter of public record and that deals with or describes details of the Security Plan Submittal.” 12/15/03 Protective Order at 2. Also under the protective order, any individual must have a “need to know” any protected information that he or she may be shown, and any disputes regarding any “need to know” determinations are to be resolved by determination of the Licensing Board. *Id.* at 3-4.

⁴We note with regard to BREDL’s motions that BREDL’s counsel, Ms. Curran, and expert, Dr. Lyman, have obtained from the NRC, after undergoing appropriate investigation, “L” level security clearances that allow them access to certain safeguards and classified information in regard to which they have a “need to know.” *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) (Dec. 18, 2002) (unpublished) (hereinafter *Duke Cogema 12/18/02 Order*).

with Respect to Classification of Information and Safeguards To Be Observed) (Jan. 23, 2004). On February 18, 2004, the Commission issued a Memorandum and Order reversing the Board's January 29 and February 4, 2004, decisions. CLI-04-6, 59 NRC 62.

On March 3, 2004, BREDL filed a safeguards document containing its security-related contentions, oral argument on which has been scheduled for March 18, 2004. *See* Order (Regarding Deadlines and Scheduling Issues) (Mar. 5, 2004) (unpublished).

II. ANALYSIS

A. Standing

A petitioner's standing, or right to participate in a Commission licensing proceeding, is grounded in section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1)(A), which requires the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding." The Commission has implemented this requirement in its regulations in 10 C.F.R. § 2.714.⁵

When determining whether a petitioner has established the necessary "interest" under section 2.714, licensing boards are directed by Commission precedent to look for guidance to judicial concepts of standing. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Institute of Technology* (Georgia

⁵The citation to 10 C.F.R. § 2.714 is to the former section number that was in effect prior to a significant revision to the agency's 10 C.F.R. Part 2 rules of practice and procedure, which became effective February 13, 2004. Under part of this revision, the provisions of section 2.714 were moved to a new section, section 2.309. *See* 69 Fed. Reg. 2182, 2220-22 (Jan. 14, 2004). Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply here, and we use the former numbering throughout this Memorandum and Order.

Under the former section 2.714(a)(2), an intervention petition must set forth with particularity "the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1)," along with "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). Subsection (d)(1) provides in relevant part that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner:

- (i) The nature of the petitioner's right under the [AEA] to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Tech Research Reactor, Atlanta, Georgia), CLI-95-2, 42 NRC 111, 115 (1995). According to these concepts, to qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995). These three criteria are commonly referred to, respectively, as “injury in fact,” causality, and redressability. The requisite injury may be either actual or threatened, *Yankee*, CLI-98-21, 48 NRC at 195 (*citing, e.g., Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)), but must arguably lie within the “zone of interests” protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA). *See Yankee*, CLI-98-21, 48 NRC at 195-96; *Ambrosia Lake Facility*, CLI-98-11, 48 NRC at 6.

As indicated above, both Duke and the Staff recognize the representational standing of BREDL and NIRS. *See* Duke 9/9/03 Answer at 8-10; Duke 11/11/03 Answer at 8-9; Staff 9/15/03 Answer at 5-8; Staff 11/10/03 Response at 3. We likewise find that both BREDL and NIRS, having members who live in the vicinity of the Catawba plant (generally within 20 miles) and who have submitted declarations authorizing BREDL or NIRS to represent their interests, have established “representational standing” to participate in this proceeding under AEA section 189a and the Commission’s rules. *See Yankee*, CLI-98-21, 48 NRC at 195; *Georgia Tech*, CLI-95-2, 42 NRC at 115; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001), *aff’d*, CLI-01-17, 54 NRC 3 (2001).

B. Contentions

1. Standards for Admissibility of Contentions

To intervene in an NRC proceeding, a Petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.714(b), (d).⁶ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1,

⁶The standards of section 2.714(b), (d), provide in relevant part as follows:

(b)(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(Continued)

2, and 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). In addition, nontimely filings may not be entertained unless we find that a balancing of the following factors from 10 C.F.R. § 2.714(a)(1) so warrants:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke*

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

* * * *

- (d) . . . [A] ruling body or officer shall, in ruling on —
. . . .
 - (2) The admissibility of a contention, refuse to admit a contention if:
 - (i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or
 - (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)).

Thus, Petitioners must do more than merely make unsupported allegations. Any petitioner must “read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and the petitioner’s opposing view,” and “explain[] why they have a disagreement with [the applicant].” *Millstone*, CLI-01-24, 54 NRC at 358 (citing the Statement of Considerations (SOC) for the 1989 amendments to the contention requirements, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)); 54 Fed. Reg. at 33,171. Contentions must *specifically* state the issues a petitioner wishes to raise and, in addition to providing support for each contention in the form of expert opinion, document(s), and/or a fact-based argument at least, a petitioner must provide reasonably specific and understandable *explanation* and *reasons* to support its contentions. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341-42 (1999).

As the Commission has explained:

It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of Petitioners who themselves have no particular expertise — or expert assistance — and no particularized grievance, but are hoping something will turn up later as a result of NRC Staff work.

Id. at 342. Nor will mere reference to documents provide an adequate basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

The contention rule does not require “a specific allegation or citation of a regulatory violation,” *Millstone*, CLI-01-24, 54 NRC at 361, but an admissible contention “must *explain, with specificity*, particular safety or legal reasons requiring rejection of the contested [licensing action],” *id.* at 359-60 (emphasis added). Moreover, a petitioner is obliged, under 10 C.F.R. § 2.714(b)(2)(iii), either “to include references to the specific portion of the application . . . that the petitioner disputes and the supporting *reasons* for each dispute,” *id.* (emphasis added), or, if a contention alleges that an application “fails to contain information on a relevant matter as required by law,” *id.*, to identify “each failure and the supporting reasons for the petitioner’s belief.” *Id.* (emphasis added); see *Millstone*, 54 NRC at 361-62. The Commission has in addition advised that a petitioner has “an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.” 54 Fed. Reg. at 33,170 (quoting from *Duke Power Co.*

(Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)).

In the SOC to the 1989 amendments the Commission provides guidance in interpreting and applying the contention admissibility standards — guidance that is entitled to “special weight” in adjudication proceedings. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). The Commission notes in the SOC that the requirement of 10 C.F.R. § 2.714(b)(2)(ii) “does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). Further, the Commission notes:

“[A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.”

. . . . The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.

54 Fed. Reg. at 33,170-71 (quoting from *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980).

It is, however, the petitioner’s obligation to formulate a contention and provide the information necessary to satisfy the basis requirement of the rule. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 125 (1998). A “contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement” of the rule. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

Finally, contentions are necessarily limited to issues that are germane to the application pending before the Board, *Yankee*, CLI-98-21, 48 NRC at 204 n.7, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission’s notice of opportunity for hearing. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

To summarize, a contention must:

(A) under section 2.714(b)(2), consist of a *specific* statement of the issue of law or fact the petitioner wishes to raise or controvert; and

(B) under subsection 2.714(b)(2)(i), be supported by a brief *explanation* of the factual and/or legal basis or bases of the contention, which goes beyond mere allegation and speculation, is *not* open-ended, ill-defined, vague, or unparticularized, and *is* stated with reasonable specificity; and

(C) under subsection 2.714(b)(2)(ii), include a statement of the alleged facts or expert opinion (or both) that support the contention and on which the petitioner intends to rely to prove its case at a hearing, which must also be stated with reasonable specificity; and

(D) also under subsection 2.714(b)(2)(ii), include references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish the facts it alleges and/or the expert opinion it offers, which must also be stated with reasonable specificity and, at a minimum, consist of a fact-based argument sufficient to demonstrate that an inquiry in depth is appropriate, and illustrate that the petitioner has examined the publicly available documentary material pertaining to the facility(ies) in question with sufficient care to uncover any information that could serve as a foundation for a specific contention; and

(E) under subsection 2.714(b)(2)(iii), provide sufficient information to show that a *genuine dispute* exists with the applicant on a *material* issue of law or fact (i.e., a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which “would make a difference in the outcome of the licensing proceeding,” 54 Fed. Reg. at 33,172), which includes either:

(1) *references to the specific portions of the application* (including the applicant’s environmental report and safety report) that the petitioner disputes *and the supporting reasons for each dispute*, or

(2) if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the *identification of each failure and the supporting reasons for the petitioner’s belief*.

See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 67-68 (2002); *see also* LBP-03-3, 57 NRC at 64.

Also, as indicated in the text of section 2.714(b)(2)(iii), for issues arising under NEPA, contentions must be based on the applicant’s environmental report, and the petitioner can amend such contentions or file new contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that

differ significantly from the data or conclusions in the applicant’s document.’’ And under section 2.714(d)(2)(ii), in ruling on a contention a licensing board must refuse to admit a contention if, assuming the contention were proven, it would be of no consequence in the proceeding because it would not entitle the petitioner to specific relief.

2. Discussion and Rulings on Contentions

In light of the preceding discussion, we now address the Petitioners’ contentions. We first address a grouping of contentions that center around the same sets of issues, and then consider the remaining contentions individually.

a. BREDL Contentions Relating to MOX Fuel Behavior, and Impact of Differences Between MOX and LEU Fuel Behavior on DBA Analysis and Potential for Releases Under NEPA

BREDL Contentions 1, 2, 6, 7, 10, 11, and 12 raise two related groups of issues. One group of issues has to do with how differences between the behavior of low enriched uranium (LEU) fuel and MOX fuel could impact the design basis accident analysis for Catawba; the other concerns how the same differences could impact severe accident consequences and potential releases under the National Environmental Policy Act (NEPA). More specifically, the first group of issues deals with whether Duke in its LAR has adequately considered those aspects of MOX fuel behavior that are different from LEU fuel behavior in the calculations Duke has used to support its assertion that there is essentially no difference between MOX and LEU fuel performance during a design basis accident (DBA). The second group of issues — that having to do with severe accident consequences and potential releases under NEPA — goes to whether any differences in MOX fuel behavior would have any impact on the potential for, magnitude of, and/or consequences of any releases from Catawba, and whether Duke has in its LAR adequately quantified the risk to the environment that could result from the use of the MOX fuel lead test assemblies at Catawba.

The root of all these contentions is BREDL’s assertion that Duke has failed to account for differences in MOX and LEU fuel behavior (both known differences as well as recent information on possible differences) and to account for and quantify the impact of such differences on both the DBA analysis for Catawba, and the potential for releases and their consequences, under NEPA.

Because the factual and technical questions involved in the above-listed contentions overlap to a large degree, and also appear to us to focus on the central substantive set of issues raised in the contentions now before us, we consider first in our analysis the contentions that raise these dual “threads” of inquiry

together, as a group, prior to addressing the remaining contentions submitted by the Petitioners. Before, however, moving into an in-depth analysis of this group of contentions, an overview of the contentions themselves perhaps best illustrates the related nature of the issues addressed therein:

BREDL 1. Failure to Provide Quantitative Information in Risk Impact Analysis

Duke's risk impact analysis is inadequate, because it presents the results of its analysis in qualitative terms only.

BREDL 2. Inappropriate use of SPDEIS for Estimate of Consequence Increase

Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant.

BREDL 6. Failure to Provide Quantitative Information in Support of Assertions re Environmental Impacts

Duke fails to provide quantitative support for its assertion that the consequences of a severe accident involving use of LTA MOX fuel assemblies will increase 0.3% at most.

BREDL 7. Inappropriate use of SPDEIS for Conclusion that Impacts are Insignificant

Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant.

BREDL 10. Failure to Account for uncertainties in MOX fuel assembly behavior during Loss of Coolant Accidents

Duke's safety analysis for design-basis loss-of-coolant accidents ("LOCAs") in Section 3.7 of the LTA license amendment application is inadequate, because it fails to account for uncertainties in the technical understanding of the behavior of MOX fuel during LOCAs that may lead to significant deviations from low-enriched uranium ("LEU") fuel behavior.

BREDL 11. Failure to consider uncertainties in MOX fuel assembly behavior on the probabilities and consequences of severe accidents

Duke's analysis of the impact of the plutonium MOX LTAs on the probabilities and consequences of severe accidents is inadequate, because it fails to account for uncertainties in the technical understanding of the behavior of MOX fuel during severe accidents that may lead to significant deviations from low-enriched uranium ("LEU") fuel behavior.

BREDL 12. Failure to consider effects of plutonium MOX fuel characteristics on severe accident potential

BREDL characterizes Contentions 1, 2, 10, and 11 as safety issues under the Atomic Energy Act (AEA) and implementing regulations, and Contentions 6, 7, and 12 as issues arising under the National Environmental Policy Act (NEPA). Again, as indicated above, the root of all these contentions is that Duke has failed to account for certain asserted differences in MOX and LEU fuel behaviors, and for the impact of such asserted differences on both the Catawba DBA analysis and the potential for releases under NEPA.

In the next several sections of this Memorandum, we summarize BREDL's bases for this group of contentions; discuss the responses of Duke and the NRC Staff on the admissibility of these contentions; state our rulings; and provide our reframing of the contentions we find admissible in two consolidated contentions, renumbered as Contentions I and II.

(1) BASES FOR BREDL CONTENTIONS 1, 2, 6, 7, 10, 11, AND 12

BREDL 1. Failure to Provide Quantitative Information in Risk Impact Analysis

Duke's risk impact analysis is inadequate, because it presents the results of its analysis in qualitative terms only.

BREDL in Contention 1 challenges Duke's risk impact analysis in section 3.8 of the LAR. BREDL in this contention relies on the first two paragraphs of section 3.8, which contain the following language:

The use of four MOX fuel lead assemblies (out of a total of 193 fuel assemblies in the core) will not significantly change the risk to public health and safety that is posed by operation of . . . Catawba.

Duke uses probabilistic risk assessment (PRA) analyses to evaluate the risk to public health and safety due to operation of its nuclear plants. PRA analyses quantify the probability and consequences of severe accidents that involve core melt and containment failure events. Key considerations in PRA analyses are equipment requirements to prevent core melt (success criteria); ice melt times, containment pressurization rates, and potential containment failures (containment performance); and doses to the public (offsite consequences). The attributes of MOX fuel that impact these areas are fundamentally similar to uranium fuel, as discussed below.

LAR, Attachment 3 at 3-36; BREDL 10/21/03 Contentions at 4. Asserting that Duke provides only qualitative arguments for its claim that the probability of a severe accident will not significantly increase, BREDL contends that Duke "does not attempt to calculate the changes in core damage frequency (CDF)

and Large Early Release Frequency (LERF) associated with the proposed license amendment.” BREDL 10/21/03 Contentions at 5. BREDL argues that by failing to provide quantitative calculations, “Duke’s risk analysis fails to provide an adequate basis for the NRC to conclude that the increases in core damage frequency or risk are ‘small and consistent with the intent of the Commission’s Safety Goal Policy Statement,’ an important criterion for risk-informed decision-making.” *Id.* (citing Regulatory Guide 1.174, Revision 1, entitled “An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis” at 1.174-6 (2002) [hereinafter Reg. Guide 1.174]).

BREDL 2. Inappropriate use of SPDEIS for Estimate of Consequence Increase

Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant.

In Contention 2, also relating to section 3.8 of the LAR, BREDL challenges Duke’s statement that the “potential impact [from use of MOX lead test assemblies] on offsite consequences from severe accidents would range from about minus 0.1% to plus 0.3% compared to LEU fuel.” LAR, Attachment 3 at 3-37; *see* BREDL 10/21/03 Contentions at 5. Noting that Duke apparently relies on scaled results, based on figures for offsite consequences from severe accidents with a 40% MOX fuel core that are found in DOE’s November 1999 Surplus Plutonium Disposition Final Environmental Impact Statement (SPDEIS), BREDL alleges the following problems: (1) incorrect scaling of the figures, with Duke dividing by an incorrect factor of 40 rather than the correct factor of 20 (leading to a result “from between (–) 0.2% to (+) 0.7%”); (2) the outdated nature of DOE’s calculation of consequences; (3) Duke’s not taking into account published research noting flaws in DOE’s analysis (including an article of Dr. Lyman on public health risks associated with MOX fuel use), according to which the DOE calculation uses “uniformly low values for actinide release fractions,” which are “parameters with large uncertainties”; and (4) the current impossibility of fully evaluating the risk impact of the proposed MOX lead test assemblies LAR using Reg. Guide 1.174, “because the NRC staff has not completed final guidance on how [Reg. Guide] 1.174 can be applied in the case of MOX fuel use.” *Id.* at 5-6.

BREDL asserts that “[i]n order to evaluate the overall impact on risk of the MOX LTA license amendment, it is necessary to know which accidents will be most affected, and how the increase in probability and consequences will change,” and that “in order to make that assessment, Duke must use its own up-to-date PRA, and provide the results of its calculations, including the details of the consequence assessment.” *Id.* at 6-7 (citing, *inter alia*, E. Lyman, “Public Health Risks of Substituting Mixed-Oxide for Uranium Fuel in Pressurized Water

Reactors,’’ *Science & Global Security* 9 at 33-79 (2001) [hereinafter Lyman 2001 *Science Article*]).

BREDL 6. Failure to Provide Quantitative Information in Support of Assertions re Environmental Impacts

Duke fails to provide quantitative support for its assertion that the consequences of a severe accident involving use of LTA MOX fuel assemblies will increase 0.3% at most.

BREDL 7. Inappropriate use of SPDEIS for Conclusion that Impacts are Insignificant

Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant.

BREDL Contentions 6 and 7 address the same factual questions as those raised in BREDL Contentions 1 and 2, relating to the consequences of a severe accident using MOX LTAs, but in a NEPA context. In Contention 6, BREDL claims that Duke has not shown quantitative support for its statement, in section 5.6.3.2 of the Environmental Report (ER) of the LAR, that the consequences of a severe accident from the LAR will have a maximum increase of 0.3%. *Id.* at 13-14. Further, BREDL alleges, “[b]y describing environmental impacts in purely qualitative terms, when it also has the information in quantitative terms, Duke violates the requirement of [10 C.F.R. § 51.45(c)] that the analysis in an Environmental Report must quantify the various factors considered ‘to the extent possible.’” *Id.* at 14. BREDL asserts that Duke must document its risk analysis by providing “all the details of its consequence assessment, including a full description of core inventory, release fractions, consequence modeling, techniques used, and a full accounting of uncertainties.” *Id.*

In Contention 7, as in Contention 2, BREDL disputes Duke’s claim that the radiological consequences of a severe accident would increase by no more than 0.3%, noting the asserted incorrect scaling of the SPDEIS figures, which BREDL alleges “misrepresents the environmental impacts of the proposed license amendment.” *Id.* Thus, BREDL asserts:

In order to evaluate the significance of the impacts of MOX LTA testing, it is necessary to know which accidents will be most affected, and how the increase in probability and consequences will change. In turn, in order to make that assessment, Duke must use its own up-to-date PRA, and provide the results of its calculations, including the details of the consequence assessment. Even if the increase in consequences is no more than 2%, the change in risk could be significant for CDFs 100 times higher than what Duke assumed, as may be the case if sump recirculation is not available.

Id. at 15.

BREDL 10. Failure to account for uncertainties in MOX fuel assembly behavior during Loss of Coolant Accidents

Duke's safety analysis for design-basis loss-of-coolant accidents ("LOCAs") in Section 3.7 of the LTA license amendment application is inadequate, because it fails to account for uncertainties in the technical understanding of the behavior of MOX fuel during LOCAs that may lead to significant deviations from low-enriched uranium ("LEU") fuel behavior.

BREDL 11. Failure to consider uncertainties in MOX fuel assembly behavior on the probabilities and consequences of severe accidents

Duke analysis of the impact of the plutonium MOX LTAs on the probabilities and consequences of severe accidents is inadequate, because it fails to account for uncertainties in the technical understanding of the behavior of MOX fuel during severe accidents that may lead to significant deviations from low-enriched uranium ("LEU") fuel behavior.

BREDL 12. Failure to consider effects of plutonium MOX fuel characteristics on severe accident potential

Contention 10, along with Contentions 11 and 12 (all three of which were filed on December 2, 2003), all arise out of information presented at an October 23, 2003, meeting the NRC Staff held with representatives of the French Institut de Radioprotection et de Sûreté Nucléaire (IRSN). In this meeting, A. Mailliat and J.C. Mélis presented slides relating to a proposal to do a series of tests at the Phébus experimental reactor in France, relating to MOX fuel. BREDL 12/2/03 Contentions at 3. BREDL argues that this proposal is highly significant "given NRC's dependence on foreign MOX data (or lack thereof) in evaluating MOX-related submittals." *Id.*

With regard to application of the late-filing criteria of 10 C.F.R. § 2.714(a)(1) to Contentions 10, 11, and 12, BREDL contends that it had good cause for the late filing of Contentions 10, 11, and 12, stating that the slides from the October 23, 2003, IRSN presentation were not available to them until they were placed in NRC's CITRIX system on November 4, within 30 days of which BREDL filed the contentions.⁷ *Id.* at 11. BREDL also asserts that the October 2003 presentation not only raised new and significant different information not previously presented by the IRSN at earlier meetings in 2001 and 2002, it had as its primary purpose the presentation of a proposal and discussion of issues relating to plutonium MOX fuel and high burnup fuel. Tr. 647-58. Regarding the other four factors of 10 C.F.R. § 2.714(a)(1)(i)-(v), BREDL argues, first, that there are no other

⁷ At BREDL's request the slides were later placed in ADAMS, with Accession No. ML032970642. BREDL 12/2/03 Contentions at 11.

means available than this proceeding of “protecting its interest in ensuring that the testing of plutonium MOX lead test assemblies is conducted in a manner that adequately protects health and safety and complies with the environmental safeguards of NEPA.” BREDL 12/2/03 Contentions at 11. Next, BREDL asserts that its participation in the proceeding “may reasonably be expected to assist in developing a sound record,” through the testimony of Dr. Lyman, and that there are no other parties who can represent BREDL’s interest in this regard. *Id.* Finally, BREDL argues that, while granting a hearing on the late-filed contentions “may broaden the proceeding somewhat, these effects will not be unreasonable, given that the contentions are being filed early in the proceeding,” and that a balancing of the late-filing factors thus favors the admission of the contentions. *Id.*; *see also* Tr. 666-69.

Substantively, BREDL in Contention 10 challenges Duke’s deterministic safety analysis for the impact of the MOX fuel lead assemblies (in sections 3.7.1 and 3.7.1.1 of the LAR), contending that it fails to take into account what BREDL asserts to be an inadequacy in the experimental database for MOX fuel performance during LOCAs. BREDL 12/2/03 Contentions at 3. BREDL argues that the proposed French tests both illustrate and address such “gaps” in the experimental database for both MOX fuel and high-burnup LEU fuel. *Id.* According to BREDL, the IRSN presentation suggests that MOX fuel relocation “would increase power and negatively affect heat transfer, with a deleterious impact on important LOCA parameters,” including increases in peak clad temperature (PCT) (“stated at the meeting to be 100°C higher”), clad oxidation (“stated at the meeting to be a 5%-10% increase in the oxide layer”), and clad hydrogen uptake. *Id.* at 3-4; *see* Tr. 644-45. BREDL states that the IRSN representatives pointed out that “this question is particularly important for end-of-life MOX fuel where power generation is not reduced, unlike for UO₂ fuel.” BREDL 12/2/03 Contentions at 4 (*quoting* IRSN slides at 21).

Further, BREDL asserts, the IRSN presentation suggested that “modern, low-tin, high ductility cladding materials, such as the M5 cladding that will be used in the MOX LTAs, will form bigger ‘balloons’ than conventional Zircaloy and are likely to have higher blockage ratios.” *Id.* (*citing* IRSN slides at 24-25). This effect, BREDL argues, “combined with MOX-specific behavior, cannot be fully assessed in the absence of the integral LOCA MOX fuel-bundle tests that IRSN is proposing,” and “[t]hus there is insufficient information to provide confidence that the MOX LTAs will not cause coolant blockage during a LOCA that could lead to an unacceptable loss of core coolable geometry and an uncontrolled core melt.” BREDL 12/2/03 Contentions at 4. Because of these “unknowns regarding the behavior of MOX fuel during a LOCA,” BREDL argues, “Duke lacks a factual basis for assuring that the existing emergency core cooling systems at Catawba will meet the acceptance criteria in 10 CFR 50.46,” and its LAR should be denied. *Id.*

In Contention 11, BREDL relies on the basis provided for Contention 10, and makes many of the same arguments as in Contention 10, relating them to section 3.8 of the LAR and severe accidents instead of LOCAs, and citing a part of the IRSN presentation having to do with MOX fuel behavior during severe accidents. *See id.* at 5. BREDL asserts that the IRSN information indicates that “[p]henomena that could affect the consequences of severe accidents include both higher release rates and higher release fractions for both fission products and actinides compared to LEU, as a result of the MOX fuel microstructure and different oxidation potential.” *Id.* at 5-6. BREDL concludes, in Contention 11, with the following argument:

[T]he use of plutonium MOX fuel at the Catawba nuclear plant appears to pose a risk that plant safety systems will not be adequate to stop a LOCA from progressing to a core melt. At a minimum, the different characteristics of MOX fuel and LEU raise substantial uncertainties with respect to the probabilities and consequences of severe accidents for the MOX LTA core. Because of the potential for a significant increase in severe accident risk, these uncertainties should be fully analyzed in Duke’s MOX LTA [LAR].

Id. at 6.

BREDL in Contention 12 adopts and incorporates by reference the bases of Contentions 10 and 11, challenging Duke’s discussion, in sections 5.6.3.1 and 5.6.3.2 of its ER, of the environmental impacts of both design basis and severe accidents. Pointing out that neither cited section of the ER discussed “the susceptibility of plutonium MOX fuel to slumping during a LOCA or the adverse effect that slumped fuel may have on the ability of the safety injection system to cool the entire core,” BREDL asserts that the ER should address the significance of both of these characteristics “with respect to the potential for and consequences of a design basis accident or severe accident.” BREDL 12/2/03 Contentions at 6-7.

(2) DUKE AND STAFF RESPONSES TO BREDL CONTENTIONS 1, 2, 6, 7, 10, 11,
AND 12

(i) Responses to BREDL Contention 1

Duke and the Staff oppose BREDL Contention 1 (which asserts inadequacy in Duke’s risk impact analysis by virtue of its failure to provide quantitative information), both urging that the LAR is “not a risk-informed application” such that Reg. Guide 1.174 would even come into play. Duke 11/11/03 Answer at 15-16 (emphasis omitted); *see* Staff 11/10/03 Response at 6. Arguing that the Reg. Guide applies only to proposed licensing basis changes that go beyond current NRC Staff positions, etc., “where the proposal is based on an analysis

grounded in probabilistic risk assessment,” Duke asserts that its LAR is grounded in a traditional deterministic engineering evaluation, and therefore the Reg. Guide is inapplicable. Duke 11/11/03 Answer at 16. Duke notes that the LAR does introduce changes in fission products and source term, but that its engineering evaluation includes a safety analysis of the effects of the four MOX LTAs on the design basis transients and accidents described in the facility Updated Final Safety Analysis Report (UFSAR), and points out that its safety analysis, which is found in section 3.7 of Attachment 3 of the LAR, is not challenged by the contention. *Id.*

Duke asserts that it has demonstrated, using the traditional evaluation approach, that it meets applicable acceptance criteria for the design basis transients and accidents, including that radiological dose consequences will remain within the limits of relevant regulatory criteria. *Id.* Arguing that Contention 1 fails to show that any additional quantitative assessment of risk is required for the NRC to make the “reasonable assurance” of safety findings required under 10 C.F.R. §§ 50.92(a) and 50.57(a), Duke also states that BREDL has provided no basis to suggest that such an assessment is required to assure adequate protection of public health and safety. *Id.*

Duke states that the “risk assessment provided in Section 3.8 of the LAR is for information and perspective only.” *Id.* at 17. Arguing that there is no NRC requirement for any assessment of changes in CDF or LERF, Duke argues further that the relief BREDL seeks in Contention 1 — further quantitative risk analysis — would exceed NRC regulatory requirements, and that the basis offered by BREDL “does not establish how or why the relief could be granted in this proceeding.” *Id.* at 16-17. Duke argues in addition that the factual premise for BREDL Contention 1 is flawed, because it is “readily apparent from the LAR that the proposed changes in the core (four assemblies) will not significantly change the decay heat produced, and will not increase the likelihood of design basis events or change the ability of the plant to mitigate the consequences of design basis events.” *Id.* at 17 (*citing* LAR, Attachment 3, section 3.7.2). Moreover, according to Duke, BREDL has provided no basis on which to assert that the proposed LAR would either change CDF or LERF materially or increase public health and safety risk significantly. *Id.* Thus, Duke argues, BREDL Contention 1 is inadmissible because it lacks a sufficient regulatory or factual basis to demonstrate the existence of a genuine dispute on a material issue, and because it would not entitle BREDL to any relief in this proceeding. *Id.*

The Staff largely concurs with Duke’s arguments on BREDL Contention 1, agreeing that “[c]hanges in the CDF or LERF are not required to be addressed or calculated for this deterministic amendment,” and that BREDL has shown no dispute as to a material fact or issue of law. Staff 11/10/03 Response at 7. Because the LAR “is not a risk-informed LAR,” the risk analysis proposed by BREDL is “not necessary,” nor is Reg. Guide 1.174 relevant, according to the

Staff. *Id.* at 6-7. While the limited risk information submitted by Duke “may be looked at during the Staff’s review,” it “does not play a large role and is not a key component in the decision making process.” *Id.* at 7.

(ii) *Responses to BREDL Contention 2*

Both Duke and the Staff also oppose admission of BREDL Contention 2 (regarding alleged inappropriate use of SPDEIS for estimate that severe accident consequence increase will not be significant), arguing that, because there is no requirement for licensees to design against severe accidents or to perform a risk assessment on safety and risk issues regarding severe accident consequences, BREDL Contention 2 fails to address any issues material to this proceeding. Duke 11/11/03 Answer at 18; Staff 11/10/03 Response at 8. The Staff also challenges the contention based on BREDL’s failure to “specify any accident sequences, not previously analyzed by the applicant, that, because of irradiation of MOX LTAs, must be included in the LAR.” Staff 11/10/03 Response at 8. In addition, besides arguing generally that the contention falls short of meeting the materiality and entitlement to relief requirements of 10 C.F.R. § 2.714, Duke 11/11/03 Answer at 18, Duke specifically responds to each of the problem areas raised by BREDL.

While Duke concedes that BREDL’s challenge to its scaling calculation is quantitatively correct, it maintains that even if the change in public health risk from severe accidents did range, as BREDL contends, from minus 0.2% to plus 0.7%, that change is still not significant in the context of a PRA. Duke 11/11/03 Answer at 19. Duke supports this argument with a reference to a study of risks from severe accidents at five plants including Sequoyah, an ice condenser containment plant similar to Catawba. *Id.* at 19-20 n.40 (*citing* NUREG-1150, “Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants” (Dec. 1990)). Noting that the NRC as part of this study had generated quantitative risk values and examined the uncertainty inherent in the results, Duke argues that, in the context of NUREG-1150’s range of two orders of magnitude between the 5th and 95th percentile results, and difference of approximately a factor of 3 between the mean and the median, a change of less than 2% in risk is “much smaller than the uncertainty inherent in the calculations and therefore is not significant.” *Id.* Accordingly, Duke argues, BREDL’s revised numbers are not sufficient to establish a genuine dispute on a material issue of fact as required by section 2.714(b)(2)(iii). *Id.* at 19-20. Nor, Duke argues, is there any reasonable basis on which to conclude that the scaling aspect of the contention would entitle BREDL to any relief, given that “no public health risk assessment is even required [by the NRC] (as opposed to the analysis of changes in dose consequences discussed in Section 3.7 of the LAR),” and given that this basis asserts “only a change in risk of, at most, plus 0.7%.” *Id.* at 20.

Regarding BREDL's challenge to the use of the SPDEIS, and claim that Duke's risk assessment calculation should have been based on the most recent version of Duke's own plant-specific PRA, Duke argues that this lacks a regulatory basis, as Duke is not required to perform any PRA — qualitative or quantitative — of the proposed amendment. *Id.* at 20. (Duke also states that BREDL did not challenge the SPDEIS when issued and suggests that this is not the proper forum to do so. *Id.* at 23.) With respect to the published reports critical of DOE's analysis, Duke avers that BREDL's broad references to two documents and its general assertion that DOE used parameters with large uncertainties do not provide a sufficient basis for an admissible contention or "establish a genuine, material issue that could make a difference in the outcome of this matter." *Id.* at 21-22. Citing case law for the proposition that broad references to documents are insufficient to support a contention without analysis and explanation of their significance, Duke questions BREDL's references and their significance, applying the same scaling analysis discussed above to Dr. Lyman's conclusions in his article to question their significance. *Id.* at 22-23.

Finally, both Duke and the Staff again argue that, because the present matter before the Staff does not involve a risk-informed licensing basis change but rather a deterministic review, Reg. Guide 1.174, which provides guidance to be used by the Staff in assessing risk-informed LARs, is irrelevant to the instant LAR. Duke 11/11/03 Answer at 24; Staff 11/10/03 Response at 8-9.

(iii) *Responses to BREDL Contentions 6 and 7*

Both Duke and the Staff argue that BREDL Contention 6 (which alleges failure to provide quantitative support for assertions on environmental impacts of severe accidents) is inadmissible; only Duke opposes Contention 7 (which alleges inappropriate use of SPDEIS to support the conclusion that impacts will not be significant). With regard to the reliance on 10 C.F.R. § 51.45(c) in Contention 6, both Duke and the Staff question this section as authority for any requirement of a PRA or the detailed information sought by BREDL, and contend that it does not so require. Duke 11/11/03 Answer at 42; Staff 11/10/03 Response at 17. In addition, Duke argues that section 51.45(c) does not require a "risk analysis," and that 10 C.F.R. § 51.22(c)(9) categorically excludes LARs such as the instant one from the requirement for an environmental review, asserting that its LAR "involves no significant hazards consideration . . . , no significant changes in types or amounts of effluents . . . , and no significant increase in occupational exposures." Duke 11/11/03 Answer at 42-43 (*citing* LAR, Attachments 4 and 5 (at 5-6-5-7); *id.* at 44.

Further, Duke asserts that it does provide quantitative assessments of postulated accidents in section 3.7 of the LAR technical justification, quantitative results for changes in dose consequences from the use of four MOX LTAs in section

5.6.3.1 of the ER, and a quantitative assessment of the changes in consequences of severe accidents in section 3.8 of the LAR technical justification. *Id.* at 43. Duke also contends that its conclusions are “generally consistent with BREDL’s own numbers — that is, a maximum 1.6% change in consequences associated with four lead assemblies.” *Id.* at 45 n.72. The Staff supports Duke’s arguments that it has provided sufficient quantitative data, and also asserts that BREDL has provided no facts or expert opinion “that would indicate that there would be changes to CDF or LERF.” Staff 11/10/03 Response at 17-18.

Both Duke and the Staff argue that Contention 6 should be denied for failure to demonstrate a genuine dispute on a material issue of law or fact, and Duke in addition argues that BREDL seeks relief that cannot be granted. Duke 11/11/03 Answer at 45; Staff 11/10/03 Response at 18. In support of its argument for denial of Contention 6, Duke also cites the Licensing Board’s denial of a contention asserting that section 51.45(c) required a PRA for the proposed MOX fuel fabrication facility. Duke 11/11/03 Answer at 44 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 448 (2001)). Finally, the Staff asserts that the contention is not supported by relevant facts or expert opinion. Staff 11/10/03 Response at 18.

The Staff, as indicated above, supports admission of Contention 7, except to the extent that it seeks a PRA from Duke. *Id.* at 18-19. According to the Staff, “[u]nlike contention 6 (which . . . without basis merely demands more quantitative analysis), contention 7 challenges the technical merit of Duke’s conclusions relating to severe accident environmental impacts.” *Id.* at 18. Duke, on the other hand, questions the basis for the contention that there could be a change in CDF “100 times higher than what Duke assumed,” and asserts that the sump blockage issue is outside the scope of this proceeding given that the subject is being addressed in the context of Generic Safety Issue 191 (GSI-191). Duke 11/11/03 Answer at 46-47 (quoting BREDL 10/21/03 Contentions at 15).

(iv) *Responses to BREDL Contentions 10, 11, and 12*

Both Duke and the Staff oppose the admission of these three contentions (all based on the IRSN materials), arguing that BREDL has neither demonstrated good cause for their late filing, nor made a compelling showing on the remaining factors of 10 C.F.R. § 2.714(a)(1) to justify their lateness. Duke 12/23/03 Answer at 6-9; Staff 12/24/03 Opposition at 6-8. Duke and the Staff assert that the issues presented by the IRSN during the October 2003 meeting are not new issues and that the same issues had in fact been previously presented by the IRSN at NRC public meetings held in October 2001, February 2002, and in May 2002. Duke 12/23/03 Answer at 6-7; Staff 12/24/03 Opposition at 6. Duke points to the February 2002 meeting in particular, arguing that because BREDL’s technical advisor, Dr. Lyman, attended and participated in that meeting and was apparently

aware of the VERCORS source term tests discussed there long before 2002, Contention 10 is untimely. Duke 12/23/03 Answer at 6-9.

The Staff asserts that fuel relocation and its potential effects, and fuel behavior during a LOCA, are not new issues and that BREDL and Dr. Lyman “were or should have been aware of the issues long before the late-filed contentions were proposed.” Staff 12/24/03 Opposition at 6. According to the Staff, BREDL has not met its obligation “to examine the application and publicly available information, and to set forth their claims at the earliest possible moment.” *Id.* at 6-7 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 429 (2003)). The Staff in addition questions BREDL’s ability to contribute to a sound record based on what it contends are BREDL’s failures to “set out with as much particularity as possible the precise issues it plans to cover,” summarize its witness’s proposed testimony, and demonstrate that Dr. Lyman is an expert on the issues raised in the contention. *Id.* at 7.

In challenging the merits of Contention 10, Duke characterizes the IRSN presentation that forms the basis of BREDL’s contention as a research proposal that neither addresses the application at issue nor takes a position on Duke’s lead assembly proposal, nor demonstrates a “genuine dispute with Duke’s proposal for MOX fuel lead assemblies.” Duke 12/23/03 Answer at 10, 14. Duke and the Staff argue that the Board should attach no significance to the mere fact that IRSN wishes to conduct research into the effects of MOX fuel, which by itself is insufficient to provide a basis for an admissible contention. Staff 12/24/03 Opposition at 8; Duke 12/23/03 Answer at 10. The contention is further without merit, Duke argues, in that it: (1) ignores test results contrary to those it relies upon; (2) ignores that the VERCORS RT2 test was not a LOCA test; (3) makes no specific challenge to Duke’s LOCA analysis; (4) ignores that the NRC Staff has previously raised fuel relocation as a generic issue but subsequently gave it a low priority and dropped it; (5) speculates without any basis on lead assembly power generation at end-of-life; (6) ignores the track record of M5 cladding; (7) speculates without basis regarding ballooning leading to a core-wide LOCA; and (8) does not address the fact that no European regulators have taken any action related to MOX fuel use based on the VERCORS tests. Duke 12/23/03 Answer at 10-15. For its part, the Staff asserts that BREDL’s statements and conclusions regarding the claimed effects of the use of MOX fuel are unsupported by any factual basis, and that Contention 10 should be rejected for failure to demonstrate a specific dispute on a material issue of law or fact. Staff 12/24/03 Opposition at 8.

Both Duke and the Staff submit that BREDL Contention 11 is also inadmissible because it fails to meet the materiality requirement of 10 C.F.R. § 2.714(b)(2)(iii), in that analysis of severe accidents is not a part of traditional deterministic analysis and is not required to be submitted in support of an LAR, such as Duke’s, that

is not risk informed. Duke 12/23/03 Answer at 17; Staff 12/24/03 Opposition at 9-10. Duke further challenges the conclusions drawn by BREDL from the IRSN presentation and notes that BREDL has not explained how the small amount of MOX fuel in the four lead test assemblies (which would comprise only 2% of the core) would substantively change either the performance of the emergency core cooling system (ECCS), or the probability or consequences of a severe accident. Duke 12/23/03 Answer at 18-19.

With regard to BREDL Contention 12, Duke claims that BREDL has not demonstrated how the ER's discussions of the consequences of both design basis and severe accidents would be substantively affected by consideration of the IRSN research proposal. *Id.* at 20-21. Duke further asserts that the underlying proposition of BREDL's contention — that an ER must somehow acknowledge and address every uncertainty or research proposal that could be related to an application under review — defies NEPA's "rule of reason." *Id.* at 21. Rather, Duke maintains, the ER's discussion of design basis and severe accident impacts fully complies with the requirements of 10 C.F.R. § 51.45(c). *Id.* For its part, the Staff argues that BREDL has provided no factual basis to support either its assertion that slumping would occur, or that if it were to occur, cooling of the core would be prevented. Staff 12/24/03 Opposition at 11.

(3) LICENSING BOARD RULINGS ON BREDL CONTENTIONS 1, 2, 6, 7, 10, 11,
AND 12

(i) *Timeliness*

Before considering any of these contentions under the general admissibility standards of section 2.714(b), (d), we first address the question of timeliness regarding Contentions 10, 11, and 12. As discussed above, Duke and the Staff argue that admission of these three contentions should be denied based on their untimeliness, asserting that the issues they address are not new, and that BREDL has not fulfilled its duty to examine all publicly available material and present its claims at the earliest possible moment. Countering these arguments, BREDL asserts that the October 2003 IRSN presentation had a different purpose, and raised new and significant information not previously presented at the earlier 2001 and 2002 meetings cited by the Staff and Duke.

We have examined portions of NUREG/CP-0176, the Proceedings of the October 2001 Nuclear Safety Research Conference, cited by the Staff in its December 24, 2003, Response. In this document, the presentation cited by the Staff is described as a "Poster Paper." Staff 12/24/03 Opposition, Exhibit 1 at viii. We note at the outset that a "poster paper" is not generally understood to consist of an actual scheduled verbal presentation, and would not generally attract the same level of attention. More importantly, we observe that the cited poster paper does not present the specific quantitative information relied upon by BREDL from

the 2003 slides, but rather discusses only qualitative results and assessments from various tests, stating that “there exists a few number of available results of such experiments with irradiated material.” *Id.* at 431. For example, in the introduction to the paper, entitled “Need for Experimental Programmes on LOCA Issues Using High Burn-up and MOX Fuels,” it is stated that “[u]ncertainties exist regarding how much the existing safety margins associated with peak clad temperature, clad oxidation, core coolability, clad residual ductility can be reduced by new fuels like the MOX one, burn up increases, the arrival of various alloys for fuel rod cladding.” *Id.* at 429. It is further stated that “[a] better knowledge of specific phenomena associated to fuel effects is required in order to estimate the new margins and to resolve pending uncertainties related to the LOCA criteria.” *Id.* Although the paper discusses a project involving a series of integral in-pile experiments involving bundle geometries in the PHEBUS facility, *id.*, unlike the 2003 materials, no quantitative results are presented that suggest there is a real difference in the performance of MOX versus UO₂ fuel.

We have also examined portions of the transcript of the May 3, 2002, Advisory Committee on Reactor Safeguards meeting cited by the Staff, in which various PHEBUS projects are discussed. *See* Transcript of Advisory Committee on Reactor Safeguards (ACRS) 492d meeting, May 3, 2002, at 230 (ADAMS Accession No. ML021370418). Although there is discussion of fuel relocation and proposed testing with regard to the nature of fuel including MOX fuel, *id.* at 296-301 *et seq.*, again, no quantitative information of the sort provided in the 2003 presentation slides appears to have been provided at the 2002 ACRS meeting.

With regard to the VERCORS tests discussed by Duke, Dr. Lyman does reference the VERCORS source term tests with MOX fuel in his 2000 *Science & Global Security* paper. *See* Duke 12/23/03 Answer at 6-9; Lyman 2001 *Science* Article at 42-43. On the other hand, the reference to Dr. Lyman in the transcript of a February 2002 meeting of the Source Term Applicability Panel indicates that he had “just [come] in the door” during the third day of the meeting. Source Term Applicability Panel Meeting, February 21, 2002, Transcript at 553 (ADAMS Accession No. ML020770207). Again, however, neither of these references appears to include the quantitative information provided in the October 2003 slides.

In light of the preceding circumstances, we find it difficult to see how one could gain the insight required to suggest the principles discussed by BREDL, until publication of the 2003 materials by the NRC in CITRIX. The 2003 slides clearly discuss certain quantitative differences observed in the tests and thereby provide demonstrative data to support BREDL’s contentions.

More generally, with regard to the “good cause” criterion of § 2.714(a)(1)(i), we have considered all the participants’ arguments in the context of how issues, similar to those in question in Contentions 10 through 12, customarily arise and are addressed in the scientific community. In science, it frequently occurs that a new

idea or concept is found to have precursors in the literature that pointed the way to the new idea. Often, however, a closer look will reveal that the earlier results were insufficiently developed for their importance to be recognized. Typically, contributions from more than one researcher combine to produce a new insight, with the pertinent contributions coming forth over a period of years. In a sense, there develops a sort of “critical mass” of information that is, as a practical matter, required in order for a new idea or technical result to be recognized. But this does not come about all at once, and indeed more usually develops over time.

In addition, even assuming there were earlier documents that specifically provided all the quantitative information provided in the 2003 IRSN slides, it often occurs that publications in the open literature may appear to be available to everyone, but real-life practicalities in fact make it difficult — to the point of being essentially impossible — to learn of and acquire all new information on any given subject. Conference proceedings can be particularly difficult to obtain and are often limited in their scope. For example, the *Transactions of the American Nuclear Society*, a conference proceeding, restricts articles to fewer than 1000 words, so that articles can be quite limited in the information they provide. Some publications are available only for a fee and abstracting services may not reference keywords in all of the articles in a collection. Also, search engines may key on different keywords in similar technical articles and some publications may not show up soon after publication, if at all. Thus, we do not find it meaningful to address the “good cause” factor in a vacuum, without taking into account these very real practical considerations.

In this context, and based on the preceding discussion, we find that BREDL had good cause under factor (i) of section 2.714(a)(1) for failing to file Contentions 10, 11, and 12 earlier than it did — 28 days after the 2003 slides were available. In addition, we find that the remaining factors also support the admissibility of these contentions. Clearly, there are no other means whereby BREDL’s interest could be protected, under subsections 2.714(a)(1)(ii) and (iv). With regard to the third factor, we find that BREDL’s participation with regard to the information at issue in Contentions 10 through 12 may reasonably be expected to assist in developing a sound record, through Dr. Lyman’s testimony, given among other things his writing on related subjects and his expertise in the area. We further find that factors (i) through (iv) clearly outweigh any disadvantage based on the extent to which BREDL’s participation will broaden the issues or delay the proceeding under section 2.714(a)(1)(v), particularly in light of certain limitations, discussed in the next section of this Memorandum, that we will place on the parties with regard to any admitted portions of the group of issues therein addressed.

(ii) *Admissibility Under Section 2.714(b), (d)*

We begin our discussion of the admissibility of Contentions 1, 2, 6, 7, 10, 11, and 12 under the general criteria of 10 C.F.R. § 2.714(b), (d), by noting that all present quite specific statements of the issues of law and/or fact BREDL wishes to raise; all are supported by sufficient explanation, stated with reasonable specificity; and all rely on stated facts as well as the expert opinion of Dr. Lyman, which we find to be sufficient in all cases to support the contentions at issue. In addition, BREDL has provided specific references to various documents and authorities, including various portions of Duke's LAR.

Our primary focus in this group of contentions is on whether BREDL has shown genuine disputes on material issues of law and/or fact. After carefully considering and taking into account the arguments of BREDL, Duke, and the Staff on these contentions, we find that some of the concerns raised do not rise to the level of genuine disputes on material issues of fact or law. We also note that Duke and the Staff have presented strong factual arguments with regard to several issues, which may become more pertinent in merits-based consideration of the issues in an evidentiary hearing — but the merits nature of which we do not find appropriate for consideration at this time. Overall, we find that BREDL has provided sufficient basis in the preceding collection of submitted contentions for several issues of material fact and law, on which there are genuine disputes, and which are presented with sufficient specificity and support to render them admissible.

For example, in Contentions 2, 10, and 11, BREDL sets forth several areas of quite specific facts, related to the issue of the significance of the severe accident consequences associated with the proposed MOX LTA use. In addition, for the reasons stated by the Staff, we agree that at least that part of Contention 7 that challenges the technical merit of Duke's conclusions relating to severe accident environmental impacts is admissible.

On the other hand, we do not find any “incompleteness” of guidance on use of Reg. Guide 1.174 to support BREDL's contention that it is impossible to evaluate fully the risk impact of the proposed project. But because Duke itself has used probabilistic risk analysis to its benefit, *see* LAR, Attachment 3, § 3.8, we are not inclined to exclude completely any evidence related to risk, within reasonable and practical limits.

Regarding the NEPA issues of whether the severe accident consequences associated with MOX LTA use will be significant, and whether Duke has, as required by 10 C.F.R. § 51.45(c) and argued in Contention 6, quantified all environmental factors “to the fullest extent practicable” in its ER, we find that BREDL has presented sufficient basis, facts, and expert opinion to demonstrate a genuine dispute on these issues — one factual, one a combined legal/factual issue — which are clearly material to the proposal before us.

With specific respect to the issues presented in Contentions 10, 11, and 12, we find that BREDL has provided sufficient support from the IRSN materials to render admissible its contentions that Duke's safety analysis is inadequate in its discussion of LOCAs, and that the LAR inadequately addresses the potential for releases and the potential environmental impact of both design basis and severe accidents. Among the information BREDL describes from the IRSN materials, we note, for example, the following statements from BREDL's second set of contentions:

The IRSN presentation points out that plutonium MOX fuel relocation has been observed at a lower temperature than LEU fuel relocation (stated at the meeting to be 200°C - 300°C lower), i.e., that during a LOCA, the MOX fuel pellet column collapses into the lower part of the fuel rod sooner than LEU fuel. . . . This would increase power and negatively affect heat transfer, with a deleterious impact on important LOCA parameters[, including] increases in peak clad temperature (PCT) (stated at the meeting to be 100°C higher), clad oxidation (stated at the meeting to be a 5%-10% increase in the oxide layer) and clad hydrogen uptake. . . .

BREDL 12/2/03 Contentions at 3-4 (citations omitted).

The IRSN presentation further points out that modern, low-tin, high ductility cladding materials, such as the M5 cladding that will be used in the MOX LTAs, will form bigger "balloons" than conventional Zircaloy and are likely to have higher blockage ratios.

Id. at 4 (citation omitted).

Phenomena that could affect the consequences of severe accidents include both higher release rates and higher release fractions for both fission products and actinides compared to LEU, as a result of the MOX fuel microstructure and different oxidation potential.

Id. at 5-6 (citation omitted).

Based upon the preceding analysis, we find that significant portions (as specifically defined below) of BREDL Contentions 1, 2, 6, 7, 10, 11, and 12 meet the general contention admissibility standards of 10 C.F.R. § 2.714(b), (d). We have consolidated these portions, and reframed and renumbered them as set forth below, in order to provide for a more efficient hearing with regard to the admissible portions of the contentions, pursuant to our authority under 10 C.F.R. § 2.714(f)(1), (3), to condition intervention on terms that will further the interests of controlling the compass of the hearing and restricting duplicative and repetitive evidence and argument. So reframed, these contentions provide:

Contention I: The LAR is inadequate because Duke has failed to account for differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs and on the DBA analysis for Catawba.

Contention II: The LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba, as required by NEPA.

The preceding consolidated and reframed contentions cover all issues that we find to be admissible within the grouping of contentions considered above, and we deny all portions not included within the contentions so reframed. We will, moreover, expect the parties to present their evidence in a manner that is limited to direct, to-the-point exposition of the issues defined in the reframed contentions.

We turn now to the remaining contentions submitted by the Petitioners.

b. BREDL Contention 3 (Relating the Containment Sump Clogging)

BREDL 3. Failure to Evaluate Containment Sump Failure

The discussion of risk impacts of MOX fuel lead assemblies in Section 3.8 of the LTA application is incomplete, because it does not include an evaluation of the effect of containment sump failure on risk impacts of operating the Catawba nuclear power plant with four MOX fuel assemblies.

Relying on two documents that include statements relating to the vulnerability of ice condenser plants to containment sump failure, BREDL faults section 3.8 of the LAR for not including “an evaluation of the effect of containment sump failure on risk impacts of operating Catawba with four MOX fuel assemblies.” BREDL 10/21/03 Contentions at 7 (*citing* Union of Concerned Scientists, GSI-191 Impact on Catawba and McGuire (Aug. 14, 2003); Arthur Buslik, Risk Considerations Associated with GSI-191, “Assessment of Debris Accumulation on PWR Sump Performance” (Aug. 22, 2001)). Asserting that core damage frequency will increase as a result of a “previously unrecognized design flaw: failure to protect against containment sump clogging in the event of a loss of coolant accident (‘LOCA’),” BREDL argues further that, “[s]ince small-break LOCAs are the most probable class of LOCAs, this means that the potential for sump clogging has a greater impact on the LOCA CDF for ice condensers than for other [pressurized-water reactors].” BREDL 10/21/03 Contentions at 7-8. BREDL concludes:

Although Duke has stated that the consequences of an accident would not increase appreciably as a result of MOX LTA fuel use, consequences must be taken together with accident probability in order to evaluate overall risk. In this case, the baseline core damage frequency may be much higher than was assumed in the Catawba PRA, thereby driving up the total risk impact associated with the increased consequences of a severe accident involving the MOX LTA core.

Id. at 8. Finally, noting that Duke has stated (in an August 7, 2003, letter to the NRC) that it is committed to dealing with the containment sump failure issue by the end of March 2004, BREDL argues that, until the issue is “resolved satisfactorily, . . . the application remains incomplete.” *Id.*; see also Duke 11/11/03 Answer at 25-26 n.50.

Duke argues with regard to BREDL’s proposed Contention 3 that, because the sump clogging issue is being addressed in a generic safety issue, it should not be considered in this proceeding. Duke 11/11/03 Answer at 25-26. Therefore, Duke also asserts, “[i]nherently, the NRC has determined that continuing operation pending resolution of these issues presents no undue risk.” *Id.* at 25. Further, according to Duke, “[a]ny challenge to the adequacy of the existing licensing basis is an impermissible challenge to the Commission’s regulations, and one for which relief would need to be pursued in accordance with 10 C.F.R. § 2.802.” *Id.* at 25 (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001)). Because Contention 3 “does not address possible changes that might be caused by or relate to the use of four MOX fuel lead assemblies,” Duke argues, “it fails to demonstrate a *genuine* dispute with respect to a *material* issue.” Duke 11/11/03 Answer at 28 (emphasis in original). Finally, Duke asserts, “because the contention does not challenge the required safety analysis, it fails to demonstrate how the petitioner would be entitled to any relief in this proceeding.” *Id.*

The Staff challenges BREDL Contention 3 largely on the basis that “it contains no factual support for the bald assertion that somehow the type of fuel irradiated bears any relation to the sump clogging issue.” Staff 11/10/03 Response at 9. Further, the Staff asserts, none of the documents cited by BREDL support its central argument that “the baseline core damage frequency could be ‘much higher than was assumed in the Catawba PRA, thereby driving up the total risk impact associated with the increased consequences of a severe accident involving the MOX LTA core.’” *Id.* at 10 (*quoting* BREDL 10/21/03 Contentions at 8). And even if it is assumed “that BREDL has adequately supported their claims regarding core damage frequency at Catawba as it relates to sump performance,” according to the Staff, “BREDL still failed to provide any support for their bald assertion that there would be increased consequences of a severe accident if it involved a reactor using MOX LTAs.” *Id.* Finally, the Staff argues that Contention 3 is inadmissible because there is “no requirement that sump

clogging due to the use of MOX be considered as part of the accident analysis which supports the LAR,” and because, since the LAR is “not a risk-informed amendment, the contention does not raise a genuine dispute regarding a material issue of fact or law,” or provide a technical basis for its assertions.” *Id.* at 11.

LICENSING BOARD RULING ON BREDL CONTENTION 3

We find that Contention 3 does not demonstrate a genuine dispute with respect to a material issue of law or fact in the context presented, because, as Duke argues, the contention does not address any changes that could be caused by the use of four MOX fuel lead assemblies themselves. Whatever the situation is now, or will be within the coming month, with regard to the sump clogging issue at Catawba, this issue is not relevant to measuring any increased impact on safety resulting from the use of the four MOX LTAs, which is the only question before us, in the context of this contention. We therefore deny this contention.

c. BREDL Contention 4 (Relating to Future Use of MOX Fuel)

BREDL 4. Failure to Evaluate Future Use of MOX Fuel

The Environmental Report for the LTA application (Attachment 5) is deficient because it completely fails to address the environmental impacts of using batch quantities of MOX fuel in the Catawba and McGuire reactors. Duke’s failure to address the impacts of MOX use in its Environmental Report is inconsistent with Council on Environmental Quality (“CEQ”) regulations and judicial and NRC decisions interpreting NEPA, which require consideration of connected actions, as well as cumulative impacts.

BREDL in Contention 4 challenges Duke’s “postponement,” in section 5.3.7 of its Environmental Report, of any evaluation of the environmental impacts of using batch quantities of MOX fuel until any future batch LAR, as “illegal segmentation of the decision-making process with respect to MOX fuel.” BREDL 10/21/03 Contentions at 9. BREDL contends that the “testing and use of MOX fuel” are “connected” and “interdependent” actions that should be considered together under NEPA. *Id.* at 9-10. In support of its argument, BREDL cites Duke’s cover letter to its September 15, 2003, Security Submittal, which does not “limit[] the requested license amendment application to the period of MOX fuel testing.” *Id.* at 10; *see* Duke 9/15/03 Security Submittal. BREDL asserts that this satisfies the NEPA tests for “ripeness” and “nexus” — i.e., that there be a concrete proposal for the other action (batch MOX fuel use), and that the proposal be connected to the action at issue such that it would be “unwise or irrational” not to go through, in this case, with batch MOX fuel use after LTA testing. *Id.* at 11.

Duke opposes BREDL Contention 4, asserting that any future proposal for batch MOX fuel use is only potential at this point, and depends on satisfactory lead assembly performance. Duke 11/11/03 Answer at 29-30 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 298 (2002); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990)). Duke also cites the case of *Society Hill Towers Owners' Association v. Rendell*, in which the Third Circuit rejected a claim that the impact of future development had to be considered along with a project for a hotel and parking garage in the city of Philadelphia, because it was not clear that the additional projects would ever be completed. Duke 11/11/03 Answer at 30-31 (citing *Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168 (3d Cir. 2000)). According to Duke, “[s]ubstantial uncertainties still surround the MOX fuel project.” Duke 11/11/03 Answer at 31. These uncertainties include, Duke states, questions relating to the planned fuel fabrication facility and the success or failure of certain international agreements. Duke 11/11/03 Answer at 31-33. Duke states further that its “limited attempt at regulatory efficiency” in its September 2003 Security Submittal “does not commit Duke to file a ‘batch’ application, commit the NRC to approve ‘batch use,’ or make NRC authorization of ‘batch use’ any more certain or likely.” *Id.* at 34.

It is possible that no LAR for batch use will ever be filed, Duke says. *Id.* “Should the lead assembly program reveal unexpected problems, Duke would not move forward with ‘batch use’ until the problems are resolved,” Duke states, also suggesting that there is no “practical commitment” to batch use. *Id.* at 35 (citing *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983); *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 433 (10th Cir. 1996)). Prior MOX demonstration programs have not led to large-scale use of MOX fuel, Duke notes. *Id.* at 35-36 n.63. The lead assemblies testing does not, Duke asserts, “automatically trigger” future batch use; the testing can proceed even if batch use does not, and can be justified on its own, for its testing purpose. *Id.* at 36. Concluding, Duke states:

The implication of the contention is that the NRC cannot approve a test program without also first evaluating full-scale implementation of the technology being tested — even where subsequent approvals will be required and will have full environmental review. The contention should be rejected as a matter of law.

Id. at 37 (citing 10 C.F.R. § 2.714(b)(2)(iii); see *id.* at 37 n.66 (citing *Project Management Corp.* (Clinch River Breeder Reactor Plant), LBP-76-14, 3 NRC 430, 434 (1976)).

The Staff agrees with Duke that under *McGuire/Catawba*, the contention must be dismissed. Staff 11/10/03 Response at 11-12 (citing *McGuire/Catawba*, CLI-02-14, 55 NRC at 295). The Staff notes as well that it has “already communicated

to Duke that it will only review its security related submittal in relation to the LTAs,” and that any review relating to batch quantities “must be deferred until Duke makes a proposal for such use.” *Id.* at 12 n.7 (citing Letter from Robert E. Martin to Michael S. Tuckman, Re: Mixed Oxide Fuel Assemblies (Oct. 31, 2003) (ADAMS Accession No. ML033040017) (Attachment 1)).

LICENSING BOARD RULING ON BREDL CONTENTION 4

We deny this contention because, under relevant precedent including the Commission’s recent decision in the *McGuire/Catawba* license renewal proceeding, evaluation of future use of MOX fuel is neither required nor appropriate in this proceeding. The LAR involves only lead test assemblies, the results for which may or may not ultimately lead to future batch use of MOX fuel in Catawba. As Duke argues, any future proposal for batch use of MOX fuel is uncertain at this point, and not automatic. To be sure, there is “dependence,” in that future batch use is *dependent on* a number of circumstances and factors, including the results of the lead test assemblies. But there is not “interdependence” going in both directions, nor is there “ripeness,” as required under the case law discussed above, including, most recently, the Commission’s decision in *McGuire/Catawba*, under which the issues relating to batch use of MOX fuel must be deemed not to be “ripe” until the LAR “proposal” for it is submitted. Although the Commission stated that “NIRS and BREDL are of course free to raise MOX-related safety and environmental issues . . . when and if Duke submits a license amendment application seeking permission to possess and use MOX fuel,” *McGuire/Catawba*, CLI-02-14, 55 NRC at 297, we find that the more likely intent of this statement was that the issues that would be permissible to raise would be those directly related to whatever application is at issue at any given time.

Thus, while BREDL may raise issues relating to the lead test assemblies in this proceeding, it may not raise issues relating to batch use until an application for such use has been submitted. If there is a future license amendment request regarding batch use of MOX fuel, that will be the appropriate time to require the sought evaluation.

d. BREDL Contention 5 (Relating to NEPA Alternatives Analysis)

BREDL 5. Failure to Consider New Information Showing Viability of Alternatives

The Environmental Report is deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire.

BREDL in Contention 5 challenges sections 5.2.2 and 5.7 of Duke's Environmental Report (ER), in which it is stated that no alternatives other than the proposed action or no-action are viable, with no explanation provided. BREDL 10/21/03 Contentions at 12. BREDL refers to two items of "new information," not considered in the SPDEIS, that "demonstrates that McGuire and Catawba are not appropriate choices for MOX fuel batch use, because of two significant previously unidentified design flaws that make them particularly vulnerable to accidents, including containment breach." *Id.* BREDL contends that this new information "compels a re-evaluation of conclusions previously reached in the SPDEIS." *Id.*

The first piece of new information cited by BREDL is NUREG/CR-6427, "Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments" (April 2000), which deals with the problem of hydrogen ignition, a subject also currently pending with the Staff in their work on Generic Safety Issue 189 (GSI-189), and one that BREDL contends has not been addressed in any EIS. *Id.* at 12-13. The second piece of information is what BREDL characterizes as the particular vulnerability of ice condenser plants to reactor sump clogging accidents, another issue that has not been addressed in the SPDEIS. *Id.* at 13. BREDL asserts that these two items, "regarding the heightened vulnerability of the Catawba and McGuire containments to breach or rupture, and the heightened vulnerability of plant cooling systems to clogging, could significantly increase the overall risk of an accident" at Catawba in comparison to other plants, with MOX fuel use. *Id.* Therefore, BREDL asserts, this new information should be considered in a supplemental EIS. *Id.*

Duke and the Staff have opposed the admission of BREDL Contention 5, although the Staff modified its position during oral argument to the extent of agreeing that Duke should address the alternative of using Duke's Oconee plant for the MOX LTAs in its ER. Tr. 456; *see* Staff 12/19/03 Reply at 9 n.6. Duke asserts that under NEPA, the "only viable alternative" to its LAR, the "proposed action," is the No Action alternative that is already covered by the LAR. Duke 11/11/03 Answer at 38-39.

Duke asserts further that this proceeding is limited to the LAR, and that the contention inappropriately seeks to evaluate alternatives that are "not presently available to either Duke or DOE and that are beyond the scope of the present environmental review." Duke 11/11/03 Answer at 38. Citing case law for a "rule of reason" in considering alternatives under NEPA, and that the analysis need not consider the environmental effects of alternatives that are "deemed only remote and speculative possibilities," Duke asserts that the premise, that other nuclear power plants are alternatives for the MOX lead assembly program, is "unfounded and speculative." *Id.* at 38-39. In addition, noting the requirement in 10 C.F.R. § 51.30(a) for only a "brief discussion" of alternatives, Duke argues that "BREDL seeks too much when it seeks to inject a full evaluation of currently

existing generic safety issues into an environmental review for a site-specific amendment request.” *Id.* at 40. Any increase in risk at Catawba due to the issues addressed in GSI-189 and GSI-191 “remains to be determined in the context of the GSIs and exists independent of MOX fuel lead assemblies,” according to Duke. *Id.* at 40.⁸ The issues in GSI-189 and GSI-191 are “outside the scope of this LAR,” Duke asserts. *Id.* Finally, Duke argues that, to the extent the contention challenges DOE’s SPDEIS, this is the wrong forum. *Id.* at 41.

The Staff agrees that the NRC and this Board lack jurisdiction to address DOE’s environmental responsibilities. Staff 11/10/03 Response at 14 n.9. The Staff also argues that “BREDL fails to establish a relationship between the ice condenser containment’s alleged increased vulnerability and the irradiation of MOX,” and that “generic safety issues that are not related to the use of MOX are not within the scope of this proceeding.” *Id.* at 14. Finally, the Staff asserts that Duke is not required to evaluate alternative plants owned by other companies, stating that this is “not feasible, because neither Duke nor the NRC can initiate the application process to amend licenses of other reactors to allow the use of MOX,” and notes that Duke did, in its September 23, 2003, letter from M.S. Tuckman, explain that the timing of the availability of the LTAs “supported the operational schedule at Catawba, thus explaining why McGuire was not a viable alternative.” *Id.* at 14-15 (citing *Citizens Against Burlington v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991)); 16; 14 n.10 (citing *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)).

LICENSING BOARD RULING ON BREDL CONTENTION 5

We agree with the argument that we do not have jurisdiction to consider in this proceeding alternatives not within the control of Duke, and deny this contention to this extent. As the Staff itself concedes, however, Duke does have control over the Oconee plant, and thus we find it appropriate to require analysis of this alternative in the environmental report, at least to the extent required for a “brief discussion” under 10 C.F.R. § 51.30(a). We therefore admit BREDL Contention 5 to this extent, reframed and renumbered as follows:

⁸Regarding the generic safety issues, Duke refers us to its arguments in opposition to BREDL Contention 3, in which it cites what it characterizes as the NRC “longstanding practice” of “not address[ing] generic safety issues in individual licensing proceedings.” Duke 11/11/03 Answer at 40; 25-26 (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)).

Contention III: The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.

Within this context, we will permit BREDL and the other parties to present evidence relating to the comparative safety, practicability, and appropriateness of using the MOX lead test assemblies at Catawba and Oconee.

We turn now to a consideration of Contentions 9 and 13, both related to the shipment of the plutonium proposed to be used to fabricate the MOX LTAs.

e. BREDL Contentions 9 and 13 (Relating to DOE Plutonium Shipments)

BREDL 9. Failure to identify the quantity of plutonium to be shipped to France

The LTA license amendment application fails to identify the quantity of plutonium that will be shipped to France for processing. This is a significant omission, in light of the significant discrepancy (40kg) between the amount of plutonium oxide that the DOE seeks to ship to France and the amount of plutonium needed to make four lead test assemblies. This discrepancy and its environmental impacts should be addressed before the LTA use permit is issued.

BREDL 13. Failure to adequately address the environmental impacts of plutonium shipments

Duke's license amendment application must be rejected because it is not supported by an adequate analysis of the security-related environmental impacts of shipping plutonium to France, or the security-related impacts of shipping the LTAs from France back to the United States.

In Contention 9, BREDL cites the SPDEIS for the information that it takes about 100 kg of plutonium to make four MOX lead test assemblies, noting that DOE's export application to the NRC seeks permission to export up to 140 kg of weapons-grade plutonium oxide powder to France. BREDL 10/21/03 Contentions at 16 (*citing* Letter from Edward J. Siskin, Assistant Deputy Administrator, Office of Fissile Materials Disposition, DOE, to Deputy Director, Office of International Programs, NRC (Oct. 1, 2003); SPDEIS at 2-63). BREDL challenges this, asserting that the "potential environmental impacts of 40 stray kilograms of plutonium falling into the wrong hands are enormous," and that "DOE should be required to explain this discrepancy before any permit is issued for LTA use." *Id.* at 16.

Duke opposes admission of this contention on the grounds that "[e]xport and other issues associated with transportation outside the United States are not within the scope of this Part 50 license amendment application." Duke 11/11/03 Answer

at 51. These issues are appropriately addressed, Duke says, in the context of the Part 110 export license application. *Id.* at 51-52. Duke also notes that the export application addresses how any extra material will be handled, packaged, and returned to the U.S., and therefore there is no genuine issue in dispute. *Id.* at 52. The Staff agrees. Staff 11/10/03 Response at 20.

Contention 13 is presented as a substitute for BREDL's original Contention 8, which is withdrawn. BREDL 12/2/03 Contentions at 7 n.3. BREDL asserts that, although it is NRC policy not to address the environmental impacts of terrorist attacks, sabotage, or other acts or malice or insanity, DOE — having “affirmatively decided to address the environmental impacts of terrorist attacks” — is “subject to review for the reasonableness of its analysis.” *Id.* at 7 n.4. BREDL asserts further that for a “number of reasons” DOE's 1996 Programmatic Environmental Impact Statement for Storage and Disposition of Weapons-Usable Fissile Materials (DOE/ES-229), and its November 2003 Supplemental Analysis, Fabrication of [MOX] Fuel Lead Assemblies in Europe (DOE/EIS-0229-SA3), are “completely inadequate to support the shipment of plutonium to and from France.” *Id.* at 7-8; *see id.* at 9-10. Citing case law for its argument that “significant new circumstances or information” warrant preparation of a new EIS, BREDL asks that this be done, and that it be “published in draft form, so that members of the public can be involved in the decision-making process.” *Id.* at 9-10 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th Cir. 1980); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000)).

Duke and the Staff oppose admission of Contention 13, with Duke arguing, *inter alia*, that BREDL never substantively challenges the November 2003 Supplemental Analysis, that the Supplemental Analysis provides a detailed discussion of appropriate issues, that the transportation issues raised in the contention are outside the scope of this proceeding because they apply to DOE and not Duke (noting that BREDL has petitioned to intervene in the DOE export license application proceeding), and that Commission precedent in any event precludes consideration in this proceeding of the issues. Duke 12/23/03 Answer at 22-26 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)). The Staff agrees, also citing two additional Commission decisions to the same effect. Staff 12/24/03 Response at 11-13 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002)).

We find these contentions to relate to an activity within the control of DOE, which is not before us in this proceeding. Although Duke reliance on DOE information may be relevant in appropriate circumstances in this proceeding, these contentions speak to what DOE “should be required to explain,” and given that we do not have jurisdiction over DOE in this proceeding, the contention must be denied.

f. NIRS Contention 1 (Relating to Plutonium Oxide Process History and Content, and Independent Certification of Test Fuel)

NIRS 1. Duke’s proposed plan is lacking key benchmarks.

NIRS Contention 1 is concerned with the absence of key benchmarks in Duke’s LAR, notably “documentation of the plutonium oxide process history and content” and “independent certification of the test fuel.” NIRS Contentions at 2. Because of uncertainties about the differences between reactor-grade and weapons-grade fuel behavior and reactor control, NIRS asserts that these benchmarks are necessary, “[i]n order to show in the future that the present tests are representative, or bounding of future large-scale use of weapons plutonium fuel.” *Id.*

The first of these benchmarks is necessary, NIRS argues, because the weapons-grade plutonium “will come from multiple processes and will have to be treated to remove impurities and other materials in order to make the MOX fuel.” *Id.* at 3. According to NIRS, the majority of the U.S. material to be converted to MOX fuel comes from bomb parts known as “pits,” consisting of an alloy of plutonium and other elements including gallium, and it is therefore “important to know whether the plutonium oxide that would be used to make the test fuel was ever in the pit form.” *Id.* NIRS cites documents produced at Los Alamos National Laboratory and the NRC for the proposition that gallium “may attack the zirconium alloy metal of the fuel cladding,” and that the effects of small parts of gallium on fuel and cladding behavior “have not been fully assessed.” *Id.* (citing Arjun Makhijani, Technical Aspects of the Use of Weapons Plutonium as Reactor Fuel, posted at http://www.ieer.org/sdafiles/vol_5/5-4/moxmain4.html; and “NRC Staff White Paper on Mixed Oxide Fuel Use in Commercial Light Water Reactors,” posted at <http://www.nrc.gov/materials/fuel-cycle-fac/mox/pdf/ml993620025.pdf>). Noting studies that indicate that low amounts of gallium (low parts per million) will not lead to significant interaction with cladding, NIRS argues that it is important to document the level of gallium and other contaminants, for future use in consideration of any batch loading of MOX fuel into the Catawba reactor. NIRS

Contentions at 3-4 (*citing* D.F. Wilson *et al.*, Behavior of Zircaloy Cladding in the Presence of Gallium, Oak Ridge National Laboratory, 1999).

NIRS also challenges the quality assurance of the proposed fuel assemblies, noting Duke's statement in section 3.5.4 of the LAR that Framatone ANP has responsibility for the "entire fuel assembly fabrication process" for the LTAs, and questioning whether this includes quality certification of the test fuel pellets and rods in addition to the assemblies. NIRS Contentions at 4. Citing various concerns about fuel pellet quality, including inconsistent diameters, inhomogeneities or plutonium clusters in MOX fuel, lack of experience with producing fuel pellets from weapons-grade plutonium, and past difficulties validating MOX products, NIRS asserts that "the parameters associated with these first assemblies are particularly important" and support its call for independent certification of the test fuel. *Id.* at 5-6.

(1) DUKE AND STAFF RESPONSE TO NIRS CONTENTION 1

Duke and the Staff claim that NIRS Contention 1 is beyond the scope of the present LAR and proceeding because it focuses upon a "potential future application addressing batch use." Duke 11/11/03 Answer at 53-54; *see also* Staff 11/10/03 Response at 21-22. Duke asserts that it has provided sufficient information in its LAR to address any safety issues and environmental impacts related to *this* LAR, and suggests further that:

if in connection with a batch assembly application NIRS believes that the lead assemblies are not representative of the batch assemblies proposed to be authorized *at that time*, NIRS would have a potential issue related to *that* approval (subject to the requirements of 10 C.F.R. § 2.714(b)(2) for an admissible contention)

Duke 11/11/03 Answer at 53-54 (emphasis in original). Whether or not data from the present LAR would be useful or support a future batch-use amendment application, Duke argues that "there is no NRC requirement that use of lead assemblies of any type of fuel can only be authorized if the data generated will prove useful to the fuel vendor or the licensee in the future." *Id.* at 55.

Specifically, Duke contends that, with regard to plutonium oxide and "parts per million" of gallium, it has gone further in incorporating a specification "limiting gallium to *parts per billion* — orders of magnitude below the concern identified as a basis for the contention." *Id.* at 55 (emphasis in original); *see id.* at 55-56 (*citing* LAR, Attachment § 3.5; LAR, Reference 1, Framatone *MOX Fuel Design Report* [hereinafter Fuel Design Report]). Thus, Duke argues, there is no genuine dispute for litigation in this proceeding. *Id.*

Regarding the issue of quality certification of the fuel pellets, Duke states, among other things, that the lead assemblies will be manufactured by Framatome under a quality assurance program that must meet 10 C.F.R. Part 50, Appendix

B, and that it has provided responses to Staff Requests for Additional Information (RAIs) relating to this as well, neither of which circumstances NIRS Contention 1 engages or suggests will be inadequate. *Id.* at 57-58 (*citing* LAR, Attachment 3, § 3.5.4; Letter to NRC from M. Tuckman (Oct. 1, 2003) (ADAMS Accession No. ML032880370)). Duke argues that there is no factual or regulatory basis to mandate independent certification of the MOX fuel assemblies. Duke 11/11/03 Answer at 60. For these and other reasons, Duke argues that NIRS has shown no basis for its contention regarding quality assurance, and no basis for further relief in this proceeding. *Id.*

According to the Staff, NIRS's arguments about the source of the plutonium oxide are outside the scope of this proceeding, and instead a matter falling within DOE's jurisdiction. Staff 11/10/03 Response at 22. The Staff cites Attachment 3 to the LAR and the Framatome report as indicating "that the elements enumerated by NIRS are already a part of the MOX fuel design and certification program," and refers specifically to page 14 of the Fuel Qualification Plan and the Fuel Design Report, both provided by Duke, for information about the specification for the isotopic and impurity range and design of the MOX fuel, respectively. Staff 11/10/03 Response at 22.

The Staff asserts that the physical form of the original material (i.e., the "pit") and where it came from "is not relevant to the Staff's assessment of the fuel"; rather, "[o]nly the composition of the fuel provided for use in the reactor is important." *Id.* The Staff points out that, because gallium is an impurity that does need to be limited, the material undergoes a chemical process called "aqueous polishing" before it can be processed, but that this is not relevant in this proceeding "because the process used for getting the material into the composition needed to meet the material specification will not impact how the fuel behaves." *Id.* at 22-23 (*citing* Fuel Design Report §§ 3.2.1, 3.2.2, 3.2.3).

The Staff also refers to Duke's RAI responses, which are asserted to provide "further clarification with respect to the breadth of the quality assurance program as it related to the fabrication process," and notes that all hardware and materials will come from qualified suppliers who "will be performing their activities affecting quality in accordance with a quality assurance program that has been reviewed and approved" to assure that they meet the "stringent requirements of 10 C.F.R. Part 50, Appendix B." *Id.* at 23. In addition, Duke's own quality assurance program is also required to meet Part 50, Appendix B, which contains explicit requirements for "independent assessment of activities affecting quality." *Id.* at 24-25. Therefore, the Staff argues, NIRS Contention 1 is without basis, demonstrates no genuine dispute regarding a material issue of law or fact, and should be rejected. *Id.* at 25.

(2) LICENSING BOARD RULING ON NIRS CONTENTION 1

We find that NIRS has not demonstrated in this contention a genuine dispute on a material issue of law or fact. Given the specification, cited by Duke, that gallium content is limited to parts per billion, the support provided by NIRS, relating to parts per million, fails. With regard to the quality certification issue, likewise, we find no genuine dispute on a material issue. The entire basis of this part of the contention is premised on an inadequate quality assurance program, but insufficient support has been provided to establish a genuine dispute on this issue, given the quality assurance requirements cited by Duke and the Staff, which are not disputed by NIRS. We therefore deny NIRS Contention 1.

g. NIRS Contention 2 (Relating to Provisions for Irradiated MOX Test Assemblies)

In its Contention 2, NIRS cites specific characteristics of irradiated MOX fuel — higher thermal power, slower decay rate than LEU fuel, more fissile plutonium than LEU waste — as well as “uncertainties about the impact of burnup on the fuel rods” and “any complications from inhomogeneities and possible residues from other nuclear bomb ingredients,” to bolster its claim that a plan is required for the ongoing monitoring of irradiated MOX fuel waste until Duke is informed about the “eventual disposition of high-level waste.” NIRS Contentions at 6-7. As support, NIRS cites a publication from the National Academy Press, entitled “Management and Disposition of Excess Weapons Plutonium: Reactor-Related Options.” NIRS Contention at 6 n.8. NIRS also claims that there is no “provi[sion] for lower density packaging for transport in the event that a repository becomes available.” NIRS Contentions at 7.

Both Duke and the Staff argue that NIRS Contention 2 is inadmissible, suggesting that this contention lacks supporting facts or expert opinion, basis, and the specificity required of an admissible contention. Duke 11/11/03 Answer at 60-62; Staff 11/10/03 Response at 26. The Staff adds that it previously accepted “the M5 cladding material that will be used for the MOX LTAs,” and explains that this M5 cladding has been applied to European reactors with MOX fuel. Staff 11/10/03 Response at 26. Aside from contesting NIRS’s broad reference to the National Academy of Sciences book, Duke characterizes this contention as posing only questions and uncertainties, which fail to show “how these four [MOX fuel] assemblies would pose a significant challenge to the Catawba spent fuel pool.” Duke 11/11/03 Answer at 60-61. Duke also views NIRS’s transportation concerns as lacking a basis sufficient to demonstrate a genuine dispute, as being outside the scope of the current LAR, and as being the responsibility of DOE and thus appropriate for consideration in a different proceeding (such as the DOE

environmental impact statement for the proposed high-level waste repository at Yucca Mountain). *Id.* at 62.

LICENSING BOARD RULING ON NIRS CONTENTION 2

We find this contention lacks the specificity required for an admissible contention. Apart from a general reference to one document, NIRS has provided no facts or expert opinion to support the contention, sufficient to provide a basis that would make it admissible. We therefore deny NIRS Contention 2.

h. NIRS Contention 3 (Relating to Asserted Gap in NRC and DOE Regulations)

NIRS 3. Duke's License Amendment Underscores Regulatory Gap Between NRC and DOE: Duke's License Amendment Precedes The Department of Energy's Fulfillment of It's [*sic*] Responsibility Under [NEPA].

In this contention NIRS asserts that because the irradiation of the LTAs "depend upon the shipment of the weapons-grade plutonium to France," this transportation should be considered in this proceeding. NIRS Contentions at 7. NIRS notes DOE's export license application, but asserts that there is no EIS addressing this shipment, and that this "regulatory gap" must likewise be considered in this proceeding. *Id.*

Duke and the Staff assert that NIRS Contention 3 fails to meet the requirements of 10 C.F.R. § 2.714(b), (d). *See* Staff 11/10/03 Response at 27-28; Duke 11/11/03 Answer at 47-51. For its part, the Staff argues that NIRS Contention 3 lacks specificity and insufficiently states the relief being sought. Staff 11/10/03 Response at 27-28. Duke and the Staff point out that Contention 3 is misdirected because the proper forum for such concerns is DOE's pending Part 110 export license application, which is a separate proceeding subject to its own regulations. *Id.* at 27; Duke 11/11/03 Answer at 47-50. Duke also states that any NEPA requirements applicable to the transportation of feed material to France instead involve DOE, and defends the sufficiency of its own Environmental Report. Duke 11/11/03 Answer at 48. Duke and the Staff also argue that no relief could be granted relative to this contention in this proceeding. Staff 11/10/03 Response at 27; Duke 11/11/03 Answer at 48. Duke adds that "export licensing matters under 10 C.F.R. Part 110 are explicitly excluded from the scope of the Commission's environmental regulations in 10 C.F.R. Part 51," and that Commission precedent relating to export licensing as well supports denial of this contention. Duke 11/11/03 Answer at 50-51 (citing *Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980) (citing *Edlow International*, CLI-76-6, 3 NRC 563, 584 (1976))).

LICENSING BOARD RULING ON NIRS CONTENTION 3

As with BREDL Contentions 9 and 13, this contention relates to an activity within the control of DOE, which is not before us in this proceeding. Given that we do not have jurisdiction over DOE in this proceeding, the contention must be denied.

i. NIRS Contention 4 (Relating to No Action Alternative)

NIRS 4. Only the No Action Alternative is Consistent with the Overall Goal for Plutonium.

In this contention NIRS asserts that the “No Action” alternative, or not undertaking the MOX LTA proposal, is necessary because the U.S.-Russian Federation plutonium disposition program will not increase security with regard to the plutonium. NIRS Contentions at 7-8. NIRS claims that “the bomb plutonium remains relatively easy to recover for nuclear weapons use, until after irradiation.” *Id.* at 8. In support of this statement NIRS cites a report from *Arms Control Today*, a publication of the Arms Control Association in Washington, D.C. *Id.* at 8 n.12 (citing article found at the following Web site: http://www.armscontrol.org/act/2003_01-02/mox_janfeb03.asp?print). NIRS also cites former NRC Commissioner Victor Gilinsky, who has written that “recycling the plutonium in civilian reactors is a particularly bad answer,” because disposal of it will take a long time — 20 to 30 years — and because there is a “significant risk of theft and the subsequent hostile use of this material as it is taken out of storage, transported, and processed.” *Id.* at 9 (quoting “America’s Plan to Dispose of Weapons-Grade Plutonium, Atoms for Peace or a Gift to Terrorists?” found at the following Web site: <http://www.aei.org/events/filter.,eventID.298/summary.asp>).

NIRS argues that it is “not credible to support the weapons MOX program as a means of non-proliferation.” *Id.* at 9. Further, NIRS asserts, “[w]hile NRC may not be in the position to reverse decisions made by other federal agencies, it does have the authority and the responsibility under the Atomic Energy Act [AEA] to engage US nuclear policy matters and should work to end this fatally flawed and dangerous program.” *Id.* at 9-10. The first step in doing this, NIRS urges, would be “to select the No Action Alternative, and deny this license amendment.” *Id.* at 10.

Duke and the Staff oppose NIRS Contention 4, with the Staff arguing that the bases offered by NIRS are outside the scope of this proceeding, and that, “at this stage of the amendment review process,” no relief could be granted, as the Board is without authority to direct the Staff to deny the application “at this juncture.” Staff 11/10/03 Response at 28-29. Duke agrees that the relief desired by NIRS cannot be provided, resting its argument on NEPA, pointing out NEPA’s

“essentially procedural” nature, under which an agency is not mandated to reach a particular result if a proposed action complies with all safety requirements under the AEA, and noting that the discussion of the “No Action” alternative may be brief. Duke 11/11/03 Answer at 65-66 (citing, *inter alia*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001)).

Duke also argues that the contention “merely sets forth NIRS’s opposing view of the MOX fuel program, rather than alleging any specific perceived deficiencies in Duke’s LAR,” as it must do to support an admissible contention. Duke 11/11/03 Answer at 62-63 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)).

LICENSING BOARD RULING ON NIRS CONTENTION 4

Although the “No Action” alternative is a valid issue under NEPA, and although NIRS has provided support from very respectable sources for its contention, we do not find that the support NIRS offers provides the necessary specificity to render the contention admissible. Although NIRS makes reference to dangers of theft, it does not specify in any way how such theft could occur, and thus the contention fails.

We note that NIRS has, in this contention, raised various national policy issues. Undoubtedly, these are significant issues. They do not, however, support an admissible contention before us in this proceeding, which is governed by the contention admissibility requirements quoted and discussed at some length above. These sorts of policy questions are more appropriate for determination by the Commission in its oversight role with regard to the civilian use of nuclear materials in the U.S. Therefore, while we will not address these sorts of issues in this proceeding, NIRS may choose to present these issues to the Commission, separately.

j. NIRS Contention 5 (Relating to Asserted Need for EIS)

NIRS 5. An Environmental Impact Statement is Needed to Inform This Decision.

LICENSING BOARD RULING

In Contention 5, NIRS provides extensive argument that the LAR at issue involves a “major federal action” that warrants the preparation of an EIS. NIRS Contentions at 10-16. Without speaking to the merits of NIRS’s arguments, we do not go into this argument herein, because we agree with the Staff that the contention is premature, given that the Staff has not decided whether the LAR is a major federal action or whether to generate an EIS or Environmental Assessment (EA). Staff 11/10/03 Response at 30-31 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 39 (1999)). As the Staff proposes, we therefore dismiss NIRS Contention 5 without prejudice, leaving the door open for a late-filed contention, should the Staff issue an EA in lieu of an EIS. *See* Staff 11/10/03 Response at 30-31 (citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 36 (1993)).

III. CONCLUSION

A. Standing and Admitted Contentions

In conclusion, although we find that both BREDL and NIRS have established standing to participate in this proceeding, we conclude that only BREDL has provided admissible contentions, which we consolidate, reframe, and admit, as follows:

Contention I: The LAR is inadequate because Duke has failed to account for differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs and on the DBA analysis for Catawba.

Contention II: The LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba, as required by NEPA.

Contention III: The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.

B. Settlement

Commission regulations recognize that it is in the public interest for particular issues or an entire matter to be settled, and encourage parties and licensing boards

to seek fair and reasonable settlements. 10 C.F.R. § 2.759. To the degree the issues in this proceeding may be amenable to this, we encourage the parties to seek such settlement of any or all of the contentions that we admit in this Memorandum and Order, and that may subsequently be admitted, and advise the parties that they may jointly contact the Board Chair if they wish to have a Licensing Board Panel-appointed Settlement Judge or Mediator assist in this endeavor.

IV. ORDER

In light of the foregoing discussion, and based upon the entire record of this proceeding to date, it is, this 5th day of March 2004, ORDERED:

1. BREDL (Reframed) Contentions I, II, and III are hereby admitted as contentions in this proceeding, as set forth and described above in this Memorandum and Order. The request of BREDL for a hearing on these contentions, as reframed, is hereby granted, and BREDL is hereby admitted as a party to this proceeding.

2. The remaining BREDL contentions are hereby rejected.

3. All of NIRS's contentions are rejected, for the reasons stated above, and as a result, NIRS is not admitted as a party to this proceeding.

4. A telephone conference will be convened on *March 16, 2004, at 1:30 p.m.*, to address various scheduling, administrative, and other appropriate matters, including discovery, the evidentiary hearing, the hearing of limited appearance statements, and other issues, all of which are addressed in greater detail in an unpublished order also issued this date.

5. This Order is subject to appeal in accordance with the provisions of 10 C.F.R. § 2.714a(a)-(c). Any petitions for review meeting applicable requirements set forth in that section must be filed within 10 days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 5, 2004⁹

⁹Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket Nos. 70-143-MLA
70-143-MLA-2
70-143-MLA-3
(ASLBP Nos. 02-803-04-MLA
03-810-02-MLA
04-820-05-MLA)

NUCLEAR FUEL SERVICES, INC.
(Erwin, Tennessee)

March 17, 2004

MEMORANDUM AND ORDER
(Ruling on Hearing Requests)

This issuance determines the acceptability of hearing requests submitted by numerous individuals and organizations with regard to a series of materials license amendment applications addressed to different phases of a single project. The determination is being made in the context of now-superseded provisions of the Commission's Rules of Practice that nonetheless govern this proceeding because they were in effect at the time the hearing requests were submitted. Applying those provisions, some of the hearing requests are granted and others denied.

I. BACKGROUND

In hand are a number of hearing requests filed in connection with three applications of Nuclear Fuel Services, Inc. (Licensee) for amendments to its Special

Materials License (SNM-124). All three applications relate to the Blended-Low-Enriched Uranium (BLEU) Project that is to be conducted on the Licensee's Erwin, Tennessee site. That project is part of a Department of Energy program designed to reduce stockpiles of surplus high-enriched uranium through re-use or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

A. The first of the three applications was filed on February 28, 2002, and sought authorization to store low-enriched uranium-bearing materials in the Uranyl Nitrate Building (UNB) on the Erwin site. A notice of opportunity for hearing on that application was published in the *Federal Register* on July 9, 2002 (67 Fed. Reg. 45,555, 45,558) and, because of deficiencies in it, a revised notice was published on October 30, 2002 (67 Fed. Reg. 66,172, 66,173). In response to these notices, timely hearing requests were filed by (1) the State of Franklin Group of the Sierra Club in conjunction with three other organizations similarly based in the Erwin area (hereinafter collectively Sierra);¹ (2) the Blue Ridge Environmental Defense League (Blue Ridge); (3) Kathy Helms-Hughes; and (4) a group of fifteen individuals said to reside in northeast Tennessee whose separate "declarations" were submitted through an attorney.

On October 22, 2002, the Licensee submitted its second license amendment application, which sought authorization to downblend the high-enriched uranium to low-enriched uranium in the BLEU Preparation Facility (BPF). On January 7, 2003, the NRC Staff published a *Federal Register* notice of opportunity for hearing with regard to this proposed license amendment (68 Fed. Reg. 796). Sierra and Ms. Helms-Hughes (but not either Blue Ridge or the fifteen individuals) filed timely requests with regard to this second application.

Rulings were deferred, however, on the hearing requests pertaining to these two amendment applications. This was the result of a January 21, 2003 order that was further explained 10 days later in LBP-03-1, 57 NRC 9 (2003). On a determination that there was no good reason to consider separately the three license amendment applications associated with the BLEU Project, the January 21 order directed that all further action with regard to the first (UNB) and second (BPF) applications be held in abeyance to await the filing of the third license amendment application and the submission of any timely hearing requests with regard thereto. Order (Directing the Holding of the Proceeding in Abeyance) (Jan. 21, 2003) at 2 (unpublished).

That third amendment application — addressed to the operation of the Oxide Conversion Building (OCB) and the Effluent Processing Building (EPB) — was filed in late October 2003 and led to the publication on December 24, 2003 of

¹ Those other organizations are Friends of the Nolichucky River Valley, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council.

a *Federal Register* notice of opportunity for hearing with regard to it. 68 Fed. Reg. 74,653, 74,654. In response to that notice, on February 2, 2004, both Sierra and Ms. Helms-Hughes filed hearing requests that were timely under a deadline extension that had previously been granted to them. As with respect to the second (BPF) amendment application, no hearing request was filed by either Blue Ridge or the fifteen individuals.

B. Effective February 13, 2004, the Commission's Rules of Practice codified in 10 C.F.R. Part 2 have undergone a substantial revision. *See* 69 Fed. Reg. 2182 (Jan. 14, 2004). Because, however, all of the hearing requests related to the BLEU Project were filed in advance of that date, and the Commission not having directed otherwise, this proceeding remains governed by those provisions of Part 2 in effect prior to the revision. Accordingly, all references hereinafter are to the now-superseded provisions.

Specifically, before the recent Rules of Practice revision, the provisions controlling the grant or denial of hearing requests in materials license proceedings such as the one at bar were to be found in 10 C.F.R. § 2.1205(e) and (h), a part of Subpart L of the then Rules of Practice. As stipulated therein, to obtain acceptance of the hearing request, the petitioner must both meet the "judicial standard for standing" and specify at least one "area of concern" that is "germane to the subject matter of the proceeding."

On the first score, the Commission has noted:

[The concept of judicial standing requires a showing of] (1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . and (4) is likely to be redressed by a favorable decision.

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001) (citing *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)). *See also International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001). Thus, the first question that must be addressed in passing upon the submitted hearing requests is whether the various petitioners have made that showing.

As above noted, Blue Ridge and the fifteen individuals put forth hearing requests solely with regard to the proposed storage of low-enriched uranium-bearing materials in the UNB. It necessarily follows, therefore, that their entitlement to obtain a hearing is totally dependent upon whether they have sufficiently alleged an actual or threatened concrete and particularized injury that is fairly traceable

to that storage and, in addition, have specified an area of concern germane to that storage.²

The situation is quite different, however, in the case of Sierra and Ms. Helms-Hughes, who have filed hearing requests with respect to each of the license amendment applications. In totality, these requests address the entire BLEU Project covered by the three license amendment applications. Because they have been consolidated, the applications can and will be considered as if the three phases of the project had been presented in a single application and challenged by Sierra and Ms. Helms-Hughes in single hearing requests. Accordingly, those Petitioners will be deemed to have satisfied the dictates of the applicable Rules of Practice if found to have met the injury-in-fact and area of concern requirements with regard to any one of the facets of the BLEU Project.

Of course, to the extent that it is seeking to represent the interests of its members (i.e., is claiming representational standing), an “organization must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member.” *White Mesa*, CLI-01-21, *supra*, 54 NRC at 250. Given that they are endeavoring to represent their members in a representational capacity, Sierra and Blue Ridge are confronted with these additional requirements.

II. ANALYSIS

With the foregoing principles in mind, each Petitioner’s hearing request(s) will be considered in turn. In that regard, without exception, the requests are opposed by the Licensee on the asserted ground that they do not meet the requirements imposed by section 2.1205(e) and (h) of the applicable Rules of Practice.

²This is so notwithstanding that there might have been some mention in the August and November 2002 submissions of those Petitioners to phases of the BLEU Project that would later become the subject of the second and third license amendment applications. The subsequent determination in January 2003 to consolidate the three applications did not relieve Blue Ridge or the fifteen individuals of the obligation to respond to the *Federal Register* notices pertaining specifically to the BPF and OCB/EPB applications if, indeed, they believed that a grant thereof would cause them substantial injury.

By standing mute in the wake of the publication of those notices, the Petitioners conveyed the impression that there had been an evaporation of any possible concern on their part regarding phases of the BLEU Project other than that involving UNB storage. In the circumstances, then, there is good reason to confine the inquiry in their cases to whether they have met the standing and area of concern requirements with regard to the UNB storage phase.

A. Fifteen Individual Hearing Requesters

By August 8, 2002 letter, C. Todd Chapman, Esq. transmitted the “Declarations” of fifteen “residents of Northeast Tennessee” who Mr. Chapman stated that he represented. Letter to Richard A. Meserve, NRC Chairman, from C. Todd Chapman, Counsel to Individual Petitioners (Aug. 8, 2002) [hereinafter Chapman Letter]. The substance of each of the submissions was essentially the same. Specifically, each declarer asserted that he or she had reviewed the NRC Staff’s June 2002 Environmental Assessment (EA) and Finding of No Significant Impact that were said to have accompanied the July 9, 2002 *Federal Register* notice of opportunity for hearing on the first (UNB) license amendment application. 67 Fed. Reg. at 45,558. That review had prompted the conclusion that, in the context of the Nolichucky River (which borders the Erwin site),³ the EA had improperly failed to address the impact of the proposed activity upon downstream sources of drinking water, consumers of harvested fish, or persons using the river downstream for recreational purposes.⁴ By way of relief, each declaration sought the preparation of a “thorough Environmental Impact Statement . . . detailing, among other things, the impact on downstream consumers of water from the Nolichucky River.” *See generally* Chapman Letter Declarations ¶ 6.

As the Licensee pointed out in its August 23, 2002 opposition to the fifteen declarations (Applicant’s Answer to [Chapman Letter] Request for Hearing at 8 [hereinafter Applicant’s August 23 Answer]), the July 9 *Federal Register* notice did not contain the entire Environmental Assessment issued in June 2002 but only what the notice characterized as a “Summary of Environmental Assessment.” 67 Fed. Reg. at 45,555. In that connection, the notice called public attention to the electronic availability of the full EA and “the documents related to this proposed action.” *Id.* at 45,558. Had those documents been consulted, the Licensee went on to observe (Applicant’s August 23 Answer at 8), the declarers would have determined that section 5 of the EA, entitled “Environmental Consequences,” contained the statement that “[d]ischarges from the proposed action are not expected to have significant impact on the surface water quality in the Nolichucky river.” EA § 5.1.1.1 at 5-2. Additionally, the EA reflected the Staff’s conclusion that “the proposed action will not discharge any effluents to the groundwater; therefore, no adverse impacts to groundwater are expected.” *Id.* at 5-3.

³ See June 2002 Environmental Assessment, Fig. 4.1 at 4-5.

⁴ Most, but not all, of the declarers asserted that they used the Nolichucky River as a source of drinking water or for recreational purposes. One declarer (David Byrd) referred simply to a desire not to breathe polluted air; another (Gerald M. O’Connor, Jr.) alluded solely to his ownership of two manufacturing plants in Erwin; and two others (James Smith and Peter H. Zars) expressed concerns regarding the possibility and consequences of an accident. *See* Chapman Letter Declarations ¶ 2.

It would thus seem clear that the declarations were founded entirely on a misapprehension of fact. Were this not so, however, the declarers would stand on no firmer footing in terms of providing reasons to grant them a hearing in this matter. For it is equally apparent that none of the declarers came close to meeting the requirement of a showing of “an actual or threatened, concrete and particularized injury” that is “fairly traceable to the challenged action.” *Sequoyah*, CLI-01-2, *supra*, 53 NRC at 13. In that regard, it is difficult to fathom how such a showing could have been made, given that the single license amendment application to which the declarations pertained involved solely the construction and operation of a storage building. It appears without contradiction that no chemical processes or reactions would take place in connection with that limited activity and that there would be no discharges of chemical or radiological contaminants into the Nolichucky River.⁵ That being so, it seems hardly likely that the employment of the river as a source of drinking water or for recreational activities would be at all adversely impacted.⁶

Accordingly, the hearing requests of the fifteen individuals, as set forth in their declarations, must be denied for lack of a showing of standing.⁷

B. Blue Ridge Environmental Defense League

According to its November 29, 2003 hearing request submitted in response to the October 30, 2002 revised *Federal Register* notice of opportunity for hearing (67 Fed. Reg. at 66,173), Blue Ridge has members living within 2 to 6 miles of the Erwin site who work within a mile of the facility. The Substitute Request of the Blue Ridge Environmental Defense League for a Hearing on a License Amendment for Nuclear Fuel Services at 1 [hereinafter Blue Ridge Hearing Request]. In support of this assertion, Blue Ridge appended to the hearing request the affidavits of two of its members that contain averments to that effect. Although neither member expressly authorized the organization to represent his or

⁵On August 19, 2003, the Staff furnished Judge Cole and this Presiding Officer, as well as the hearing requesters, with a copy of NRC Inspection Report 70-143/2003-04 in which it is stated (at 11) that “there would be no process liquid waste and no direct liquid effluent discharges as the result of UNB operations.” The report concluded (*ibid.*) that the “UNB has no liquid waste stream, and expected airborne effluents released to the environment were predicted to be a small fraction of regulatory limits.”

⁶Likewise, those declarers concerned with either air pollution or accidents (*see* note 4, *supra*), offered nothing to establish an actual or threatened concrete injury stemming from the construction and operation of the UNB building.

⁷Although the matter need not be pursued here, it is at best doubtful that a different result might have been obtained had the largely boilerplate declarations been considered in the context of the overall BLEU Project. For none of the declarations contained anything approaching the required illumination regarding how the second or third phase of the project might threaten its sponsor with harm.

her interests, such authorization might reasonably be inferred from the totality of their affidavits. In addition to the claim of representational standing, the hearing request referred (at 2) to Blue Ridge's offices in Glendale Springs, North Carolina, as illustrative of the "property, financial, or other interest in the proceeding" possessed by the organization itself.

The hearing request asserted (*ibid.*) that several buildings on the Erwin site already are contaminated and, additionally, that the groundwater below the site is contaminated with numerous toxic chemicals including isotopes of uranium, thorium, and plutonium. Although Blue Ridge and its members supplying affidavits evinced a concern that this contamination would be increased during the fulfillment of the BLEU Project, their submission offered no basis for that belief, let alone a foundation for a conclusion that there might be an injury-in-fact sustained by Blue Ridge members.

Accordingly, as in the case of the fifteen declarations, it is unlikely that the Blue Ridge hearing request would prove to be successful were it considered in the context of the entire BLEU Project. Once again, however, that request pertained exclusively to the construction and operation of the UNB building and there is no apparent reason to entertain it more broadly. And, as noted in connection with the appraisal of the declarations submitted by Mr. Chapman, that first phase of the overall BLEU Project does not involve any chemical processes or reactions. It thus is not readily apparent how it might nonetheless occasion harm to Blue Ridge members in the vicinity of the Erwin site and the hearing request provides no illumination in that respect. In that regard, standing alone, the asserted proximity of some Blue Ridge members to the Erwin site is totally irrelevant. It is now well settled that, in NRC materials licensing cases (unlike those involving commercial reactor licensing), there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 75 n.22 (1994).⁸

The short of the matter thus is that, in common with the declarations of the fifteen individuals discussed above, the Blue Ridge hearing request falls well short of demonstrating the requisite standing to obtain a hearing on the UNB license amendment application. To be sure, as will be later discussed in greater detail, the pleading requirement at this stage of a Subpart L proceeding is relatively modest.

⁸Regarding Blue Ridge's claim of organizational (as opposed to representational) standing based upon its offices in Glendale Springs, the Licensee points out in its December 13, 2002 opposition to the Blue Ridge hearing request that that community is located approximately 44 miles from the Erwin site and approximately 37 miles from the closest point of the Nolichucky River. Applicant's Answer to Request for Hearing and Areas of Concern of the Blue Ridge Environmental Defense League (Dec. 13, 2002) at 9-10.

Nonetheless, once again, the hearing request must allege facts that provide an underpinning for a conclusion that the requester (and/or those that it represents) are confronted with an actual or threatened, concrete and particularized injury that is fairly traceable to the activity in question. The Blue Ridge request simply does not meet that standard.

C. Kathy Helms-Hughes

1. As previously noted, in contrast to the fifteen individual declarers and Blue Ridge, Ms. Helms-Hughes submitted hearing requests in connection with all three license amendment applications associated with the BLEU Project. In essence, as reflected in her November 29, 2002 filing with regard to the UNB application, her claim of standing to challenge the project rests upon her ownership of three parcels of land in Butler, Tennessee, approximately 20 miles distant from the Erwin site, that were stated to represent a family ancestral home.⁹

According to the November 2002 hearing request, Ms. Helms-Hughes was then living with her 10-year-old daughter and conducting farming activities on her Butler property. In that regard, they ate the produce of the land and drank the spring water that flowed across the property from the Cherokee National Forest. Helms-Hughes Declaration at 1. *See also* Helms-Hughes January 26 Response at 2-3.

That situation, however, no longer obtains. At present, Ms. Helms-Hughes (presumably with her daughter) resides in Arizona, where she is employed by a newspaper. Although acknowledging that she is not “physically present on her [Tennessee] property at this time . . . because she must work out of state temporarily in order to earn a living in her profession,” she maintains that she “fully intends to return to Tennessee within the next five years.”¹⁰

⁹ In that filing, Ms. Helms-Hughes described her property as being “less than 20 miles downwind” from the site, without any specification with regard to how much “less.” Declaration of Kathy Helms-Hughes (Nov. 29, 2002) at 1 [hereinafter Helms-Hughes Declaration]. *See also* Kathy Helms-Hughes Response to Applicant’s Motion To Strike Part of Helms-Hughes Response to Nuclear Fuel Services, Inc.’s January 16, 2003 Motion To Deny Helms-Hughes Request for Standing and Leave To Intervene (Jan. 26, 2003) at 2 [Hereinafter Helms-Hughes January 26 Response]. From our examination of a detailed map of the area, the distance between the specific address of the property provided in the hearing request and the facility would appear to be almost precisely 20 miles.

¹⁰ Helms-Hughes Response to Applicant’s Answer to Third Segment of License Amendment Request Regarding Nuclear Fuel Services proposed [BLEU] Project (Feb. 23, 2004) at 1-2. Apparently, caretakers are maintaining and farming the property in Ms. Helms-Hughes’ absence. Third Request for Hearing by Kathy Helms-Hughes Regarding Nuclear Fuel Services Proposed [BLEU] Project (Feb. 2, 2004) at 2. She does not seem, however, to rely on that fact as a basis for standing. Nor could she. As the Appeal Board held over 25 years ago, a person who resides far from a facility cannot

(Continued)

With regard to the injury-in-fact that she deems to be threatened by the BLEU Project, Ms. Helms-Hughes asserts (Request for Hearing and Leave To Intervene by Kathy Helms-Hughes in the Matter of Nuclear Fuel Services, Inc.'s Notice To Amend Its NRC Special Nuclear Material Licence SNM-124 (Feb. 6, 2003) at 2) that the project will bring about additional airborne contaminants that will pose a health risk to her, her family, and the community at large. On this score, she points to disclosures in the June 2002 Environmental Assessment to the effect that both uranium and thorium air emissions are expected to increase by a factor of four to five times current levels. EA § 2.1.3.1 at 2-9, 2-10. In addition, the hydrogen and nitrogen oxide emissions from the BLEU complex will almost double when added to the existing airborne releases. *Ibid.* Still further, the radiological impacts of the project would include the release of plutonium, americium, actinium, and lesser quantities of fission products including technicium, cesium, and strontium. EA § 5.1.1.2 at 5-4.

2. The fact that she does not currently reside on her Tennessee property, but is instead pursuing her profession at a distance of some 1400 miles or so from that property, would seem of itself to defeat any claim that the BLEU Project threatens Ms. Helms-Hughes with the injury-in-fact upon which standing must rest. See *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-38 (1979) (petitioner owning and renting to another farmland 10 to 15 miles from the reactor site held not to have standing even though he occasionally visited the farm). To be sure, she expresses a current intent to return to Tennessee within the next 5 years. Without questioning the sincerity of that representation, whether her return actually occurs within any time period must be regarded as a matter of substantial conjecture. That Ms. Helms-Hughes took the step of leaving her ancestral home to take a position with a newspaper in a far distant part of the country definitely suggests a strong commitment to the pursuit of her profession that might or might not lessen with the passage of time.

In the circumstances, the teachings of *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) come into play (standing denied where threat of injury too speculative). Even if, however, her current residence were not to be deemed an insuperable barrier to a grant of her hearing requests, it would scarcely perforce follow that she has made the required showing on injury-in-fact.

acquire standing to intervene by asserting the interests of a third party who will be near the facility unless the latter is "a minor or otherwise under a legal disability," which would preclude his or her own participation. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978). That holding was cited by the Commission a decade later in connection with its ruling that a person cannot derive standing from the interests of another person. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

As noted, the Helms-Hughes property is located at a considerable distance from the BLEU complex on the Erwin site. To establish standing, Ms. Helms-Hughes therefore cannot simply point to references in the EA to the effect that there will be some airborne emissions as the result of the execution of the BLEU Project. Rather, her burden extends to supplying some good reason to believe that, 20 miles away from the site, the emissions might prove harmful. Mere potential exposure to minute doses of radiation within regulatory limits does not constitute a “distinct and palpable” injury on which standing can be founded. *See Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993).

A careful review of the content of her various submissions has left Judge Cole and this presiding officer entirely unpersuaded that Ms. Helms-Hughes has come close to satisfying that burden. According to the June 2002 EA, “[b]ecause the BLEU Project supports the production of nuclear generated electric power for public use, [the Licensee] will have to comply with a more stringent public dose constraint of” 25 millirems (mrem) per year. EA § 2.1.4 at 2-13. Thus, the question is whether Ms. Helms-Hughes has offered anything to suggest that, at a distance of 20 miles, an individual on her property might receive a radiation dose that, because of the Licensee’s operations, might equal or exceed that limitation. In that connection, although relying on the EA references to increases in existing levels of airborne emissions, Ms. Helms-Hughes does not endeavor to quantify those levels.

The significance of the absence of such quantification is highlighted by the estimates contained in the June 2002 EA with respect to the total annual dose that would be received by the “maximally exposed individual.” EA § 5.1.1.2 at 5-5. Located at the nearest point of water use (the Jonesborough Water Plant located 8 miles downstream from the Erwin site), that individual would receive an estimated annual dose from all existing and planned liquid and airborne effluents of 2.26 mrem — less than 10% of the allowable 25 mrem/year public dose limit. EA § 5.1.1.2 at 5-5. Importantly, more than 90% (2.06 mrem/year) of the 2.26 mrem annual dose is attributable to liquid discharges (as opposed to the airborne discharges that appear to be Ms. Helms-Hughes’ sole concern). *Ibid.*; *see also* Table 5.1 at 5-5, Table 5.2 at 5-6.

Needless to say, there is no reason to believe that the dose received at a distance of 20 miles would exceed that received by an individual 8 miles distant from the Erwin site. Indeed, it clearly will be substantially less. This being so, Ms. Helms-Hughes’ burden on the injury-in-fact question was hardly satisfied by reliance on the EA acknowledgment that there would be some increase in existing airborne emissions.

In sum, were Ms. Helms-Hughes now residing on her Tennessee property, she still would lack the requisite standing to challenge the BLEU Project. She has simply provided no basis for a possible conclusion that, notwithstanding the

appreciable distance between the Erwin site and that property, the project poses a threat of harm to her upon which standing might be founded. To the contrary, all of the information at hand negates the existence of any such threat.¹¹

D. State of Franklin Group of the Sierra Club *et al.* (Sierra)

1. Although, in common with Ms. Helms-Hughes, the four organizations collectively referred to as Sierra submitted hearing requests with regard to all three license amendment applications, for standing purposes an examination of the February 2, 2004 hearing request in connection with the third (OCB/EPB) application should suffice. Third Request for Hearing by State of Franklin Group of the Sierra Club *et al.* Regarding Nuclear Fuel Services' proposed BLEU Project (Feb. 2, 2004) [hereinafter Sierra Third Hearing Request]. Appended as exhibits to that request in support of the claim of representational standing were the declarations (in some instances an amendment of a previously submitted declaration) of members of one or more of the four organizations.

The declaration of Willa D. Early (Sierra Third Hearing Request, Exhibit 2) is illustrative. According to the declaration, she resides within 1 mile of the Licensee's Erwin facility and passes directly by it 5 days a week while driving to a nearby city. *Id.* ¶2. A member of two of the four organizations submitting the hearing request, Ms. Early has authorized those organizations to represent "my interests in protecting my health and safety and my environment with respect to the entire BLEU Project, by participating in the NRC proceedings with respect to all three license amendments sought by [the Licensee]." *Id.*

With regard to the threatened injury-in-fact, Ms. Early states (*id.* ¶4) as follows:

¹¹ In a March 7, 2003 reply to the Licensee's opposition to her hearing request regarding the second (BPF) license amendment application, Ms. Helms-Hughes urged (at 1) that she be at least granted discretionary standing under the authority of *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). On a balancing of the factors that the Commission there determined should be considered, it is manifest that the conferral of such standing is not warranted in this instance. Two of the stated factors appear decisive.

First, as has just been determined, given the distance between her property and the Erwin site, Ms. Helms-Hughes' interest in the proceeding is very limited at best. Second, as will be seen shortly, the hearing requests of the four organizations led by the Sierra Club are being granted. Those requests were presented on the organizations' behalf by counsel with considerable experience in NRC adjudicatory proceedings garnered over a long period of time. There thus is no reason to doubt that, irrespective of its extent, the Helms-Hughes interest will be adequately represented by existing parties to this proceeding. Stated another way, her participation does not seem necessary for the development of a sound record on the presented environmental and safety issues pertaining to the BLEU project, yet another factor referred to by the Commission in *Pebble Springs*.

As shown by the EA, the operation of the BLEU project facilities involves a number of potential accidents, including “spill of chemical and or radioactive material in a building, leak in a storage tank or supply piping, release of gaseous and particulate effluents (chemical and/or radioactive materials) due to a malfunction of the process off gas treatment system, and upset in the control of process parameters leading to undesirable reactions and release of hazardous or explosive compounds such as hydrogen, hydrogen peroxide, ammonia, NO_x and nitric acid vapors.” EA at 5-10. The NRC also states that “the loss of control of the process may include release of radioactive materials and nuclear criticality.” *Id.* According to the NRC, these accidents “can potentially impact worker safety, public health and safety, and the environment.” *Id.*

The same proximity to the Erwin site and the same concern regarding the possibility of an accident undergirds the declarations of several of the other individuals who have likewise authorized the organizations to which they belong to represent them in this proceeding.

The distinction between Sierra’s claim of representational standing and the standing claim advanced by Ms. Helms-Hughes is so apparent as not to warrant extended discussion. Notwithstanding the Licensee’s assertion to the contrary (Applicants Answer to Third Request for Hearing by State of Franklin Group of the Sierra Club *et al.* Regarding Nuclear Fuel Services’ Proposed BLEU Project (Feb. 12, 2004)), there is little room for serious doubt that, were an accident of the kind postulated in the EA to occur, persons residing within a short distance of the Erwin site might well be threatened with injury. In contrast, as seen, given the appreciable distance between her property and that site there is absolutely no reason to believe that the emissions referred to in the EA (upon which Ms. Helms-Hughes relies for standing) might cause injury to those on the property or damage to the property itself. Put in its simplest terms, Sierra presented a credible threat of injury stemming from the execution of the BLEU Project whereas Ms. Helms-Hughes did not.

In arriving at this conclusion, Judge Cole and this presiding officer have not overlooked that, just last month, we denied a motion filed by Sierra seeking a stay of the effectiveness of the NRC Staff’s decision in January to issue the second license amendment associated with the BPF portion of the BLEU Project. *See* LBP-04-2, 59 NRC 77 (2004). Although it is true that the motion was founded in large measure upon the assertion that an accidental release of the hazardous materials involved at the BPF would cause irreparable injury to Sierra members, its denial is of no moment here. As we pointed out, in order to satisfy the crucially important irreparable injury prong of the four-part test applied in determining whether stay relief is appropriate, the movant must establish “a threat of injury both ‘certain’ and ‘great,’ ” something that we found Sierra had failed to do. *Id.*, 59 NRC at 81.

No comparable burden exists where, as here, the issue is not entitlement to stay relief but, rather, standing to obtain a hearing on a license amendment application. Indeed, LBP-04-2 itself pointed to the likelihood that, notwithstanding the denial of a stay, Sierra would be found to have standing to challenge the BLEU Project. *Id.* at 79-80 n.1. The short of the matter is that it suffices for present purposes (as it did not in passing upon the stay application) that the possibility of an accident occasioning injury to persons in the vicinity of the site is acknowledged in the EA and thus cannot be excluded from consideration. The likelihood of such an accident, together with an appraisal of the possible consequences were one to occur, must be left for determination once the written presentations (and any supplementary oral presentations) are in hand.

2. It follows that the grant of a hearing to Sierra on the license amendment applications associated with the BLEU Project hinges upon whether it has asserted in its several submissions at least one area of concern “germane to the subject matter of the proceeding.” 10 C.F.R. § 2.1205(h). In addressing this matter, it is well to take note anew of the fact that “[a]ll that [the hearing requester in a Subpart L proceeding] need do is ‘state [its] areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant — i.e., ‘germane’ — to the license amendment at issue.’” *Fansteel, Inc.* (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 368 (2003), *quoting from the Commission decision in Sequoyah Fuels Corp.*, CLI-01-2, *supra*, 53 NRC at 16.

Applying this standard, it is beyond cavil that Sierra has satisfied the area of concern requirement. This is apparent from an examination of the concerns set forth in the February 2, 2004 hearing request addressed to the third (OCB/EPB) license amendment application.

As developed in that hearing request, those concerns fall within two categories: environmental and safety. On the first score, Sierra asserted that, for a wide variety of reasons, the NRC Staff has failed to comply with the dictates of the National Environmental Policy Act (NEPA). Sierra Third Hearing Request at 11-15. Among other things, it pointed (*id.* at 12) to what it deems to be a concession in the June 2002 EA that “operation of the BLEU Complex, including the OCB, the EPB, and associated storage tanks, poses significant hazards to human health and the environment.”¹² That being so, Sierra would have it that the Staff was required to prepare an environmental impact statement “that addresses these impacts in

¹²In an earlier portion of the hearing request concerned with the issue of standing (at 5-8), Sierra discussed in some detail the specific provisions of the June 2002 EA that it regarded as containing the asserted concession. There is no apparent need to rehearse them here.

detail, and also discusses the costs and benefits of alternatives and mitigative measures.” *Ibid.*¹³

Manifestly, whether or not ultimately found to be meritorious, Sierra’s environmental concerns are germane. The same may be said of its three specified safety concerns. According to the hearing request (*id.* at 15-16), the Licensee has failed to demonstrate (1) “that it has made adequate arrangements to fund the decommissioning of the OCB and EPB at the end of the facility’s life”; (2) that it “can and will comply” with certain operational requirements imposed by 10 C.F.R. § 70.23(a)(2), (3), and (4); and (3) that it can be counted on to “make complete and accurate reports to the NRC.” In each instance, the hearing request assigned a reason for the concern.

With a single exception,¹⁴ the concerns set forth in the other Sierra hearing requests likewise appear admissible for adjudication. In substantial measure they mirror the concerns specified in the third hearing request that have already been discussed.¹⁵ It bears repetition, however, that this does not mean that they have been found meritorious. Once again, whether there is substance to a particular specified concern is not to be determined at this preliminary stage of the proceeding but, instead, must await the submission of written presentations.

The conclusion is thus compelled that, unlike the other hearing requesters, Sierra has satisfied both the standing and area of concern requirements for obtaining a hearing on the BLEU Project license amendment applications. Accordingly, its request for that relief will be granted.

¹³ A second, at least marginally germane, environmental concern advanced in the February 2 hearing request (at 13 -14) related to what Sierra regarded as a prior history on the Licensee’s part of exceeding permit limits with respect to the emission of effluent to the environment. On a seemingly better footing insofar as admissibility is concerned is the Sierra challenge as unreliable of the estimates contained in the EA for certain airborne and liquid effluent releases. *Id.* at 14.

¹⁴ In its November 27, 2002 hearing request addressed to the first (UNB) license amendment application, Sierra maintained as an area of concern (Request of Hearing by State of Franklin Group of the Sierra Club *et al.* (Nov. 27, 2002) at 9) that there are several “significant environmental impacts posed by the proposed BLEU Project” requiring the preparation of an environmental impact statement. Among the examples cited in support of that proposition (at 11) was that “[o]peration of the BLEU Project will involve transport, storage, handling, and processing of tons of HEU [High-Enriched Uranium], an attractive target for terrorists and insane individuals who might seek to do harm to the facility, or to steal HEU for the production of a nuclear weapon.” The Commission has squarely held, however, that such a concern is not open to litigation in its adjudicatory proceedings. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002). A like concern contained in Sierra’s February 6, 2003 hearing request pertaining to the second (BPF) license amendment application (Second Request for Hearing by State of Franklin Group of the Sierra Club *et al.* (Feb. 6, 2003) at 13-14) is similarly barred.

¹⁵ *See* pages 9-14 of Sierra’s November 27, 2002 hearing request and pages 7-15 of its February 6, 2003 hearing request.

For the foregoing reasons, the hearing requests of the State of Franklin Group of the Sierra Club *et al.* are *granted* and those of the fifteen individual declarers, the Blue Ridge Environmental Defense League, and Kathy Helms-Hughes are *denied* for lack of standing. As mandated by 10 C.F.R. § 2.1231(a), within thirty (30) days of the date of this Order, the NRC Staff shall file a hearing file in the manner prescribed in that section.¹⁶ Following the receipt of the hearing file, a telephone conference will be conducted with counsel for the purpose of scheduling the filing and service of the written presentations called for by 10 C.F.R. § 2.1233. In that connection, although the Staff had elected not to participate in the proceeding,

¹⁶ In accord with 10 C.F.R. § 2.1231, in creating and providing the hearing file for this proceeding within 30 days of the date of entry of this Order, the NRC Staff can utilize one of two options.

1. Hard copy file. The hearing file that is submitted to the Presiding Officer and the parties in hard copy must contain a chronologically numbered index of each item contained in it and each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three-ring binders of no more than 4 inches in thickness.

2. Electronic file. For an electronic hearing file, the Staff shall make available to the parties and the Presiding Officer a list that contains the ADAMS accession number, date, and title of each item so as to make the item readily retrievable from the agency's Web site, www.nrc.gov, using the ADAMS "Find" function. Additionally, the Staff should create a separate folder in the agency's ADAMS system, which it should label "Nuclear Fuel Services — 70-143-MLA Hearing File," and give James Cutchin of ASLBP and the SECY group (Office of the Secretary) viewer rights to that folder. Once created, the Staff should place in that folder copies of the ADAMS files for all the Hearing Docket materials. For documents in ADAMS packages a subfolder should be created into which the package content should be placed. The subfolder should have a title that comports with the title of the package. Thereafter, as part of its notice to the parties and the Presiding Officer regarding the availability of the Hearing File materials in ADAMS, the Staff should advise the Presiding Officer that this process is complete and the "Hearing File" folder is available for viewing. (As an information matter for the parties, once this notice is received, the contents of the folder will be copied so as to make its contents available to an ASLBP-created ADAMS folder that will be accessible to ASLBP personnel only and into a folder that will be accessible by the parties from the NRC Web site.) If the Staff thereafter provides any updates to the hearing file, it should place a copy of those items in the "Nuclear Fuel Services — 70-143-MLA Hearing File" ADAMS folder and indicate it has done so in the notification regarding the update that is then sent to the Presiding Officer and the parties. If at any juncture the Staff anticipates placing any nonpublic documents into the hearing file for the proceeding, it should notify the Presiding Officer of that intent prior to placing those documents into the "Nuclear Fuel Services — 70-143-MLA Hearing File" and await further instructions regarding those documents from the Presiding Officer. (Questions regarding the electronic hearing file creation process should be addressed to James Cutchin at 301-415-7397 or jmc3@nrc.gov.)

If the Staff decides to utilize option two, within 7 days from the date of this Order it shall give notice to the Presiding Officer and the parties of that election. If any party objects to this method of providing the hearing file, it shall file a response within 7 days outlining the reasons why access to an electronic hearing file will place an undue burden on that party's ability to participate in this proceeding.

we have now concluded that its participation on all issues will be of material assistance in the resolution of those issues. *See* 10 C.F.R. § 2.1213. The Staff is therefore hereby made a full party to the proceeding and its counsel will be expected to take part in the scheduling conference.

If so inclined, within ten (10) days of the service of this Order, the hearing requesters whose requests were denied may appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.1205(o). The Licensee may similarly appeal from so much of the order as granted the Sierra hearing requests. Responses to any such appeals may be filed within fifteen (15) days of the service of the appeal brief. Unless the Commission should direct otherwise, the filing of an appeal shall have no effect upon the further progress of the proceeding.

It is so ORDERED.

BY THE PRESIDING OFFICER¹⁷

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 17, 2004

¹⁷ Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station,
Units 1 and 2)**

April 21, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission dismisses, without prejudice, Duke's premature appeal of the Licensing Board's decision to grant an Intervenor's hearing request. The Commission also accepts the Board's certified questions regarding a security contention.

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

RULES OF PRACTICE: APPEALABLE ORDERS

APPELLATE REVIEW: INTERVENTION RULINGS

RULES OF PRACTICE: INTERLOCUTORY APPEALS

Duke stated that it appealed pursuant to 10 C.F.R. § 2.714a(c). Under that regulation, "[a]n order granting a petition for leave to intervene and/or request

*CLI-04-10, issued in the matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), is being withheld from publication while the Commission determines which portions of that decision should be withheld from public disclosure as proprietary financial information.

for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied.’’ Although LBP-04-4 does indeed grant a petition to intervene and request for hearing, we hold that the order is not appealable, for it is too early to tell if BREDL’s petition should have been ‘‘wholly’’ denied. To be appealable under section 2.714a(c), the disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner. But at the time Duke filed its appeal, the Board had not yet ruled on any of BREDL’s security contentions.

APPELLATE REVIEW: INTERVENTION RULINGS

RULES OF PRACTICE: INTERLOCUTORY APPEALS

The Commission endorses an Appeal Board decision that held that appeals of intervention rulings lie only when a party challenges a licensing board’s dispositive ruling on the entire petition to intervene.

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

RULES OF PRACTICE: APPEALABLE ORDERS

APPELLATE REVIEW: INTERVENTION RULINGS

RULES OF PRACTICE: INTERLOCUTORY APPEALS

For a hearing petitioner to take an appeal pursuant to 10 C.F.R. § 2.714a(b), the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing. And for a license applicant to take an appeal under the counterpart regulation, 10 C.F.R. § 2.714a(c), the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner.

RULES OF PRACTICE: CERTIFIED QUESTIONS

The Commission’s customary practice is to accept questions certified by licensing boards. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 461 (2001).

MEMORANDUM AND ORDER

This is a license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of Duke Energy Corporation's Catawba commercial nuclear reactors. Duke has appealed the Licensing Board's decision to grant the Blue Ridge Environmental Defense League's (BREDL) hearing request. We dismiss Duke's appeal, without prejudice, as premature. We also accept the Board's April 12, 2004 certification of questions regarding a security contention and set out a briefing schedule.

I. BACKGROUND

This litigation arises from Duke Energy Corporation's license amendment request to revise the McGuire and Catawba Technical Specifications to allow insertion of four MOX lead test assemblies at either the McGuire or the Catawba Nuclear Station.¹ Following publication of a notice of opportunity for hearing in the *Federal Register*,² BREDL and the Nuclear Information and Resource Service (NIRS) filed petitions to intervene and requests for hearing. Neither Duke nor the NRC Staff contested the standing of either organization.

On October 21, 2003, both NIRS and BREDL filed supplemental petitions containing, respectively, five and nine contentions unrelated to security. The NRC Staff opposed admission of all except parts of two of BREDL's contentions and all of NIRS's contentions. Duke opposed all of the contentions of both Petitioners. The Board heard oral argument on the contentions on December 3-4, 2003.

On December 2, 2003, BREDL submitted four late-filed contentions. Both Duke and the NRC Staff opposed the late-filed contentions on substantive grounds, as well as on grounds of failure to meet the criteria of 10 C.F.R. § 2.714(a)(1)

¹MOX is a mixture of uranium and plutonium oxides. As part of a cooperative program with the Russian Federation, the U.S. Department of Energy plans to dispose of weapons-grade plutonium by converting it into MOX fuel for commercial nuclear reactors. Under contract with DOE, Duke initially intended to test four MOX fuel assemblies in one of its Catawba or McGuire reactors. Duke later narrowed its request to placing the four test assemblies into the 193-assembly core of one of the Catawba reactors. After irradiation, the MOX assemblies will be tested to verify their properties. Prior to "batch use" of the fuel, a subsequent license amendment will be necessary.

²See Duke Energy Corporation et al., Catawba Nuclear Station, Units 1 and 2; McGuire Nuclear Station, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing, 68 Fed. Reg. 44,107 (July 25, 2003).

regarding late-filed contentions.³ The Board heard oral argument on the late-filed contentions on January 15, 2004.

BREDL submitted its security-related contentions on March 3, 2004, after the Commission resolved the parties' disputes about BREDL's "need to know" certain safeguards information.⁴ The content of the security contentions is not at issue in Duke's appeal.

The Board issued its order on standing and nonsecurity contentions on March 5, 2004.⁵ The Board found that NIRS had submitted no admissible contentions and thus denied NIRS's request for a hearing. The Board stated that portions of several of BREDL's contentions were admissible. The Board then "consolidate[d], reframe[d], and admit[ted]" the following contentions:

Contention I: The LAR [license amendment request] is inadequate because Duke has failed to account for differences in MOX and LEU [low enriched uranium] fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs [loss of coolant accidents] and on the DBA [design basis accident] analysis for Catawba.

Contention II: The LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs [lead test assemblies] at Catawba, as required by NEPA.

Contention III: The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.⁶

Duke appealed the Board's decision.⁷ The NRC Staff supported and BREDL opposed the substance of the appeal. BREDL also argued that Duke's appeal is premature and requested that it be held in abeyance pending issuance of the Board's decision on the security contentions.

³The NRC has recently amended its adjudicatory procedural rules, 10 C.F.R. Part 2. *See* Changes to Adjudicatory Process: Final Rule, 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rules of procedure apply to proceedings noticed on or after Feb. 13, 2004. Thus, the NRC's adjudicatory regulations that were in effect before Feb. 13, 2004, apply to the Duke proceeding. Except as otherwise noted, references to 10 C.F.R. Part 2 in this Order cite the earlier version of the rules.

⁴*See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62 (2004) for detailed information regarding these disputes.

⁵*See* LBP-04-4, 59 NRC 129 (2004).

⁶*Id.* at 183.

⁷Pursuant to 10 C.F.R. § 2.714a(b), NIRS had a right to appeal the Board's decision, but did not do so.

After Duke filed the instant appeal, the Board issued an order on the five security contentions BREDL filed on March 3, 2004.⁸ The Board certified Security Contention 1, along with associated questions, to the Commission, admitted one reframed contention, and denied the remaining three.⁹

II. DISCUSSION

Today we hold that Duke's appeal is premature and, therefore, dismiss it without prejudice to a later timely appeal. We also accept the Board's certification regarding one of BREDL's security contentions. We turn first to a discussion of Duke's interlocutory appeal.

A. Duke's Appeal

Duke stated that it appealed pursuant to 10 C.F.R. § 2.714a(c).¹⁰ Under that regulation, "[a]n order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied."¹¹ Although LBP-04-4 does indeed grant a petition to intervene and request for hearing, we hold that the order is not appealable, for it is too early to tell if BREDL's petition should have been "wholly" denied. As explained below, to be appealable under section 2.714a(c), the disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner. But at the time Duke filed its appeal, the Board had not yet ruled on any of BREDL's security contentions.

For the Board's order to have been appealable when Duke filed its appeal, we would have to interpret section 2.714a(c) as granting a right to appeal any hearing request the Board grants erroneously, whether or not the Board rules on the entire

⁸ On April 8, 2004, BREDL also filed amended contentions on Duke's security plan submittal. The Board has not yet ruled on these amended contentions.

⁹ See unpublished Memorandum and Order (Ruling on Security-Related Contentions) (April 12, 2004). This order contains safeguards information and therefore will not be made public.

¹⁰ In view of our holding today, we need not address Duke's substantive arguments: (1) that BREDL's late-filed contentions were inexcusably late; (2) that none of BREDL's thirteen nonsecurity contentions were admissible; (3) that the Board's "reframing," using (allegedly inadmissible) bits and pieces of BREDL's contentions, exceeded its authority; and (4) that the contentions as reframed were also inadmissible.

¹¹ 10 C.F.R. § 2.714a(c).

petition.¹² Although it was only a partial ruling on BREDL's petition, LBP-04-4 did specifically grant the petition to intervene, and it ruled on both standing and admissibility of contentions. But, before Duke's appeal, BREDL had submitted three groups of contentions, the Board in LBP-04-4 had granted a hearing based on the first two groups, and the third group remained pending. By appealing LBP-04-4, Duke implicitly argues that the appealable question is whether the Board should have granted a hearing on the basis of the subset of materials the Board actually considered in making its incomplete ruling on BREDL's petition to intervene. Under this view, the Board's continued consideration of other pending contentions is immaterial.

Duke's apparent conception of section 2.714a(c) is not incompatible with the language of the regulation. An authoritative Appeal Board decision, issued 17 years ago in the *Shoreham* proceeding, held that appeals lie only when a party challenges a licensing board's dispositive ruling on the entire petition to intervene:

[A] party may appeal from the acceptance or rejection of contention(s) at the threshold if, but only if, such acceptance or rejection controlled the Licensing Board's disposition of the petition for intervention advancing the contention(s). Thus, for example, a would-be intervenor may appeal immediately the rejection of *all* of its contentions and the resultant denial of its petition. . . . Conversely, in circumstances where an intervention petition is granted on the strength of the acceptance of one or more of the contentions set forth therein, another party to the proceeding may appeal at once if its claim is that all of the contentions should have been rejected and the petition therefore denied.¹³

We agree that, for a hearing petitioner to take an appeal pursuant to section 2.714a(b), the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing. And for a license applicant, like Duke, to take an appeal under the counterpart regulation, section 2.714a(c), the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner.

¹²We often refer to the Statement of Considerations as an aid in interpreting our regulations. For section 2.714a, however, the Statement of Considerations is not illuminating. *See* 37 Fed. Reg. 28,710-11 (Dec. 29, 1972). We also note that there is no material change in the language of the corresponding regulation in our new rules. The new rule is 10 C.F.R. § 2.311(c): "An order granting a petition to intervene and/or request for hearing is appealable by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied." 69 Fed. Reg. at 2241.

¹³*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987) (emphasis in original, citations omitted).

Although *Shoreham* presented circumstances different from here,¹⁴ we endorse the Appeal Board's interpretation of section 2.714a. Moreover, two earlier Appeal Board decisions involving attempted appeals of *incomplete* rulings by Licensing Boards are factually similar to the instant case and reinforce our ruling today.¹⁵ In those cases, the Appeal Board refused to entertain appeals by license applicants challenging partial Board rulings — i.e., rulings not considering all pending contentions.

Based on the Appeal Board's rulings — which continue to reflect the Commission's stance on appeals under section 2.714a — the Commission dismisses Duke's appeal without prejudice. When Duke took its appeal the Licensing Board had not yet ruled on BREDL's security contentions. Duke can renew or modify its appeal after the Board rules on BREDL's entire petition; i.e., Duke can appeal on an interlocutory basis if a successful appeal would dispose of the case.¹⁶ We turn next to the second matter before the Commission.

B. The Board's Certified Questions

The Board has sought further guidance from the Commission on the admissibility of BREDL's Security Contention 1. Under 10 C.F.R. § 2.718(i),¹⁷ the Board has certified the questions “specifically raised in Security Contention 1, and those that arise out of and relate to it, the responses to it, and also to issues addressed in CLI-04-06, as discussed [in the Board's order of April 12, 2004.]”¹⁸

Consistent with our customary practice,¹⁹ we accept the Board's certification and seek briefs on the admissibility of Security Contention 1 and on what the Board characterized as “several pertinent related questions.” The briefs shall not exceed thirty pages and should be filed simultaneously by May 5, 2004. Reply briefs, containing only rebuttal, shall not exceed ten pages and should be filed simultaneously by May 12, 2004. The Board shall move forward expeditiously on all other issues in this adjudication.

¹⁴ *Shoreham* addressed a nonparty's attempt to appeal part of a Licensing Board's decision to admit contentions. See *Shoreham*, ALAB-861, 25 NRC at 132.

¹⁵ See *Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980); *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).

¹⁶ Because the Board's April 12, 2004 order did not rule on admissibility of one of BREDL's security contentions, this case remains unripe for appeal under 10 C.F.R. § 2.714a(c).

¹⁷ This regulation empowers a presiding officer to certify questions to the Commission, either in the discretion of the presiding officer or on direction of the Commission.

¹⁸ Unpublished Order at 33 (Apr. 12, 2004).

¹⁹ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 461 (2001).

III. CONCLUSION

For the foregoing reasons, the Commission (1) *dismisses* Duke's appeal *without prejudice*, (2) *accepts* the Board's certification, and (3) *invites* the parties to submit briefs.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
the 21st day of April 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket Nos. 70-143-MLA
70-143-MLA-2
70-143-MLA-3
(ASLBP Nos. 02-803-04-MLA
03-810-02-MLA
04-820-05-MLA)

NUCLEAR FUEL SERVICES, INC.
(Erwin, Tennessee)

April 7, 2004

MEMORANDUM AND ORDER
(Referring Filing to the Commission)

A. This proceeding involves three license amendment applications submitted by Nuclear Fuel Services, Inc. (Licensee) in connection with its Special Nuclear Materials License (SNM-124). All three applications relate to the Blended-Low-Enriched Uranium (BLEU) Project that is to be conducted on the Licensee's Erwin, Tennessee site. That project is part of a Department of Energy program designed to reduce stockpiles of surplus high-enriched uranium through reuse or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

In LBP-04-5, 59 NRC 186 (2004), Judge Cole and this Presiding Officer ruled upon the acceptability of a number of hearing requests addressed to one or another of the license amendment applications associated with the BLEU Project. Among those requests were those filed by Kathy Helms-Hughes with regard to each of

those applications. Basing her standing to challenge the project on her ownership of three parcels of land located approximately 20 miles from the Erwin site, Ms. Helms-Hughes maintained that the carrying out of the proposed project would pose a health risk to her and her family, as well as to the community at large. In that connection, she relied exclusively on disclosures in the NRC Staff's June 2002 Environmental Assessment respecting the airborne emissions that would be associated with the project.

For the two independent reasons set forth therein (59 NRC at 193-96), LBP-04-5 reached the conclusion that Ms. Helms-Hughes' averments did not constitute the requisite showing on the injury-in-fact component of judicial standing. First, she does not now reside on the Tennessee property but, rather, is living and working in Arizona. In this regard, although she expressed a current intent to return to Tennessee within 5 years, "whether her return actually occurs within any time period must be regarded as a matter of substantial conjecture." *Id.* at 194. Second, Ms. Helms-Hughes' hearing request provided no basis for believing that the airborne emissions referred to in the Environmental Assessment might prove harmful at a distance of 20 miles and, indeed, the assessment itself provided cause to reach the opposite conclusion. *Id.* at 194-96.

LBP-04-5 ended by calling the attention of Ms. Helms-Hughes (among others) to the appellate remedy that was provided by the then-applicable Commission's Rules of Practice. Specifically, if dissatisfied with the denial of her hearing requests, she could file an appeal within 10 days of service of the order. *Id.* at 201.

Rather than file an appeal directly with the Commission, Ms. Helms-Hughes submitted to this Presiding Officer on April 1 a document labeled a "Motion for Appeal" of LBP-04-5. Although so characterized, as thus presented, it had the obvious effect of being a motion for reconsideration of his and Judge Cole's denial of her hearing requests. In the filing, she maintained that for standing purposes it should not be thought significant that she currently resides in Arizona rather than on her Tennessee property. Beyond that, she expressed disagreement with the determination in LBP-04-5 that airborne emissions generated by the BLEU project had not been shown to have a possible harmful impact at a 20-mile distance.

B. The Commission's Rules of Practice applicable to this proceeding do not specifically authorize the filing with the presiding officer of motions for reconsideration of the denial of a hearing request. Nonetheless, there seems to be good reason why such a motion should be countenanced at least in circumstances where the aggrieved hearing requestor can demonstrate that the presiding officer overlooked or misapprehended facts having a pivotal bearing upon the correctness of his or her decision. By the same token, however, where the requestor is merely expressing disagreement with the conclusions undergirding the denial of the

request, the appropriate course is to put that disagreement before the Commission by invoking the remedy specifically provided for that very purpose.

In this instance, Ms. Helms-Hughes plainly should have presented her “Motion for Appeal” to the Commission rather than to this Presiding Officer. In the final analysis, her filing does no more than set forth her reasons for believing that Judge Cole and I were wrong both in attaching significance to her current place of residence and in determining that, given the considerable distance between her property and the Erwin site, those currently on that property had not been shown to be threatened with injury-in-fact as a result of airborne emissions attributable to the BLEU Project. In that regard, our attention has not been directed to any fact that was either overlooked or misapprehended in LBP-04-5, thereby warranting a reexamination of what was decided on the standing issue in that issuance.

C. Although, in the circumstances, a summary denial of the “Motion for Appeal” was one possible outcome, in the exercise of our discretion Judge Cole and I have decided instead to refer the Helms-Hughes filing to the Commission for such consideration as it might wish to provide it. Our reason for doing so is that Ms. Helms-Hughes obviously intended to seek appellate review of LBP-04-5, as is reflected by the caption of her filing. Moreover, the document was filed within the period provided in the Rules of Practice for seeking such review. There thus is no room for doubt that the filing of the document with the Presiding Officer, rather than with the Commission, was occasioned by a layperson’s misunderstanding regarding to whom the appeal should be addressed. That being so, we believe the ends of justice to be best served by a referral that will enable the Commission, should it be so inclined, to entertain Ms. Helms-Hughes’ challenge to LBP-04-5.

The April 1, 2004 “Motion for Appeal” of Kathy Helms-Hughes is hereby *referred* to the Commission.

It is so ORDERED.

BY THE PRESIDING OFFICER¹

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 7, 2004

¹ Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

J. E. Dyer, Director

In the Matter of

Docket No. 50-346
(License No. NPF-3)

FIRSTENERGY NUCLEAR OPERATING
COMPANY
(Davis-Besse Nuclear Power Station,
Unit 1)

April 22, 2004

The petition dated August 25, 2003, from Greenpeace, Nuclear Information and Resource Service, and the Union of Concerned Scientists (the Petitioners), requested that the Nuclear Regulatory Commission (NRC) take enforcement actions against FirstEnergy Nuclear Operating Company (FirstEnergy), the Licensee for Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse), and the NRC was requested to suspend the Davis-Besse license and prohibit plant restart until certain conditions have been met.

As basis for the request to have the NRC take enforcement actions against the Licensee, the Petitioners stated that FirstEnergy has failed to complete commitments related to the NRC's section 50.54(f) design basis letter (issued on October 9, 1996), and refer to design basis violations dating back to plant licensing (corresponding to Requests 1 and 2 in the Petitioners' August 25 letter).

The final Director's Decision on this petition was issued on April 22, 2004, and provides the bases for the Staff's findings on the Petitioners' Requests 1 and 2 — these findings are summarized below.

With respect to the first request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based solely on failure of the Licensee to complete commitments represents a misinterpretation of the agency's enforcement policies regarding commitments. As is discussed in the Director's Decision, reasonable assurance of adequate protection of public health and safety is, as a general matter, defined by the Commission's health and safety regulations

themselves. In most cases, the agency cannot take formal enforcement actions solely on the basis of whether licensees fulfill commitments, as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement. However, when failures to meet commitments result in violations of the Commission's health and safety regulations, the Staff will take the appropriate enforcement actions.

With respect to the second request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based on numerous design basis violations (i.e., the licensee event reports (LERs) submitted by the Licensee) is in effect being granted by the actions already taken by the Staff, as is evident by the discussions of the agency's processes for reviewing and evaluating LERs presented in the Director's Decision.

The Petitioners also requested that the NRC suspend the Davis-Besse license and prohibit plant restart until all design basis deficiencies identified in response to the NRC's section 50.54(f) design basis letter are adequately addressed, the plant probabilistic risk assessment is updated to reflect design flaws, and no systems are in a "degraded but operable" condition (corresponding to Requests 3, 4, and 5 in the Petitioners' August 25 letter).

The agency considered Requests 3, 4, and 5 to be "immediate action" requests and responded to these requests in its letter dated November 26, 2003. The Staff considered these three requests to be equivalent to immediate action requests because the Davis-Besse Licensee might complete all necessary restart activities, and the NRC Staff might complete all necessary oversight activities, before the Staff could finalize the Director's Decision on this petition.

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

I. INTRODUCTION

By letter dated August 25, 2003, Greenpeace filed a petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R.) on behalf of the Nuclear Information and Resource Service and the Union of Concerned Scientists (collectively, the Petitioners). The Petitioners requested that the Nuclear Regulatory Commission (NRC) take enforcement actions against FirstEnergy Nuclear Operating Company (FirstEnergy), the Licensee for Davis-Besse Nuclear Power Station in Oak Harbor, Ohio, and also requested that NRC suspend the Davis-Besse license and prohibit plant restart until certain conditions have been met. As basis for the request to have the NRC take enforcement actions against the Licensee, the Petitioners stated that FirstEnergy has failed to complete commitments related to the NRC's section 50.54(f) design basis letter (issued

on October 9, 1996), and referred to numerous design basis violations dating back to plant licensing (corresponding to Requests 1 and 2 in the Petitioners' August 25 letter). The Petitioners also requested that the NRC suspend the Davis-Besse license and prohibit plant restart until all design basis deficiencies identified in response to the NRC's section 50.54(f) design basis letter are adequately addressed, the plant probabilistic risk assessment (PRA) is updated to reflect design flaws, and no systems are in a "degraded but operable" condition (corresponding to Requests 3, 4, and 5 in the Petitioners' August 25 letter).

In a letter dated October 7, 2003, the NRC informed the Petitioners that the issues in the petition were accepted for review under 10 C.F.R. § 2.206 and had been referred to the Office of Nuclear Reactor Regulation for appropriate action. A copy of the acknowledgment letter is publicly available in the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML032690314. A copy of the petition is publicly available in ADAMS under the Accession No. ML032400435.

The Petitioners' representatives met with NRC Staff on September 17, 2003, to provide additional details in support of this request. This meeting was transcribed and the transcript is publicly available on the NRC Web site as a supplement to the petition (<http://www.nrc.gov/reactors/operating/ops-experience/vessel-head-degradation/controlled-correspondence.html>).

The Licensee responded to the petition on October 20, 2003 (ML033421458). This response was considered by the Staff in its evaluation of the petition.

In a letter dated November 26, 2003 (ML033010172), the NRC provided to the Petitioners its evaluation of their "immediate action" requests. The Staff considered the Petitioners' requests to suspend the Davis-Besse license and prohibit plant restart until certain conditions have been met to be equivalent to "immediate action" requests because the Davis-Besse Licensee might complete all necessary restart activities, and the NRC Staff might complete all necessary oversight activities, before the Staff could finalize the Director's Decision on this petition. Requests 3, 4, and 5 in the Petitioners' August 25 letter were considered immediate action requests, and the Staff's November 26 evaluation is repeated in Section II.D for completeness.

The NRC sent a copy of the proposed Director's Decision to the Petitioners and to the Licensee for comment on February 5, 2004 (ML040280003). Neither the Petitioners nor the Licensee provided comments on the proposed Director's Decision.

II. DISCUSSION

This section contains a discussion of the agency's regulatory oversight process, relevant NRC enforcement policies, the NRC Staff's response to the Petitioners'

requests for enforcement action (Requests 1 and 2 in the Petitioners' August 25, 2003, letter), and for completeness, the Staff's November 26, 2003, response to the Petitioners' immediate action requests (Requests 3, 4, and 5 in the Petitioners' August 25, 2003, letter).

The objective of the descriptive information presented below on the agency's processes and policies is to provide a clear understanding of the basis for the Staff's findings with respect to the Petitioners' two requests for enforcement action. These findings are summarized below.

- With respect to the first request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based solely on failure of the Licensee to complete commitments represents a misinterpretation of the agency's enforcement policies regarding commitments. As will be discussed later in this Director's Decision, reasonable assurance of adequate protection of public health and safety is, as a general matter, defined by the Commission's health and safety regulations themselves. In most cases, the agency cannot take formal enforcement actions solely on the basis of whether licensees fulfill commitments, as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement. However, when failures to meet commitments result in violations of the Commission's health and safety regulations, the Staff will take the appropriate enforcement actions. Although the Staff has not taken any formal enforcement actions against FirstEnergy solely for failure to meet commitments, the Staff has taken formal enforcement actions against the Licensee for noncompliance with NRC requirements, including enforcement actions for failure to meet design-related requirements.
- With respect to the second request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based on numerous design basis violations (i.e., the licensee event reports (LERs) submitted by the Licensee) is in effect being granted by the actions already taken by the Staff, as will be evident from the discussions of our processes for reviewing and evaluating LERs presented later in this Director's Decision.

A. Reactor Oversight Process

This section provides a brief overview of the process by which the Staff inspects and assesses licensees' compliance with the Commission's rules and regulations. This overview is intended to provide an understanding of what the current regulatory oversight of the Davis-Besse plant consists of, and why this oversight was imposed on this Licensee. It is important to note that the agency has been utilizing its process for the highest level of Staff oversight for plants

with performance problems or operational events in inspecting and assessing the Davis-Besse Licensee activities since May 3, 2002. Any additional enforcement actions, as requested by the Petitioners, would not increase this level of Staff oversight, which is directed at assuring that the plant is capable of safe operation in accordance with the Commission's rules and regulations.

The fundamental building blocks of the framework for the regulatory oversight process are the seven cornerstones of safety: initiating events, mitigating systems, barrier integrity, emergency preparedness, occupational radiation safety, public radiation safety, and physical protection. These cornerstones are grouped into three strategic areas: reactor safety, radiation safety, and safeguards. This framework is based on the principle that the agency's mission of assuring public health and safety is met when the agency has reasonable assurance that licensees are meeting the objectives of the seven cornerstones of safety.

The Reactor Oversight Process (ROP) integrates the NRC's inspection, assessment, and enforcement programs. Along with performance indicators (PIs), assessment, and enforcement, the reactor inspection program is an integral part of the ROP. Acceptable performance in the cornerstones, as measured by the PIs and the risk-informed baseline inspection program, is indicative of overall performance that provides for adequate protection of public health and safety.

Another principle of the framework is that there is a level of performance for which the NRC does not need to engage the Licensee beyond some baseline level of oversight. Performance indicators reported by power reactor licensees and the NRC's inspection program provide the information used in comparing licensee performance against the cornerstones of safety. The risk-informed baseline inspection program is designed to be the inspection oversight that provides indications of performance within areas of the cornerstones of safety that are not measured by the PIs or not adequately measured by PIs.

The Operating Reactor Assessment Program evaluates the overall safety performance of operating commercial nuclear reactors and communicates the results to licensee management, members of the public, and other government agencies.

This assessment program collects information from inspections and PIs to enable the agency to arrive at objective conclusions about the licensee's safety performance. Based on this assessment information, the NRC determines the appropriate level of agency response, including supplemental inspection and pertinent regulatory actions ranging from management meetings up to and including orders for plant shutdown. The assessment information and agency response are then communicated to the public. Followup agency actions, as applicable, are conducted to ensure that the corrective actions designed to address performance weaknesses were effective.

In general, when significant performance problems are identified in one or more of the seven cornerstones in the areas of reactor safety, radiation safety, or security, as defined by NRC Inspection Manual Chapter (IMC) 0305, "Operating

Reactor Assessment Program,” the level of NRC actions is governed by the Action Matrix (Exhibit 5 of IMC 0305). The Action Matrix was developed with the philosophy that, within a certain level of safety performance (e.g., the licensee response band), licensees would address their performance issues without additional NRC engagement beyond the baseline inspection program. Agency action beyond the baseline inspection program will occur only if assessment input thresholds are exceeded. The Action Matrix identifies the range of NRC and licensee actions and the appropriate level of communication for varying levels of licensee performance. The Action Matrix describes a graded approach in addressing performance issues. The possible approaches could include additional supplemental inspection, a demand for information, a confirmatory action letter, or issuance of an order, up to and including a plant shutdown. The highest level of Staff oversight of licensee activities for plants with performance problems or operational events is governed by IMC 0350, “Oversight of Operating Reactor Facilities in a Shutdown Condition with Performance Problems.”

By letter dated April 29, 2002, the NRC informed FirstEnergy that its corrective actions at Davis-Besse would receive enhanced NRC oversight as described in IMC 0350. The decision by the Staff to place the Davis-Besse Licensee in the highest level of Staff oversight was based on the identified performance deficiencies, and was also intended to assure close coordination between NRC and Licensee personnel on the corrective actions needed to assure safe plant restart. That enhanced monitoring began on May 3, 2002, and included the creation of an oversight panel to provide the required oversight during the plant shutdown, during the startup of the plant following the NRC’s letter dated March 8, 2004, which removed the restriction the NRC had placed on plant restart, and following restart until a determination is made that the plant is ready for return to the NRC’s normal ROP.

When a plant is under the IMC 0350 process, the routine ROP is suspended. However, the ROP continues to be used as guidance. The oversight panel will assess inspection findings and other performance data to determine the required level and focus of followup inspection activities and any other appropriate regulatory actions. The focus of this manual chapter is to provide oversight of the Licensee’s performance until a return to the routine oversight under the ROP is warranted.

All of the documents referenced in Section II.A are available at the NRC Web site, www.nrc.gov.

B. Relevant Enforcement Policies

This section provides a brief overview of the NRC’s scope and authority relative to the enforcement policy, and the processes by which the Staff takes enforcement actions relative to licensees’ compliance with the Commission’s rules

and regulations. This overview is intended to provide a general understanding of how and why enforcement actions are taken against licensees, as well as an understanding of the appropriate enforcement actions relative to the specific requests from the Petitioners.

1. Background

The Atomic Energy Act of 1954, as amended, establishes “adequate protection” as the standard of safety on which NRC regulations are based. In the context of NRC regulations, safety means avoiding undue risk or, stated another way, providing reasonable assurance of adequate protection of workers and the public in connection with the use of source, byproduct, and special nuclear materials.

While safety is the fundamental regulatory objective, compliance with NRC requirements plays an important role in giving the NRC confidence that safety is being maintained. Under Atomic Energy Commission and NRC case law, reasonable assurance of adequate protection of public health and safety is, as a general matter, defined by the Commission’s health and safety regulations themselves. That is, unless otherwise provided, there is reasonable assurance of adequate protection of public health and safety when the applicant or licensee demonstrates compliance with the Commission’s regulations. NRC requirements, including technical specifications, other license conditions, orders, and regulations, have been designed to ensure adequate protection — which corresponds to “no undue risk to public health and safety” — through acceptable design, construction, operation, maintenance, modification, and quality assurance measures. The regulations were established using defense-in-depth principles and conservative practices that provide a degree of margin to unsafe levels. In the context of risk-informed regulation, compliance plays a very important role in ensuring that key assumptions used in underlying risk and engineering analyses remain valid.

While adequate protection is presumptively assured by compliance with NRC requirements, circumstances may arise where new information reveals that an unforeseen hazard exists or that there is a substantially greater potential for a known hazard to occur. In such situations, the NRC has the statutory authority to require licensee action above and beyond existing regulations to maintain the level of protection necessary to avoid undue risk to public health and safety.

The NRC also has the authority to exercise discretion to permit continued operations — despite the existence of a noncompliance — where the noncompliance is not significant from a risk perspective and does not, in the particular circumstances, pose an undue risk to public health and safety. When noncompliance occurs, the NRC must evaluate the degree of risk posed by that noncompliance to determine if specific immediate action is required. Where needed to ensure adequate protection of public health and safety, the NRC may demand immediate licensee action, up to and including a shutdown or cessation of licensed activities.

Based on the NRC's evaluation of noncompliance, the appropriate action could include refraining from taking any action, taking specific enforcement action, issuing orders, or providing input to other regulatory actions or assessments, such as increased oversight (e.g., increased inspection). Since some requirements are more important to safety than others, the NRC endeavors to use a risk-informed approach when applying NRC resources to the oversight of licensed activities, including enforcement activities.

The primary purpose of the NRC's Enforcement Policy is to support the NRC's overall safety mission in protecting the public health and safety and the environment. Consistent with that purpose, the policy endeavors to:

- deter noncompliance by emphasizing the importance of compliance with NRC requirements, and
- encourage prompt identification and prompt, comprehensive correction of violations of NRC requirements.

Therefore, licensees, contractors, and their employees who do not achieve the high standard of compliance that the NRC expects will be subject to enforcement sanctions. Each enforcement action is dependent on the circumstances of the case. However, in no case will licensees who cannot achieve and maintain adequate levels of safety be permitted to continue to conduct licensed activities.

2. Relevant Enforcement Policies

The Petitioners' requests for enforcement actions against the Davis-Besse Licensee are related to commitments made by the Licensee in response to the NRC's 1996 section 50.54(f) letter and to the LERs submitted by the Licensee (these two requests are explained more fully in Section II.C).

With respect to the issue of enforcing commitments, the agency in most cases cannot take formal enforcement actions solely on the basis of whether licensees fulfill commitments, as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement such as a rule, order, license condition, or technical specification. However, when failures to meet commitments result in violations of the Commission's health and safety regulations, the Staff will take the appropriate enforcement actions.

With respect to the issue of taking enforcement related to LERs, the Staff has processes in place for reviewing LERs submitted by nuclear power plant licensees, and those processes include determining appropriate enforcement actions if violations are identified. A brief description is provided below of how the Staff reviews and dispositions LERs. This process is part of the Reactor Oversight Process, described in Section II.A.

NRC inspectors conduct inspections of licensed nuclear power plants following guidance in the NRC Inspection Manual, which contains objectives and procedures to use for each type of inspection. Inspection Procedure 71153, “Event Followup,” requires inspectors to review LERs and related documents for accuracy of the LER, appropriateness of corrective actions, violations of requirements, and generic issues.

If an LER involves a finding or noncompliance that the Licensee entered into its corrective action program, IMC 0612, “Power Reactor Inspection Reports,” directs the inspectors to include in the inspection report a description of the safety significance of the event and any appropriate enforcement actions.

The safety significance of LER findings is determined by using the Significance Determination Process (SDP) as defined in IMC 0609, “Significance Determination Process.” Each SDP analysis supports a cornerstone associated with the strategic performance areas as defined in IMC 2515, “Light-Water Reactor Inspection Program — Operations Phase.” The SDP is primarily used to assess the significance of NRC inspection findings, but is also used for other purposes, including the assessment of LER findings.

Depending on their significance, LER findings are assigned colors of:

- green (very low safety significance),
- white (low to moderate safety significance),
- yellow (substantial safety significance), or
- red (high safety significance).

If the LER findings are associated with violations of regulatory requirements, enforcement actions are processed in accordance with the current revision of NUREG-1600, “General Statement of Policy and Procedures for NRC Enforcement Actions.” The significance of the LER findings is considered in the determination of the appropriate enforcement action.

All of the documents referenced in Section II.B are available at the NRC Web site, www.nrc.gov.

C. Staff Response to Petitioners’ Requests To Take Enforcement Action

1. Response to First Request for Enforcement

The first of the two specific requests for enforcement action by the Petitioners was for the NRC to “take enforcement actions against First Energy Nuclear Operating Company for failure to live up to their commitments made in response to the NRC’s October 1996 10 CFR 50.54(f) letter. Since the 10 CFR 50.54(f) letter was issued in direct response to the problems at Millstone that netted its

owner a record \$2.1 million fine from the NRC, failure to heed the Millstone warning should carry at least an equivalent sanction.”

The purpose of the 1996 section 50.54(f) letter was to require information that would provide the NRC added confidence and assurance that U.S. nuclear power plants are operated and maintained within the design bases and any deviations are reconciled in a timely manner. As stated in the Staff’s response to the Petitioners’ requests for immediate action (*see* Section II.D), the adequacy of safety-significant structures, systems, and components would be assessed by the Staff’s oversight activities and would be adequately addressed before the NRC allowed the plant to restart. The Staff’s oversight activities while the Davis-Besse plant was shut down provided the level of confidence and assurance that this plant meets the objectives stated in the section 50.54(f) letter. These oversight activities included system health assurance inspections, inspections of design basis issues, and an inspection of the Licensee’s actions associated with the completeness and accuracy of required records and submittals to the NRC (Inspection Report 50-346/03-19, dated January 28, 2004).

In Inspection Report 50-346/03-19, the Staff stated that, based on the documents and corrective actions reviewed and the results of previous NRC inspections of Licensee activities under the Davis-Besse Return-to-Service Plan, the NRC has reasonable confidence that important docketed information is complete and accurate in all material respects and that future submittals will be complete and accurate. This inspection identified no widespread noncompliances with regulatory requirements or current programmatic concerns associated with the completeness and accuracy of submittals to the NRC. The inspection report identified three findings, including a noncited violation and an apparent violation, which is being considered for escalated enforcement. The apparent violation involves failure to provide the NRC complete and accurate information as required by 10 C.F.R. § 50.9 in the Licensee’s November 11, 1998, response to NRC Generic Letter 98-04, “Potential for Degradation of the Emergency Core Cooling System and the Containment Spray System After a Loss-of-Coolant-Accident Because of Construction and Protective Coating Deficiencies and Foreign Material in Containment.” Specifically, information pertaining to unqualified protective coatings and the likelihood of clogging of the containment emergency sump screen was not provided to the NRC in a complete and accurate manner. The Licensee submitted a written response to the apparent violation on February 27, 2004. The NRC is in the process of making its final enforcement decision.

As stated in the previous section, the agency in most cases cannot take formal enforcement actions solely on the basis of whether licensees fulfill commitments, as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement.

Although the Staff has not taken any formal enforcement actions against FirstEnergy solely for failure to meet commitments, the Staff has taken for-

mal enforcement actions against the Licensee for noncompliance with NRC requirements, including enforcement actions for failure to meet design-related requirements.

Two recent enforcement actions taken against the Davis-Besse Licensee were for systems, structures, and components (SSCs) not configured or maintained in accordance with the plant design and licensing basis. On October 7, 2003, the NRC issued a final significance determination for a yellow finding associated with potential clogging of the emergency sump following a loss-of-coolant accident. In addition, on March 4, 2004, the NRC issued its final significance determination for a white finding for a design issue involving the high-pressure injection pumps. The Licensee submitted LERs to the NRC on both of these issues and more detailed discussions of these two issues are included in the Staff's response below to the Petitioners' second request for enforcement action.

In response to the Petitioners' reference to the enforcement actions taken against the Millstone licensee, those enforcement actions were for noncompliance with NRC requirements, not solely related to any failures to fulfill commitments. With respect to the civil penalty assessed to the Millstone licensee, it should be noted that the agency's Enforcement Policy has changed since that time in conjunction with adopting the ROP.

Instead of using civil penalties as a deterrent, the NRC uses enforcement actions under the ROP as but *one part* of the agency's overall regulatory response. The ROP's Action Matrix will cause the Staff to consider specific regulatory actions based on the risk significance of the issue. Actions might include increased inspections, demands for information, or orders.

However, civil penalties (and the use of severity levels) will be considered for issues with actual consequences, such as an overexposure to the public or plant personnel above regulatory limits, failure to make the required notifications, impacting the ability of federal, state, and local agencies to respond to an actual emergency (site area or general emergency), a transportation event, or a substantial release of radioactive material. Civil penalties and severity levels will also be used to address violations that are willful or that have the potential for impacting the regulatory process.

The use of civil penalties in these instances remains appropriate as a deterrent for these types of issues. To the extent that the SDP can provide an assessment of the significance of the underlying violation or issue, it will be used as a first step in determining the significance of the violation. This will ensure a consistent approach for significance determinations. The Staff considers the SDP output in conjunction with the guiding principles for assessing significance and the guidance included in the supplements to the Enforcement Policy to determine the appropriate severity level. For example, a procedural violation associated with an inspection finding characterized by the SDP as green may be categorized

at Severity Level IV based on the risk significance and ultimately assigned a Severity Level III categorization because the violation was willful.

There are ongoing NRC activities that may lead to civil and/or criminal proceedings against the Davis-Besse Licensee. NRC's Office of Investigations (OI) conducted an investigation to determine whether the Davis-Besse Licensee willfully violated NRC requirements and whether the Licensee willfully misled the NRC. The results of the OI investigation were provided to the U.S. Department of Justice (DOJ) in accordance with the Memorandum of Understanding (MOU) between the NRC and DOJ. The federal investigation into these matters continues under the leadership of the U.S. Attorney in Cleveland supported by the NRC Office of Investigations and the DOJ.

In accordance with Section III.C of the MOU, after notifying DOJ, the NRC may take immediate actions necessary to protect the public health and safety. Absent such circumstances, the NRC shall normally defer actions such as civil penalties until DOJ concludes its activities. The Staff concluded that immediate actions to protect the health and safety of the public are not necessary at this time. A senior NRC manager is monitoring the ongoing federal investigation for any emerging safety concerns.

2. Response to Second Request for Enforcement

The second specific request for enforcement action by the Petitioners was for the NRC to "take enforcement actions against First Energy Nuclear Operating Company for the numerous design basis violations dating back to the date of licensure with penalties for each day that the licensee was out of compliance with NRC regulations." As basis for this request, the Petitioners cite the LERs submitted by the Licensee since the plant was licensed, and they specifically cite seven LERs that have been submitted by the Licensee since mid-2002.

Based on the NRC's evaluation of each noncompliance reported in the LERs (and other sources such as NRC inspection reports), the appropriate action could include refraining from taking any action, taking specific enforcement action, issuing orders, or providing input to other regulatory actions or assessments, such as increased oversight (e.g., increased inspection).

The NRC endeavors to use a risk-informed approach when applying NRC resources to the oversight of licensed activities, including enforcement activities. As described in the Commission's Enforcement Policy, varying levels of significance using either one of four severity levels or one of four risk levels derived from the ROP are applied to documented violations. Civil penalties can be applied to Severity Levels III, II, and I, but are not normally applied to ROP findings that constitute violations. The ROP utilizes other mechanisms, such as increased inspection oversight, to motivate compliance and corrective actions.

As stated in Section II.B, the Staff's findings on individual LERs are discussed in resident inspection reports. Of the seven LERs specifically cited by the Petitioners in support of their request for enforcement action, the Staff had published inspection reports providing its findings on four at the time the proposed Director's Decision was issued. To illustrate how the Staff implements the agency's Enforcement Policy in regard to LER findings, summaries from these published inspection reports for the four LERs are provided below. Of the remaining three LERs specifically mentioned by the Petitioners, two were closed in Inspection Report 50-346/03-10, dated March 5, 2004 (ML040680070), which documented the NRC's special corrective action team inspection to assess the effectiveness of the implementation of the Licensee's corrective action program. The two LERs closed by this report, LER 2002-006, "EDG [Emergency Diesel Generator] Exhaust Piping Not Adequately Protected from Potential Tornado-Generated Missiles," and LER 2003-003, "Potential Inadequate High Pressure Injection Pump Minimum Recirculation Flow Following a Small Break Loss of Coolant Accident," were identified as noncited violations, having very low safety significance. The remaining LER, 2003-007, "AC System Analysis Shows Potential Loss of Offsite Power Following Design Basis Event," is currently open and will be addressed by the same process used to disposition the closed LERs.

3. LER 2002-004, "Containment Isolation Closure Requirements for Reactor Coolant Pump (RCP) Seal Injection Valves MU66A-D"

This LER documented a condition where the pressure regulating valve setpoint for the RCP seal injection valves was inadequate to ensure closure of the valves upon receipt of a containment isolation signal. This condition represented a potential common-mode failure. As a result of this condition, during postulated accident conditions, a potential for uncontrolled radioactive leakage outside containment could be created. This condition had apparently existed since original plant construction, and is a violation of Technical Specification (TS) 3.6.3.1 for Modes 1-4. For Modes 1, 2, 3, and 4, this TS states, "All containment isolation valves shall be operable with isolation times less than or equal to required isolation times." Contrary to this requirement, the pressure regulating setpoint for the RCP seal injection valves was inadequate to ensure closure of the valves upon receipt of a containment isolation signal. In addition, the valves were determined to be installed inconsistent with design assumptions.

However, downstream of these isolation valves are check valves that are designed to prevent flow out of the reactor coolant system, thereby isolating the flow path regardless of whether the RCP seal injection valves are closed. The reliability of the check valves was determined to be high based on test history (no test failures in the past 10 years had occurred). The regional senior reactor analyst performed a Phase 3 assessment in accordance with IMC 0609 and determined

that the issue had very low safety significance (green). This determination was due to the low initiating event frequency of an interfacing system loss-of-coolant accident (ISLOCA), 1E-7, coupled with the check valve probability of failure to prevent a potential ISLOCA if the RCP seal injection valve failed. The senior reactor analyst also reviewed the Licensee's risk assessment and determined that the calculation was conservative given the assumptions used. The Licensee's analysis determined that the change in core damage frequency was in the 1E-8 per year range.

Based on the above evaluation of risk, this LER was closed in Inspection Report 50-346/02-17 as a Licensee-identified noncited violation of TS 3.6.3.1.

4. LER 2002-005, "Potential Clogging of the Emergency Sump Due to Debris in Containment"

On September 4, 2002, with the reactor defueled, FirstEnergy determined that a gap in the sump screen larger than allowed by design basis (greater than 1/4-inch openings) existed. Also, the existing amount of unqualified containment coatings and other debris (e.g., insulation) inside containment could have potentially blocked the emergency sump intake screen, rendering the sump inoperable following a loss-of-coolant accident. The unqualified coatings and existence of other debris had existed since original construction. FirstEnergy declared the emergency sump inoperable and entered the deficiency into its corrective action program. With the emergency sump inoperable, both independent emergency core cooling system (ECCS) trains and both containment spray (CS) system trains were inoperable, due to both requiring suction from the emergency sump during the recirculation phase of operation. This could prevent both trains of ECCS from removing residual heat from the reactor and could prevent CS from removing heat and fission product iodine from the containment atmosphere.

FirstEnergy reported this information in LER 2002-05 on November 4, 2002. On December 11, 2002, FirstEnergy submitted Supplement 1, which provided additional information regarding corrective actions for the sump strainer and coatings issues. In this supplement, FirstEnergy stated that a debris generation and transport analysis would be performed. Supplement 2, dated May 21, 2003, provided additional information regarding additional corrective actions. On May 28, 2003, FirstEnergy informed the NRC that a further review of the past significance of these issues would not be performed.

FirstEnergy obtained information on at least two occasions prior to issuance of the LER that should have alerted them to the unqualified coatings. First, a 1976 letter from Babcock and Wilcox (B&W) informed the Davis-Besse Licensee that B&W had no data regarding design basis accident testing for particular coatings. The equipment coated with unqualified paint identified in the letter included the RCP motors, reactor vessel, steam generators, pressurizer, and reactor coolant

system piping. Second, NRC Generic Letter 98-04, "Potential for Degradation of the Emergency Core Cooling System and the Containment Spray System After a Loss-of-Coolant Accident Because of Construction and Protective Coating Deficiencies and Foreign Material in Containment," dated July 14, 1998, was issued to operating reactors specifically requesting information about the potential effects of containment coating deficiencies.

On July 3, 2003, a Significance and Enforcement Review Panel meeting was held regarding the significance of the failure to effectively implement corrective actions for design control deficiencies regarding containment coatings, uncontrolled fibrous material, and other debris inside containment. This deficiency resulted in the inability of the ECCS sump to perform its safety function under certain accident scenarios due to clogging of the sump screen. The NRC Staff determined that several combinations of factors led to core damage frequency increases in the 1E-5 (yellow) range.

On July 30, 2003, the NRC issued the preliminary yellow finding in Inspection Report 50-346/03-15. FirstEnergy provided a written response dated August 29, 2003, acknowledging the performance deficiency. FirstEnergy did not contest the finding and its response provided no new information to change the NRC's preliminary conclusion. On October 7, 2003, the NRC issued the Yellow Final Significance Determination, which included a Notice of Violation of 10 C.F.R. Part 50, Appendix B, Criterion XVI, "Corrective Actions," for the failure to promptly identify and correct significant conditions adverse to quality involving the potential to clog the emergency core cooling and CS system sump with debris following a loss-of-coolant accident.

As corrective actions, FirstEnergy performed extensive modifications on the sump during the recent extended outage. FirstEnergy replaced the previous emergency sump strainer with a much larger strainer. The unqualified coatings and other debris, including fibrous insulation remaining in containment, have been walked down, verified, and documented. Much of the fibrous insulation has been removed from containment, and most of the containment internal surfaces and surfaces of equipment inside containment have been recoated with qualified paint. Debris generation, transport, strainer head loss, and strainer integrity analyses were performed for the emergency sump to return the emergency sump to full qualification and operability. The NRC inspection of FirstEnergy's new sump is documented in Inspection Report 50-346/03-06. The NRC identified no significant issues with the new sump. This LER will be closed following the NRC Staff's review of the past significance of the gap in the sump screen.

5. LER 2003-002, “Potential Degradation of High-Pressure Injection Pumps Due to Debris in Emergency Sump Fluid Post Accident”

On October 22, 2002, with the reactor defueled and in an extended outage, FirstEnergy identified a design deficiency regarding internal clearances of the high-pressure injection (HPI) pumps. This deficiency resulted in operation of the HPI pumps being affected by debris that may be entrained in the process fluid during some post-accident scenarios. Specifically, it was determined that small ports in the HPI pumps that supply lubricating water to the hydrostatic bearing in the pump were smaller than the designed openings in the emergency sump screen. During certain accidents when the reactor coolant system is at high pressure, the HPI pumps are needed to maintain the core cooled by operating in the high-pressure sump recirculation mode of operation and taking suction from the containment sump via the low-pressure injection pumps. It was during this mode of operation that the potential existed for debris from the sump (fibrous insulation, paint chips, and smaller debris such as containment floor dirt) to be transported to the HPI pumps and cause blockage of the ports and loss of lubricating water to the hydrostatic bearing. This could result in failure of the pumps due to excessive vibration/overheating.

This deficiency was an original design flaw that had existed since initial plant operation. On April 7, 2003, FirstEnergy reported this issue to the NRC in accordance with 10 C.F.R. § 50.72. Subsequently, on May 5, 2003, FirstEnergy submitted LER 2003-02. FirstEnergy modified both HPI pumps during the recent extended outage to eliminate the potential for blockage of the ports.

On September 4, 2003, a Significance and Enforcement Review Panel determined the issue to be greater than green because of the large uncertainty in determining the most likely failure probability of the HPI pumps and the contribution to risk from fires. On October 8, 2003, the NRC issued Inspection Report 50-346/03-21 transmitting the preliminary greater-than-green finding to the Licensee. On November 7, 2003, FirstEnergy requested an extension on the response to the preliminary significance determination. On December 5, 2003, FirstEnergy provided its analysis of this issue. On March 5, 2004, the NRC issued a white Final Significance Determination, which included a Notice of Violation of 10 C.F.R. Part 50, Appendix B, Criterion III, “Design Control,” for the failure to adequately implement design control measures for verifying and checking the adequacy of the original design of the HPI pumps to mitigate all postulated accidents.

Regarding corrective actions, the Licensee performed extensive analysis, pump modifications, qualification testing, in-plant testing, and reduction of fibrous insulation in the containment to ensure adequate HPI pump performance during the recirculation mode. The Staff conducted a review of the analysis, testing, and modifications performed by the Licensee and concluded that the Licensee’s overall

approach to the modification of the HPI pumps was acceptable and provided reasonable assurance that the pumps would perform their required functions when called upon. This review is detailed in the Task Interface Agreement 2003-04 response dated February 11, 2004, which is included as an attachment to NRC Inspection Report 50-346/04-02.

6. LER 2003-005, “Containment Gas Analyzer Heat Exchanger Valves Found Closed Rendering the Containment Gas Analyzer Inoperable”

This LER reported the failure by the Licensee to establish an appropriate operational test from the original plant startup until May 2003 to ensure that sufficient cooling water flow is provided to the hydrogen analyzer heat exchangers during operational modes that require the hydrogen analyzers to be operable. The hydrogen analyzers are part of the containment hydrogen control system, which is designed to control the concentration of hydrogen that may be released into containment following a LOCA. In accordance with IMC 0609, Appendix A, Attachment 1, the inspectors performed a SDP Phase 1 screening and determined that the issue affected the Reactor Safety Strategic Performance Area. The finding was more than minor because (1) it involved the configuration control attribute of the barrier integrity cornerstone, and (2) it affected the cornerstone objective of providing reasonable assurance that physical design barriers protect the public from radionuclide releases caused by accidents or events.

This finding is unrelated to SSCs that are needed to prevent accidents from leading to core damage. To determine if this finding had an effect on large early release frequency (LERF), the inspectors used IMC 0609, Appendix H, “Containment SDP.” The finding was characterized as a Type B finding (having no impact on core damage frequency) and was then compared to Table 3 in Appendix H. The inspectors determined that the hydrogen analyzer had no impact on the containment-related SSCs listed in Table 3 (i.e., containment penetration seals, containment isolation valves, or purge and vent lines) and would not influence LERF. On this basis, the finding has very low safety significance.

Because of the very low safety significance and because the issue was entered into the Licensee’s corrective action program, it was treated as a noncited violation, consistent with section VI.A of the NRC Enforcement Policy. The details of the Staff’s evaluation are contained in Inspection Report 50-346/03-17, dated September 29, 2003.

This LER also discussed a second issue that involved a condition that would potentially render the moisture trap on the gas analyzer sample line inoperable. The Licensee provided a January 23, 2004, supplement to this LER describing the modifications made to prevent the moisture trap from becoming inoperable. The Staff determined that the potential containment bypass pathway caused by the improper trap condensate drain path was a Licensee-identified minor violation of

10 C.F.R. Part 50, Appendix B, Criterion III, "Design Control." This issue was determined to be of minor significance because there was no evidence that the trap had ever functioned, and since pressure of the air supplied to the trap was insufficient to operate the trap, it was highly unlikely that the trap would have ever functioned. This LER was closed in Inspection Report 50-346/04-02, dated March 22, 2004.

Although the above discussion on the individual LERs is meant to demonstrate how the Staff implements the agency's inspection process and Enforcement Policy in regard to LER findings, the Staff's first priority is to assure that the issues involved will not adversely impact future plant safety. The Staff then reviews the Licensee's analysis for accuracy and completeness, and conducts its own risk assessment of the condition reported by the Licensee. Once the safety implications are well understood, the Staff imposes the appropriate enforcement actions in accordance with the Enforcement Policy.

D. Staff Response to Petitioners' Immediate Action Requests

The NRC Staff provided its findings on the Petitioners' requests for "immediate action" in a letter dated November 26, 2003. The Staff considered the Petitioners' requests to suspend the Davis-Besse license and prohibit plant restart until certain conditions have been met to be equivalent to "immediate action" requests because the Davis-Besse Licensee might complete all necessary restart activities, and the NRC Staff might complete all necessary oversight activities, before the Staff could finalize the Director's Decision on this petition. Requests 3, 4, and 5 contained in the Petitioners' August 25 letter are considered to be the immediate action requests, and the Staff's evaluation of each of these requests contained in its November 26 letter is repeated verbatim below.

In Request 3, the Petitioners requested the NRC, "suspend the license and prohibit restart of the Davis Besse reactor unless and until First Energy Nuclear Operating Company has addressed all 1000 design basis deficiencies identified in 1997." The NRC staff agrees that design basis issues need to be addressed before plant restart. The NRC's oversight activities of the licensee's ongoing programs related to the design adequacy of the Davis-Besse plant are focused on plant safety. The licensee has initiated, and is still implementing, extensive corrective actions to address hardware, programmatic, and human performance issues to assure compliance with its license and NRC regulations. Compliance includes evaluating, testing, or inspecting safety-related systems to ensure that they are able to perform their design basis functions as defined in the plant's technical specifications (TS) and updated final safety analysis report. The staff's oversight activities include independent NRC inspections and NRC reviews of the licensee's evaluations to ensure conformance of safety systems and programs to the design and licensing bases. The adequacy of safety-significant structures, systems, and components is being tracked under

NRC Restart Checklist Item 5.b, “Systems Readiness for Restart” and must be adequately addressed before the NRC will allow the plant to restart.

The Petitioners’ Request 3 is based on information contained in the NRC’s February 26, 2003, inspection report on Davis-Besse design-related activities, which reported that approximately 200 of the more than 1000 design basis deficiencies identified in response to the NRC’s 50.54(f) design basis letter had not been corrected. The licensee had agreed, prior to the Petitioners’ August 25, 2003, letter, to place all remaining unresolved design basis deficiencies identified in response to the NRC’s 50.54(f) design basis letter in its corrective action program. Information on how the remaining unresolved design basis deficiencies will be dispositioned can be found in the licensee’s October 20, 2003, letter responding to this Petition, and in the licensee’s letter dated November 20, 2003, providing supplemental information related to the NRC’s 50.54(f) design basis letter. In these letters, FirstEnergy stated that, while it had been slow to implement corrective actions for those issues identified in response to the NRC’s 50.54(f) design basis letter, FirstEnergy has determined that these issues either were corrected or have been documented in condition reports and entered into the Davis-Besse corrective action program. Each condition report generated by FirstEnergy was evaluated for potential impact on the operability of systems, structures, or components (SSCs). Those conditions classified as restart action items require evaluation for needed corrective actions prior to restart. Conditions that are not classified as restart action items will remain in the licensee’s corrective action program and will be prioritized for resolution, which may occur after plant restart. The licensee stated in these letters that the number of open items has been reduced to approximately 100, with only a small number designated as restart items.

Appendix B of 10 CFR Part 50 requires operators of nuclear power plants to maintain an effective corrective action program. The process described above by the licensee to evaluate and disposition the remaining design basis deficiencies conforms with this regulatory requirement. The NRC’s oversight of the licensee’s activities includes specific inspections of the corrective action program to assure that this process is being followed correctly. The NRC will not allow the plant to restart until the licensee has demonstrated the capability to adequately manage the resolution of unresolved design basis deficiencies.

Therefore, the staff considers these activities, initiated prior to receiving the Petition, to completely satisfy the Petitioners’ immediate action request to prohibit plant restart until the licensee has addressed all 1000 design basis deficiencies. The staff also concludes that the Petitioners’ immediate action request to suspend the plant license until the licensee has addressed all 1000 design basis deficiencies is in effect being granted by the actions already taken by the staff. These actions include our confirmatory action letter of March 13, 2002 (which confirmed the licensee’s agreement that NRC approval is required for restart of the Davis-Besse plant), the enhanced NRC oversight as described in NRC Inspection Manual Chapter 0350, and compliance with the regulatory requirements imposed on all U.S. nuclear power plants. If the licensee had not agreed to obtain NRC approval before restarting the

Davis-Besse plant, the NRC would have taken appropriate regulatory actions to assure restart would not occur unless NRC approval was received.

In Request 4, the Petitioners requested the NRC, “suspend the license and prohibit restart of the Davis Besse reactor unless and until First Energy has updated its Probabilistic Risk Assessment to reflect the flaws in it[s] design and licensing basis.” The Petitioners provided clarifying information related to this request during the September 17, 2003, meeting. The Petitioners are requesting that the Davis-Besse PRA be revised to include the known design flaws, which will be corrected before the plant is allowed to restart, to account for unknown design flaws that may currently exist or may exist in the future.

The NRC’s policy statement on PRA encourages greater use of this analysis technique to improve safety decisionmaking and improve regulatory efficiency in a manner that complements the NRC’s deterministic approach and supports the NRC’s traditional defense-in-depth philosophy. However, for the specific purpose of assuring that all restart issues have been satisfactorily addressed, the staff does not intend to rely on the Davis-Besse PRA to determine if there is reasonable assurance of adequate protection of the public health and safety.

On a more general level, while the staff recognizes that a PRA is a useful analysis tool, there are currently no regulatory requirements for licensees to develop a plant PRA, nor are there requirements to maintain or update a plant PRA. As explained in Management Directive 8.11, requests for changes to existing NRC regulations should be submitted as a petition for rulemaking and are not considered valid requests under 10 CFR 2.206. Therefore, the staff will not consider taking any action under Section 2.206 in regard to the Petitioners’ request that the NRC suspend the license and prohibit restart of the Davis-Besse reactor until the plant PRA is updated to reflect design flaws, and this request is therefore denied.

In Request 5, the Petitioners requested the NRC, “suspend the license and prohibit restart of the Davis Besse reactor with any systems in a ‘degraded but operable’ condition.” It is the staff’s judgement that the processes and programs in place for the Davis-Besse restart effort (described above in the staff’s response to Request 3) will provide reasonable assurance that all safety-related systems will be capable of performing their intended safety function and will be in compliance with the plant license and TS. The NRC has issued generic guidance (Generic Letter 91-18, “Information to Licensees Regarding Two NRC Inspection Manual Sections on Resolution of Degraded and Nonconforming Conditions and on Operability”) which provides a process for licensees to develop a basis to continue operation or to place the plant in a safe condition and take prompt corrective action. This process assures that issues affecting the operability of SSCs that are subject both to 10 CFR Part 50, Appendix B, and 10 CFR Part 50.59 are corrected promptly, and that SSCs in degraded but operable conditions are returned to full functional capability in a timely fashion. Each licensee is authorized to operate its plant in accordance with the NRC’s regulations and the plant license. If an SSC is degraded or nonconforming but operable, the licensee must establish an acceptable basis to continue to operate.

The licensee must, however, promptly identify and correct the condition adverse to safety or quality in accordance with 10 CFR Part 50, Appendix B, Criterion XVI. The basis for this authority to continue to operate is that the plant license and TS contain the specific characteristics and conditions of operation necessary to ensure that an abnormal situation or event does not pose an undo [*sic*] risk to public health and safety. Thus, if the TS are satisfied and required equipment is operable, and the licensee is correcting any degraded conditions in a timely manner, allowing a plant to restart or to continue operation does not pose an undue risk to public health and safety. This generic guidance applies to all U.S. nuclear power plants, including Davis-Besse, and the NRC will continue to monitor licensees to assure that this guidance is followed appropriately. Therefore, the Petitioners' Request 5 is not needed to assure plant safety nor is it consistent with established staff regulatory requirements, and is therefore denied.

III. CONCLUSION

The NRC Staff has carefully considered the Petitioners' arguments regarding why the NRC should take enforcement actions against FirstEnergy. In summary, the Petitioners stated that FirstEnergy has failed to complete commitments related to the NRC's section 50.54(f) design basis letter (issued on October 9, 1996) and referred to numerous design basis violations dating back to plant licensing (corresponding to Requests 1 and 2 in the Petitioners' August 25 letter). As noted earlier, the Petitioners' requests for immediate actions (corresponding to Requests 3, 4, and 5 in the Petitioners' August 25 letter) were evaluated in the Staff's November 26, 2003, letter and this evaluation is repeated in Section II.D of this Director's Decision for completeness.

With respect to the first request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based solely on failure of the Licensee to complete commitments represents a misinterpretation of the agency's enforcement policies regarding commitments. As stated earlier, reasonable assurance of adequate protection of public health and safety is, as a general matter, defined by the Commission's health and safety regulations themselves. In most cases, the agency cannot take formal enforcement actions solely on the basis of whether licensees fulfill commitments, as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement. However, when failures to meet commitments result in violations of the Commission's health and safety regulations, the staff will take the appropriate enforcement actions. Although the staff has not taken any formal enforcement actions against FirstEnergy in direct response to any failures to meet commitments, the Staff has taken formal enforcement actions, as discussed in the previous section, against the Licensee for noncompliance with NRC requirements.

Therefore, I deny the Petitioners' request for enforcement actions based solely on any failures on the part of the Licensee to not fully comply with commitments made in response to the section 50.54(f) letter. Formal enforcement actions are taken when there is a noncompliance with NRC requirements, and the severity of those actions is based in part on the degree of risk posed by that noncompliance.

With respect to the second request for enforcement action, the NRC Staff finds that the Petitioners' request for enforcement based on numerous design basis violations (i.e., the LERs submitted by the Licensee) is in effect being granted by the actions already taken by the Staff, as shown by the earlier discussion of our processes for reviewing and evaluating LERs.

It is also important to note that the highest level of Staff oversight of licensee activities for plants with performance problems or operational events is governed by IMC 0350, and that the agency has been overseeing the Licensee's activities using this process since May 3, 2002. The decision by the Staff to place the Davis-Besse Licensee in the highest level of Staff oversight was based on the identified performance deficiencies, and was also intended to assure close coordination between NRC and Licensee personnel on the corrective actions needed to assure safe plant restart. Any additional enforcement actions, as requested by the Petitioners, would not increase this level of Staff oversight, which is directed at assuring that the plant is capable of safe operation in accordance with the Commission's rules and regulations.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

J. E. Dyer, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 22d day of April 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-336
50-423
(License Renewal)**

**DOMINION NUCLEAR
CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)**

May 4, 2004

The Commission declines to vacate a decision by the Secretary of the Commission to return a petition to intervene in the proceeding that had been filed prior to publication of a notice of opportunity for hearing.

RULES OF PRACTICE: INTERVENTION

A person cannot intervene in a proceeding before the proceeding actually exists. For reactor licensing actions, issuance of either a “notice of hearing” or a “notice of proposed action” is a prerequisite to the initiation of a proceeding.

RULES OF PRACTICE: NEW PART 2 RULES

The new Part 2 Rules of Practice apply to all proceedings noticed on or after February 13, 2004. This proceeding was noticed after that date. Petitioner has not presented any injury specific to itself that would warrant our suspension of the normal rules applicable to all proceedings commenced after February 13, 2004.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion filed by the Connecticut Coalition Against Millstone (CCAM), the Petitioner in this proceeding. CCAM seeks to vacate a letter signed by the Secretary of the Commission on March 4, 2004, returning its initial petition to intervene in this proceeding as premature. Both the NRC Staff and the Licensee, Dominion Nuclear Connecticut, have filed answers in opposition to the motion. In addition, CCAM has tendered a reply, which although unauthorized by our rules,¹ we have accepted even though it was not accompanied by a motion for leave to file. As more fully discussed below, we deny the Motion To Vacate.

II. BACKGROUND

This case involves a question of whether to apply the “new” Part 2 Rules of Practice to this proceeding, or whether the filing of the petition to intervene was sufficient to require application of the “old” Part 2 Rules. On January 14, 2004, we published a final rule amending the agency’s Rules of Practice contained in 10 C.F.R. Part 2. *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004). These revised procedures apply to “proceedings noticed on or after the effective date, unless otherwise directed by the Commission.” *Id.* According to the notice, the new rules took effect on February 13, 2004. In addition, the Commission published guidance on its Web site providing different scenarios and explaining whether the new rules or the old rules would apply in each case.²

On January 22, 2004, Dominion Nuclear submitted two applications for license renewal of both Unit 2 and Unit 3 of the Millstone facility. On February 3, 2004, the NRC published a “Notice of Receipt” of the applications, 69 Fed. Reg. 5197, which advised the public that “[t]he acceptability of the tendered application for docketing, and other matters including the opportunity to request a hearing, will be the subject of subsequent Federal Register notices.” *Id.* On February 12, 2004, CCAM filed a Petition to Intervene and Request for Hearing relating to the submitted application, even though the NRC had not yet published a *Federal Register* notice docketing the application and providing the opportunity to request a hearing. Accordingly, on March 4, 2004, the Secretary of the Commission

¹ See 10 C.F.R. § 2.323(c) (“New” Part 2).

² See <http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html>.

returned the petition, advising CCAM that the petition had been filed prematurely because “[t]he NRC Staff is still reviewing the Application and has not yet docketed it. Accordingly, there is not yet a proceeding in which you can seek to intervene.” Letter of March 4, 2004, at 1.

On March 12, 2004, the NRC Staff published a *Federal Register* notice announcing that it had accepted the applications for docketing and persons who wished to intervene in the proceeding and request a hearing could do so. *See* Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49, 69 Fed. Reg. 11,897 (Mar. 12, 2004). On March 22, 2004, CCAM filed the instant motion, seeking to “vacate” the Secretary’s letter and reinstate the petition to intervene and request for hearing as of the original date of submission. Quite simply, CCAM argues that its petition was filed on February 12, 2004, so the old Part 2 Rules of Procedure should apply to the proceeding. In addition, CCAM also resubmitted its petition to intervene.

On March 25, 2004, we issued an order that: (1) referred the resubmitted petition to the Atomic Safety and Licensing Board “for appropriate action[.]” and (2) retained jurisdiction over the Motion To Vacate and invited the NRC Staff and the Licensee to respond to the motion. On April 2, 2004, both the Staff and the Licensee filed answers to the motion. On April 12, 2004, CCAM submitted its unauthorized reply which we have now accepted.

Upon review, we conclude that, assuming arguendo that the Motion To Vacate is timely,³ the Secretary correctly returned the original petition as premature: there was no proceeding in existence in which CCAM’s Petition To Intervene and Request for Hearing could have been filed.

III. ANALYSIS

It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists. Otherwise, persons could file petitions to intervene in proceedings that may — or may not — occur years in advance of the applicant

³ Under the new rules, the Motion To Vacate appears to be untimely, as it must be filed within 10 days of the date of the “occurrence or circumstance from which the motion arises.” 10 C.F.R. § 2.323(a). As the Secretary issued the letter on March 4 and the motion was not filed until March 22, the motion appears to be untimely. However, CCAM alleges that the Secretary did not mail the letter until March 10, 6 days after being signed (although CCAM did not take the simple step of attaching a copy of the envelope as proof of its allegation). Moreover, the old rules — the application of which is at issue in this decision — do not contain the 10-day limitation. *See* 10 C.F.R. § 2.730. Finally, the Secretary cited to the old Part 2 Rules in her letter rejecting the petition.

Because we find the motion to be without merit, we need not reach the issue of timeliness of the motion in this decision.

or licensee seeking the action sought to be challenged. For reactor licensing actions, such as that involved here, under both the old Part 2 and the new Part 2, there must either be a “notice of hearing” or a “notice of proposed action.” See, e.g., 10 C.F.R. § 2.318(a) (new Part 2) (“A proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued”); 10 C.F.R. § 2.700 (old Part 2) (“The general rules in this subpart govern procedure in all adjudications *initiated by the issuance* of . . . a notice of hearing [or] a notice of proposed action issued pursuant to § 2.105 . . .”) (emphasis added). Thus, issuance of a “notice of hearing” or a “notice of proposed action” is a prerequisite to the initiation of a “proceeding.”

In this case, Dominion Nuclear submitted an application for license renewal for the two Millstone facilities on January 20, 2004, and the NRC Staff published a *Federal Register* notice announcing “receipt” of that submission on February 3, 2004. But that notice was not a “notice of proposed action” or a “notice of hearing” under 10 C.F.R. § 2.105, which remains unchanged in the new Part 2 in relevant part. Section 2.105(d) states that a “notice of proposed action *will* provide that, within thirty (30) days from the date of publication in the Federal Register, . . . [a]ny person whose interest may be affected by the proceeding may file a request for a hearing or a petition for leave to intervene” 10 C.F.R. § 2.105(d)(2) (emphasis added). Thus a notice of proposed action must include a notice of opportunity for a hearing.⁴ In this case, the NRC Staff did not publish either a “notice of proposed action” or “notice of opportunity for a hearing” until March 12, 2004, when it published the “Notice of Acceptance for Docketing . . . and Notice of Opportunity for a Hearing.” The “Notice of Receipt” published by the Staff on February 3, 2004, did not contain a notice of opportunity for a hearing; therefore, it cannot constitute a “notice of proposed action” for purposes of the rule and cannot initiate a “proceeding” under the Commission’s regulations.

In summary, there was no “proceeding” in existence in which CCAM could intervene until March 12, 2004, because the Staff did not issue a “Notice of Opportunity for a Hearing” until that date. Therefore, CCAM’s original petition, which was filed on February 12, 2004, before the publication of Notice of Docketing and Opportunity for a Hearing, was clearly premature and was correctly rejected by the Secretary.

We turn now to the question of which Part 2 Rules will apply to this proceeding. As we noted above, the new Part 2 applies to all proceedings “noticed” on or after February 13, 2004. Inasmuch as this proceeding was noticed after that date, the new Part 2 Rules will apply to this proceeding.

⁴In fact, the terms “notice of proposed action” and “notice of opportunity for a hearing” appear to be interchangeable.

The Petitioner argues that two of the various “scenarios” published on the NRC’s Web site to assist in determining whether the new Part 2 will apply to proceedings initiated during the transition period (transition from the old Part 2 to the new Part 2) support its claim. Under each scenario, if the prerequisites are satisfied, the proceedings will be conducted under the old Part 2 Rules of Procedure. The two scenarios are:

Scenario 5: Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004;

Scenario 9: Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for a hearing published on NRC Web site before February 13, 2004, but not in the Federal Register; hearing request/intervention petition received after February 13, 2004.

<http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html>. See generally Motion To Vacate at 3-4.

Even a cursory review demonstrates Petitioner’s error. Initially, both scenarios require that the application not only be “submitted” to the NRC before February 13, 2004, but that the NRC Staff must have “docketed the application” before that date. But the NRC Staff did not accept the two applications in this case for docketing until March 12, when it published the *Federal Register* notice announcing that fact. Moreover, in order for Scenario 5 to apply, the NRC Staff must not have published a notice of docketing and opportunity for a hearing. But in this case the Staff did, in fact, publish such a notice; thus, Scenario 5 cannot apply. Likewise, in order for Scenario 9 to apply, the NRC Staff must have published a notice of docketing and opportunity for a hearing on the NRC’s Web site but not in the *Federal Register*; however, as we have noted above, the Staff *did* publish a notice of docketing in the *Federal Register*. Thus, it is clear that neither scenario applies to this case.

The Petitioner also argues that its initial filing is valid under 10 C.F.R. § 2.309(b)(4)(ii). Motion To Vacate at 6. But that argument fails for the same reason: that rule, by its own terms, explicitly applies only to “proceedings for which a Federal Register notice of agency action is not published . . .” *Id.* Thus, this provision is also inapplicable to the instant case, because a *Federal Register* notice was indeed issued by the Staff for this application.

The Petitioner also ignores the process used by the Staff in its acceptance review of the application. An application is neither accepted for full review by the NRC Staff nor automatically noticed for a possible hearing when it is submitted; instead, the Staff reviews it to ensure it contains the information and analyses

required in a proper application to allow the Staff's full review of the proposed licensing action. If the application does not provide the necessary content, it is returned to the applicant for appropriate changes and possible resubmission. Until an application has been accepted by the NRC Staff, there is not certainty that there will be a proceeding in which a hearing may be requested. In this case, the NRC Staff initiated its docketing review when Dominion Nuclear submitted the applications in January and issued the notice of opportunity to request a hearing when the acceptance review was completed.

Before us now, the Petitioner alleges that the NRC Staff "deliberately" did not docket the applications until after February 13, 2004, the effective date of the new Part 2 Rules. Motion To Vacate at 6; Reply at 4-5. Briefly, Petitioner alleges that because the NRC had conducted several meetings with the Applicant on this subject, it should not have needed any time to conduct its acceptance review. However, notwithstanding any such meetings, the Staff is still required to make an affirmative finding on the adequacy of the Licensee's application for docketing purposes. *See* 10 C.F.R. § 2.101(a)(1)-(3). Here, the Staff's review appears to have been completely normal. We have no reason to question the Staff's conduct of the docketing review and — other than unsupported innuendo — the Petitioner has given us none.

Finally, the Petitioner correctly points out that the Commission has the discretion to waive the application of the new Part 2 Rules of Practice and allow the hearing to proceed under the old Part 2 Rules. Reply at 5. However, the Petitioner has given us no reason to take such a step other than its claim that "[t]he revisions [i.e., the new Part 2] severely curtail [its] rights and opportunities . . . in the hearing process." Reply at 5. Simply put, CCAM has not presented any injury specific to itself that would warrant our suspension of the normal rules applicable to all proceedings commenced after February 13, 2004.

IV. CONCLUSION

In view of the foregoing, we deny the Motion To Vacate. Because the pleadings before us contain some reference to matters now pending before the Licensing Board, we refer all pleadings before us to the Board for review with regard to matters now pending there, such as the Licensee's claim that the new petition is defective. Dominion Nuclear Answer at 5-7.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of May 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 70-143-MLA
70-143-MLA-2
70-143-MLA-3

NUCLEAR FUEL SERVICES, INC.
(Erwin, Tennessee)

May 20, 2004

In these materials license amendment proceedings associated with reduction of stockpiles of surplus high-enriched uranium, the Commission affirms the Presiding Officer's decision to deny Kathy Helms-Hughes' three hearing requests.

RULES OF PRACTICE: APPELLATE REVIEW (INTERVENTION DENIALS); MOTION FOR RECONSIDERATION

A presiding officer's denial of a request for a hearing is appealable to the Commission on the question whether the hearing request should have been granted in whole or in part. 10 C.F.R. § 2.1205(o). A disappointed hearing requester also has the option of filing a motion for reconsideration with the Presiding Officer. *See* 10 C.F.R. §§ 2.1259(b), 2.771.

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner must meet the "judicial standards for standing." 10 C.F.R. § 2.1205(h). To do so requires the following four-part showing: "(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision."

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001), citing *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)).

RULES OF PRACTICE: STANDING TO INTERVENE; STANDARD OF REVIEW

Absent an error of law or an abuse of discretion, the Commission generally defers to the Presiding Officer's decisions regarding standing. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

RULES OF PRACTICE: STANDING TO INTERVENE

STANDING TO INTERVENE: INJURY IN FACT

In materials licensing cases proximity alone does not suffice for standing, absent an "obvious" potential for offsite harm. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994). There is no obvious potential for harm at Ms. Helms-Hughes' property 20 miles from the NFS site. Thus, it becomes her burden to show a specific and plausible means how the planned activities at the NFS site will affect her. See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

RULES OF PRACTICE: STANDING TO INTERVENE

Conclusory allegations about potential radiological harm are insufficient to establish standing.

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a petitioner must allege that he will be harmed by the challenged agency action, not merely that he can imagine circumstances in which he could be affected. Where any alleged injury is entirely speculative, there is no standing.

MEMORANDUM AND ORDER

Nuclear Fuel Services, Inc. submitted a series of three materials license amendment applications associated with its portion of a Department of Energy program to reduce stockpiles of surplus high-enriched uranium. Kathy Helms-Hughes appealed the Presiding Officer's denial of her three hearing requests. The Commission affirms the Presiding Officer's decision.

I. BACKGROUND

The Blended Low Enriched Uranium (BLEU) Project is a Department of Energy program to reduce stockpiles of surplus high-enriched uranium (HEU) by reuse as low-enriched uranium (LEU) or disposal as radioactive waste. Nuclear Fuel Services, Inc. (NFS) has contracted with DOE to downblend surplus HEU uranium material to a LEU nitrate and to convert the LEU nitrate to a uranium oxide at its Erwin, Tennessee site. To support its role in the BLEU Project, NFS has applied for a series of three amendments to its special nuclear materials license. The three related license amendments would authorize NFS: (1) to store LEU-bearing material at the uranyl nitrate building; (2) to downblend HEU/aluminum alloy and HEU material metal to low-enriched uranyl nitrate solutions; and (3) to convert uranyl nitrate solutions to uranium dioxide powder and conduct associated effluent processing.¹

Ms. Helms-Hughes petitioned for a hearing on each of the three NFS license amendment requests. The Presiding Officer deferred ruling on any hearing requests until after NFS filed the last of its three related license amendment requests.² Thereafter, the Presiding Officer found that Ms. Helms-Hughes lacked standing and denied her requests,³ and Ms. Helms-Hughes filed a "Motion for Appeal," asking the Presiding Officer to reconsider her "motion for standing."⁴

¹ We refer the reader to our earlier more detailed discussion of these amendment requests. *See* CLI-03-3, 57 NRC 239, 240-41 (2003).

² *See* unpublished Order (Directing the Holding of the Proceeding in Abeyance) (Jan. 21, 2003); LBP-03-1, 57 NRC 9 (2003).

³ *See* LBP-04-5, 59 NRC 186 (2004). Besides Ms. Helms-Hughes, other Petitioners for hearing on one or more of the license amendment requests were the State of Franklin Group of the Sierra Club in conjunction with three other organizations; the Blue Ridge Environmental Defense League; and a group of fifteen individuals. The Presiding Officer granted the hearing request of the Sierra Club and denied the other requests.

⁴ *See* "Kathy Helms-Hughes' Motion for Appeal of March 17, 2004, Memorandum and Order/Ruling on Hearing Requests in the Matter of Nuclear Fuel Services' Proposed Blended Low-Enriched Uranium Project" (Apr. 1, 2004).

II. DISCUSSION

We first address a preliminary procedural question about the nature of Ms. Helms-Hughes' Motion for Appeal. The Presiding Officer deemed it a misfiled appeal, rather than a motion for reconsideration, and referred it to the Commission.⁵ We elect to consider Ms. Helms-Hughes' misdirected motion as an appeal of the Presiding Officer's standing decision pursuant to 10 C.F.R. § 2.1205(o).⁶ That regulation provides that a presiding officer's denial of a request for a hearing is appealable to the Commission on the question whether the hearing request should have been granted in whole or in part. A disappointed hearing requester also has the option of filing a motion for reconsideration with the Presiding Officer.⁷ Ms. Helms-Hughes' filing of her motion for appeal with the Presiding Officer was "neither fish nor fowl"; however, we are exercising our discretion to treat the timely filed motion as an appeal, as the Presiding Officer suggested in his referral order. We turn now to the merits of Ms. Helms-Hughes' appeal.

The concept of standing in a Subpart L materials licensing case has been well developed. A petitioner must meet the "judicial standards for standing."⁸ To do so requires the following four-part showing:

- (1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision.⁹

The Presiding Officer denied Ms. Helms-Hughes' hearing request on two grounds, both relating to the lack of a concrete and particularized injury, or "injury-in-fact." He ruled, first, that Ms. Helms-Hughes currently resides in Arizona rather than on the property she owns approximately 20 miles from the NFS site¹⁰ and second, that she failed to show a "distinct and palpable" injury

⁵ See unpublished Memorandum and Order (Referring Filing to the Commission) (Apr. 7, 2004).

⁶ The NRC has recently amended its adjudicatory procedural rules, 10 C.F.R. Part 2. See Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rules of procedure apply to proceedings noticed on or after Feb. 13, 2004. Thus, the NRC's adjudicatory regulations that were in effect before Feb. 13, 2004, apply to the NFS proceeding. All references to 10 C.F.R. Part 2 in this Order cite the earlier version of the rules.

⁷ See 10 C.F.R. §§ 2.1259(b), 2.771.

⁸ 10 C.F.R. § 2.1205(h).

⁹ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001), citing *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)).

¹⁰ LBP-04-5, 59 NRC at 193.

on which standing can be founded,” even were she to live on her Tennessee property.¹¹

Absent an error of law or an abuse of discretion, the Commission generally defers to the Presiding Officer’s decisions regarding standing.¹² Here, the Presiding Officer reasonably found that Ms. Helms-Hughes has

provided no basis for a possible conclusion that, notwithstanding the appreciable distance between the [NFS] site and [her] property, the project poses a threat of harm to her upon which standing might be founded. To the contrary, all of the information at hand negates the existence of any such threat.”¹³

On appeal, Ms. Helms-Hughes takes issue with both the “residence” and “injury” grounds on which the Presiding Officer relied in denying her hearing request. She states that she intends to return to her Tennessee property and has been forced for economic reasons to work out of the area on a temporary basis. Despite the distance of her property from the NFS site, she claims the activities described in the license amendment requests will injure her. But in materials licensing cases proximity alone does not suffice for standing, absent an “obvious” potential for offsite harm.¹⁴ There is no obvious potential for harm at Ms. Helms-Hughes’ property 20 miles from the NFS site. Thus, it becomes her burden to show a specific and plausible means how BLEU-related activities at the NFS site will affect her,¹⁵ a burden she does not meet. Instead, she only makes conclusory allegations about potential radiological harm to herself and others.¹⁶ “[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he . . . will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency’s action.”¹⁷ Because any alleged injury to Ms.

¹¹ *Id.* at 193-95, citing *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993).

¹² See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

¹³ LBP-04-5, 59 NRC at 195-96.

¹⁴ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

¹⁵ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

¹⁶ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191-93 (1999) (conclusory allegations about potential radiological harm insufficient basis for standing); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (injury to others not a basis for standing).

¹⁷ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973). *Accord Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999).

Helms-Hughes is entirely speculative, the Presiding Officer was correct in his conclusion that she has no standing in these license amendment proceedings.¹⁸

III. CONCLUSION

We affirm the Presiding Officer's decision to deny Ms. Helms-Hughes' hearing request.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004.

¹⁸We do not reach the Presiding Officer's alternate rationale that Ms. Helms-Hughes' absence from her Tennessee property defeats her standing claim. This can be a complex issue that we need not analyze to resolve this case. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31-32 (1998) (citing *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1282-83 (1st Cir. 1996) (consider length and nature of visits); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324-25 (1999) (frequent visits enough to establish standing). *Cf. Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-38 (1979) (occasional trip insufficient); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558, 560 (1976) (transfer of residence would defeat intervention).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(P.O. Box 15910, Rio Rancho,
NM 87174)

May 20, 2004

The Commission grants two petitions for review of a Presiding Officer decision on financial assurance, and sets forth a briefing schedule.

RULES OF PRACTICE: ABEYANCE OF PROCEEDING

It has not been NRC general policy to place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval.

MEMORANDUM AND ORDER

I. INTRODUCTION

This long-pending adjudicatory proceeding concerns a license for a proposed multiple-site *in situ* leach mining project in New Mexico that was issued to Hydro Resources, Inc. (HRI). In this proceeding initiated under 10 C.F.R.

Part 2, Subpart L,¹ several Intervenors challenge the validity of the license. The proceeding was held in abeyance for approximately 2 years pending unsuccessful settlement negotiations, and resumed last year. Recently, the Presiding Officer issued LBP-04-3, 59 NRC 84 (2004), a financial assurance decision on the HRI Restoration Action Plan for the Church Rock Section 8 site. Currently before the Commission are two petitions for review of LBP-04-3, one filed by HRI and the other by the Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC). In this Decision, we consider and grant both petitions for review.

II. DISCUSSION

HRI's petition seeks Commission review of Presiding Officer findings on HRI's labor and equipment cost estimates. The Presiding Officer found that HRI's financial estimates should not have assumed that an independent contractor would have laborers capable of performing multiple functions (wearing "multiple hats"). He also found that HRI should not have assumed that "major" onsite equipment owned by HRI would remain available for an independent contractor to use for decommissioning activities in the event HRI were to abandon the project prior to the site's restoration. The NRC Staff supports HRI's petition for review. The Intervenors oppose it.

The Commission believes that the labor and equipment issues warrant review. Both issues present important questions on the proper interpretation and application of 10 C.F.R. Part 40, Appendix A, Criterion 9, which requires licensee decommissioning cost estimates to "take into account" the costs that would be incurred "if an independent contractor were hired to perform the decommissioning and reclamation work." The equipment availability issue also involves questions of creditor rights that have not been explored. Moreover, the Presiding Officer's call for new cost estimates (by two or more independent contractors) that are to include the costs of all "major equipment" necessary for decommissioning appears ill-defined and thus open to different interpretations. Nor is it obvious to the Commission, from what we have seen of the record, why HRI cannot assume that an independent contractor may have personnel that perform related albeit distinct functions. The more precise pertinent inquiry would seem to be whether the proposed labor categories appear reasonably sufficient in number (e.g., person-hours) and expertise for the proposed restoration tasks and volume

¹ The NRC recently amended its adjudicatory procedural rules in 10 C.F.R. Part 2. *See* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new procedural rules apply only to proceedings noticed on or after February 13, 2004, and therefore do not apply to this proceeding.

of restoration work. The Commission believes that the record on the labor and equipment issues merits further consideration and would benefit from further briefing. We therefore grant review of HRI's petition.

Intervenors ENDAUM and SRIC also seek review of LBP-04-3 based on two grounds. First, they challenge the Presiding Officer's "refus[al] to consider [their] evidence on the adequacy of HRI's pore volume estimate."² A "pore volume" is a term used by the *in situ* leach mining industry to "describe the quantity of free water in the pores of a given volume of rock."³ It is used as a "unit of reference that a miner can use to describe the amount of circulation that is needed to leach an ore body, or [to] describe the [number of] times water must be flowed through a quantity of depleted ore to achieve restoration."⁴ The Intervenors seek to challenge the Restoration Action Plan's estimate of the number of pore volumes that will be necessary for restoration.

In LBP-04-3, the Presiding Officer found that the pore volume issue already has been litigated earlier in this proceeding. The Presiding Officer ruled that "[b]ecause this [pore volume] issue has been affirmed by the Commission, any challenges must be directed to the Commission and cannot be raised here."⁵ HRI and the NRC Staff agree that the pore volume issue has been fully litigated and resolved. They therefore oppose the Intervenors' petition for review.

A look at the record confirms that the Intervenors did in fact previously raise a challenge to HRI's pore volume estimate, not only in their financial assurance briefs but also, and *primarily*, in their briefs on technical groundwater claims. In their review petition, however, the Intervenors stress that HRI's Restoration Action Plan, filed *after* relevant Presiding Officer and Commission rulings on pore volumes, provided "for the first time, [HRI's] rationale for . . . the number of 'pore volumes' of water that will be required to be flushed through the aquifer to achieve restoration standards after mining is completed."⁶ The Intervenors insist that prior to submission of the Restoration Action Plan, HRI never made "any attempt to justify its nine pore volume estimate," and therefore that any prior rulings on pore volumes were made on an "admittedly incomplete and legally infirm record," which should not be held to prevent the Intervenors from challenging new information presented later by HRI.⁷ As an example of the new

² Intervenors ENDAUM and SRIC's Petition for Review of Memorandum and Order LBP-04-04, Ruling on Restoration Action Plan (Mar. 18, 2004) ("Intervenor Petition" at 6).

³ HRI Restoration Action Plan at E-2a.

⁴ *Id.*

⁵ LBP-04-3, 59 NRC at 92-93 (referencing the financial assurance decisions in LBP-99-13, 49 NRC 233 (1999), and CLI-00-8, 51 NRC 227 (2000)).

⁶ Intervenor Petition at 2-3.

⁷ *See id.* at 6-7.

information, said to have been made available for the first time in the Restoration Action Plan, the Intervenor point to Attachment E-2-1 of HRI's Plan.⁸

Based on our preliminary review of the record, however, it is unclear what information from Attachment E-2-1, if any, was not already available in the record and thus subject to challenge — in either the groundwater or financial assurance portions of the proceeding (or both) — long before HRI filed its Restoration Action Plan.⁹ Yet due to the complexity and disjointed nature of the case record on the pore volumes issue, the Commission believes that a close look at the record is warranted. We therefore grant the Intervenor's petition for review. Our review will be focused, however, on the limited question of whether there is any significant issue on pore volumes that the Intervenor reasonably could not have raised before HRI filed its plan.

In short, the Intervenor already have challenged HRI's 9-pore-volume estimate in both the financial assurance and technical groundwater portions of this proceeding. They clearly are not entitled now to an additional opportunity to raise arguments that either have been or *could have been* raised previously. Briefs on review therefore should focus on this point.

The Intervenor's petition also claims that review is warranted because in LBP-04-3 the Presiding Officer raised a significant policy question. Specifically, the Presiding Officer suggested that because HRI might never obtain required aquifer exemptions, the NRC and the parties might squander resources in proceeding with this lengthy and complex litigation. He therefore proposed that the Commission "reconsider its current position that an applicant or licensee, such as HRI, need not first obtain required aquifer exemptions before the agency will docket an initial application, a license amendment application, or a renewal application for a Part 40 license involving ISL [*in situ* leach] mining."¹⁰ Based on these statements, the Intervenor now request the Commission to hold the proceeding in abeyance to consider this concern on review. We deny this request.

HRI received a license for four sites: Sections 8 and 17 in Church Rock, New Mexico, and the Unit 1 and Crownpoint sites in Crownpoint, New Mexico. To date, the parties have only litigated the Section 8 site. HRI has had the option of applying for a license amendment to reduce the scope of its license, but has chosen instead to proceed with litigation on the remaining sites. In doing so, HRI has "proactively assume[d] the risk that it cannot obtain appropriate aquifer exemptions in the future."¹¹ Moreover, even if HRI were to obtain all required

⁸ *Id.* at 3.

⁹ *See, e.g.*, HRI's Response to Intervenor's Brief in Opposition to HRI's Application for a Materials License with Respect to Groundwater Issues (Feb. 19, 1999), Exh. 1, Pelizza Affidavit at 12-14, and Exh. 1, Pelizza Aff., Attachment 3, Church Rock Pore Volume Calculation.

¹⁰ LBP-04-3, 59 NRC at 110 n.154.

¹¹ HRI Response to Intervenor's Petition for Commission Review (Apr. 2, 2004) at 10.

permits, it may decide for market reasons not to proceed with mining in one, two, or even all of the proposed sections. The Commission has no control over such business choices. Hence, uncertainties do exist here, but there are risks and expenses inherent in litigation for all sides, particularly in a case as complex as this one has proven to be. It has not been our general policy to place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval.¹² Instead, absent extraordinary reasons for delay, the NRC acts as promptly as practicable on all applications it receives. We therefore deny the Intervenor's request to place this proceeding in abeyance.¹³

III. SCHEDULING OF BRIEFS

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets forth the following briefing schedule:

- (1) HRI and the NRC Staff shall file their respective briefs on the labor and equipment issues on or before June 14, 2004. The briefs shall be no longer than twenty-five pages. The Intervenor shall file their responsive brief, limited to thirty pages, on or before July 12, 2004. (We allow additional pages for the Intervenor's response given that they will be responding to two briefs.) HRI and the Staff may each file a reply brief, limited to ten pages, on or before July 26, 2004.
- (2) Intervenor ENDAUM and SRIC shall file their brief on the "pore volumes" issue on or before June 14, 2004. The brief shall be no longer than twenty-five pages. The NRC Staff and HRI shall file their responsive briefs, limited to twenty-five pages, on or before July 12, 2004. ENDAUM and SRIC may file a reply brief, limited to ten pages, on or before July 26, 2004.

IV. CONCLUSION

For the reasons given in this Order, the Commission *grants* the HRI and ENDAUM and SRIC petitions for review of LBP-04-3, and sets forth a schedule for briefs.

¹² See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334 (2002).

¹³ Ironically, at a previous stage in this proceeding it was HRI that wished to place the proceeding in abeyance and the Intervenor who, on fairness grounds, objected to doing so. See CLI-01-4, 53 NRC 31, 35-37 (2001). We denied HRI's request, just as we deny the Intervenor's request today.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-3103-ML

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

May 20, 2004

The Commission grants standing to two Petitioners and refers the Petitioners' hearing request to the Licensing Board for further appropriate action.

ORDER

In a Notice of Hearing and Commission Order issued earlier this year,¹ we indicated that we would make threshold standing determinations in this case ourselves, and we would refer the petitions of persons with requisite standing to the Atomic Safety and Licensing Board for further adjudicatory proceedings. We also stated that we would determine the admissibility of any contentions associated with environmental justice matters.²

The Commission has received three requests for hearing and petitions to intervene. None involves environmental justice issues. Two requests for hearing are from designated representatives of the State of New Mexico, the state where the proposed Louisiana Energy Services (LES) facility is to be located. Pursuant to 10 C.F.R. § 2.309(d)(2)(i), the two state representatives did not need to demonstrate

¹ CLI-04-3, 59 NRC 10, 13-15 (2004); *see also* 65 Fed. Reg. 5873 (Feb. 6, 2004).

² CLI-04-3, 59 NRC at 15.

standing, and their petitions for intervention already have been referred to the Licensing Board for appropriate action.³

The sole petition for hearing remaining before us is that of the Nuclear Information and Resource Service (NIRS) and Public Citizen. There appears to be no question as to these Petitioners' standing. Both LES and the NRC Staff concur that the Petitioners have established organizational standing to intervene, given that NIRS and Public Citizen each have identified members who live in close proximity to the proposed LES facility, at distances that might be affected by the construction, operation, or decommissioning of the facility. The Commission therefore grants standing to both NIRS and Public Citizen. The Commission refers the Petitioners' hearing request to the Licensing Board for further appropriate action.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004.

³ See Memorandum to G. Paul Bollwerk, III, From Annette L. Vietti-Cook, Secretary, Re: Request for Hearing by the New Mexico Environment Dept. (April 1, 2004); Memorandum to G. Paul Bollwerk, III, From J. Samuel Walker, Acting Secretary, Re: Request for Hearing Submitted by the Attorney General of New Mexico (April 6, 2004).

Cite as 59 NRC 259 (2004)

LBP-04-7

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

May 6, 2004

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.-Russian Federation plutonium disposition program, the Licensing Board grants Duke Energy Corporation's motion to dismiss Contention III (admitted by the Board in LBP-04-4) based upon grounds of mootness.

RULES OF PRACTICE: CONTENTIONS (DISMISSAL FOR MOOTNESS)

Under Commission precedent on "contentions of omission," where a contention alleges the omission of particular information in an application, rather than substantively challenging "specific deficiencies" in information provided by an applicant or in how an applicant addresses an issue, and the omitted information is later supplied by the Applicant, the contention is moot. *Duke Energy Corp.*

(McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002).

RULES OF PRACTICE: CONTENTIONS (DISMISSAL FOR MOOTNESS)

Because Applicant provided information that addressed, albeit minimally, the omissions asserted in the original contention (challenging Applicant's failure to discuss in its environmental report other plants as alternatives under NEPA), Intervenor should, under the Commission's "contention of omission" doctrine, have filed an amended contention, in which it could have made the same arguments as those made in its opposition to applicant's motion to dismiss (to the effect that the information the applicant supplied, in responses to NRC Staff requests for additional information, was *inadequate* in its analysis of "the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel").

RULES OF PRACTICE: CONTENTIONS (DISMISSAL FOR MOOTNESS)

Because much of Applicant's rationale for excluding Oconee as a technically feasible or practical alternative for MOX LTA irradiation was that Oconee was neither proposed to nor selected by the Department of Energy as a facility to irradiate batch quantities of MOX fuel, if in the future the Applicant submits a license amendment request seeking approval of plans to use batch quantity MOX fuel in Catawba and/or McGuire, a petitioner would have the right to submit a contention challenging any failure to address, or alleged inadequacy in addressing, the technical feasibility, practicality, and comparative safety of Oconee as an alternative site for proposed "batch" use of MOX fuel, and, assuming any such contention meets the contention admissibility criteria, the circumstance that the LTAs were tested in the Catawba plant should not be considered a valid ground for excluding such a contention.

MEMORANDUM AND ORDER

(Ruling on Motion To Dismiss Non-Security-Related Contention III)

Duke Energy Corporation (Duke) has filed a motion in this proceeding,¹ asking the Licensing Board to dismiss Contention III, admitted by the Board

¹This proceeding involves Duke's February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies (LTAs) at
(Continued)

in LBP-04-4, based upon grounds of mootness. [Duke]’s Motion To Dismiss Contention III (Mar. 15, 2004) [hereinafter Duke Motion]; *see* LBP-04-4, 59 NRC 129 (2004). Intervenor Blue Ridge Environmental Defense League (BREDL) opposes Duke’s motion; the NRC Staff states it does not oppose the motion. [BREDL]’s Opposition to [Duke]’s Motion To Dismiss Contention III (Mar. 25, 2004) [hereinafter BREDL Opposition]; [NRC] Staff’s Response to [Duke]’s Motion To Dismiss Contention III (Mar. 30, 2004) [hereinafter Staff Response]. For the reasons stated herein, we grant Duke’s motion and dismiss Contention III.

In LBP-04-4, the Board denied in part and admitted in part BREDL’s Contention 5, which asserted that Duke’s Environmental Report (ER) was “deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire.” *See* LBP-04-4, 59 NRC at 171, 173-74. We found that we had no jurisdiction to consider in this proceeding alternatives not within the control of Duke, but admitted the contention to the extent of requiring analysis of the alternative of using the Oconee plant, “at least to the extent required for a ‘brief discussion’ under 10 C.F.R. § 51.30(a).” *Id.* at 173-74. We renumbered and reframed the contention as follows:

Contention III: The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.

Id. at 174. We noted that, “[w]ithin this context, we will permit BREDL and the other parties to present evidence relating to the comparative safety, practicability, and appropriateness of using the MOX lead test assemblies at Catawba and Oconee.” *Id.*

In support of its motion, Duke argues that it has now provided the “brief discussion under 10 C.F.R. § 51.30(a),” in a March 1, 2004, response to a Staff Request for Additional Information (RAI). Duke Motion at 1-2. In support of its argument Duke cites case law and Council on Environmental Quality regulations for the principles that a NEPA alternatives analysis is, among other things, governed by a “rule of reason”; does not require consideration of alternatives that are “deemed only remote and speculative possibilities”; and requires discussion only of alternatives that are “feasible.” *Id.* at 3, 4. Duke argues that it “cannot be required to address comparative safety or environmental

the station. By Memorandum and Order dated March 5, 2003, Petitioner Blue Ridge Environmental Defense League (BREDL) was admitted as a party in the proceeding, after having filed a petition to intervene and request for hearing in response to a July 2003 *Federal Register* notice concerning this application. *See* LBP-04-4, 59 NRC 129 (2004); 68 Fed. Reg. 44,107 (July 25, 2003). Additional background on this proceeding is provided in LBP-04-4, as well as in an April 12, 2004, Memorandum and Order (Ruling on Security-Related Contentions), which was, when issued, sealed as Safeguards Information, but a redacted version of which will be published in the near future.

consequences for alternatives that are not feasible and would not serve the purpose of the proposal at issue.” *Id.* at 3. Characterizing the contention as a “contention of omission,” Duke asserts that it has, in its March 1 RAI response, “explained the basis for concluding that Oconee is not available or appropriate for a MOX fuel lead assembly program,” and thereby addressed any “omission” in its ER, thus rendering moot Contention III. *Id.* at 4.

The NRC Staff agrees with Duke’s assertion that Contention III “is moot because the answer to the Staff’s RAI provided a discussion of Oconee sufficient to meet the requirements of [LBP-04-4], and 10 C.F.R. § 51.30(a).” Staff Response at 1-2.

In opposition, BREDL argues that Duke’s RAI response is “fundamentally inadequate to satisfy the requirement for consideration of Oconee as an alternative,” because its analysis is “based on the assumption that ‘batch’ use of plutonium fuel will be carried out only at Catawba.” BREDL Opposition at 1. “Having made this assumption,” BREDL states, “the RAI response reaches the unsurprising, indeed inevitable, conclusion that it is appropriate to test the fuel at the same plant where ultimately it will be used in batch quantities.” *Id.* at 1-2. BREDL asserts that Duke “completely misses the point” of the contention at issue, which, BREDL explains, is that:

in light of new information regarding the hazards of operating nuclear plants with ice condenser containments, it is appropriate to consider batch use of MOX fuel at another nuclear power plant under Duke’s control, *i.e.*, Oconee, as an alternative for mitigating or avoiding the impacts of accidents.

Id. at 2. It is therefore inappropriate, BREDL argues, for Duke to “limit its factual analysis of the suitability of Oconee as an alternative to the question of whether Oconee would be an appropriate location to test fuel that ultimately will be used at Catawba.” *Id.* Duke’s analysis *should have addressed*, according to BREDL, “in addition, the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel.” *Id.*

Although its argument has some logic, BREDL’s analysis is flawed on two points. First, Duke’s RAI response does, contrary to BREDL’s suggestion, include at least the bare statement that Catawba is “very similar in design to European reactors that have amassed decades of experience using reactor grade MOX fuel.” Letter from H.B. Barron to NRC (Mar. 1, 2004), Attachment 1, MOX Fuel Lead Assembly License Amendment Request, *Environmental Review — Response to NRC Request for Additional Information* [hereinafter Duke RAI Response], at 1-2. To be sure, BREDL is correct that Duke’s RAI response does rely prominently on the argument that using the lead test assemblies at Oconee is inappropriate because any future batch use is planned to be at Catawba and McGuire. But this is not Duke’s exclusive response to the RAI. It does address,

albeit minimally, through the above-quoted statement, “the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel.” In addition, its response includes a statement that Duke knows of no “technical reason that MOX fuel could not be used safely at Oconee.” *Id.* at 2.

Second, under the Commission’s “contention of omission” doctrine, BREDL should have filed an amended contention, in which it could have made its arguments that Duke’s RAI response is *inadequate* in its analysis of “the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel.” Indeed, in a March 16 telephone conference, BREDL was counseled that the contention in question “does generally fit the Commission’s approach to contentions of omission, so it might be best to just move forward with filing a new contention by March 30.” Tr. 1230. No such amended contention has, however, been filed.

The Commission discussed its “contention of omission” doctrine in another proceeding in which Duke, BREDL, and the Staff were also involved, that on Duke’s license renewal application. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002). In CLI-02-28, the Commission considered whether a BREDL contention challenging Duke’s failure to address a Sandia National Laboratories study in its environmental report was rendered moot by Duke’s subsequent revision of its analysis to acknowledge the Sandia study. *Id.* at 378-81. In its decision the Commission noted:

There is, in short, a difference between contentions that merely allege an “omission” of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft [environmental impact statement], the contention is moot.

Id. at 382-83. Because the Commission found the Intervenors’ contention to be one of omission, rather than one that substantively challenged the “specific deficiencies in the way the study was used,” it concluded that the appropriate means for the Intervenors’ “new challenge” was an amended contention. *Id.* at 383, 382.

In the instant proceeding, BREDL’s original contention regarding alternatives challenged Duke’s failure to discuss other plants as alternatives to Catawba in its ER, rather than the substance of any then-existing Duke or Staff evaluation of such alternatives. We admitted the contention to the extent that it encompassed the argument that Duke’s environmental report “fail[ed] to consider Oconee,” a plant under Duke’s control, “as an alternative for the MOX LTAs,” having found that we did not have jurisdiction to consider in this proceeding other alternatives

not under Duke's control. LBP-04-4, 59 NRC at 173-74. Therefore, under the "contention of omission" doctrine, BREDL should have, following Duke's March 1 RAI response, filed an amended contention if it wished to challenge the merits and adequacy of Duke's assessment of the technical feasibility, practicality, and comparative safety of Oconee as an alternative site for the MOX LTAs. Given that Duke's RAI response does address the alleged failure, or "omission," in question — even if minimally, particularly with regard to the safety issues asserted by BREDL — we must under this doctrine grant Duke's motion to dismiss Contention III.

We make this ruling in full recognition of the somewhat facile aspect of Duke's RAI response rationale for excluding Oconee as a technically feasible or practical alternative for MOX LTA irradiation, on the basis that Oconee was neither proposed to nor selected by the Department of Energy as a facility to irradiate batch quantities of MOX fuel. *See* Duke RAI Response at 1-2. We note in this regard, however, that should Duke submit a license amendment request seeking approval of plans to use batch quantity MOX fuel in Catawba and/or McGuire, a petitioner would have the right to submit a contention challenging any failure to address, or alleged inadequacy in addressing, the technical feasibility, practicality, and comparative safety of Oconee as an alternative site for proposed "batch" use of MOX fuel.² And, assuming any such contention meets the contention admissibility criteria, the circumstance that the LTAs were tested in the Catawba plant should not be considered a valid ground for excluding such a contention.

²This is in keeping with Duke's consistently maintained position herein that there is no relationship between this proceeding and any proceeding relating to future "batch use" of MOX and thus no issues relating to the latter should be considered in this proceeding, thereby leaving open for argument in any subsequent "batch use" proceeding any and all issues, including issues under NEPA. *See, e.g.,* Duke Motion at 2 n.3.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 6, 2004³

³Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 40-7580-MLA-3
(ASLBP No. 04-816-01-MLA)

FMRI, INC. [formerly FANSTEEL, INC.]
(Muskogee, Oklahoma Facility)

May 26, 2004

INITIAL DECISION
(Upholding Issuance of License Amendment)

This proceeding involves an application filed in July 2003 by Fansteel, Inc. (the predecessor of FMRI, Inc.) (Licensee) for an amendment to its materials license (No. SMB-911). Issued under 10 C.F.R. Part 40, and subject to the provisions of that Part of the Commission's regulations, that license authorizes the possession at the Licensee's site on the Arkansas River near Muskogee, Oklahoma, of source material consisting of up to 400 tons of natural uranium and thorium in any form. The sought amendment relates to a decommissioning plan for the Muskogee site that had been submitted by the Licensee in January 2003 and thereafter supplemented.

In response to a *Federal Register* notice of opportunity for hearing published in August 2003 (68 Fed. Reg. 47,621), the State of Oklahoma filed a timely hearing

request with regard to the license amendment application. In LBP-03-22, 58 NRC 363 (2003), the request was granted.¹

In the wake of the grant, and in accordance with an established schedule, Oklahoma filed its written presentation on January 30, 2004; the Licensee and NRC Staff filed their responsive written presentations on March 4, 2004; and Oklahoma filed a rebuttal written presentation on April 1, 2004.² It appearing to Judge Cole and this presiding officer that the several presentations are sufficient to enable an informed consideration and disposition of the issues raised by Oklahoma, no supplemental oral presentations are being solicited.

On December 4, 2003, shortly after the grant of Oklahoma's hearing request, the NRC Staff approved the issuance of a license amendment authorizing the decommissioning of the Muskogee site, subject to the observance of certain specified license conditions. Effective January 23, 2004, the license and "all equipment, real property, improvements, and all other assets of Fansteel comprising the Muskogee facility were transferred to FMRI, a subsidiary of Reorganized Fansteel." *See* Licensee's Written Presentation at 12.³ In an April 7 Memorandum and Order (unpublished) at 1 n.1, FMRI was substituted as the party to the proceeding on the strength of a January 29 letter from Licensee's counsel calling attention to this development. Henceforth in this Decision the term "Licensee" will be employed to refer to both Fansteel and FMRI.

For the reasons set forth hereinafter, we uphold the NRC Staff's issuance of the license amendment in question.⁴

¹The hearing request was submitted and acted upon in the context of the then provisions of Subpart L, the portion of the Commission's Rules of Practice applicable to the adjudication of materials license proceedings. 10 C.F.R. § 2.1201 *et seq.* Thereafter, effective February 13, 2004, the Rules of Practice codified in 10 C.F.R. Part 2 underwent a substantial revision. *See* 69 Fed. Reg. 2182 (Jan. 14, 2004). The Commission not having directed otherwise, however, this proceeding remains subject to the provisions of the now-superseded Subpart L and any references to the Rules of Practice in this decision will be to those provisions.

²The rebuttal presentation is dated March 31, 2004, and will henceforth be referred to by that date.

³As will be further discussed, the transfer was the culmination of action on a petition that Fansteel had filed under Chapter 11 of Title 11 of the *United States Code* seeking reorganization in bankruptcy.

⁴While the ultimate decisional responsibility in Subpart L proceedings may lie with the Presiding Officer, the applicable Rules of Practice also contemplate that a member of the Licensing Board Panel with technical expertise will participate actively in the adjudication of any proceeding to which assigned as a Special Assistant. *See* 10 C.F.R. § 2.722. In this instance, Judge Cole played an important role in the assessment of the record pertaining to the several presented issues, particularly those relating to site characterization. Each of the determinations reached in this Decision has his endorsement.

I. BACKGROUND

A. The materials license in question was issued in 1967 and, under its aegis, until 1989 the Licensee operated a rare metal extraction facility on its Muskogee site. As a result of those operations, the site apparently now contains material in the form of uranium, thorium, radium, and other decay-chain products in process equipment and buildings, soil, sludge, and groundwater.

Although some earlier developments are discussed below, the starting point of the proceeding at bar may here be taken as the Licensee's January 14, 2003 submission of a decommissioning plan for NRC Staff review. As described in the Staff's presentation (at 2), the Licensee proposed to remove the contaminated materials in the soil and groundwater to meet the unrestricted release requirements of the Radiological Criteria for License Termination rule (10 C.F.R. Part 20, Subpart E). The submission went on to note that, given the pending bankruptcy reorganization proceeding (*see* note 3, *supra*), the amount and type of financial assurance to be provided in connection with the decommissioning plan would be set forth in a plan of reorganization to be filed with the bankruptcy court. In addition, the Licensee had indicated in the submission an intent to file an alternative schedule for completion of decommissioning, as well as a request for exemption from the regulatory funding requirements in 10 C.F.R. § 40.36(d), (e) to support the terms and conditions of the reorganization plan.

On May 8, 2003, at the Staff's insistence, the Licensee supplemented the decommissioning plan with additional information. It also referred to the forthcoming transfer of the materials license to FMRI as part of a confirmed reorganization plan. That wholly owned subsidiary of the reorganized Fansteel would undertake a four-phased approach to decommissioning the Muskogee site.

The Staff deemed the supplemental information provided in the Licensee's May 8 letter to be sufficient to enable it to commence a technical review of the tendered decommissioning plan. On June 26, 2003, however, the Licensee withdrew that plan. A month later, on July 24, the plan was resubmitted with the requests that the materials license be amended to reflect its approval, an alternate decommissioning schedule be approved pursuant to 10 C.F.R. § 40.42(i), and an exemption be granted from the financial assurance requirements of 10 C.F.R. § 40.36(e). In a supplement to the July 24 submission, the Licensee outlined the means by which it proposed to provide financial assurance for the decommissioning.

As earlier noted, upon review of these requests the Staff on December 4, 2003, approved a license amendment authorizing decommissioning of the Muskogee site subject to certain conditions that were incorporated in the amended materials license. The imposition of these conditions was supported by a Safety Evaluation Report that had been issued the previous day.

Prior to the approval of the license amendment, the Staff had conducted an environmental assessment of the decommissioning plan that had led to the conclusion that the proposed license amendment would not result in any significant environmental impacts. Accordingly, it determined that the preparation of an environmental impact statement was unnecessary and, on October 31, 2003, had issued a Finding of No Significant Impact (FONSI).

Also as a precursor to authorizing the sought license amendment, the Staff had addressed the financial assurance matter. In a November 7, 2003 letter, it had advised the Licensee of its determination that the financial instruments that the Licensee proposed to use — although different from those specified in the Commission's regulations — would nevertheless be adequate to ensure the availability of sufficient funding for decommissioning. Accordingly, as long as certain prerequisites pertaining to the implementation of the proposed financial instruments were met, a sufficient basis existed for exempting the Licensee from the financial assurance requirements of 10 C.F.R. § 40.46(e).

B. Oklahoma's January 30 presentation challenges the Licensee's decommissioning plan and the NRC Staff's grant of the license amendment application on a variety of grounds. At the outset, the State maintains (Presentation at 10-35) that the plan rests upon a characterization of the site that is incomplete and inaccurate, as well as not reflective of current site conditions. As a consequence of these asserted deficiencies, the plan is said not to address appropriately all of the contamination present on the site. Further on the matter of site characterization, Oklahoma maintains (*id.* at 35-37) that the Staff failed to follow its own guidance in accepting the plan notwithstanding the inadequacy of the data supplied by the Licensee.

The State's second claim (*id.* at 38-40) is that the plan was improperly predicated on the site being used in the future for solely industrial purposes. Third, Oklahoma attacks (*id.* at 41-42) the Staff's waiver of the regulatory financial assurance requirements. Fourth, the State would have it (*id.* at 42-44) that the cost estimates for decommissioning supplied by the Licensee were based on undocumented and unreasonable assumptions and, as such, should have been rejected. Finally, it insists (*id.* at 44-47) that the Staff issuance of the FONSI was improper.

In their March 4 responsive presentations, both the Licensee and the Staff addressed each of the Oklahoma assertions, in most instances buttressing their positions on the assertions with affidavits. As above noted, in a March 31 filing, the State took advantage of the opportunity to submit a rebuttal to the Licensee and Staff submissions.

II. ANALYSIS

Before turning to a consideration of the specific claims advanced by Oklahoma, a few preliminary observations are in order so as to put the inquiry into its proper context. In significant measure, particularly with regard to the site characterization issues it raises, the State's challenge to the adequacy of the Licensee's decommissioning plan rests upon assertions that there was a failure to comply with the provisions of certain NRC guidance documents (NUREGs). In addition, in connection with several claims, Oklahoma questions the sufficiency of the NRC Staff's review of the decommissioning plan and insists that further review activities be undertaken.

As the Staff observes (Presentation at 5-7), it is quite apparent that Oklahoma has misapprehended both the significance of the NUREGs and the outer bounds of what might be considered in an NRC adjudicatory proceeding. In that connection, the Staff points to 10 C.F.R. § 40.42(g)(5), which provides that a proposed decommissioning plan will be approved "if the information therein demonstrates that the decommissioning will be completed as soon as practicable and that the health and safety of workers and the public will be adequately protected." Given this directive, the Staff insists, Commission rulings make it clear that the inquiry here must be confined to whether the decommissioning plan tendered by the Licensee meets the regulatory requirements and thus does not embrace the sufficiency of the Staff review of that plan. For this proposition, the Staff directs attention to the very recent decision in *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 & n.23 (2004), which, in turn, cites *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995).⁵

On the matter of the significance of the NUREGs upon which Oklahoma heavily relies in its attack upon the sufficiency of the Licensee's decommissioning plan, the Staff points (Presentation at 6) to the holding in *Curators of the University of Missouri* to the effect that only "statutes, regulations, orders, and license conditions can impose requirements" with the consequence that, because guidance documents such as NUREGs do not purport to establish enforceable requirements, "nonconformance with such guides does not equate to noncompliance" with Commission regulations. CLI-95-1, 41 NRC at 98. Rather, the

⁵Of course, whether the Staff has complied with the obligations imposed upon this agency by the National Environmental Policy Act is always open to adjudicatory consideration at the behest of a petitioner. That is, however, a quite different matter than the adequacy of the Staff's review of a decommissioning plan to determine whether it satisfies all regulatory requirements. Even if, in the minds of some, the review was deficient in some respects, what is of pivotal importance is whether the licensee has nonetheless established that, in fact, the plan meets those requirements.

Commission ruled, although an NRC guidance document sets forth one way in which compliance with a regulatory requirement might be obtained, other approaches to such compliance might prove just as acceptable. *Id.* at 100.

In evaluating Oklahoma's challenges to the decommissioning plan, the foregoing settled principles must be kept in mind. Specifically, our task here is to determine whether, in the words of the governing regulation (section 40.42(g)(5)), there is cause to conclude, on the basis of what has been put before us by Oklahoma, the Licensee, and the NRC Staff, that the decommissioning plan will be completed as soon as practicable and adequately protects the health and safety of workers and the public. If the answer to that question is in the affirmative, it necessarily follows that the Staff's December 4, 2003 conditioned approval of the plan must be upheld. On the other hand, if the plan is found not to meet the regulatory standard, that approval cannot stand.

With regard to this inquiry, the Staff takes note (Presentation at 5 n.4) of the fact that Oklahoma has supplied no expert opinion to support any of its claims. In contrast, the Staff (and the Licensee as well) responded on each of those claims with expert evidence of its own in the form of affidavits. None of those affidavits was countered by an expert on the particular subject as part of the State's March 31 rebuttal presentation. To be sure, that absence cannot be taken as fatal *per se* to Oklahoma's cause. It was open to the State to endeavor to establish, by argumentation without more, that the Staff's and Licensee's expert testimony was so flawed or unpersuasive as to warrant receiving little, if any, weight. Needless to say, however, that is a difficult undertaking that is not invariably successful.

A. The major portion of Oklahoma's written presentations is devoted to the State's claim that the decommissioning plan is founded upon a characterization of the Licensee's site that is incomplete, inaccurate and, as such, not reflective of current site conditions. Accordingly, we are told, the plan fails to address adequately all contaminants present on the site. As earlier noted, in advancing this claim, Oklahoma maintains that the NRC Staff's approval of the plan was not consistent with the guidance provided in NUREGs.

1. So that the State's claims in that regard might be addressed in context, it is necessary first to consider both what is involved in the site characterization undertaking and what the plan contemplates with respect to its fulfillment.⁶

⁶The factual recitation that immediately follows has been drawn in large measure from the affidavits of Gary L. Tessitore and Marcel David Tourdot, both of which were appended to the Licensee's Presentation as Tab A and Tab C, respectively. Mr. Tessitore is the Board Chairman, President, and Chief Executive Officer of the Licensee. Before he recently assumed other employment, Mr. Tourdot was employed by Earth Sciences Consultant, Inc. That corporation had worked with the Licensee for over 14 years "on matters such as site characterization, remediation support, site surveys, radiological health and safety, and general radiological engineering." Affidavit at 1.

(Continued)

The specific function of the Muskogee facility between 1967 and 1989 was the production of the rare metals tantalum and columbium (formerly niobium). This production was obtained through extraction from natural ores, ore concentrates and tin slags that, overall, contained approximately 0.15% of each of two radionuclides — uranium and thorium — as naturally occurring constituents. Those raw materials were digested in a hydrofluoric acid (HF) solution, following which a series of unit processes were conducted to separate the metal products.

The “work in progress” (WIP) byproducts of the separation processes, including the radioactive uranium and thorium residue, were deposited in Pond Nos. 2, 3, and 5. Stored in Pond Nos. 6, 7, 8, and 9 were primarily precipitants in the form of calcium hydroxide and calcium fluoride, with the occasional minor addition of several metal oxides. As later determined in a 1993 Site Assessment Survey, the highest concentrations of radiological contaminants were in Pond Nos. 2 and 3, with an average ranging from 360 to 640 picocuries per gram (pCi/g) of U-238 and 360 to 440 pCi/g of Th-232. By way of contrast, the range of the average concentrations in Pond Nos. 5 through 9 was between 14 and 53 pCi/g for U-238 and 2 and 26 pCi/g for Th-232.

In June 1989, the west embankment of Pond No. 3 failed and supernatant from the pond spilled into the surrounding area and the Arkansas River. The discharge was halted by the emergency construction of containment dikes. The fluids contained by those dikes were routed to the facility’s water treatment system and, following treatment, were placed in Pond Nos. 8 and 9. In the wake of its failure, Pond No. 3 received no further residues from ore/slag processing and 6 months later, in December 1989, the operations for the production of tantalum and columbium were terminated.

In the early 1990s, the Licensee submitted a draft Work Plan for a Site Remediation Assessment to this Commission, the U.S. Environmental Protection Agency, and the State of Oklahoma. Following review by those agencies and the incorporation of their comments, a final Work Plan was submitted to the NRC Staff in July 1992 for its approval. That approval was given and the Work Plan was incorporated in the materials license here in issue by a December 21, 1992 amendment.

The Remediation Assessment called for by the Work Plan was conducted in 1993 and is the source of much of the current site information, as subsequently updated to reflect activities since that time such as ongoing surveys of buildings and equipment. Among other things, the 1993 undertaking included installation of soil borings, monitoring wells, and test pits; the collection and analysis of soil, sediment, surface water, groundwater, air, and pond residue samples; and

Because of the absence of any evidentiary submission on the part of Oklahoma, all representations of fact contained in the Tessitore and Tourdot affidavits, as well as those found in the other affidavits that accompanied the Licensee and NRC Staff presentations, may reasonably be deemed uncontested.

the performance of a radioactivity scoping survey. Borehole, well, and test pit locations were selected on the basis of facility history and operations information. Sample locations were chosen based on such factors as the possibility that they might have been affected by material handling and storage, past releases, manufacturing operations, and air emissions.

Radiological survey activities were conducted over the interior and exterior of the site structures and the external open lands on the site. All of the buildings associated with the ore processing activities were surveyed. The Chemical “C” Building was found to be contaminated throughout with radioactive ore residues. Isolated areas of radioactive contamination were also identified in some of the other site buildings.

In addition to its performance of the 1993 Remediation Assessment, in the period between 1989 and August 1996, the Licensee removed processing equipment, conducted limited site remediation, and conducted decommissioning of selected site areas. Specifically, 35 acres of the site, designated as the “Northwest Property,” were decontaminated and released by the NRC Staff in August 1996 for unrestricted use. In 1999, 19 acres of that area were sold to the Port of Muskogee.

Commencing in 1997, as part of a site remediation effort, the Licensee submitted to the NRC Staff detailed plans for a 3000-foot groundwater interceptor trench. It was installed in 1998-99 and keyed 3 feet into the underlying low-permeability shale. The trench was designed to capture all shallow groundwater migrating in a west-to-east direction toward the Arkansas River. It went into operation in August 1999 and, according to Licensee affiants, has functioned successfully since that time.

2. This was essentially the situation when, on January 25, 2002, the Licensee advised the NRC Staff that it had filed a petition under Chapter 11 of Title 11 of the *United States Code* seeking reorganization in bankruptcy. According to Mr. Tessitore (Affidavit ¶ 12), the Licensee recognized that one of the significant issues facing it in bankruptcy was the remediation of the Muskogee site, among others. It therefore had worked with a number of federal agencies, including the NRC, in an endeavor “to craft a solution that would permit remediation of all environmental sites, while still meeting its obligations to other creditors in accordance with the bankruptcy laws.” *Ibid.* As Mr. Tessitore observed, a liquidation of the Licensee would have produced an inability even to commence remediation measures. *Ibid.*

During the balance of 2002, there was interaction between the Licensee and the NRC of no particular moment here. Then, on January 14, 2003, the Licensee submitted its decommissioning plan for NRC Staff review.

We have summarized at an early stage of this opinion what transpired in the wake of the receipt of the plan. *See pp. 268-69, supra.* It suffices here to note that, in apparent recognition of the financial constraints imposed by the bankruptcy

proceeding, the focus was on the development of a plan that provided for the early remediation of the most contaminated site areas, to be followed at a later point with the site characterization work needed to identify and to remediate less contaminated areas. The ultimate goal was the complete remediation of the entire site to meet the established standards for unrestricted site release.

To this end, a four-phased approach for the decommissioning of the Muskogee site was formulated and then incorporated in License Condition 37, one of the conditions imposed upon the license that, in turn, undergirded the NRC Staff's approval of the sought amendment. The four phases may be summarized as follows:

Phase 1 will involve the remediation and the offsite disposal of the radioactive WIP residue material in Pond Nos. 2 and 3, considered to be the most contaminated areas of the Muskogee site. That endeavor is scheduled to commence this September and to be completed by March 31, 2006.

Phase 2 will involve remediation and offsite disposal of material in Pond Nos. 5 through 9. According to the affidavit of James Shepherd, the NRC Project Manager overseeing the remediation of the Muskogee site, appended to the Staff's Presentation as Exhibit 2, Pond Nos. 6 through 9 are wet and the calcium fluoride low-level radioactive waste contained therein is in a very mobile form. For its part, Pond No. 5 is now dry but has been grouped with the other four ponds because it is adjacent to them and, further, low-level radioactivity has been detected historically in samples collected within its boundary. Shepherd Affidavit ¶ 6. This remediation phase is slated to begin by January 1, 2007, and to conclude by April 30, 2011.

Phase 3 will involve completion of the remediation, including buildings, equipment, and soils. During this phase, any additional needed site characterization will be conducted and completed by the end of 2011. Final site grading is to be completed in 2012, resulting in a 9-year cleanup schedule.

Phase 4 will involve groundwater monitoring and remediation. According to Mr. Shepherd (Affidavit ¶ 9), that phase is ongoing and will continue until radioactive contaminants reach release limits. In a July 24, 2003 letter to the NRC Staff (at 3), the Licensee stated that it did not intend to seek license termination until the groundwater is satisfactorily remediated or alternative arrangements acceptable to the NRC Staff are in place.

3. There is little room for doubt that, but for the Licensee's current financial situation, the decommissioning plan submitted to, and approved by, the NRC Staff would have been significantly different in content. It is also beyond cavil that, as Oklahoma repeatedly stresses over the course of the twenty-eight pages of its January 30 Presentation devoted to site characterization issues, the plan does not comport with all of the guidance contained in those NUREGs concerned with decommissioning. But, once again, that is not of particular, let alone controlling, significance here. Rather, the question before us for determination is whether

the Staff's acceptance of a decommissioning plan driven by fiscal realities was consistent with governing NRC regulations, most particularly the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public. *See* p. 270, *supra*. As reflected by the affidavit of Mr. Shepherd, the Project Manager overseeing the remediation of the Muskogee site, the NRC Staff reached the conclusion that, with the inclusion and observance of certain specified conditions in the amended license, the pertinent regulatory requirements would be met. Affidavit ¶¶ 5-10, discussing License Condition 37 summarized above.

In addition, Mr. Shepherd addressed (*id.* ¶¶ 12-14) several assertions that Oklahoma had advanced in its January 30 Presentation. In this regard, he set forth both the basis for his disagreement with the State's claim that certain groundwater data acquired in 1993 were flawed and the reasons that he believed that the Staff had justifiably concluded that "since 1993, except for groundwater transport of soluble radionuclides, there have been no onsite activities which would significantly alter the distribution of the existing contamination." Mr. Shepherd also responded to Oklahoma's concerns respecting the effectiveness of the interceptor trench and the Staff's determination that it was unlikely that any amount of contamination released from the site into the Arkansas River through the groundwater pathway would have an adverse impact upon the water quality of the river.

Considering the matter of groundwater more broadly, it appears from the record that there are two separate and distinct systems of interest at the Muskogee site. One is a shallow groundwater aquifer contained in the alluvial terrace deposits on the site and the other is a deeper groundwater aquifer separated from the shallow groundwater by a 30-foot-thick Bedrock Layer that has been shown to have extremely low permeability. Data on groundwater elevation levels clearly establish that there is no hydrogeologic connection between the shallow and the deep groundwater. Affidavit of Scott C. Blauvelt, appended to the Licensee's Written Presentation as Tab D, at 3, ¶¶ 7-8, 19-20.⁷

The current groundwater remediation strategy consists of the collection (interceptor) trench around the downgradient periphery of the site. Tourdot Affidavit ¶ 19. As previously noted, it is keyed 3 feet into the underlying low-permeability shale and is designed to capture all the shallow groundwater migrating in a west-to-east direction toward the Arkansas River. *Ibid.* The collected groundwater is pumped through the existing wastewater treatment system. *Ibid.* According to Mr. Blauvelt (Affidavit ¶ 15), the shallow groundwater apparently has been

⁷ Between April 1989 and June 2003, Mr. Blauvelt served as the principal hydrogeologist assigned to the Muskogee site by his then employer, Earth Sciences Consultants, Inc. In that capacity, he reviewed all data that were collected to characterize the geology and hydrogeology of the site.

impacted by previous site operations and is still being monitored and collected in the interceptor trench as part of the waste treatment system.

Finally on this phase of the site characterization issue, a review of the geological and hydrological data for the site indicates that the contaminants present in the shallow groundwater are isolated from the underlying deep groundwater by a natural barrier that is effectively blocking the downward migration of the contaminants. *Id.* ¶¶ 19, 22. Moreover, the lateral migration of contamination in the shallow groundwater is prevented from leaving the site boundary by the interceptor trench system that collects the water and pumps it to the treatment facility. *Id.* ¶ 21.

Moving on to other claims advanced by Oklahoma, we are told (January 30 Presentation at 13) that the decommissioning plan does not contain a description of the remediation techniques that will be employed in each room or work area of the contaminated structures. In response, the Licensee calls attention (Presentation at 27) to the fact that, in section 8.1.2, entitled “Remediation Techniques,” the plan contains a general discussion of such techniques. It points as well to Staff-imposed License Condition 32 to the effect that there shall not be a removable fraction of residual radioactivity on any specific building surface that exceeds 3%. The Licensee goes on to observe (*ibid.*) that, in light of that substantive limit, great importance will not attach to the specific remediation techniques that will be developed in conjunction with contractors for what is described as relatively minor structure contamination. Still further, the Licensee takes note of its successful decontamination of the Northwest Property portion of the site that was released in 1996 for unrestricted use. *Ibid.*

We agree with the Licensee that, in the totality of these considerations (none of which received an evidentiary refutation), the additional information sought by the State was not required. In that connection, it is noteworthy that Oklahoma gave little, if any, recognition to the imposition of License Condition 32 — or for that matter to the other conditions imposed upon the license in conjunction with the grant of the amendment of which the State complains.

Respecting the discussion in the decommissioning plan of the remediation of contaminated systems and equipment, the State finds the discussion incomplete because it does not include such items as (a) a description of the radiation protection methods and control procedures that will be employed during remediation; and (b) a summary of the equipment to be removed or decontaminated and the procedures for accomplishing the decontamination. January 30 Presentation at 13-14. The Licensee’s answer (Presentation at 28-29) refers to the stipulation in License Condition 33 to the effect that, before the release of any equipment, all surfaces, interior and exterior, must be characterized and all contaminated equipment remediated to the limits prescribed in NRC Regulatory Guide 1.86 entitled “Termination of Operating Licenses for Nuclear Reactors.” Still further, the Licensee cites past instances of its remediation of contaminated systems

and equipment and insists that it will encounter little difficulty in achieving the same result with regard to the systems and equipment here-involved, given their relatively low levels of contamination.

On this score as well, we are satisfied that, particularly in light of the license condition governing the remediation activity in question, the decommissioning plan was not fatally flawed because it did not contain the additional detail that the State desired to be included. Contrary to Oklahoma's apparent belief, we discern nothing in Commission regulations that might be taken as requiring the providing of minute detail respecting every element of the remediation process that the decommissioning plan contemplates.

That consideration likewise applies to Oklahoma's complaint (Presentation at 14) that the plan contains insufficient information regarding the techniques that will be employed to remove or to remediate surface and subsurface soil at the site. We find sufficient the disclosures in section 8.3.2 of the plan, which is devoted to those techniques. Prior to remediation activities, a segment of the site will be prepared as a stockpile and material processing area. Soil will be excavated, segregated by radioactive content by gamma scanning, air-dried if necessary, and sent to a licensed facility for disposal. The pond excavations will be backfilled with "clean" material to bring the site back to grade. The site will be restored to minimize weathering.

Although not all of them were deemed to warrant being specifically addressed as part of the foregoing discussion, we have considered each of Oklahoma's claims with regard to the adequacy of the site characterization and determined that none of them is sufficiently meritorious to bring into serious question the acceptability of the decommissioning plan. In sum, when taken in conjunction with the several license conditions that the NRC Staff has imposed in connection with its approval (none of which, to repeat, the State seems to have taken into account), we conclude that the Licensee has provided sufficient detail in the plan with regard to each facet of the remediation process.

It might well be that greater information would have been included in the plan were it not for the four-stage approach to site remediation dictated by the Licensee's current financial condition. Indeed, it seems that much of Oklahoma's difficulty with the information regarding site characterization and remediation that has been provided has its roots in the fact that the decontamination of the entire site will take place over a course of many years, with some phases of it not to start for some time to come. Apart, however, from being an imperative in the totality of circumstances, the approach that has been adopted has not been shown to run afoul of any Commission regulation pertaining to site decommissioning. Beyond that, no reason has been assigned for questioning either the ability or the

will of the NRC Staff to oversee the remediation process to ensure that the license conditions it has imposed are fully met.

B. Subpart E of 10 C.F.R. Part 20 sets forth radiological criteria for license termination. In circumstances where, as here, unrestricted public use of the site is under consideration, section 20.1402 requires that “the residual radioactivity that is distinguishable from background radiation [result] in a TEDE [total effective dose equivalent] to an average member of the critical group that does not exceed 25 mrem . . . per year, including that from groundwater sources of drinking water.” For its part, “critical group” refers to “the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.” 10 C.F.R. § 20.1003.

As explained in the affidavit of Mark Thaggard (appended to the Staff’s Presentation as Exhibit 1), to demonstrate compliance with section 20.1402 “licensees must consider scenarios that account for possible environmental pathways by which residual radioactivity may be transported and routes by which someone using the site could be exposed to the residual radioactivity. These scenarios are expected to define a *reasonable* set of human activities that may occur at the site in the future.”⁸

In carrying out this mandate, the Licensee employed for dose modeling purposes a so-called industrial-use scenario that was based on its determination that, upon its release, the Muskogee site would be employed for industrial purposes. Although the Staff approved that choice, Oklahoma insists that a resident farmer scenario should have been employed instead.

The State bases that insistence upon its belief that, although the Muskogee City-County Port Authority might acquire portions of the property for industrial use, there might also be some recreational use of the property given its location on a river and the presence of a boat launching area on the other side of that river. It also points to the asserted fact that there is considerable agricultural activity in the county in which the site is located. January 30 Presentation at 39-40.

In addition, relying on its interpretation of the guidance provided in NUREG-1757, concerned with the invocation of the two scenarios, the State maintains (*id.* at 38) that the residential farmer scenario must be employed where the groundwater is shallow enough that it reasonably could serve either (1) to irrigate a small farm and to provide domestic drinking water or (2) to intercept and to connect to a fish pond. Pointing to a map in the decommissioning plan indicating that the groundwater depth is between 20 and 40 feet, Oklahoma would have it that the first of these two situations is present. *Id.* at 38-39.

⁸March 3, 2004 Affidavit ¶4 (emphasis in the original). Mr. Thaggard was the lead Staff technical reviewer of “the dose assessment and development of derived concentration guideline levels (DCGLs)” submitted as part of the decommissioning plan.

Countering Oklahoma's position on the matter, the Licensee supplied the March 3 affidavit of A. Fred Dohmann at Tab B of its Presentation. The President and Chief Executive Officer of the current Licensee, Mr. Dohmann, referred to his "extensive" discussions with representatives of the Port Authority regarding the use of the site. According to the affidavit, the Authority, which provides service transloading facilities for barge, rail, and truck cargo, proposes to acquire the site and to develop further certain portions of it. The affidavit further takes note of the fact that the site is already zoned for light industrial/commercial use and that other industrial businesses either border or are in close proximity to it. Finally, Mr. Dohmann avers that the site is currently supplied by a municipal water source and that that source is capable of supplying sufficient water for typical manufacturing industries in the area. Affidavit ¶¶ 9-11.

In his Affidavit (¶ 6), Mr. Thaggard echoes the considerations that Mr. Dohmann advanced in support of employment of the industrial use scenario — namely, the current and proposed future industrial use of the site and its immediate surroundings. Although not entirely ruling out the conversion of the land from industrial to residential farming use, he regards such conversions to be unusual. *Ibid.*

It well might be, as Oklahoma maintains, that the groundwater depth at the site is such that water might be pumped from it for farmland irrigation and drinking water uses. That consideration is, however, of no moment here. Apart from the fact that it serves merely as guidance and does not impose regulatory requirements, we do not read NUREG-1757 as attaching crucial significance to irrigation potential in circumstances where, as here, there appears to be little likelihood that the site will ever be converted from industrial to agricultural use. Insofar as the drinking water potential is concerned, Oklahoma has not disputed the Licensee's representation (Presentation at 76-77) that the municipal water source that currently serves the site is capable of continuing for the foreseeable future to furnish sufficient water for typical manufacturing industries in the area. Moreover, pointing to disclosures in the Tourdot and Blauvelt affidavits (*see* pp. 271-72, 275 & nn.6, 7, *supra*), the Licensee asserts (Presentation at 77), again without contradiction, that the groundwater is not useable.

Once again, the regulatory objective reflected in the guidance contained in NUREG-1757 is the selection of that scenario for dose modeling purposes that best conforms with reality. On the record at hand, there is equally no room for doubt that the industrial use scenario was appropriately chosen. Although it might not be beyond the realm of *all* possibility that the Muskogee site would ultimately

become farmland, that possibility has not been shown by Oklahoma to be other than so remote as to be unworthy of any serious consideration.⁹

C. Section 40.36(d) of 10 C.F.R. specifies that the decommissioning funding plan required by paragraph (a) of that section must contain “a cost estimate for decommissioning and a description of the method of assuring funds for decommissioning from paragraph (e) of this section” For its part, paragraph (e) identifies the “one or more” methods by which “[f]inancial assurance for decommissioning must be provided.” In the case of a nongovernmental licensee, those methods are (1) “[p]repayment”; (2) “[a] surety method, insurance, or other guarantee method”; and (3) “[a]n external sinking fund . . . coupled with a surety method or insurance.”

Because, in this instance, the Licensee was not able to provide financial assurance through any of these methods, it sought and obtained an exemption from the section 40.36(e) requirements. Oklahoma challenges the grant of the exemption (January 30 Presentation at 41-42) on the stated ground that the requirements for affording that relief had not been met. Among other things, the State maintains that, even if (as to which it expresses some uncertainty) a Bankruptcy Review Team was established by the Staff following notification of the Licensee’s filing for bankruptcy and the “appropriate documents reviewed,” the authority to waive the requirements in question was lacking. For this proposition, Oklahoma relies upon NUREG-1556.

In his affidavit (attached to the Staff’s Presentation as Exhibit 3), Thomas L. Fredrichs addressed the Oklahoma challenge on this issue. An NRC Project Manager–Financial Analyst, Mr. Fredrichs had been called upon to review the information that the Licensee had submitted in support of the January 15, 2002 bankruptcy petition filed by the Licensee. That information included a business plan for exiting bankruptcy that included projections of sales, revenues, and

⁹ We have found nothing in Oklahoma’s March 31 rebuttal presentation (at 13-17) to cast substantial doubt on the validity of resort to the industrial use scenario. Rather than putting forth evidence of its own to support its claim that the resident farmer scenario was a more appropriate choice, the State confines itself to criticisms of the Licensee and Staff evidentiary showings that, in the final analysis, have little bearing on the choice of scenario question.

To cite but one example, Oklahoma attacks as misleading (*id.* at 15-16) the statement in the Thaggard affidavit that land use in the immediate vicinity of the site is limited to industrial purposes. According to the State, in “risk analysis and dose assessment vernacular, the term ‘land use’ is not restricted to dry land but, rather, encompasses adjacent surface waters” such as the river bordering the site on which nonindustrial activities take place. Although that might well be so, it hardly supports the State’s insistence that employment of the resident farmer scenario was therefore required despite the fact that the site itself is zoned, and will be utilized, for industrial activities and is bordered on all other sides by industrial concerns.

The same may be said of the balance of Oklahoma’s rejoinder on this issue. Although some of the points it makes might have some technical validity, none of them offers a compelling reason to reject the industrial use scenario.

expenses, a liquidation analysis of the Licensee's assets, and a proposal for providing alternative means for funding decommissioning. An examination of the information led to the conclusion that the Licensee would not be able to provide financial assurance by resort to one of the methods specified in section 40.36(e), with the consequence that an exemption from the requirements of the section was necessary. Affidavit ¶ 8.

In considerable detail, the Fredrichs affidavit (*id.* ¶¶ 9-27) goes on both to describe the alternative financial instruments that the Licensee had supplied and to explain the reasoning underlying his determination that "they provided reasonable assurance that funds would be available for decommissioning." On the basis of that determination, the requested exemption from the section 40.36(e) requirements was included as part of the license amendment issued on December 4, 2003.

Still further, Mr. Fredrichs noted (*id.* ¶ 28) that, when the Licensee announced its intention to file a bankruptcy petition, the Staff had indeed formed a Bankruptcy Review Team. His affidavit went on to spell out the actions taken by that team. *Ibid.*

We take up in the next section of this Decision Oklahoma's attack upon the decommissioning cost estimates that Mr. Fredrichs employed in determining that the alternative financial instruments furnished by the Licensee were sufficient. As will be there seen, the attack is without merit. That being so, the State's challenge to the grant of the exemption must also fail.

Section 40.14(a) of 10 C.F.R. specifically authorizes the Commission to grant such exemptions from the requirements contained in Part 40 "as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." That authority manifestly extends to exemptions directed to the section 40.36(e) requirements. Additionally, as earlier noted (p. 270, *supra*), the Commission has ruled that the process employed by the Staff in conducting its regulatory reviews is not open to question in an NRC adjudicatory proceeding.

D. As above observed, decommissioning plans are required by regulation to contain cost estimates for decommissioning. In its January 30 Presentation (at 43-44), Oklahoma asserts that the cost estimate supplied by the Licensee was based upon undocumented and unreasonable assumptions and, as such, should not have been accepted by the NRC Staff. In large measure, the assertion is founded upon the fact that the Licensee's cost estimate was less than that provided by a contractor that the Staff had retained to provide an independent opinion on the decommissioning cost matter.

This disparity was specifically addressed in the Fredrichs affidavit. As he noted (¶ 11), the primary reason for the difference between the contractor's estimate and that of the Licensee was the assumed volume of the contaminated soil that would need to be removed and disposed of. The Licensee's estimate was based

on the removal from the site of “only soil that was known to be contaminated . . . based on limited characterization data.” On the other hand, the contractor had based its cost estimate “on a projection of the amount of soil that would be removed by assuming that contamination would be found in areas that had not yet been completely characterized.” Additionally, the Licensee had assigned a lower amount than did the contractor to the costs associated with planning and the final status survey.

Insofar as the latter matter was concerned, Mr. Fredrichs referred to the fact that the contractor applied a standard percentage to the disposal costs to arrive at its figure. As he saw it, however, that percentage’s multipliers overstated the actual costs that the Licensee will incur. This was because “[t]he standard percentages were derived from cost studies of complex sites,” whereas the decommissioning project in issue is “straightforward” in nature. *Id.* ¶ 13.

Upon reviewing both estimates, Mr. Frederichs reached the conclusion that “there was reasonable certainty that [the Licensee’s] estimate was representative of decommissioning costs for removing the known amount of contaminated soil and pond contents.” He further concluded that (as has been previously discussed in this Decision) additional site characterization would be required to determine precisely how much soil will be needed to be remediated at the site. *Id.* ¶ 14.

As Mr. Fredrichs saw it, the fact that the Licensee’s cost estimate reasonably assessed the known costs of decommissioning made that estimate acceptable given that, were it to prove inadequate, there was a mechanism in place to provide additional funds in the future. In that regard, he took note of the further fact that, because of the Licensee’s limited funds, money spent on further characterization would reduce the amount available for decommissioning. *Id.* ¶ 15.

The mechanism to which the affiant had reference is a Contingent Note supplied by the Licensee that “would be used to fund decommissioning costs not funded by the financial instruments already provided, if necessary.” According to Mr. Fredrichs, the “approach” being adopted

was designed to maximize effective use of limited funds in the beginning of the project, when the material with the highest hazard will be removed and disposed of, by minimizing the duplication of work necessary to perform additional site characterization. Data collected during the course of the work will be useful in performing the additional characterization that will be needed to resolve the uncertainty in waste soil volume. In approximately 2011, the project will be reviewed and additional costs, if any, determined. At that time, [the Licensee] will provide additional financial assurance, if necessary, using the Contingent Note.

Id. ¶ 17.

Although Oklahoma might not endorse this approach to dealing with the matter at hand, it appears to us to be quite reasonable given the realities of the Licensee’s

current financial situation. More to the point, it has not been shown to run afoul of any Commission regulatory provision concerned with decommissioning.

E. That leaves for consideration Oklahoma's claim (January 30 Presentation at 44-47) that the NRC Staff improperly issued its finding of no significant [environmental] impact (FONSI). For this proposition, the State relies first (*id.* at 44) on the stated fact that, although the Muskogee Port Authority intends to develop the site as an industrial park, the surrounding area is not entirely industrial. Although that might be so, Oklahoma has provided no basis for a conclusion that the decommissioning of the site will have a significant environmental impact upon the recreational areas on the other side of the Arkansas River to which it alludes. Moreover, its charge that the decommissioning plan is so "replete with inaccurate and insufficient data" as to make an adequate Staff review impossible is not accompanied by any documentation. To the extent that the charge rested upon the asserted flaws in site characterization or the employment of the industrial use scenario, we have already determined that the plan was not defective in those respects.

Oklahoma next takes issue (*id.* at 45) with the acknowledged failure of the Environmental Assessment (§ 3.1.2) to address the chemical contamination on the site for the reason that it lacked regulatory authority to do so. It recognizes that, in granting its hearing request in LBP-03-22, 58 NRC 363, 370 (2003), Judge Cole and this presiding officer had expressly determined that Oklahoma's stated concern regarding nonradiological contaminants was outside the bounds of this proceeding. The State nonetheless maintains that it should have been consulted by the NRC Staff for guidance in the appropriate remediation of those contaminants. We find nothing in the Commission's regulations pertaining to environmental reviews that makes such consultation obligatory. Moreover, as the Licensee notes (Presentation at 89-90), Oklahoma had sufficient opportunity to present its views to the Staff.

Finally, based upon its reading of certain correspondence between the Licensee and the NRC Staff, Oklahoma asserts (January 30 Presentation at 47) that the Staff predetermined the outcome of the Environmental Assessment. We agree with the Licensee (Presentation at 92-93) that that correspondence is not reasonably open to such an interpretation.

Not surprisingly, Oklahoma seemingly would prefer all site characterization and other activities associated with the decommissioning of the Muskogee site to have been accomplished before the NRC Staff put its stamp of approval on the Licensee's plan. Unfortunately, however, financial constraints preclude the achievement of such an objective. Confronted with that reality, the Staff has endorsed a staged approach to the completion of the decommissioning effort, with conditions imposed on the materials license designed to ensure that the public

health and safety is adequately protected at all times. Under that approach, the decommissioning process now moves forward.

In these circumstances, the ultimate question before us is whether we have been provided by the Licensee and NRC Staff with an adequate evidentiary basis for a determination that, although it is to be carried out in stages rather than all at once, the Licensee's decommissioning plan (when coupled with the Staff-imposed license conditions) satisfies applicable Commission regulations in the respects challenged by the State. On the basis of our analysis of Oklahoma's principal concerns and assertions, we conclude that this question requires an affirmative answer.¹⁰ The short of the matter is that the affidavits of experts supplied by the Licensee and the Staff (taken in conjunction with the supporting exhibits that were also included in the former's presentation) squarely and persuasively responded to those concerns. To the limited extent that the Licensee's and Staff's evidentiary showing is at all confronted in the State's rebuttal presentation, the challenge takes the form of argumentation by counsel and, as such, has not been found to cast significant doubt upon the probative value of that showing.¹¹

Accordingly, contrary to Oklahoma's insistence, the NRC Staff's approval of the proposed materials license amendment cannot be deemed to have been improvident. It therefore must be, and hereby is, *upheld*.

As authorized by 10 C.F.R. § 2.1253, if so inclined Oklahoma may petition the Commission for review of this Decision in accordance with the procedures set forth in now-superseded sections 2.786 and 2.763 of the Rules of Practice (*see* note 1, *supra*). Pursuant to section 2.786(b)(1), the petition for review must be filed within fifteen (15) days of the service of this Decision and must meet the requirements set forth elsewhere in subsection (b)(2). Within ten (10) days after service of the petition, other parties to the proceeding may file answers either supporting or opposing its grant. 10 C.F.R. § 2.786(b)(3). For its part, section 2.763 authorizes a party to request the Commission to allow oral argument with regard to the petition.

¹⁰ As previously observed, not all of Oklahoma's numerous assertions have been found sufficiently significant to warrant discussion in this Decision. Suffice it to say that, whether or not specifically treated in the Decision, we have found none of the State's perceived flaws in the decommissioning plan to possess enough substance to bring the Staff's approval of the plan into serious question.

¹¹ We do not mean to suggest that materials licensing proceedings conducted under Subpart L of the Rules of Practice always should consist of contests between expert witnesses supplying affidavits and counter-affidavits. As earlier noted (p. 271, *supra*), however, there are difficulties associated with endeavors to refute the evidentiary presentation of the adversary without putting forth a like presentation of one's own. In this instance, those difficulties were simply not overcome by Oklahoma in its two written presentations that were both entirely devoid of anything in the way of an evidentiary showing.

It is so ORDERED.

BY THE PRESIDING OFFICER¹²

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 26, 2004

¹² Copies of this Initial Decision were sent this date by Internet electronic mail transmission to the counsel for Oklahoma, the Licensee, and the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. 70-03098-ML
(ASLBP No. 01-790-01-ML)

**DUKE COGEMA STONE &
WEBSTER**
**(Savannah River Mixed Oxide Fuel
Fabrication Facility)**

May 28, 2004

In response to the Applicant's motion for summary disposition of contentions 1 and 2, the Licensing Board grants the motion and finds that the contentions are contentions of omission and, as such, are moot, and therefore fail to generate a genuine issue of material fact.

MEMORANDUM AND ORDER
(Ruling on Motion for Summary Disposition of
GANE Contentions 1 and 2)

Before us is the motion of Applicant Duke Cogema Stone & Webster (DCS) for summary disposition of contentions 1 and 2 in this Commission-modified informal 10 C.F.R. Part 70 materials license proceeding on DCS's construction authorization request (CAR) to construct a mixed oxide fuel fabrication facility

(MFFF).¹ The Intervenor, Georgians Against Nuclear Energy (GANE), opposes the motion, while the NRC Staff supports it.² For the reasons set forth below, we grant the Applicant's motion for summary disposition on both contentions.

I. BACKGROUND

A. Contentions 1 and 2

GANE's first contention deals with the insufficiency of information in the CAR on the design features of the material control and accounting (MC&A) system for the MFFF. Specifically, GANE asserts that, because the CAR lacks adequate information on MC&A design features, the Staff has no ground on which to find that the Applicant's design basis for MC&A and related commitments will lead to a Fundamental Nuclear Material Control Plan (FNMCP) that will meet or exceed the acceptance criteria in section 13.2.4 of the Staff's MFFF Standard Review Plan (SRP), and there is no indication that DCS took MC&A considerations into account in designing the facility. Therefore, according to GANE, "the CAR in its current form is grossly inadequate and should be rejected."³ As the basis of its contention, GANE relies, *inter alia*, upon a 1992 International Atomic Energy Agency (IAEA) Board of Governors' recommendation and a 1997 report by safeguards experts at the Los Alamos and Sandia National Laboratories indicating that if safeguard measures are not considered early in the design phase of a new facility, the costs of retrofitting it to comply with regulatory requirements could be prohibitive or lead to choices that do not permit adequate safeguards measures.⁴ GANE states that, rather than providing a reasonably complete description of the safeguards measures at the design stage, the section of the CAR addressing the MC&A system is less than one page in length and merely asserts DCS will provide an FNMCP meeting the regulatory requirements when it applies for a possession and use license.⁵

¹ See Duke Cogema Stone & Webster's Motion for Summary Disposition on Contentions 1 and 2 (May 9, 2003) [hereinafter DCS Motion].

² See Georgians Against Nuclear Energy Opposition to Duke Cogema Stone & Webster's Motion for Summary Disposition of GANE Contentions 1 and 2 (June 5, 2003) at 1 [hereinafter GANE Opposition]; NRC Staff's Response to Motion for Summary Disposition Submitted by Duke Cogema Stone & Webster (June 5, 2003) at 1 [hereinafter Staff Response].

³ See Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site (Aug. 13, 2001) at 2-3 [hereinafter GANE Contentions].

⁴ See *id.* at 3-4.

⁵ See *id.* at 5.

Similar to its first contention, GANE's second contention asserts that, because the CAR lacks sufficient physical protection design information, the CAR fails to provide any basis for the Staff to determine that the Applicant's proposed physical protection plan will meet or exceed the acceptance criteria set forth in section 13.1.4 of the MFFF SRP, and there is no indication that DCS took physical protection considerations into account in designing the facility. Thus GANE asserts that "the CAR in its current form is grossly inadequate and should be rejected."⁶ As support for this contention, GANE avers that design elements such as the facility layout, structural design, and location of physical barriers play a crucial role in the technical basis for physical protection and, consequently, should be considered in the design of the facility as early as possible to ensure that an adequate system can be implemented without compromising the safety of emergency personnel.⁷ As in the case of DCS's treatment of the design basis of the MC&A system, GANE states that the section of the CAR dealing with physical security is only one paragraph in length and merely indicates that DCS will provide a physical protection plan meeting regulatory requirements when it applies for a possession and use license.⁸

B. Summary Disposition Motion

In its motion for summary disposition, DCS asserts that pursuant to the Commission's April 18, 2001 hearing notice⁹ and April 3, 2002 Memorandum and Order,¹⁰ the scope of both GANE contentions is limited to information relative to the design bases of the MC&A and physical protection systems and, as such, the design features of the systems are not subject to litigation.¹¹ Based on the language of the contentions and Board statements made during an April 18, 2003 teleconference, DCS argues that the scope of the contentions is further limited to the lack of, rather than the sufficiency of, MC&A and physical protection design basis information in the CAR.¹² Consequently, while DCS acknowledges that the original CAR filed in February 2001 did not include *any* design basis information for either the MC&A or physical protection systems, it contends that because the

⁶ *See id.* at 10.

⁷ *See id.* at 10-11.

⁸ *See id.* at 12.

⁹ *See* Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001).

¹⁰ *See* CLI-02-9, 55 NRC 245, 249 (2002).

¹¹ *See* DCS Motion at 8-9.

¹² *See id.* at 9-10.

CAR was revised in October 2002 to include such information, that aspect of GANE's contentions 1 and 2 is now moot.¹³

Notwithstanding its claim that the substantive content of the CAR's design basis information is beyond the scope of the contentions, in its motion before the Board, DCS nonetheless discusses the MC&A and physical protection design bases in some detail to demonstrate its efforts in developing the information.¹⁴ With respect to contention 1, DCS asserts that contrary to GANE's suggestion, it has analyzed and taken MC&A considerations into account during the MFFF design process.¹⁵ In particular, DCS maintains that the design of the facility's two major functional processing areas — the aqueous polishing area and the mixed oxide (MOX) processing area — reflects efforts to minimize residual plutonium holdup.¹⁶ In discounting GANE's references to the difficulties experienced by the Japanese Plutonium Fuel Production Facility and the French MELOX plant, DCS points to this Board's observation that references to how foreign MOX fuel industries define the same terms used in NRC regulations are irrelevant to NRC proceedings because such foreign facilities are not licensed by the Commission.¹⁷ In this regard, DCS argues that experiences at foreign facilities are similarly irrelevant to the instant proceeding.¹⁸ Finally, DCS dismisses GANE's concern that the MFFF Scrap Processing Unit may not be able to meet applicable NRC requirements by asserting that the MFFF is exempt from the Commission's scrap control requirements.¹⁹ Thus, DCS contends, because it has accounted for MC&A considerations in the facility's design, there remains no genuine issue of material fact, and summary disposition of GANE contention 1 is warranted.²⁰

With regard to GANE's second contention, DCS maintains that it has taken physical protection considerations into account during each of the three facility design phases.²¹ According to DCS, through the use of multiple design analysis tools — including value engineering analysis, vulnerability analyses of different design options, and consultation with security professionals — many layers of security inside the MFFF have been established and enhanced in conformance with the NRC physical protection requirements set forth in 10 C.F.R. Part 73.²²

¹³ See *id.* at 11.

¹⁴ See *id.* at 11-13.

¹⁵ See *id.* at 17-19.

¹⁶ See *id.* at 20-22; see also *id.*, Exh. C, Affidavit of Donald Joy (May 5, 2003), ¶ 16 [hereinafter Joy Aff.].

¹⁷ See DCS Motion at 22-23 (*citing* LBP-01-35, 54 NRC 403, 428 (2001)).

¹⁸ See *id.*

¹⁹ See *id.* at 23; see also Joy Aff. ¶¶ 24-32.

²⁰ See DCS Motion at 27.

²¹ See *id.* at 23-24.

²² See *id.* at 24-26.

Such security features include fortified interior and exterior walls, safe havens for MFFF employees, barriers, search and control points, alarm stations, truck bay, interior and exterior fighting positions, and a “sally port”²³ design for the entrances and exits.²⁴ In light of these efforts, DCS argues, it is entitled to judgment as a matter of law on contention 2 because physical protection considerations have been accounted for in the design of the MFFF.²⁵

In its response to the DCS motion, GANE objects to the Applicant’s attempt to limit the scope of contentions 1 and 2, asserting that the contentions challenge not the total lack of design basis information, but rather the completeness of the CAR’s information to allow a thorough Staff review of the adequacy of the CAR to satisfy NRC requirements for MC&A and physical protection systems.²⁶

With regard to contention 1, GANE recognizes that it may not challenge the adequacy of the Staff’s review of an application or CAR, yet nonetheless argues that “the nature, completeness, and quality of the Staff’s review is a relevant consideration” in the Board’s decision.²⁷ Because the record of the Staff’s safety review is, in GANE’s view, confusing and contradictory, GANE asserts that the Board should not accept the Staff’s findings until GANE has had an opportunity to conduct further discovery and ask the Staff what MC&A design information was actually taken into account during the Staff’s review.²⁸ In addition to contesting the Applicant’s characterization of the contentions’ scope and the completeness of the Staff’s review, GANE substantively challenges the new MC&A design basis information in the revised CAR, arguing that the new MC&A discussion omits essential design basis information.²⁹ According to GANE, the IAEA’s Design Information Questionnaire provides a more comprehensive template for the kind of design information that the NRC needs to make its MC&A determination.³⁰

In support of its second contention, GANE argues that because the additional physical protection information in the revised CAR fails to include quantitative information of sufficient specificity, detail, and accuracy, the Staff has no basis on which to make a finding regarding the adequacy of the physical protection

²³ The “sally port” design requires at least one closed barrier to the outside at all times as people or vehicles enter the building. *See id.* at 27.

²⁴ *See id.* at 26-27.

²⁵ *See id.* at 27.

²⁶ *See* GANE Opposition at 15-16.

²⁷ *Id.* at 9.

²⁸ *See id.* at 9-10.

²⁹ *See id.* at 19-20; *see also id.*, Exh. 3, Declaration of Edwin S. Lyman Regarding GANE Contention 1 (Material Control and Accounting) (June 5, 2003), ¶ 8 [hereinafter Lyman Cont. 1 Decl.].

³⁰ *See* Lyman Cont. 1 Decl. ¶ 11.

design bases.³¹ Furthermore, according to GANE, the design basis threat (DBT) on which the MFFF's proposed security design is based is no longer valid.³² In this regard, GANE contends that without knowing which DBT applies to the MFFF, it is impossible for the Staff to evaluate whether the design basis information is adequate to permit a safety finding under 10 C.F.R. § 70.23(b).³³

For its part, the Staff supports the DCS motion.³⁴ Relying on section 70.23(b), the Staff again argues, as it did in opposing the admission of the contentions,³⁵ that the scope of its required preconstruction findings is limited to the issue of whether the design bases of the principal structures, systems, and components (SSCs) adequately protect against the effects of natural phenomena such as earthquakes, severe weather, and accidents.³⁶ In the Staff's view, because there is nothing in the record that demonstrates that the MC&A and physical protection systems would play any role in protecting against natural phenomena and the consequences of potential accidents, there are no genuine issues of material fact on whether these systems would be within the set of principal SSCs governed by section 70.23(b).³⁷ Nonetheless, the Staff agrees substantively with the conclusions reached by the Applicant's experts.³⁸

II. ANALYSIS

At the time of its original filing in February 2001, the CAR did not include any design basis information for either the MC&A or physical protection systems and merely stated the Applicant's commitment to submit the MC&A and physical protection system plans with the anticipated filing of its possession and use license

³¹ See GANE Opposition, Exh. 4, Declaration of Edwin S. Lyman Regarding GANE Contention 2 (Physical Security), ¶ 8 [hereinafter Lyman Cont. 2 Decl.].

³² See GANE Opposition at 20. Following the terrorist attacks of September 11, 2001, the Commission issued separate orders to two 10 C.F.R. Part 70 licensees — BWX Technologies (BWXT) and Nuclear Fuel Services, Inc. (NFS) — imposing a revised DBT against which these licensees must modify their physical security and safeguards contingency plans. See 68 Fed. Reg. 26,675 (May 16, 2003); 68 Fed. Reg. 26,676 (May 16, 2003). The new DBT issued to BWXT and NFS supercedes the DBT set forth in 10 C.F.R. § 73.1. See 68 Fed. Reg. at 26,675, 26,677. Although the MFFF would, like the existing BWXT and NFS facilities, be a Category 1 fuel cycle facility based on the quantity of strategic special nuclear material (SSNM) it would possess and use, the Commission has not imposed a revised DBT on the MFFF. See Staff Response at 2-3. The Staff does, however, intend to seek Commission approval to send the revised DBT to DCS. See *id.* at 3.

³³ See GANE Opposition at 8, 20.

³⁴ See Staff Response at 1.

³⁵ See LBP-01-35, 54 NRC at 427.

³⁶ See Staff Response at 6-7.

³⁷ See *id.* at 7-8.

³⁸ See *id.* at 8.

application.³⁹ Based on the absence of MC&A design information, GANE's first contention asserts, "[c]onsequently, Chapter 13.2 of the CAR in its *current form* is grossly inadequate and should be rejected."⁴⁰ With the exception of a different citation to the CAR, GANE's second contention repeats the same language.⁴¹

After admitting contentions 1 and 2, the Board advised the parties that all late-filed contentions must be submitted within 30 days of the initiating action underlying the late-filed contention, e.g., the issuance of a Staff or DCS document that legitimately undergirds a late-filed contention.⁴² In that same order, the Board specifically cautioned the intervenors that they

may need to file a late-filed contention or a late-filed amendment to an admitted contention if, for example, the scope, data, or conclusions set out in the draft [Environmental Impact Statement] or the draft [Safety Evaluation Report] differ significantly from DCS's Environmental Report or construction authorization request. Failure to file a new late-filed contention or a late-filed amendment to an admitted contention may, upon a proper motion, result in the dismissal of an admitted contention.⁴³

Although our order did not specifically refer to the filing of a revised CAR, GANE nonetheless should have been well aware of the Board's expectation that late-filed contentions or late-filed amended contentions should be filed promptly following the issuance of any documents containing significant new or different information. Moreover, during an April 2002 telephone conference among the Board and the parties, the Board stated very plainly its view of the scope of the contentions:

GANE contention[s] 1 and 2 deal with the lack of material in the construction authorization request dealing with material control and accounting and physical security. They don't deal with the adequacy of something that's not yet there. And anything dealing with the latter, of course, would require a late filed contention. . . .

What the Board was also wondering was frankly, if contentions, for example 1 and 2 deal with, as it is the Board's understanding when we admitted them, the lack of information concerning material control and accounting as it relates to the design basis and physical security as it relates to design basis, and if the Applicant

³⁹ See CAR, Rev. 2/28/01, §§ 13.1, 13.2.

⁴⁰ GANE Contentions at 3 (emphasis added).

⁴¹ See *id.* at 10.

⁴² See Licensing Board Memorandum and Order (Feb. 12, 2002) at 3 (unpublished).

⁴³ *Id.*

is intending in its supplemental filings with the Commission to be providing much of this information, will that not essentially resolve any of these contentions.⁴⁴

Despite the Board's clear admonition in the February 2002 order and its statements made during the April 2002 telephone conference, GANE chose not to file any late-filed amendments or late-filed contentions after DCS submitted its October 2002 revised CAR containing new MC&A and physical protection design basis information. GANE's claim that the original contentions encompass information in the revised CAR⁴⁵ simply does not comport with the language of its contentions, which challenge sections 13.1 and 13.2 of the CAR in their "current" forms, i.e., as they existed at the time the contentions were filed in August 2001. As the Commission has clearly stated:

There is, in short, a difference between contentions that merely allege an "omission" of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot.⁴⁶

Accordingly, GANE's contentions of omission are moot. Nor can GANE's attempt to distinguish semantically between the completeness and adequacy of the information assist it here. As we have previously observed in this proceeding, "the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance."⁴⁷ Thus, because GANE cannot directly challenge the adequacy or completeness of the Staff's review, GANE cannot attempt to obtain the same result by framing its contentions as questioning the information or lack of information the Staff had before it while it was conducting its review.

While we have dismissed GANE's contentions 1 and 2 as moot, an additional observation with respect to GANE's second contention is in order. Initially, it was unclear from the parties' submissions which DBT applied to the MFFF,⁴⁸ and

⁴⁴ See Tr. (Apr. 18, 2002) at 14, 29.

⁴⁵ See Tr. (Aug. 5, 2003) at 18-20.

⁴⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

⁴⁷ LBP-01-35, 54 NRC at 433 (*quoting* Final Rule: "Rules of Practice for Domestic Licensing Proceedings; Procedural Changes in the Hearing Process, Statement of Consideration," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

⁴⁸ In its response to the DCS motion, the Staff noted that "the DBT to be addressed by the physical security and safeguards contingency plans DCS will be required to submit is no longer the DBT set

(Continued)

the Board consequently was troubled by how physical protection design bases could be developed and evaluated without having an identified DBT. Although 10 C.F.R. § 73.1 was, as we noted earlier, superceded by Commission order with specific regard to BWXT and NFS, the Staff confirmed that section 73.1 remains in effect for all other Category 1 fuel cycle facilities, including the MFFF.⁴⁹ To date, the Commission has not amended the regulation or issued a specific order imposing a different DBT on the DCS facility, presumably with regard to the latter because DCS has not yet been granted either a construction permit or a possession and use license. Thus, notwithstanding that it is readily conceded by both DCS and GANE that, as a practical matter, the DBT specified in the regulations is no longer operable, for purposes of this summary disposition motion, the DBT set forth in 10 C.F.R. § 73.1 is the applicable law with respect to the MFFF. Accordingly, because there is an identified DBT against which DCS's design bases may be evaluated and because GANE failed to proffer any late-filed amendments or late-filed contentions following DCS's submission of the revised CAR, GANE's contention 2 must be dismissed.

The Board also notes that the Staff continues to insist, on the one hand, that DCS need not provide any physical protective design basis information at the CAR stage and that the existing DBT in section 73.1 will govern any application that DCS may file for a possession and use license. But, on the other hand, the Staff nevertheless provided DCS with the revised DBT applicable to other facilities on July 28, 2003, for the stated purpose of advising the Applicant of the standards the MFFF might be subject to at the possession and use license stage.⁵⁰ Recognizing that the Staff's seemingly contradictory position is, in some part, a creature of the agency's regulatory scheme — under which the existing applicable regulation is, as a practical matter, no longer operable and the Staff is unable to issue an order modifying a license or construction permit to an Applicant who holds neither — we note that fortunately, DCS has adopted a prudent and practical approach. Because the Applicant assumes the risk that its proposed facility may not be licensed, DCS indicates in the affidavits supporting its summary disposition motion that it has taken both the existing section 73.1 DBT and the revised DBT into account in developing the physical protection design bases for the proposed facility.

We further note that despite our dismissal of contention 2, GANE is not without remedy should it wish to pursue the issue of the adequacy of physical

forth in 10 C.F.R. § 73.1, because as discussed above that DBT was superceded by the April 29, 2003 orders issued to BWX Technologies and Nuclear Fuel Services Inc.” Staff Response at 3. At the oral argument held on August 5, 2003, however, the Staff reversed itself and stated that the DBT specified in section 73.1 was still in force for the DCS physical security plan. *See* Tr. (Aug. 5, 2003) at 8-9.

⁴⁹ *See id.*

⁵⁰ *See id.* at 41-42.

protection design bases. As we see it, GANE retains two possible options: it can (1) file a late contention if the DBT for the MFFF is revised through either (a) a memorandum of understanding between the NRC and the Department of Energy, or (b) a Commission-issued order specific to the MFFF (assuming DCS is issued a construction permit); or (2) challenge the adequacy of the design bases to meet the applicable DBT at the possession and use license application stage. At this time, however, GANE's failure to submit a late-filed contention or late-filed amendment following the Applicant's revision of the CAR requires us to dismiss, as moot, contention 2.

For the foregoing reasons, the Applicant's motion for summary disposition is granted. The Board dismisses GANE contentions 1 and 2, which challenged the lack of MC&A and physical protection design basis information in the Applicant's original CAR, because GANE failed to file late-filed amendments or late-filed contentions after DCS submitted a revised CAR containing new and significantly different MC&A and physical protection design basis information.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵¹

Thomas S. Moore
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 28, 2004

⁵¹ Copies of this Order were sent this date by Internet e-mail transmission to (1) GANE, (2) BREDL, (3) DCS, and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)

DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)

April 12, 2004*

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.–Russian Federation plutonium disposition program, the Licensing Board admits one security-related contention, and publishes its ruling in a redacted version of a previously issued Memorandum and Order that was sealed as safeguards information.

LICENSING BOARDS: DECISIONS

The current Memorandum and Order is a redacted version of the originally issued, sealed-as-safeguards document, with redactions made based on the definition of “Safeguards Information” found in 10 C.F.R. § 73.2, and in consultation with the security representative appointed by the Commission pursuant to 10

*Sealed as Safeguards; Redacted Public Version Issued May 28, 2004.

C.F.R. § 2.904 to advise and assist the Licensing Board with respect to security classification of information and the safeguards to be observed in this proceeding.

LICENSING BOARDS: CERTIFICATION OF QUESTIONS TO COMMISSION

The Licensing Board certifies questions arising out of a contention and responses to it, which involve several significant issues regarding access to security-related information and interpretation of a prior Commission decision on such access issues, to the Commission under 10 C.F.R. § 2.718(i).

CONTENTIONS: ADMISSIBILITY

The Licensing Board admits a contention challenging Applicant’s support for requests for exemption from certain security-related requirements of 10 C.F.R. §§ 73.46 and 11.11, finding that Intervenor presented a sufficiently specific statement of issues raised, supported by sufficient basis consisting of a specifically stated explanation, fact-based argument, documents, and expert opinion, to establish genuine disputes on material issues of combined law and fact, and warrant admission of the contention under 10 C.F.R. § 2.714.

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MEMORANDUM AND ORDER
(Ruling on Security-Related Contentions)

This proceeding involves the February 2003 application of Duke Energy Corporation (Duke), to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel¹ lead test assemblies (LTAs) at the station. Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003) [hereinafter LAR]. Blue Ridge Environmental Defense League (BREDL) was admitted as a party Intervenor on March 5, 2004, with three admitted non-security-related contentions. Memorandum and Order (Ruling on Standing and Contentions), LBP-04-4, 59 NRC 129 (2004) [hereinafter LBP-04-4]. Petitioner Nuclear Information and Resource Service (NIRS) was found to have standing, but not to have filed any admissible contentions, and was therefore not admitted as a party. *Id.* We address herein five security-related contentions submitted by BREDL on March 3, 2004. [BREDL]’s Contentions on Duke’s Security Plan Submittal (Mar. 3, 2004) [hereinafter BREDL Security Contentions].

¹ MOX fuel contains “a mixture of plutonium and uranium oxides (PuO₂ and UO₂) with plutonium providing the primary fissile isotopes.” LAR, Attachment 3, n.1.

We make two preliminary procedural observations at the outset. First, as indicated above, the original version of this Memorandum and Order was issued on April 12, 2004, and was sealed as Safeguards Information. This document is a redacted version of the original. These redactions are made, based on the definition of “Safeguards Information” found in 10 C.F.R. § 73.2, namely:

information not otherwise classified as National Security Information or Restricted Data which specifically identifies a licensee’s or applicant’s detailed, (1) security measures for the physical protection of special nuclear material, or (2) security measures for the physical protection and location of certain plant equipment vital to the safety of production or utilization facilities.

In compliance with this definition and the requirements for the protection of safeguards information found in 10 C.F.R. § 73.21, and in consultation with Mr. Robert B. Manili, the security representative appointed by the Commission pursuant to 10 C.F.R. § 2.904 to advise and assist the Licensing Board with respect to security classification of information and the safeguards to be observed in this proceeding, *see* Order (Feb. 2, 2004), the Board has redacted material that could in some way identify Duke’s detailed security measures as specified in section 73.2, whether now or in the future, after final action on Duke’s current LAR. All parties agree with many of these redactions; BREDL objects to some of them. In making these redactions we wish to emphasize that BREDL may revisit the appropriateness of redacting references to various information, if any dispute then remains or arises, at the time we issue an initial decision on the merits of BREDL’s security contentions.

Second, we note the recent receipt of a new BREDL filing. [BREDL]’s Amended Contentions on Duke’s Security Plan Submittal (April 8, 2004) [hereinafter BREDL Amended Security Contentions]. This document, despite its title, concerns certain additional information BREDL wishes to include in three specific parts of the basis for one contention — Security Contention 5, filed as part of its March 3 Security Contentions. *Id.* at 2. This additional information is based on Duke’s March 1, 2004, response to the NRC Staff’s January 30, 2004, Requests for Additional Information (RAIs), which BREDL indicates became available to it during the 30 days prior to April 8, 2004. *Id.* at 5. We expect that Duke and the Staff will file timely responses to this document, and we will rule on it as soon as possible after receipt of such responses and any appropriate oral argument. We have considered whether to defer issuing this Memorandum and Order until such time, and find that such a course of action would cause undue and unnecessary delay. Because BREDL in this new filing essentially raises additional information, and in no way withdraws any portion of its March 3 Security Contentions or bases therefor, we find no reason to hold up issuance of this decision on BREDL’s March 3, 2004, Security Contentions.

I. BACKGROUND

A. License Amendment Request

As previously noted in LBP-04-4, Duke sought the original license amendment at issue, relating to both the McGuire Nuclear Station, Units 1 and 2, and the Catawba Nuclear Station, Units 1 and 2, in February 2003, but subsequently revised its license amendment request (LAR) to restrict it to the Catawba facility. LAR; 68 Fed. Reg. 44,107 (July 25, 2003); Letter from M.S. Tuckman to NRC (Sept. 23, 2003). In the LAR Duke seeks to modify certain technical specifications (TSs) to enable the use of four MOX fuel lead test assemblies in the Catawba plant, and also requests exemption from certain NRC regulations. The LAR is “part of [a U.S.]–Russian Federation . . . nuclear nonproliferation program . . . to dispose of surplus plutonium from nuclear weapons by converting [it] into MOX fuel and using that fuel in nuclear reactors,” in which Duke, as part of the consortium, Duke Cogema Stone & Webster (DCS), has contracted with the Department of Energy (DOE) to perform various functions. LAR at 2; *id.*, Attachment 3 at 3-2. DCS is to “provide for the design, construction, operation, and deactivation of a [MOX] Fuel Fabrication Facility (MFFF),” in which DCS “will process PuO₂ powder supplied by [DOE], blend it with depleted UO₂ powder, and fabricate it into MOX fuel pellets,” which would then be “loaded into MOX fuel assemblies.” LAR, Attachment 3 at 3-2. Duke states that, “[f]ollowing NRC approval of required license amendments, the fuel assemblies will be used in the McGuire and Catawba Nuclear Stations with core fractions up to 40% MOX fuel.” *Id.* The latter are referred to as “batch” quantities of MOX fuel.

The four lead test assemblies at issue in this proceeding will, assuming approval of the LAR at issue herein, be manufactured, not in the planned MFFF, but “under the direction of Framatome ANP.” *Id.* Duke’s plans:

call for [the] four lead assemblies to be irradiated for a minimum of two cycles to confirm acceptability of the planned MOX fuel assembly design, verify the validity of Duke’s models to predict fuel assembly performance, and confirm the applicability of the European database to Duke’s use of MOX fuel. Poolside post-irradiation examination (PIE) is planned to verify selected mechanical properties of the lead assemblies. In addition, some or all of the lead assemblies will undergo a third cycle of irradiation to assure that the lead assembly burnup bounds the planned batch fuel burnup. Examination of one or more fuel rods in a hot cell is planned at the completion of the lead assembly irradiation program.

Id. at 3-2–3-3.

The technical specification sections that would be modified if the LAR is approved include the following: two relating to storage of the MOX fuel lead test

assemblies in the spent fuel storage racks (section 3.7.15, “Spent Fuel Assembly Storage,” and section 4.3, “Fuel Storage”); one that would be revised to allow the use of MOX fuel in addition to the currently specified slightly enriched uranium dioxide fuel, as well as the use of fuel rod cladding with an “M5™ zirconium alloy that has a different material specification than the materials currently referenced in the TS” (section 4.2, “Reactor Core”); one that would be revised to include additional methodologies that would be used to develop the limits included in the Core Operating Limits Report (section 5.6.5, “Core Operating Limits Report”); and, finally, the TS Bases section, for which certain associated changes have been proposed. 68 Fed. Reg. 44,107 (July 25, 2003).

Reference may be made to LBP-04-4 for detailed background information on most of the proceedings in this matter from the date of the LAR through the March 5, 2004, issuance date of LBP-04-4, and we see no need to repeat all of this information here. Because, however, the parties in their arguments on the current contentions make various references to certain specifically security-related issues not addressed in great detail in LBP-04-4, we provide herein the following additional, more detailed background information on these issues.

On October 8, 2003, Duke and the Staff filed a Motion for Protective Order, relating to certain material deemed by the Staff to constitute Safeguards Information (SGI). Motion for Protective Order (Oct. 8, 2003) [hereinafter 10/8/03 Motion for Protective Order]. Based on certain security concerns relating to the Motion for Protective Order, the Board on October 9 issued an order scheduling a telephone conference for October 10 to address these concerns. Order (Addressing Certain Security Issues and Scheduling Telephone Conference) (Oct. 9, 2003). During the October 10 conference, Tr. 1-46, the Staff indicated that, despite the October 8 motion, “there may be some concern” such that the Staff was “not ready to give . . . a final decision” on certain issues relating to the proposed protective order. Tr. 6-7. This related to the possibility of applying Category I facility standards to Catawba with regard to the LAR, which the Staff was not ready to decide at that point, and which, according to Staff counsel, “could cause a delay in the proceedings.” Tr. 12-15.

Staff counsel indicated that it would try to provide notification of the relevant classification by October 23, and that “the 30th of October would probably be the latest date [the Staff] anticipate[d] . . . getting back to the Board.” Tr. 42-44. Counsel agreed to notify the Board and all participants, no later than October 15, of when the Staff expected to make a determination on the classification level of the material in question. Tr. 36. Two tentative dates were set for another telephone conference — October 23 and 30 — the final scheduling of which would depend on when the Staff made its determination. Tr. 43-44; *see* Order (Confirming Matters Addressed at October 10, 2003, Telephone Conference) (Oct. 10, 2003). On October 15, 2003, Staff counsel sent the Board a letter, stating that the Staff expected to make its determination as to the classification level of the material

in question “on or about December 5, 2003.” Letter from Antonio Fernández, Counsel for NRC Staff, to Administrative Judges (Oct. 15, 2003).

Thereafter, the Board issued an order on October 16, 2003, setting the next telephone conference for October 23, the earlier of the two tentative dates,² and indicating that the schedule for the Staff’s classification level determination, and its impact on the conduct of this proceeding, along with any other appropriate matters, would be addressed at this conference. Order (Scheduling October 23, 2003, Telephone Conference) (Oct. 16, 2003) [hereinafter 10/16/03 Order]. At the October 23 conference, various scheduling matters, including those related to security issues, were addressed. Tr. 47-70.

On November 26, 2003, after various issues relating to the original proposed order had been addressed as discussed above, the Staff filed a new motion for a protective order. *See* NRC Staff’s Motion for Protective Order (Nov. 26, 2003) [hereinafter Staff 11/26/03 Motion for Protective Order]. On December 1, the Board informed the participants that it would hear argument on the proposed order to the extent possible within the time available during the December 3-4 prehearing conference, at the conclusion of oral argument on the Petitioners’ contentions. *See* Order (Regarding Motion for Protective Order and General Conduct of Oral Argument) (Dec. 1, 2003) at 1.

The Staff’s new motion and proposed protective order addressed the same material as the earlier proposed order did — primarily, a September 15, 2003, document submitted by Duke in support of its LAR, describing additional security measures it proposes to implement relating to the anticipated presence and irradiation of the MOX lead test assemblies at the Catawba plant. Staff 11/26/03 Motion for Protective Order at 1; *see* 10/8/03 Motion for Protective Order. Duke’s September 15 submittal, most of which has been designated by the Staff as containing Safeguards Information, consists of a transmittal letter and seven attachments, including a proposed revision to Duke’s existing Nuclear Security and Contingency Plan (also referred to by Duke as its physical security plan), and a related request for exemptions from certain NRC regulations. *See* Staff 11/26/03 Motion for Protective Order at 1; Letter from M.S. Tuckman, Duke Energy Corporation, to Document Control Desk, NRC (Sept. 15, 2003) [hereinafter Duke 9/15/03 Security Submittal]; *see* Duke 9/15/03 Security Submittal at 1, Attachment 7.

In its December 8, 2003, Order, the Board directed the participants to try to work out by agreement a schedule for a number of anticipated activities

²The Board chose the earlier of the two tentative dates previously considered, based on the absence of any reason to add to the delay already occasioned by the filing of the Motion for Protective Order without first assuring that all matters addressed therein had been adequately addressed by appropriate security personnel, and by the failure to provide the classification determination in question any earlier than December 5, when this had been expected in October 2003. 10/16/03 Order at 2.

and filings, including among other things any remaining matters relating to the Staff's Motion for Protective Order, a schedule for the filing of any security-related contentions and responses thereto, and oral argument on security-related contentions. Order (Regarding Telephone Conference, Deadlines and Scheduling Issues) (Dec. 8, 2003) at 1-2. On December 10 BREDL filed an objection to the Staff's proposed protective order, stating its concern that the proposed order did not contain a procedure for redacting pleadings so that they can be released to BREDL members and the public. [BREDL]'s Objection to Proposed Protective Order (Dec. 10, 2003), at 2. During the December 11 telephone conference, in addition to addressing various scheduling matters, the Board heard argument on the proposed protective order, BREDL's objection thereto, and related matters. Tr. 577-614.

On December 15, the Board issued two orders: One approved a schedule of various deadlines and dates for further proceedings (including deadlines for security-related contentions and dates for oral argument on them), noting that the proposed protective order would be issued the same date with certain proposed revisions, and addressing the matter of assistance with security issues for the Board and participants. The second was the revised protective order itself, with an attached nondisclosure affidavit to be signed by all persons to be granted access to Safeguards Information under the protective order. *See* Order (Regarding Deadlines and Scheduling Issues) (Dec. 15, 2003) [hereinafter 12/15/03 Scheduling Order]; Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan) (Dec. 15, 2003) [hereinafter 12/15/03 Protective Order]. The information covered by the protective order and nondisclosure affidavit includes "(1) the September 15, 2003 Security Plan Submittal or any supplements or amendments thereto, including Requests for Additional Information (RAIs) or responses to RAIs relating to that submittal; and (2) any information obtained, developed, or created by virtue of these proceedings, in any form, that is not otherwise a matter of public record and that deals with or describes details of the Security Plan Submittal." 12/15/03 Protective Order at 2. Also under the protective order, any individual must have a "need to know" any protected information that he or she may be shown, and any disputes regarding any "need to know" determinations are to be resolved by determination of the Licensing Board. *Id.* at 3-4.

On January 13, 2004, after failing to obtain from the Staff access to certain Safeguards Information in regard to which BREDL asserted a "need to know," BREDL filed a request and motion with the Licensing Board, relating to this issue and seeking an extension of the previously set deadline for the filing of security-related contentions. [BREDL]'s Request for Need To Know Determination and Motion for Extension of Deadline for Filing Security Contentions (Jan. 13, 2004) (designated as "May Contain Safeguards Information") [hereinafter BREDL 1/13/04 Motion]. BREDL's counsel, Ms. Curran, and expert, Dr.

Lyman, have obtained from the NRC, after undergoing appropriate investigation, “L” level security clearances that allow them access to certain safeguards and classified information in regard to which they have a “need to know.” See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) (Dec. 18, 2002) (unpublished) (hereinafter *Duke Cogema 12/18/02 Order*).

Some discussion of the issues raised by BREDL’s motion was held during the January 15 oral argument on late-filed non-security-related contentions. See, e.g., Tr. 621-43, 746-63. At that time it was decided to hold oral argument on BREDL’s motion insofar as it related to Safeguards Information on January 21 before Administrative Judges Young and Baratta (Administrative Judge Elleman being unavailable because of previously made plans), Tr. 756, and to hear further argument on the motion, insofar as it relates to Classified Information on a date in February 2004 that had already been set for oral argument on security-related contentions, Tr. 748. Thereafter, on January 20, the Board issued an Order formally scheduling an *in camera* session for January 21, which would be closed to all who had not received clearance under 10 C.F.R. § 73.21(c). Order (Scheduling *In Camera* Oral Argument on Blue Ridge Environmental Defense League’s Request for Need To Know Determination and Motion for Extension of Deadline for Filing Security Contentions) (Jan. 20, 2004).

After hearing the participants’ arguments on January 21, the Board requested that the Commission designate a representative to advise and assist the Board (as well as the participants, to a limited extent) with respect to security classification of information and the safeguards to be observed in this proceeding. Request to Commission (Seeking Designation of Representative to Advise and Assist Licensing Board with Respect to Classification of Information and Safeguards To Be Observed) (Jan. 23, 2004). Then, on January 29, Administrative Judges Young and Baratta, acting as a quorum of the Licensing Board in Administrative Judge Elleman’s absence, granted BREDL’s 1/13/04 Motion in part, in a sealed memorandum and order [hereinafter *Board 1/29/04 Safeguards Memorandum and Order*]. Public notice of this decision was provided in a memorandum issued the same day. Memorandum (Providing Notice of Granting BREDL Motion for Need To Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan 29, 2004) [hereinafter *Board 1/29/04 Public Memorandum*].

On January 30 the Staff filed a petition for stay to preserve the status quo pending review by the Commission of its petition for interlocutory review to be filed later the same day. NRC Staff’s Motions for Temporary Stay To Preserve the Status Quo and for Stay Pending Interlocutory Review of the Licensing Board’s January 29, 2004 Order Regarding Access to NRC Documents Containing Safeguards Information (Jan. 30, 2004). Later the same day, the Staff filed its petition for review by the Commission. NRC Staff’s Motion for Interlocutory Review of the Licensing Board’s January 29, 2004 Order Finding

a Need-to-Know and Ordering NRC Staff to Provide Petitioner with Access to Documents Containing Safeguards Information (Jan. 30, 2004). This motion was subsequently withdrawn and a substitute motion, with one portion from the original motion removed, filed on February 2, 2004.³ On January 30, 2004, the Commission granted a “housekeeping” stay, “until February 13, 2003.” Order (Jan. 30, 2004) at 1-2. In this order the Commission set a deadline of February 6 for Duke and BREDL to respond to the Staff’s pleadings. *Id.* at 2.

On February 2 the Commission appointed Mr. Robert B. Manili, of the Materials, Transportation and Waste Security Division, Division of Nuclear Security, Office of Nuclear Security and Incident Response (NSIR), to be the “representative to advise and assist the Atomic Safety and Licensing Board with respect to security classification of information and the safeguards to be observed in this proceeding, pursuant to 10 C.F.R. § 2.904.” Order (Feb. 2, 2004).

On February 3, BREDL filed an “Emergency Motion” seeking access to a February 6 meeting the NRC Staff had scheduled with Duke to discuss requests for additional information on Duke’s September 15, 2003, request for exemptions from certain regulatory requirements. [BREDL]’s Emergency Motion for Access to NRC Staff Meeting on February 6, 2004 (Feb. 3, 2004); *id.*, Exhibit 2 at 4. BREDL counsel had previously requested to attend the meeting and, upon not receiving a favorable response to its letter to such effect, had filed its motion. *Id.* at 2-3; *id.*, Exhibit 1. A telephone conference was held February 4 to address BREDL’s motion. Tr. 947-1010. Later that day Administrative Judges Young and Baratta, as a quorum of the Board, issued a Memorandum and Order ruling on the motion, finding that BREDL had a need to know with regard to the February 6 meeting and information to be discussed therein, but providing in the alternative that, given the pending appeal of the Board’s January 29 ruling by the Staff, the Staff could elect to have the meeting in question transcribed in lieu of BREDL attending, in order that the status quo could be preserved pending a final Commission ruling on the Staff’s appeal of the Board’s January 29 rulings, and any guidance the Commission might have to offer in deciding these security-related matters. Memorandum and Order (Ruling on BREDL Motion Regarding Staff February 6, 2004, Meeting with Duke Energy and Request for Need To

³ According to Staff Counsel Fernández, the Staff’s new filing “supercede[d] the Staff’s previous request for interlocutory review.” 2/2/04 E-mail from Antonio Fernández, Subject: Letter to Commission; *see* NRC Staff’s Motion for Interlocutory Review of the Licensing Board’s January 29, 2004 Order Finding a Need-to-Know and Ordering NRC Staff to Provide Petitioner with Access to Documents Containing Safeguards Information (Feb. 2, 2004). In the letter accompanying the new filing, counsel explained that the January 30 filing contained references to information protected by the December 15, 2003, Protective Order in this proceeding, and that the new filing did not contain such references. Letter to Annette L. Vietti-Cook, Secretary of the Commission, from Antonio Fernández (Feb. 2, 2004).

Know Determination (Feb. 4, 2004) [hereinafter Board 2/4/04 Memorandum and Order].

On February 5, 2003, the Staff notified counsel for Duke and BREDL that the February 6 meeting had been “postponed pending resolution of the issues raised by the Licensing Board’s February 4, 2004 Order.” Letter from Susan Uttal, Counsel for NRC Staff, to Diane Curran, Counsel for BREDL, and David Repka, Counsel for Duke (Feb. 5, 2004). On February 11, the Staff filed a petition for review of the Board’s February 4 Order with the Commission. NRC Staff’s Petition for Review of the Licensing Board’s February 4, 2004 Order Relating to BREDL’s Request To Attend a Closed Meeting (Feb. 11, 2004). On February 12 the Commission issued an order extending the stay it had previously ordered on January 30 until 5:00 p.m. February 18, 2004. Order (Feb. 12, 2004).

The Board heard oral argument on February 13, 2004, in a closed session, on that part of BREDL’s 1/13/04 request for need to know determination relating to classified information, as well as on other pending security-related issues in the proceeding, including the impact of the current Staff appeals to the Commission on this proceeding, pending the Commission’s ruling on the appeals. Tr. 1011-1163. On February 17, 2004, Judges Young and Elleman, acting as a quorum of the Board,⁴ issued a memorandum and order denying BREDL’s motion, finding no “need to know” with regard to the classified information at issue at that time. Memorandum and Order (Ruling on BREDL Motion for Need To Know Determination Regarding Classified Documents) (Feb. 17, 2004) [hereinafter Board 2/17/04 Memorandum and Order].

On February 18, 2004, the Commission issued a memorandum and order reversing the Board’s January 29 and February 4, 2004, decisions, finding, among other things, no showing that BREDL had a “need to know” the information in question, and that the Board lacked authority to order access to a meeting closed by the Staff, disputes on which, the Commission stated, should be handled outside the adjudication. Memorandum and Order, CLI-04-6, 59 NRC 62, 73-74 (2004). The Commission also stated that “[m]ore general security information related to the Catawba plant-at-large,” than that provided in Duke’s September 15, 2003, Security Submittal, was not, in the Commission’s judgment “‘necessary’ to allow BREDL to participate meaningfully in this license amendment proceeding.” *Id.* at 72. In the way of providing general guidance, the Commission stated that licensing boards should give “considerable deference to the Staff’s judgments” on “need to know” decisions and that any access granted should be as narrow as possible. *Id.* at 74-75.

⁴ Administrative Judges Young and Elleman ruled on the request for classified information, because Administrative Judge Baratta, being relatively newly appointed to the Atomic Safety and Licensing Board Panel, had not, as of the issuance date of the memorandum and order, received his clearance for access to classified information.

On March 3, 2004, BREDL filed a Safeguards document containing its security-related contentions. [BREDL]'s Contentions on Duke's Security Plan Submittal (March 3, 2004) [hereinafter BREDL Security Contentions]. Thereafter, on March 16, Duke and the NRC Staff filed their responses to BREDL's security contentions, also each designated as Safeguards Information. Answer of Duke Energy Corporation to the "Blue Ridge Environmental Defense League's Contentions on Duke's Security Plan Submittal" (March 16, 2003) [hereinafter Duke Response]; [NRC] Staff's Response to [BREDL]'s Contentions Regarding Duke's Security Plan Submittal (March 16, 2004) [hereinafter Staff Response]. Oral argument was heard on the security contentions on March 18, 2004, in a hearing closed to all except those with appropriate clearance and need to know. Tr. 1263-1513.

II. ANALYSIS

A. Standards for Admissibility of Contentions

To intervene in an NRC proceeding, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.714(b), (d).⁵ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2,

⁵The citation to 10 C.F.R. § 2.714 is to the former section number that was in effect prior to a significant revision to the agency's 10 C.F.R. Part 2 rules of practice and procedure, which became effective February 13, 2004. Under part of this revision, the provisions of section 2.714 were moved to a new section, § 2.309. See 69 Fed. Reg. 2182, 2220-22 (Jan. 14, 2004). Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply here, and we use the former numbering throughout this Memorandum and Order.

The former section 2.714 provides in relevant part as follows:

(b)(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the

(Continued)

and 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). In LBP-04-4, 59 NRC at 148, we provided the following summary of the contention requirements:

To be admissible, a contention must:

(A) under section 2.714(b)(2), consist of a *specific* statement of the issue of law or fact the petitioner wishes to raise or controvert; and

(B) under subsection 2.714(b)(2)(i), be supported by a brief *explanation* of the factual and/or legal basis or bases of the contention, which goes beyond mere allegation and speculation, is *not* open-ended, ill-defined, vague, or unparticularized, and *is* stated with reasonable specificity; and

(C) under subsection 2.714(b)(2)(ii), include a statement of the alleged facts or expert opinion (or both) that support the contention and on which the petitioner intends to rely to prove its case at a hearing, which must also be stated with reasonable specificity; and

(D) also under subsection 2.714(b)(2)(ii), include references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish the facts it alleges and/or the expert opinion it offers, which must also be stated with reasonable specificity and, at a minimum, consist of a fact-based argument sufficient to demonstrate that an inquiry in depth is appropriate, and illustrate that the petitioner has examined the publicly available documentary material pertaining to the facility(ies) in question with sufficient care to uncover any information that could serve as a foundation for a specific contention; and

identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

* * * *

(d) . . . [A] ruling body or officer shall, in ruling on —

. . . .

(2) The admissibility of a contention, refuse to admit a contention if:

(i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

(E) under subsection 2.714(b)(2)(iii), provide sufficient information to show that a *genuine dispute* exists with the applicant on a *material* issue of law or fact (i.e., a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which “would make a difference in the outcome of the licensing proceeding”), 54 Fed. Reg. at 33,172), which includes either:

(1) *references to the specific portions of the application* (including the applicant’s environmental report and safety report) that the petitioner disputes *and the supporting reasons for each dispute*, or

(2) if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the *identification of each failure and the supporting reasons for the petitioner’s belief*.

See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 67-68 (2002); *see also* LBP-03-3, 57 NRC at 64.

Also, as indicated in the text of subsection 2.714(b)(2)(iii), for issues arising under NEPA, contentions must be based on the applicant’s environmental report, and the petitioner can amend such contentions or file new contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s document.” And finally, under subsection 2.714(d)(2)(ii), in ruling on a contention a licensing board must refuse to admit a contention if, assuming the contention were proven, it would be of no consequence in the proceeding because it would not entitle the petitioner to specific relief.

B. Discussion and Rulings on Contentions

We address BREDL’s security-related contentions in light of the preceding discussion. We first note BREDL’s prefatory statement, applicable to all its contentions, that the contentions are supported by the expert declaration of Dr. Edwin S. Lyman.⁶ BREDL Security Contentions at 1. BREDL states further that the contentions are based on the following portions of Duke’s September 15, 2003, Security Plan Submittal: Attachment 1, Revision 16 to Duke Energy

⁶In his declaration Dr. Lyman, a Senior Staff Scientist at the Union of Concerned Scientists, describes some of his qualifications as an expert and states that he assisted in the preparation of BREDL’s contentions, that the factual assertions contained in them are true and correct to the best of his knowledge, and that the opinions expressed in them are based on his best professional judgment. BREDL Security Contentions, Exhibit 1.

Corporation Nuclear Security and Contingency Plan (Physical Security Plan); Attachment 2, Description and Rationale for MOX Fuel-Related Nuclear Security and Contingency Plan; Attachment 6, Physical Security Plan Comparisons to 10 C.F.R. § 73.46; and Attachment 7, Request for Exemptions from Selected Regulations in 10 C.F.R. Parts 11 and 73. *Id.*⁷

We turn now to BREDL's first security-related contention.

1. Contention 1 (Relating to Alleged Failure To Address Revised DBT)

Security Contention 1. Failure to address revised design basis threat.

Duke's revisions to its security plan and its exemption application are deficient because they fail to address the post-9/11 revised design basis threat for Category I nuclear facilities.

a. Basis

BREDL in Security Contention 1 relies on the Commission's post-9/11 "'top-to-bottom' review of its security-related regulations for all licensed facilities," which "resulted in the issuance of enforcement orders imposing security upgrades at all operating nuclear power plants and Category I facilities," for the latter of which the NRC "explicitly declared that the revised design basis threat 'supercedes [*sic*] the Design Basis Threat (DBT) specified in 10 CFR 73.1.'" *Id.* at 3 (*citing* the Matter of Nuclear Fuel Services, Inc., Erwin, TN; Order Modifying License (Effective Immediately), 68 Fed. Reg. 26,676 (May 16, 2003) [hereinafter NFS Order]). Arguing that before Duke's amendment application can be granted it must be determined that the amendment poses "no undue risk to public health and safety or the common defense and security" under 42 U.S.C. § 2077, BREDL contends that the Commission in the post-9/11 NFS Order

⁷ BREDL also states that it is "unable to fully evaluate whether the Security Plan Submittal, together with the security plan for protection against radiological sabotage that will be in effect at the time that the plutonium MOX lead test assemblies (LTAs) are received at the Catawba site, is adequate to meet NRC security regulations for the physical protection against theft of formula quantities of strategic special nuclear material (SSNM)," because it has not been granted access to "confidential NRC guidance documents and post-9/11 enforcement orders regarding security requirements for nuclear power plants and Category I facilities." *Id.* at 2. BREDL goes on to state that it is "handicapped in its ability to evaluate whether Duke has demonstrated that the exemptions it seeks are 'authorized by law and will not endanger life or property or the common defense and security,'" *citing* 10 C.F.R. § 73.5, and that because "the Commission revised and replaced the regulatory definition of the design basis threat in 10 C.F.R. § 73.1 in enforcement orders issued to nuclear power plant and Category I facility licensees," it is "not possible to determine whether Duke's application satisfies the Commission's current concept of adequate protection against the design basis threat, without access to these confidential standards." BREDL Security Contentions at 2-3.

“changed the concept of what constitutes ‘no undue risk’ to public health and safety and the common defense and security, such that mere compliance with NRC regulations will not suffice.” *Id.* at 4. Thus, asserts BREDL, even if Duke could demonstrate compliance with published regulations on maintaining security of formula quantities of strategic special nuclear material (SSNM) at Catawba, “Duke still would not be entitled to a license, unless it could demonstrate compliance with the no undue risk standard as it is currently conceived by the Commission.” *Id.*

b. Responses

(1) DUKE

Prior to addressing any of BREDL’s contentions individually, Duke provides certain “general considerations” relating to all of the contentions. First, it points out that it currently maintains a physical security plan and implementing procedures for Catawba that “meet the requirements of 10 C.F.R. § 73.55 for physical protection of licensed activities at a Part 50 power reactor.” Duke Response at 3. The plan and procedures also, according to Duke, “specifically address the Part 50 [DBT] for radiological sabotage established in accordance with 10 C.F.R. § 73.1(a)(1).” *Id.*

Further, Duke states, the physical security plan and procedures “either already meet the additional requirements imposed on Catawba (and all other power reactors) by NRC orders following the terrorist attacks of September 11, 2001, or will do so by the applicable compliance date.” *Id.* at 3-4. Citing the Commission’s ruling in CLI-04-6, Duke states that these requirements and Duke’s compliance with them are “not at issue in this proceeding.” *Id.* at 4. Duke quotes the following statement from CLI-04-6:

All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke’s Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order.

Id. (quoting CLI-04-6, slip op. at 10 [59 NRC at 73]). Rather, Duke urges, again quoting from CLI-04-6, what is at issue in this case “is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.” *Id.* (quoting CLI-04-6, slip op. at 10 [59 NRC at 73]).

Duke agrees that there is “no dispute that the presence of MOX fuel assemblies at Catawba brings into consideration the additional DBT related to potential theft or diversion of special nuclear material (‘SNM’) under 10 C.F.R. § 73.1(a)(2),”

and that, at least “until such time as the MOX fuel assemblies are inserted into the reactor core and irradiation has begun, the NRC’s requirements in 10 C.F.R. §§ 73.45 and 73.46 and in 10 C.F.R. Part 11 potentially apply, at least absent an exemption.” Duke Response at 4. Accordingly, Duke states, its Security Submittal “carefully outlines the incremental security measures that Duke would implement — in addition to the security measures to be implemented by [DOE] during delivery before Duke accepts possession — to address the threat of theft of MOX fuel assemblies.” *Id.* As well as identifying in its submittal “those specific regulatory requirements normally applicable to a Category I facility that it would meet,” Duke states that it has identified “those for which compliance would not be necessary and for which an exemption is therefore warranted.” *Id.* at 4-5.

Arguing that the Commission in CLI-04-6 “gives further clarity to the specificity and basis requirements of Section 2.714(c) in the current context,” Duke asserts that the burden on BREDL in proffering proposed security contentions in this proceeding includes not only satisfying the requirements of 10 C.F.R. § 2.714, but also “review[ing] the Security Submittal and ‘identify[ing] credible vulnerabilities, if any.’” *Id.* at 5 (*quoting* CLI-04-6, slip op. at 10 [59 NRC at 73] (emphasis supplied by Duke)). Duke argues that all of BREDL’s contentions, including Contention 1, fail because they identify no such “credible vulnerabilities.” Duke Response at 5. According to Duke, BREDL’s contentions “boldly attempt to shift to Duke the Petitioner’s burden to demonstrate credible theft scenarios and vulnerabilities or challenge Duke to prove that none exists.” *Id.*

Duke suggests that CLI-04-6 mandates that BREDL identify a “credible vulnerability — consistent with the theft DBT in 10 C.F.R. § 73.1(a)(2) — by which a small group of adversaries could enter the Protected Area by violent, external assaults or by stealth or deceptive actions, obtain access to the Fuel Building, identify the storage locations of the MOX fuel, obtain access to the relevant fuel handling equipment or otherwise remove the MOX fuel assemblies, separate that material from the fuel assembly matrix, and leave the site with the MOX fuel pellets.” *Id.* at 6. Having failed to do this, or otherwise to address or engage the specifics of Duke’s Security Submittal, Duke argues, BREDL’s contentions are inadmissible. *Id.* at 6-7.

Duke specifies what it asserts are “[s]everal errors and inadequacies — when judged against 10 C.F.R. § 2.714 and CLI-04-6 — [that] are repeated throughout BREDL’s discussion of individual contentions.” Duke Response at 7. Duke enumerates the following asserted errors:

- BREDL fails to identify specific and credible vulnerabilities, or to explain how an attacker would exploit those vulnerabilities to achieve its goal.
- To be credible, any scenario suggested as the basis for a security contention would require the identification of a timeline demonstrating that the threat can

be accomplished in such a timeframe, so as to avoid capture. BREDL has not done this.

- The hypothetical attack suggested as the basis for a security contention would be required to be by a “small group” with the attributes described in 10 C.F.R. § 73.1(a)(2), the only applicable regulatory standard for the theft DBT.
- BREDL’s proposed contentions fail to accept as a baseline that the Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order, and that such compliance gives Catawba a significant ability to counter an attack for purposes of theft as well as sabotage.
- BREDL cannot justify a contention by attempting to shift to Duke the burden of demonstrating that no credible scenario could exist that would allow theft of the MOX fuel.

Id. Duke counsel explained during oral argument that Duke did not intend by the statement at the fourth bullet to “talk about any particular requirement,” but only to make a “very general point about the environment” of a “Part 50 facility that has an existing security force that meets as a baseline the post-9/11 Part 50 Security Orders.” Tr. 1309-10. Counsel also stated that “all we’re trying to say . . . is that in the context of a Part 50 facility that meets the revised post-9/11 requirements, there is a significant capability with respect to sabotage as well as theft,” and that this is “not a measurement against old requirements, that’s really just a truism that that is, again, the context you have to look at.” Tr. 1325.

Duke argues more specifically with regard to Contention 1 that it is not admissible “because it fails to specifically identify and support the existence of a genuine dispute on a material issue of law or fact.” Duke Response at 8 (*citing* 10 C.F.R. § 2.714(b)(2)(iii)). In addition, Duke argues that the contention does not “identify any ‘credible vulnerability’ with respect to theft of the MOX fuel assemblies from the Catawba facility, contrary to CLI-04-06.” *Id.* (*citing* CLI-04-6, slip op. at 10 [59 NRC at 73]). Duke characterizes BREDL’s reference to the Commission’s post-9/11 “‘top-to-bottom’ review of its security-related regulations for all licensed facilities” as “merely allud[ing] to the NRC’s ongoing assessment of security requirements.” *Id.* Duke describes the NFS order to which BREDL refers as “a plant-specific order issued post-9/11 by the NRC to a Category I facility,” citing in addition another, “similar order” — specifically, an order issued to BWX Technologies for its Lynchburg, Virginia, facility. *Id.*; *id.* n.13 (*citing* In the Matter of BWX Technologies, Lynchburg, Va; Order Modifying License (Effective Immediately), NRC Docket No. 70-27, 68 Fed. Reg. 26,675 (May 16, 2003) [hereinafter BWXT Order]).

Duke argues that BREDL’s failure to address specifically in Contention 1 Duke’s security submittal, as well as, among other things, its failure to explain

why the enhancements identified in the submittal are insufficient, render the contention inadmissible for failing to meet the specificity and basis requirements of the contention rule and “the Commission’s expectations as reflected in CLI-04-06.” Duke Response at 8.

Duke argues further that the Commission’s “no undue risk” standard has not changed, and that this continues to apply as before, “under the Commission’s general performance objectives and requirements for physical security established in 10 C.F.R. § 73.20(a),” which require a licensee to establish and maintain a physical protection system that has as its objective “to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security, and do not constitute a[n] unreasonable risk to the public health and safety,” and that is “designed to protect against the design basis threats of theft or diversion of strategic special nuclear material and radiological sabotage as stated in § 73.1(a).” *Id.* at 9. BREDL does not establish with specificity and basis, Duke argues, how Duke will fail to meet that standard. *Id.*

Duke also asserts as error BREDL’s “assumption that there are some generally applicable post-9/11 requirements for Category I facilities that Duke will not meet.” *Id.* Duke argues that such an assumption is incorrect and “simply speculation,” and cites “several” statements of the NRC Staff that “there are no such requirements.” *Id.* (citing Tr. 1056, 1066). Citing as well a document issued by the Staff on January 29, 2004, Duke argues that the “NRC Staff has clearly laid out the scope and standard for its review” of Duke’s request for exemption from various provisions of 10 C.F.R. Parts 11 and 73. *Id.* (citing Memorandum to Glenn M. Tracy, Director, NRC Division of Nuclear Security, from Joseph W. Shea, Director, Nuclear Security Policy Project Directorate, re “Review Plan for Evaluating the Physical Security Protection Measures Needed for Mixed Oxide Fuel and Its Use in Commercial Nuclear Power Reactors” (Jan. 29, 2004) [hereafter NRC MOX Security Review Plan]). Finally, citing 10 C.F.R. § 2.758 (which provides that Commission rules are not subject to attack in any adjudicatory proceeding), Duke argues that “[i]f BREDL believes that additional requirements must apply to Catawba, it must ask the Commission to impose them,” and that it is “BREDL’s burden to identify [any asserted additional required] measures and justify their applicability to Catawba.” Duke Response at 10.

(2) STAFF

The NRC Staff argues that BREDL’s contention is inadmissible because it raises issues regarding documents that are beyond the scope of this proceeding and therefore cannot be said to raise an issue of law or fact that is material to the proceeding “or required by 10 C.F.R. § 2.714 (b)(2).” Staff Response at 5. The

Staff quotes in support of its argument the following language from CLI-04-6 (which includes the language quoted by Duke, as indicated above):

The current proceeding has *nothing* to do with the NRC’s post-September 11 general security orders. It is not these orders, but Duke’s MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of MOX fuel assemblies at issue here.

. . . . All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke’s Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That’s not at issue in this MOX license amendment case.

Id. at 5-6 (*quoting from* CLI-04-6, slip op. at 9-10) [59 NRC at 72-73] (emphasis supplied by NRC Staff). The Staff asserts that the Commission’s “finding that the security orders issued post-September 11 are not material to this proceeding is unambiguous,” and that in light of this Contention 1 “cannot be admitted in this proceeding.” Staff Response at 6. We should, the Staff urges, “reject BREDL’s Security Contention 1 as failing to meet the requirements of 10 C.F.R. § 2.714(b)(2) that a contention must raise an issue of law or fact that is *material* to the proceeding.” *Id.* (emphasis in original).

c. Licensing Board Analysis

In addressing BREDL’s first contention, we note initially that the Commission has indeed indicated, in the above quotations from CLI-04-6 provided by Duke and the Staff, that the post-9/11 security orders that were issued to various licensees are not relevant in this proceeding. We note also, however, that CLI-04-6 dealt with an appeal *not* relating specifically to any post-9/11 orders issued to Category I facilities, but relating, rather, to the post-9/11 orders issued to reactors — specifically, to orders issued for Catawba (and related documents). *See* CLI-04-6, 59 NRC at 67, 69; *see also* Tr. 1334. In CLI-04-6, the Commission reversed a ruling by a quorum of this Board finding a “need to know” with regard to the post-9/11 orders for Catawba and related documents, as well as an additional ruling related to a Staff-Duke meeting to discuss Staff requests for additional information (RAIs).⁸ *See* CLI-04-6, 59 NRC at 70, 73; Board 1/29/04 Memorandum and Order (Safeguards); Board 1/29/04 Public Memorandum; Board 2/4/04 Memorandum and Order.

⁸ A different quorum of the Board had, one day prior to issuance of CLI-04-6, issued a memorandum and order finding no “need to know” with regard to the two security orders issued to the two Category I fuel fabrication facilities (NFS and BWXT) as of the time of the ruling. *See* Board 2/17/04 Memorandum and Order.

Thus, it might be found that CLI-04-6 does not apply to the Category I facility post-9/11 security orders, thereby possibly leaving open the questions raised in the contention (on which the parties are in obvious and genuine dispute) concerning a change in the concept of “undue risk to the public health and safety” — which BREDL asserts to be a material issue of fact, *see* Tr. 1377-78 — and concerning Duke’s alleged failure to address any *de facto* revised DBT found in these orders, which might arguably be applied to Catawba if not exempted from relevant Category I requirements for possessing formula quantities of SSNM.

We note with respect to the latter concern BREDL’s statement in oral argument that, even if granted any exemptions from the provisions in Part 73 from which Duke seeks exemption, “Duke is still going to be a Category I facility . . . still . . . subject to the Category I design-basis threat,” the content of which BREDL argues has been “redefined” by the Commission. Tr. 1376. We also note that the actual possibility that an order or orders similar to those issued to NFS and BWXT might be issued with regard to Catawba in the future appears not to be foreclosed. The Staff, in response to a question to the effect of whether, if the requested exemptions are not granted, an order similar to the NFS and BWXT ones might be issued for Catawba, stated that it did not know “when and if Duke will ever have MOX onsite, and at the time that they will receive MOX, or that the MOX process, if it goes forward [*sic*], *the Staff would have to reassess what the threat conditions are at that time.*” Tr. 1315 (emphasis added); *see* Tr. 1314.⁹ In addition, when asked about this, Duke counsel stated that Catawba could, “[b]y virtue of having the MOX fuel, . . . become[] potentially subject to the generic Category I requirements,” both those in the regulations as well as, “potentially and in the abstract, . . . additional requirements . . . [including] whatever additional requirements were imposed upon BWXT and NFS.” Tr. 1290; *see* Tr. 1297-98. (Counsel for Duke indicated that Duke has no actual

⁹We also note Staff’s argument through counsel to the effect that, without any such reassessment: to reach the conclusion that the Intervenor suggests, which is that the Category I DBT should apply to Catawba, would require [the Licensing Board] to find that that order modified the regulatory requirements in 73.1 and therefore that order should apply in this case. And to make that particular finding, [the Licensing Board] would have to find that the Commission, in violation of the Administrative Procedures Act, promulgated an order which applies prospectively and rescinded a promulgated regulation.

Tr. 1349. The Licensing Board obviously makes no such finding herein as suggested by Staff counsel, nor do we speak to the correctness of counsel’s premise, or to whether the ultimate conclusion suggested by counsel necessarily follows from such premise. To the contrary, what the Board attempts to do in its discussion of Security Contention 1 is to highlight some of the questions, issues, and implications — both legal and practical — relating to and arising out of the contention and the parties’ arguments on it, so as to clarify as much as possible, in a somewhat complex context of interrelated issues, some of the more significant aspects of the questions we herein certify to the Commission.

knowledge of what is contained in the NFS and BWXT post-9/11 security orders. Tr. 1299.)

Notwithstanding, however, that the matters specifically at issue in CLI-04-6 did not include the post-9/11 security orders issued to the two Category I fuel facilities, and that both the Staff and Duke argue that the Category I facility security orders do *not* now apply to Catawba, some of the *principles* discussed by the Commission in CLI-04-6 would seem, to the effect argued by Duke and the Staff, *see, e.g.*, Tr. 1286, 1334, to relate also to the post-9/11 orders issued to the Category I fuel facilities.

The question thus arises: to what extent do the principles of CLI-04-6 relate to the post-9/11 Category I fuel facility security orders, in the context of the issue posed by BREDL in Contention 1?

The Commission's statement, quoted above by the Staff, that "[t]he current proceeding has nothing to do with the NRC's post-September 11 general security orders" would lead to one conclusion. However, another statement of the Commission in CLI-04-6, quoted by both the Staff and Duke, is not so clear with regard to the Category I fuel facility orders — i.e., the statement that all parties to this adjudication "may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order," would not appear to apply to the Category I fuel facility orders under the theories posed by Duke and the Staff, given that both have stated through counsel that these do not apply to Catawba at this time. *See, e.g.*, Duke Response at 9-10; Tr. 1290, 1314-15.

Whether the Staff's potential future assessment of Catawba with regard to the issuance of any security order similar to the NFS and BWXT orders might at some point render these Category I facility orders (or their provisions) relevant and/or warrant making them accessible to BREDL would seem to be an open question, given that the Commission in CLI-04-6, in addition to making the statements quoted above, also stated the following:

the touchstone for a demonstration of "need to know" is whether the information is indispensable. Here, as the pleadings before us represent, neither Duke nor the NRC Staff has any intention of measuring Duke's security arrangements for MOX against last year's general security orders issued to reactors. . . .

CLI-04-6, 59 NRC at 73. Thus the indispensability (and, implicitly, the relevance) of the post-9/11 orders issued to reactors is tied to whether or not either Duke or the Staff has "any intention of measuring Duke's security arrangements . . . against [these orders]." Logically, the same principle could be applied to the post-9/11 Category I facility orders — i.e., if either Duke or the Staff has any "intention of measuring Duke's security arrangements for MOX against last year's general security orders" issued to Category I facilities, this would very

arguably make them relevant and indispensable to BREDL such that it might have a “need to know” with regard to them.

We make these observations both in the context of the possible future Staff assessment (as discussed above) of any need for the issuance of an order regarding Catawba similar to the two Category I post-9/11 security orders cited by BREDL and Duke — which arguably indicates some level of intention that the Staff might in the future assess, or “measure,” Duke’s security arrangements for MOX against the types of requirements contained in such orders; as well as in light of certain statements of Duke, through counsel, which could be taken as an indication of Duke’s intention that *the Licensing Board* measure Duke’s proposed security arrangements against the post-9/11 orders issued to reactors.

Duke counsel first addressed the “measurement” issue in response to questioning about its arguments on the specificity requirements for contentions as well as about its assertion made in the fourth bulleted item quoted above, in which Duke states:

- BREDL’s proposed contentions fail to accept as a baseline that the Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order, and that such compliance gives Catawba a significant ability to counter an attack for purposes of theft as well as sabotage.

Duke Response at 7. Upon being asked how this assertion should be considered in light of the Commission’s statement that “neither Duke nor the NRC Staff has any intention of measuring Duke’s security arrangements for MOX against last year’s general security orders,” Counsel first argued that no “measurement” was involved, stating:

all we’re trying to say, as we say there, is that in the context of a Part 50 facility that meets the revised post-9/11 requirements, there is a significant capability with respect to sabotage as well as theft. That’s not a measurement against old requirements, that’s really just a statement of a truism that that is, again, *the context you have to look at*. If you are going to steal the material, you have to be able to get to the material, so the baseline is the Commission’s baseline, the existing requirements.

Tr. 1325 (emphasis added); *see* Tr. 1304-11, 1318-26.¹⁰

¹⁰Counsel had earlier, in contrast, stated that “[i]f there is something new that we’re proposing to rely upon to address this additional threat to theft of the MOX fuel assemblies, that could be an issue in this proceeding [but] this contention doesn’t address any specific new proposed addition.” Tr. 1286.

Additional statements, made by Duke co-counsel in oral argument on other security contentions, go more directly to the “measurement” issue. One, made with regard to Security Contention 3, arose as follows:

MR. WETTERHAHN: Because of safeguards limitations, the only thing I can ask you because you’ve seen it in the past, to *take a look at the radiological DBT, as revised*, and determine whether Catawba as well as anyone else we see in that order would have to defend **x x x x x x x x x x x x x x**.

JUDGE YOUNG: So are you at this point measuring your security arrangements against the general security orders that are safeguards[,] which is the door that the Commission seems to be leaving open by basing its decision on the fact that neither Duke nor the NRC staff has any intention of measuring Duke’s security arrangements for MOX against last year’s general security orders?

MR. WETTERHAHN: We are using that as a baseline to look at the increment necessitated by the receipt of MOX fuel. *If the baseline is that we have to defend against more than one team, then we take that as a baseline and proceed from there*, whether or not the Commission orders require that it is a safeguards issue.

Tr. 1447 (emphasis added).

Another of Duke counsel’s statements made in oral argument concerned Security Contention 5, and was actually raised in the context of a discussion of, among other things, what the Commission intended in CLI-04-6, which was initiated by Staff counsel. Tr. 1485; *see* Tr. 1486-87. Duke co-counsel stated that the Board in reaching our rulings might look not only at the incremental additional aspects to the DBT for theft found at 10 C.F.R. § 73.1(a)(2) (as compared to the DBT for sabotage specified at 10 C.F.R. § 73.1(a)(1)), but also, as in the above-quoted statement, at “the revised design basis threat.” Tr. 1487.¹¹

¹¹ Counsel’s actual words were, “the Board, which has access to the revised design basis threat —” Tr. 1487. (Counsel’s statement was interrupted by a person coming into the room, necessitating a pause to assure the person’s security status vis á vis the proceeding.) Counsel later clarified upon questioning that he *did* intend by this statement to refer to “last year’s general security orders issued to reactors,” Tr. 1490. In this instance counsel explained that he was making the statement at issue in the context of the Commission’s statement in CLI-04-6 (59 NRC at 73) that all parties could “assume . . . that Duke’s Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order,” and did not mean to imply that Duke intended that the Board “measure [Duke’s] security arrangements against the revised [DBT] in the post-9/11 orders.” Tr. 1488; *see also* Tr. 1324-26. We must, however, deal with the reality of the situation — however it is characterized — and given that the statement obviously evidences some intention that the Board look at the “revised DBT” in the post-9/11 orders issued to Catawba and consider this in our determinations relative to Duke’s security proposals, it is hard to see how this does not in actual effect involve some “measurement” of the proposals against the orders.

(Continued)

Finally, another, similar statement is found in Duke’s written response to BREDL’s security contentions:

Whether or not the radiological DBT for nuclear power plants under the post-9/11 orders considers x x x x x x x x x x x x x x x x would be Safeguards Information. However, the Board, which is privy to such information, may consider this matter in its deliberations as a basis in rejecting this contention. If the Board has any doubt, it should refer the matter to the Commission for its determination.

Duke Response at 27 n.38.

In these statements counsel quite obviously, in the end, ask us to look at, and consider, the post-9/11 security orders as we weigh BREDL’s contentions and the parties’ arguments on them. Counsel does not use the word “measure,” using instead another term used in CLI-04-6, i.e., “baseline,” arguing that BREDL “fail[s] to accept as a baseline that the Catawba facility will comply with all applicable general security requirements,” *including* “those prescribed by NRC order,” which are asserted to “give[] Catawba a significant ability to counter an attack for purposes of theft as well as sabotage.” *See supra* pp. 313, 318 (*quoting from* Duke Response at 7). Counsel does not explain how the Intervenor (or, more pertinently, its counsel and expert) *could* with any specificity in writing contentions “accept as a baseline” any information of which it has no knowledge — and this question goes to the applicability of the “indispensability” principle established by the Commission in CLI-04-6. Nor does counsel explain how *this Licensing Board* could “look at” and “consider” such information *without*, in real practical effect, “measuring Duke’s security arrangements for MOX against” it.

As indicated above, some of counsel’s statements were addressed to other contentions than Contention 1. The overall question that they address, however, arose in argument on Contention 1, to which the bulleted language quoted above is in part directed. In addition, the broader question, or issue — which we will call the “indispensability/measurement” issue for ease of reference at this point — comes most into focus in discussion of Contention 1. This issue, moreover, arises out of CLI-04-6, on which both Duke and the Staff have relied in their responses to Contention 1; and it is in Contention 1, the responses thereto, and argument thereon that related questions addressed in CLI-04-6, concerning the post-9/11 orders, access to them, and their relevance, are most directly engaged. In view of these factors as well as the efficiency value of considering these related

Indeed, the Staff, perhaps implicitly recognizing that in making such a suggestion Duke was coming close to (if not actually) stating its “intention” that we “measur[e] Duke’s security arrangements for MOX against last year’s general security orders [issued to reactors],” expressly disagreed with Duke on this. Tr. 1492.

issues and questions together, we find that the subject matter of the statements of counsel noted above, as well as the various related issues, warrant attention here.

Considering, then, the issues surrounding counsel's statements, in light of the Commission's statement that "neither Duke nor the NRC Staff has any intention of measuring Duke's security arrangements for MOX against last year's general security orders issued to reactors," as well as the Commission's statement (made in a context of discussing a party's "wants" versus "needs" for any given information) that "a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information," *see* CLI-04-6, 59 NRC at 72-73, we are led to a number of combined legal and practical questions. These circumstances might, for example, lead to a possible finding that Duke's indication of intention that *we* in effect measure its proposal against the post-9/11 reactor security orders, effectively distinguishes the current situation from the situation considered by the Commission in CLI-04-6 — and that this effectively bring us, under the Commission's analysis, to a *new stage* of this proceeding with regard to the post-9/11 reactor orders, at which access to these on the part of BREDL could arguably be viewed as now being "indispensable." There appears to be at least some possibility that the same question might arise as well with regard to the post-9/11 Category I facility security orders, given the Staff's indication of a possible reassessment of the situation with regard to this at some point.

We highlight these questions not lightly, but rather to illuminate and underscore the significance of the questions raised and argued by the parties with regard to Contention 1 and related issues — which might well extend, in various forms, beyond Contention 1 and our current rulings herein and into the future, in various contexts.

The controlling authority of the Commission's decision in CLI-04-6 is without question, and how it is interpreted and applied with regard to these questions is pivotal. Specifically with regard to Security Contention 1, although the post-9/11 reactor orders addressed in CLI-04-6 are not at issue in this contention, *both* Duke and the Staff rely on CLI-04-6 in their arguments on this contention, as indicated above, with Duke relying on it both in its general "Overview of Proposed Security Contentions" as well as in its specific arguments on Contentions 1, 2, 3, and 4. Staff Response at 5-6; Duke Response at 8; *see id.* at 3 n.7, 4, 5, 6, 12, 16 & n.21, 20. And Security Contention 1, in addition to the questions it explicitly and specifically raises, also goes to the heart of both those issues considered by the Commission in CLI-04-6 and those related issues that are the subject of BREDL's continuing arguments that access to both the reactor and Category I facility post-9/11 orders by its counsel and expert is and will be effectively "indispensable" to it in the preparation and litigation of its case at this and future

stages of this proceeding.¹² *See, e.g.*, Tr. 1279, 1361-62; note 7, above. Moreover, Staff counsel indicated in response to questioning that it would make the same arguments it makes on Contention 1 with regard to other contentions. Tr. 1329.

In light of all these considerations, we find that the wisest course of action with regard to Contention 1 is to seek further guidance from the Commission on what appears to us to be a rather significant coalescence of several pertinent related questions, at this critical stage of this proceeding in which we rule on the admissibility of the Intervenor's security contentions, thus determining its right to a hearing on the issues presented therein. We therefore, under 10 C.F.R. § 2.718(i), herein certify to the Commission for its consideration these questions, both those specifically raised in Security Contention 1, and those that arise out of and relate to it, the responses to it, and also to issues addressed in CLI-04-6, as discussed above. We have attempted herein to provide what elucidation we can on these questions, and leave it to the Commission in its discretion to provide whatever further elucidation and guidance it wishes to provide on them.

2. Contention 2 (Relating to Alleged Failure To Describe Perceived Danger of Theft)

Security Contention 2. Failure to describe perceived danger of theft of SSNM and how it will be handled.

The Security Plan Revision fails to satisfy Appendix C of 10 C.F.R. Part 73 or the Standard Review Plan, because it does not contain a statement of the perceived danger with respect to theft of [SSNM], or how that threat will be handled.

a. Basis

BREDL in Security Contention 2 challenges Duke's security submittal in two particulars: first, that it fails to describe perceived dangers, and second, that it fails

¹²With regard to the post-9/11 reactor orders generally and BREDL's arguments regarding them, we would note that, without affording BREDL or its representatives access to information that Duke would urge us to consider in making our rulings, any actual consideration of such information by us would result in our decision being based on matters outside the record available to all parties (or their representatives with appropriate clearance), thus depriving BREDL of an arguable due process right to notice of and opportunity to respond to any information that might be used against it in this proceeding. Unlike some other (non-NRC) cases where it may be argued (sometimes with notable attendant controversy) that adjudicatory decisions may or should be based on secret information, this case involves no suggestion of untrustworthiness on the part of those persons from whom the information is withheld, who have undergone investigations leading to the issuance of "L"-level security clearances, *see* CLI-04-6, 59 NRC at 71, 75 n.27, and who as BREDL's counsel and expert would seem to have obvious ground for access at least to material *now actually proposed to be considered by us in reaching our decision*.

to describe means of handling perceived dangers. BREDL Security Contentions at 5, 9. BREDL cites Appendix C's requirement that a safeguards contingency plan must:

identify and define the perceived dangers and incidents with which the plan will deal and the general way it will handle these.

Perceived Danger — A statement of the perceived danger to the security of special nuclear material, licensee personnel, and licensee property, including covert diversion of special nuclear material, radiological sabotage, and overt attacks. The statement of danger should conform with that promulgated by the [NRC]. (The statement contained in 10 C.F.R. § 73.55(a) or subsequent Commission statements will suffice.)

Id. at 5 (*quoting* 10 C.F.R. Part 73, Appendix C, § 1, Background).

BREDL notes that section 73.55(a) describes the perceived threat to nuclear power plants as one of sabotage alone, but that this has been described as out of date, and that according to a relevant guidance document, “[t]he 1979 physical security upgrade rule replaced the reactor threat definition in Section 73.55(a) with design basis threats for radiological sabotage in 10 CFR 73.1(a)(01) [*sic*] and for theft or diversion of formula quantities of SSNM in 10 CFR 73.1(a)(2).” BREDL Security Contentions at 5 n.2 (*quoting* Standard Review Plan for Safeguards Contingency Response Plans for Category I Fuel Facilities (NUREG/CR-6667) (2000) [hereinafter Standard Review Plan or SRP] at 19. BREDL further cites the Standard Review Plan for the principles that a Category I applicant “must commit to a statement of perceived danger,” and may not exclude a threat of theft. BREDL Security Contentions at 6 (*citing* Standard Review Plan at 19).

Noting that both theft and sabotage threats have their own unique challenges, BREDL refers to the 9/11 terrorist attacks as making it clear that “determination is another factor distinguishing the severity of the theft threat from the sabotage threat.” BREDL Security Contentions at 6-7. Quoting the Director of the Central Intelligence Agency (CIA), BREDL points out that acquiring chemical, biological, radiological, and nuclear weapons constitutes a “religious obligation” in the eyes of Osama bin Laden, “al-Qa’ida and more than two dozen other terrorist groups” that are pursuing such weapons. *Id.* at 7 (*quoting from* George J. Tenet, Statement Before the Senate Select Committee on Intelligence, *The Worldwide Threat 2004: Challenges in a Changing Global Context* (Feb. 24, 2004)).

BREDL argues that, although Duke counsel has assured that Duke does not seek exemption from the DBT for theft or diversion, it has not described or even referenced a DBT for theft in its security submittal. BREDL Security Contentions at 7. Citing a reference by Duke to its own approach being to continue with a DBT for sabotage, and challenging Duke’s statements that “the existing armed responders are capable of dealing with attempts at radiological sabotage since

this is the design basis threat,” and that “because of the form of the SSNM (fuel assemblies), the current armed responders are also capable of deterring any attempted theft,” BREDL asserts that there is no evidence to support Duke’s claim. *Id.* at 8 (*citing* Duke 9/15/03 Security Submittal, Attachment 2 at 3; Attachment 7 at 14). BREDL argues that Duke does not appear to appreciate the “important point” that a “terrorist plot to seize SSNM and successfully remove it to a secure location for production of nuclear weapons would require significantly greater planning, resources and firepower than a plot to conduct a suicidal sabotage attack, where escape would not be necessary.” BREDL Security Contentions at 8.

BREDL also cites subsections 1(b) and 1(c) of Appendix C for its argument that Duke must describe the means of handling perceived dangers, and quotes the Standard Review Plan in support of its argument that the safeguards contingency plan must:

contain a delineation of the types of incidents covered in the plan. If addressed in this module, this discussion can be of a general nature, so long as the discussion of events in the Generic Planning Base is sufficiently specific to meet the requirements of 10 CFR 73 Appendix C, contents of the Plan, Section 2. Alternatively, this section may cross-reference the discussion in the Generic Planning Base. The listing of incident types addressed in the plan must include all types that must be protected against in order to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to public health and safety. (*See* 10 CFR 73.20).

Id. at 9-10 (*quoting* Standard Review Plan at 21). BREDL argues that the security submittal fails to describe the types of incidents covered by Duke’s revisions to its security plan or identify or evaluate credible theft scenarios under the theft DBT, such as, for example, a small group of attackers with the ability to operate as two or more teams, as provided in 10 C.F.R. § 73.1(a)(2). BREDL Security Contentions at 10.

b. Responses

(1) DUKE

Duke argues that in Security Contention 2 BREDL is attempting “to shift to Duke the burden of identifying a credible vulnerability with respect to theft of the MOX fuel assemblies,” and that the contention “does not articulate a genuine dispute on a material issue of law or fact, or establish a basis for meaningful relief in this proceeding.” Duke Response at 10. Duke notes the statement in Appendix C that “[t]he statement [of perceived danger] contained in 10 C.F.R. § 73.55(a) or subsequent Commission statements will suffice,” which, Duke says,

“indicates that, to the extent there is some formalistic requirement to be fulfilled, it is not an elaborate requirement.” *Id.* at 11. In addition, Duke states that “no genuine dispute exists as to the ‘perceived danger’ addressed by Duke’s Security Submittal. The perceived incremental danger is theft of the MOX fuel assemblies.” *Id.* (citing Security Submittal, Attachment 2 at 2-3). According to Duke, “[t]he enhancements to the security plan address precisely that threat, and BREDL does not identify any specific perceived vulnerability in this contention.” Duke Response at 11.

Duke counters BREDL’s arguments about terrorism threats of theft by stating that the submittal “is specifically intended to address attempts at theft,” and arguing that BREDL does not engage the information in that submittal in any substantive way. *Id.* at 11-12. In response to BREDL’s argument that Duke does not describe the threat, Duke refers to the DBT for theft at 10 C.F.R. § 73.1(a)(2). *Id.* at 12. Duke states that “the strategy employed in the Security Submittal is premised upon, and credits, the existing security capabilities at Catawba to address the DBT for sabotage at a Part 50 facility — as one part of protecting against the DBT for theft.” *Id.* Referencing the statement in the submittal that “because of the form of the SSNM (fuel assemblies), the current armed responders are also capable of deterring any attempted threat,” Duke argues that “[I] logic dictates that those armed responders can prevent external attackers from ever reaching the MOX fuel [and] . . . can also respond to attempts to assault the facility for the purposes of theft, or respond to attempts to steal the fuel from the inside.” *Id.* at 12-13. BREDL fails, Duke asserts, to offer “anything to suggest how Duke’s approach is specifically inadequate.” *Id.* at 13.

In Duke’s eyes, BREDL’s assertions, that Duke does not know the specific capabilities of a Category I adversary, and that the security plan based on a sabotage threat “will be utterly inadequate to protect against the considerably more severe threat of theft of SSNM,” beg many questions, such as “Why is the plan inadequate? Why is the threat of theft considerably more severe than the threat of sabotage? What adversary characteristics does BREDL believe are sufficient to overcome the security plan as revised? How are those characteristics consistent with 10 C.F.R. § 73.1(a)(2)?” *Id.* at 13. Duke says it “inherently recognizes in the Security Submittal that protecting against the threat of theft may have nuances different than protecting against radiological sabotage,” and that it has accordingly proposed “extensive additional actions to protect the MOX fuel from theft, while concurrently maintaining existing measures to protect the facility against the threat of sabotage.” *Id.* The “totality of these measures,” Duke argues, “provides the protection against sabotage to the facility *and* theft of the MOX fuel.” *Id.* (emphasis in original). Regarding BREDL’s criticism of Duke for failing to “identify or evaluate credible theft scenarios,” Duke argues that this task belongs to BREDL, and that it does not establish a genuine dispute on a material issue of law or fact, as required by section 2.714(b)(2)(iii). *Id.* at 14.

of perceived danger permits reference to a regulatory provision, which BREDL agrees has been replaced with the provisions of 10 C.F.R. § 73.1(a)(2), we find this adoption of the provisions to be sufficient to meet the requirement.

Regarding BREDL's arguments that Duke has failed to describe the means of handling perceived dangers, we note that subsections 1(b) and 1(c) of Appendix C do state that the contents of the Safeguards Contingency Plan include:

b. Purpose of the Plan — A discussion of the general aims and operational concepts underlying implementation of the plan.

c. Scope of the Plan — A delineation of the types of incidents covered in the plan.

10 C.F.R. Part 73, Appendix C.

Inssofar as the “general aims and operational concepts underlying implementation” of any portions of Duke's Safeguards Contingency Plan (at any time at which it may be required to address the use of MOX fuel in the Catawba plant) and any “delineation of the types of incidents covered in the plan” are concerned, we find that evidence on these matters may well be relevant to the question of whether Duke should be granted the exemptions it requests — without regard to when the plan should be amended to address any use of MOX fuel. Many of the parties' arguments on Contention 2 concern this latter issue of timing, which involves not only legal questions but practical ones relating to the Staff's oversight function and Duke's responsibilities in that regard. We see no need, however, either to rule on these legal issues here or to delve into these sorts of practical questions relating to the Staff's functions. We find that the underlying factual issues may be addressed more effectively, in this adjudicatory proceeding, in the context of our ruling below on what we consider to be the core issue in this proceeding: whether Duke should be granted the exemptions it requests in its LAR. We thus leave any further comments on Contention 2 to our discussion and rulings on Contention 5, below.

3. Contention 3 (Relating to Alleged Failure To Provide Planning Bases Information)

Security Contention 3. Failure to provide information about the generic and licensee planning bases for protection against theft of SSNM.

Duke's Security Plan Submittal is deficient because it fails to provide adequate information required by Sections 2 and 3 of Appendix C to 10 C.F.R. Part 73, regarding the generic and licensee planning bases for protection against theft of SSNM.

(1998)). Duke also asserts that the Standard Review Plan cited by BREDL is not applicable to Catawba because it applies only to fuel facilities — “which are completely different than a nuclear reactor,” arguing as well the principle that NRC Staff regulatory guides are not, and do not have the force of, regulations. Duke Response at 15 n.19.

With regard to BREDL’s reliance on Appendix C, § 3, and the need for information on law enforcement agencies, Duke states that it is already required as a power reactor licensee to have safeguards contingency plans for Catawba in accordance with Appendix C to 10 C.F.R. Part 73, under 10 C.F.R. § 73.55(h)(1), and that to address the issue of a listing of local law enforcement contacts, 10 C.F.R. § 73.55(h)(2) already requires the establishment of a liaison with local law enforcement authorities. *Id.* at 16. Relying on CLI-04-6, Duke argues that its “compliance with these existing NRC security requirements is not at issue in this proceeding.” *Id.* (citing CLI-04-6, slip op. at 10 [59 NRC at 73]). Therefore, Duke argues, BREDL’s reliance on this argument fails to support an admissible contention. *Id.*

Duke refers to its “existing plan which, consistent with CLI-04-06, must be credited with meeting existing requirements (including liaison with local law enforcement officials and the ability to deal with threats).” *Id.* In light of this, Duke argues, its “detailed Security Submittal provid[es] only the additional, *incremental* measures it is taking to address potential theft of the MOX fuel on site,” in regard to which BREDL has not identified “credible vulnerabilities” in proposed Contention 3. *Id.* (emphasis in original). BREDL provides “no support for th[e] generality” that the theft threat is “more deadly and more complex,” nor, Duke argues, does it “address the specific DBT standard 10 C.F.R. § 73.1(a)(2).” *Id.* at 16-17.

Duke asserts that BREDL has merely:

raise[d] a vague “bogeyman” scenario of a “small group of attackers” who “operate as two or more teams,” in which one group (which, to be consistent with Section 73.1(a)(2), must be a subset of a “small group” *i.e.*, an even smaller group) creates a diversion, while the other group (also a smaller subset of a “small group”) manages to kill all the plant guards and completely disrupt communications with local law enforcement agencies.

Id. at 17. Arguing that “BREDL’s hypothetical must further assume that this small group will defeat all the barriers, retrieve the MOX fuel, and successfully transport it outside the station,” Duke argues that, “absent a definite scenario and realistic timeline, BREDL has not posited the ‘credible vulnerability’ envisioned by the Commission that would support admission of a security contention.” *Id.* Duke goes on to critique BREDL’s example as “naively assum[ing] that, when responding to a threat, a licensee’s security force would not anticipate a diversion

as a prelude to an attack.” *Id.* It also assumes, Duke asserts, “without basis, that this licensee would expose its entire, relatively large force of response personnel to a single attack, which would subject them all to be killed by an attacking subset of a small group, i.e., an even smaller group.” *Id.*

Duke relies on 10 C.F.R. § 73.55(e) and (f)(1)-(3) for requirements that each facility must have “diverse secure locations, with multiple communications capabilities, and the ability to monitor the Protected Areas to determine whether an attack is underway.” *Id.* at 17 n.23. “Given a realistic context,” Duke argues, “there is nothing in this proposed contention to support a genuine dispute on a material issue of law or fact.” *Id.* at 17-18 (citing 10 C.F.R. § 2.714(b)(2)(iii)).

Duke argues that BREDL’s reliance on the NFS and BWXT orders mischaracterizes these orders, which are “particular to two specific licensees,” and have “no generic application, particularly to a non-fuel facility such as Catawba.” *Id.* at 18. Duke challenges BREDL’s references to the various “unclassified studies” as lacking sufficient specificity “as to how the documents allegedly support admission of this contention,” and suggests that “to the extent these documents apply to nuclear power plants, the Commission took them into account before promulgating its post-9/11 orders.” *Id.* (citing *Fansteel*, CLI-03-13, 58 NRC at 195, 203; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 212-13 (2003)). With respect to any requirement that Duke should conduct an annual force-on-force exercise, Duke states that if this is a requirement of an NRC order (that “might be Safeguards Information”), Duke “would be required to fully comply with it.” Duke Response at 18.¹³

(2) STAFF

The Staff asserts that BREDL has not supported this contention with an adequate legal basis, arguing that, as with Contention 2, Duke has not submitted its safeguards contingency plan and so the requirements of Appendix “simply do not apply,” and therefore the contention “does not meet the requirements in 10 C.F.R. § 2.714(b)(2).” Staff Response at 9.

c. *Licensing Board Ruling*

As with the second part of Contention 2, we find that BREDL raises some issues in Contention 3, evidence on which may well be relevant to the question of

¹³ We note in this regard Duke’s argument, again, that we should “assume that Catawba will comply with all applicable general security requirements, both those prescribed in NRC rules and orders,” and that BREDL must “focus on the increment — the additional security measures proposed by Duke,” and “identif[y] credible vulnerabilities.” *Id.* at 16 n.21 (citing CLI-04-6, slip op. at 10 [59 NRC at 73]).

whether Duke should be granted the exemptions it requests in its LAR — without regard to when its Safeguards Contingency Plan should be amended to address any use of MOX fuel. Again, most of the parties’ arguments on Contention 3 concern this timing issue, which involves not only legal questions but also practical ones relating to the Staff’s oversight function and Duke’s responsibilities in that regard. And again, we see no need either to rule on these legal issues here or to delve into these sorts of practical questions relating to the Staff’s functions, and find that the underlying factual issues raised in Contention 3 may be addressed more effectively, in this adjudicatory proceeding, in the context of our ruling below on what we consider to be the core issue in this proceeding: whether Duke should be granted the exemptions it requests in its LAR. We thus, as with the second part of Contention 2, leave any further comments on Contention 3 to our discussion and rulings on Contention 5, below.

4. Contention 4 (Relating to Alleged Failure To Discuss Certain Policy Issues)

Security Contention 4. Failure to discuss policy constraints on the use of deadly force.

The Security Plan Revision fails to demonstrate that security for the Catawba nuclear plant will be adequate during use of plutonium MOX fuel, because it fails to discuss policy constraints on the use of deadly force.

a. Basis

BREDL in Security Contention 4 relies on the requirement in section 3(e) of Part 73, Appendix C, that the Licensee’s Safeguards Contingency Plan Licensee Planning Base include a “discussion of State laws, local ordinances, and company policies and practices that govern licensee response to incidents.” BREDL Security Contentions at 14. Referencing one of the examples the rule states “may be discussed” (that regarding the use of “deadly force”), BREDL states that the “state law criteria for the use of deadly force by private security forces are generally different for sabotage than for theft and diversion.” *Id.* In support of the contention BREDL provides, as an exhibit to its contentions, a paper entitled *State Law Limits on the Use of Deadly Force by Facility Security Forces*, arguing on the basis of this document that “many state laws prohibit the use of deadly force to protect property,” and noting that “South Carolina law, for example, allows deadly force in response to imminent threat of death or serious bodily injury,” but “to protect property only if the trespasser resists attempts to eject him/her with the threat of death or serious bodily harm.” *Id.* (*citing* Sean Barnett

and Robert Haemer, *State Law Limits on the Use of Deadly Force by Facility Security Forces* (2003) at 7 [hereinafter BREDL Exhibit 2]).

Thus, BREDL argues, while the use of deadly force in defense of a nuclear power plant against an overt armed attack would appear to be justified under South Carolina state law, “the use of deadly force to protect people against ambiguous or less capable attacks or in defense of nuclear materials facilities or radioactive materials shipments would depend on the nature of the material being defended and the precise circumstances surrounding the attack,” according to the authors of this paper. BREDL Security Contentions at 14 (*quoting* Exhibit 2 at 7). Specifically, BREDL asserts, “it is not clear whether security guards could fire on thieves who were posing unarmed as a ruse.” BREDL Security Contentions at 14 (*citing* Exhibit 2 at 2). Asserting further that “Duke’s revision to its security plan for Catawba completely fails to address the impact of this state law policy constraint on Duke’s proposed measures for protecting plutonium fuel from theft or diversion,” BREDL contends that Duke’s proposal “fails to satisfy Appendix C or its implementing guidance.” *Id.* at 14-15.

b. Responses

(1) DUKE

Duke responds to Contention 4 by stating that, “[c]ontrary to BREDL’s assertion, Duke’s security plan, procedures, and training already address the use of escalating force, including deadly force.” Duke Response at 19. Noting that 10 C.F.R. § 73.55(h) requires that a licensee “establish, maintain and follow an NRC-approved safeguards contingency plan for responding to threats, thefts and radiological sabotage,” and that “[s]afeguards contingency plans must be in accordance with the criteria in Appendix C to this part, Licensee Safeguards Contingency Plans,” Duke argues that this created a “preexisting requirement for Duke to have addressed Appendix C (and the specific matters enumerated therein) in its security plan” — compliance with which, Duke asserts, “is to be assumed,” under CLI-04-6, absent some showing by BREDL of a “specific vulnerability.” *Id.* at 19-20 (*citing* CLI-04-6, slip op. at 10 [59 NRC at 73]). Also, Duke says, section 73.55(h)(5), which is applicable to Catawba as a Part 50 facility, requires as follows:

(5) The licensee shall instruct every guard and all armed response personnel *to prevent or impede attempted acts of theft* or radiological sabotage by using force sufficient to counter the force directed at him including the use of deadly force when the guard or other armed response person has a reasonable belief it is necessary in self-defense or in the defense of others.

Duke Response at 20 (emphasis supplied by Duke).

Again, Duke argues, since this is already required, we must presume that Duke complies with it, and that, regarding the “ruse” example posited by BREDL, “response personnel, armed with contingency weapons” and “non-lethal weapons,” and “in constant communication with each other and their command,” would “use escalating force as they are trained.” *Id.* at 20-21 & n.27. Duke notes that section 73.55(h)(4)(iii)(A) “already requires that, upon detection of intrusion into an isolation zone, a protected area, material access area (‘MAA’) or a vital area,” its security organization “must take immediate concurrent measures to neutralize the threat by requiring responding guards or other armed response personnel ‘to intercept any person exiting with special nuclear material.’” *Id.* at 21. Duke also notes that, while DOE is onsite, its personnel are permitted under 10 C.F.R. Part 1047 to use deadly force under certain “conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed.” *Id.* at 21 n.28 (*citing* 10 C.F.R. §§ 1047.1, 1047.2, 1047.7(a)). Duke argues that given these existing requirements, BREDL has “not posed a credible scenario not already covered by the plans that would support this contention,” and Contention 4 should be denied. *Id.* at 21.

(2) STAFF

The Staff argues that this contention is inadmissible “because it is not supported by law or fact.” Staff Response at 10. Again, the Staff asserts that “Duke’s Submittal does not raise any issues that are covered by Part 73, Appendix C,” and “[t]herefore, Appendix C does not provide an adequate legal basis for alleging that Duke’s Submittal is deficient.” *Id.* The Staff notes that the language used in section 3 of Appendix C is that the Licensee Planning Base “should” address various topics, including Policy Constraints and Assumptions relating to State laws, etc. *Id.* Given such permissive language, the Staff argues there is no such “requirement,” especially since the Commission does use the mandatory “shall” in other parts of the regulation (i.e., in section 3, that the plan “shall include the factors affecting contingency planning that are specific for each facility”). *Id.* at 10-11.

c. Licensing Board Ruling

Given the use in 10 C.F.R. Part 73, Appendix C, § 3.e, of the permissive words, “[e]xamples that *may be* discussed include: Use of deadly force” (emphasis added), we will not admit Security Contention 4. As with Contentions 2 and 3, however, it may be that evidence from the report submitted by BREDL in support of Contention 4 may be relevant and admissible with regard to the exemption requests at issue in Contention 5, assuming an appropriate showing of this at the appropriate time.

5. ***Contention 5 (Relating to Alleged Failure To Show Exemption Standards Met)***

Security Contention 5. Failure to show that Duke meets standard for granting exemptions.

Duke has failed to show that the requested exemptions from 10 C.F.R. Part 73 are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be in the public interest. 10 C.F.R. 11.9, 73.5. consistent with law or in the public interest [*sic*].

a. *Basis*

BREDL provides as basis for this contention various arguments relating to Duke's request for exemption from the following Part 73 requirements for Category I facilities:

(i) Section 73.45(d)(1)(iv) requirements concerning detection and monitoring systems to discover and assess unauthorized placement and movement of SSNM;

(ii) Section 73.46(c)(1) requirements related to physical barriers for vital areas and Material Access Areas (MAAs),

(iii) Section 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in Section 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in 10 C.F.R. 73.55,

(iv) Section 73.46(d)(9) requirements related to armed guards at MAA access points and search requirements for personnel and materials entering/exiting MAAs, and

(v) Section 73.46(e)(3) requirements concerning alarms for detecting movement within unoccupied vital areas not related to MOX fuel storage.

BREDL Security Contentions at 15 (*citing* Duke 9/15/03 Security Submittal, Attachment 7 [hereinafter Exemption Request] at 9). BREDL also cites, in its discussion of the request for exemption from section 73.46(d)(9), Duke's related request for exemption from 10 C.F.R. § 11.11(b). BREDL Security Contentions at 25; *see also* Tr. 1500; Exemption Request at 2-7.

BREDL first challenges various "general arguments" made by Duke in support of the preceding exemption requests, asserting that these arguments are neither "consistent with law" nor "adequately protective of common defense and security." BREDL Security Contentions at 15. BREDL begins by attacking Duke's argument that the "underlying rationale for imposing these [Category I] regulatory requirements does not apply to the contemplated use, i.e., the use of

b. Responses

(1) DUKE

Duke contests this contention, addressing the various parts of BREDL's basis for the contention one by one. First, Duke argues that BREDL's argument that, because the NRC in promulgating requirements for Category I facilities "chose to apply stricter requirements for certain classes of special nuclear material that are not encapsulated, it cannot issue a further exemption" from the regulations "associated with the encapsulated material in this case," is "incorrect." Duke Response at 22. (Duke states in a footnote that the differing substantive requirements in the rule are not really "exemptions" but merely "appropriate use of rulemaking to recognize substantive differences between classes of material." *Id.* at 22 n.29.) Citing various precedent for the proposition that the NRC may issue an exemption "[i]f the applicable exemption standard is met," Duke asserts that "[h]ere, where the facility type at issue, i.e., a commercial nuclear reactor, is so different from the type of facility for which the rule was written, e.g., a fuel fabrication facility, it is a natural subject for an exemption." Duke Response at 23. In addition, Duke asserts, "the recently issued NRC MOX Security Review Plan clearly contemplates that applicants, such as Duke, may seek exemptions from relevant security requirements in Parts 11 and 73." *Id.* at 23 n.31.

Citing the Commission's 1989 exemption of the Fort St. Vrain Nuclear Generating Station from 1988 amendments to Part 73 that "required more stringent physical protection and security personnel performance regulations, and a revised DBT, for NRC-licensed fuel facilities possessing formula quantities of strategic special nuclear material," Duke argues that this illustrates both the Commission's authority to issue exemptions and the substantive basis for such exemptions for a nuclear power plant. *Id.* at 23-24 & n.32 (citing Jan. 19, 1989 Letter from K. Heitner, NRR, to R.O. Williams, Jr., Public Service Company of Colorado, transmitting *Public Service Co. of Colorado* (Fort St. Vrain Nuclear Generating Station), "Exemption" (Docket No. 50-267)). Regarding the substantive issue, Duke quotes the following language from the Commission in its exemption to Fort St. Vrain:

Fuel elements containing 93.15% enriched uranium fuel at Fort St. Vrain are located in the core or in storage. Only fresh fuel in storage is important to this physical protection requirements [*sic*]. Fresh fuel elements are stored in a substantial building, located within the reactor protected area, that is locked and protected by alarms and guards.

* * * *

The end result is that the fissile material is highly diluted by graphite and other materials. Recovery of the fissile material is made difficult by the inert and refractory nature of the carbon and silicon carbide coatings and by the presence of thorium.

(2) STAFF

The Staff argues that this contention is inadmissible, because it is not supported by law or fact and “merely presents a series of unsupported arguments that fail to address Duke’s central proposition — that relaxation of certain security requirements would not cause undue harm to the public health and safety given the form, composition, and structure of the MOX LTAs.” Staff Response at 12. The Staff charges that BREDL’s basis consists only of a “litany of possible catastrophies associated with an unspecified attack on Catawba” and “vague and highly speculative scenarios,” without any factual support, that are “designed to shift to Duke the burden of defending its application.” *Id.*

The Staff urges that, “[i]n order to frame an adequate contention, BREDL [i]s required to identify the threat that it allege[s] is not addressed by Duke, and the factual or legal basis for the view that Duke was required to address that threat.” *Id.* Characterizing BREDL’s arguments as “merely stating, in a conclusory fashion, that an attacking force intent on theft is more determined than one seeking to cause radiological sabotage,” the Staff insists that “[i]t is incumbent upon BREDL, as the proponent of the instant contention, to meet the clear standards laid out by the Commission in § 2.714 and it has not done so.” *Id.* at 12-13.

c. Licensing Board Ruling

We begin our analysis of Contention 5 by noting that BREDL has not in its basis for the contention specifically addressed either the exemption request regarding detection and monitoring systems, or that concerning alarms for detecting movement within unoccupied vital areas not related to MOX storage. We thus find those parts of Contention 5 relating to these matters to be lacking in specificity sufficient to render them admissible in this proceeding.

With regard, however, to the remaining portions of Contention 5, on the requests for exemption from the requirements of 10 C.F.R. § 73.46(c)(1) concerning physical barriers, §§ 73.46(h)(3) and 73.46(b)(3)–(12) concerning the tactical response team and related requirements, and §§ 73.46(d)(9) and 11.11(b) concerning armed guards, security clearances, and related requirements, we find that BREDL has presented a sufficiently specific statement of the issues it wishes to raise, supported by sufficient basis consisting of specifically stated explanation, fact-based argument and expert opinion (through Dr. Lyman’s participation in the preparation of the contention and basis), to establish genuine disputes on material issues of combined law and fact, so as to warrant admission of the contention. In addition, BREDL, as it is required to do, has provided documentary support of which it is aware at this time. *See* Statement of Consideration, 1989 Amendments

to Contention Admissibility Requirements, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

On Duke's argument that the existing distinction in the rules between encapsulated and unencapsulated SSN does not prevent any "further exemption," *see supra* p. 343, we would observe that this is essentially self-evident, but nonetheless does not prevent litigation of *whether* a "further exemption" is appropriate — regardless of the characterization of the existing distinction as an "exemption," as BREDL urges, or "appropriate use of rulemaking to recognize substantive differences between classes of material," as Duke suggests.¹⁶ We have also considered Duke's extensive arguments that really *go to the merits* of *whether* the exemptions should be granted. These all (with the exception of such unrealistic and somewhat disingenuous assertions as some of those made regarding BREDL's arguments on the shielding effect of water, *see supra* p. 346) concern issues that may well be litigated in a hearing on those parts of Contention 5 that we admit herein. However, even though some may indeed ultimately prove to be meritorious, they are not grounds for rejecting those portions of Contention 5 that we find to be admissible.

With respect to the arguments of Duke and the Staff to the effect that BREDL has not supported its contention with an adequate basis, we find that BREDL has supported those three parts of its contention that we admit, with expert opinion, documentary material, and with reasonably specific explanation and fact-based argument sufficient to meet the requirements of the contention admissibility requirements in this regard. It may be that the parties differ on the meaning and import of various facts, statements from documents such as the Red Team Report, and other evidence both encompassed within the basis provided for the contention and later to be admitted in a hearing on this contention, but such differences in viewpoints more illustrate a "genuine dispute" than negate it, or any other of the requirements for an admissible contention.

We note Duke's arguments that the Commission has somehow heightened the contention admissibility requirements in this proceeding. Specifically, we note Duke's statement that the Commission has "expressly required" BREDL to "come forward with a scenario that would call into substantial question" Duke's proposed measures, Duke Response at 32; and that BREDL should identify a "particular credible threat scenario," *id.* at 34; as well as the following:

The burden on BREDL in proffering proposed security contentions is clear. *In addition to* satisfying the general rules on admissibility of contentions established in 10 C.F.R. § 2.714, the Commission directed that BREDL (and its putative expert)

¹⁶ We note, with regard to Duke's arguments based on the exemption granted to Fort St. Vrain, BREDL's argument in response, distinguishing Fort St. Vrain as having fuel elements containing less SQ, or material necessary to make a nuclear weapon. Tr. 1477.

must review the Security Submittal and “identify *credible* vulnerabilities, if any.” CLI-04-06, slip op. at 10 [59 NRC at 73] (emphasis supplied). This is a substantive burden. The directive from the Commission gives further clarity to the specificity and basis requirements of Section 2.714(c) in the current context.

Duke Response at 5 (first emphasis added by Licensing Board). Given the rather unusual nature of Duke’s argument — that the Commission has created *new* contention admissibility requirements “in addition to” those set forth in the rule, we quote here the actual words of the Commission itself in CLI-04-6:

At stake here is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site. While these security enhancements are safeguards information, BREDL has been given access to that information and thus is in a position to measure Duke’s security proposals against the requirements of Part 73. After doing so, BREDL (or its technical expert) should be able to identify credible vulnerabilities, if any, and present corresponding contentions to the Board.

59 NRC at 73.

As argued by BREDL counsel in oral argument, the Commission also made the following statements in CLI-04-6, which do not refer to any requirement to submit “scenarios,” as argued by Duke:

This proceeding has a limited scope, focusing on the lawfulness and safety of Duke’s proposed MOX amendment.

Id. at 72; Tr. 1341.

We see no reason why BREDL cannot evaluate Duke’s proposed incremental changes to its security plan related to the presence of MOX fuel assemblies and decide whether to challenge Duke’s proposed security arrangements as inadequate to accommodate the use of MOX fuel at Catawba.

CLI-04-6, 59 NRC at 72-73; Tr. 1342. As BREDL argues, its contentions are “addressed to the lawfulness and safety of Duke’s proposed MOX amendment,” asserting that Duke “has not complied with, and in some cases even addressed, the regulatory requirements.” Tr. 1341-42.

What we take from the quoted statements from CLI-04-6 is that, although it is apparent that in one part of CLI-04-6 the Commission indicates that *one* way of submitting an admissible contention is to state a “specific vulnerability” (which might arguably take “scenario” form); in other parts of the decision the Commission allows for *other* ways, in keeping with the actual provisions of the contention admissibility requirements in the governing rule. We take the

Commission's words as providing, as often occurs in NRC case law, interpretation of the rule provisions on contentions, but not as adding any *new* requirements to the rule provisions that govern in this proceeding. *See* note 5 above. In light of this, we find that, to the extent the arguments of either Duke or the Staff suggest that BREDL must present a full-blown "scenario" that details fully every possible vulnerability in terms of exact numbers of people, exact numbers and types of weapons, exact methods and timelines, etc., this suggestion does not track with the actual requirements of the governing contention requirements, or with a comprehensive reading of CLI-04-6. In addition, the specificity with which BREDL or any petitioner or intervenor can address a proposal is to some degree obviously tied to the specificity of the proposal itself.

In any event, we find that BREDL has provided, as basis for the three parts of this contention that we admit, a sufficiently specific fact-based argument and explanation, supported by expert opinion as well as a number of documents in which various of the points BREDL raises are addressed. Our summary, above, of BREDL's basis for the contention illustrates these points: BREDL has quite obviously provided a significant amount of detail and specificity on the three subject areas of this contention that we find to be admissible.

Finally, as indicated above, we find that some evidence on the issues raised in the second part of Contention 2, as well as those raised in Contention 3, may be relevant to parts of the three areas of Contention 5 that we admit. We will therefore allow BREDL to present, in addition to other relevant evidence on Duke's requests for exemptions from the three respective sets of regulatory requirements, evidence on the issues raised by BREDL in its Contentions 2 and 3 that relate to these parts of Contention 5. In addition, to the extent that BREDL can show, at an appropriate time, the relevance of the Shaw Pittman report cited in Contention 4 to any of the same three areas of issues, we will allow evidence on this as well in the hearing on Contention 5.

III. CONCLUSION

A. Admitted Contention

In conclusion, we admit the following security-related contention of BREDL, limited and reframed as necessary to indicate those portions of BREDL Security Contention 5 that are admitted:

Duke has failed to show, under 10 C.F.R. §§ 11.9 and 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1), (h)(3) and (b)(3)-(12), and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.

B. Certified Question

We also, pursuant to 10 C.F.R. § 2.718(i), hereby certify to the Commission for its consideration the questions raised in and arising out of Security Contention 1, and relating to issues addressed by the Commission in CLI-04-6, as discussed above in our analysis on the contention.

C. Settlement

Commission regulations recognize that it is in the public interest for particular issues or an entire matter to be settled, and encourage parties and licensing boards to seek fair and reasonable settlements. 10 C.F.R. § 2.759. To the degree the issues in this proceeding may be amenable to this, we encourage the parties to communicate regarding the possibility of settling any such issues, and advise the parties that they may jointly contact the Board Chair if they wish to have a Licensing Board Panel-appointed settlement judge or mediator assist in this endeavor.

IV. ORDER

In light of the foregoing discussion, and based upon the entire record of this proceeding to date, it is on this 12th day of April 2004, ORDERED:

1. BREDL Security Contention 5 is hereby admitted in this proceeding, insofar as limited and reframed above; and the request of BREDL for a hearing on this contention, as so limited, is hereby granted.

2. Of the remaining BREDL Security Contentions, Security Contention 1 and related questions, as indicated in Section B of the Conclusion above, are certified to the Commission for its consideration; and Security Contentions 2, 3, and 4 are rejected, except as to evidence on certain portions thereof to the limited extent specified herein.

3. On April 20, 2004, during a telephone conference already scheduled in this matter for 10:00 a.m., the Licensing Board will discuss with the parties any appropriate scheduling and other matters relating to the litigation of the contention admitted herein, as well as BREDL's Amended Security Contentions and responses thereto. Thereafter, in a closed conference as necessary, on a date to be scheduled, any related subjects that are not amenable to discussion in a public session will be addressed.

4. This Order is subject to appeal in accordance with the provisions of 10 C.F.R. § 2.714a(a)-(c). Any petitions for review meeting applicable requirements set forth in that section must be filed within 10 days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman (by GPB III)
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 12, 2004 (Sealed as
Safeguards; Redacted Public
Version Issued May 28, 2004)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

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

June 9, 2004

MEMORANDUM AND ORDER

This Order accepts for review the issue of what financial information may be withheld from public disclosure as proprietary information in this proceeding.

On March 24, 2004, the Commission issued CLI-04-10, as yet unpublished, which accepted for review various issues relating to the Private Fuel Storage, L.L.C. (PFS)'s financial assurances. The financial assurance issues arose on petition for review of four Board orders, as yet unpublished, relating to PFS's assurances that it will be financially capable of constructing, operating, and decommissioning the proposed project. In its order granting review, CLI-04-10, the Commission asked the parties to indicate what information they thought should be redacted from CLI-04-10 as proprietary information prior to publication.

On March 31, the Board issued its Memorandum and Order (Disclosure/Redaction of Evidentiary and Decisional Materials Relating to Contentions Utah E/Confederated Tribes F and Utah S; Adopting Transcript Corrections Relating to Contentions Utah E/Confederated Tribes F and Utah S). That order has been the subject of cross-petitions for review by PFS and Utah.

On April 30, the Board granted PFS's motion for stay and partial reconsideration, and clarified its March 31 ruling on proprietary information.

Because the issue of proprietary information is already before us with respect to the information to be withheld from CLI-04-10, and because novel issues on

the proprietary question have been raised, the Commission accepts review of the issues raised in the cross-petitions, and of related issues raised by the Board's April 30 ruling.

The parties have already submitted briefs in this matter outlining their respective positions. Should any party wish to supplement its brief, it may do so with briefs, not to exceed 15 pages, within 21 days following the issuance of this Order. The parties may submit reply briefs, not to exceed 5 pages, 10 days thereafter.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of June 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 11005440
(Application No. XSNM03327)

U.S. DEPARTMENT OF ENERGY
(Plutonium Export License)

June 15, 2004

The Commission denies the Greenpeace, Charleston Peace, and Blue Ridge Environmental Defense League's request for intervention and hearing on an application by the U.S. Department of Energy for a license to export weapons-grade plutonium oxide to France. The Commission further denies the Petitioners' request for waiver of the regulations pertaining to physical security and directs the Office of International Programs to issue a license to the Department of Energy for the export of up to 140 kg of plutonium oxide.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

Petitioners' generalized institutional interest in minimizing danger from proliferation is insufficient to confer standing. Petitioners' claims of potential injury are also so speculative, and separate from the export license, that they do not amount to cognizable harm for purposes of standing.

EXPORT LICENSING: HEARING REQUEST

The public participation provisions found in the Commissions' export licensing regulations in 10 C.F.R. § 110.84, promulgated shortly after enactment of the Nuclear Non-Proliferation Act, provide that the Commission will consider whether a person requesting a hearing has "an interest which may be affected"

but do not explicitly provide that if a person has standing, the Commission will order a hearing.

NUCLEAR NON-PROLIFERATION ACT: HEARING REQUEST

A straightforward reading of the Nuclear Non-Proliferation Act, which is not contradicted by any Commission regulation or prior adjudicatory decision, is that the Commission is required to hold a hearing only if it concludes that public participation will be in the public interest and assist it in making the statutory determinations that are prerequisites to the issuance of the requested export license.

ATOMIC ENERGY ACT: HEARING REQUEST

There is nothing in the statutory language that suggests that the Commission must hold a hearing if a member of the public requesting a hearing has standing — or as Atomic Energy Act § 189 puts it, “an interest which may be affected.”

EXPORT LICENSING: HEARING REQUEST; PHYSICAL SECURITY

A hearing for the purpose of delving into the specifics of the physical security measures of a recipient foreign country to determine the adequacy of those measures and of the existing standards clearly would not be appropriate, both because of legal restrictions on dissemination of such information and because further dissemination of such information could endanger security.

EXPORT LICENSING: GENERAL

The transfer of nuclear material to an intermediate consignee performing only shipping services such as the Pacific Nuclear Transport, Ltd., does not in any respect constitute an “export” to a foreign sovereign under the Commission’s regulations or under international law.

NATIONAL ENVIRONMENTAL POLICY ACT: COMMON DEFENSE AND SECURITY

NRC case law does not require a National Environmental Policy Act–based review of terrorism; however, the Applicant U.S. Department of Energy of course has discretion to review terrorism in the National Environmental Policy Act context.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

In addition to finding that the recipient country will satisfy the nonproliferation criteria in section 127, the Commission must also determine pursuant to section 57c(2) of the Atomic Energy Act that a proposed export will not be “inimical to the common defense and security” of the United States.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

The legislative history of the Nuclear Non-Proliferation Act indicates that, in the absence of unusual circumstances, the Commission need not look beyond the non-proliferation safeguards in section 127 for nuclear-weapons states in determining whether the common defense and security standard is met.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

The Executive Branch’s noninimicality determinations involve “strategic judgments” and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

The NRC views actions as being inimical to the common defense and security where there is an unacceptable likelihood of grave or exceptionally grave damage to the United States. The NRC’s principal concern once fissile nuclear materials have left the United States is the possibility of theft.

MEMORANDUM AND ORDER

I. INTRODUCTION

Greenpeace International, Charleston Peace, and Blue Ridge Environmental Defense League (BREDL) (“Petitioners”) have requested leave to intervene and a hearing on an application by the U.S. Department of Energy (DOE), filed on October 1, 2003, for a license to export up to 140 kilograms (kg) of weapons-grade plutonium oxide to France. Petitioners also requested a waiver of the physical

security standard in 10 C.F.R. § 110.44 in this proceeding.¹ For the reasons discussed in this Memorandum and Order, we deny the Petitioners' request for intervention and hearing and waiver of 10 C.F.R. § 110.44.

II. DOE'S LICENSE APPLICATION

DOE seeks a license from the Commission to export up to 140 kg of weapons-grade plutonium oxide to France. DOE, in its license application, discusses the following in support of the proposed export.

The U.S. and Russia each have committed to dispose of 34 metric tons of weapons-grade plutonium by converting it into mixed oxide (MOX) fuel as part of a major nonproliferation effort aimed at reducing the threat of terrorist organizations' or rogue nations' obtaining nuclear weapons materials. DOE's proposed export is to support the MOX fuel qualification efforts for DOE's surplus plutonium disposition program. The plutonium oxide that DOE wants to export will be used to fabricate MOX fuel lead test assemblies (LTAs) for irradiation in a U.S. commercial nuclear reactor.

Currently, the U.S. does not have the capability to make MOX fuel LTAs. As part of the larger plutonium disposition program, DOE through its contractor Duke Cogema Stone & Webster (DCS) has applied for a license from the NRC to construct and operate a MOX fuel fabrication facility (MFFF) at DOE's Savannah River Site (SRS) near Aiken, South Carolina.² If the NRC gives the necessary approvals, the MOX fuel LTAs fabricated in the U.S. would be irradiated at a nuclear power plant owned and operated by Duke Energy, the Catawba Power Station. In February 2003, Duke Energy applied for an amendment to its Catawba reactor operating license to allow the use of MOX fuel LTAs.³ Duke Energy plans to irradiate the MOX LTAs fabricated at Cadarache, France, in the Catawba plant to confirm that the MOX fuel performs as expected in a nuclear power reactor.

The plutonium oxide that DOE proposes to export is currently at the Los Alamos National Laboratory (LANL) in New Mexico. It would be transported by land from LANL to the Charleston Naval Weapons Station (NWS) in Charleston, South Carolina, using the systems operated by the DOE, National Nuclear Security

¹ "Request for Hearing and Petition To Intervene by Greenpeace International, Charleston Peace, and Blue Ridge Environmental Defense League," filed November 26, 2003; "Request for Waiver of 10 C.F.R. § 110.44 by Greenpeace International, Charleston Peace, and Blue Ridge Environmental Defense League," filed November 26, 2003.

² See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Docket No. 70-3098-ML.

³ See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413-OLA, 50-415-OLA.

Administration, Office of Secure Transportation (OST).⁴ At the Charleston NWS, the material would be loaded onto two armed Pacific Nuclear Transport, Ltd. (PNTL) ships in shipping packages certified by the NRC, and transported to Cherbourg, France.⁵ The PNTL ships will sail in convoy for mutual protection. If approved, DOE expects to carry out this export in July/August 2004.

From Cherbourg, the plutonium oxide would be shipped overland to Cogema's fuel fabrication facility in Cadarache, France. Once the material is fabricated into MOX fuel at Cadarache, it would be transported by land and assembled into LTAs at the MELOX facility. Once the MOX LTAs are fabricated, they would be shipped back to Cherbourg and returned to the U.S. aboard PNTL ships.

The transfer of the plutonium oxide would take place in accordance with the U.S.-EURATOM Agreement for Cooperation. Safeguards would be implemented by the EURATOM Safeguards Inspectorate, which is similar to the IAEA safeguards system. The French government would determine the physical protection measures to be implemented while the material is in France, in compliance with IAEA recommendations, including INFCIRC/225/Rev. 4, "Physical Protection of Nuclear Material and Nuclear Facilities."⁶ The actual physical protection measures used at the fuel fabrication facilities and during transport will be classified. Such measures will include armed guards and close communication with the French national response forces. DOE emphasizes that the measures used by France will be comparable to the measures used in the U.S. to transport and process this type of radiological material. Additionally, these measures are subject to periodic review by the DOE Office of Export Control.

The Cadarache fuel fabrication plant is scheduled to close permanently in the summer of 2005. If the plutonium oxide is not exported this summer, DOE would have to wait to fabricate the LTAs in the U.S. until the MFFF at the SRS is licensed and constructed. The earliest the MFFF is expected to be operational, if licensed, is 2008. Therefore, DOE believes that if this export is delayed, the

⁴For a description of the unclassified characteristics of OST's secure system, see DOE's Amended Record of Decision, "Surplus Plutonium Disposition Program," 68 Fed. Reg. 64,611, 64,612 n.2 (Nov. 14, 2003). These include, among other things, advanced communications equipment; around-the-clock, real-time monitoring of the location and status of the vehicle; enhanced structural supports; armed federal officers; and a tractor-trailer combination using various defense technologies to protect crew members and cargo from attack.

⁵The PNTL ships are specially designed with special safety features to transport radioactive materials. The ships include double hulls; enhanced buoyancy; duplicate navigation, communications, electrical, and cooling systems; dual propulsion systems; specialized firefighting equipment; satellite navigation and tracking; and highly experienced crew members. See Amended Record of Decision, *supra* note 4.

⁶INFCIRC/225/Rev. 4 is incorporated by reference in the Commission's regulations in 10 C.F.R. § 110.44, "Physical security standards" pursuant to section 127 of the Atomic Energy Act (AEA), as amended by the Nuclear Non-Proliferation Act (NNPA).

MOX program itself could be delayed by 3 to 4 years and costs could increase for the MOX program by a predicted one billion dollars. Russia's parallel program to convert weapons-grade plutonium into reactor fuel also could be jeopardized by a U.S. delay because Russian officials have stated they will move forward only if the U.S. continues to move forward. Such a delay would postpone the removal of the equivalent of approximately 1000 nuclear weapons per year from the inventory of surplus weapons-grade plutonium.⁷

III. PETITIONERS' REQUEST FOR HEARING

The Petitioners seek intervention and a hearing to argue that (1) if the proposed export is authorized, it would be inimical to the common defense and security of the United States because "the international [physical protection] standard under which the application is to be judged is grossly inadequate to meet the security demands of the post-September 11, 2001 environment" (Nov. 26 Petition at 1-2); (2) the license application is deficient because it does not identify the United Kingdom as a recipient of the plutonium (*id.* at 10); and (3) the Environmental Impact Statement and Supplemental Analysis are inadequate to support the issuance of an export license to DOE (*id.* at 11). Pursuant to 10 C.F.R. § 110.111(a), the Petitioners also seek a waiver of 10 C.F.R. § 110.44(a), which provides that "physical security measures in recipient countries must provide protection at least comparable to the recommendations in . . . IAEA publication INFCIRC/224/Rev. 4," and request that the Commission "upgrade its regulatory standard for maintaining security in the export of materials to foreign countries. . . ." Nov. 26 Waiver Request at 1.

DOE filed an Opposition in Response to Petition To Intervene on December 31, 2003. In its response (at 6-23), DOE argued that Petitioners failed to establish standing to intervene as of right. DOE also argued that Petitioners do not meet the Commission's requirement for a discretionary hearing because a hearing would not be in the public interest and would not assist the Commission in making the determinations required by the AEA or 10 C.F.R. § 110.45. DOE Response at 24-30. Additionally, DOE argued that the Commission should not waive 10 C.F.R. § 110.44(a) because Petitioners failed to meet the standard set forth in 10 C.F.R. § 110.111 for granting a waiver, and that section 110.44 continues to meet

⁷ By letter dated January 9, 2004, the Executive Branch informed the Commission of its judgment that all applicable export licensing criteria of the AEA, as amended, had been met, including the relevant physical security measures, and that it supported the issuance of the requested license. The Commission also received confirmation from the European Commission, by way of the U.S. Department of State, that the proposed export would take place pursuant to the U.S.-EURATOM Agreement for Nuclear Cooperation.

its purpose of ensuring that physical protection in recipient countries is sufficient to protect against the proliferation of nuclear weapons. DOE Response at 30-36. Petitioners filed a Reply to DOE's Opposition to Hearing Request and Waiver Petition on January 23, 2004.⁸

A. The Petitioners' Standing

The Commission has traditionally applied the judicial concepts of standing to determine whether a potential intervenor has an "interest [that] may be affected" within the meaning of section 189a of the AEA.⁹ Petitioners Greenpeace International, Charleston Peace, and BREDL each claim an interest for standing on the basis of their organizational interests falling within the purposes of the AEA of protecting public health and safety and the common defense and security.¹⁰ Petition at 13. Petitioners state that issuance of the proposed license would adversely affect their organizational interests by creating "the risk of an unplanned radiological release to the environment during the shipment of plutonium to Europe." *Id.*

Petitioners have failed to establish standing based on organizational interests. The Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), made clear that:

[A] mere "interest" in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient

⁸ These pleadings were followed by additional filings by Petitioners and responses by DOE that are not contemplated by the Commission's regulations pertaining to the initial filing of an intervention and hearing petition. See 10 C.F.R. § 110.83(b). The Commission reviewed these additional filings, however, and took all relevant information into account in reaching a decision on the intervention petition and export application. In effect, therefore, Petitioners have been afforded the opportunity to provide views that is the functional equivalent of that afforded for a written hearing conducted pursuant to 10 C.F.R. § 110.85.

⁹ See *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). The judicial concepts of standing are satisfied when a petitioner shows "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. *Perry*, 38 NRC at 92-93; see also *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 168 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹⁰ The petition describes Greenpeace International as "an international nonprofit campaigning organization that uses nonviolent, creative confrontation to expose global environmental problems, advocate nonproliferation and disarmament. . . ." Charleston Peace's described purpose is to "promote peace and social justice." Similarly, BREDL's purpose is described as "fostering of earth stewardship and conservation of natural resources by the government and public." Petition at 3-4.

by itself to render the organization “adversely affected” or “aggrieved” within the meaning of the APA.

See also Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976). Thus, the generalized institutional interest in minimizing danger from proliferation is insufficient to confer standing. *Transnuclear, Inc.*, 39 NRC at 5; *see also Dellums v. NRC*, 863 F.2d 968, 972 (D.C. Cir. 1988) (stating that “opposing nuclear proliferation and ensuring proper safeguards for nuclear energy” is only a generalized goal).

Petitioners also assert representational standing of their members based on their proximity to the plutonium shipments. They submitted declarations of individual members and supporters in support of this assertion.¹¹ *Id.* at 14-15. Under this proximity or geographic presumption, standing to intervene may be found in some circumstances if the petitioner lives within, or has frequent contacts with, the zone of reasonably foreseeable harm from the source of radioactivity. The Commission’s articulated standard for applying the “proximity presumption” is:

[W]e have held that living within a specific distance from the [nuclear power] plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto, such as the expansion of the capacity of a spent fuel pool. However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific “injury in fact” that will result from the action taken

Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (citations omitted). *See also Yankee*

¹¹ Merrill T. Chapman lives within an eighth of a mile of Charleston Harbor and within 2 miles of the Charleston Naval Base. Petition, Attachment 4. Marcella Guerriero resides 1.5 miles from Charleston Harbor and 3 miles from the Charleston Naval Base. Petition, Attachment 5. Amy Horwitz lives within a mile of Charleston Harbor and less than 10 miles from the Charleston Naval Base. Petition, Attachment 6. Linda Price King lives within 20 miles of the Newport News, Virginia port, 5 miles from railroad lines, and 5 miles from Interstate Highways 168, 464, and 64. Petition, Attachment 7. James Scott lives within 20 miles of the Newport News, Virginia port, 5 miles from railroad lines, and 5 miles from Interstate Highways 168, 464, and 64. Petition, Attachment 8. “[M]ere geographical proximity to potential transportation routes is insufficient to confer standing; instead, . . . Petitioners must demonstrate a causal connection between the licensing action and the injury alleged.” *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002). *See also International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31-32 (2001).

Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996). The focus in applying this presumption is whether the

proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995) (citations omitted). *See also Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).

Petitioners allege that the potential for a successful terrorist attack and radiological release is “obvious” and provide two reasons. First, Petitioners assert that weapons exist that are capable of piercing the walls of the storage and transport casks. Second, Petitioners state that plutonium is an attractive target to terrorists. However, even if these assertions are accepted as true, the potential for a successful radiological release is far from obvious. Petitioners fail to provide any evidence of a specific credible threat and do not go beyond mere speculations about an unsupported and undefined potential threat. The grant or denial of this export license is far removed from the generalized and hypothetical harm complained of by the Petitioners.¹²

Further, Petitioners fail to establish a nexus between the agency’s actions and their alleged injury. The alleged harm — the attack or diversion of nuclear material by terrorist organizations — does not result from the grant or denial of the export license; rather, the remote potential for harm is dependent on the intervening acts of unknown third parties. *See Transnuclear, Inc.* (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 531-32 (1977); *Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 332 (1994). Here, Petitioners are concerned that a terrorist attack on the radiological material could threaten public health and safety. Terrorist acts are unlawful domestically as well as in the EURATOM nations. Therefore, the potential for harm that concerns Petitioners arises not from the export itself but from unlawful acts. As the Commission previously has said,

the Commission’s responsibility for considering the possibility of diversion as one aspect of protecting the common defense and security of the United States does

¹² “A plaintiff may not rely on the remote possibility, unsubstantiated by allegations of fact, that his situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.” *Cf. Warth v. Seldin*, 422 U.S. 490, 507 (1975).

not establish that diversion would cause any concrete personal or direct harm to petitioners which would entitle them to a voice in its proceedings.

Edlow International Co., CLI-76-6, 3 NRC at 577.

Further, unlike the line of Commission decisions discussing the proximity presumption and involving permanent or long-term licensed facilities, this license application involves a one-time export, under armed guard, of a limited quantity of plutonium oxide through the Charleston NWS. The material will be at the military facility for a limited time and details of the shipment, including the time and location, will be classified to guard against theft, diversion, or terrorist attack. For the reasons discussed above, Petitioners' claims of potential injury are so speculative, and separate from the export license, that they do not amount to cognizable harm for purposes of standing.¹³

B. Statutory Requirements for a Hearing on an Export Application

Even if the Petitioners had shown standing, we would not order a hearing on this export application. As discussed in detail below, in the Nuclear Non-Proliferation Act of 1978 (NNPA), Congress gave the Commission discretion to hold public hearings, or not, "as the Commission deems appropriate." Here, we already have sufficient information in the record (including the Petitioners' submissions) to make a reasoned judgment on this export license. Public hearings would not further assist the Commission's decisionmaking.

Section 304(b) of the NNPA provides that the Commission shall allow "public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations . . . including such public hearings and access to information as the Commission deems appropriate." Section 304(c) of the NNPA then provides that the procedures established pursuant to section 304(b) "shall constitute the exclusive basis for hearings in nuclear export licensing proceedings before the Commission . . . and shall not require the Commission to grant any person an on-the-record hearing in such a proceeding."

A straightforward reading of these provisions, which is not contradicted by any Commission regulation or prior adjudicatory decision, is that the Commission is required to hold a hearing only if it concludes that public participation will be in

¹³ We note that DOE would have the authority to transport plutonium oxide within the U.S. regardless of the NRC's grant of the export license. The NRC's jurisdiction to license DOE exports of special nuclear material under AEA § 54d does not extend to any aspects of DOE's domestic transportation of such material. Therefore, it is not at all clear that denial of DOE's proposed export license would redress or avoid the harm that Petitioners assert for standing purposes — i.e., DOE's transportation of the plutonium oxide near Charleston and Newport News.

the public interest and assist it in making the statutory determinations required by the Atomic Energy Act. There is nothing in the statutory language that suggests that the Commission must hold a hearing if a member of the public requesting a hearing has standing — or as AEA § 189 puts it, “an interest which may be affected.”¹⁴ The scant legislative history of the hearing provisions of the NNPA nowhere says or implies that Congress intended that a person is entitled to a hearing upon a finding by the Commission that the person has standing. The most illuminating statement in the legislative history is found in the report issued by the Senate Committee on Governmental Affairs. The Committee stated: “public participation is permissible when the NRC finds that such participation will be in the public interest and will assist the NRC in making the statutory determinations required by the 1954 Act.”¹⁵ This statement clearly indicates that the Committee did not envision mandatory hearings; it viewed public participation to be a matter of Commission discretion and it contemplated hearings *only* when the NRC finds that hearings will assist the NRC in making the statutory determinations.

The public participation provisions found in the Commission’s export licensing regulations in 10 C.F.R. § 110.84, promulgated shortly after enactment of the NNPA, provide that the Commission will consider whether a person requesting a hearing has “an interest which may be affected” but do not explicitly provide that if a person has standing, the Commission will order a hearing. In the subsequent years, the Commission in its export licensing orders typically has addressed the standing of requesters — persons without standing are not as likely as persons with standing to contribute significantly to Commission decisionmaking — but has not explicitly found that if a person has standing the Commission must hold a hearing.

Beyond the standing question (which, in this case we have resolved against Petitioners), the Commission’s focus must be on whether a hearing would be “in the public interest and assist the Commission in making the statutory determinations” that are prerequisites to the issuance of the requested export license. Here,

¹⁴ Shortly after enactment of the NNPA, the Assistant Legal Adviser for Nuclear Affairs, Department of State, who served as the principal Executive Branch draftsman of the NNPA, wrote a law review article explaining the new Act. He stated:

The NNPA provides that the NRC shall not be required to grant any person an on-the-record hearing in an export licensing proceeding. This has led to some confusion as to whether judicial standing doctrines previously applied by the NRC for public participation in export licensing proceedings survive. The NRC regulations avoided taking an immediate position on whether the NRC has to grant a hearing to any person not constitutionally entitled, since the regulations merely list the elements the NRC will consider in deciding on standing and do not assert that a person who establishes that his interests will be affected will automatically be granted standing to participate in an export licensing proceeding. Ronald J. Bettauer, *The Nuclear Non-Proliferation Act of 1978*, 10 *Law & Pol’y Int’l Bus.* 1105, 1119 (1978).

¹⁵ S. Rep. No. 95-467, at 15 (1978).

as discussed further in Part C, *infra*, the Commission is unable to find that holding the requested hearing would be in the public interest and assist the Commission in making the statutorily required determinations. *See* 10 C.F.R. § 110.84(a). The Applicant and the Petitioners have submitted comprehensive filings that clearly set forth the issues, and provide detailed analysis in support of their views. This record, augmented by the views of the Executive Branch on the merits of the application, provides the Commission with ample information upon which to base its export licensing decision such that under the circumstances further proceedings would not be in the public interest.

C. Whether a Hearing Would Be in the Public Interest and Assist the Commission in Making the Required Statutory Determinations

We turn now to the specific issues raised by the Petitioners: (1) the export would be inimical to the common defense and security because international physical security measures are outdated and inadequate; (2) the license application is deficient because DOE failed to name the United Kingdom as a recipient state; and (3) the 1996 Storage and Disposition PEIS and 1999 SPDEIS and recent Supplemental Analysis are not adequate to support the issuance of the export license.

1. Adequacy of Physical Security Measures

Petitioners maintain that the level of physical security protection required under the Commission's regulations (10 C.F.R. § 110.44(a)) for recipient countries of U.S.-origin exports is outdated. The crux of Petitioners' position is that the basic international standard embodied in the NRC's regulations for physical security measures — specifically, IAEA INFCIRC/225/Rev. 4 — needs to be revised after the events of September 11, 2001. According to Petitioners, therefore, the Commission cannot make the requisite statutory determinations under sections 127(3) and 57c(2) of the AEA for the grant of the proposed license. Petitioners request a hearing on the matter. Petitioners state that a hearing would assist the Commission in determining the adequacy of current physical security measures in France for the proposed plutonium oxide fuel export in light of the events of September 11. As explained below, we find that a hearing on this issue would not be in the public interest or assist us to make the requisite statutory determinations.

Petitioners themselves acknowledge (Nov. 26 Request at 9) that they do not possess any specialized knowledge not already in the public record as to what physical security measures are currently in place in France because “of the lack of available information regarding the manner in which the French Government implements IAEA INFCIRC/225/Rev. 4.” A hearing for the purpose of delving

into the specifics of the physical security measures of a recipient foreign country to determine the adequacy of those measures and of the existing standards clearly would not be appropriate, both because of legal restrictions on dissemination of such information and because further dissemination of such information could endanger security. The Commission's assessment of the adequacy of physical security for exports of weapons-grade nuclear materials depends in part upon its expert technical assessment of sensitive information not available to the public. Details of security arrangements consist in large part of national security information classified under Executive Order 12958, as amended, or safeguards information protected from public disclosure under section 147 of the Atomic Energy Act. Based on the information made available to the NRC by the Executive Branch, including a classified briefing of the NRC Staff, the NRC has adequate information before it to assess the adequacy of the physical security for this proposed export.

In addition to assessing the adequacy of the security measures that will protect the material, the NRC is mindful that the proposed export is an essential and integral component of a major bilateral agreement on nuclear nonproliferation, the U.S.-Russia Plutonium Management and Disposition Agreement, the very purpose of which is to further the United States' nuclear nonproliferation goals by providing for the reduction of vast quantities of surplus weapons-grade plutonium from weapons programs. Moreover, the U.S. has had a long history of reciprocal trust and cooperation with EURATOM on physical security, safeguards, and other matters relevant to the prevention of nuclear proliferation. Thus, the export authorization decision also involves matters of policy, requiring the Commission to assess its technical conclusions as to physical security and the other statutory criteria along with the important nuclear nonproliferation and foreign policy objectives underlying the U.S.-Russian agreement.

Finally, Petitioners have already submitted detailed information as to the basis for their position. We do not believe a hearing will result in significant new information that is not already available to and considered by the Commission in making the requisite statutory determinations.

2. Failure To Name the United Kingdom as a Recipient State

Petitioners argue that DOE's application is deficient because it did not identify the U.K., in addition to France, as an importing nation. As best we understand it, Petitioners maintain that the U.K. should be treated as a recipient foreign nation because the PNTL vessels to which the plutonium will be transferred for transportation on the high seas are majority-owned by the U.K. Petitioners apparently believe that the U.K.'s ownership of the PNTL vessels transforms the transportation of the material by the vessels into an "export," with international transportation security measures to be decided by the U.K. as an importing

“recipient state.” In this context, Petitioners maintain that DOE’s license application is also deficient because it was filed prior to the U.K.’s approval of an international transportation security plan for the PNTL ships. *See, e.g.*, Large Supplemental Declaration (Dec. 11, 2003).

The basic premises of Petitioners’ position are incorrect. The transfer of nuclear material to an intermediate consignee performing only shipping services such as the PNTL does not in any respect constitute an “export” to a foreign sovereign under the Commission’s regulations (*see* 10 C.F.R. § 110.2) or under international law.¹⁶ Moreover, it is the U.S., and not the U.K., that is ultimately responsible for approving the transportation plan to be used by the PNTL vessels for international transportation of the plutonium from the U.S. to Cherbourg, France. The Executive Branch made this clear in its January 9, 2004 letter transmitting its views, in which it stated that the “export will be subject to a transportation plan as agreed by the Departments of Energy and Defense and the NRC, which will include . . . use of two armed [PNTL] vessels which will escort one another for the sea shipment to and from France.”¹⁷ Both the U.S. and the U.K., as a member of EURATOM, are signatories to international treaties that set the standards for international transportation security, including the Convention on the Physical Protection of Nuclear Materials (IAEA INFCIRC/274/Rev. 1) and the Safety of Life at Sea Convention (SOLAS). We are confident that the transportation plan agreed to by the U.S., through the NRC, DOE, and DOD, will be in full compliance with governing international standards and do not see any basis for a hearing in this area.

3. Adequacy of Environmental Analysis

Petitioners also assert that DOE’s Storage and Disposition of Weapons-Useable Fissile Materials Final Programmatic Impact Statement (DOE/EIS-0229) (December 1999) (PEIS), the Surplus Plutonium Disposition Final Environmental Impact Statement (DOE/EIS-0283) (November 1999) (EIS), and the recent Supplemental Analysis for Fabrication of Mixed Oxide Lead Assemblies in Europe (DOE/EIS-0229-SA3) (November 2003) (SA) are inadequate and outdated, and thus do not support the issuance of the proposed export license to DOE. Specifically, Petitioners argue that the PEIS and EIS predate the terrorist attacks on September 11,

¹⁶ As DOE points out (DOE’s December 31, 2003 Response at 20), under international law, countries to which ships are registered have limited duties relating primarily to “administrative, technical and social matters” over the ship and its crew. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 94.

¹⁷ We note that this method of ocean transport was previously evaluated by a team of U.S. physical security experts during a classified physical protection bilateral visit with the U.K. The U.S. team determined that this transport method meets the requirements of INFCIRC/225/Rev. 4.

2001, and that the SA does not address the significantly changed circumstances in the post-September 11 environment.¹⁸

The Commission has thoroughly reviewed Petitioners' arguments regarding DOE's NEPA review and finds no basis for ordering a hearing. NRC case law does not require a NEPA-based review of terrorism¹⁹; however, DOE of course has discretion to review terrorism in the NEPA context. Here DOE did evaluate, among other things, sabotage and terrorism in the PEIS and EIS, as well as in the November 2003 SA, and determined that while "the likelihood of an attempted act of sabotage or terrorism occurring is not precisely knowable, the chance of success of any such attempt was judged to be very low, particularly in light of the transport methods . . . which are designed specifically to afford security against sabotage or terrorism, as well as safety in the event of an accident." SA at 23. Contrary to Petitioners' assertion, DOE has taken a "hard look" at sabotage and terrorism and determined that adequate safeguards remain in place to meet such threats in the post-September 11 environment. *Id.* at 23-24. To conduct the type of NEPA review on terrorism that Petitioners are seeking would not be in the public interest and would be incompatible with NEPA's public participation process:

In the wake of September 11, an overriding government priority is to avoid disclosing to terrorists themselves precisely where and how nuclear facilities might be most vulnerable and what steps are being taken to lessen terrorists' chance of success. Yet it would not be possible to embark upon a meaningful NEPA review of any type without engaging in such subjects. NEPA does not override our concern for making sure that sensitive security-related information ends up in as few hands as practicable.

Private Fuel Storage, CLI-02-25, 56 NRC at 347.

In short, DOE has already conducted a thorough terrorism analysis in the NEPA context; this analysis, while useful, is not required by NEPA.²⁰ Therefore,

¹⁸ Specifically, Petitioners desire the NEPA review to address the following issues:

- (a) sending plutonium across the ocean in vessels with "questionable" security measures, (b) to a country whose measures for safeguarding are shrouded in secrecy, (c) under international security standards that are "grossly outdated."

¹⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002). Recently, the Commission's position has been challenged in the federal courts. See *San Luis Obispo Mothers for Peace v. NRC*, No. 03-74628 (9th Cir. filed Dec. 19, 2003).

²⁰ The purpose of a NEPA analysis "is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about 'worst-case' scenarios and how to prevent them." *Private Fuel Storage*, CLI-02-25, 56 NRC at 347. See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002); *Duke Cogema* (Continued)

the Commission does not find that hearing is warranted for additional NEPA review on terrorism as requested by Petitioners.

IV. THE STATUTORY DETERMINATIONS

A. Section 127 Criteria

In order to grant an export license to a nuclear-weapons state such as France, the Commission must determine that the nonproliferation criteria set forth in section 127 of the AEA have been met. The Petitioners contend that the criterion under section 127(3), requiring “adequate physical security measures” in recipient countries, cannot be met.

Section 127(3) provides that “[f]ollowing the effective date of [Commission regulations promulgated pursuant to section 304(d) of the NNPA], physical security measures shall be deemed adequate if such measures provide a level of protection equivalent to that required by the applicable regulations.” Section 304(d), in turn, directs the Commission, in consultation with DOE and the Departments of State and Defense, to promulgate “regulations establishing the levels of physical security which in its judgment are no less strict than those established by any international guidelines to which the United States subscribes and which in its judgment will provide adequate protection for facilities and material referred to in [section 127(3) of the AEA] taking into consideration variations in risks to security as appropriate.” In accordance with NNPA § 304(d), the Commission’s regulation in 10 C.F.R. § 110.44(a), which was promulgated in consultation with the specified Executive Branch agencies, references the international guideline regarding physical security to which the U.S. subscribes, i.e., “the current version of IAEA publication INFCIRC/225/Rev. 4 (corrected).” That regulation requires that physical security measures in recipient countries must provide a level of protection at least comparable to the recommendations in IAEA INFCIRC/225/Rev. 4. Therefore, by definition, the physical security measures of a recipient foreign country of a U.S.-origin export “shall be deemed adequate” within the meaning of section 127(3) if such measures provide a level of protection at least comparable to that required by INFCIRC/225/Rev. 4. Pursuant to 10 C.F.R. § 110.44(b), “Commission determinations on the adequacy of physical security measures are based on — (1) [r]eceipt of written assurances from recipient countries that physical security measures provide protection at least comparable to the recommendations set forth in INFCIRC/225/Rev. 4 (corrected);

Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 338-39 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367, 371 (2002); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 7 (2003).

(2) [i]nformation obtained through country visits, information exchanges, or other sources. Such determinations are made on a countrywide basis and are subject to continuing review. . . .”

The Commission has determined that France’s physical security system provides protection at least comparable to INFCIRC/225/Rev. 4, the current international standard. The existing U.S.-EURATOM Agreement for Cooperation pursuant to section 123 of the AEA reflects a reciprocal obligation by all EURATOM countries, including France, to protect U.S.-origin material under terms and conditions that track all of the section 127 criteria. Regarding physical security measures, article 11.2 of the U.S.-EURATOM Agreement reflects a commitment by EURATOM countries to provide physical security at levels that satisfy the criteria recommended by the IAEA in its most recent INFCIRC 225 publication. By letter dated December 15, 2003, EURATOM has confirmed that the proposed export will be protected by France under all of the terms and conditions of the U.S.-EURATOM Agreement, including the condition regarding physical security. In a letter dated January 9, 2004, the Department of State transmitted the views of the Executive Branch that all of the criteria in section 127 of the AEA have been met. The Commission also received additional information regarding France’s physical security system in a recent classified briefing of the NRC Staff by the Executive Branch. We also note that France has adopted the Nuclear Supplier Group Guidelines and is a member of the Exporters Committee of parties to the Treaty on the Non-Proliferation of Nuclear Weapons (“Zangger Committee”). Accordingly, we find that the criterion under section 127(3) for “adequate” physical security has been satisfied. On the basis of this record, we find that the non-proliferation criteria under sections 127(1), (2), (4), (5), and (6) have also been met.²¹

B. Noninimicality Finding

In addition to finding that the recipient country will satisfy the nonproliferation criteria in section 127, the Commission must also determine pursuant to section 57c(2) of the AEA that a proposed export will not be “inimical to the common defense and security” of the United States. As we understand it, the crux of the Petitioners’ position is that, even if the AEA § 127 criteria are satisfied, the proposed export will nonetheless be inimical to the common defense and security because the “international guidelines [on physical security] to which the United States subscribes,” i.e., IAEA INFCIRC/225/Rev. 4, do not provide “adequate protection” from a physical security standpoint within the meaning of NNPA § 304(d), and France has not imposed additional physical security measures

²¹ These criteria are not the subject of the Petitioners’ intervention and hearing request.

exceeding IAEA INFCIRC/225/Rev. 4 that are sufficient to guard against terrorist attacks.

As noted in *Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1363 (D.C. Cir. 1981) (*NRDC*), the legislative history of the NNPA indicates that, in the absence of “unusual circumstances,” the Commission “need not look beyond the non-proliferation safeguards [in section 127 for nuclear-weapons states] in determining whether the common defense and security standard is met.” In its letter transmitting the views of the Executive Branch to the Commission, the Department of State found that the proposed export would not be inimical to the U.S. common defense and security. In reaching its noninimicality conclusion, the Department of State, as required by section 133 of the AEA, consulted with the Department of Defense to confirm that physical protection measures will be adequate to deter theft, sabotage, and other acts of international terrorism that would result in the diversion of the material during the export or transfer. Thus, the Executive Branch has concluded that there are no “unusual circumstances” regarding the proposed export that would render the export “inimical” to the common defense and security notwithstanding that the section 127 criteria have been satisfied. The Executive Branch’s noninimicality determinations involve “strategic judgments” and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions. *NRDC*, 647 F.2d at 1363; *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 77 (2000).

We emphasize that we must necessarily balance our statutory role in export licensing with the conduct of United States foreign relations, which is the responsibility of the Executive Branch. As Judge Wilkey noted in *NRDC*,

Responsibility . . . rests finally in the executive branch to ensure achievement of the nation’s foreign policy goal to defeat nuclear proliferation. The Commission’s task is complementary.

657 F.2d at 1358. We view this particular export application within the context of a major U.S. foreign policy objective — the defeat of nuclear proliferation on a global basis. It is significant that the proposed export is not commercial in nature but integral to fulfilling U.S. obligations under the U.S.-Russian Agreement in a timely manner. DOE explains that there could be serious consequences to effectively carrying out the agreement if the proposed export were denied or delayed, including a 3- to 4-year delay in the removal of the equivalent of approximately 1000 nuclear weapons per year from the inventory of surplus weapons-grade plutonium (DOE Response at 25; Declaration of Linton F. Brooks at 2; Declaration of Edward J. Siskin at 2). Such a delay would hinder U.S. efforts to encourage the Russian Federation to design and construct a Russian MOX fuel

fabrication facility (DOE Response at 25-26; Declaration of Linton F. Brooks at 2; Declaration of Edward J. Siskin at 2), and potentially stall U.S. efforts to obtain international funding for the Russian program. DOE Response at 25-26; Declaration of Linton F. Brooks at 3; Declaration of Edward J. Siskin at 3. DOE also notes that failure or delay in implementing the U.S.-Russian Agreement could adversely affect the U.S.'s ability to negotiate and implement future agreements related to nonproliferation. In sum, we believe that in the circumstances of this export application, there would be a serious risk of "unduly impeding the conduct of United States foreign relations" (*NRDC*, 647 F.2d at 1358) in the area of nuclear nonproliferation were we not to defer to the Executive Branch's foreign policy and national security conclusions.

Petitioners' latest filing, received by the Commission on March 26, 2004, indicates that a primary concern of Petitioners with respect to French physical security is in the transportation of the plutonium oxide within France. Petitioners, through the declaration of their "witness" John H. Large, indicated that the French government has released information that shows that the FS47 transportation package (which will be used to transport the plutonium oxide) failed explosive tests designed to simulate terrorist attacks (i.e., radiological sabotage).

The NRC views actions as being inimical to the common defense and security where there is an unacceptable likelihood of grave or exceptionally grave damage to the United States. Thus, the NRC's principal concern once fissile nuclear materials have left the United States is the possibility of theft. For this specific export application, the potential for grave damage to the U.S. arises from the theft of sufficient plutonium oxide during transportation or at the French fabrication facility, incorporation of the material into an improvised nuclear device (IND), i.e., a weapon of mass destruction, transportation of the IND to the U.S., and detonation of the IND within the U.S. Petitioners' concerns regarding the possibility of a tunnel fire or an act of radiological sabotage to disperse the plutonium oxide in France, while no doubt important to the French government and considered by that government in establishing transportation security arrangements, do not raise issues relating to the theft of the exported plutonium oxide, incorporation of the plutonium oxide into an IND, transportation of the IND to the U.S., and detonation of the IND within the U.S.²²

²² Although not relevant to the inimicality determination, Petitioners have argued that the FS47 transportation package is vulnerable to a tunnel fire. The FS47 package is currently certified by competent authorities of France to meet the Type B fissile standards of IAEA standard TS-R-1, "Regulations for the Safe Transport of Radioactive Material," 1996 Edition. The Department of Transportation has requested NRC technical assistance concerning the ability of the design to meet TS-R-1 for purposes of the U.S. revalidation of the package for use in the transportation associated with U.S. imports and exports.

As noted, Petitioners, through the declarations of their “witnesses,” have repeatedly maintained in their various filings that the Commission cannot find France’s physical security to be adequate even if it meets the standard of INFCIRC/225/Rev. 4 because that standard is outdated after the events of 9/11. This is the basis for their request for a waiver of 10 C.F.R. § 110.44. However, Petitioners have failed to take into account that, under section 8 of INFCIRC/225/Rev. 4, states transporting special nuclear material are obligated to have emergency procedures to effectively counter the state’s design basis threat. Moreover, under section 4 of INFCIRC/225/Rev. 4, states are obligated to continuously review the design basis threat and evaluate the implications of any changes in that threat for the levels and methods of physical protection. As we concluded above, France, through the U.S.-EURATOM Agreement as well as the case-specific EURATOM assurance letter of December 15, 2003, has unquestionably committed to meeting the standards embodied in INFCIRC/225/Rev. 4. Accordingly, we do not find that special circumstances exist that would result in the rule not serving the purposes for which it was adopted. *See* 10 C.F.R. § 110.111.

Finally, France, a member of EURATOM, has a long and solid history of commitment to nuclear nonproliferation, including reciprocal cooperation with the U.S. under the U.S.-EURATOM Agreement for Cooperation with respect to physical security and safeguards. As a nuclear weapons state, France has a long history of securing nuclear-weapons-grade material. In addition to its nuclear weapons program, France has for many years reprocessed spent nuclear fuel and transported plutonium separated through that process to Japan and other countries. Thus, France has substantial experience in protecting facilities where weapons-grade material is present and transporting that material both within France and internationally. This experience, along with France’s assurances, the great weight given to Executive Branch views, and information obtained in a classified briefing of the NRC Staff by the Executive Branch, allows the Commission to conclude that French physical security arrangements will be adequate in the current environment.

V. CONCLUSION AND ISSUANCE OF THE LICENSE

For the reasons stated above, we find that (1) Petitioners have not demonstrated standing, (2) a hearing in this matter would not be in the public interest and assist us in making the statutory determinations, and (3) Petitioners’ substantive arguments are without merit. Accordingly, Petitioners’ petition to intervene and request for hearing are denied.

The Commission has determined that the export licensing criteria set forth in section 127 of the AEA have been met and that issuance of this license would not be inimical to the common defense and security of the United States or constitute

an unreasonable risk to the health and safety of the public. Accordingly, we deny Petitioners' request for waiver of the regulations and direct the Office of International Programs to issue license XSNM03327 to the Department of Energy for the export of up to 140 kg of plutonium oxide.

IT IS SO ORDERED.

For the Commission

KENNETH R. HART
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of June 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. 50-346-CO
(ASLBP No. 04-825-01-CO)

**FIRSTENERGY NUCLEAR
OPERATING COMPANY**
**(Davis-Besse Nuclear Power
Station, Unit 1)**

June 2, 2004

In response to a request for a hearing from several individuals and an organization challenging the NRC Staff's March 8, 2004 confirmatory order modifying the 10 C.F.R. Part 50 operating license of FirstEnergy Nuclear Operating Co. (FENOC) for the Davis-Besse Nuclear Power Station, Unit 1, to require several facility safety changes to address performance deficiencies relating to the March 2002 discovery of a corrosion-induced cavity in the reactor pressure vessel head, the Licensing Board concludes the Petitioners, lacking standing and an admissible contention, have failed to establish their right to intervene in accord with 10 C.F.R. § 2.309 so that their hearing request must be denied.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENTS)

A petitioner seeking to obtain a hearing has the burden of demonstrating that he or she has standing and has proffered at least one admissible contention. In this

regard, and particularly in connection with a Staff enforcement order, an initial question a licensing board must confront is whether a hearing request falls within scope of the proceeding as defined by that order.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING

It is well established that the Commission has the authority to define the scope of a proceeding. *See Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). This authority includes limiting a proceeding regarding an enforcement order narrowly to the issue of whether the order should be sustained. *See Bellotti*, 725 F.2d at 1382.

ENFORCEMENT ACTIONS: STANDING TO INTERVENE

RULES OF PRACTICE: STANDING TO INTERVENE

While proximity to a plant might be sufficient to establish standing in a reactor operating license proceeding, the scope of litigable concerns in those proceedings is much broader than an enforcement order proceeding. If a petitioner has made no effort in the context of a confirmatory order to establish how the order's corrective measures cause it any harm whatsoever, under the scope of the proceeding as defined in the confirmatory order, the petitioner has failed to establish the requisite injury-in-fact. *See Maine Yankee*, CLI-04-5, 59 NRC at 56 n.14 (person whose interest cannot be affected by the issues before the Commission in a proceeding lacks essential element of standing).

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

If a challenge to a confirmatory order is limited by its terms to whether the order should be sustained, any issues a petitioner seeks to litigate would fall within the scope of the proceeding only if they amount to matters that oppose the issuance of the order as unwarranted, so as to require relaxation, or affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

In the context of agency enforcement proceedings, a “whether the order should be sustained” limitation on the scope of any hearing is intended to address a serious concern about whether members of the public can be afforded the opportunity to litigate before the Commission “any and all issues that occur to them without demolishing the regulatory process,” *Bellotti*, 725 F.2d at 1382.

**ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS
(AVAILABILITY OF 10 C.F.R. § 2.206 PROCESS TO OBTAIN
RELIEF)**

Commission regulations provide for public requests to modify a license. If a petitioner believes the NRC should take action to address a matter or impose other enforcement sanctions, he or she can file a petition pursuant to 10 C.F.R. § 2.206. The NRC provides this procedure for any interested person who wants some action taken beyond those adopted by the Staff in the exercise of its enforcement discretion. *See Marble Hill*, CLI-80-10, 11 NRC at 442. Such petitions could lead to a license modification proceeding if the agency finds it appropriate.

**MEMORANDUM AND ORDER
(Denying Intervention Petition)**

Pending before the Licensing Board is a request for a hearing filed by individual Petitioners Michael Keegan, Joanne DiRando, Donna Lueke, and the organization Nuclear Information and Resource Service (NIRS) (collectively Petitioners) challenging the NRC Staff’s March 8, 2004 immediately effective confirmatory order modifying the 10 C.F.R. Part 50 operating license of the Davis-Besse Nuclear Power Station, Unit 1. With that order, Davis-Besse Licensee FirstEnergy Nuclear Operating Company (FENOC) is required to make several safety changes at the facility to address performance deficiencies relating to the March 2002 discovery of a corrosion-induced cavity in the reactor pressure vessel (RPV) head.

Both FENOC and the Staff have provided responses opposing the Petitioners’ hearing request. As we explain herein, having sought to litigate matters that fall outside the scope of this proceeding, the Petitioners have failed to establish their right to intervene in accord with 10 C.F.R. § 2.309. We thus deny their hearing petition.

I. BACKGROUND

FENOC owns and operates Davis-Besse Unit 1, a nuclear power station located in Ottawa County, Ohio. On March 6, 2002, during a routine refueling outage, FENOC discovered that small cracks in a nozzle that penetrates the RPV had caused reactor coolant containing boric acid to leak onto the RPV head. This long-term leakage had, in turn, created a cavity in the RPV head. *See* 69 Fed. Reg. 12,357, 12,357 (Mar. 16, 2004). The Staff subsequently determined that the leak was caused, among other things, by FENOC's failure properly to implement boric acid corrosion control and corrective action programs. *See id.*

Because of the safety significance of the performance deficiencies, a number of corrective actions were taken by FENOC and the Staff before the plant was permitted to restart. In this regard, the Staff issued a March 13, 2002 confirmatory action letter (CAL) that detailed actions FENOC had to implement before the plant could reopen. Also, beginning in May 2002 the Staff put in place an oversight panel to provide enhanced facility monitoring during shutdown and during and after any future restart until a determination was made that a return to normal NRC facility oversight was warranted. For its part, FENOC developed and submitted a May 21, 2002 return-to-service plan that described FENOC's actions for a safe and reliable return to service, while on August 16, 2002, the Staff oversight panel established a restart checklist outlining the essential issues necessary to resolve the causes of the RPV head degradation so that FENOC could safely restart and operate the facility. Further, on November 23, 2003, FENOC submitted an operational improvement plan intended to ensure that implemented improvements continued after the plant reopened, including requiring that FENOC conduct regular refueling outage inspections for leakage from or above the RPV head. *See id.* at 12,358-59.

In issuing the March 2004 confirmatory order at issue in this proceeding, the Staff declared that, notwithstanding the corrective actions taken by FENOC to address the Staff's CAL and restart checklist and the actions that are planned by FENOC in its operational improvement plan, additional measures are necessary to improve FENOC's ability to self-assess plant problems, which the Staff denoted as an essential element in preventing a recurrence of a safety-related event such as the RPV head degradation incident. To this end, that order modifies the FENOC operating license for Davis-Besse to require two additional actions. First, FENOC must obtain comprehensive independent outside assessments of the facility's operational performance, organizational safety culture (including safety-conscious work environment), corrective action program implementation, and engineering program effectiveness. Second, FENOC must conduct a visual examination of the RPV upper head during the next (Cycle 14) midcycle outage and report the results to the Staff before restart from the outage. *See id.* at

12,359-60. With this immediately effective confirmatory order in place, the Staff approved the restart of Davis-Besse on March 8, 2004.

Among its procedural provisions, the confirmatory order states that “[a]ny person adversely affected by this [order], other than the licensee, may request a hearing within 20 days of its issuance.” *Id.* at 12,360. The order also declares that “[i]f a hearing is held, the issue to be considered at such a hearing shall be whether this Confirmatory Order should be sustained.” *Id.* Pursuant to the order, on March 29, 2004, the Petitioners filed a hearing request. *See* Objections to Confirmatory Order Modifying License (Mar. 29, 2004) [hereinafter Hearing Petition]. In their intervention request, the Petitioners ask that the agency (1) hold an evidentiary hearing on fire-protection issues, (2) suspend FENOC’s 10 C.F.R. Part 50 operating license and halt the restart of Davis-Besse because of the NRC’s alleged “regulatory indifference,” and (3) require FENOC to satisfy all licensing criteria before allowing the commercial generation of electricity at Davis-Besse. *See* Hearing Petition at 3-11. Both FENOC and the Staff filed responses asserting the hearing request should be denied. *See* [FENOC] Answer to Objections to Confirmatory Order and Request for Hearing (Apr. 23, 2004) at 1-2 [hereinafter FENOC Response]; NRC Staff Response to Objections to Confirmatory Order Modifying License (Apr. 23, 2004) at 1 [hereinafter Staff Response]. Subsequently, the Petitioners filed additional declarations in support of their standing claims, *see* Notice of Filing of Declarations in Support of Petitioners’ Standing To Sue (Apr. 29, 2004) [hereinafter Support Declarations], and a reply to the NRC and FENOC answers, *see* Petitioners’ Combined Reply in Opposition to “NRC Staff Response to Objections” and FENOC’s “Answer to Objections” (May 13, 2004) [hereinafter Petitioners’ Reply].

III. ANALYSIS

Under section 2.309(d), (f) of the Commission’s recently amended rules of practice,¹ a petitioner seeking to obtain a hearing has the burden of demonstrating that he or she has standing and has proffered at least one admissible contention. In this regard, and particularly in connection with a Staff enforcement order such as the one at issue in this proceeding, an initial question a licensing board must confront is whether a hearing request falls within scope of the proceeding as defined by that order.

It is well established that the Commission has the authority to define the scope of a proceeding. *See Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44

¹ The new rules, which became effective February 13, 2004, apply to this proceeding. *See* 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

(1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). This authority includes limiting a proceeding regarding an enforcement order narrowly to the issue of whether the order should be sustained. *See Bellotti*, 725 F.2d at 1382.

In *Bellotti*, the United States Court of Appeals for the District of Columbia Circuit was asked to review a Commission decision denying the request of the Attorney General of the Commonwealth of Massachusetts (Attorney General) for a hearing on a Staff enforcement order issued in connection with a nuclear power plant in his state. The order there in question modified the facility license to require, among other things, a plan for reappraisal and improvement of management functions. *See id.* at 1381. Seeking to intervene to challenge the plant's continued operation, the adequacy of the reappraisal plan, the nature of the necessary improvements, and the adequacy of the plant's implementation of necessary changes, the Attorney General argued that he was entitled to a hearing under the language of Atomic Energy Act § 189(a) providing an adjudicatory forum for "any person whose interest that may be affected by the proceeding." *Id.* (quoting 42 U.S.C. § 2239(a)). In upholding the Commission's decision not to grant the Attorney General's hearing request, the *Bellotti* court determined that the Commission was not arbitrary in limiting the scope of the proceeding to whether the enforcement order should be upheld. Moreover, given that the Attorney General was seeking to litigate whether other, additional corrective measures were needed, the court concluded that such matters fell outside the ambit of the proceeding as lawfully defined by the Commission — i.e., whether the order should be sustained — so that the Commission was correct in denying his intervention request. *See id.* at 1382-83.

Bellotti clearly remains the controlling precedent in this context. Recently, using the *Bellotti* analysis, the Commission in the *Maine Yankee* proceeding considered a Licensing Board decision denying the petition of the State of Maine (State) for a hearing on an order modifying a license to store spent nuclear fuel at a Maine reactor site by imposing additional security measures. The agency order likewise limited any hearing requested by an interested person to whether the order should be sustained. The State argued that *Bellotti* did not preclude its intervention in that it opposed the order because it wanted provisions added that would allow it to better evaluate the financial and environmental impacts of the order's security provisions on the State. *See Maine Yankee*, CLI-04-5, 59 NRC at 55. The Commission disagreed with the State's analysis, reasoning that the State did not substantially oppose the order, but rather sought "additional measures." *Id.* at 57. The Commission explained that the State did not really oppose the order in that it did not disagree with the order's security provisions (i.e., did not assert they were unwarranted or should be relaxed), but rather was seeking to add

measures to the order. The Commission thus upheld the Board's conclusion that a petition seeking to add to an existing enforcement order effectively falls outside the scope of the proceeding as defined in the order. *See id.* at 57-58, 60-61.

As was noted earlier, the Staff's March 2004 confirmatory order limits the scope of any hearing to whether the order should be sustained. *See* 69 Fed. Reg. at 12,360. As *Bellotti* and the Commission's recent *Maine Yankee* decision suggest, this limitation affects both who has standing to be admitted as an intervenor and what contentions may be litigated. In connection with their standing, the individual Petitioners in this case, who declare they live as close as 19 miles to the Davis-Besse nuclear power station, and organizational Petitioner NIRS, which seeks to establish its representational standing based on the membership of an individual living within 25 miles of the facility, allege general concerns for public and private welfare and the possibility of illness or death in the event of an accident involving a radiation release. *See* Hearing Petition at 1-3; *see generally* Support Declarations, attachs. While such proximity to a plant might be sufficient to establish standing in a reactor operating license proceeding, the scope of litigable concerns in those proceedings is much broader than the current proceeding. Relative to the Staff's March 2004 enforcement order, as defined by that order the only matters at issue are the two measures intended to improve FENOC's self-assessment efforts. The Petitioners, who do not address the *Bellotti* precedent in either their petition or their reply filing despite extensive discussions in both the FENOC and the Staff responses to their petition, *see* FENOC Response at 5-8, Staff Response at 4-6, have made no effort in the context of the confirmatory order to establish how the order's corrective measures cause them any harm whatsoever. Thus, under the scope of this proceeding as defined in the confirmatory order, the Petitioners have failed to establish the requisite injury-in-fact. *See Maine Yankee*, CLI-04-5, 59 NRC at 56 n.14 (person whose interest cannot be affected by the issues before the Commission in a proceeding lacks essential element of standing).

By the same token, the Petitioners also fail to proffer any admissible contentions. Because the March 2004 confirmatory order limited any challenges to its terms to whether it should be sustained, any issues the Petitioners seek to litigate would fall within the scope of the proceeding only if they amount to matters that oppose the issuance of the order as unwarranted, so as to require relaxation, or affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation). Upon examination, the Petitioners' arguments clearly do not oppose the issuance of the order, but rather seek to add additional safety measures or sanctions that ultimately fall outside the scope of this proceeding.

In this regard, the Petitioners' first argument that the plant has inadequate fire protection and the public must have an "opportunity to examine and question the adequacy of fire protection at Davis-Besse within the context of a public

license amendment proceeding,’’ Hearing Petition at 7, is outside the scope of the order given that the order does not discuss fire protection. The Petitioners argue that fire safety nonetheless is an admissible matter because the Davis-Besse oversight panel considered fire safety, thus making it a matter relevant to restart. *See* Petitioners’ Reply at 4-5. As the *Bellotti* court noted, however, in the context of agency enforcement proceedings a “whether the order should be sustained” limitation on the scope of any hearing is intended to address a serious concern about whether members of the public can be afforded the opportunity to litigate before the Commission “any and all issues that occur to them without demolishing the regulatory process.” 725 F.2d at 1382. The same is true regarding the Petitioners’ arguments that (1) the Board should suspend FENOC’s operating license and halt the restart of Davis-Besse based on NRC’s “regulatory indifference” and a pervasive problem of unresolved safety issues, including NRC “indifference to completion of analysis” before allowing restart,² *see* Hearing Petition at 7-8, 11; Petitioners Reply at 18; and (2) NRC has not imposed civil sanctions against FENOC, consequently minimizing the possibility that a criminal indictment will be made against the company, so that the Board should not allow FENOC to operate Davis-Besse for the commercial generation of electricity until FENOC has satisfied all licensing criteria and a grand jury has made its report and imposed sanctions, *see* Hearing Petition at 8, 10-11; Petitioners’ Reply at 20.

This is not to say the Petitioners are without recourse relative to these matters. Commission regulations provide for public requests to modify a license. If the Petitioners believe the NRC should take action to address fire safety matters or impose other enforcement sanctions, they can file a petition pursuant to 10 C.F.R. § 2.206. The NRC provides this procedure for any interested person who wants some action taken beyond those adopted by the Staff in the exercise of its enforcement discretion. *See Marble Hill*, CLI-80-10, 11 NRC at 442. Such petitions could lead to a license modification proceeding if the agency finds it appropriate.³

²The Petitioners’ argument that FENOC’s operating license should be suspended based upon perceived Staff inaction not only fails to address whether the March 2004 confirmatory order should be sustained, but also is outside the scope of the proceeding in light of the longstanding principle in NRC adjudications that issues concerning the conduct of the Staff as it carries out its regulatory functions are outside the purview of a licensing board. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 & n.23 (2004).

³The Petitioners note that NIRS, along with Greenpeace and the Union of Concerned Scientists, filed a section 2.206 petition in October 2003. *See* Petitioners’ Reply at 15-16. Subsequent to their intervention request regarding the Staff’s confirmatory order, the section 2.206 petition was denied

(Continued)

III. CONCLUSION

As it seeks to challenge the Staff's March 2004 confirmatory order on grounds that go beyond the scope of that order, i.e., based on concerns that various additional measures are necessary to make the Davis-Besse facility safer prior to and following its restart, we conclude the Petitioners' intervention request is not cognizable in this proceeding and must be denied.

For the foregoing reasons, it is, this second day of June 2004, ORDERED that:

1. The March 29, 2004 intervention petition of Michael Keegan, Joanne DiRando, Donna Lueke, and NIRS is *denied* and this proceeding is terminated.

2. In accord with the provisions of 10 C.F.R. §2.311, as it rules upon an intervention petition, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 2, 2004

by the Director of the NRC's Office of Nuclear Reactor Regulation. *See* DD-04-1, 59 NRC 215 (2004). Although the Petitioners argue that this director's decision is not adjudicatory in nature so that it cannot have res judicata or collateral estoppel effect to bar the admissibility of the Petitioners' contentions, *see* Petitioners' Reply at 17, this assumes that the matters they wish to have addressed in this proceeding are litigable here, which we have concluded they are not.

⁴Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) the Petitioners, (2) FENOC, and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)

DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)

June 10, 2004

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.-Russian Federation plutonium disposition program, the Licensing Board rules that Intervenor may utilize certain additional information in the litigation of a contention admitted in LBP-04-10, 59 NRC 296 (2004).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Under certain case law cited in the decision, when determining for any reason the scope of a contention, one looks not only to the contention itself but also to the basis or bases provided for the contention, which clarify the “reach” and “focus” of a contention by establishing a sort of “envelope” within which information will be considered to be within such “reach” or “focus” and therefore relevant in litigation of the contention. Thus, even if information is not specifically stated in the original contention and bases, it will be relevant if it falls within the

“envelope,” “reach,” or “focus” of the contention when read with the original bases offered for it, but if it falls outside such ambit, then it will not be considered relevant, unless an amended contention concerning the information in question has been filed and admitted.

RULES OF PRACTICE: CONTENTIONS (AMENDMENT)

Although Intervenor styled its filing an “Amended Contention,” the filing in effect provided additional specific information falling within the ambit of an earlier-admitted contention, and is thus not really an “amendment”; accordingly, parties will be permitted to seek discovery on the new information, as well as present evidence on it at the hearing on the original contention.

MEMORANDUM AND ORDER (Ruling on BREDL “Amendments” to Security Contention 5)

On April 8, 2004, Blue Ridge Environmental Defense League (BREDL), which has already been admitted as an Intervenor in this proceeding,¹ filed a document entitled [BREDL]’s Amended Contentions on Duke’s Security Plan Submittal (April 8, 2004) [hereinafter BREDL April 8, 2004, Filing]. BREDL filed the document in accordance with a protective order issued December 15, 2003, designating it as “Confidential [because it] May Contain Safeguards Information.” BREDL Cover Letter and April 8, 2004, Filing. In its filing BREDL submits certain additional information as bases in support of its previously filed and admitted security-related Contention 5. *Id.*; see LBP-04-10, 59 NRC at 336-52. Duke Energy Corporation and the NRC Staff filed responses to this document on April 19 and 26, 2004, respectively. Answer of Duke Energy Corporation to the “[BREDL]’s Amended Contentions on Duke’s Security Plan Submittal” (April 19, 2004) (sealed as Safeguards Information) [hereinafter Duke Response];

¹This proceeding involves Duke’s February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies (LTAs) at the station. By Memorandum and Order dated March 5, 2004, Petitioner Blue Ridge Environmental Defense League (BREDL) was admitted as a party in the proceeding, after having filed a petition to intervene and request for hearing in response to a July 2003 *Federal Register* notice concerning this application. See LBP-04-4, 59 NRC 129 (2004); 68 Fed. Reg. 44,107 (July 25, 2003). Additional background on this proceeding is provided in LBP-04-4; LBP-04-7, 59 NRC 259 (2004); and LBP-04-10, 59 NRC 296 (2004), the last of which is a public, redacted version of an April 12, 2004, Memorandum and Order that originally was issued nonpublicly because it contained Safeguards Information. BREDL’s new filing proposes amendments to the one contention admitted by the Licensing Board in LBP-04-10.

[NRC] Staff's Response to [BREDL]'s Amended Contentions on Duke's Security Plan Submittal (April 26, 2004) [hereinafter Staff Response]. For the reasons set forth herein, we will permit BREDL to utilize the additional information provided in its April 8, 2004, filing in the litigation of Security Contention 5.

Duke formally opposes admission of the proposed amended bases to Contention 5 as untimely and otherwise inadmissible, posing many of the same arguments originally asserted against admission of Contention 5 itself. Duke Response at 1, 6-10; *see* LBP-04-10, 59 NRC at 343-48. Duke also, however, states among other things that while it "wishes to preserve its objection to the admission of these additional bases to Contention 5," it recognizes that the Licensing Board's previous admission of Contention 5 would, as the "law of the case," "seemingly result in the Licensing Board admitting the amended examples or bases contained in BREDL's . . . filing." Duke Response at 3-4.

The Staff does not oppose acceptance of BREDL's amended bases. Staff Response at 1. The Staff does, however, in response to certain questions raised by the Licensing Board Chair, cite certain NRC case law in support of its earlier oral argument that "the articulated bases of a contention define the scope of that contention." *Id.*, *see* Tr. 1719-21.² Although we do not view this case law as necessary for the decision herein in light of the above-stated positions of the Staff and Duke on the additional information provided by BREDL in its April 8, 2004, filing, we find that it provides clarification that is appropriate for us to note, in order to forestall any possible confusion in future stages of this proceeding, particularly as regards Contention 5.

The Staff first cites the Commission's statement that "[where] an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention." Staff Response at 1-2 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citations omitted)). In addition, the Staff cites a decision in which the then-extant Appeal Board observed that "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." Staff Response at 2 (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)). As noted by the Staff, the Appeal Board in *Seabrook* went on to state that "an intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses." Staff Response at 2 (quoting *Seabrook* at 97 n.11).

² We would note that, although BREDL's April 8, 2004, filing was discussed by the parties during an April 20, 2004, telephone conference, *see* Tr. 1714-22, all parties agreed that no formal oral argument was necessary, Tr. 1717, 1719, 1722, and therefore none was held.

In sum, under the preceding case law, when determining for any reason the scope of a contention, one looks not only to the contention itself but also to the basis or bases provided for the contention. The bases clarify the “reach” and “focus” of a contention, which may not be changed absent an appropriate amendment to a contention. In other words, the basis or bases originally offered in support of a contention, together with the issue(s) stated in the contention itself, establish a sort of “envelope” within which information will be considered to be within the “reach” or “focus” of a contention and therefore relevant in litigation of the contention. Thus, if in preparing for an evidentiary hearing on a contention, an intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would — even if not specifically stated in the original contention and bases — be relevant if it falls within the “envelope,” “reach,” or “focus” of the contention when read with the original bases offered for it.³ If it falls outside such ambit, then an amended contention would be necessary in order for the new information to be considered relevant and admissible.

BREDL in its “Amended Contention” has in effect really provided additional specific information, which we will not identify herein because it appears to us to constitute Safeguards Information, but which we find does fall within the ambit of its original Contention 5, as admitted in LBP-04-10. As such, in the Board’s estimation, it is not really an “amendment” at all. Nonetheless, we also note, relative to the late-filing standards in 10 C.F.R. § 2.714(a)(1), that the information submitted by BREDL in its “Amended Contention” was filed within 30 days of its receipt of certain information that Duke filed on March 1, 2004, in response to certain Staff requests for additional information (RAIs) that were issued on January 30, 2004. BREDL has also argued, persuasively, that its participation with regard to the new information can reasonably be expected to lead to the development of a sound record, that there are no other parties representing BREDL’s interest in this proceeding, and that inclusion of the new information will not unduly broaden the proceeding beyond the scope of the originally admitted Contention 5. BREDL April 8, 2004, Filing at 5.

Based upon the preceding analysis, we will permit BREDL to present evidence on the new information presented in its April 8, 2004, filing at the hearing on Contention 5, and will permit discovery by all parties on the information as well, in accordance with our previously defined schedule for the same.

³The same principles would apply to information that any party wished to submit as evidence in a proceeding, but we address herein only the issue before us, which concerns additional information submitted by an intervenor.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 10, 2004⁴

⁴Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Brian W. Sheron, Acting Director

In the Matter of

**Docket Nos. 50-247
50-286
(License Nos. DPR-26,
DPR-64)**

**ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3)**

June 18, 2004

The Petitioners requested that the Nuclear Regulatory Commission (NRC) issue an order to Entergy Nuclear Operations, Inc., the operator of Indian Point Nuclear Generating Units 2 and 3, to immediately shut down these plants until the containment sumps are modified to resolve Generic Safety Issue 191 (GSI-191). The Petitioners also requested as an alternative, should the NRC deny the request for an immediate shutdown, that the NRC issue an order to prevent plant restart following each plant's next refueling outage until such time that the containment sumps are modified to resolve GSI-191. The Petitioners stated that there was a lack of reasonable assurance that the containment sumps at Indian Point would be able to perform their function during a loss-of-coolant accident. The Petitioners' conclusion was based on their analysis of publicly available reports that were prepared for the NRC by the Los Alamos National Laboratory. The NRC-sponsored studies were performed in support of the NRC Staff's review of GSI-191.

The final Director's Decision on this petition was issued on June 18, 2004. In this Decision, the NRC Staff denied the Petitioners' request for an immediate plant shutdown because there is currently no basis to conclude that the plants are operating unsafely. The Staff noted that there are sources of safety margin in plant design, compensatory measures were taken to mitigate potential risks associated with the issue, and the occurrence of any accident, especially one that could potentially challenge the sump, is very unlikely. The NRC Staff also stated that,

consistent with the generic issue process, it is currently developing guidance to be used by individual plants to evaluate the potential for sump clogging. Although many plants have taken steps to further ensure adequate sump recirculation in the event of a loss-of-coolant accident, an NRC-approved methodology for evaluating each plant's sump performance is intended to (1) ensure that each plant evaluates the potential for debris clogging in a consistent manner based on state-of-the-art, Staff-approved methods and plant-specific information, and (2) provide the NRC with the technical basis for ensuring that any proposed solution adequately addresses the issue. If, at any time during the resolution of the generic issue, the NRC should determine that unsafe conditions exist at Indian Point or any other plant, immediate actions will be taken to ensure the continued health and safety of the public.

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

I. INTRODUCTION

By letter dated September 8, 2003, as supplemented by letters dated September 22 and October 29, 2003, Mr. Alex Matthiessen of Riverkeeper, Inc., and Mr. David Lochbaum of the Union of Concerned Scientists (collectively, the Petitioners) filed a petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.) section 2.206. The Petitioners requested:

1. That the Nuclear Regulatory Commission (NRC) take immediate enforcement action against Entergy Nuclear Operations, Inc. (Entergy), the Licensee for Indian Point Nuclear Generating Units 2 and 3 (IP2 and 3) in Buchanan, New York, by issuing an order requiring Entergy to immediately shut down IP2 and 3 and maintain the reactors shutdown until the containment sumps are modified to resolve Generic Safety Issue 191 (GSI-191).
2. As an alternative, should the NRC deny the above request to require IP2 and 3 to shut down immediately, that the NRC issue an order to prevent plant restart following each plant's next refueling outage until such time that the containment sumps are modified to resolve GSI-191. If this alternative is chosen, the Petitioners further requested a requirement to be included within the order for Entergy to (a) maintain all equipment needed for monitoring leakage of reactor coolant pressure boundary components within containment fully functional and immediately shut down the affected reactor upon any functional impairment to leakage monitoring equipment, and (b) refrain from any activity under 10 C.F.R.

§ 50.59, 10 C.F.R. § 50.90, section VII.C of the NRC's Enforcement Policy, or Generic Letter 91-18, Revision 1, that increases or could increase the probability of a loss-of-coolant accident (LOCA).

The Petitioners stated that the basis for both of the requested enforcement actions in the petition is a lack of reasonable assurance that the IP2 and 3 containment sumps will be able to perform their function during a LOCA. Their conclusions regarding the containment sumps are based on their analysis of publicly available reports that were prepared for the NRC by the Los Alamos National Laboratory (LANL). Specifically, LANL's findings are documented in the following reports:

1. NUREG/CR-6762, Volume I, "GSI-191 Technical Assessment: Parametric Evaluations for Pressurized Water Reactor [PWR] Recirculation Sump Performance" (hereafter referred to as the Parametric Study), dated August 2001.
2. NUREG/CR-6771, "The Impact of Debris Induced Loss of ECCS [Emergency Core Cooling System] Recirculation on PWR Core Damage Frequency," dated August 2001.
3. LANL Report LA-UR-02-7562, "The Impact of Recovery from Debris-Induced Loss of ECCS Recirculation on PWR Core Damage Frequency," dated February 2003.

These documents are cited in the petition as the primary basis for the request to shut down IP2 and 3. The Petitioners further stated that the requested enforcement actions are appropriate based on precedents, including NRC actions taken at the Donald C. Cook and Davis-Besse Nuclear Power Plants in late 1997 and early 2002, respectively.

The Petitioners met with the Office of Nuclear Reactor Regulation's Petition Review Board (PRB) by teleconference on September 24, 2003, to discuss the petition and provide additional details in support of this request. This meeting was transcribed, and the transcript is publicly available as a supplement to the petition.

In letters dated October 15, 2003, and January 20, 2004, Entergy provided information related to the petition. This information was considered by the Staff in its evaluation of the petition.

By letter dated October 22, 2003, the NRC informed the Petitioners that their request for the NRC to issue an order to immediately shut down IP2 and 3 was denied because there is currently no basis to conclude that IP2 and 3 are operating unsafely. The Staff noted that there are sources of safety margin in plant design, compensatory measures were taken to mitigate potential risks associated with the issue, and the occurrence of any accident, especially one that could potentially

challenge the sump, is very unlikely. The issues in the petition were referred to the Office of Nuclear Reactor Regulation for appropriate action.

The NRC sent a copy of the Proposed Director's Decision to the Petitioners and to Entergy for comment on February 19, 2004. The Petitioners responded with comments on March 30, 2004. The Staff did not receive any comments on the Proposed Director's Decision from Entergy. The Petitioners' comments and the NRC Staff's response to them are included with the Director's Decision.

II. DISCUSSION

The potential for sump clogging in PWRs is an issue that is currently being evaluated by the NRC through the NRC's Generic Issue Program. The Petitioners used NRC-sponsored studies that were performed in support of the Staff's review of GSI-191 to formulate the basis for their requested enforcement actions. Specifically, the Petitioners stated their belief that the requested enforcement actions are appropriate because:

1. There is insufficient assurance against containment sump failure and consequential impairment of the reactor core and containment cooling function; and
2. The public around Indian Point would be subjected to unnecessarily high risk until GSI-191 is resolved for IP2 and 3.

The Petitioners reached these conclusions by considering the Parametric Study and the associated risk study documented in NUREG/CR-6771. As noted above, the NRC denied the Petitioners' request for immediate shutdown of IP2 and 3. The NRC Staff has evaluated the alternative actions requested by the Petitioners, and the basis for the requested actions, as follows:

1. **Differences Between the Parametric Study and Actual Plants:** The Parametric Study does not raise sufficient concerns regarding plant-specific vulnerabilities of IP2 and 3 to warrant immediate action. The Parametric Study was a generic study that did not model individual plants in sufficient detail to provide information for drawing conclusions about the operability of a particular sump. The Parametric Study clearly states that the results are not adequate for that purpose. The Petitioners did not provide any detailed analysis or valid assessment to demonstrate the applicability of the generic study to support their assertion of its applicability to the actual IP2 and 3 sump design. Therefore, the Staff continues to conclude that the Parametric Study is insufficient to support the conclusions the Petitioners have drawn regarding the operability of IP2 and 3 sumps.

The Parametric Study was specifically designed to answer two questions. First, is the ECCS sump clogging issue a plausible concern for domestic PWRs? Second, is there a need for additional regulatory action regarding PWR sumps? The Parametric Study answers these questions on a generic, not a plant-specific, basis. It supports the conclusion that ECCS sump clogging is indeed an issue that merits additional study for PWRs. To demonstrate this, LANL conducted a study of sixty-nine cases to determine if there were any typical plant features or characteristics (i.e., plant parameters) that would eliminate sump clogging as a plausible issue for PWRs. The study was conducted using a generic plant piping and containment configuration. Various plant parameters were then overlaid onto the generic plant. LANL used combinations of parameters that were reflective of actual licensed plants to determine a reasonable range of sump failure probabilities. Since each case was calculated using a combination of a generic plant piping and containment configuration, some generalized assumptions, and some actual plant characteristics, none of the parametric cases represent any of the sixty-nine operating PWRs. Rather, the study can only be used to determine a range of overall possibilities that may exist. Further plant-specific study is needed to assess the sump reliability for individual plants. In any case, this study cannot be used to draw conclusions about the potential for sump clogging at specific plants, such as IP2 and 3.

To better understand the limited applicability of the Parametric Study, it is important to understand that debris generation and transport are strongly influenced by plant geometry. Factors such as pipe-break orientation, types of debris sources, locations of debris sources relative to the break, and locations of plant structures and gratings all have potentially significant impacts on both the amount of debris generated and the amount transported to the sump. For example, most plants use more than one type of insulation in their containment. In actual cases, some insulation types may only be used in certain locations throughout the containment. Different insulations create significantly different head loss characteristics (i.e., restrictions to flow) when entrained onto a sump screen. The Parametric Study lacked sufficient information to model actual debris types and source locations, so it was assumed that all insulation types were homogeneously mixed throughout the containment. This assumption, while adequate for the purposes of the study, distorts predicted plant-specific responses to different pipe-break scenarios.

Because the Parametric Study was not intended to draw conclusions regarding specific plants, there are other limitations that make it inappropriate to apply its results to actual plants. For example, the information

used in the study was not verified with nuclear power plant licensees for accuracy after the study was completed. Entergy has stated that the ECCS recirculation flow rates are incorrect and are approximately double each plant's actual flow rate. Since the pressure drop (i.e., head loss) across a sump screen is directly proportional to the velocity squared, the calculated head losses in the Parametric Study for these two parametric cases could be higher by a factor of approximately four. Consequently, net positive suction head (NPSH) margins would be substantially better than reported in the study.

Another important limitation of the Parametric Study is that it does not model all unique plant-specific features. In the case of IP2 and 3, both units have two sumps in containment: an ECCS sump and a second containment sump that can also be used for recirculation. This second sump is located in a different part of the containment from the ECCS recirculation sump, utilizes the residual heat removal (RHR) pumps instead of the recirculation pumps, and is not put into operation during an accident unless initiated by operator action (i.e., will not collect debris on suction screens while the ECCS recirculation sump is operating). This backup system can be used for recirculation if the normal ECCS recirculation sump loses suction due to debris clogging of the sump screen. Thus, this backup system provides an additional level of redundancy and diversity at IP2 and 3. On page 15 of the petition, the Petitioners indicate that the Indian Point extra sump has no impact on safety because the Parametric Study already analyzed this feature when it considered phased introduction of recirculation (i.e., half ECCS flow at a time). The Petitioners have misinterpreted the Parametric Study. The study considered utilizing half of the ECCS flow in a phased manner to model the use of one ECCS train at a time. The IP2 and 3 containment sump feature provides an additional sump not considered in the study. It is not another train of ECCS, but an entirely separate system.

The Parametric Study also used plant data that are at least 5-7 years old. Some plants have made significant changes during this time. As a result, the study modeled plant characteristics that do not necessarily reflect current plant configurations. For instance, Entergy and the former licensees have greatly reduced the amounts of calcium silicate (cal-sil) insulation in the containments of both Indian Point units (e.g., the new steam generators at IP2 are insulated with fiberglass). The result is that both plants now have minimal amounts of cal-sil. The parametric cases assumed by the Petitioners to represent IP2 and 3 had approximately 40% cal-sil. This assumption would overestimate head losses relative to IP2 and 3 because cal-sil debris has substantially higher head loss characteristics than fiberglass insulation. Additionally, Entergy has improved the design

of IP2's ECCS recirculation pumps. This modification decreased the NPSH required by the pump, thus increasing the licensing basis NPSH margin from 0.97 foot of water to approximately 2.5 feet of water. This plant modification occurred after the data for the Parametric Study was obtained. These changes would lead to an estimate of the likelihood of ECCS sump failure for the parametric cases that is not representative of IP2 and 3.

NPSH margin for the recirculation mode of the ECCS system is dependent on several different factors including the flow rate, the height of the water level above the pump suction, the water temperature, and the containment pressure. For the purposes of licensing a nuclear plant, each licensee is required to conservatively calculate a minimum NPSH margin based on the worst case for each factor. This conservative calculation ensures that the ECCS pumps can handle the worst-case scenario. A licensing-basis NPSH margin is calculated at large-break LOCA conditions assuming the maximum pump flow rate (i.e., runout flow), the maximum water temperature, the minimum water level in the sump, and no containment pressure above atmospheric conditions. This method of calculating the licensing-basis NPSH margin results in ECCS pumps that are designed with additional safety margin.

The Parametric Study used the licensing-basis NPSH margin as the criterion for defining ECCS pump failure. This criterion assumes that loss of the licensing basis NPSH margin is equivalent to a complete failure of the ECCS pumps. While this criterion was appropriate for the purposes of the study, loss of the licensing-basis NPSH margin does not necessarily mean that the ECCS pumps would fail, but only that performance might degrade.

For all of the reasons cited above, the Parametric Study does not provide an adequate basis for drawing conclusions regarding the adequacy of sumps at actual operating plants, including IP2 and 3.

2. **Applicability of Cited Precedents:** The Petitioners cite prior regulatory actions at the Davis-Besse and Donald C. Cook Nuclear Power Plants as a basis for the requested immediate action. These actions are not applicable to IP2 and 3. The Donald C. Cook Nuclear Power Plant shut down voluntarily based on plant-specific information that called into question the adequacy of the sump design. Upon further evaluation, the Licensee's engineering staff concluded that the sump design was adequate, and no modifications to the sump were made. The Davis-Besse Nuclear Power Plant was shut down as a result of the reactor vessel head degradation issue. During this outage, the Licensee identified unqualified coatings inside

containment. The sump screen area was enlarged to resolve this issue. In both cases, the decisions were based on plant-specific evaluations. Given the nature of the Parametric Study, there is no plant-specific information at this time to support the conclusion that IP2 and 3 have a similar deficiency. As part of the resolution of GSI-191, all PWRs will be requested to perform an evaluation of the potential for debris clogging based on state-of-the-art, Staff-approved methods using plant-specific information. Any deficiencies identified by these evaluations will have to be addressed by licensees in accordance with established regulatory requirements.

3. **Action Plan for Issue Resolution:** The Staff believes that GSI-191 is an important issue, and it is currently being addressed through the NRC's Generic Issue Program. An action plan for resolution has been developed and is being followed. This action plan is publicly available through ADAMS (Accession No. ML032900950). All PWR licensees have been participating in the resolution process. Additionally, by implementing compensatory measures, such as those that were requested by NRC Bulletin 2003-01, "Potential Impact of Debris Blockage on Emergency Sump Recirculation at Pressurized-Water Reactors" (e.g., alternate water sources or refilling the refueling water storage tank (RWST)), licensees have enhanced safety by improving guidance for successful operator recovery actions. Although many plants have taken steps to further ensure adequate sump recirculation in the event of a LOCA, an NRC-approved methodology for evaluating each plant's sump performance is being developed to (1) ensure that each plant evaluates the potential for debris-clogging in a consistent manner based on state-of-the-art, Staff-approved methods and plant-specific information; and (2) provide the NRC with the technical basis for ensuring that any proposed solution adequately addresses the issue. If the NRC's continued studies indicate that unsafe conditions exist at Indian Point or any other plant, immediate actions will be taken to ensure the continued health and safety of the public.

The Petitioners asserted that Licensee actions to resolve the boiling-water reactor (BWR) strainer clogging issue in the 1990s showed further evidence that the Indian Point containment sump screens are likely undersized. All domestic BWRs replaced their suction strainers in response to NRC Bulletin 96-03, "Potential Plugging of Emergency Core Cooling Suction Strainers by Debris in Boiling-Water Reactors," dated May 6, 1996. This was done after performing a plant-specific analysis using an NRC-approved methodology. The current action plan for resolving GSI-191 is following a resolution path that is very similar to the BWR resolution, and includes (as noted above), the development of an NRC-

approved methodology for evaluating each plant's susceptibility to sump clogging. Since BWRs and PWRs have significantly different designs, it cannot be assumed that because the BWRs all replaced their suction strainers, PWRs must also do so. BWRs and PWRs do not mitigate accidents in the same way. The mechanism driving debris transport to the ECCS strainers in the BWR suppression pool is very different from the debris transport mechanism in a PWR.

4. **GSI-191 Generic Risk Estimate:** Citing prior NRC reports, the Petitioners assert that these reports indicate that the containment sumps at Indian Point have a very high likelihood of failing during a LOCA and that any argument to the contrary would be flawed. The NRC Staff considers the risk estimates in LANL Report LA-UR-7562 to be more realistic estimates of the risk associated with the sump clogging issue. LANL Report LA-UR-02-7562, in effect, supercedes NUREG/CR-6771 since it provides updated risk estimates that utilize the latest information on pipe-break frequencies and it accounts for operator actions that were not originally considered in NUREG/CR-6771. Based on the LANL risk studies, the average plant core damage frequency (CDF) calculated for the GSI-191 containment sump issue is slightly less than $1E-5$ per reactor year. This generic estimate indicates that, in combination with the actions taken in response to Bulletin 2003-01, it is safe for plants to continue to operate while they are performing the necessary plant-specific analyses. The estimate does justify further plant-specific analyses. If these analyses identify the need for safety enhancements, they will be implemented.

Commercial nuclear power plants are designed and licensed with many layers of protection, a concept commonly referred to as defense-in-depth. The defense-in-depth approach ensures that plants have multiple layers of protection against the release of fission products to the surrounding environment, so that the failure of any one layer of protection will not result in fission product release. In general, defense-in-depth is created in the design of nuclear plants through the use of reliable systems and components. Despite the fact that systems are constructed reliably, nuclear power plants are designed to accommodate failures through redundancy (e.g., multiple trains), and the use of diverse methods to accomplish important safety functions. Finally, plants are designed with safety margin (i.e., designing the system or component for greater than the worst expected conditions) to provide for unforeseen events.

As noted above, the Petitioners' request for immediate action (i.e., to order IP2 and 3 to immediately shut down until GSI-191 is resolved) was denied because there is currently no basis to conclude that IP2 and 3 are

operating unsafely. The technical and regulatory basis provided by the Petitioners for their proposed alternative enforcement action is the same as for the request to immediately shut down IP2 and 3. Accordingly, the above discussion concludes that the basis provided by Petitioners for the requested actions does not support accelerating the resolution of GSI-191 for IP2 and 3 (i.e., require the Licensee to resolve GSI-191 prior to starting up after each plant's next shutdown).

Consistent with the generic issue process, the NRC is currently developing guidance to be used by individual plants to evaluate the potential for sump clogging. Although many plants have taken steps to further ensure adequate sump recirculation in the event of a LOCA, an NRC-approved methodology for evaluating each plant's sump performance is intended to (1) ensure that each plant evaluates the potential for debris-clogging in a consistent manner based on state-of-the-art, Staff-approved methods and plant-specific information; and (2) provide the NRC with the technical basis for ensuring that any proposed solution adequately addresses the issue. If, at any time during the resolution of the generic issue, the NRC should determine that unsafe conditions exist at Indian Point or any other plant, immediate actions will be taken to ensure the continued health and safety of the public.

The first step in being able to assess susceptibility to sump clogging, however, is the development of an engineering methodology for acceptably calculating the amount of debris accumulation on the sump screens and the associated head loss across the debris bed. Without an approved methodology, it would be extremely difficult to determine with reasonable certainty whether a plant may be susceptible to the problem, and if modifications are made, would the modifications adequately address the issue. If plants make modifications in the future, these modifications should utilize an appropriate and acceptable technical basis for determining the need for modifications. Establishing the schedule for resolving the issue is a risk-informed process. Based on the risk estimates associated with GSI-191, the Staff concludes that the current schedule for resolution is appropriate.

III. CONCLUSION

As stated in the discussion above, the NRC Staff has thoroughly reviewed the basis for the Petitioners' requested actions and denies the requested enforcement actions because the information provided in the petition does not provide an adequate basis for immediate shutdown of IP2 and 3. On the basis of the same

information, the Staff also denies the Petitioners' proposed alternative course of action.

Consistent with the generic issue process, the NRC is currently developing guidance to be used by individual plants to evaluate the potential for sump clogging. Although many plants have taken steps to further ensure adequate sump recirculation in the event of a LOCA, an NRC-approved methodology for evaluating each plant's sump performance is intended to (1) ensure that each plant evaluates the potential for debris-clogging in a consistent manner based on state-of-the-art, Staff-approved methods and plant-specific information; and (2) provide the NRC with the technical basis for ensuring that any proposed solution adequately addresses the issue. The data reviewed by the Staff to date, including the petition and the Parametric Study, do not support the actions requested by the Petitioners. If, at any time during the resolution of the generic issue, the NRC should determine that unsafe conditions exist at Indian Point or any other plant, immediate actions will be taken to ensure the continued health and safety of the public.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

Brian W. Sheron, Acting Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 18th day of June 2004.

CLI-04-10 can be found as Attachment 1 to CLI-05-8, 61 NRC 129, 131 (2005). This is the redacted public version of the Commission's sealed Memorandum and Order dated March 24, 2004, and does not include the proprietary information contained in the sealed version.

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- Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990)
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- Airport Neighbors Alliance v. United States*, 90 F.3d 426, 433 (10th Cir. 1996)
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- Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981)
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- Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999)
a plaintiff must allege that he will be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action; CLI-04-13, 59 NRC 248 (2004)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)
failure of a contention to comply with any one of the pleading requirements is grounds for dismissing the contention; LBP-04-4, 59 NRC 145 (2004); LBP-04-10, 59 NRC 308 (2004)
- Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993)
hearing request is denied because petitioner does not reside on her property which is 20 miles from the site and she failed to show a distinct and palpable injury on which standing could be founded; CLI-04-13, 59 NRC 248 (2004)
mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; LBP-04-5, 59 NRC 195 (2004)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998)
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- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998)
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- Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)
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- Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
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- Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
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- Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 39 (1999)
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- Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980)
Commission refuses to entertain appeals by license applicants challenging Board rulings that do not consider all pending contentions; CLI-04-11, 59 NRC 209 (2004)
- Citizens Against Burlington v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991)
in explaining why another plant was not a viable alternative for testing of lead assemblies, applicant cited operational scheduling factors at the plants; LBP-04-4, 59 NRC 173 (2004)
- City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983)
NRC may change its rules of procedure as long as there is adequate notice and no prejudice; CLI-04-8, 59 NRC 119 (2004)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985)
if irreparable injury is lacking, the grant of a stay will be improvident in the absence of a convincing showing that success on the merits of the controversy is not only likely, but a virtual certainty; LBP-04-2, 59 NRC 80 (2004)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)
Commission has traditionally applied judicial concepts of standing to determine whether a potential intervenor has an interest that may be affected; CLI-04-17, 59 NRC 363 (2004)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92-93 (1993)
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- Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980)
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- Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980)
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- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999)
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- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191-93 (1999)
conclusory allegations about potential radiological harm is insufficient basis for standing in materials licensing cases; CLI-04-13, 59 NRC 248 (2004)

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- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)
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- Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)
a petitioner must make a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-04-4, 59 NRC 147 (2004)
- Consumer Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973)
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- Cuomo v. NRC*, 772 F.2d 972, 976 (1985)
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- Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995)
guidance documents such as NUREGS do not purport to establish enforceable requirements and thus nonconformance with them does not equate to nonconformance with Commission regulations; LBP-04-8, 59 NRC 270 (2004)
- Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995)
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- Dellums v. NRC*, 863 F.2d 968, 972 (D.C. Cir. 1988)
opposing nuclear proliferation and ensuring proper safeguards for nuclear energy is only a generalized goal and thus is insufficient to confer standing; CLI-04-17, 59 NRC 364 (2004)
- Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978)
a person who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility unless the latter is a minor or otherwise under a legal disability that would preclude his or her own participation; LBP-04-5, 59 NRC 193-94 n.10 (2004)
- Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978)
Commission refuses to entertain appeals by license applicants challenging Board rulings that do not consider all pending contentions; CLI-04-11, 59 NRC 209 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359-60 (2001)
an admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested licensing action; LBP-04-4, 59 NRC 146 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 361 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 361-62 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367, 371 (2002)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 212-13 (2003)
petitioner's references to the various "unclassified studies" lack sufficient specificity as to how the documents allegedly support admission of its contention; LBP-04-10, 59 NRC 332 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-3, 57 NRC 45, 64 (2003)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-3, 57 NRC 45, 72-73 (2003)
a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information; LBP-04-10, 59 NRC 321 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-3, 57 NRC 45, 73 (2003)
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- Dubois v. Department of Agriculture*, 102 F.3d 1273, 1282-83 (1st Cir. 1996)
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 n.15 (2002)
Commission undertakes interlocutory review when a board ruling either threatens immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-04-6, 59 NRC 70 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-21 (2002)
Staff may complete its environmental review of a license amendment application prior to the completion of its safety evaluation; LBP-04-2, 59 NRC 82 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 338-39 (2002)
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 448 (2001)
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- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 & n.23 (2004)
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- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74-75 (2004)
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- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002)
any environmental review relating to batch quantities of MOX fuel must be deferred until applicant makes a proposal for such use; LBP-04-4, 59 NRC 170 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 297 (2002)
issues that would be permissible to raise are those directly related to whatever application is at issue at any given time; LBP-04-4, 59 NRC 171 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 298 (2002)
impact of future use of MOX fuel need not be considered in license amendment proceeding to test lead fuel assemblies; LBP-04-4, 59 NRC 170 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002)
consideration of export licensing issues is precluded in operating license amendment proceedings; LBP-04-4, 59 NRC 175 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002)
purpose of a NEPA analysis is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about worst-case scenarios and how to prevent them; CLI-04-17, 59 NRC 371 n.20 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
where an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention; LBP-04-12, 59 NRC 390 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)
the appropriate means for a new challenge involving a contention of omission, for which applicant has supplied the missing information, is an amended contention; LBP-04-7, 59 NRC 263 (2004)
where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft environmental impact statement, the contention is moot; LBP-04-7, 59 NRC 263 (2004); LBP-04-9, 59 NRC 293 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002)
complaints about the adequacy of an applicant's environmental review are superseded when the issues involved are discussed in the final environmental impact statement; CLI-04-4, 59 NRC 40 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)

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- a party proffering a contention always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists; CLI-04-4, 59 NRC 49 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 429 (2003)
- petitioner is obliged to examine the application and publicly available information and to set forth its claims at the earliest possible moment; LBP-04-4, 59 NRC 161 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003)
- NRC adjudicatory hearings are not editing sessions for environmental impact statements; CLI-04-4, 59 NRC 41 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 67-68 (2002)
- failure of a contention to comply with any one of the pleading requirements of section 2.714(b)(2) is grounds for dismissing the contention; LBP-04-10, 59 NRC 309 (2004)
- pleading requirements for contentions; LBP-04-4, 59 NRC 148 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 125 (1998)
- petitioner is obliged to formulate a contention and provide the information necessary to satisfy the basis requirement of the contention rule; LBP-04-4, 59 NRC 147 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999)
- a showing that a genuine dispute exists with the applicant on a material issue of law must include references to the specific portions of the application that the petitioner disputes or identification of each failure and the supporting reasons for the petitioner's belief; LBP-04-10, 59 NRC 307-08 (2004)
- to intervene, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of section 2.714(b), (d); LBP-04-4, 59 NRC 144-45 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
- the contention rule is strict by design, having been toughened because, in prior years, licensing boards admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-04-4, 59 NRC 145-46 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341-42 (1999)
- contentions must specifically state the issues a petitioner wishes to raise, provide support in the form of expert opinion, document(s), and/or a fact-based argument, and provide reasonably specific and understandable explanation and reasons to support its contentions; LBP-04-4, 59 NRC 146 (2004)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)
- petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-04-4, 59 NRC 146-47 (2004)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985)
- NRC has a longstanding practice of not addressing generic safety issues in individual licensing proceedings; LBP-04-4, 59 NRC 173 n.8 (2004)
- Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976)
- mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved; CLI-04-17, 59 NRC 364 (2004)
- Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 577 (1976)
- Commission responsibility for considering the possibility of diversion as one aspect of protecting the common defense and security of the United States does not establish that diversion would cause any concrete personal or direct harm to petitioners which would entitle them to a voice in its export license proceedings; CLI-04-17, 59 NRC 366 (2004)

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- Edlow International*, (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 584 (1976)
export licensing matters under Part 110 are explicitly excluded from the scope of the Commission's environmental regulations in Part 51; LBP-04-4, 59 NRC 180 (2004)
- English v. General Electric Co.*, 496 U.S. 72, 81 (1990)
federal preemption of state law is based on Congress's clear intent, in enacting the Atomic Energy Act, that the federal government occupy the field of regulating the safety of atomic energy; CLI-04-4, 59 NRC 37 (2004)
- Envirocare of Utah v. NRC*, 194 F.3d 72, 76 (D.C. Cir. 1999)
a person whose interest cannot be affected by the issues before the Commission in a proceeding lacks an essential element of standing; CLI-04-5, 59 NRC 56 n.14 (2004)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
an intervention petitioner cannot simply refer to voluminous reports, but rather is obligated to provide the analysis as to why particular sections of a document provide a basis for a proposed contention; LBP-04-10, 59 NRC 330 (2004)
petitioner's references to the various "unclassified studies" lack sufficient specificity as to how the documents allegedly support admission of its contention; LBP-04-10, 59 NRC 332 (2004)
- Fansteel, Inc.* (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 368 (2003)
a hearing requester in a Subpart L proceeding must state its areas of concern with enough specificity that the presiding officer may determine whether the concerns are truly relevant to the license amendment at issue; LBP-04-5, 59 NRC 198 (2004)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
a person cannot derive standing from the interests of another person; CLI-04-13, 59 NRC 248 (2004); LBP-04-5, 59 NRC 194 n.10 (2004)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)
to establish standing to intervene, absent situations involving obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken; CLI-04-17, 59 NRC 364 (2004)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001)
organizations having members who live in the vicinity of a plant (generally within 20 miles) and who have submitted declarations authorizing the organization to represent their interests, have established representational standing to participate in the proceeding; LBP-04-4, 59 NRC 144 (2004)
- Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000)
significant new circumstances or information warrant preparation of a new environmental impact statement; LBP-04-4, 59 NRC 175 (2004)
- Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 168 (2000)
judicial concepts of standing are satisfied when a petitioner shows a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-17, 59 NRC 363 n.9 (2004)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-2, 42 NRC 111, 115 (1995)
organizations having members who live in the vicinity of a plant (generally within 20 miles) and who have submitted declarations authorizing the organization to represent their interests, have established representational standing to participate in this proceeding; LBP-04-4, 59 NRC 144 (2004)
when determining whether a petitioner has established the necessary interest, licensing boards must look for guidance to judicial concepts of standing; LBP-04-4, 59 NRC 143-44 (2004)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994)
Commission undertakes interlocutory review when a Board ruling either threatens immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-04-6, 59 NRC 70 (2004)
interlocutory review is necessary because disclosure of safeguards information would be effectively irreversible later; CLI-04-6, 59 NRC 71 (2004)

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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)
for the proximity presumption to apply, a proposed action must involve a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-04-17, 59 NRC 365 (2004)
- Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558, 560 (1976)
transfer of residence would defeat intervention based on geographic proximity; CLI-04-13, 59 NRC 249 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000)
the Commission will not consider matters raised for the first time on appeal; CLI-04-2, 59 NRC 8 n.18 (2004)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-51 (2001)
the Commission reviews the admissibility of petitioner's contentions because NEPA cost-benefit questions have proved troublesome in the past, the record would benefit from a written decision on these issues, and the context of the question is unusual; CLI-04-4, 59 NRC 43 (2004)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)
in explaining why another plant was not a viable alternative for testing of lead assemblies, applicant cited operational scheduling factors at the plants; LBP-04-4, 59 NRC 173 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998)
in NRC materials licensing cases, there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny; LBP-04-5, 59 NRC 192 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001)
standing to intervene in materials license amendment proceedings where requested amendment authorizes no new activity and threatens no injury to any person or entity is denied; CLI-04-1, 59 NRC 3 n.10 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31-32 (2001)
mere geographical proximity to potential transportation routes is insufficient to confer standing; CLI-04-17, 59 NRC 364 n.11 (2004)
petitioners must demonstrate a causal connection between the licensing action and the injury alleged; CLI-04-17, 59 NRC 364 n.11 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001)
an organization seeking standing must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-04-5, 59 NRC 189 (2004)
judicial standing requires a showing of an actual or threatened, concrete and particularized injury, that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; CLI-04-13, 59 NRC 247 (2004); LBP-04-5, 59 NRC 188 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)
absent an error of law or an abuse of discretion, the Commission generally defers to the presiding officer's decisions regarding standing; CLI-04-13, 59 NRC 248 (2004)
- Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)
to qualify for standing a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-04-4, 59 NRC 144 (2004)
- Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995)
an agency is not mandated to reach a particular result if a proposed action complies with all safety requirements under the Atomic Energy Act, and discussion of the No Action alternative may be brief; LBP-04-4, 59 NRC 182 (2004)
- Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)
if irreparable injury is lacking, the grant of a stay will be improvident in the absence of a convincing showing that success on the merits of the controversy is not only likely, but a virtual certainty; LBP-04-2, 59 NRC 80 (2004)

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- Kleppe v. Sierra Club*, 427 U.S. 390 (1976)
impact of future use of MOX fuel need not be considered in a license amendment proceeding to test lead fuel assemblies; LBP-04-4, 59 NRC 170 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987)
appeals lie only when a party challenges a licensing board's dispositive ruling on the entire petition to intervene; CLI-04-11, 59 NRC 208 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988)
Commission guidance in interpreting and applying the contention admissibility standards is entitled to special weight in adjudicatory proceedings; LBP-04-4, 59 NRC 147 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997)
financial criteria of Part 70 can be met for enrichment facility licenses by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-04-3, 59 NRC 23 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)
limits on the treatment of environmental issues in NRC proceedings; CLI-04-3, 59 NRC 22 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-100 (1998)
the Commission reviews the admissibility of petitioner's contentions because NEPA cost-benefit questions have proved troublesome in the past, the record would benefit from a written decision on these issues, and the context of the question is unusual; CLI-04-4, 59 NRC 43 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
misleading information on the economic benefits of a project could skew an agency's overall assessment of a project's costs and benefits and result in approval of a project that otherwise would not have been approved because of its adverse environmental effects; CLI-04-4, 59 NRC 43 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10 (2004)
Commission has discretion to expand or restrict the application of the new Rules of Practice; CLI-04-8, 59 NRC 118 (2004)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
judicial concepts of standing are satisfied when a petitioner shows a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-17, 59 NRC 363 n.9 (2004)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 55 (2004)
Commission was not arbitrary in limiting the scope of the proceeding to whether an enforcement order should be upheld; LBP-04-11, 59 NRC 384 (2004)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004)
Commission has the authority to define the scope of a proceeding; LBP-04-11, 59 NRC 383-84 (2004)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n.14 (2004)
person whose interest cannot be affected by the issues before the Commission in a proceeding lacks essential element of standing; LBP-04-11, 59 NRC 385 (2004)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57-58, 60-61 (2004)
a petition seeking to add to an existing enforcement order effectively falls outside the scope of a proceeding that was limited to whether the enforcement order should be sustained; LBP-04-11, 59 NRC 385 (2004)
- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)
significant new circumstances or information warrant preparation of a new environmental impact statement; LBP-04-4, 59 NRC 175 (2004)
- Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-79 (1983)
cost-benefit analysis is not pertinent to an environmental justice inquiry, and psychological harm resulting from fear or stigma associated with a facility is not cognizable under NEPA; CLI-04-4, 59 NRC 50 (2004)

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- National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001)
Commission may change its rules of procedure as long as there is adequate notice and no prejudice; CLI-04-8, 59 NRC 119 (2004)
- National Wildlife Federation v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990)
impact of future use of MOX fuel need not be considered in license amendment proceeding to test lead fuel assemblies; LBP-04-4, 59 NRC 170 (2004)
- Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1358 (D.C. Cir. 1981)
in the case of plutonium export application, there would be a serious risk of unduly impeding the conduct of U.S. foreign relations in the area of nuclear nonproliferation were the Commission not to defer to the Executive Branch's foreign policy and national security conclusions; CLI-04-17, 59 NRC 375 (2004)
responsibility rests in the Executive Branch to ensure achievement of the nation's foreign policy goal to defeat nuclear proliferation, the Commission's task being complementary to that; CLI-04-17, 59 NRC 374 (2004)
- Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1363 (D.C. Cir. 1981)
Executive Branch's noninimicality determinations involve strategic judgments and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions; CLI-04-17, 59 NRC 374 (2004)
in the absence of unusual circumstances, the Commission need not look beyond the nonproliferation safeguards, in AEA section 127 for nuclear-weapons states, in determining whether the common defense and security standard is met; CLI-04-17, 59 NRC 374 (2004)
- NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)
Commission may change its rules of procedure as long as there is adequate notice and no prejudice; CLI-04-8, 59 NRC 119 (2004)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001)
an agency is not mandated to reach a particular result if a proposed action complies with all safety requirements under the Atomic Energy Act, and discussion of the No Action alternative may be brief; LBP-04-4, 59 NRC 182 (2004)
- Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 247 n.46 (2003)
Staff may complete its environmental review of a license amendment application prior to the completion of its safety evaluation; LBP-04-2, 59 NRC 82 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405, *review denied*, CLI-77-23, 6 NRC 455 (1977)
disclosure standard entails thorough examination of safeguards materials and, at times, release of only portions of documents or redacted versions of documents; CLI-04-6, 59 NRC 75 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984)
mere speculation about the potential occurrence of a nuclear accident does not constitute the requisite imminent, irreparable harm justifying a stay of a licensing decision; LBP-04-2, 59 NRC 81 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334 (2002)
NRC does not place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval; CLI-04-14, 59 NRC 254 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 36 (1993)
premature contention is dismissed without prejudice, leaving the door open for a late-filed contention, should the Staff issue an environmental assessment in lieu of an EIS; LBP-04-4, 59 NRC 183 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)
mere geographical proximity to potential transportation routes is insufficient to confer standing; CLI-04-17, 59 NRC 364 n.11 (2004)
petitioners must demonstrate a causal connection between the licensing action and the injury alleged; CLI-04-17, 59 NRC 364 n.11 (2004)

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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 7 (2003)
purpose of a NEPA analysis is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about worst-case scenarios and how to prevent them; CLI-04-17, 59 NRC 372 n.20 (2004)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)
a contention that merely sets forth an opposing view rather than alleging any specific perceived deficiencies in the license application is inadmissible; LBP-04-4, 59 NRC 182 (2004)
- Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976)
standard for discretionary grant of standing; LBP-04-5, 59 NRC 196 n.11 (2004)
- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
NRC has a longstanding practice of not addressing generic safety issues in individual licensing proceedings; LBP-04-4, 59 NRC 173 n.8 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31-32 (1998)
because any alleged injury to petitioner is entirely speculative, the Commission need not consider the fact that petitioner's absence from her property defeats her standing claim; CLI-04-13, 59 NRC 249 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324-25 (1999)
frequent visits to a property in proximity to a contested site are enough to establish standing; CLI-04-13, 59 NRC 249 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000)
the Commission's longstanding general policy disfavors interlocutory review; CLI-04-6, 59 NRC 70 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2002)
a decision is affirmed where no error of law or abuse of discretion that might serve as grounds for reversal is cited; CLI-04-2, 59 NRC 8 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 461 (2001)
consistent with its customary practice, the Commission accepts the Board's certification and seeks briefs on the admissibility of a security contention and several pertinent related questions; CLI-04-11, 59 NRC 209 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002)
limits on the treatment of environmental issues in NRC proceedings; CLI-04-3, 59 NRC 22 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002)
consideration of export licensing issues is precluded in operating license amendment proceedings; LBP-04-4, 59 NRC 175 (2004)
environmental impacts of terrorism or sabotage are not subject to review under NEPA; CLI-04-4, 59 NRC 38 (2004); LBP-04-5, 59 NRC 199 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002)
NEPA does not override NRC concern for making sure that sensitive security-related information ends up in as few hands as practicable; CLI-04-17, 59 NRC 371 (2004)
purpose of a NEPA analysis is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about worst-case scenarios and how to prevent them; CLI-04-17, 59 NRC 371 n.20 (2004)

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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 356 (2002)
the Commission has a strong interest in limiting access to safeguards and security information to those having an actual and specific, rather than a perceived, need to know; CLI-04-6, 59 NRC 73 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)
NRC has a longstanding practice of not addressing generic safety issues in individual licensing proceedings; LBP-04-4, 59 NRC 173 n.8 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998), *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998)
an intervention petitioner cannot simply refer to voluminous reports, but rather is obligated to provide the analysis as to why particular sections of a document provide a basis for a proposed contention; LBP-04-10, 59 NRC 330-31 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298 (1998)
an intervention petitioner cannot simply refer to voluminous reports, but rather is obligated to provide the analysis as to why particular sections of a document provide a basis for a proposed contention; LBP-04-10, 59 NRC 330 (2004)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-5, 57 NRC 233 (2003)
license applications are measured against regulatory standards, not against enforcement orders; CLI-04-6, 59 NRC 72 n.21 (2004)
- Project Management Corp.* (Clinch River Breeder Reactor Plant), LBP-76-14, 3 NRC 430, 434 (1976)
a contention implying that NRC cannot approve a test program without also first evaluating full-scale implementation of the technology being tested should be rejected as a matter of law; LBP-04-4, 59 NRC 170 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)
contentions are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission's notice of opportunity for hearing; LBP-04-4, 59 NRC 147 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977)
irreparable injury is the most important stay factor; LBP-04-2, 59 NRC 80 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980)
NRC licensees would be unlikely to acquiesce in enforcement actions if by doing so they subjected themselves routinely to formal proceedings possibly leading to more severe or different enforcement actions; CLI-04-5, 59 NRC 58 n.21 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980)
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- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 n.11 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)
an intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses; LBP-04-12, 59 NRC 390 (2004)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259 (1990)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)
a contention that merely sets forth an opposing view rather than alleging any specific perceived deficiencies in the license application is inadmissible; LBP-04-4, 59 NRC 182 (2004)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)
judicial standing requires a showing of an actual or threatened, concrete and particularized injury, that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act and is likely to be redressed by a favorable decision; CLI-04-13, 59 NRC 247 (2004); LBP-04-5, 59 NRC 188 (2004)
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- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998)
the requisite injury for standing may be either actual or threatened but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-04-4, 59 NRC 144 (2004)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)
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- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)
an agency is not mandated to reach a particular result if a proposed action complies with all safety requirements under the Atomic Energy Act, and discussion of the No Action alternative may be brief; LBP-04-4, 59 NRC 182 (2004)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994)
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- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994)
to establish standing, a petitioner must show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-5, 59 NRC 57 n.16 (2004)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-03-15, 58 NRC 349 (2003)
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- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001)
judicial standing requires a showing of an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; LBP-04-5, 59 NRC 188, 191 (2004)
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to meet the judicial standards for standing, a petitioner must show an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; CLI-04-13, 59 NRC 247 (2004)

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- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 16 (2001)
a hearing requester in a Subpart L proceeding must state its areas of concern with enough specificity that the presiding officer can determine whether the concerns are truly relevant to the license amendment at issue; LBP-04-5, 59 NRC 198 (2004)
- Sequoyah Fuels Corp.* (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 513 (1986)
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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994)
for the proximity presumption to apply, a proposed action must involve a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-04-17, 59 NRC 365 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)
in materials licensing cases, proximity alone does not suffice for standing, absent an obvious potential for offsite harm; CLI-04-13, 59 NRC 248 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994)
if irreparable injury is lacking, the grant of a stay will be improvident in the absence of a convincing showing that success on the merits of the controversy is not only likely, but a virtual certainty; LBP-04-2, 59 NRC 80 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994)
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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 75 n.22 (1994)
in NRC materials licensing cases, there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny; LBP-04-5, 59 NRC 192 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994)
when a hearing is requested by a target of an enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because one possible outcome is that the order will not be sustained; CLI-04-5, 59 NRC 58 n.19 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)
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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 & n.5 (1997)
NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request; CLI-04-5, 59 NRC 58 (2004)
- Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)
mere interest in a problem, no matter how longstanding the interest or how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved for purpose of standing; CLI-04-17, 59 NRC 363-64 (2004)
- Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002)
state law barring any local government from providing services, including law enforcement, is preempted by federal law; CLI-04-4, 59 NRC 37 (2004)
- Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168 (3d Cir. 2000)
impact of future development need not be considered because it is not clear that the additional projects would ever be completed; LBP-04-4, 59 NRC 170 (2004)
- State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 868 F.2d 810, 819 (1989)
a person whose interest cannot be affected by the issues before the Commission in a proceeding lacks an essential element of standing; CLI-04-5, 59 NRC 56 n.14 (2004)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)
the Commission directs the licensing board to expeditiously decide legal and policy issues that may resolve threshold issues or expedite this proceeding; CLI-04-3, 59 NRC 17 (2004)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)
a contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement; LBP-04-4, 59 NRC 147 (2004)

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- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)
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- Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)
to qualify for standing, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-04-4, 59 NRC 144 (2004)
- Thomas v. Peterson*, 753 F.3d 754 (9th Cir. 1985)
in a NEPA analysis it is proper for an agency to consider the overall effect of a government program involving smaller connected actions, rather than considering only the components, each of which may have only insignificant environmental effects; CLI-04-4, 59 NRC 41 n.24 (2004)
- Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994)
Commission has traditionally applied judicial concepts of standing to determine whether a potential intervenor has an interest that may be affected; CLI-04-17, 59 NRC 363 (2004)
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- Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 77 (2000)
Executive Branch's noninimicality determinations involve strategic judgments and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions; CLI-04-17, 59 NRC 374 (2004)
- Transnuclear, Inc.* (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 531-32 (1977)
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- United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973)
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- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978)
an agency is not mandated to reach a particular result if a proposed action complies with all safety requirements under the Atomic Energy Act, and discussion of the No Action alternative may be brief; LBP-04-4, 59 NRC 182 (2004)
- Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th Cir. 1980)
significant new circumstances or information warrant preparation of a new environmental impact statement; LBP-04-4, 59 NRC 175 (2004)
- Warth v. Seldin*, 422 U.S. 490, 507 (1975)
a plaintiff may not rely on the remote possibility, unsubstantiated by allegations of fact, that his situation might have been better had respondents acted otherwise, and might improve were the court to afford relief; CLI-04-17, 59 NRC 365 n.12 (2004)
- Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-38 (1979)
a petitioner owning and renting to another farmland 10 to 15 miles from the reactor site does not have standing even though he occasionally visited the farm; LBP-04-5, 59 NRC 194 (2004)
an occasional trip to a property in proximity to a contested site is insufficient to establish standing; CLI-04-13, 59 NRC 249 (2004)
- Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983)
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- Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980)
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- Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 332 (1994)
petitioners fail to establish a nexus between the agency's actions and their alleged injury where the remote potential for harm is dependent on the intervening acts of unknown third parties; CLI-04-17, 59 NRC 365 (2004)
- Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)
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- Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 1996 WL 627, 640 (Oct. 2, 1996)
the Commission grants a housekeeping stay of a Board order pending review of a petition for interlocutory review to be filed on the same day; CLI-04-6, 59 NRC 69 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996)
to establish standing to intervene, absent situations involving obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken; CLI-04-17, 59 NRC 364-65 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996)
a contention shall not be admitted if the contention and supporting material fail to satisfy the requirements of section 2.714(b)(2) or the contention, if proven, would not entitle petitioner to relief; LBP-04-10, 59 NRC 308 (2004)
to intervene, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of section 2.714(b), (d); LBP-04-4, 59 NRC 144 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998)
the requisite injury for standing may be either actual or threatened but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-04-4, 59 NRC 144 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 n.7 (1998)
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- 10 C.F.R. 2.101(a)(1)-(3)
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- 10 C.F.R. 2.105(d)(2)
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- 10 C.F.R. 2.206
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- 10 C.F.R. 2.306
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- 10 C.F.R. 2.309
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- 10 C.F.R. 2.309(b)(4)(ii)
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- 10 C.F.R. 2.309(c)(1)(i)-(viii)
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- 10 C.F.R. 2.309(d)
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- 10 C.F.R. 2.309(d)(1)
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- 10 C.F.R. 2.309(d)(2)
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- 10 C.F.R. 2.310
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- 10 C.F.R. 2.311
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- 10 C.F.R. 2.311(c)
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- 10 C.F.R. 2.315(a)
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- 10 C.F.R. 2.315(c)
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- 10 C.F.R. 2.318(a)
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- 10 C.F.R. 2.319(l)
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- 10 C.F.R. 2.323(a)
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- 10 C.F.R. 2.323(f)
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- 10 C.F.R. 2.334
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- 10 C.F.R. 2.390
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- 10 C.F.R. Part 2, Subpart G
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- 10 C.F.R. 2.700
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- 10 C.F.R. 2.704
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- 10 C.F.R. 2.704(c)
no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the Staff shall make the pretrial disclosures required by; CLI-04-3, 59 NRC 16 (2004)
- 10 C.F.R. 2.709
discovery shall not commence until the issuance of the particular document unless the ASLB in its discretion finds that commencing discovery against the Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner; CLI-04-3, 59 NRC 16 (2004)
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- 10 C.F.R. 2.710
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- 10 C.F.R. 2.710(a)
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- 10 C.F.R. 2.714
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in proffering security contentions, petitioner must satisfy the general rules on admissibility of contentions and must review the Security Submittal and identify credible vulnerabilities, if any; LBP-04-10, 59 NRC 350-51 (2004)
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- 10 C.F.R. 2.714(a)(1)
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- petitioner has neither demonstrated good cause for late filing nor made a compelling showing on the remaining factors to justify its lateness; LBP-04-4, 59 NRC 160 (2004)
- 10 C.F.R. 2.714(a)(1)(i)
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- 10 C.F.R. 2.714(a)(1)(i)-(v)
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- 10 C.F.R. 2.714(a)(2)
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petitioners must specifically state the issues of law and/or fact they wish to raise, provide sufficient support stated with reasonable specificity, and rely on stated facts as well as the expert opinion; LBP-04-4, 59 NRC 165, 166 (2004)
to intervene, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of; LBP-04-4, 59 NRC 144 (2004); LBP-04-10, 59 NRC 307-08 (2004)
- 10 C.F.R. 2.714(b)(2)
a contention must consist of a specific statement of the issue of law or fact the petitioner wishes to raise or controvert; LBP-04-4, 59 NRC 148 (2004); LBP-04-10, 59 NRC 313, 315, 345 (2004)
failure of a contention to comply with any one of the pleading requirements is grounds for dismissing the contention; LBP-04-10, 59 NRC 308 (2004)
- 10 C.F.R. 2.714(b)(2)(i)
a contention must be supported by a brief explanation of the factual and/or legal basis for the contention, which goes beyond mere allegation and speculation, is not open-ended, ill-defined, vague, or unparticularized, and is stated with reasonable specificity; LBP-04-4, 59 NRC 148 (2004)
- 10 C.F.R. 2.714(b)(2)(ii)
a contention must include a specific statement of the alleged facts or expert opinion (or both) that support the contention and on which the petitioner intends to rely to prove its case at a hearing; LBP-04-4, 59 NRC 148 (2004)
a contention must include references to specific sources and documents and a fact-based argument sufficient to demonstrate that an inquiry in depth is appropriate; LBP-04-4, 59 NRC 148 (2004)
intervenor is not called upon to make its case at the contention pleading stage of the proceeding, but rather to indicate what facts or expert opinions provide the basis for its contention; LBP-04-4, 59 NRC 147 (2004)
- 10 C.F.R. 2.714(b)(2)(iii)
a contention implying that NRC cannot approve a test program without also first evaluating full-scale implementation of the technology being tested should be rejected as a matter of law; LBP-04-4, 59 NRC 170 (2004)
a contention must include references to the disputed information or identify omissions of relevant matters required by law along with supporting reasons; LBP-04-4, 59 NRC 146 (2004)
a contention must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; LBP-04-4, 59 NRC 148, 158, 161 (2004)
a contention that raises issues regarding documents that are beyond the scope of the proceeding are inadmissible because it cannot be said to raise an issue of law or fact that is material to the proceeding; LBP-04-10, 59 NRC 314, 325, 330, 332 (2004)
for issues arising under NEPA, contentions must be based on the applicant's environmental report, and the petitioner can amend such contentions or file new contentions; LBP-04-4, 59 NRC 148 (2004)
- 10 C.F.R. 2.714(d)
petitioners must specifically state the issues of law and/or fact they wish to raise, provide sufficient support stated with reasonable specificity, and rely on stated facts as well as the expert opinion; LBP-04-4, 59 NRC 165, 166 (2004)

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- to intervene, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of; LBP-04-4, 59 NRC 144 (2004); LBP-04-10, 59 NRC 307-08 (2004)
- 10 C.F.R. 2.714(d)(1)
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- 10 C.F.R. 2.714(d)(2)(ii)
in ruling on a contention, a licensing board must refuse to admit a contention if, assuming the contention were proven, it would be of no consequence in the proceeding because it would not entitle the petitioner to specific relief; LBP-04-4, 59 NRC 149 (2004); LBP-04-10, 59 NRC 309 (2004)
- 10 C.F.R. 2.714(f)(1), (3)
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- 10 C.F.R. 2.714a(b)
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- 10 C.F.R. 2.714a(c)
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to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-04-11, 59 NRC 208, 209 (2004)
- 10 C.F.R. 2.716
NRC adjudicatory rules provide for consolidation of proceedings if such action will be conducive to the proper dispatch of the Commission's business and to the ends of justice; CLI-04-2, 59 NRC 7 n.9 (2004)
- 10 C.F.R. 2.718(i)
a presiding officer may certify questions to the Commission, either at the discretion of the presiding officer or on direction of the Commission; CLI-04-11, 59 NRC 209 (2004)
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- 10 C.F.R. 2.722
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- 10 C.F.R. 2.724(a)(1)(i)
in presenting a late contention, the proponent's first duty is to demonstrate good cause for its late filing to the board; CLI-04-4, 59 NRC 43, 44 (2004)
- 10 C.F.R. 2.730
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- 10 C.F.R. 2.734
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- 10 C.F.R. 2.758
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- 10 C.F.R. 2.759
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- 10 C.F.R. 2.763
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- 10 C.F.R. 2.771
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- 10 C.F.R. 2.786
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- 10 C.F.R. 2.786(b)(1)
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- 10 C.F.R. 2.786(b)(3)
within 10 days after service of a petition for review, other parties to a proceeding may file answers either supporting or opposing its grant; LBP-04-8, 59 NRC 284 (2004)
- 10 C.F.R. 2.786(b)(4)
the Commission may grant review based on any consideration it deems to be in the public interest; CLI-04-4, 59 NRC 35 (2004)
- 10 C.F.R. 2.786(d)
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- 10 C.F.R. 2.786(g)
Commission undertakes interlocutory review when a board ruling either threatens immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-04-6, 59 NRC 70 (2004)
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- 10 C.F.R. 2.786(g)(1)
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- 10 C.F.R. 2.788(e)
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where petitioner fails to demonstrate either irreparable injury or a strong likelihood of success on the merits, detailed consideration of the remaining two stay factors is unnecessary; LBP-04-2, 59 NRC 83 (2004)
- 10 C.F.R. 2.802
any challenge to the adequacy of the existing licensing basis is an impermissible challenge to the Commission's regulations, and one for which relief would need to be pursued in accordance with; LBP-04-4, 59 NRC 168 (2004)
- 10 C.F.R. Part 2, Subpart I
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- 10 C.F.R. 2.904
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- 10 C.F.R. 2.1205(e) and (h)
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- 10 C.F.R. 2.1205(h)
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- standing to intervene in materials license amendment proceedings where requested amendment authorizes no new activity and threatens no injury to any person or entity is denied; CLI-04-1, 59 NRC 3 n.10 (2004)
- to meet the judicial standards for standing, a petitioner must show an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; CLI-04-13, 59 NRC 247 (2004)
- 10 C.F.R. 2.1205(l)(1)
for grant of a late-filed hearing request, petitioner must show that the delay in filing was excusable and that granting the request will not result in undue prejudice or undue injury to any other participant in the proceeding; CLI-04-2, 59 NRC 8 (2004)
- 10 C.F.R. 2.1205(l)(2)
if a hearing request is found to be untimely and the requestor fails to establish that it otherwise should be entertained, the request will be treated as a petition under section 2.206 and referred for appropriate disposition; CLI-04-2, 59 NRC 8 (2004)
- 10 C.F.R. 2.1205(o)
a presiding officer's denial of a request for a hearing is appealable to the Commission on the question of whether the hearing request should have been granted in whole or in part; CLI-04-13, 59 NRC 247 (2004)
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- 10 C.F.R. 2.1213
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- 10 C.F.R. 2.1231
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- 10 C.F.R. 2.1231(a)
NRC Staff shall file a hearing file within 30 days of the date of the licensing board order; LBP-04-5, 59 NRC 200 (2004)
- 10 C.F.R. 2.1233
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- 10 C.F.R. 2.1235
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- 10 C.F.R. 2.1253
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- 10 C.F.R. 2.1259(b)
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- 10 C.F.R. 2.1263
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- 10 C.F.R. Part 11
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- 10 C.F.R. 11.9
applicant has failed to show that its requested exemptions from sections 73.46(c)(1), (h)(3), (b)(3)-(12), and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest; LBP-04-10, 59 NRC 352 (2004)
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- 10 C.F.R. 11.11(b)
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on the requests for exemption from the requirements concerning armed guards, security clearances, and related requirements, petitioner has established genuine disputes on material issues of combined law and fact, so as to warrant admission of its contention; LBP-04-10, 59 NRC 349 (2004)
- 10 C.F.R. 20.1003
a "critical group" refers to the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances; LBP-04-8, 59 NRC 278 (2004)
- 10 C.F.R. Part 20, Subpart E
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- 10 C.F.R. 20.1402
where unrestricted public use of a site is under consideration, the residual radioactivity that is distinguishable from background radiation must result in a total effective dose equivalent to an average member of the critical group that does not exceed 25 mrem per year, including that from groundwater sources of drinking water; LBP-04-8, 59 NRC 278 (2004)
- 10 C.F.R. Part 25
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- 10 C.F.R. 30.33
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- 10 C.F.R. Part 40
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- 10 C.F.R. 40.14(a)
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- 10 C.F.R. 40.31
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- 10 C.F.R. 40.32
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- 10 C.F.R. 40.32(c) and (d)
an applicant is required to demonstrate that its equipment, facilities, and planned procedures will protect the public health and will not endanger life or property in the surrounding community; LBP-04-3, 59 NRC 88 (2004)
- 10 C.F.R. 40.36(d)
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- licensee requests an exemption from the regulatory funding requirements in order to support the terms and conditions of its reorganization plan; LBP-04-8, 59 NRC 268, 280 (2004)
- methods by which financial assurance for decommissioning must be provided in the case of a nongovernmental licensee are prepayment, a surety method, insurance, or other guarantee method, or an external sinking fund coupled with a surety method or insurance; LBP-04-8, 59 NRC 280 (2004)
- 10 C.F.R. 40.36(e)
Commission has authority to grant exemptions from; LBP-04-8, 59 NRC 281 (2004)
- 10 C.F.R. 40.42(c)
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- 10 C.F.R. 40.42(g)(5)
a proposed decommissioning plan will be approved if the information therein demonstrates that the decommissioning will be completed as soon as practicable and that the health and safety of workers and the public will be adequately protected; LBP-04-8, 59 NRC 270 (2004)
- 10 C.F.R. 40.42(i)
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- 10 C.F.R. 40.44
appropriate vehicle for materials reclassification request; CLI-04-1, 59 NRC 4 (2004)
- 10 C.F.R. 40.46(e)
as long as prerequisites pertaining to implementation of proposed financial instruments are met, a sufficient basis exists for exempting licensee from the financial assurance requirements of; LBP-04-8, 59 NRC 269 (2004)
- 10 C.F.R. Part 40, Appendix A, Criterion 9
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- licensee's cost estimates for decommissioning and decontamination must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work; CLI-04-14, 59 NRC 251 (2004); LBP-04-3, 59 NRC 88, 101, 103 (2004)
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- 10 C.F.R. Part 50
NRC Staff issued an order modifying the licenses of all licensees that currently store or have near-term plans to store spent fuel in an ISFSI to address the current terrorism threat environment; CLI-04-5, 59 NRC 54 (2004)
- 10 C.F.R. 50.9
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- 10 C.F.R. 50.54(f)
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- 10 C.F.R. 50.54(p)
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- 10 C.F.R. 50.57(a)
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- 10 C.F.R. 50.81
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- 10 C.F.R. 50.92(a)
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- 10 C.F.R. Part 50, Appendix B
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- 10 C.F.R. Part 50, Appendix B, Criterion III
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- 10 C.F.R. Part 50, Appendix B, Criterion XVI
if a safety-related structure, system, or component is degraded or nonconforming but operable, the licensee must establish an acceptable basis to continue to operate; DD-04-1, 59 NRC 235 (2004)
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- 10 C.F.R. Part 51
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- 10 C.F.R. Part 51, Subpart A
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- 10 C.F.R. 51.22(c)(9)
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- 10 C.F.R. 51.30(a)
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- 10 C.F.R. 51.45(c)
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- 10 C.F.R. 51.52
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- 10 C.F.R. 61.2
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- 10 C.F.R. Part 70
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- 10 C.F.R. 70.22(a)(8)
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- 10 C.F.R. 70.23
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- 10 C.F.R. 70.23(a)(2), (3), and (4)
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- 10 C.F.R. 70.23(a)(5)
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- 10 C.F.R. 70.23(b)
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- 10 C.F.R. 70.23a
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- 10 C.F.R. 70.32(k)
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- 10 C.F.R. 70.44
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- 10 C.F.R. Part 72
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- 10 C.F.R. 72.32(a)
NRC does not require an independent spent fuel storage installation that will only store prepackaged waste to have a formal offsite emergency plan because no onsite accident is expected to have significant offsite consequences; CLI-04-4, 59 NRC 47 (2004)
- 10 C.F.R. 72.122(f)
fuel cladding, once encased in a canister, is no longer considered a component important to safety; CLI-04-4, 59 NRC 39 (2004)
- 10 C.F.R. 72.128(a)
spent fuel storage facilities must be designed with a capability to test and monitor components important to safety; CLI-04-4, 59 NRC 39 (2004)
- 10 C.F.R. 72.184(a)
contention asserting that applicant has failed to adequately assess and describe procedures that will protect spent fuel from unauthorized access or activities, such as terrorism and sabotage, is found to be an impermissible attack on; CLI-04-4, 59 NRC 37 (2004)
- 10 C.F.R. 72.184(b)
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- 10 C.F.R. Part 73
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- 10 C.F.R. 73.1
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- 10 C.F.R. 73.1(a)(1)
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the design basis threats speak only to land vehicles for entrance to or exit from the facility; LBP-04-10, 59 NRC 346 (2004)
- 10 C.F.R. 73.1(a)(2)
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- 10 C.F.R. 73.2
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"need-to-know" means a determination made by a person having responsibility for protecting safeguards information that a proposed recipient's access to the information is necessary in the performance of official, contractual, or licensee duties of employment; CLI-04-6, 59 NRC 72 (2004)
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- 10 C.F.R. 73.3
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- 10 C.F.R. 73.5
applicant has failed to show that its requested exemptions from sections 73.46(c)(1), (h)(3), (b)(3)-(12), and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest; LBP-04-10, 59 NRC 352 (2004)
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- 10 C.F.R. 73.20
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- 10 C.F.R. 73.20(a)
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- 10 C.F.R. 73.21
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- requirements for protecting and accessing safeguards-designated information; CLI-04-6, 59 NRC 68 n.3 (2004)
- 10 C.F.R. 73.21(c)
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- 10 C.F.R. 73.45, 73.46
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- 10 C.F.R. 73.46(b)(3)-(12)
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- 10 C.F.R. 73.46(b)(8)
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- 10 C.F.R. 73.46(b)(11)(i)
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- 10 C.F.R. 73.46(c)(5)
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- 10 C.F.R. 73.46(d)(9)
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- 10 C.F.R. 73.46(h)(3)
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- 10 C.F.R. 73.51
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- 10 C.F.R. 73.55(a)
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- 10 C.F.R. 73.55(e) and (f)(1)-(3)
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- 10 C.F.R. 73.55(h)(1), (2)
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- 10 C.F.R. 73.55(h)(4)(iii)(A)
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- 10 C.F.R. Part 73, Appendix C, § 1
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- 10 C.F.R. Part 73, Appendix C, §§ 2 and 3
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- 10 C.F.R. Part 95
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- 10 C.F.R. 95.5
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- 10 C.F.R. Part 110
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- 10 C.F.R. 110.2
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- 10 C.F.R. 110.44
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- 10 C.F.R. 110.44(a)
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- 10 C.F.R. 110.83(b)
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- 10 C.F.R. 110.84
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- 10 C.F.R. 110.84(a)
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- 10 C.F.R. 110.85
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- 10 C.F.R. 110.111
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- 10 C.F.R. 110.111(a)
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- Atomic Energy Act, 53
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- Atomic Energy Act, 57
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- Atomic Energy Act, 127
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- Atomic Energy Act, 127(3)
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- Atomic Energy Act, 147, 42 U.S.C. § 2167
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- Atomic Energy Act, 184
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- Atomic Energy Act, 189
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- Atomic Energy Act, 191
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- Nuclear Non-Proliferation Act of 1978, 304(d)
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- United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 94
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- U.S.-EURATOM Agreement, art. 11.2
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Ronald J. Bettauer, *The Nuclear Non-Proliferation Act of 1978*, 10 Law & Pol'y Int'l Bus. 1105, 1119 (1978)

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S. Rep. No. 95-467, at 15 (1978)

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a petitioner must do more than merely make unsupported allegations, but rather must read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain why they have a disagreement with the applicant; LBP-04-4, 59 NRC 129 (2004)

a petitioner must include references to specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish the facts it alleges and/or the expert opinion it offers; LBP-04-4, 59 NRC 129 (2004)

a petitioner must provide support for each contention in the form of expert opinion, documents, and/or a fact-based argument; LBP-04-4, 59 NRC 129 (2004)

a showing that a genuine dispute exists with the applicant on a material issue of law must include references to the specific portions of the application that the petitioner disputes or identification of each failure and the supporting reasons for the petitioner's belief; LBP-04-10, 59 NRC 296 (2004)

a specific allegation or citation of a regulatory violation is not required but particular safety or legal reasons requiring rejection of the contested licensing action must be provided; LBP-04-4, 59 NRC 129 (2004)

appropriate means for a new challenge involving a contention of omission, for which applicant has supplied the missing information, is an amended contention; LBP-04-7, 59 NRC 259 (2004)

challenge to applicant's support for requests for exemption from certain security-related requirements of 10 C.F.R. §§ 73.46 and 11.11 is admitted; LBP-04-10, 59 NRC 296 (2004)

contested issues must be germane to the application pending before the board and material to matters that fall within the scope of the proceeding as set forth in the Commission's notice of opportunity for hearing; LBP-04-4, 59 NRC 129 (2004)

factual foundation for cask-drop contention is lacking because it does not present any plausible scenario requiring special planning for a breached cask; CLI-04-4, 59 NRC 31 (2004)

failure to meet pleading requirements is grounds for dismissal; LBP-04-4, 59 NRC 129 (2004)

if a challenge to a confirmatory order is limited by its terms to whether the order should be sustained, any issues a petitioner seeks to litigate would fall within the scope of the proceeding only if they amount to matters that oppose the issuance of the order as unwarranted; LBP-04-11, 59 NRC 379 (2004)

if a contention, and supporting material, fails to satisfy the requirements of section 2.714(b)(2) or the contention, if proven, would not entitle petitioner to relief, it is denied; LBP-04-10, 59 NRC 296 (2004)

intervenor cannot challenge the adequacy or completeness of the Staff's review by framing its contentions as questioning the information or lack of information the Staff had before it while it was conducting its review; LBP-04-9, 59 NRC 286 (2004)

intervenor may need to file a late-filed contention or a late-filed amendment to an admitted contention if the scope, data, or conclusions set out in the draft environmental impact statement or draft safety evaluation report differ significantly from applicant's environmental report or construction authorization request; LBP-04-9, 59 NRC 286 (2004)

SUBJECT INDEX

- intervenor's "amended contention" provides additional specific information falling within the ambit of an earlier-admitted contention, and thus discovery on the new information will be permitted at hearing; LBP-04-12, 59 NRC 388 (2004)
- requirements are strict by design because in prior years licensing boards admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-04-4, 59 NRC 129 (2004)
- specific statement of issues, supported by a basis consisting of a specifically stated explanation, fact-based argument, documents, and expert opinion, to establish genuine disputes on material issues of combined law and fact warrant admission of a contention under section 2.714; LBP-04-10, 59 NRC 296 (2004)
- the issue of law or fact that petitioner wishes to raise or controvert must be stated specifically; LBP-04-4, 59 NRC 129 (2004)
- the process employed by the Staff in conducting its regulatory reviews is not open to question in an NRC adjudicatory proceeding; LBP-04-8, 59 NRC 266 (2004)
- there is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application; LBP-04-9, 59 NRC 286 (2004)
- when a contention alleges omission of information in an application and the omitted information is later supplied by the Applicant, the contention is moot; LBP-04-7, 59 NRC 259 (2004)
- when determining the scope of a contention, one looks not only to the contention but also to its basis; LBP-04-12, 59 NRC 388 (2004)
- CONTENTIONS, LATE-FILED**
- a proponent's first duty is to demonstrate good cause to the board; CLI-04-4, 59 NRC 31 (2004)
- COST-BENEFIT ANALYSES**
- NEPA review considers a project's anticipated socioeconomic benefits and costs, but does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated effects of a proposed project; CLI-04-9, 59 NRC 120 (2004)
- CREDITOR REQUIREMENTS**
- regulations governing the creation of such interests in equipment, devices, or important component parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235, shall apply to licensing of enrichment facilities; CLI-04-3, 59 NRC 10 (2004)
- regulations governing the creation of such interests in special nuclear material shall apply to licensing of enrichment facilities; CLI-04-3, 59 NRC 10 (2004)
- regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by section 50.81, provided such arrangements are not inimical to the common defense and security of the United States; CLI-04-3, 59 NRC 10 (2004)
- DECOMMISSIONING COSTS**
- licensee's estimates must take into account costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work; CLI-04-14, 59 NRC 250 (2004)
- DECOMMISSIONING FUNDING**
- applicant must establish a surety arrangement that is adequate to ensure that sufficient funds would be available to carry out decommissioning and decontamination of the in situ mining site; LBP-04-3, 59 NRC 84 (2004)
- as long as prerequisites for implementation of proposed financial instruments are met, a sufficient basis exists for exempting licensee from financial assurance requirements; LBP-04-8, 59 NRC 266 (2004)
- methods by which financial assurance must be provided in the case of a nongovernmental licensee are prepayment, a surety method, insurance, or other guarantee method, or an external sinking fund coupled with a surety method or insurance; LBP-04-8, 59 NRC 266 (2004)
- DECOMMISSIONING FUNDING PLANS**
- information must include a cost estimate for decommissioning and a description of the method of assuring funds for decommissioning; LBP-04-8, 59 NRC 266 (2004)
- DECOMMISSIONING PLANS**
- adjudicatory consideration is confined to whether the plan meets regulatory requirements, not whether the Staff's review was adequate; LBP-04-8, 59 NRC 266 (2004)
- for approval, information therein must demonstrate that the decommissioning will be completed as soon as practicable and that the health and safety of workers and the public will be adequately protected; LBP-04-8, 59 NRC 266 (2004)

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DEFINITIONS

“critical group” refers to the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances; LBP-04-8, 59 NRC 266 (2004)
of “need to know” in context of safeguards information; CLI-04-6, 59 NRC 62 (2004)

See Also Interpretation

DEPARTMENT OF TRANSPORTATION

jurisdiction over transportation of nuclear materials includes the movement of property and loading, unloading, or storage incidental to the movement of materials; CLI-04-4, 59 NRC 31 (2004)

DESIGN BASIS THREAT

presence of MOX fuel assemblies at nuclear power plant brings into consideration the additional potential for theft or diversion of special nuclear material; LBP-04-10, 59 NRC 296 (2004)

DISCLOSURE

Commission accepts issue of what financial information may be withheld as proprietary information;

CLI-04-16, 59 NRC 355 (2004)

of safeguards information, thorough examination of the requested materials and, at times, release of only portions of documents or redacted versions of documents are entailed in; CLI-04-6, 59 NRC 62 (2004)
requirements for protecting safeguards information from; CLI-04-6, 59 NRC 62 (2004)

DISCOVERY

in uranium enrichment license proceeding, all parties, except NRC Staff, shall make the mandatory disclosures within 45 days of the issuance of an order admitting a contention; CLI-04-3, 59 NRC 10 (2004)

DISCOVERY AGAINST NRC STAFF

in uranium enrichment license proceeding is governed by sections 2.336(b) and 2.709; CLI-04-3, 59 NRC 10 (2004)

on safety issues before the SER is issued or on environmental issues before the FEIS is issued is at the discretion of the board if it will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner; CLI-04-3, 59 NRC 10 (2004)

Staff shall comply with requests no later than 30 days after the ASLB order admitting contentions and shall update the information at the same time as the issuance of the safety evaluation report or the final environmental impact statement; CLI-04-3, 59 NRC 10 (2004)

DOSE, RADIOLOGICAL

for unrestricted public use of a site, the residual radioactivity must result in a total effective dose equivalent to an average member of the critical group that does not exceed 25 mrem per year, including that from groundwater sources of drinking water; LBP-04-8, 59 NRC 266 (2004)

DUE PROCESS

observance where schedule for late contentions was spelled out clearly in a board scheduling order and the intervenor failed to timely request an extension; CLI-04-4, 59 NRC 31 (2004)

EMERGENCY CORE COOLING SYSTEM

potential clogging of the emergency sump due to debris in containment could cause failure of; DD-04-1, 59 NRC 215 (2004)

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT

although spent fuel is hazardous in that it requires safe handling under NRC regulations, it is not an extremely hazardous substance on EPA's list; CLI-04-4, 59 NRC 31 (2004)

EMERGENCY PLANS

an independent spent fuel storage installation that will only store prepackaged waste need not have a formal offsite plan because no onsite accident is expected to have significant offsite consequences; CLI-04-4, 59 NRC 31 (2004)

ENFORCEMENT ACTIONS

civil penalties and the use of severity levels are considered for issues with actual consequences; DD-04-1, 59 NRC 215 (2004)

Commission has the authority to define the scope of a proceeding; LBP-04-11, 59 NRC 379 (2004)

NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request; CLI-04-5, 59 NRC 52 (2004)

overview of how and why NRC Staff takes action against a licensee; DD-04-1, 59 NRC 215 (2004)

SUBJECT INDEX

scope of public participation is limited to whether the order modifying a license should be sustained; CLI-04-5, 59 NRC 52 (2004)

when a hearing is requested by a target of an enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because one possible outcome is that the order will not be sustained; CLI-04-5, 59 NRC 52 (2004)

ENFORCEMENT ORDERS

a licensing board must determine whether a hearing request falls within the scope of the proceeding as defined by that order; LBP-04-11, 59 NRC 379 (2004)

any interested person who wants some action taken beyond that adopted by the Staff in the exercise of its enforcement discretion may file a petition under section 2.206; LBP-04-11, 59 NRC 379 (2004)

Commission has authority to limit a proceeding narrowly to the issue of whether the order should be sustained; LBP-04-11, 59 NRC 379 (2004)

proximity to a plant might be sufficient to establish standing in a reactor operating license proceeding, but the scope of litigable concerns in those proceedings is much broader than in an enforcement order proceeding; LBP-04-11, 59 NRC 379 (2004)

ENFORCEMENT POLICY

licensee's failure to meet a commitment in itself does not constitute a violation of a legally binding requirement such as a rule, order, license condition, or technical specification; DD-04-1, 59 NRC 215 (2004)

NRC's scope and authority relative to; DD-04-1, 59 NRC 215 (2004)

petitioners' request for enforcement based solely on failure of the Licensee to complete commitments represents a misinterpretation; DD-04-1, 59 NRC 215 (2004)

when failures to meet commitments result in violations of the Commission's health and safety regulations, the Staff will take the appropriate enforcement actions; DD-04-1, 59 NRC 215 (2004)

ENFORCEMENT PROCEEDINGS

NRC discretion to limit the issues to whether the facts as stated in the modification order are true and whether the remedy selected is supported by those facts; CLI-04-5, 59 NRC 52 (2004)

ENVIRONMENTAL EFFECTS

NEPA is focused on the need to take a hard look at these impacts of proposed action; CLI-04-9, 59 NRC 120 (2004)

ENVIRONMENTAL IMPACT STATEMENT

commenting on the scope of the EIS does not substitute for raising a timely contention; CLI-04-4, 59 NRC 31 (2004)

environmental impacts of terrorism or sabotage are not subject to review under NEPA; CLI-04-4, 59 NRC 31 (2004)

NRC adjudicatory hearings are not editing sessions for; CLI-04-4, 59 NRC 31 (2004)

See Also Final Environmental Impact Statement

ENVIRONMENTAL JUSTICE

an executive order calls upon agencies to determine whether a proposed action would have disproportionately high and adverse human health or environmental effects, not disproportionate financial effects among different subgroups of a minority population; CLI-04-9, 59 NRC 120 (2004)

limits on the scope of litigable issues in NRC proceedings; CLI-04-3, 59 NRC 10 (2004)

parties responding to such contentions shall submit their answers to the Commission's Secretary with copies to the other parties and Board; CLI-04-3, 59 NRC 10 (2004)

ENVIRONMENTAL REPORT

complaints about the adequacy of an applicant's ER are superseded when the issues involved are discussed in the FEIS; CLI-04-4, 59 NRC 31 (2004)

ENVIRONMENTAL REVIEW

Staff may complete its review of a license amendment application prior to the completion of its safety evaluation; LBP-04-2, 59 NRC 77 (2004)

EXECUTIVE BRANCH

noninimicality determinations involve strategic judgments and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions; CLI-04-17, 59 NRC 357 (2004)

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EXECUTIVE ORDER 12898

agencies must determine whether a proposed action would have disproportionately high and adverse human health or environmental effects, not disproportionate financial effects among different subgroups of a minority population; CLI-04-9, 59 NRC 120 (2004)

EXEMPTIONS

as long as prerequisites pertaining to implementation of proposed financial instruments are met, a sufficient basis exists for exempting licensee from the financial assurance requirements; LBP-04-8, 59 NRC 266 (2004)

EXPORT LICENSES

a hearing on the adequacy of physical security measures of a recipient foreign country is inappropriate; CLI-04-17, 59 NRC 357 (2004)

Commission will consider whether a person requesting a hearing has an interest that may be affected, but even if that person has standing, the Commission is not obliged to order a hearing; CLI-04-17, 59 NRC 357 (2004)

consideration of such issues is precluded in operating license amendment proceedings; LBP-04-4, 59 NRC 129 (2004)

NRC's principal concern once fissile nuclear materials have left the United States is the possibility of theft; CLI-04-17, 59 NRC 357 (2004)

transfer of nuclear material to an intermediate consignee performing only shipping services does not constitute an export to a foreign sovereign; CLI-04-17, 59 NRC 357 (2004)

EXPOSURE

See Radiological Exposure

FEDERAL PREEMPTION

of state law prohibiting law enforcement at an independent spent fuel storage installation; CLI-04-4, 59 NRC 31 (2004)

FINAL ENVIRONMENTAL IMPACT STATEMENT

complaints about the adequacy of an applicant's environmental report are superseded when the issues involved are discussed in; CLI-04-4, 59 NRC 31 (2004)

See Also Environmental Impact Statement

FINANCIAL QUALIFICATIONS

Part 70 criteria can be met by conditioning the enrichment facility license to require funding commitments to be in place prior to construction and operation; CLI-04-3, 59 NRC 10 (2004)

FOREIGN OWNERSHIP

NRC must make an affirmative finding that the license for an enrichment facility will not be inimical to the common defense and security; CLI-04-3, 59 NRC 10 (2004)

FUEL

See Mixed Oxide Fuel

FUEL CLADDING

regulations governing structures and systems important to safety are not applicable after the cladding is enclosed in a canister; CLI-04-4, 59 NRC 31 (2004)

FUNDING

See Decommissioning Funding

GENERIC SAFETY ISSUES

petitioner's request for immediate shutdown until containment sumps are modified to resolve Generic Safety Issue 191 is denied; DD-04-2, 59 NRC 393 (2004)

safety margin in plant design allows for compensatory measures to mitigate potential risks associated with the potential for debris clogging of containment sumps; DD-04-2, 59 NRC 393 (2004)

HEARING REQUESTS

an export licensing hearing on the adequacy of protective measures of a recipient foreign country is inappropriate; CLI-04-17, 59 NRC 357 (2004)

Commission is required to hold a hearing on an export license only if it concludes that public participation will be in the public interest and assist it in making the statutory determinations that are prerequisites to the issuance of the license; CLI-04-17, 59 NRC 357 (2004)

SUBJECT INDEX

Commission will consider whether a person requesting a hearing on an export license has an interest that may be affected, but even if that person has standing, the Commission is not obliged to order a hearing; CLI-04-17, 59 NRC 357 (2004)

to obtain acceptance, a petitioner must both meet the judicial standard for standing and specify at least one area of concern that is "germane to the subject matter of the proceeding; LBP-04-5, 59 NRC 186 (2004)

HEARING REQUESTS, LATE-FILED

petitioner must show that the delay in filing was excusable and that granting the request will not result in undue prejudice or undue injury to any other participant in the proceeding; CLI-04-2, 59 NRC 5 (2004)

HEAT EXCHANGERS

gas analyzer heat exchanger valves found closed, rendering the containment gas analyzer inoperable; DD-04-1, 59 NRC 215 (2004)

HIGH-PRESSURE SAFETY INJECTION SYSTEM

potential for degradation of high-pressure injection pumps due to debris in emergency sump fluid post-accident; DD-04-1, 59 NRC 215 (2004)

IN SITU LEACH MINING

applicant must demonstrate that its equipment, facilities, and planned procedures will protect the public health and will not endanger life or property in the surrounding community; LBP-04-3, 59 NRC 84 (2004)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION

only sufficient watchmen to detect intrusion and alert local law enforcement are required for security; CLI-04-4, 59 NRC 31 (2004)

INJURY IN FACT

if a petitioner makes no effort to establish how a confirmatory order's corrective measures cause it any harm, under the scope of the proceeding as defined in the confirmatory order, the petitioner has failed to establish standing; LBP-04-11, 59 NRC 379 (2004)

in materials licensing cases, petitioner has the burden to show specific and plausible means how the planned activities at the site will affect her; CLI-04-13, 59 NRC 244 (2004)

in materials licensing cases, proximity alone does not suffice for standing, absent an obvious potential for offsite harm; CLI-04-13, 59 NRC 244 (2004)

mere potential exposure to minute doses of radiation within regulatory limits does not constitute; LBP-04-5, 59 NRC 186 (2004)

to establish standing, injury may be either actual or threatened, but must lie arguably within the zone of interests protected by the statutes governing the proceeding; LBP-04-4, 59 NRC 129 (2004)

See Also Irreparable Injury

INTERESTED GOVERNMENTAL ENTITY

a state, county, municipality, federally recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate in a uranium enrichment license proceeding; CLI-04-3, 59 NRC 10 (2004)

INTERPRETATION

See Definitions; Regulations, Interpretation

INTERVENTION

issuance of either a notice of hearing or a notice of proposed action is a prerequisite to the initiation of a proceeding for purpose of; CLI-04-12, 59 NRC 237 (2004)

INTERVENTION PETITIONS

filing deadline for any person whose interest may be affected by a proceeding is 30 days from the date of publication in the Federal Register of the notice of proposed action; CLI-04-12, 59 NRC 237 (2004)

in a uranium enrichment license proceeding, a petition shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-04-3, 59 NRC 10 (2004)

petitioner seeking hearing must demonstrate standing and proffer at least one admissible contention; LBP-04-11, 59 NRC 379 (2004)

INTERVENTION PETITIONS, LATE-FILED

a determination by the Commission or the Atomic Safety and Licensing Board that the petition should be granted is based upon a balancing of five factors; CLI-04-3, 59 NRC 10 (2004)

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INTERVENTION RULINGS

- a presiding officer's denial of a request for a hearing is appealable to the Commission on the question whether the hearing request should have been granted in whole or in part; CLI-04-13, 59 NRC 244 (2004)
- appeals by a party other than the intervention petitioner must rest on the question of whether the petition and/or the request for a hearing should have been wholly denied; CLI-04-11, 59 NRC 203 (2004)
- appeals lie only when a party challenges a licensing board's dispositive ruling on the entire petition to intervene; CLI-04-11, 59 NRC 203 (2004)
- for a hearing petitioner to take an appeal pursuant to 10 C.F.R. 2.714a(b), the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing; CLI-04-11, 59 NRC 203 (2004)
- for a license applicant to take an appeal under 10 C.F.R. 2.714a(c), the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner; CLI-04-11, 59 NRC 203 (2004)

IRREPARABLE INJURY

- a stay applicant must demonstrate that the injury claimed is both certain and great; LBP-04-2, 59 NRC 77 (2004)
- mere speculation about the potential occurrence of a nuclear accident does not satisfy the requirement for a stay; LBP-04-2, 59 NRC 77 (2004)
- most important factor to be considered in determining whether to grant or deny stay relief in Subpart L proceedings; LBP-04-2, 59 NRC 77 (2004)
- See Also Injury in Fact

LEAD TEST ASSEMBLIES

- amendment of operating license to allow for safety testing and batch MOX fuel use; LBP-04-7, 59 NRC 259 (2004) ; LBP-04-10, 59 NRC 296 (2004); LBP-04-12, 59 NRC 388 (2004)

LICENSE APPLICATIONS

- standard for review is against regulatory requirements, not against enforcement orders, such as NRC's post-September 11 general security orders; CLI-04-6, 59 NRC 62 (2004)

LICENSE CONDITIONS

- creditor regulations may be augmented as necessary to allow ownership arrangements (such as sale and leaseback) not covered by section 50.81, provided such arrangements are not inimical to the common defense and security of the United States; CLI-04-3, 59 NRC 10 (2004)

LICENSE RENEWAL PROCEEDINGS

- a person cannot intervene before issuance of either a notice of hearing or a notice of proposed action; CLI-04-12, 59 NRC 237 (2004)

LICENSE TERMINATION PLANS

- licensee proposes to remove contaminated materials in the soil and groundwater to meet the unrestricted release requirements of radiological criteria; LBP-04-8, 59 NRC 266 (2004)

LICENSING BOARD DECISIONS

- public version of the originally issued, sealed-as-safeguards document, is issued with redactions made on the basis of definition of safeguards information; LBP-04-10, 59 NRC 296 (2004)

LICENSING BOARD JUDGES

- although ultimate decisional responsibility in Subpart L proceedings may lie with the presiding officer, a member of the Licensing Board Panel with technical expertise will participate actively in the adjudication of any proceeding to which assigned as a special assistant; LBP-04-8, 59 NRC 266 (2004)

LICENSING BOARDS

- responsibility to assure itself of the reliability of the requestor of safeguards information; CLI-04-6, 59 NRC 62 (2004)
- while exercising their own judgment in "need-to-know" decisions, considerable deference should be given to the initial judgments of Staff experts; CLI-04-6, 59 NRC 62 (2004)

LICENSING BOARDS, AUTHORITY

- access to a meeting closed by the Staff cannot be authorized by; LBP-04-10, 59 NRC 296 (2004)
- considerable deference should be given to the Staff's judgments on need-to-know decisions, and any access granted to safeguards information should be as narrow as possible; LBP-04-10, 59 NRC 296 (2004)

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- neither superintending Staff regulatory reviews nor directing the Staff to admit particular individuals or groups to nonadjudicatory meetings falls within; CLI-04-6, 59 NRC 62 (2004)
- to consolidate, reframe, and renumber admissible portions of the contentions to provide for a more efficient hearing; LBP-04-4, 59 NRC 129 (2004)
- LICENSING BOARDS, JURISDICTION
 - alternatives not within the control of licensee may not be considered in an operating license amendment proceeding; LBP-04-4, 59 NRC 129 (2004); LBP-04-7, 59 NRC 259 (2004)
 - Commission authority to grant; CLI-04-6, 59 NRC 62 (2004)
 - to consider alternative nuclear power plants for testing and batch MOX fuel use, lack of; LBP-04-4, 59 NRC 129 (2004)
- LICENSING PROCEEDINGS
 - discussions of the country's need for energy and spent fuel storage are inappropriate in; CLI-04-7, 59 NRC 111 (2004)
- LIMITED APPEARANCE STATEMENTS
 - any person who does not wish, or is not qualified, to become a party to a proceeding may request permission for; CLI-04-3, 59 NRC 10 (2004)
- LOW-ENRICHED URANIUM
 - differences between behavior of mixed oxide fuel and; LBP-04-4, 59 NRC 129 (2004)
- MATERIALS LICENSE AMENDMENT APPLICATIONS
 - applicant is alleged to have failed to account for differences in MOX and LEU fuel behavior; LBP-04-4, 59 NRC 129 (2004)
- MATERIALS LICENSE AMENDMENTS
 - appropriate vehicle for request for reclassification of wastes; CLI-04-1, 59 NRC 1 (2004)
- MATERIALS LICENSE PROCEEDINGS
 - proximity alone does not suffice for standing, absent an obvious potential for offsite harm; CLI-04-13, 59 NRC 244 (2004)
 - there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny; LBP-04-5, 59 NRC 186 (2004)
- MATERIALS LICENSES
 - applicants who seek to operate nuclear storage or reprocessing facilities must comply with prescribed licensing procedures; CLI-04-7, 59 NRC 111 (2004)
- MINING
 - See In Situ Leach Mining
- MIXED OXIDE FUEL
 - application for amendment of operating license to allow use of lead test assemblies as part of U.S.-Russian Federation Plutonium Disposition Program; LBP-04-7, 59 NRC 259 (2004); LBP-04-10, 59 NRC 296 (2004); LBP-04-12, 59 NRC 388 (2004)
 - differences between behavior of low enriched uranium fuel and; LBP-04-4, 59 NRC 129 (2004)
- MODIFICATION ORDER
 - scope of public participation is limited to whether the order should be sustained; CLI-04-5, 59 NRC 52 (2004)
- MOOTNESS
 - board dismisses contentions that challenge the lack of physical security information in the applicant's original construction authorization after applicant submits a revised CAR; LBP-04-9, 59 NRC 286 (2004)
 - when a contention alleges omission of information in an application and the omitted information is later supplied by the Applicant, the contention is dismissed for; LBP-04-7, 59 NRC 259 (2004)
- MOTIONS FOR RECONSIDERATION
 - a disappointed hearing requester has the option of filing; CLI-04-13, 59 NRC 244 (2004)
 - presiding officer in operating license amendment proceeding is not specifically authorized to reconsider the denial of a hearing request, but may do so where the aggrieved hearing requestor can demonstrate that the presiding officer overlooked or misapprehended facts having a pivotal bearing upon the correctness of his or her decision; LBP-04-6, 59 NRC 211 (2004)

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where the requestor merely expresses disagreement with the conclusions undergirding the denial of standing, the appropriate course is to put that disagreement before the Commission by invoking the remedy specifically provided for that very purpose; LBP-04-6, 59 NRC 211 (2004)

MOTIONS TO REOPEN

to be granted, they must address a significant safety or environmental issue, demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and be timely; CLI-04-9, 59 NRC 120 (2004)

MOTIONS TO VACATE

deadline for filing is within 10 days of the date of the occurrence or circumstance from which the motion arises; CLI-04-12, 59 NRC 237 (2004)

MUNITIONS

depleted uranium, request for possession-only license for site containing; LBP-04-1, 59 NRC 27 (2004)

NATIONAL ENVIRONMENTAL POLICY ACT

because no connection has been shown between an independent spent fuel storage installation and the permanent repository to be developed by DOE, applicant's EIS need not consider impacts of the ISFSI on the development of a permanent repository; CLI-04-4, 59 NRC 31 (2004)

claims of financial and political corruption inside of a Native American tribe do not belong in the NRC hearing process under; CLI-04-9, 59 NRC 120 (2004)

complaints about the adequacy of an applicant's ER are superseded when the issues involved are discussed in the FEIS; CLI-04-4, 59 NRC 31 (2004)

environmental impacts of terrorism or sabotage are not subject to review under; CLI-04-4, 59 NRC 31 (2004)

neither Staff in drafting the EIS, nor a board in its hearing process, is charged with answering the political question whether the country as a whole needs an independent spent fuel storage installation; CLI-04-4, 59 NRC 31 (2004)

NRC adjudicatory hearings are not EIS editing sessions; CLI-04-4, 59 NRC 31 (2004)

NRC case law does not require review of terrorism, but the U.S. Department of Energy has discretion to do so; CLI-04-17, 59 NRC 357 (2004)

whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under; CLI-04-4, 59 NRC 31 (2004)

NATIVE AMERICANS

claims of financial and political corruption inside a tribe do not belong in the NRC hearing process under NEPA; CLI-04-9, 59 NRC 120 (2004)

federally recognized tribes do not need to address the requirements for standing; CLI-04-3, 59 NRC 10 (2004)

NEED TO KNOW

whether the information is indispensable is the touchstone for a demonstration of; CLI-04-6, 59 NRC 62 (2004)

NRC POLICY

distribution of safeguards information is limited to those having an actual and specific, rather than a perceived, need to know; CLI-04-6, 59 NRC 62 (2004)

interlocutory review is undertaken when a board ruling either threatens immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-04-6, 59 NRC 62 (2004)

NRC STAFF

considerable deference should be given by licensing boards to Staff's judgments on need-to-know decisions and any access granted to safeguards information should be as narrow as possible; LBP-04-10, 59 NRC 296 (2004)

NRC STAFF REVIEW

environmental review of a license amendment application may be completed prior to completion of the Staff's safety evaluation; LBP-04-2, 59 NRC 77 (2004)

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- licensing boards have no power to superintend Staff regulatory reviews or to direct Staff to admit particular individuals or groups to nonadjudicatory meetings; CLI-04-6, 59 NRC 62 (2004)
- meetings with applicant do not affect NRC Staff's obligation to make an affirmative finding on the adequacy of the Licensee's application for docketing purposes; CLI-04-12, 59 NRC 237 (2004)
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- NUCLEAR NON-PROLIFERATION ACT**
 - Commission is required to hold a hearing on an export license only if it concludes that public participation will be in the public interest and assist it in making the statutory determinations that are prerequisites to the issuance of the license; CLI-04-17, 59 NRC 357 (2004)
- NUCLEAR REGULATORY COMMISSION, AUTHORITY**
 - Commission may limit a proceeding regarding an enforcement order narrowly to the issue of whether the order should be sustained; LBP-04-11, 59 NRC 379 (2004)
 - discretion to limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts; CLI-04-5, 59 NRC 52 (2004)
 - discretion to undertake interlocutory review; CLI-04-6, 59 NRC 62 (2004)
 - to accept review of issues raised in licensing proceedings, based on any consideration it deems in the public interest; CLI-04-4, 59 NRC 31 (2004)
 - to change its rules as long as there is adequate notice and no prejudice; CLI-04-8, 59 NRC 113 (2004)
 - to consider petitions for interlocutory review absent a certified question or a referral by the presiding officer; CLI-04-6, 59 NRC 62 (2004)
 - to delegate jurisdiction to licensing boards over nonadjudicatory activities of Staff; CLI-04-6, 59 NRC 62 (2004)
 - to enforce compliance with the Commission's rules and regulations; DD-04-1, 59 NRC 215 (2004)
 - to grant exemptions from the requirements of Part 40, NRC must determine that they are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest; LBP-04-8, 59 NRC 266 (2004)
 - to summarily reverse a board order regarding attendance of intervenors at safeguards-related meetings between applicant and NRC Staff; CLI-04-6, 59 NRC 62 (2004)
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 - consideration of export licensing issues is precluded in; LBP-04-4, 59 NRC 129 (2004)
 - standing to intervene based on geographic proximity; LBP-04-6, 59 NRC 211 (2004)
- OPERATING LICENSE AMENDMENTS**
 - to allow the use of four mixed oxide fuel lead test assemblies as part of the ongoing U.S.–Russian Federation plutonium disposition program; LBP-04-10, 59 NRC 296 (2004)
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 - an export licensing hearing on the adequacy of protective measures of a recipient foreign country is inappropriate; CLI-04-17, 59 NRC 357 (2004)
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 - for site containing depleted uranium munitions, abeyance of proceeding pending completion of the NRC Staff's technical review of; LBP-04-1, 59 NRC 27 (2004)
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requests for changes to existing NRC regulations should be submitted as a petition for rulemaking and are not considered valid requests under section 2.206; DD-04-1, 59 NRC 215 (2004)

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of 10 C.F.R. Part 40, Appendix A, Criterion 9, regarding cost estimates for surety arrangements for decommissioning and reclamation; LBP-04-3, 59 NRC 84 (2004)

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NRC policy generally disfavors such review except when a board ruling either threatens immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-04-6, 59 NRC 62 (2004)

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- a person whose interest cannot be affected by the issues before the Commission in a proceeding lacks essential element of standing; LBP-04-11, 59 NRC 379 (2004)
- a presiding officer's denial of a request for a hearing is appealable to the Commission on the question whether the hearing request should have been granted in whole or in part; CLI-04-13, 59 NRC 244 (2004)
- absent an error of law or an abuse of discretion, the Commission generally defers to the presiding officer's decisions regarding standing; CLI-04-13, 59 NRC 244 (2004)
- admissibility of contentions on cask-drop accidents; CLI-04-4, 59 NRC 31 (2004)
- an order granting a petition to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question of whether the petition and/or the request for a hearing should have been wholly denied; CLI-04-11, 59 NRC 203 (2004)
- appeals of intervention rulings lie only when a party challenges a licensing board's dispositive ruling on the entire petition to intervene; CLI-04-11, 59 NRC 203 (2004)
- burden of proof in demonstrating that cost estimates for the surety arrangement will be adequate for decommissioning and reclamation of in situ mining site; LBP-04-3, 59 NRC 84 (2004)
- Commission has the authority to define the scope of a proceeding; LBP-04-11, 59 NRC 379 (2004)
- Commission will consider interlocutory review petitions even absent a certified question or a referral by the presiding officer if one of the standards is met; CLI-04-6, 59 NRC 62 (2004)
- Commission's customary practice is to accept questions certified by licensing boards; CLI-04-11, 59 NRC 203 (2004)
- conclusory allegations about potential radiological harm are insufficient to establish standing; CLI-04-13, 59 NRC 244 (2004)
- contention's proponent always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists; CLI-04-4, 59 NRC 31 (2004)
- decision is affirmed where brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal; CLI-04-2, 59 NRC 5 (2004)
- for a hearing petitioner to take an appeal pursuant to 10 C.F.R. 2.714a(b), the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing; CLI-04-11, 59 NRC 203 (2004)
- for a license applicant to take an appeal under 10 C.F.R. 2.714a(c), the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner; CLI-04-11, 59 NRC 203 (2004)
- if a challenge to a confirmatory order is limited by its terms to whether the order should be sustained, any issues a petitioner seeks to litigate would fall within the scope of the proceeding only if they amount to matters that oppose the issuance of the order as unwarranted; LBP-04-11, 59 NRC 379 (2004)
- in materials licensing cases, proximity alone does not suffice for standing, absent an obvious potential for offsite harm; CLI-04-13, 59 NRC 244 (2004)
- in materials licensing cases, there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny; LBP-04-5, 59 NRC 186 (2004)
- inherent supervisory authority of Commission to undertake interlocutory review; CLI-04-6, 59 NRC 62 (2004)
- intervenor's "amended contention" provides additional specific information falling within the ambit of an earlier-admitted contention, and thus discovery on the new information will be permitted at hearing; LBP-04-12, 59 NRC 388 (2004)
- intervention petitions in uranium enrichment license proceedings shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-04-3, 59 NRC 10 (2004)
- irreparable injury is the most important factor to be considered in determining whether to grant or deny stay relief in Subpart L proceedings; LBP-04-2, 59 NRC 77 (2004)

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judicial standing requires a showing of an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; LBP-04-5, 59 NRC 186 (2004)

licensing boards look to judicial concepts of standing for guidance in determining whether a petitioner has established the necessary interest; CLI-04-13, 59 NRC 244 (2004); LBP-04-4, 59 NRC 129 (2004)

matters raised for the first time on appeal will not be considered; CLI-04-2, 59 NRC 5 (2004)

motions to reopen a record must address a significant safety or environmental issue, demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and be timely; CLI-04-9, 59 NRC 120 (2004)

new Part 2 rules apply to all proceedings noticed on or after February 13, 2004; CLI-04-12, 59 NRC 237 (2004)

new rules are best applied in circumstances where no previous hearing has been held or hearings are still at an early stage and are likely to continue for a substantial period beyond the effective date of the new rules; CLI-04-8, 59 NRC 113 (2004)

nontimely intervention petitions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission or the Atomic Safety and Licensing Board that the petition should be granted, based upon a balancing of the factors in section 2.309(c)(1)(i)-(viii); CLI-04-3, 59 NRC 10 (2004)

NRC generally does not place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval; CLI-04-14, 59 NRC 250 (2004)

NRC may change its rules as long as there is adequate notice and no prejudice; CLI-04-8, 59 NRC 113 (2004)

organizations must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-04-5, 59 NRC 186 (2004)

parties have no vested interest in any form of; CLI-04-8, 59 NRC 113 (2004)

petitioner seeking hearing must demonstrate standing and proffer at least one admissible contention; LBP-04-11, 59 NRC 379 (2004)

public interest groups establish representational standing to intervene by providing affidavits of members who live in the vicinity of the plant and authorize the organizations to represent them in that proceeding; LBP-04-4, 59 NRC 129 (2004)

standard for grant of late-filed hearing requests; CLI-04-2, 59 NRC 5 (2004)

standing cannot be derived from the interests of another person; LBP-04-5, 59 NRC 186 (2004)

standing is denied where threat of injury is too speculative; LBP-04-5, 59 NRC 186 (2004)

standing to intervene in enforcement proceedings; CLI-04-5, 59 NRC 52 (2004)

standing to intervene in materials license amendment proceedings; CLI-04-1, 59 NRC 1 (2004)

stay relief in Subpart L proceedings is subject to four-factor test; LBP-04-2, 59 NRC 77 (2004)

to be admitted as a party in an NRC proceeding, a petitioner must, in addition to establishing standing, submit at least one contention meeting the admissibility requirements; LBP-04-4, 59 NRC 129 (2004)

to establish standing, a petitioner must show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-5, 59 NRC 52 (2004)

to obtain acceptance of a hearing request, a petitioner must both meet the judicial standard for standing and specify at least one area of concern that is germane to the subject matter of the proceeding; LBP-04-5, 59 NRC 186 (2004)

when a contention alleges omission of information in an application and the omitted information is later supplied by the Applicant, the contention is moot; LBP-04-7, 59 NRC 259 (2004)

when determining the scope of a contention, one looks not only to the contention but also to its basis; LBP-04-12, 59 NRC 388 (2004)

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- a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for; CLI-04-6, 59 NRC 62 (2004)
- considerable deference should be given to the Staff's judgments on need-to-know decisions and any access granted to safeguards information should be as narrow as possible; LBP-04-10, 59 NRC 296 (2004)
- definition of "need to know"; CLI-04-6, 59 NRC 62 (2004)
- disclosure entails thorough examination of the requested materials and, at times, release of only portions or redacted versions of documents; CLI-04-6, 59 NRC 62 (2004)
- if a licensing board overturns a Staff need-to-know finding, it is imperative that access to the documents be as narrow as possible; CLI-04-6, 59 NRC 62 (2004)
- in camera* sessions for licensing proceedings are closed to all who have not received the appropriate clearance; LBP-04-10, 59 NRC 296 (2004)
- interlocutory review of order for disclosure is appropriate because the adverse impact of that release would occur immediately and thus the alleged harm is immediate; CLI-04-6, 59 NRC 62 (2004)
- NRC policy is to limit distribution to those having an actual and specific, rather than a perceived, need to know; CLI-04-6, 59 NRC 62 (2004)
- public version of licensing board decision, originally issued as a sealed-as-safeguards document, is issued with redactions made on the basis of definition of; LBP-04-10, 59 NRC 296 (2004)
- requirements for protecting security plans, procedures, and equipment for the physical protection of nuclear materials and safety-significant equipment from public disclosure; CLI-04-6, 59 NRC 62 (2004)
- security representative is appointed by Commission to advise and assist licensing board in security classification of information and the safeguards to be observed in operating license amendment proceeding; LBP-04-10, 59 NRC 296 (2004)
- to obtain access, a person must have an established need to know and must provide assurance of trustworthiness; CLI-04-6, 59 NRC 62 (2004)
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- defined as avoiding undue risk or providing reasonable assurance of adequate protection of workers and the public in connection with the use of source, byproduct, and special nuclear materials; DD-04-1, 59 NRC 215 (2004)
- seven cornerstones are initiating events, mitigating systems, barrier integrity, emergency preparedness, occupational radiation safety, public radiation safety, and physical protection; DD-04-1, 59 NRC 215 (2004)
- SAFETY EVALUATION**
- Staff may complete its environmental review of a license amendment application prior to the completion of; LBP-04-2, 59 NRC 77 (2004)
- SAFETY-RELATED**
- regulations governing structures and systems important to safety are not applicable to fuel cladding after it is enclosed in a canister; CLI-04-4, 59 NRC 31 (2004)
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- an independent spent fuel storage installation must only have sufficient watchmen to detect intrusion and alert local law enforcement, and allow ISFSI operators to rely on law enforcement to thwart an attack; CLI-04-4, 59 NRC 31 (2004)
- SECURITY PROGRAM**
- appropriate heightening of security measures necessitated by the presence of MOX fuel assemblies at nuclear power plant; LBP-04-10, 59 NRC 296 (2004)
- SERVICE OF DOCUMENTS**
- if pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in NRC regulations for responding to filings served by first-class mail or express delivery shall not be applicable; CLI-04-3, 59 NRC 10 (2004)
- SITE REMEDIATION**
- of in situ mining site, estimation of volume of water and time needed for; LBP-04-3, 59 NRC 84 (2004)
- SITE RESTORATION**
- for unrestricted public use of a site, the residual radioactivity must result in a total effective dose equivalent to an average member of the critical group that does not exceed 25 mrem per year, including that from groundwater sources of drinking water; LBP-04-8, 59 NRC 266 (2004)

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- licensee proposes to remove contaminated materials in the soil and groundwater to meet the unrestricted release requirements of radiological criteria for license termination; LBP-04-8, 59 NRC 266 (2004)
- SPENT FUEL
- although it is hazardous in that it requires safe handling under NRC regulations, it is not an extremely hazardous substance on EPA's EPCRA list; CLI-04-4, 59 NRC 31 (2004)
- See Also Independent Spent Fuel Storage Installation
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- a person who resides far from a facility cannot assert the interests of a third party who will be near the facility unless the latter is a minor or otherwise under a legal disability, which would preclude his or her own participation; LBP-04-5, 59 NRC 186 (2004)
- a person whose interest cannot be affected by the issues before the Commission in an enforcement proceeding lacks an essential element of; CLI-04-5, 59 NRC 52 (2004); LBP-04-11, 59 NRC 379 (2004)
- absent an error of law or an abuse of discretion, the Commission generally defers to the presiding officer's decisions regarding; CLI-04-13, 59 NRC 244 (2004)
- appeal of denial, by petitioner who owns property within 20 miles of facility but resides out of state; LBP-04-6, 59 NRC 211 (2004)
- claims of potential injury that are so speculative and separate from an export license do not amount to cognizable harm for purposes of; CLI-04-17, 59 NRC 357 (2004)
- conclusory allegations about potential radiological harm are insufficient to establish; CLI-04-13, 59 NRC 244 (2004)
- denial where threat of injury is too speculative; LBP-04-5, 59 NRC 186 (2004)
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- exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury for purpose of; LBP-04-5, 59 NRC 186 (2004)
- if a petitioner makes no effort to establish how a confirmatory order's corrective measures cause it any harm, under the scope of the proceeding as defined in the confirmatory order, the petitioner has failed to establish the requisite injury-in-fact; LBP-04-11, 59 NRC 379 (2004)
- in materials license amendment proceeding where requested amendment authorizes no new activity and threatens no injury to any person or entity; CLI-04-1, 59 NRC 1 (2004)
- in materials licensing cases, proximity alone does not suffice for standing, absent an obvious potential for offsite harm; CLI-04-13, 59 NRC 244 (2004)
- judicial standards require a showing of an actual or threatened, concrete and particularized injury, that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; CLI-04-5, 59 NRC 52 (2004); LBP-04-4, 59 NRC 129 (2004); LBP-04-5, 59 NRC 186 (2004)
- licensing boards look to judicial concepts in determining whether a petitioner has established the necessary interest; LBP-04-4, 59 NRC 129 (2004)
- on a possession-only license for a site containing depleted uranium munitions; LBP-04-1, 59 NRC 27 (2004)
- petitioners' generalized institutional interest in minimizing danger from proliferation is insufficient to confer; CLI-04-17, 59 NRC 357 (2004)
- state and federally recognized Indian tribes do not need to address the requirements for; CLI-04-3, 59 NRC 10 (2004)
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- there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity requiring a materials license; LBP-04-5, 59 NRC 186 (2004)
- to meet the judicial standards, a petitioner must show an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; CLI-04-13, 59 NRC 244 (2004)
- where any alleged injury is entirely speculative, there is no standing; CLI-04-13, 59 NRC 244 (2004)

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an organization seeking standing must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member; LBP-04-5, 59 NRC 186 (2004)

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if petitioner fails to demonstrate either irreparable injury or a strong likelihood of success on the merits, detailed consideration of the remaining two stay factors is unnecessary; LBP-04-2, 59 NRC 77 (2004)

irreparable injury is the most important factor to be considered in determining whether to grant or deny relief in Subpart L proceedings; LBP-04-2, 59 NRC 77 (2004)

mere speculation about the potential occurrence of a nuclear accident does not constitute the requisite imminent, irreparable harm; LBP-04-2, 59 NRC 77 (2004)

to have the irreparable injury factor weigh in its favor, a petitioner must demonstrate that the injury claimed is both certain and great; LBP-04-2, 59 NRC 77 (2004)

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four factors to be considered in determining whether to grant or to deny stay relief in; LBP-04-2, 59 NRC 77 (2004)

SUBPART L PROCEEDINGS

although ultimate decisional responsibility in Subpart L proceedings may lie with the presiding officer, a member of the Licensing Board Panel with technical expertise will participate actively in the adjudication of any proceeding to which assigned as a special assistant; LBP-04-8, 59 NRC 266 (2004)

areas of concern must be stated with enough specificity that the presiding officer may determine whether the concerns are truly relevant to the license amendment at issue; LBP-04-5, 59 NRC 186 (2004)

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board dismisses contentions that challenge the lack of physical security information in the applicant's original construction authorization request because intervenor failed to file late-filed amendments or late-filed contentions after applicant submitted a revised CAR; LBP-04-9, 59 NRC 286 (2004)

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