

NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

July 1, 1995 – December 31, 1995

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PREFACE

This is the forty-second volume of issuances (1 – 258) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 1995 – December 31, 1995.

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

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

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

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

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

Issuances are referred to as follows: Commission--CLI, Atomic Safety and Licensing Boards--LBP, Administrative Law Judges--ALJ, Directors' Decisions--DD, and 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

COMMISSIONER:

Shirley A. Jackson, Chairman¹

In the Matter of

Docket No. 50-160-Ren
(Renewal of License No. R-97)

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

July 26, 1995

In this proceeding involving a license renewal application filed by the Georgia Institute of Technology (Georgia Tech), the Commission currently is considering appeals from Atomic Safety and Licensing Board order LBP-95-6, 41 NRC 281 (1995), which granted the Georgians Against Nuclear Energy's (GANE) petition for leave to intervene and admitted two contentions, one challenging the physical security at the Georgia Tech Research Reactor (GTRR), and the other alleging problems in the GTRR's management. Georgia Tech and the Nuclear Regulatory Commission Staff requested the Commission to stay discovery pending resolution of the appeals.

In light of new facts received, the Commission lifts its earlier imposed temporary stay of discovery, vacates the Licensing Board decision on the security contention, and remands the security contention to the Board for reconsideration.

MEMORANDUM AND ORDER

This proceeding concerns an application filed by the Georgia Institute of Technology (Georgia Tech) to renew its license to operate the Georgia Tech

¹This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

Research Reactor (GTRR). The Commission currently is considering appeals from Atomic Safety and Licensing Board order LBP-95-6, 41 NRC 281 (1995), which granted the request for hearing and petition for leave to intervene of the Georgians Against Nuclear Energy (GANE). The Licensing Board's decision admitted two contentions, one challenging the physical security at the GTRR, and the other alleging problems in the GTRR's management. Pursuant to 10 C.F.R. § 2.714a, both Georgia Tech and the NRC Staff appealed LBP-95-6.

Along with its appeal, Georgia Tech requested the Commission to stay discovery pending resolution of the appeal. The NRC Staff joined in the request for a stay. Georgia Tech and the NRC Staff object in particular to divulging to GANE the security arrangements for the GTRR, including security plans for the 1996 Olympic Games in Atlanta. On June 9, 1995, the Commission issued a temporary "housekeeping" stay of discovery on GANE's security contention, to allow the Commission to receive and consider the parties' responses to three questions relating to the merits of the stay request. For the reasons stated in this order, the Commission now lifts the temporary stay of discovery, vacates the Licensing Board decision on the security contention, and remands that contention to the Board for reconsideration in light of new facts.

Georgia Tech's response to the Commission's stay order introduces new information that according to the NRC Staff may render moot GANE's security contention. Georgia Tech now states that it will remove the fuel from its research reactor prior to the Olympic Games, and will replace the fuel only after the Games have concluded. Because GANE's security contention centered on the risk of a terrorist attack at the GTRR during the 1996 Olympics, and alleged that during refueling the GTRR's "bomb-grade" uranium fuel could be a "tempting target" for terrorists,² the NRC Staff argues that Georgia Tech's decision to remove the fuel may fundamentally affect the security contention's nature and vitality.

In light of this new development, the Commission believes that appellate review of the admissibility of the security contention now, without further developing the record, would be premature. In Commission practice the Licensing Board, rather than the Commission itself, traditionally develops the factual record in the first instance. The Commission therefore has decided to vacate the Licensing Board's original ruling on the admissibility of the security contention and to remand it to the Board for reconsideration in light of new facts.

The following inquiries may be relevant to the Board's reconsideration of the security contention:

²LBP-95-6, 41 NRC at 289.

- (1) Whether Georgia Tech's statement that it will remove the fuel from the reactor means that no fuel will be on site during the Olympic Games. The NRC Staff has suggested four pertinent questions: (a) What specific materials will be removed from the facility and what materials will remain on site? (b) Will the high-enriched uranium (HEU) fuel be removed from the site, or only from the reactor, prior to the Olympics? (c) Does the licensee's statement that it "plans to remove the fuel" signify its intent to replace the current HEU fuel with low-enriched (LEU) fuel? (d) Will the replacement fuel for the reactor be brought on site for storage, although not placed in the reactor, before the Olympics have concluded? Two other questions may also prove pertinent: (a) When will removal of the HEU fuel and any other materials take place? (b) What assurances exist that removal will be accomplished in a timely fashion?
- (2) Whether the removal of the fuel renders moot GANE's claim that "bomb-grade" uranium fuel constitutes a "tempting target" to terrorists requiring special security precautions during the Olympic Games. *See* 41 NRC at 289, 293-95.
- (3) Whether, in light of the proposed changes at the GTRR, GANE's security contention continues to satisfy the Commission's standards for admissibility of contentions. *See* 10 C.F.R. § 2.714(b)(2) and (d)(2).

The Board may of course choose to consider additional matters or to pose additional questions to the parties.³

Because any discovery on the security contention would be premature until the Licensing Board has reconsidered the contention's admissibility, the temporary stay of discovery imposed June 9, 1995, is now unnecessary and the Commission hereby lifts it. The Commission's remand of the security contention is without prejudice to any party's filing a subsequent appeal or application for a stay of discovery on the security contention. The Commission will continue to review the standing and management contention issues raised by the appeals of LBP-95-6, and will decide those issues in a separate decision, to be issued in due course.

For the reasons stated in this Order, the Commission lifts the temporary stay on discovery, vacates the Licensing Board decision in LBP-95-6 insofar as it approved GANE's security contention, and remands that contention to the Board for further consideration consistent with this Order.

³ Two additional documents recently filed with the Commission by Georgia Tech, one just yesterday (July 25), seemingly answer some of the Commission's inquiries, but we leave Georgia Tech's most recent statements for the Licensing Board to consider in its reevaluation of the security contention. *See* "Georgia Institute of Technology's Clarification of Response to Commission's Order Issuing Housekeeping Stay" (July 12, 1995); Letter of Patricia Guilday to Office of the Secretary, dated July 25, 1995.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of July 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-OM
(ASLBP No. 95-710-01-OM)
(Order Modifying Facility
Operating License No. R-97)

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

July 31, 1995

In a proceeding involving the proposed conversion of fuel in a research reactor from high-enriched fuel (HEU) to low-enriched fuel (LEU), the Licensing Board accepts the standing of the Petitioner for intervention based on standing established by that Intervenor in an ongoing license-renewal proceeding (subject to confirmation that the member upon whom the Intervenor relied in the renewal proceeding also seeks representation in the instant proceeding). The Board sets schedules for the filing of proposed contentions and responses thereto.

RULES OF PRACTICE: STANDING TO INTERVENE

Under certain circumstances, even if a current proceeding is separate from an earlier proceeding, the Commission may refuse to apply its rules of procedure

*During the numbering process, LBP-95-13 was inadvertently skipped.

in an overly formalistic manner by requiring that petitioners participating in the earlier proceeding must again identify their interests to participate in the current proceeding. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138 (1991).

MEMORANDUM AND ORDER (Intervention Petition)

This proceeding involves an enforcement action against the Georgia Institute of Technology (Georgia Tech or Licensee), dated June 16, 1995 ("Conversion Order") under which the NRC Staff is proposing to modify Georgia Tech's operating license to require the use of Low Enriched Uranium (LEU) fuel rather than the High Enriched Uranium fuel (HEU currently authorized. The modification implements a requirement appearing in 10 C.F.R. § 50.64, which limits the use of HEU in nonpower reactors (like the GTRR) and requires each licensee to replace its HEU with LEU (with limited exceptions not here applicable).

A Notice of Opportunity for Hearing on the Conversion Order appeared in the *Federal Register* of June 22, 1995. 60 Fed. Reg. 32,516. On July 6, 1995, Georgians Against Nuclear Energy (GANE) filed a timely request for a hearing. Georgia Tech has filed no response to GANE's request; the NRC Staff filed a response opposing GANE's request on July 26, 1995.¹

At the present time, GANE is a party to an ongoing proceeding concerning Georgia Tech's application to renew its operating license. The same Licensing Board assigned to this proceeding is also presiding in the renewal proceeding.²

The Staff recites a number of alleged procedural deficiencies as a basis for our denying GANE's hearing request. Specifically, it asserts that GANE has failed to state a factually correct or legally sufficient basis in support of its hearing request and, further, has not demonstrated an interest that may be adversely affected by a proceeding on the Conversion Order or its standing to request a hearing (Staff Response at 2).

In opposing GANE's hearing request for failing (in the Staff's opinion) to adhere to certain procedural requirements, the Staff has overlooked, as it did in the renewal proceeding, a procedural right afforded to GANE under NRC regulations. See Memorandum and Order (Intervention Petition), dated November 23, 1994, unpublished, Docket No. 50-160-Ren. Namely, under 10

¹ NRC Staff's Response to Request for Hearing on Conversion Order Filed by Georgians Against Nuclear Energy, dated July 26, 1995 (hereinafter, Staff Response).

² Establishment of Atomic Safety and Licensing Board, dated July 18, 1995 (60 Fed. Reg. 37,909, July 24, 1995).

C.F.R. § 2.714(b)(1), which is applicable to enforcement as well as licensing proceedings, a petitioner need not set forth contentions in the initial hearing request but, without leave of the Board, is permitted an additional period of time to do so. Further, a petitioner is afforded the same time period within which to amend its statement on standing, also without leave of the Board.

Furthermore, in another proceeding involving GANE, where there also were two proceedings in which GANE sought to participate, the Licensing Board determined, with respect to standing, that a showing in the first proceeding need not be reiterated in the second proceeding. The Board remarked, *inter alia*, that

while true that no affidavits were appended to the instant petition attesting that at least one member of GANE lived in close proximity to the . . . facility, we deem it was not necessary for GANE once again to establish this requisite interest of one of its members. Having established in the very recent, similar . . . case that one of its members resided in close proximity to the . . . facility, we will not delay the timely progress of the instant case by demanding that such affidavit be filed.

Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). Earlier, the Commission itself had reached a similar conclusion, refusing to apply its rules in "an overly formalistic manner," as the Licensee had urged. *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974).

We see no reason here not to accept GANE's statement of standing submitted in the renewal proceeding. We do so, subject to GANE's advising us that Mr. Robert Johnson wishes GANE to represent his interest in this as well as the renewal proceeding.

GANE must still set forth the contentions it wishes to assert in this proceeding. It should advise us and the parties of those contentions, including all the information set forth in 10 C.F.R. § 2.714(b) and (d). If it wishes to reassert the contentions admitted in the renewal proceeding, it should state why they may be relevant to the instant proceeding. The statement as to GANE's contentions, as well as its statement as to Mr. Johnson's intentions, should be filed (mailed) no later than Monday, August 21, 1995. Responses may be filed by Tuesday, September 5, 1995 (for the Applicant) and Monday, September 11, 1995 (for the Staff).

The Board will thereafter hold a prehearing conference for this proceeding, possibly in conjunction with a prehearing conference in the renewal proceeding. The conference will be held at a date and time to be announced later, either in Atlanta or through a telephone conference call. At that conference, the Board will also consider whether consolidation of the two proceedings, in whole or in part, is warranted. In their statements to be submitted on contentions, the parties and petitioner should also set forth their views on consolidation (assuming we were to find that GANE has set forth at least one admissible contention).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 31, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 99900271

ROSEMOUNT NUCLEAR INSTRUMENTS,
INCORPORATED
(Eden Prairie, Minnesota)

July 5, 1995

The Director of the Office of Nuclear Reactor Regulation denies a petition by Paul M. Blanch that requested certain action with regard to Rosemount Nuclear Instruments, Incorporated (Rosemount). The petition requested that: (1) Rosemount immediately inform all users of safety-related transmitters in accordance with the requirements of 10 C.F.R. Part 21 of the shelf-life limitations of its pressure transmitter sensor-cell fill-oil and that the fill-oil may crystallize if the transmitters are exposed to temperatures of less than 70°F, and provide all available information to each licensee for evaluation; (2) the NRC take "prompt and vigorous" enforcement action against Rosemount for knowingly and consciously failing to provide notification as required by 10 C.F.R. Part 21 of these issues and that a separate violation be issued for each defect and failure to provide the required notice; and (3) the NRC consider escalated enforcement action due to the repetitive nature of the alleged violations.

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

On November 21, 1994, Mr. Paul M. Blanch (the Petitioner) filed a petition with the Executive Director for Operations, pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), in which he requested that (1) Rosemount Nuclear Instruments, Incorporated (Rosemount),

immediately inform all users of safety-related transmitters in accordance with the requirements of 10 C.F.R. Part 21 of the shelf-life limitations of its pressure transmitter sensor-cell fill-oil, and that its pressure transmitter sensor-cell fill-oil may crystallize if the transmitters are ever exposed to temperatures of less than 70 degrees Fahrenheit (°F), and provide all available information to each licensee for evaluation as it applies to each licensed facility; (2) the U.S. Nuclear Regulatory Commission (NRC) take "prompt and vigorous" enforcement action against Rosemount for knowingly and consciously failing to provide notification as required by 10 C.F.R. Part 21 of the shelf-life limitations of the fill-oil and its potential to crystallize, and that a "separate violation must be issued" for each defect and each day of failure to provide the required notice; and (3) the NRC consider escalated enforcement action due to the repetitive nature of the alleged violations.

The Petitioner's letter has been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. By letter dated December 22, 1994, I acknowledged receipt of the petition. As described in that letter, the Petitioner's request that Rosemount "immediately" inform all users of safety-related transmitters of the shelf-life limitations of the fill-oil and the potential for crystallization was denied. With regard to the Petitioner's request that the NRC take "prompt and vigorous" enforcement action and consider escalated enforcement action against Rosemount for its alleged reporting failures, I informed the Petitioner that the Staff was evaluating this matter and would take appropriate enforcement action after completion of its evaluation, should it be warranted.

II. DISCUSSION

As set forth in 10 C.F.R. § 21.1, the regulations in Part 21 establish procedures and requirements for implementation of section 206 of the Energy Reorganization Act of 1974, which requires notification to the Commission of any basic component supplied to a licensed facility that has defects that could create a substantial safety hazard. Under 10 C.F.R. § 21.21(a), each entity subject to the regulations in Part 21 must evaluate "deviations" and "failures to comply" in order to identify a defect or failure to comply that could create a substantial safety hazard, were it to remain uncorrected.¹ In accordance with 10 C.F.R. § 21.21(b),

¹Section 21.3 defines a *deviation* as a departure from the technical requirements included in a procurement document. A *defect* is defined, in part, as a deviation in a basic component delivered to a purchaser for use in a facility or an activity subject to the regulations in Part 21 if, on the basis of an evaluation, the deviation could create a substantial safety hazard; the installation, use, or operation of a basic component containing a defect; or a condition or circumstance involving a basic component that could contribute to the exceeding of a safety limit. A *failure to comply* is defined as an activity or basic component that fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission relating to a substantial safety hazard. . . . (See 10 C.F.R. § 21.21(a)(3)(i)).

if the deviation is discovered by the supplier and the supplier determines that it does not have the capability to perform the evaluation to determine if a defect exists, then the supplier must inform the purchasers or affected licensees within 5 working days so that the purchaser or licensee may evaluate the deviation.

The Petitioner asserts that Rosemount became aware of a defect that may have created a substantial safety hazard and failed to report this defect to the affected licensees within 5 working days for evaluation. The Petitioner also asserts that neither the NRC nor Rosemount possess the technical areas of expertise to conduct this evaluation, and that the ultimate responsibility for evaluation is with the licensees.

A. Shelf-Life Limitations

The Petitioner's first request was that Rosemount must immediately inform all users of its safety-related transmitters of the shelf-life limitations of its pressure transmitter sensor-cell fill-oil and that the pressure transmitter sensor-cell fill-oil may crystallize if the transmitters are ever exposed to temperatures of less than 70°F. The Petitioner further requested that Rosemount must provide all available information to each licensee for evaluation as it applies to each licensed facility.

The shelf-life issue was first identified and discussed in NRC Inspection Report No. 99900271/93-01 which documented the results of an inspection conducted on February 1 through 4, and March 8 through 12, 1993, of the Rosemount Eden Prairie, Minnesota facility. The NRC inspection team review of the viscosity test date recorded on a container of Dow Corning (DC) 704 silicone oil used for Rosemount safety-related transmitter Models 1153 and 1154 sensor cells, located in the nuclear production sensor-cell oil-fill area, indicated that the contents were beyond the manufacturer's certified shelf life. The team noted that, upon receipt of this material, Rosemount Receipt Inspection verified its viscosity value and wrote that value and the date of test on the outside of each container. The applicable Dow Corning product specification data sheet stated, "when stored in the original, sealed container, at or below 77 degrees F, DC 704 oil has a shelf life of 12 months from the date of shipment, although no inherent limitations on the useful life of this product are known to exist." The team discussed this issue with Rosemount engineers, who stated that, as a result of product liability concerns, Dow Corning, in 1992, changed the certified shelf life of the oil listed on their product data sheet from "indefinite" to 12 months. Rosemount, however, still considered the shelf life to be indefinite and issued an engineering change notice in September 1992 to modify its procurement drawings to reflect this position. A letter dated April 14, 1992, from Dow Corning to Rosemount stated, in part, that "Dow Corning certifies that DC 704 will meet the sales specification requirements for 12 months from date of shipment when properly stored in the original

unopened container Because the sensor is completely sealed and free from contaminants and air it shouldn't change chemically over a long period of time." Another letter from Dow Corning to Rosemount, dated August 31, 1992, regarding the useable life of DC 704 stated that no inherent limitations on useful life of the product are known to exist and that it is the responsibility of Rosemount to test and evaluate Dow Corning products in their specific applications to determine compatibility. During the February and March 1993 inspection, the NRC inspectors observed that Rosemount had established a test and evaluation program that encompassed its sensor-cell application in the safety-related transmitters. The inspectors observed that Rosemount has been performing functional testing of its transmitters which includes testing at pressure and within the operational limits. Based upon the inspectors' observations and their review of Rosemount correspondence with Dow Corning, the NRC concludes that the shelf life of the oil does not constitute a safety issue.

The Petitioner filed an earlier petition on March 28, 1994, in which he requested that the NRC inform all users of Rosemount 1150-series pressure transmitters and series-510 and -710 DU trip devices of "significant safety problems identified in NRC Inspection Report 99900271/93-01." By letter dated May 2, 1994, the Petitioner repeated this request. I responded to this request by letter dated June 3, 1994. In my response, I summarized some of the above discussion and stated that the Staff did not consider the shelf life of the DC 704 fill oil to be significant.²

The Commission's regulations in 10 C.F.R. Part 21 require that notification be provided of any basic component supplied to a licensed facility that contains defects that could create a substantial safety hazard. However, the Staff determined that Rosemount was not required to notify the NRC or to inform its customers under the provisions of Part 21 because a defect or deviation as defined in 10 C.F.R. § 21.3 was not identified.

B. Sensor-Cell Fill-Oil Crystallization

An NRC Staff concern regarding potential crystallization of DC 704 silicone oil that is used in Rosemount Models 1153 and 1154 safety-related transmitters' sensor cells was formally transmitted to Rosemount by an NRC letter dated June 2, 1994. That letter identified the Staff's concern regarding an apparent disparity between the fill-oil manufacturer's precautionary note on temperature limitations and the Rosemount product data sheet. The June 2, 1994 letter also noted that Rosemount believed it had adequately addressed the concern in tests conducted in 1980, but that it was pursuing the matter further with

² A Director's Decision responding to the other issues raised in the Petitioner's December 31, 1992, and March 28, 1994 petitions (DD-94-12) was issued on December 15, 1994. 40 NRC 370.

the fill-oil manufacturer. Rosemount's letter of September 28, 1994, provided an analysis and response to these concerns. Rosemount's analysis concluded that preconditioning of the fill oil during the transmitter manufacturing process, coupled with initial and periodic testing of the transmitters in service at plants, provide adequate assurance that proper transmitter performance is maintained. The analysis also noted that Rosemount was aware of the fill oil's potential for crystallization and addressed its concerns in a 1980 report that concluded that crystallization was not a concern as long as certain conditions were met. These conditions are assured by Rosemount's manufacturing processes and its transmitter's specified range of operation. Rosemount informed the Staff in a September 1994 submittal that it found no evidence of fill-oil crystallization at licensee facilities. In addition, an NRC Staff review of industry data did not identify any instances of Rosemount Model 1153 or 1154 transmitter sensor-cell oil crystallization. The NRC Staff conducted an inspection at the Rosemount facility in January 1995 (Inspection Report 99900271/95-01), specifically to review the crystallization issue. Based on the team's review of the Rosemount procedures, manufacturing process, and personal interviews with the Rosemount manufacturing and engineering staff, the NRC Staff concluded that Rosemount's actions in 1980 regarding the DC 704 cautionary note adequately addressed its Part 21 responsibilities and the validity of its engineering basis for its Model 1153 and 1154 low-temperature-designed application. Additionally, the team determined that, although not required by Part 21, Rosemount had provided its customers a summary of its engineering analysis in a letter of December 1, 1994, and that Rosemount had appropriately implemented its applicable manufacturing process controls. The team also concluded that Rosemount's conditioning of the DC 704 oil before its use should remove any existing seeds that could cause crystallization. Based on a review of the information provided by Dow Corning, observations of Rosemount testing, and industry historical data that indicate no instances of crystallization, the Staff concludes that the concern regarding crystallization of DC 704 oil is adequately addressed by the transmitter manufacturing process and performance testing by the licensees.

In summary, the Staff found that Rosemount identified, evaluated, and took appropriate actions regarding the manufacturer's cautionary note concerning the transmitter fill-oil temperature limitations in 1980. Since Rosemount's manufacturing and testing processes are sufficient to ensure a low probability of crystallization of the fill oil, the Staff has determined that Dow Corning's cautionary note regarding crystallization did not constitute a deviation from the Rosemount product data sheet. Therefore, Rosemount was not required to inform its customers of the issue under the provisions of Part 21.

The aspect of the Petitioner's request regarding shelf-life limitations and crystallization of the fill oil is denied. The shelf-life issue was evaluated by the Staff and, as discussed in my December 22, 1994 letter to the Petitioner,

found not to be a significant safety issue. As discussed in the NRC's December 9, 1994 letter to Rosemount and NRC Inspection Report No. 99900271/95-01, the crystallization issue was determined by NRC Staff to have been adequately addressed by Rosemount in regard to its engineering and Part 21 responsibilities. Rosemount was not required under Part 21 to inform affected purchasers of these conditions; therefore, no violation of Part 21 was identified. Since the remainder of the Petitioner's request relates to enforcement action that is predicated on a violation of NRC regulations, the remainder of the Petitioner's request is also denied.

III. CONCLUSION

As explained above, following its review of the Petitioner's request and supporting argument, the NRC Staff concludes that Rosemount did not violate Part 21 with respect to the issues raised in this petition. Accordingly, the petition is hereby denied.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 5th day of July 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. 50-361
50-362

SOUTHERN CALIFORNIA EDISON
COMPANY, *et al.*
(San Onofre Nuclear Generating
Station, Units 2 and 3)

July 24, 1995

The Director, Office of Nuclear Reactor Regulation, denies a petition filed on September 19, 1994, and supplemented by letters dated December 2 and December 7, 1994, by Mr. Richard M. Dean requesting a shutdown of the San Onofre Nuclear Generating Station (SONGS). The request was based on concerns regarding the closure of the Pacific Coast Highway and the recent financial losses incurred by Orange County as related to the County's ability to effectively participate in emergency evacuation plans in the event of an emergency at SONGS.

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

I. INTRODUCTION

By petition dated September 19, 1994, Mr. Richard M. Dean (Petitioner) requested that the Nuclear Regulatory Commission (NRC) take action with regard to San Onofre Nuclear Generating Station (SONGS). The Petitioner requested that the NRC shut down the SONGS facility based upon gross negligence by Southern California Edison Company in not having an escape plan. The Petitioner asserted as a basis for this request that the closure of the Pacific Coast Highway (PCH) at the Dana Point/San Clemente border (due to a

landslide on January 16, 1993) invalidates the emergency evacuation plans for the residents of San Clemente. Notice of receipt of the petition indicating that a final decision with respect to the requested action would be forthcoming at a later date was published in the *Federal Register* on November 9, 1994 (59 Fed. Reg. 55,900).

The Petitioner, in letters dated December 2 and December 7, 1994, again requested the NRC to close the SONGS facility. The Petitioner asserted as a basis for this request that the recent financial losses incurred by Orange County called into question the county's ability to effectively participate in emergency evacuation plans in the event of an emergency at SONGS. Since these concerns were closely related to those expressed in the Petitioner's September 19, 1994 petition, they were treated as supplements to that petition.

Because the petition involves matters related to offsite emergency planning, the NRC requested the assistance of the Federal Emergency Management Agency (FEMA) in responding to the issues raised by the petition. By presidential directive, FEMA has been assigned the responsibility for assessing the adequacy of offsite emergency plans for the area surrounding a nuclear plant. The NRC is responsible for assessing the adequacy of onsite emergency plans and has the final licensing authority. FEMA responded to NRC's request for assistance by letter dated March 22, 1995.

II. DISCUSSION

Title 10 of the *Code of Federal Regulations* (C.F.R.), Part 50, section 50.54(q), states in part that "A licensee authorized to possess and operate a nuclear power reactor shall follow and maintain in effect emergency plans which meet the standards in § 50.47(b)." Section 50.54(s)(1) states in part that

Each licensee who is authorized to possess and/or operate a nuclear power reactor shall submit to NRC within 60 days of the effective date of this amendment the radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within a plume exposure pathway EPZ, as well as the plans of State governments wholly or partially within an ingestion pathway EPZ.

Section 50.47(a)(1) states in part that "no initial operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protection can and will be taken in the event of a radiological emergency." Section 50.47(a)(2) further states in part, "The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented." The review and approval of State and local

radiological emergency plans and preparedness by FEMA are performed under the provisions of 44 C.F.R. Part 350.

Officials from the State of California, Orange County, the City of San Clemente, and other jurisdictions in the emergency planning zone (EPZ) for the SONGS facility have participated in the development of the Radiological Emergency Preparedness (REP) plans to be implemented in the event of an incident at the facility. These REP plans have been evaluated in detail during each of the biennial REP exercises that began in May 1981; findings of these exercises have been reported to the NRC by FEMA. During these biennial exercises, evacuation route impediments, such as landslides, are simulated to test the capability of the offsite response organization to deal with such a contingency. The California State and local officials have continued to meet such challenges successfully during these biennial REP exercises. The most recent exercise was conducted in September 1993. As documented in (1) the October 13, 1993 letter from the NRC to Southern California Edison Company, forwarding the Staff's inspection report of the September 1993 exercise, and (2) the March 27, 1995 letter from FEMA to the NRC, forwarding its report on the exercise, the offsite radiological emergency response plans and preparedness for the State of California and the affected local jurisdictions can be implemented and are adequate to provide reasonable assurance that appropriate measures can be taken off site to protect the health and safety of the public in the event of a radiological emergency at the site.

The Petitioner's assertion that, with the closure of the PCH, Interstate 5 is the only route out of San Clemente is incorrect. The SONGS EPZ has a total of ten sectors for evacuation purposes. Three of these sectors comprise the City of San Clemente. The portion of the PCH affected by the landslide only affects the evacuation of one sector, Sector 3, of the City of San Clemente.

The landslide on January 16, 1993, closed the PCH at the San Clemente and Dana Point border. More landslides occurred in February 1993. However, an alternate route was established around the landslide area by local officials to act as a substitute evacuation route while the PCH was being repaired. The PCH had been scheduled to reopen in January 1995. However, in January 1995, the entire area received extremely heavy rainfall, causing further delays in the reopening of this portion of the PCH. The PCH was officially reopened on April 5, 1995. During reconstruction activities, the PCH was not open to the general public. However, two lanes were open for construction traffic and they could have been used to supplement the alternate route, if needed, as a means for evacuating the area. As stated by FEMA in its letter dated March 22, 1995, since an alternate evacuation route was established during the period when the PCH was closed to normal traffic, and since the PCH was available for emergency use, the safe evacuation of the citizens of San Clemente was not compromised.

With respect to the Petitioner's concerns regarding the ability of Orange County to effectively participate in emergency evacuation activities considering the County's current financial difficulties, FEMA concludes that Orange County is meeting its obligations in this matter. According to FEMA's letter dated March 22, 1995, Orange County officials are aware that the current financial situation presents a major challenge in restructuring and prioritizing services to meet their objectives and mandates within their available resources. However, the Board of Supervisors recognizes that the primary mission of the County or of the local County government is the protection of health, safety, and welfare of the citizens and visitors to the County. During this financial crisis, the Board has repeatedly reiterated and publicly confirmed that these services are the highest priority for all County agencies and departments, including those services provided to contract cities such as San Clemente. In addition, a representative of the County is an active participant on the SONGS Interjurisdictional Planning Committee (IPC), which meets on a formal basis with officials of SONGS, the affected cities, the Camp Pendleton Marine Corps Base, the State Department of Parks and Recreation, the Capistrano Unified School District, San Diego County, and federal and state emergency organizations to coordinate their nuclear power plant plans, preparedness, and procedures for emergency response to an emergency or incident at the SONGS site. The IPC also coordinates the multiagency planning, training, and drills for multihazard emergency response. The IPC representatives meet at least monthly to ensure their planning and preparedness measures are thoroughly coordinated and current. Accordingly, as stated by FEMA in its letter dated March 22, 1995, Orange County's financial difficulties are not preventing it from meeting its emergency evacuation responsibility.

III. CONCLUSION

The institution of proceedings pursuant to section 2.206 is appropriate only if substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner is warranted. With regard to the request made by the Petitioner to shut down the SONGS facility, I find no basis for taking this action. The respective local jurisdictions have maintained their emergency plans in effect and continue to monitor them on a regular basis to ensure that they remain current and coordinated. Appropriate evacuation routes are available. Local officials are aware of their resource limitations and have focused resources to ensure that the

health, safety, and welfare of the citizens are of priority. FEMA has repeatedly determined that offsite emergency response plans and preparedness can be implemented and are adequate to provide reasonable assurance that appropriate measures can be taken offsite to protect the health and safety of the public in the event of a radiological emergency at the SONGS facility. On the basis of FEMA's findings, the NRC continues to find that there is reasonable assurance that adequate protection can and will be taken in the event of a radiological emergency at the SONGS facility. For the reasons discussed above, no basis exists for taking any action in response to the petition as no substantial health or safety issues have been raised by the petition. Accordingly, the Petitioner's request for action pursuant to section 2.206 is denied.

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

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**William T. Russell, Director
Office of Nuclear Reactor
Regulation**

Dated at Rockville, Maryland,
this 24th day of July 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Frank J. Miraglia, Acting Director

In the Matter of

Docket No. 50-160

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

July 31, 1995

The Acting Director, Office of Nuclear Reactor Regulation, partially denies a petition dated October 23, 1994, filed by Ms. Pamela Blockey-O'Brien (Petitioner). This Partial Director's Decision also considered subsequent letters from the Petitioner dated November 12 and December 4, 1994, February 21, February 23, March 6, March 28, April 19, May 18, June 27, and July 18, 1995. The Petitioner requested (1) the shutdown and decontamination of the Georgia Tech Research Reactor, (2) the revocation of liquid radioactive material release authority to all licensees, (3) the revocation of licenses that use the principle of as low as reasonably achievable, (4) the termination of transportation of radioactive material by mail, and (5) the modification to posting requirements for radioactive material. After a review of the Petitioner's concerns, the Acting Director concluded that the Petitioner's concerns, addressed to date, do not raise substantial health and safety concerns warranting the requested actions. The reasons for the partial denial are fully set forth in the Partial Director's Decision.

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

I. INTRODUCTION

On October 23, 1994, Ms. Pamela Blockey-O'Brien (the Petitioner) filed a petition with the U.S. Nuclear Regulatory Commission (NRC) Staff pursuant to 10 C.F.R. § 2.206, that requested that the NRC Staff revoke the license of the Georgia Institute of Technology (Georgia Tech) Research Reactor, shut down this research reactor and its support facilities, and remove all radioactive material and contamination off site to a government-created "National Sacrifice [A]rea" such as the Savannah River or Oak Ridge facilities. In addition, the Petitioner requested that the NRC Staff withdraw all license authority nationwide involving the discharging or dumping of any quantity of radioactive material to all the sewers or waters in the United States or oceans of the world, and withdraw all licenses to all nuclear facilities, including nuclear power plants (NPPs), which operate under as low as reasonably achievable (ALARA) principles. Finally, the Petitioner requested both that the NRC Staff modify every license issued to transporters of radioactive materials and builders of NPPs so that these parties must put 2-foot-high letters on everything transported or built stating "DANGER-RADIOACTIVE" and in smaller letters "there is no safe level of radiation, any exposure can [a]ffect health," and prohibit the transportation of radioactive material by mail. The NRC Staff received additional letters dated November 12 and December 4, 1994, and February 21, February 23, March 6, March 28, April 19, May 18, June 27, and July 18, 1995, from the Petitioner and also considered these letters in this Partial Director's Decision. All letters related to this petition have been placed in the Public Document Room and docketed under the Georgia Tech Research Reactor Docket No. 50-160, in accordance with NRC Management Directive 8.11, "Review Process for 10 C.F.R. 2.206 Petitions."

As bases for the request to shut down and decontaminate the Georgia Tech Research Reactor, the Petitioner asserted that (1) a water flume comes out of the ground "destabilizing the reactor and the ground in some way"; (2) "[r]adiation levels in soil and vegetation climb markedly in GA EPD documents" around the Georgia Tech Research Reactor; (3) there is no record of air monitoring ever having been done; (4) heavy rainfall causes water to back up in the sewer and drainage lines causing flooding of the reactor parking lot and campus, as well as causing sinkholes, "puff-ups" on campus ground, and welded-shut manhole covers to be blown off; (5) radioactive contaminants have been routinely discharged into the sanitary sewer from the Georgia Tech Research Reactor's wastewater holding tank and contamination has

spread by backup of the sewage system; (6) should the Georgia Tech Research Reactor be further destabilized, the reactor and the tank holding cobalt-60 could “break apart,” causing radioactive contaminants to “drain into groundwater/down sewers/into the runoff ditch”; (7) the Georgia Tech Research Reactor is in an earthquake zone; (8) there is absolutely no reason to keep the Georgia Tech Research Reactor operating; (9) security at the Georgia Tech Research Reactor is extremely lax; and (10) in case of an accident or terrorist attack, evacuation of the campus and downtown Atlanta would be impossible both now and during the Olympics.¹

As the bases for the request to withdraw all license authority nationwide involving the discharging or dumping of any quantity of radioactive material to all the sewers or waters in the United States, to withdraw all licenses for all nuclear facilities, including NPPs, which operate under ALARA principles, and to change labeling requirements for radioactive material, the Petitioner asserted that there is no safe level of radiation, that storage and disposal of radioactive waste is inadequate, and that the NRC’s new sewage dumping guidelines are totally inadequate. The Petitioner also asserted that the request to restrict mailing of radioactive materials relates to the occurrence of transportation accidents.

II. DISCUSSION

A. Revocation of Georgia Tech Research Reactor License

The following discussion relates to the request that the NRC Staff revoke the license of the Georgia Tech Research Reactor, shut down this research reactor and its support facilities, and remove all radioactive materials and contamination off site. This Partial Director’s Decision addresses NRC-licensed activities.²

1. *A Water Flume Comes Out of the Ground “Destabilizing the Reactor and the Ground in Some Way”*

The Petitioner stated that “[d]etailed maps show that a water flume comes out of the ground directly next to and west of the reactor.” On request, the Petitioner

¹ Issue (8) includes concerns that substantial management deficiencies persist. Issue (9) involves concerns on general security and, particularly, security during the period of the 1996 Olympics. Issue (10) includes concerns on evacuation in case of a terrorist attack. Since these concerns are the subject of an ongoing license renewal proceeding before an Atomic Safety and Licensing Board, these concerns will be addressed in a Final Director’s Decision at an appropriate time after considering the decisions reached in the license renewal process. All other issues related to this 2.206 petition were considered in this Partial Director’s Decision.

² The 10 C.F.R. § 2.206 petition included some mention of the cobalt-60 irradiation facility which is not licensed by the NRC and is, therefore, not covered in this discussion except as it may affect research reactor safety. The 2.206 petition and this Partial Director’s Decision have been transmitted to the State of Georgia, the licensing authority for the cobalt-60 facility and for other state-licensed material also mentioned in the petition.

identified the "detailed maps" as City of Atlanta, Department of Public Works (DPW) Sheets I-11 and H-11, which show "flumes" or "storm drain inventory."

The NRC Staff reviewed these drawings. Drawing I-11 did not show a flume indication. Drawing H-11 does indicate a "flume" to the west of the Georgia Tech Research Reactor. The NRC Staff discussed this drawing and indication of a "flume" with DPW, the agency responsible for the sewer system and the drawings. The DPW indicated that the word "flume" in the drawing means a surface drainage path. Physical onsite examination of this location showed a surface drainage path consisting of a concrete-lined channel extending along the back retaining wall of the Georgia Tech Research Reactor facility site, approximately where the "flume" was indicated on the drawing.

Furthermore, physical examination of the Georgia Tech Research Reactor facility and site have found no evidence of an underground water flume or destabilization of the Georgia Tech Research Reactor facility or ground. Additional factors related to stability of the Georgia Tech Research Reactor are addressed under issues (4), (6), and (7).

The NRC Staff finds no reason to conclude that there is an underground water flume destabilizing the Georgia Tech Research Reactor and surrounding ground. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that the Petitioner's concerns do not present a substantial health or safety issue warranting the action requested by the Petitioner.

2. *"Radiation Levels in Soil and Vegetation Climb Markedly in GA EPD Documents" Around the Reactor*

The State of Georgia (GA) Environmental Protection Division (EPD) provided the NRC Staff with its environmental radiation monitoring results as compiled on November 23, 1994. These results included data from environmental monitoring for radioactivity with thermoluminescent dosimeters (TLDs), and from soil and vegetation sampling around the Georgia Tech Research Reactor.

The NRC Staff discussed the results with EPD. EPD stated that its monitoring found no evidence of release of radioactive material from the Georgia Tech Research Reactor. EPD further indicated that the values and variations in monitored radiation exposures and concentrations were typical of environmental monitoring results and showed no increasing trend.

The NRC Staff has concluded based on the types, quantities, and relative concentrations of the isotopes measured by EPD that they are not from the Georgia Tech Research Reactor. Some of the isotopes measured by EPD are naturally occurring. Specifically, beryllium-7 is from reactions of cosmic rays with air, potassium-40 is from primordial sources, radium-226 is from the decay of naturally occurring uranium-238, and radium-228 is from decay of naturally

occurring thorium-232.³ Additionally, radiation monitoring of effluents from the Georgia Tech Research Reactor and of areas within the research reactor containment by Georgia Tech, as required by the Technical Specifications 3.2.a and 3.5.b, provided further evidence that the measurements by EPD of other isotopes (i.e., cesium-137, cerium-141, cerium-144, ruthenium-103, zirconium-95, and niobium-95) were not from the Georgia Tech Research Reactor. Rather, EPD indicated that the radioisotopes were from other sources, such as fallout from nuclear weapons testing around the world. Furthermore, as measured by EPD, there is no indication of other radioisotopes, which would be expected if the radioactivity were from the Georgia Tech Research Reactor.

The conclusion, that there is no evidence that the release of radioactive material from the Georgia Tech Research Reactor has contributed to the monitored radiation levels in the soil and vegetation, is also corroborated by the Georgia Tech environmental monitoring program. This environmental monitoring program has used film badges, and currently uses TLDs, at various locations around the Georgia Tech Research Reactor. The film badges were provided by a National Voluntary Laboratory Accreditation Program certified vendor. The TLDs meet American National Standards Institute standards. One monitored location in the Georgia Tech Research Reactor stack measured the direct radiation for airborne releases from operation of the Georgia Tech Research Reactor. This monitor has indicated airborne effluent releases generally below detectable levels and always well below the limits of 10 C.F.R. Part 20, "Standards for Protection Against Radiation," as verified most recently in NRC Staff Inspection Report Nos. 50-160/95-01, 50-160/94-02, and 50-160/93-02.⁴ These results are consistent with the EPD data and further confirmed the conclusions of the State of Georgia EPD that its monitoring found no evidence of release of radioactive material from the Georgia Tech Research Reactor that has contributed to the monitored radiation levels in soil and vegetation.

The NRC Staff evaluation of the data confirmed the EPD conclusion that the EPD data showed no increasing trend in radiation levels around the Georgia Tech Research Reactor. The values and variations of all monitored locations around the Georgia Tech Research Reactor were typical of environmental monitoring results at other locations, were attributable to nonreactor sources, and showed no record of an increasing trend. Further corroboration of this conclusion was provided in the discussion addressing issues (3) and (5) in this Partial Director's Decision in that releases of radioactive isotopes from the Georgia Tech Research Reactor are well within NRC regulatory limits and do not correspond to the radioisotopes found in the soil or vegetation samples.

³ Kathren, R. L., "Radioactivity in the Environment: Sources, Distribution, and Surveillance," 1984.

⁴ These and the other inspection reports referenced in this Partial Director's Decision are available from the NRC's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC 20037.

The NRC Staff finds no reason to conclude that the Georgia Tech Research Reactor is contributing to radiation levels in soil or vegetation. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that the Petitioner's concern does not present a substantial health or safety issue warranting the action requested by the Petitioner.

3. There Is No Record of Air Monitoring Ever Having Been Done

The Petitioner asserted that monitoring for airborne radioactive releases from the Georgia Tech Research Reactor is inadequate. However, in addition to the environmental monitoring programs previously discussed, the Georgia Tech Research Reactor is required by its Technical Specifications 3.2.a and 3.5.b to monitor and restrict radioactive releases, including airborne releases. The monitoring system includes instruments to monitor gaseous and particulate radioactivity and to initiate safety-related functions (e.g., containment isolation). All radioactive releases are required to be within the limits established in 10 C.F.R. Part 20. NRC Staff inspections, as documented most recently in Inspection Report Nos. 50-160/95-01, 50-160/94-02, and 50-160/93-02 related to the Georgia Tech Research Reactor, have found that the effluent releases have been within 10 C.F.R. Part 20 limits. Therefore, there is neither a technical need nor a regulatory requirement for additional monitoring of air samples outside the Georgia Tech Research Reactor, since all releases are controlled, as required by Technical Specifications and in accordance with NRC regulations.

The Petitioner also raised a concern related to the storage of waste at the Georgia Tech Research Reactor. The concern is that there is a large amount of waste material stored at the facility and this storage is generally unsafe. Inspection Report Nos. 50-160/95-01, 50-160/94-02, and 50-160/93-02 have verified that storage of radioactive waste has been maintained in accordance with applicable regulatory requirements (10 C.F.R. Part 20) at the Georgia Tech Research Reactor.

The Petitioner also raised concerns about various health effects around the Atlanta area and in other localities (e.g., around the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania), but did not provide correlation to conditions related to the Georgia Tech Research Reactor. Therefore, the Petitioner did not provide bases for further action based on these concerns. Further, the data and information from EPD, the licensee, the Oak Ridge Institute for Science and Education (ORISE), and the Idaho National Engineering Laboratory (INEL), as evaluated by the NRC Staff in this issue and on issues (2) and (5), indicate little potential for the Georgia Tech Research Reactor to have contributed to such health effects.

The NRC Staff finds no reason to conclude that the Georgia Tech Research Reactor radiation monitoring program is unacceptable. The Petitioner provided

no facts to conclude otherwise or bases to conclude that additional monitoring should be required. Therefore, the NRC Staff concludes that the Petitioner's concern does not present a substantial health or safety issue warranting the action requested by the Petitioner.

4. Heavy Rainfall Causes Water to Back Up in the Sewer and Drainage Lines Causing Flooding of the Reactor Parking Lot and Campus, as Well as Causing Sinkholes, "Puff-ups" on Campus Ground, and Welded-Shut Manhole Covers to Be Blown Off

The Petitioner indicated that a major sinkhole of the Orme Street line (a major sewer line in the area) caused a backup and flooding in 1993 on the Georgia Tech Campus at the North parking lot at the Georgia Tech Research Reactor facility site. This flooding had no effect on the Georgia Tech Research Reactor, since the research reactor structures, systems, and components are isolated from the sewer by a series of valves. Further, the containment steel-reinforced concrete floor is approximately 8 feet thick.⁵ This structure supports containment internals and provides weight to protect against the buoyancy of groundwater. The structure is designed to withstand the effects of buoyancy due to groundwater which has been found on test borings at levels ranging from 11 to 40 feet.⁶ Further, DPW stated that the work that is being done on the Orme Street line and related construction activities minimize the potential for such future flooding or other problems associated with that line.

As also indicated by the Petitioner, there is a 72-inch-diameter storm drain/sanitary sewer line that could be a potential source of flooding or a sinkhole near the Georgia Tech Research Reactor. This sewer line is approximately 100 feet from the containment.⁷ By letter,⁸ DPW confirmed that the line had been inspected to ensure integrity and was found in "very good condition" on a May 24, 1994 walk-through. The DPW was "not aware of any problems with this storm sewer" and did not "anticipate any problem with the maintenance or operation of this sewer in the foreseeable future." This conclusion was reverified with DPW, including consideration of the construction (e.g., blocks and concrete pipe) and configuration (e.g., on old drainage paths) of the sewer. DPW also indicated that this drain line is considered to be a private sewer and is not part of the city system, although DPW also indicated that they have been involved in

⁵"Safety Analysis Report for the 5 MW Georgia Tech Research Reactor," Georgia Institute of Technology, Atlanta, GA 30332-0425, April 1994 (hereinafter SAR), § 4.3, *Description of Reactor Containment Building*, at 43.

⁶SAR § 2.3, *Hydrology and Geology*, at 23.

⁷SAR, Figure 4.3, at 30.

⁸Letter dated January 9, 1995, from L. Chambers of the Department of Public Works for the City of Atlanta to R. Karam of Georgia Tech.

the inspection and maintenance of such lines and there is no plan to discontinue that practice.

The Petitioner raised related issues on the structural capability of the foundation-bearing material and water intrusion around the containment foundation potentially causing destabilization of the structure. This concern referenced three Georgia Geologic Survey documents.⁹ The Georgia Geologic Survey was requested to evaluate the Petitioner's references to these reports with respect to the geology and seismology related to the Georgia Tech Research Reactor. By letter dated May 11, 1995, the State Geologist responded to the NRC Staff.¹⁰ The letter stated, in part, that:

I have reviewed the letters from a petition to shut down the Georgia Tech Research Reactor. The letters suggest (1) that the reactor overlies the Wahoo Creek Formation, which is not a suitable nor a stable foundation material; (2) that there is an earthquake risk, particularly from the Brevard Zone; (3) that unique geologic fractures, particularly horizontal fractures, might cause large quantities of ground water to seep into the reactor and cause problems. My review indicates that the petition's suggestions are specious.

The Wahoo Creek formation is one of many geologic formations of the Piedmont Physiographic Province. The fact that the Wahoo Creek Formation weathers into "slabs" is not relevant; in situ, it is a competent rock adequate to provide suitable foundation for the reactor. Comparison of the foundation characteristics of weathered and in situ rock material is not reasonable nor appropriate.

Georgia is a relatively aseismic state and earthquakes are rare. The Brevard Zone should not be considered as an "earthquake fault". The proximity of the Brevard Zone to the reactor is not relevant. Fractured rock, which is ubiquitous to the Piedmont, underlies the reactor. There are no data to suggest that horizontal fractures having high water yielding characteristics underlie or are even near the reactor. From a hydrogeological point of view, there are no known unique features of the reactor site to suggest that ground water would affect reactor safety.

The Piedmont extends from Alabama to New Jersey and occupies many tens of thousands of square miles. The comments made in the petition would apply at virtually any location in the Piedmont. In addition, the petition cites several reports published by the Geologic Survey Branch of The Georgia Environmental Protection Division. The reports cited were prepared under my direction; I personally reviewed and approved them. There are no data in these reports that indicate the reactor at Georgia Tech is not safe or poses an environmental threat.

These findings confirm the NRC Staff geologic and seismic conclusions presented in issue (7), and further support the related data and design for

⁹ McConnell and Abrams, "Geology of the Greater Atlanta Area," Georgia Geologic Survey Bulletin 96; Cressler, Thurmond, and Hester, "Groundwater in the Greater Atlanta Region," Georgia Geologic Survey Bulletin Information Circular 63; and Herrick and Legrand, "Geology and Groundwater Resources of the Atlanta Area, Georgia," Georgia Geological Survey Bulletin 55.

¹⁰ Letter from William H. McLemore, State Geologist, Georgia Department of Natural Resources, to Marvin M. Mendonca, NRC Staff, May 11, 1995.

the Georgia Tech Research Reactor as discussed under this issue. These findings confirm that further analysis or testing is not needed for hydrogeological conditions at the Georgia Tech Research Reactor.

The Petitioner also indicated that "a sinkhole appeared next to the reactor years ago and was filled in. A [w]itness to that is still very much alive." The Petitioner provided the NRC Staff with information to contact the witness. This individual said that while he and two other individuals were walking from the facility, one of the individuals fell into a sinkhole to the armpits or so, and the two other individuals helped him get out. This individual also stated that the sinkhole was near the waste storage tank facility and that the time frame was somewhere between the late 1960s and middle 1970s. The area near the waste storage tank facility was physically examined while going over the area on foot at about 3-foot intervals. No sinkhole was observed.

In addition, the NRC Staff questioned several members of the Georgia Tech Research Reactor staff. One of these Georgia Tech Research Reactor staff members recalled the sinkhole referred to by the Petitioner. However, none of the questioned Georgia Tech staff members recalled any other sinkholes at the research reactor facility. This was further confirmed by discussions with selected NRC Staff members with experience related to the Georgia Tech Research Reactor. These NRC Staff members were not aware of any sinkholes at the facility other than the one of concern to the Petitioner.

Additionally, drawings of the research reactor site¹¹ and physical examination of the research reactor facility and site showed no major drainage paths (other than the 72-inch storm drain line previously discussed) that could impact the Georgia Tech Research Reactor.

Construction drawings and records¹² were also reviewed, and selected portions of the installation were examined by the NRC Staff to determine the vulnerability of the foundation structure for the Georgia Tech Research Reactor to the phenomena that were raised in the petition. The drawings showed the bottom of the Georgia Tech Research Reactor containment building steel shell about 25 feet below finished grade. The drawings indicated that the Georgia Tech Research Reactor containment building is anchored by bolts to a steel-reinforced concrete pad about 1 foot thick and to a ring foundation that extends approximately another 12 feet down under the concrete pad. Further, examination of selected portions of the foundation and containment structure found the structure consistent with the construction and drawing details. Construction test boring records also showed that the pad and ring foundation rest on material that meets or exceeds construction specifications for safe bearing capacity. The construction test boring records showed the material at the bottom

¹¹ SAR, Figures 4.2 and 4.3, at 29 and 30.

¹² Letter from R. A. Karam, Georgia Tech, to D. M. Collins, USNRC, dated October 22, 1993.

of the foundation ring to be moderately hard to hard gray gneiss. As previously discussed in issue (4) and in this issue, no information has been provided by the Petitioner or is known to the NRC Staff to suggest that this foundation and support structure are not as designed or are not acceptable.

Sinkholes develop in soils or in limestone as solution cavities. Although sinkholes could develop in the soil fill material surrounding the Georgia Tech Research Reactor facility, there is no credible source for sinkhole development. Sinkholes cannot develop in or significantly affect gneiss such as that on which the Georgia Tech Research Reactor foundation is built. Therefore, the development of sinkholes near or underneath the Georgia Tech Research Reactor is not a credible event.

Even in the unlikely event of failures of the 72-inch storm drain line or the Orme Street line previously mentioned, erosion or sinkhole effects could not be expected to affect the Georgia Tech Research Reactor, since the lines are far from the research reactor containment relative to these potential effects, and the design of the reactor facility is such that it would not be impacted by such phenomena. The 72-inch storm drain is about 100 feet from the reactor containment and passes below the northwest corner of the laboratory and office building which is adjacent to the containment building. The footings for the office building, which measures approximately 90 by 130 feet, were founded on the partially weathered rock. Assuming the 72-inch line did collapse where it passes under the building, approximately a 20-foot-square section of the northwest corner of the building could be affected. This section of the building houses laboratories, offices, and storage areas. Radioactive materials are not stored in this area. The remaining portion of the facility, particularly the research reactor containment building, would not be affected because of the design characteristics of the foundation and support material as previously discussed.

DPW verified that the Orme Street line is 10 to 12 feet in diameter and is about 1200 feet from the Georgia Tech Research Reactor. The sinkhole that resulted from the failure of the Orme Street line was a sinkhole approximately 50 feet in radius, which is at the upper limit of sinkhole size in the Atlanta area, based on DPW experience. Based on this experience (which is consistent with NRC Staff information on such phenomena) it is not credible to consider that a sinkhole from the Orme Street line, at a distance of 1200 feet, could affect the Georgia Tech Research Reactor.

The containment foundation for the Georgia Tech Research Reactor is considered to be impervious to the effects of sinkholes as the foundation rests on relatively hard material to depths and distances well beyond the credible influence of any potential source for a sinkhole.

Puff-ups are heaves, or upward expansion, which occur when locked-in stress in soil, usually clay, exceeds the load above it. The most common occurrence of puff-ups is in regions that were overlain by glaciers and the soils beneath

(till, lake beds, etc.) were overconsolidated. When the glaciers melted, there was still enough material over these clays to lock in the stress. Removal of some of this overlying material, either by erosion or excavation, allows the clays to expand. Puff-ups can occur in unglaciated regions generally soon after either erosion or excavation removes the overlying material. Research reactor construction was completed in the 1960s, and considering this time interval, occurrence of a puff-up at the facility is highly unlikely. Further, puff-ups are near-surface, soil deformation phenomena. As discussed above, the relatively hard, relatively deep foundation structure and gray gneiss-bearing material of the Georgia Tech Research Reactor could not be expected to be affected by the geologic phenomenon of puff-ups.

With regard to the welded manhole covers that were thrown up to 8 feet as alleged by the Petitioner by sewer backup problems, the distance from the containment to the nearest manhole cover has been verified by physical examination of the site to be greater than 50 feet. This physical examination found no other potential impact point related to the Georgia Tech Research Reactor that was closer than 50 feet. The Petitioner has neither provided nor does the NRC Staff possess any information or experience that would suggest that a manhole cover could be thrown the distance and have the force necessary to damage the Georgia Tech Research Reactor. Therefore, the potential for damage to the Georgia Tech Research Reactor due to this asserted phenomenon is not credible.

Based on the above, these design features and conditions provide assurance that the Georgia Tech Research Reactor would not be adversely affected by flooding, sinkholes, "puff-ups" or thrown welded manhole covers. These phenomena could not be expected to affect the Georgia Tech Research Reactor, given the design and configuration of the facility. Therefore, the NRC Staff concludes that the Petitioner's concern does not present a substantial health or safety issue warranting the action requested by the Petitioner.

5. Radioactive Contaminants Have Been Routinely Discharged into the Sanitary Sewer from the Georgia Tech Research Reactor's Wastewater Holding Tank and Contamination Spread by Backup of the Sewage System

Radioactive materials can be released to the sanitary sewer system from the Georgia Tech Research Reactor in accordance with 10 C.F.R. § 20.2003.¹³ The Georgia Tech Research Reactor licensee monitors releases to the sewage system, and NRC Staff inspections (e.g., Inspection Report Nos. 50-160/95-01,

¹³Radioactive releases to the sanitary sewer were previously permitted in accordance with 10 C.F.R. § 20.303, which was superseded by section 20.2003 on January 1, 1994.

50-160/94-02, and 50-160/93-02) have confirmed that the radioactive releases (primarily cobalt-60 and tritium) to the sanitary sewer have met NRC discharge limits.¹⁴

The Petitioner expressed a concern that the release to the sanitary sewer system could expose individuals, including sewer workers, to radiation. The releases from the Georgia Tech Research Reactor to the sanitary sewer have generally been several orders of magnitude less than NRC regulatory limits. Further, the assumption in the regulation of ingestion directly at the point of release from the campus provides considerable conservatism to ensure that individuals, such as sewer workers or other individuals, would be exposed to a lesser degree even in the event of a potential backup of the sewer system with large quantities of water.

Furthermore, in response to a request from the State of Georgia, the NRC Staff had ORISE perform an independent analysis for radioisotopes in process sludge and ash samples from the City of Atlanta's R. M. Clayton sewer treatment facility. The samples were taken from the sewer treatment facility on March 13, 1995. This analysis detected naturally occurring and accelerator-produced radioisotopes (used primarily for medical diagnostic and therapeutic treatments). There were no detected radioisotopes from the Georgia Tech Research Reactor. Similarly, the NRC Staff had an independent analysis performed by INEL of liquid waste samples from the Georgia Tech Research Reactor. This analysis found no indication of the contamination suggested by the Petitioner (e.g., plutonium or uranium).

Georgia EPD and Georgia Tech analysis on wastewater are consistent with these results. This sampling and analysis verified that a relatively small amount of radioactive material has been released from the Georgia Tech Research Reactor facility to the sanitary sewer system, and any material that has been released is well within NRC regulatory limits. These facts, and the regulatory conservatism and monitoring results, as previously discussed, establish that no further sampling of the sewer releases or system is necessary to ensure that the health and safety of the public is protected.

An issue was also raised by the Petitioner regarding the need for the Georgia Tech Research Reactor to have a sewer discharge permit from the City of Atlanta. The City of Atlanta does not deal with radiological health and safety issues over which NRC has regulatory authority (*see* 10 C.F.R. § 8.4). The City of Atlanta is responsible for the release of materials to the sanitary sewer system for other than radiological health and safety reasons. With regard to the concern about

¹⁴ It should also be noted that revisions to the NRC's regulations with regard to release to sewage systems are under consideration (Advanced Notice of Proposed Rulemaking, "Disposal of Radioactive Material by Release into Sanitary Sewer Systems," 59 Fed. Reg. 9146 (Feb. 25, 1994)).

compliance with city ordinances, the City of Atlanta is the appropriate regulatory body to deal with the implementation of its requirements.

Since there is no evidence of the spread of unacceptable contamination from the Georgia Tech Research Reactor effluents to the sewage system, the NRC Staff finds no reason to conclude that unacceptable radioactive contamination was released or could be spread by the backup of the sewage system. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that the Petitioner's concern does not present a substantial health or safety issue warranting the action requested by the Petitioner.

6. *Should the Georgia Tech Research Reactor Be Further Destabilized, the Reactor and the Tank Holding Cobalt-60 Could "Break Apart," Causing Radioactive Contaminants to "Drain into Groundwater/Down Sewers/Into the Runoff Ditch"*¹⁵

From the evaluations and inspections to date, there is no evidence that the Georgia Tech Research Reactor has been "destabilized" in any manner. The Georgia Tech Research Reactor is designed to reduce the likelihood and mitigate the consequences of uncontrolled releases of radiation. For example, the design and configuration features as discussed for issue (4) provide considerable assurance that the Georgia Tech Research Reactor has not and will not be "destabilized" due to the previously postulated concerns expressed by the Petitioner.

A recent safety evaluation of the Georgia Tech Research Reactor by the NRC Staff is associated with the Order to Convert from High Enriched Uranium (HEU) to Low Enriched Uranium (LEU).¹⁶ The associated safety evaluation considered all potential safety analyses that are affected by the change-out of the fuel, including potential design-basis accident scenarios. This safety evaluation was issued on the bases that the pertinent reactor design features (1) continue to acceptably ensure that the health and safety of the public is protected for the HEU fuel and (2) have also been demonstrated to be acceptable for the LEU fuel.

The Petitioner raised concerns on various structures, systems, and components at the research reactor. First, the ability of the containment building steel structure at the Georgia Tech Research Reactor to control releases of radioactive material was questioned. In this regard, the containment leak rate is tested, in accordance with Technical Specification 4.3.b, for at least 2.0 pounds per square

¹⁵ "Destabilized" in the context of this petition issue has been defined as some condition that would result in the uncontrolled release of radioactive material.

¹⁶ "Georgia Institute of Technology (Georgia Tech Research Reactor); Order Modifying Facility Operating License No. R-97," 60 Fed. Reg. 32,516 (June 22, 1995).

inch gauge (psig), which is the design-basis pressure. Technical Specification 4.3.b requires that leakage from the containment building shall not exceed 1.0% of the building air volume in 24 hours at 2.0 psig overpressure. Actual test results show that leakage is about one-half that value. Containment building structural requirements based on expected external pressures have been estimated capable of withstanding internal pressures of at least 7.5 psig.¹⁷ This leakage integrity and the testing and design margin provide assurance that radioactive materials will not be released in an uncontrolled manner from the Georgia Tech Research Reactor containment.

The design function of the shield and crane support wall to mitigate potential radiation exposures was also questioned by the Petitioner. The steel-reinforced concrete wall inside the containment extends about 34 feet above the outside ground level. A safety function of the steel-reinforced concrete wall is shielding during potential design-basis accident conditions.¹⁸ The design calculations for this shielding function have been reviewed and independently verified. This review finds that the calculations conservatively modeled radioactive source terms and containment configuration.

The Petitioner also raised an issue of a potential "runaway chain reaction." The Georgia Tech Research Reactor is designed with two independent and diverse shutdown systems: the reactor scram system and the top reflector drain system. These systems have significant shutdown capability and have been shown, both analytically and experimentally, capable of withstanding any excess reactivity condition.¹⁹ These analyses show that the Georgia Tech Research Reactor can meet (with substantial margin) the Technical Specification 3.1.a requirements to be shut down (i.e., subcritical by at least 1.0% delta k/k with both the highest reactivity worth shim-safety blade and the regulating rod fully withdrawn). Further, specific design features of the Georgia Tech Research Reactor prevent or mitigate reactivity and power increase conditions. Analyses²⁰ show that both the HEU and LEU fuels are designed to withstand maximum credible reactivity worth/power excursion conditions without damage, including maximum reactivity addition conditions. As indicated in the SAR, this analysis technique has been verified by test data.²¹ This degree of shutdown capability and provisions for mitigation of design-basis accidents is consistent with other U.S. research reactor designs, has been verified by data and NRC Staff review, and provides assurance that the Georgia Tech Research Reactor can be safely shut down for any credible condition, including analyzed accident conditions.

¹⁷ SAR § 4.3.2, *Provisions for Insuring Leak-Tightness*, at 49.

¹⁸ SAR § 4.3, *Description of Reactor Containment Building*, § 4.3.1, *General Layout*, at 42-49.

¹⁹ SAR § 5.6, *Shutdown Margins*.

²⁰ SAR § 5.10, *Accident Analyses*, at 139-144.

²¹ SAR § 5.9.1, *Comparison of Calculations with SPERT-II Experiments*, at 137-138.

The Petitioner also raised a concern that a previous accident analysis assumed a fuel loading accident that was considered "incredible" and no analysis of this scenario was performed in the current SAR.²² The SAR states: "During refueling operations, all control elements are required to be fully inserted and the top D₂O reflector drained to storage. Following the refueling operation, the reactor startup will be accomplished with standard practice. Under these conditions, a sudden introduction of reactivity is impossible."²³ Although the NRC Staff agrees with the Licensee that this accident is not credible, the NRC Staff did verify that the results would be acceptable in the unlikely event of such an accident. Specifically, in the safety evaluation for the Order to Convert from HEU to LEU,²⁴ the NRC Staff found that (1) the previous safety evaluation²⁵ remained valid in that the HEU fuel would not be damaged by the fuel loading accident and (2) the reactivity characteristics of the LEU compared to the HEU fuel are such that the maximum fuel temperatures of the LEU fuel would be less than the temperature for the HEU fuel during the potential fuel loading accident. Therefore, the NRC Staff finds that, although the fuel loading accident analysis was not and need not be performed in the current SAR for the Georgia Tech Research Reactor, the potential results, if the analysis were to be performed in the current SAR, would remain acceptable for both fuel types.

The Petitioner also raised a concern regarding the emergency cooling capabilities at the Georgia Tech Research Reactor. The research reactor is designed with an emergency cooling system.²⁶ The system, as required by Technical Specification 3.7, consists of a passive tank capable of providing cooling for 30 minutes, and two separate long-term supplies, only one of which is required for a total of 12 hours of cooling. (It should be noted that in the SAR the licensee assumed that (1) the long-term cooling supply connections are prevented or interrupted, (2) a complete core meltdown and conservative fission product release occurred, and (3) conservative radiological exposure conditions existed. These assumptions were used in a calculation to demonstrate acceptable design bases for the Georgia Tech Research Reactor containment, that is leakage rate and shielding functions, as previously discussed.) The Petitioner's concern relates to the time required to make the manual connections to the backup water supplies and potential radiation exposures during this process. These connections are made outside the containment structure. The 30-minute cooling period flow is

²² SAR § 5.10.3, *Fuel Loading Accident*.

²³ SAR § 8.4.2, *Fuel Loading Accidents*.

²⁴ Letter from Marvin M. Mendonca, NRC, to Dr. Ratib A. Karam, Georgia Institute of Technology, "Issuance of Order Modifying License No. R-97 to Convert from High- to Low-Enriched Uranium — Georgia Institute of Technology (TAC No. M85896)," Enclosure 3, Safety Evaluation § 2.14.5, *Fuel Loading Accident*.

²⁵ U.S. Atomic Energy Commission, Safety Evaluation by the Directorate of Licensing, Docket No. 50-160, Georgia Institute of Technology, § 6.0, *Accident Analysis*, at 12, dated December 19, 1972.

²⁶ SAR § 4.4.8.3, *Emergency Cooling System*, at 87-90.

designed to be provided by gravity flow from the previously mentioned passive tank through two redundant fast-acting, failsafe valves. This cooling ensures no fuel damage or radiation release effect in the event of the loss-of-coolant accident in that 30-minute time period. The NRC Staff concludes, based on a walk-through with the Licensee, that 30 minutes continues to be an acceptable time to make the connections. The long-term emergency cooling connections could be accomplished within the 30-minute time period and there would be no increased radiation exposure while making these connections. Therefore, the previous NRC Staff conclusion in licensing the Georgia Tech Research Reactor remains valid, that is, there will be acceptable emergency cooling of the core in the event of the loss-of-coolant accident.

The Petitioner also raised a concern on the reduction in shielding for the cobalt-60 storage pool, caused by the use of water from this storage pool to provide one of the two alternate long-term water supplies for emergency cooling of the research reactor. The emergency cooling function effect on radiation levels from the cobalt-60 pool was reviewed and independently verified. This evaluation has found that the reduction in water above the cobalt-60 sources for the long-term reactor emergency cooling function would not significantly affect the shielding of the cobalt-60 source, i.e., there will remain sufficient water for shielding. This was confirmed with the Georgia EPD, the licensing authority for the cobalt-60 source, and the Georgia Tech Research Reactor licensee. Therefore, the use of the cobalt-60 pool for emergency cooling of the Georgia Tech Research Reactor would not adversely impact that function or radiation safety.

The Petitioner raised a concern regarding the use of hot channel factors and engineering uncertainty factors. The SAR analyzed the fuel design to establish safety limits considering power peaking conditions (hot channel factors) and conservative fuel manufacturing tolerance (engineering uncertainty factors). Consistent with research reactor regulatory policy, the SAR verified that these safety limits would not be exceeded or even approached, so that no fuel damage would occur.²⁷ The NRC Staff finds that these conclusions remain valid for both the current HEU fuel and for the LEU fuel as documented in the Order to convert from HEU fuel.²⁸

The Petitioner also had a concern related to the reasonableness of assuming a scram after pump failures in the SAR. The SAR paragraph in question states: "The loss of the primary D₂O pump or the secondary cooling water pump can result in undesirable reactor operating conditions. These systems are therefore provided with high temperature and low flow interlocks with the reactor scram

²⁷ SAR § 5.7, *Thermal-Hydraulic Safety Parameters*, at 127-135.

²⁸ Letter from Marvin M. Mendonca, NRC, to Dr. Ratib A. Karam, Georgia Institute of Technology, Enclosure 3, Safety Evaluation § 2.11, *Thermal-Hydraulics*.

circuitry. Of the two pump failures, the loss of the D₂O pump is the more serious. Two independent low D₂O flow scram interlocks, and loss of electrical power interlocks have been provided in the reactor safety instrumentation. It is therefore acceptable to assume that the reactor will scram because of low flow shortly after an electrical power failure or the more serious case of pump seizure."²⁹ These interlocks provide redundant and diverse scram functions for the Georgia Tech Research Reactor. The NRC Staff concludes that in the unlikely event that one of the independent low D₂O flow scram interlocks were to fail or be inoperable, the other low D₂O flow scram interlock would scram the reactor. These redundant scram interlocks are required by Technical Specification 3.2.a. Additionally, the high D₂O temperature and loss of electrical power scram interlocks provide additional assurance that the reactor will scram on potential pump failure events. Based on the redundancy of the low D₂O flow scram interlocks and the additional redundancy from diverse scram interlocks such as the high D₂O temperature scram interlocks, the NRC Staff concludes that it is acceptable to assume that the reactor will scram for the potential pump failure analysis.

The Petitioner also asserted that plutonium and cesium-137 were not included in the core burnout analysis. For the core burnout analysis, data show that the assumed release fractions from the fuel of isotopes in the SAR are conservative and that plutonium, cesium, or other particulate isotopes would not be released.³⁰ Furthermore, page 196 of the SAR states that the source term includes daughter products of the released volatile fission products, which would include cesium-137 as a daughter product of released isotopes. Based on the above-quoted data and consideration of volatile fission-product decay daughters, the release assumptions are acceptable.

The Petitioner also indicated that there were errors in the Georgia Tech Research Reactor SAR. These alleged errors include the following: that the half-life of iodine-131 was incorrectly specified; that the geologic data are inadequate; that population data are outdated; that the radiation exposure calculational technique and data used to estimate design-basis accident radiological doses are outdated; that incorrect names were used for State of Georgia organizations; and that a 30-year wind rose was needed.

Regarding the half-life of iodine-131, there was a typographical error where 1.92 hours was typed instead of 192 hours. This has been corrected by the Licensee in a January 1995 SAR revision.

The geologic data presented by the Licensee in the SAR, along with other data and information that were provided by the Petitioner, DPW, the Georgia Geologic Survey, and the Licensee, have been evaluated and discussed by the

²⁹ SAR § 8.2.2, *Pump Failures*.

³⁰ SAR at 196 and Reference B.1.

NRC Staff in issues (4) and (7) of this Partial Director's Decision. Based on these evaluations by the NRC Staff, the geologic data do not change the previous Staff conclusions in licensing the Georgia Tech Research Reactor, and the NRC Staff does not possess any information that would suggest that the geologic information for the research reactor is not acceptable.

The population data presented by the Licensee were from the 1990 census rather than from current City of Atlanta or other estimates on population as stated by the Petitioner. The use of the 1990 census data is acceptable because they are the latest official U.S. census data. The use of such data as implemented in the Georgia Tech Research Reactor SAR and the Technical Specifications is consistent with reactor licensing practices for restricted area, exclusion area, and low population zones.

The radiation exposure calculational technique and data used to estimate design-basis-accident radiological doses (SAR Appendices B and C) were reviewed and found to be conservative and therefore acceptable for use.

Regarding the use of incorrect names for State of Georgia organizations, this was a failure of the Licensee to completely update its SAR and will be corrected in the license renewal process.

Finally, the use of a 5-year wind rose, rather than a 30-year wind rose, is not significant to the Georgia Tech Research Reactor safety analysis or emergency planning because conservative assumptions, which are independent of the wind rose data, are used for dose assessments in the SAR.³¹ In addition, the Georgia Tech emergency preparedness plan uses actual measurements, rather than wind rose assumptions, to determine necessary protective actions.³² Also, as previously discussed in issues (2) and (3), the environmental, effluent, and area radiation monitoring for the Georgia Tech Research Reactor, provides acceptable verification of compliance to Technical Specification and 10 C.F.R. Part 20 requirements, and further wind direction data or wind rose accuracy for environmental monitoring is not required.

The design and analysis features, as documented in the SAR and appropriately required and verified in the Technical Specifications for the Georgia Tech Research Reactor, reduce the potential for or mitigate the consequences of design-basis accidents and provide acceptable assurance that there will be no uncontrolled release of radioactive material. Therefore, the NRC Staff finds no reason to conclude that the radioactive contaminants would be spread by any credible event or condition at the Georgia Tech Research Reactor. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes

³¹ SAR, Appendix B.

³² Letter from R. A. Karam, Georgia Tech, to U.S. Nuclear Regulatory Commission, dated April 19, 1994, Attachment 6, Emergency Preparedness Plan.

that the Petitioner's concern does not raise a substantial health or safety issue warranting the action requested by the Petitioner.

7. *The Georgia Tech Research Reactor Is in an Earthquake Zone*

The NRC Staff has continued to closely follow the seismic and geologic developments in the tectonic province in which the Georgia Tech Research Reactor is located. The site is located in the southeastern Piedmont, which, along with the Blue Ridge, comprises the southern portion of the broad region designated by the NRC Staff as the "New England-Piedmont Tectonic Province." The New England-Piedmont Province is bounded on the northwest by the Southern Valley and Ridge Tectonic Province and on the southeast by the Coastal Plain Tectonic Province.

The NRC Staff has extensively reviewed the geology and seismology of this region (e.g., the Safety Analysis Reports for McGuire, Catawba, North Anna, Shearon Harris, Vogtle, and Summer Nuclear Power Plants). These studies include considerations of the New Madrid, Charleston, east Tennessee, and Brevard seismic zones that were mentioned in the petition. These evaluations by the NRC Staff, as documented in the safety evaluations for the McGuire, Catawba, North Anna, Shearon Harris, Vogtle, and Summer Nuclear Power Plants, and other, nuclear and non-nuclear-related evaluations during the last two decades, have identified no capable faults³³ in this region.

The NRC also has supported regional seismic networks in the southeast.³⁴ In 1990, the NRC began to transfer support from these regional networks to the National Seismic Network operated by the United States Geological Survey. The NRC Staff continues to review the results from these networks, and finds no new information that would change previous conclusions on the seismicity of the southeastern Piedmont (i.e., there are no capable faults and the potential for a damaging earthquake is very remote).

Seismology has been considered in the licensing of the Georgia Tech Research Reactor. The New Madrid, Missouri, and the Charleston, South Carolina earthquakes (that were mentioned in this petition issue) were considered, as were lesser-magnitude earthquakes in and near Georgia. The Petitioner has presented no new seismic information for the region. The NRC Staff evaluation continues

³³ Capable faults are defined in 10 C.F.R. Part 100, "Seismic and Geologic Siting Criteria for Nuclear Power Plants," Appendix A, § III "Definitions."

³⁴ These networks include the Charleston network, first operated in 1973 by the U.S. Geological Survey (USGS). Others were added during the mid and late 1970s and early 1980s, which were operated by Virginia Polytechnic and State University (Central Virginia and Giles County Seismic Zones), the University of Memphis (Southern Appalachians and New Madrid Seismic Zones), Georgia Institute of Technology (Georgia and Alabama), and St. Louis University (New Madrid Seismic Zone).

to support the conclusion that the seismology for the Georgia Tech Research Reactor has been acceptably considered in the licensing of this facility.

A study of seismic hazards has been performed for Georgia Tech and referenced in the petition.³⁵ This study reviewed seismic history, performed probabilistic and deterministic seismic ground motion studies, and made estimates of potential ground motion. The report validated Standard Building Code seismic coefficient requirements for the Georgia Tech campus, and did not change the conclusion on the acceptability of the Georgia Tech Research Reactor.

The above conclusions, as previously discussed in issue (4), are further supported by the Georgia State Geologist in a letter dated May 11, 1995.

The NRC Staff finds no reason to conclude that the seismic characteristics for the site are unacceptable for the Georgia Tech Research Reactor. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that the Petitioner's concern does not raise a substantial health or safety issue warranting the action requested by the Petitioner.

8. There Is Absolutely No Reason to Keep the Georgia Tech Research Reactor Operating

The license for the Georgia Tech Research Reactor was issued in accordance with all applicable requirements. The Licensee programs in education, research, and development are consistent with the Georgia Tech Research Reactor license. Specifically, the Georgia Tech license renewal request dated April 19, 1994, discussed activities at the research reactor, including nuclear education in nuclear engineering and health physics. It also discussed contributions to the community, such as plant irradiation experiments for high school science classes and use by the Boy Scouts of America for nuclear merit badges at the Georgia Tech Research Reactor. The Georgia Tech Research Reactor has capability for biomedical irradiation research and development, isotope production, neutron diffraction, and activation analysis. The license renewal request specified programs evaluating radiation decomposition of chemicals, characterizing neutron-absorbing materials, and characterizing soil samples.

The Petitioner also raised concerns on the monitoring and calibration of neutron beams for medical therapy. At this time, the Georgia Tech Research Reactor is not authorized to conduct medical therapy,³⁶ so the specific concern is not applicable.

³⁵ "Seismic Hazard Study for the Georgia Institute of Technology Campus, Atlanta, Georgia," Law Engineering Project No. 57704495.01, March 16, 1993.

³⁶ The Georgia Tech Research Reactor cannot perform medical therapy without specific authorization under the provisions of the Atomic Energy Act § 104(a). Georgia Tech may perform experiments, such as the characterization of irradiation conditions for potential, future medical therapy as long as the experiments and research reactor are

(Continued)

The Petitioner has asserted that substantial management deficiencies persist, including concerns on the problems related to the 1987/1988 time frame. This concern on the persistence of substantial management deficiencies may be addressed in the pending license renewal proceeding. As previously outlined in the Introduction to this Partial Director's Decision, the Final Director's Decision will take into account any relevant findings from this license renewal proceeding at an appropriate time after completion of the NRC Staff review.

The NRC Staff finds no reason at this time to conclude that the Georgia Tech Research Reactor is not continuing to conduct research and development activities in accordance with the Atomic Energy Act and NRC regulations. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that no information has been provided on this issue to conclude that a substantial health or safety issue exists warranting the action requested by the Petitioner.

9. Security at the Georgia Tech Research Reactor Is Extremely Lax

The concerns on security issues, as previously outlined in the Introduction to this Partial Director's Decision, may be addressed in a pending license renewal proceeding. These issues will be addressed in a Final Director's Decision at an appropriate time after taking into account any relevant findings from this license renewal proceeding and after completion of the NRC Staff reviews.

10. In Case of an Accident or Terrorist Attack, Evacuation of the Campus and Downtown Atlanta Would Be Impossible Both Now and During the Olympics³⁷

With respect to potential accident conditions for the Georgia Tech Research Reactor, the Emergency Planning Zone (EPZ), the area within which pre-determined protective actions are established, is a 100-meter radius from the facility.³⁷ This EPZ is in accordance with NRC emergency preparedness guidance applicable to research reactors.³⁸ The Georgia Tech Research Reactor accident analyses³⁹ demonstrate that this 100-meter EPZ is conservative for the Georgia Tech Research Reactor. These analyses have been found acceptable most re-

within the provisions of the current license and other NRC regulatory requirements. In order to perform medical therapy at the Georgia Tech Research Reactor, an associated license under the provisions of 10 C.F.R. § 50.21(a) would be required, as well as associated modifications to the Technical Specifications from the NRC.

³⁷ That portion of the issue that deals with potential terrorist attacks will be included in issue (9) on security.

³⁸ "Standard Review Plan for Review and Evaluation of Emergency Plans for Research and Test Reactors," NUREG-0849, Appendix II.

³⁹ SAR § 5.10, *Accident Analyses*, at 139-144; § 8, *Reactor Hazards Evaluation*; and Appendices A, B, and C, at 176-214.

cently in the safety evaluation for the Order to convert from HEU fuel.⁴⁰ These analyses demonstrate that the potential need for protective actions outside the EPZ is highly unlikely. The specification of emergency classifications (e.g., no general emergency classification) for the Georgia Tech Research Reactor has also been reviewed by the NRC Staff and found to be consistent with the NUREG-0849 guidance. The Georgia Tech Research Reactor emergency plan has been previously verified by the NRC Staff to be acceptable in accordance with this regulatory guidance and applicable regulations.

The Georgia Tech Research Reactor has conducted emergency response drills in accordance with its emergency plan (the last three drills were on October 19, 1994, November 4, 1993, and November 9, 1992). The drills have included involvement of onsite or offsite agencies, such as the Georgia Tech Police Department, the Atlanta Fire Department, the Atlanta/Fulton County Emergency Management Agency, the Georgia Emergency Management Agency, the Georgia Environmental Protection Division, and the Grady Memorial Hospital. Training, equipment, and contingency planning for onsite and offsite personnel have been acceptably in accordance with emergency plan requirements, as verified most recently in NRC Staff Inspection Reports 50-160/94-04, 50-160/93-03, and 50-160/92-04. Police, fire, and medical personnel have been observed by NRC Staff to acceptably perform their responsibilities. Other recent discussions with these emergency response organizations demonstrate that they acceptably understand and feel capable of discharging their responsibilities under emergency conditions at the Georgia Tech Research Reactor.

With regard to emergency preparedness during the Olympics,⁴¹ the NRC Staff and the Licensee have been discussing the necessary steps to take for reactor safety during this event for some time before this petition was raised. The Licensee has decided to not operate the research reactor during the 1996 Olympics and to remove the spent fuel from the facility prior to the Olympics.⁴² This would eliminate the potential for radiological releases during the Olympics related to the presence of such fuel on site, and would reduce the potential for any emergency response to be taken due to radiological conditions for the Georgia Tech Research Reactor during the Olympics.

Georgia Tech has indicated that there are no events or additional resident population that are planned to be within the EPZ, and that the entire campus is to

⁴⁰ Letter from Marvin M. Mendonca, NRC, to Dr. Ratib A. Karam, Georgia Institute of Technology, Enclosure 3, Safety Evaluation, § 2.14, *Potential Accident Scenarios*.

⁴¹ As previously noted, the implications of terrorist acts during the Olympics relative to emergency preparedness may be addressed in a pending license renewal proceeding. These issues will be addressed in a Final Director's Decision at an appropriate time after taking into account any relevant findings from this license renewal proceeding and after completion of the NRC Staff reviews.

⁴² Georgia Institute of Technology's Response to Commission's Order Issuing Housekeeping Stay, dated June 21, 1995, and letter from Patricia Guilday, Assistant Attorney General, State of Georgia, Department of Law, to the Secretary of the NRC dated July 25, 1995.

be controlled for access such that increased transient population through the EPZ is not expected. Further, supplemental emergency provisions for the Olympics are being planned by Georgia Tech in coordination with the Atlanta Committee for the Olympic Games, the U.S. Department of Defense, the Federal Bureau of Investigation, the Georgia State Patrol, Georgia Department of Transportation, City of Atlanta Police, and City of Atlanta Fire Department.

Additionally, the Petitioner in her July 18, 1995 letter, raised a concern on emergency preparedness for power reactor licenses, including emergency preparedness during the Olympics. NRC regulations require the development of emergency preparedness plans for all reactor licenses. The Petitioner presented no information and the NRC Staff does not know of any information that would suggest that reactor emergency preparedness is not acceptable, including emergency preparedness during the Olympics.

The Petitioner also raised an issue addressing the location of the emergency command center within the Georgia Tech Research Reactor building. However, the emergency command center is outside the containment structure in which the Georgia Tech Research Reactor is housed. The emergency command center is isolated from the containment structure, which, as previously discussed on issue (6), is capable of withstanding pressures greater than would result from any analyzed accident. The discussions on the preceding issues also demonstrate that there is little likelihood that the emergency command center could be affected by a radiological event related to the Georgia Tech Research Reactor. The emergency command center is monitored for radiation so that in the unlikely event of an indication of unacceptable radiation in the emergency command center, or if it were to otherwise become unavailable, alternative actions could be taken (e.g., relocation of emergency response personnel). The above is consistent with the Georgia Tech Research Reactor emergency plan and previous NRC acceptance of the emergency plan, continues to acceptably implement the requirements of NUREG-0849, and, therefore, provides acceptable emergency preparedness for the Georgia Tech Research Reactor.

Based on the above, the 100-meter EPZ at the Georgia Tech Research Reactor is acceptable as a planning basis to ensure the protection of the public health and safety both now and during the Olympics, and the likelihood of evacuation or other protective action beyond the EPZ is acceptably low. During the Olympics, Georgia Tech's plans to not operate and to remove spent fuel ensure that there will be minimal potential of radiological-related emergencies arising in connection with the NRC license for the Georgia Tech Research Reactor. Further, during the Olympics, the conditions around the research reactor, access controls to the campus, and planning for supplementary emergency provisions ensure that the provisions of the emergency plan will not be adversely affected by the Olympics.

The NRC Staff finds no reason to conclude that the emergency planning zone for the Georgia Tech Research Reactor is not acceptable, including during the time period of the Olympics. The Petitioner provided no facts to conclude otherwise. Therefore, the NRC Staff concludes that no information has been presented to conclude that a substantial health or safety issue exists warranting the action requested by the Petitioner.

B. Revocation of Liquid Radioactive Material Release Authority; Revocation of Licenses Using the Principle of As Low As Reasonably Achievable; Prohibition of Transportation of Radioactive Material by Mail; and Modification to Posting Requirements for Radioactive Material

The following are general requests by the Petitioner for actions related to various categories of licenses:

1. The request to withdraw all license authority nationwide involving the discharging or dumping of any quantity of radioactive material to all the sewers or waters in the United States;
2. The request to withdraw all licenses to all nuclear facilities, including nuclear power plants, which operate under as low as reasonably achievable (ALARA) principles;
3. The request that the NRC Staff prohibit the transportation of radioactive material by mail; and
4. The request that the NRC Staff modify every license issued to transporters of radioactive materials and builders of nuclear power plants so that these parties must put 2-foot-high letters on everything transported or built stating "DANGER-RADIOACTIVE" and in slightly smaller letters "there is no safe level of radiation, any exposure can [a]ffect health."

The bases for these requests are that there is no safe level of radiation, that storage and disposal of radioactive waste is inadequate, and that the NRC sewage discharge guidelines are totally inadequate. The Petitioner has also indicated that the basis for the request related to transportation by mail is that accidents have occurred while transporting radioactive materials. The issues enumerated by the Petitioner are broadly framed requests to take actions to prohibit discharging all radioactive material into sewers and waters of the United States, to create a zero-release limit of radioactive material, and to modify the transportation regulations under 10 C.F.R. Part 71.⁴³ The Petitioner

⁴³The NRC's packaging and transportation regulations in Part 71 are part of a broad regulatory scheme for the packaging and transportation of radioactive materials. The packaging and transportation of radioactive materials are also subject to the regulations of the U.S. Department of Transportation and the U.S. Postal Service. See 10 C.F.R. § 71.0(b).

also raises concerns over the adequacy of current NRC regulations related to radiation protection.⁴⁴ Finally, the Petitioner questions the adequacy of NRC and Environmental Protection Agency (EPA) regulations on allowed radioisotopes in the environment.

For each of the Petitioner's concerns cited directly above, the Petitioner has provided no specific information or basis that would support taking action on the Petitioner's four requests cited in this section. The Petitioner's request to withdraw all license authority for the discharging of any quantity of radioactive materials to all sewers and waters is based on a general assertion that the NRC's sewer dumping guidelines are totally inadequate. The Petitioner offers no support for this assertion. In addition, the Petitioner's stated bases for the request to withdraw all licenses that operate under ALARA principles (i.e., there is no safe level of radiation and the storage and disposal of radioactive materials, as well as the regulations, are inadequate) have not been substantiated by any data or references in the petition. Finally, no information was provided that transportation accidents had not been evaluated and issues resolved under the provision of current regulations or that present regulations regarding the use of mail to transport radioactive material is not acceptable. Because these stated concerns are general and are not supported by additional information in the petition, these concerns do not provide the basis for taking enforcement action under 10 C.F.R. § 2.206.

No specific information was provided to support the Petitioner's general statements on the inadequacy of NRC regulations. The Petitioner has provided no information that would lead to a conclusion that the packaging and transportation regulations in 10 C.F.R. Part 71, the radiation protection regulations in 10 C.F.R. Part 20, and the NRC's and EPA's environmental protection regulations, are not providing acceptable protection to the public health and safety, as well as to the environment. Since the Petitioner has not submitted any relevant technical, scientific, or other data to support any of the general requests for the actions enumerated in this section, or raised a substantial health and safety concern based on these issues, the Petitioner's general requests for such actions are denied. However, should this Petitioner, or anyone, wish to provide relevant technical, scientific, or other data and grounds to support any change to NRC regulations, a Petition for Rulemaking can be submitted in accordance with 10 C.F.R. § 2.802.

⁴⁴ These concerns include that the release limits to the sewer systems is established as a monthly concentration and allows release of soluble material, that the brain and ovaries are not specifically mentioned in the organ dose weighting factors, that an individual is not considered a member of the public any time in which the individual receives an occupational dose, that special exposures should not be allowed, that no dose be allowed to the embryo/fetus whether the woman is declared pregnant or not, and that radiological release limits are established assuming a "Reference Man."

III. CONCLUSION

The institution of proceedings pursuant to section 2.206 is appropriate only if substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner is warranted.

With regard to the requests made by the Petitioner discussed herein, the NRC Staff finds no basis for taking such actions. Rather, as explained above, the NRC Staff concludes that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's requests for action, pursuant to section 2.206 on the Georgia Tech Research Reactor, are denied on issues A.1 through A.8 and A.10, insofar as the issues on A.8 do not relate to the Petitioner's concerns on the persistence of substantial management deficiencies and the issues on A.10 do not relate to the Petitioner's security issues. As previously noted in the Introduction and Discussion to this Partial Director's Decision, the issue related to the persistence of management problems (part of A.8) and the issue related to security (A.9 and part of A.10) will be decided after taking into account the results of the licensing proceeding on the license renewal application. In addition, the Petitioner's requests on general license and authority revocation, as discussed in Section B of this Partial Director's Decision, are denied.

A copy of this Decision will be filed with the Secretary for the Commission as provided by 10 C.F.R. § 2.206(c) of the Commission's regulations. The Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Frank J. Miraglia, Acting Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of July 1995.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley A. Jackson, Chairman¹

In the Matter of

Docket Nos. 70-00270
30-02278-MLA
(Byproduct License
No. 24-00513-32; Special
Nuclear Materials License
No. SNM-247)
(TRUMP-S Project)

CURATORS OF THE
UNIVERSITY OF MISSOURI

August 22, 1995

The Commission denies the University of Missouri's petition for reconsideration seeking a clarification that the "Site Area Emergency" classification for its MURR facility comes into play only when a fire or accident involving nuclear materials could lead to radiation exposures possibly approaching 1-rem whole-body dose *at the site boundary*. The Commission rules that a reference to the site boundary is already implicit in the existing "Site Area Emergency" condition. In addition, the Commission *sua sponte* requires the University either (i) to require evacuation of all persons (except emergency personnel) to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials or (ii) to provide the NRC Staff sufficient information to determine that the existing Emergency Plan and procedures (or any proposed modifications of the Plan and procedures) adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials.

¹ This decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this decision.

MEMORANDUM AND ORDER (Petition for Partial Reconsideration)

For a second time, the University of Missouri has asked the Commission to reconsider and clarify its decision to require the University's emergency plan to include a "Site Area Emergency" classification for certain accidents involving nuclear materials. See CLI-95-1, 41 NRC 71, 154-56 (1995). The University is concerned that the Commission's decision on the initial reconsideration petition does not specify that a Site Area Emergency comes into play only when a fire or accident involving nuclear materials could lead to radiation "exposures possibly approaching the EPA PAG lower level (1 rem whole body dose)" *at the site boundary*. See CLI-95-8, 41 NRC 386, 390-92 (1995).

The Commission considers the reference to the site boundary already implicit in the "Site Area Emergency" condition, and therefore denies the University's petition for reconsideration. The potential for significant exposures at the *site boundary* is what triggers a *Site Area Emergency*. This point was reinforced in CLI-95-8 where the Commission described as "well taken" the University's argument, *inter alia*, that significant releases possibly approaching EPA PAG levels *at the site boundary* should be classified as a Site Area Emergency. CLI-95-8, 41 NRC at 390.

Moreover, definitions in current NRC rules (10 C.F.R. §§ 40.4, 70.4) and record evidence in this case, including the NRC's Response Technical Manual, ANSI standards, and the University's own Emergency Plan, confirm this understanding of the Site Area Emergency classification — which is designed to designate accidents with potential significant radiation consequences *off site*. See CLI-95-1, 41 NRC at 154-56. Conversely, these same materials make clear that an "Alert" (the emergency level immediately below a Site Area Emergency) is the appropriate classification for events *not* likely to spawn radiation consequences *outside the site boundary*. The Commission does not understand its prior decisions in this proceeding to suggest otherwise.

Although we are denying the University's reconsideration request as unnecessary, our further examination of the classification of emergencies arising out of the TRUMP-S Project has brought to light an additional concern: whether the University's "Action" responses are adequate to protect those members of the public *within* the site boundary from radioactive exposure exceeding 1 rem due to a fire involving TRUMP-S nuclear materials. Although the Commission has found such exposures highly unlikely beyond a radius of 150 meters, even in a worst-case fire scenario (see CLI-95-1, 41 NRC at 151-52 & nn. 125-126), exposure of 1 rem or more within that radius is a risk that bears further examination.

The University has indicated that its "Alert" classification permits a case-by-case determination "whether any on-site personnel should be evacuated" (by contrast, a Site Area Emergency classification requires "automatic evacuation"). See Licensee's Petition for Partial Reconsideration at 6 (filed Mar. 31, 1995). But because a fire involving the TRUMP-S materials may lead to relatively quick radiation releases and because the Commission wishes to minimize any exposure to members of the general public during such releases,² the Commission directs the University either (i) to require evacuation of all persons (except emergency personnel) to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials or (ii) to provide the NRC Staff sufficient information to determine that the existing Emergency Plan and procedures (or any proposed modification of the Plan and procedures) adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials. To the extent Staff concludes that further protective measures are necessary, it is instructed to require the University to take such measures.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of August 1995.

² See CLI-95-1, 41 NRC at 155 ("the amount of time available to mitigate the effects of a materials fire would presumably be shorter than the time available to mitigate the effects of an equally serious fire affecting the reactor"). See also CLI-95-8, 41 NRC at 391 ("Actual radiation measurements . . . normally come after-the-fact. Site area emergencies are declared on the basis of predictive judgments based on site conditions.").



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment;
Transfer to Southern Nuclear)

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

August 3, 1995

The Atomic Safety and Licensing Board held that a secretary's communications, recorded in a note by her employer's attorney, are unlikely to be discoverable because they are privileged communications of a client to an attorney. However, the Board ordered the *in camera* inspection of the notes before reaching a final determination concerning the specific factual circumstances present in this case and the applicability of the purposes of the attorney-client privilege.

RULES OF PRACTICE: ATTORNEY-CLIENT PRIVILEGE; FACTS TOLD TO ATTORNEY BY SECRETARY

When the client is a corporation, the attorney-client privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate

duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. *Upjohn Co. v. United States*, 449 U.S. 383, 396-97, 101 S. Ct. 677, 685-86 (1981).

RULES OF PRACTICE: ATTORNEY-CLIENT PRIVILEGE; SIMPLE FACTS

When a claim of attorney-client privilege is made for a document containing a simple report of facts, the Atomic Safety and Licensing Board may examine the document further in order to ascertain whether granting privilege to the document is consistent with the purposes of the attorney-client privilege.

MEMORANDUM AND ORDER (Request for Discovery Concerning Ester Dixon)

Allen Mosbaugh (Intervenor) has requested discovery of an attorney's notes of an interview of Ester Dixon conducted in 1992.¹ Georgia Power has persuaded us that Ms. Dixon's communications with its attorney are unlikely to be discoverable because they are privileged communications of a client to an attorney. However, we shall order the *in camera* inspection of those documents before reaching a final determination concerning the specific factual circumstances present in this case and the applicability of the purposes of the attorney-client privilege.

The prevailing standard in this case is found in 10 C.F.R. §§ 2.740(b)(1) and 2.740(b)(2). Section 2.740(b)(1) authorizes discovery of "any matter, not privileged." Section 2.740(b)(2) expands the scope of discovery for trial preparation materials but only if they are "otherwise discoverable under paragraph (b)(1) of this section." However, privileged material is not "otherwise discoverable."

A similar issue already was decided by us and is the law of this case. In *Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2)*, LBP-93-18, 38 NRC 121, 124, 125 (1993), we said:

We accept the following statement of GPC as accurately setting forth the law concerning the attorney-client privilege:²

¹ Intervenor filed its "Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon" (Motion) on June 30, 1995, and Georgia Power Company, *et al.* (Georgia Power) filed its "Response to Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon" (Response) on July 17, 1995. On July 24, 1995, we received by facsimile transmission all but the first page of "Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon." To the extent that the motion deals with the pending motion about Ester Dixon, it is a nonauthorized response and has been disregarded.

² GPC Response at 17.

The United States Supreme Court has held that, when the client is a corporation, the attorney-client privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. *Upjohn Co. v. United States*, 449 U.S. 383, 396-97, 101 S. Ct. 677, 685-86 (1981); *see also Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989). The Court in *Upjohn* declined to establish an all-encompassing test for application of the attorney-client privilege to corporations. Instead, it held that each case must be evaluated to determine whether application of the privilege would further its underlying purposes of encouraging candid communications between client and counsel and providing effective representation of counsel. *Upjohn, supra*, 449 U.S. at 389, 390-91, 396-97, 101 S. Ct. at 682-86.³

* * *

. . . Management may decide it wants to investigate a problem and ascertain the truth. It may need to ask very probing questions. To encourage this kind of appropriate management action, in a complex regulatory setting in which an enforcement action was reasonably foreseeable, GPC used its lawyers. It is appropriate that these professionals should be given as much information as possible without having to risk public disclosure of their work. The attorney-client privilege protects this activity, and the company need not later reveal the affidavits it compiled.

The materials now being sought are a 1992 interview of the person who typed some key documents in this case. This interview, conducted by Georgia Power's attorney, was the first time Ms. Dixon was asked to recall relevant details. Subsequently, Ms. Dixon was deposed in this case in 1994 and gave live testimony in 1995. Ms. Dixon's testimony helps to establish the order in which key documents were typed. It has a bearing on Intervenor's allegation that the "Cash List" was prepared after the "Successful Starts Slide," even though the Cash List is alleged by Georgia Power to have been prepared in order to document the number of starts cited in the Successful Starts Slide.

Careful consideration of the specific facts of this case indicates that Georgia Power's lawyer's interaction with Ms. Dixon was about a simple and straightforward factual matter: when certain documents were typed. Compared to other matters that might be involved in an attorney-client interaction, this matter is relatively straightforward and calls for little attorney sophistication and relatively little trust from the employee. Nor does the employee appear to have a clear personal stake in how the issues concerning company documents may be resolved. If, pursuant to the *Upjohn* test, there is any specific situation in which the attorney-client privilege does not apply, we are close to that case here. As we already said, *Upjohn* requires that:

³ *See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-31, 18 NRC 1303, 1305 (1983).

each case must be evaluated to determine whether application of the privilege would further its underlying purposes of encouraging candid communications between client and counsel and providing effective representation of counsel.

We note that there is one other factor operating here. The interview in this case was conducted 2 years after the events. It does not involve fresh recollections, even though it contains the earliest notes of recollections. There have been two subsequent efforts by Intervenor to test those recollections, both in depositions and at the hearing. Since even the earliest recollections were not fresh, there is less reason to consider releasing attorney-client material contained in these notes; and we are aware that *any* release of such material, however justified, would have some dampening effect on subsequent attorney-client communications, particularly within the same company.

A problem we face in judging whether or not to apply the attorney-client privilege, in this borderline situation, is our lack of complete knowledge about the notes of the interview. We find that we cannot properly make an informed judgment in this case without an *in camera* examination of the allegedly privileged notes. Only by examining the document can we be satisfied that the purposes of the privilege are well served by applying it in this instance.⁴

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 3d day of August 1995, ORDERED that:

Georgia Power Company, *et al.*, shall promptly present for *in camera* inspection by this Board its notes of the interview of Ester Dixon conducted by its attorney in 1992. Unless the Atomic Safety and Licensing Board shall publish a subsequent opinion on this subject, Intervenor's "Motion to

⁴ Somewhat relevant to our determination is *Southern Railway Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968). However, the opinion did not involve the attorney-client privilege. It stated, at 134, that: "If privileged communications between appellant and its counsel were encompassed by the [trial] court's order to produce, they must be deleted."

Compel Production of Licensee's Notes of Interview of Ester Dixon," filed on June 30, 1995, is *denied*.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 50-245

**NORTHEAST NUCLEAR ENERGY
COMPANY**

(Millstone Nuclear Power Station,
Unit 1)

August 2, 1995

The Director of the Office of Enforcement has denied a petition filed by Clarence O. Reynolds requesting that the NRC take immediate escalated enforcement action with regard to Millstone Nuclear Power Station Unit 1 on the basis of alleged discriminatory actions taken against him. Specifically, Mr. Reynolds requested that multiple Severity Level II and III violations be issued against the Millstone Unit 1 Maintenance Department, that suspension of Maintenance Department management be instituted pending a complete investigation, and that he be immediately reinstated as maintenance mechanic pending completion of the investigation. The reasons for the denial are fully set forth in the Decision.

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

I. INTRODUCTION

On August 22, 1993, Clarence O. Reynolds (Petitioner) filed a request for enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The petition requested that the Executive Director for Operations take immediate escalated enforcement action with regard to Northeast Nuclear Energy Company's (Licensee's) Millstone Nuclear Power Station Unit 1. Specifically, Mr. Reynolds requested that multiple Severity Level II and III violations be issued against the Millstone

Unit 1 Maintenance Department, that suspension of Maintenance Department management be instituted pending a complete investigation, and that the Executive Director for Operations' (EDO's) office insist that he be immediately reinstated as maintenance mechanic pending this investigation.

On September 21, 1993, the NRC acknowledged receipt of the request and denied the portion of the request that asked that the EDO's office insist on immediate reinstatement of Mr. Reynolds (following his suspension) to his position as a maintenance mechanic pending an investigation and requested additional information to provide the basis to act on the Petitioner's other requests. On October 19, 1993, the Petitioner responded with this additional information.

On June 29, 1994, Petitioner supplemented his original petition. In his supplement, Petitioner informed the NRC that his employment with Northeast Nuclear Energy Company had been terminated on June 27, 1994, and he alleged that the Licensee terminated him due to his raising of safety concerns. Petitioner requested that NRC take action to reinstate him to his employment and provide for back pay for lost wages.

On August 17, 1994, Petitioner again supplemented his petition, requesting that: (1) three Severity Level I violations be issued against Northeast Utilities Chief Executive Officer, Vice President of Nuclear Operations, and the Vice President at Millstone; (2) two Severity Level II violations be issued against the Unit One Director and the Maintenance Manager of Millstone; (3) a Severity Level III violation be issued against the first-line supervisor; (4) the NRC remove all managers mentioned above; and (5) the NRC require reinstatement of Petitioner until the matter is resolved.

Letters dated October 25, 1993, August 16, 1994, and January 27 and March 16, 1995, were received from Northeast Utilities, responding to Petitioner's assertions. Petitioner responded to some of the issues raised by Northeast Nuclear Energy Company in letters dated November 8, 1993, and September 12, 1994.

II. DISCUSSION

As a basis for his August 22, 1993 request, Petitioner asserted that he was suspended from his position at Millstone following his filing of nuclear concerns with Millstone management and the NRC, that there have been other complaints of retaliation that have occurred recently in his department, and that a recent NRC Inspector General's report indicated that there have been a significant number of complaints by employees being discriminated against at Millstone after bringing forth nuclear concerns. As a basis for his June 29, 1994 supplement, Petitioner

states that he was terminated by Northeast Nuclear Energy Company due to his raising safety concerns.

Petitioner bases his requests for sanctions on his assertion that he was a victim of discrimination. Therefore, the decision as to whether the requested actions should be taken must be based on a finding as to whether discrimination occurred. Petitioner describes two specific incidents as alleged discrimination, namely (1) his suspension without pay in August 1993, and (2) his termination by Licensee in June 1994.

With respect to Petitioner's request for immediate reinstatement, the NRC informed him in a letter dated September 21, 1993, that the NRC has no authority to order a direct personal remedy such as reinstatement of an employee and that, if the Petitioner sought reinstatement, he should file a complaint with the Department of Labor (DOL). This response referred to the Petitioner's request for reinstatement following his suspension, but it also applies to reinstatement of Petitioner following his termination. Therefore, the Petitioner's August 17, 1994 request that NRC reinstate the Petitioner to his position at Millstone is denied.

In his letters of August 22, 1993, and August 17, 1994, Petitioner describes his suspension without pay. The NRC's Office of Investigations (OI) investigated this allegation and concluded, in a report dated April 18, 1995, that the allegation that this suspension was for discriminatory reasons was not substantiated (1-93-047R). This conclusion was based on, among other things, a record of Petitioner's history of attendance problems, his excessive sick leave, and his continued problems controlling his temper and abrasive personality. The Petitioner had also been given several verbal and written warnings for similar conduct prior to being suspended.

With respect to Petitioner's termination which he described in his letter of June 29, 1994, OI concluded that the allegation that his termination was for discriminatory reasons was not substantiated. Specifically, OI cited Petitioner's poor performance, insubordination, and attendance problems, noting that the act that caused the Petitioner to be terminated (being outside of the protected area and absent from his work station without supervisory approval) was similar to the act which caused the Petitioner to be suspended without pay in August 1993. Petitioner also filed a complaint with the DOL concerning his termination and the DOL Area Director notified Petitioner on September 22, 1994, that his complaint was being dismissed on the basis that he had failed to make a *prima facie* showing of discrimination. The Area Director stated: "Our finding is that the firm would have reached the same decision with respect to your termination even in the absence of your protected conduct and activities." Petitioner has

appealed this decision to the DOL Administrative Law Judge but, to date, there has been no decision on the matter.¹

III. CONCLUSION

As explained above, neither the conclusions of the Department of Labor nor the report of the NRC Office of Investigations support Petitioner's claim that he was subject to discrimination. From our review of the DOL and OI findings, we have concluded that the matters complained of by Petitioner did not involve discrimination or a violation of 10 C.F.R. § 50.7. In the absence of sufficient evidence of a violation involving discrimination, there is no basis for the NRC to take the enforcement actions requested by Petitioner. Therefore, the petition filed on August 22, 1993, as supplemented by letters dated October 19, 1993, June 29, 1994, and August 17, 1994, is denied.

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

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 2d day of August 1995.

¹In accordance with its normal practice, the Staff will monitor the DOL process and will consider the need for enforcement action if DOL finds that discrimination occurred.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-245
50-336

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Units 1 and 2)

August 2, 1995

The Director of the Office of Enforcement has denied petitions filed by Anthony J. Ross requesting that the NRC take escalated enforcement action with regard to violations at Millstone Nuclear Power Station arising from alleged discriminatory acts committed by his supervisors. Mr. Ross asks that the NRC issue Severity Level II and III violations and other sanctions against the supervisors who committed the alleged acts of discrimination, and that Severity Level I violations be issued against senior managers for failing to rectify the problem. The reasons for the denial are fully set forth in the Decision.

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

I. INTRODUCTION

On August 7, 1993, Anthony J. Ross (Petitioner) filed a request for enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The petition requested that the Executive Director for Operations take escalated enforcement action with regard to alleged violations at Millstone Nuclear Power Station. Specifically, Petitioner requested that a Severity Level II violation be issued against his department manager and a Severity Level III violation be issued against his first-line supervisor for alleged violations of the provisions of 10 C.F.R. § 50.7,

that sanctions be instituted against these individuals for engaging in deliberate misconduct in violation of 10 C.F.R. § 50.5, and that the first-line supervisor be removed from his position until a satisfactory solution to the problem can be achieved. The NRC acknowledged receipt of this petition on September 1, 1993 (58 Fed. Reg. 47,769 (Sept. 10, 1993)).

On May 23, 1994, Petitioner filed another petition, requesting that the NRC issue a Severity Level II violation and other sanctions against the Maintenance Manager at the Millstone plant (Unit 1) and remove the Maintenance Manager from his position until resolution of the issues raised in his complaint. The NRC acknowledged receipt of this additional petition on June 16, 1994 (59 Fed. Reg. 32,246 (June 22, 1994)). This additional petition was supplemented in an August 17, 1994 letter requesting that Severity Level I violations and other sanctions be issued against the Senior Vice President and the Chief Executive Officer at Millstone for their knowing failure to rectify the alleged harassment and discrimination issue and that these individuals be removed from their positions until a satisfactory solution to the problem can be achieved.

Letters dated October 12, 1993, and August 4, 1994, were received from Northeast Nuclear Energy Company, providing information concerning this petition.

II. BACKGROUND

As a basis for his August 7, 1993 request, Petitioner stated that he had been subjected to acts of harassment, retaliation, and discrimination since reporting to the Nuclear Safety Concerns Program that he observed his first-line supervisor performing work on a 10 C.F.R. Part 50, Appendix R, emergency light without a work order. He alleged that the discriminatory acts were committed by his department manager and first-line supervisor. Petitioner did not provide details concerning the specific acts of harassment, retaliation, and discrimination that he had experienced.

As a basis for his May 23, 1994 request, Petitioner stated that the Maintenance Manager told him that Petitioner was "obligated" to share his safety concerns with the Maintenance Manager. He alleged that this statement was a violation of 10 C.F.R. §§ 50.5 and 50.7 and that the maintenance manager was inhibiting the free flow of information.

In his August 17, 1994 supplement to the petitions, Mr. Ross alleged that the Chief Executive Officer and Senior Vice President at Millstone nuclear plant were aware of the harassment and intimidation that he had experienced and they had done nothing to rectify the problem. He also stated that an unjust written reprimand was written by the Maintenance Manager about him on December 13, 1993, and that his annual review was lowered by the Maintenance Manager, all

of which was alleged to be further evidence of harassment and discrimination by management against the Petitioner.

III. DISCUSSION

Petitioner bases his requests for sanctions against individuals on his assertion that he was a victim of discrimination. Therefore, the decision as to whether the requested actions should be taken must be based on a finding of whether his claims of discrimination are substantiated. In his letters of August 7, 1993, and May 23 and August 17, 1994, which contain the substance of his petition, Mr. Ross discusses three specific instances of discrimination. While the August 7 letter does not allege any specific instances of discrimination, his May 23 letter alleges that he was discriminated against when the Maintenance Manager told him he was obligated to bring his safety concerns to the Maintenance Manager. In his August 17 letter, Petitioner discusses an "unjust written reprimand" and the "lowering of [his] annual review grades." While certain other allegations by the Petitioner were received by the NRC and not specifically included by him in his petition, some of these other allegations were considered by the Office of Investigations (OI) in its investigation (OI No. 1-93-044R) into Petitioner's claim of discrimination.¹

Petitioner also filed five complaints with the U.S. Department of Labor (DOL) alleging discrimination. These complaints do not bear directly on the specific instances of discrimination claimed by Mr. Ross in his petitions, but were considered in formulating this Director's Decision since such allegations bear on Petitioner's claim of continuing acts of harassment, retaliation, and discrimination.

The Department of Labor received a complaint from Petitioner on August 2, 1994. Following a finding by the DOL Area Director on August 15, 1994, that Petitioner had not made a *prima facie* showing of discrimination, this complaint was dismissed by a DOL Administrative Law Judge (ALJ) in a Recommended Decision and Order Granting Motion for Summary Judgment dated March 1, 1995 (94-ERA-039). This case awaits final disposition by the Secretary of Labor. Complaints received by DOL on August 18 and December 14, 1994, were dismissed by the Area Director on September 29, 1994, and January 17, 1995, respectively, for failure to make a *prima facie* showing of discrimination. NRC records reflect an appeal only of the second of these complaints. The DOL ALJ recently recommended that that appeal and complaint be dismissed with

¹ Separate from the 2.206 process, and subsequent to his filing of the petitions addressed herein, Mr. Ross has raised some additional allegations concerning discrimination. These issues are pending before the Staff.

prejudice.² Complaints received by DOL on January 18 and 26, 1995, initially were dismissed by the Area Director for failure to make a *prima facie* showing. Both these decisions were appealed and, following a notification from Petitioner that he intended to withdraw his complaints, the ALJ recommended dismissal of the complaints on May 2, 1995. The ALJ's recommended dismissals in these cases, 95-ERA-025 and 95-ERA-027, were approved by the Secretary of Labor, who dismissed the cases on June 9, 1995.

On May 26, 1995, the NRC Office of Investigations (OI) issued a report on its investigation into Petitioner's allegations of harassment and discrimination that are the subject of the instant petitions. As to Petitioner's claim that he was told that he was obligated to report safety concerns to the Maintenance Manager, OI did not substantiate that this constituted discrimination. The Petitioner, in fact, provided a tape of his conversation with the Maintenance Manager on this matter and the Staff has reviewed both the tape and a transcript of the meeting reflected on the tape. It is true that, in one instance, the Maintenance Manager stated that Mr. Ross had an obligation to bring his safety concerns to Licensee management, but Petitioner responded that he had a choice to provide his concerns to NRC or to the Licensee and that, based on his past experiences, he chose to take his concerns to the NRC. From our review of the taped record of this meeting, it is clear that the Maintenance Manager was stressing the importance of reporting safety concerns to the Licensee so that the concerns could be addressed in a timely manner (and prior to returning equipment with potential problems to an operable status), but he did not direct that concerns be brought to Licensee management,³ nor did he indicate that the Petitioner could not report his concerns to the NRC instead of the Licensee. Based on our review of the tape, we cannot conclude that the Maintenance Manager was attempting to dissuade Petitioner from going to the NRC.

With respect to Petitioner's allegation that he had been given an unjust written reprimand, OI reviewed Licensee records and letters documenting the reasons for the disciplinary action taken against the Petitioner. The OI report referred to a Licensee investigation that noted that an event that resulted in the loss of availability of a critical safety system was attributed to Petitioner's inattention to detail. The OI report also noted that Petitioner had previously received a

² See 95-ERA-17, Order Recommending Dismissal of Complaint, April 28, 1995.

³ This appears to be different from the situation in *Saporito v. Florida Power & Light Co.* (89-ERA-007, 89-ERA-017), a case involving threats and actual disciplinary action against the employee by the licensee when the employee refused to comply with management's direction that he disclose safety concerns to management. In the instant case, no action was taken against Petitioner when he indicated his preference to go to the NRC. Rather, it is clear from the tape of the meeting that the Maintenance Manager was concerned about Petitioner's safety concerns with equipment that the Licensee was about to declare operable and the manager was urging Petitioner to disclose his concerns so that they could be addressed. Although the Petitioner indicated that he would take his concerns to the NRC, he did not indicate when that might occur or whether the Licensee would ever be apprised of the concerns. The Maintenance Manager emphasized the Licensee's responsibility for safe operation of the facility and urged the Petitioner to ensure that the Licensee was made aware of potential safety problems.

verbal reprimand and that it was customary for this Licensee to issue a written reprimand to individuals who had already received verbal reprimands for past events. The OI report concluded that the Petitioner's allegation could not be substantiated.

OI also investigated Petitioner's allegation that his annual review grades were lowered due to his raising safety concerns. OI noted that Petitioner had been promoted from Electrician B to Electrician A between 1992, when Petitioner received a very good appraisal, and 1993, when the grades in Petitioner's appraisal were lower. The OI report referenced Licensee managers who said that the position description for an Electrician A had more stringent performance criteria and that Petitioner's appraisal was not a derogatory appraisal. One Licensee manager referred to a category of the annual appraisal called "Dependability," and noted that the lower rating in that category reflected the excessive number of sick days taken by Petitioner. The OI report concluded that the allegation that the Petitioner's annual appraisal was lowered due to his reporting safety concerns could not be substantiated.

With respect to Petitioner's allegation that he received a half-day suspension and an oral reprimand for reporting safety concerns, OI reviewed Licensee records and letters documenting the reasons for the disciplinary action taken against the Petitioner. The Licensee pointed out that the disciplinary action was taken because Petitioner's relationship with his managers had deteriorated in 1993, including an incident in which Petitioner called his supervisor a liar. Based on this information, OI concluded that the allegation could not be substantiated.

OI also investigated Petitioner's allegation that his automatic pay raise was delayed due to his reporting a safety concern. The Licensee attributed the delay in Petitioner's pay raise to errors in the computerized personnel information system and said that when Petitioner pointed out the discrepancy, the Personnel Department looked into the matter, discovered additional errors, and corrected them. Additional problems were discovered in the administration of the proper procedure, e.g., whether a performance appraisal was necessary before a pay raise could be approved. Petitioner's pay raise was corrected and he was reimbursed retroactively. Based on the evidence developed during the investigation, OI concluded that the allegation that Petitioner's automatic pay raise was delayed due to his reporting a safety concern could not be substantiated.

IV. CONCLUSION

As explained above, neither the findings of the Department of Labor nor the investigation by the NRC's Office of Investigations support Petitioner's claim that he was subjected to discrimination. From our review of the DOL and OI findings, we have concluded that the matters alleged by the Petitioner did not

involve discrimination or a violation of 10 C.F.R. § 50.7. In the absence of adequate evidence of a violation involving discrimination, there is no basis for the NRC to take the enforcement actions requested by Petitioner. Therefore, the petitions filed on August 7, 1993, and May 23, 1994, as supplemented by Petitioner's letter dated August 17, 1994, are denied.

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

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 2d day of August 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-219

GENERAL PUBLIC UTILITIES
NUCLEAR CORPORATION
(Oyster Creek Nuclear Generating
Station)

August 4, 1995

The Director of the Office of Nuclear Reactor Regulation denies in part a petition dated September 19, 1994, filed with the Nuclear Regulatory Commission (NRC) by Reactor Watchdog Project, Nuclear Information and Resource Service (NIRS), and Oyster Creek Nuclear Watch (Petitioners), requesting that the NRC take action with respect to the General Public Utilities Nuclear Corporation (GPUN or Licensee) Oyster Creek Nuclear Generating Station (OCNGS). The petition requests that the NRC: (1) immediately suspend the OCNGS operating license until the Licensee inspects and repairs or replaces all safety-class reactor internal component parts subject to embrittlement and cracking, (2) immediately suspend the OCNGS operating license until the Licensee submits an analysis regarding the synergistic effects of through-wall cracking of multiple safety-class components, (3) immediately suspend the OCNGS operating license until the Licensee has analyzed and mitigated any areas of noncompliance with regard to irradiated fuel pool cooling as a single-unit boiling-water reactor (BWR), and (4) issue a generic letter requiring other licensees of single-unit BWRs to submit information regarding fuel pool boiling in order to verify compliance with regulatory requirements, and to promptly take appropriate mitigative action if the unit is not in compliance.

The December 13, 1994 Supplemental Petition requests that the NRC: (1) suspend the license of the OCNGS until the Petitioners' concerns regarding cracking are addressed, including inspection of all reactor vessel internal components and other safety-related systems susceptible to intergranular stress

corrosion cracking (IGSCC) and completion of any and all necessary repairs and modifications; (2) explain discrepancies between the response of the NRC Staff, dated October 27, 1994, to the Petition of September 19, 1994, and the time-to-boil calculations for the FitzPatrick plant; (3) require GPUN to produce documents for evaluation of the time-to-boil calculation for the OCNGS irradiated fuel pool; (4) identify redundant components that may be powered from onsite power supplies to be used for spent fuel pool cooling as qualified Class 1E systems; (5) hold a public meeting in Toms River, New Jersey, to permit presentation of additional information related to the petition; and (6) treat the Petitioner's letter of December 13, 1994, as a formal appeal of the denial of Petitioners' request of September 19, 1994, to immediately suspend the OCNGS operating license.

After review of the issues related to cracking of reactor internal components raised by Requests (1) and (2) of the September 19, 1994 Petition, and Request (1) of the December 13, 1994 Supplemental Petition, the petition is denied with respect to these requests because the issues raised by the Petitioners are being adequately addressed already. A Director's Decision concerning the issues related to irradiated fuel pool cooling and fuel pool boiling, raised by Requests (3) and (4) of the September 19, 1994 Petition and Requests (2), (3), and (4) of the December 13, 1994 Supplemental Petition will be issued upon completion of NRC Staff's review regarding those matters. Petitioners' request for a public meeting and for treatment of their letter of December 13, 1994, as a formal appeal of the NRC Staff's denial of their request of September 19, 1994, for immediate suspension of the OCNGS operating license, was denied by letter dated April 10, 1995.

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

I. INTRODUCTION

By letter dated September 19, 1994, Reactor Watchdog Project, Nuclear Information and Resource Service (NIRS), and Oyster Creek Nuclear Watch (Petitioners), submitted a petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), requesting that the U.S. Nuclear Regulatory Commission (NRC) take action with regard to the Oyster Creek Nuclear Generating Station (OCNGS), operated by the GPU Nuclear Corporation (GPUN or the Licensee). By letter dated December 13, 1994, Petitioners supplemented the petition.

The September 19, 1994 Petition requests that the NRC (1) immediately suspend the OCNGS operating license until the Licensee inspects and repairs or replaces all safety-class reactor internal component parts subject to embrittlement and cracking, (2) immediately suspend the OCNGS operating license until the Licensee submits an analysis regarding the synergistic effects of through-wall cracking of multiple safety-class components, (3) immediately suspend the OCNGS operating license until the Licensee has analyzed and mitigated any areas of noncompliance with regard to irradiated fuel pool cooling as a single-unit boiling-water reactor (BWR), and (4) issue a generic letter requiring other licensees of single-unit BWRs to submit information regarding fuel pool boiling in order to verify compliance with regulatory requirements, and to promptly take appropriate mitigative action if the unit is not in compliance.

The December 13, 1994 Supplemental Petition requests that the NRC: (1) suspend the license of the OCNGS until the Petitioners' concerns regarding cracking are addressed, including inspection of all reactor vessel internal components and other safety-related systems susceptible to intergranular stress corrosion cracking (IGSCC) and completion of any and all necessary repairs and modifications; (2) explain discrepancies between the response of the NRC Staff dated October 27, 1994, to the Petition of September 19, 1994, and the time-to-boil calculations for the FitzPatrick plant; (3) require GPUN to produce documents for evaluation of the time-to-boil calculation for the OCNGS irradiated fuel pool; (4) identify redundant components that may be powered from on-site power supplies to be used for spent fuel pool cooling as qualified Class 1E systems; (5) hold a public meeting in Toms River, New Jersey, to permit presentation of additional information related to the petition; and (6) treat the Petitioners' letter of December 13, 1994, as a formal appeal of the denial of the Petitioners' request of September 19, 1994, to immediately suspend the OCNGS operating license.

The September 19, 1994 Petition sought relief concerning safety-class reactor internal components based on the following premises: (a) the core shroud in General Electric BWRs is vulnerable to age-related deterioration; (b) twelve domestic and foreign BWR owners have found extensive cracking on welds of the core shroud; (c) only ten of thirty-six U.S. BWR owners have inspected their core shrouds and nine of the ten core shrouds had cracks; (d) nineteen of twenty-five selected BWR internal components are susceptible to stress corrosion cracking and six of nineteen are susceptible to irradiation-assisted stress corrosion cracking; (e) as the oldest operating General Electric Mark I BWR and the third oldest operating reactor in the United States, OCNGS has been subjected to the longest period of operational conditions that cause embrittlement and cracking; (f) the BWR Owners Group (BWROG) stated that cracking of the core shroud is a warning signal that additional safety-class reactor internals are increasingly susceptible to age-related deterioration; (g) cracking

of any single part or multiple components jeopardizes safe operation of that nuclear station; (h) Oyster Creek did not inspect for core shroud cracking prior to the current refueling outage and other safety-class reactor internals have not been adequately inspected for cracking; and (i) a safety analysis has not been performed on the potential synergistic effects of multiple-component cracking.

The September 19, 1994 Petition also sought relief concerning fuel pool cooling design deficiencies, based on the following premises: (a) various design defects in BWR fuel pool cooling systems pose a significant increase in risk to the public safety and violate 10 C.F.R. § 50.59, 10 C.F.R. Part 50, Appendix A, Criterion 63, 10 C.F.R. Part 50, Appendix B, Criterion III, and Regulatory Guides 1.13, 1.89, and 1.97; (b) OCNGS is a single-unit facility with no adjacent units to rely upon in the event that a design-basis event were to disable the fuel pool cooling system; and (c) OCNGS has not docketed any material with regard to BWR design deficiencies identified in the 10 C.F.R. Part 21 Report of Substantial Safety Hazard (November 27, 1992) of Messrs. Lochbaum and Prevatte, and thus OCNGS may be in violation of NRC regulatory requirements.

The Petitioners assert the following bases to support their requests in the December 13, 1994 Supplemental Petition: (a) the October 27, 1994 letter of the NRC Staff, acknowledging receipt of the petition and denying the requests for immediate suspension of the operating license, failed to address concerns central to the petition, such as the Licensee's failure to recognize that IGSCC indicates that cracking could be occurring in additional safety-class reactor internal components and the Licensee's failure to perform inspections of all safety-class components to determine whether cracking is occurring; (b) recently discovered cracking in the top guide and core plates in foreign BWRs and cracking discovered on December 8, 1994, at the New York Power Authority's (NYPA's) FitzPatrick reactor underscore the Petitioners' concern that additional safety-class components at OCNGS are degrading; (c) the Licensee did not conduct an enhanced inspection of the core plate and top guide of the OCNGS facility during the current outage, despite notification by the General Electric Rapid Information Communication Service Information Letter (GE RICSIL) 071 dated November 22, 1994; (d) the Licensee, the NRC, and the BWR Owners Group (BWORG) have failed to provide an analysis of the synergistic effects of multiple-component cracking of additional safety-class reactor internal components; (e) the time-to-boil calculation is dictated by the amount of decay heat generated and the volume of water in the fuel pool rather than the number of reactors at a site that store irradiated fuel in a separate pool; (f) NRC documents state that the time-to-boil calculation for FitzPatrick following a loss-of-coolant accident is 8 hours, and NYPA documents state that the time-to-boil calculations in two cases are 11.86 and 5.36 hours. Finally, nothing indicates that the time-to-boil calculation at OCNGS is longer than the time-to-boil calculation at the

Susquehanna facility; and (g) the NRC and the Licensee have failed to establish whether redundant components and power supplies to the OCNGS fuel pool cooling system have been qualified as Class 1E systems.

The Petitioners' requests that the Commission immediately suspend the OCNGS operating license were denied in my letter of October 27, 1994, to the Petitioners, because (1) OCNGS was in a refueling outage, had inspected core shroud welds, and was making structural modifications before restart of the unit to address some weld cracks found during the inspection; and (2) inspections and corrective actions recommended by General Electric Company and the American Society of Mechanical Engineers Boiler and Pressure Vessel Code for various reactor internals had been and continued to be performed by the Licensee.

The Petitioners' request for treatment of their letter of December 13, 1994, as a formal appeal of the NRC Staff's denial of their request of September 19, 1994, for immediate suspension of the OCNGS operating license, was denied in my letter of April 10, 1995, to the Petitioners. The Petitioners provided no basis for revisiting the denial of their request of September 19, 1994, for immediate suspension of the license. As discussed below, the Licensee completed all ASME Code § XI reactor vessel internal inspections and BWROG-recommended inspections and took appropriate remedial action before restart of OCNGS in December 1994. The NRC Staff was also aware of the potential problem for United States BWRs raised by cracking in top guide and core plates of foreign BWRs before the restart of OCNGS. The NRC Staff determined, as explained below, that cracks in these components would not adversely affect safety of the plant because of differences in the OCNGS design as compared to the affected foreign reactors.

Regarding the OCNGS spent fuel pool cooling system capability, the Staff determined that the time to the onset of spent fuel pool boiling following a loss of spent fuel pool cooling during periods where the reactor vessel contains irradiated fuel at single-unit BWR sites, such as OCNGS, is long enough to allow compensatory measures. The probability of a sustained loss of spent fuel pool cooling creating adverse environmental conditions that may cause failure of essential equipment is extremely low. Therefore, the Staff has concluded that immediate action to address the concerns the Petitioners have identified at OCNGS is not justified. As stated in my letter of October 27, 1994, spent fuel pool safety is being reviewed generically by the Staff and this review has not yet been completed.

The Petitioners' request for a public meeting was denied in my letter of April 10, 1995.¹ The issue of internals cracking has been discussed at several public

¹ In addition, the NRC Staff determined, in accordance with the guidance in NRC Management Directive 8.11, "Review Process for 10 C.F.R. 2.206 Petitions," that an informal public hearing was not warranted because the petition did not present new information or a new approach for evaluating the concerns Petitioners raised.

meetings, including a public meeting on November 4, 1994, that a representative of NIRS attended regarding the OCNGS core shroud. With respect to spent fuel pool cooling, the Staff has held several public meetings and public briefings with the Advisory Committee on Reactor Safeguards. Summaries of these public meetings are available in the NRC Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the local public document rooms for the affected BWR plants. Transcripts of ACRS meetings are also available.

The NRC Staff's review of the issues related to cracking of reactor internal components, raised by Requests (1) and (2) of the September 19, 1994 Petition, and Request (1) of the December 13, 1994 Supplemental Petition, is now complete. For the reasons set forth below, the petition is denied with respect to these requests. A Director's Decision concerning the issues related to irradiated fuel pool cooling and fuel pool boiling, raised by Requests (3) and (4) of the September 19, 1994 Petition and Requests (2), (3), and (4) of the December 13, 1994 Supplemental Petition will be issued upon completion of the NRC Staff's review regarding those matters.

II. BACKGROUND

Intergranular stress corrosion cracking (IGSCC) of BWR internal components has been identified as a technical issue of concern by both the NRC Staff and the nuclear industry. The core shroud is among the internal reactor components susceptible to IGSCC. Identification of cracking at the circumferential beltline region welds in several plants during 1993 led to the publication of NRC Information Notice (IN) 93-79, "Core Shroud Cracking at Beltline Region Welds in Boiling-Water Reactors," issued on September 30, 1993. Several licensees inspected their core shrouds during planned outages in the spring of 1994 and found cracking at the circumferential welds. The NRC has closely monitored these inspection activities. Additionally, licensees have inspected other BWR reactor vessel internal components as discussed below. NRC issued IN 94-42, "Cracking in the Lower Region of the Core Shroud in Boiling-Water Reactors," on June 7, 1994, and Supplement 1 to IN 94-42, on July 19, 1994, concerning cracking in the core shroud found at Dresden Unit 3 and Quad Cities Unit 1. IN 95-17, "Reactor Vessel Top Guide and Core Plate Cracking," issued on March 10, 1995, concerned reactor vessel top guide and core plate cracking. The NRC has monitored Licensee inspection activities of these components at the OCNGS as discussed below.

III. DISCUSSION

A. **Petitioners Request That the NRC Suspend the OCNGS License Until the Licensee Inspects and Repairs or Replaces All Safety-Class Reactor Internal Component Parts Subject to Embrittlement and Cracking**

Nuclear power reactor licensees, including GPUN, are required by 10 C.F.R. § 50.55a to implement inservice inspection programs in accordance with the guidelines of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code). The scope of the inservice inspection programs for reactor pressure vessels and their internal components is prescribed by ASME Code § XI, Division 1, Subsections IWA and IWB. The Licensee is also required by ASME Code § XI, Article IWA-6000, to submit the results of these inspections to the NRC within 90 days of completion. The NRC Staff performs periodic audits of licensee-implemented inservice inspection programs to determine compliance with applicable codes and regulations. These audits are documented in NRC inspection reports, which are publicly available at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the local public document room for the OCNGS located at the Ocean County Library, Reference Department, 101 Washington Street, Toms River, NJ 08753.

The Licensee performed inspections of the OCNGS reactor vessel and its internal safety-related components in accordance with the requirements of ASME Code § XI, and the NRC Staff has reviewed the Licensee's inservice inspection programs, as discussed below.

Cracking of the core spray piping was first detected during Licensee inspections at OCNGS in 1978, and its extent has been evaluated by the Licensee during each subsequent outage. The core spray piping was repaired in 1978 and 1980. Since that time, additional visual inspections by the Licensee have not identified any significant degradation of the piping or of the repairs made to the piping. The NRC's review of the Licensee's inspection results and disposition during the 14R outage, documented in NRC Inspection Report 50-219/92-22, dated March 19, 1993, and a letter to GPUN dated November 18, 1994, regarding the 15R inspection concluded that the Licensee inspections and dispositions of core spray system findings were appropriate.

The Licensee first detected cracking of the top guide in 1991 and has closely monitored it in successive outages. The NRC Staff conducted an inspection in June 1991, and concluded that the Licensee's disposition of the top guide crack as "acceptable as is" was adequate. The results of the inspection were reported in NRC Inspection Report 50-219/91-21, dated August 9, 1991. During an NRC inspection conducted in December 1992 and January 1993, the NRC Staff

evaluated the results of a remote visual inspection of the top guide conducted by General Electric Corporation for GPUN. The Staff evaluated the quality of the Licensee's visual inspection of the top guide and agreed with the Licensee's determination that the top guide was acceptable to "use as is." The results of the inspection were reported in NRC Inspection Report 50-219/92-22, dated March 19, 1993.

The Licensee notified the NRC Staff during an October 11, 1994 telephone call that additional cracking in the top guide had been found. The Licensee also reported that cracks found in earlier inspections of the top guide had not shown any measurable growth. In addition, during the refueling outage for Cycle 15 of operation (15R refueling outage), which began in September 1994, the Licensee assessed all the cracks that had been identified to ensure they would not jeopardize the structural integrity or function of the top guide.

It should be noted that the location of the cracks that have been detected in the OCNGS top guide is different from that in the foreign reactor cited in the NIRS letter of December 13, 1994, and the subject of GE RICSIL-071. Moreover, both the top guide and the core plate at OCNGS are components of a GE BWR while the foreign plant is a non-GE BWR. Furthermore, the OCNGS core plate is bolted in place, and the top guide is restrained vertically by hold-down devices and horizontally by lateral supports. These configurations result in a highly redundant structure, and even if cracking similar to that observed in the foreign plant were to occur, it would not adversely affect the safety of the plant, and these components could still perform their safety-related functions.

The BWROG has addressed the issue of cracking in the internal components of reactor pressure vessels by recommending that BWR licensees perform inspections of various components pursuant to vendor recommendations of the General Electric Company. Among inspections recommended by the BWROG are examination of core spray spargers, core shrouds, top guides, return-line nozzles, and in-core instrumentation, which in the case of OCNGS are the intermediate-power-range monitors. The BWROG has also formed the Boiling Water Reactor Vessels & Internals Project (BWRVIP), chaired by five nuclear industry vice presidents, to develop a proactive program to address and mitigate cracking in reactor pressure vessel internal components. NRC Staff correspondence with the BWRVIP, Staff evaluation of the BWRVIP generic submittals, summaries of meetings with the BWRVIP, and Staff assessments of plant-specific submittals in regard to these subjects are also available to the public for review at the local public document room of each BWR plant.

The Licensee inspected the following safety-related components during the 15R refueling outage, which began in September 1994: core spray sparger and annular piping, steam dryer and separator assembly, core shroud head bolts, core support plate holddown bolts, guide rod and steam dryer support brackets, feedwater spargers, top guide assembly, four intermediate-power-range monitors,

one low-power-range monitor, core shroud brackets, conical support to shell weld, and the core shroud. Cracking was observed on the core shroud and a steam dryer bracket, and required repairs to these components were made. Minor cracking was observed on the core spray piping, a tack weld on the keeper bolt of the feedwater spargers, and the top-guide cross beams. None of these cracks would have prevented the components from performing their normal operating and postulated accident functions. These indications were dispositioned as is. The Licensee submitted results of its core shroud inspection and its core spray sparger inspection to the NRC in separate letters, both dated November 3, 1994. As a result of a conference call on January 19, 1995, the Licensee submitted a summary of the results of its inspections of reactor vessel internal components performed during the 15R refueling outage. By a letter dated March 16, 1995, in accordance with 10 C.F.R. § 50.55a(g) and ASME § XI, IWA 6220 (1986 Ed. with no addenda), GPUN forwarded the reports of its inservice inspection activities conducted during the 15R refueling outage. In the report, GPUN lists the inspections performed and discusses unacceptable indications of certain components and their disposition. Inservice inspection of reactor vessel internal components is required by the ASME Code and the Licensee's inservice inspection program for future outages provides assurance that degradation of components will be detected and appropriate action will be taken. The documents discussed above are available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the local public document room located at the Ocean County Library, Reference Department, 101 Washington Street, Toms River, NJ 08753.

The Licensee's inspection of the OCNGS core shroud found that one of the ten circumferential welds (the H4 weld) had indications of substantial cracking. To ensure shroud integrity under all postulated accidents, the Licensee elected to install a modification, consisting of ten stabilizing tie-rods, designed to ensure that the core shroud would perform its design functions under normal operation and postulated accidents even if it were to develop 360° through-wall cracks. The NRC Staff reviewed this modification and issued a safety evaluation on November 25, 1994, which concluded that the core shroud modification proposed by the Licensee is acceptable and, therefore, is approved. The safety evaluation is also available at the public document rooms previously listed.

On the basis of the NRC Staff's review of various plant-specific and industry programs implemented by the Licensee, the NRC Staff concluded that the Licensee took appropriate actions to address embrittlement and cracking in, and thus to ensure the reliability of, the OCNGS reactor vessel internal components.

Based on the above, the Staff has concluded that suspension of the Oyster Creek Nuclear Generating Station operating license due to embrittlement and cracking of the reactor vessel internal components is not warranted. As stated previously, continued monitoring of reactor vessel internals as required by the

ASME Code and the Licensee's inservice inspection program will provide assurance that degradation of components will be detected and appropriate action will be taken.

B. Petitioners Request That the NRC Suspend the OCNCS Operating License Until the Licensee Provides an Analysis Regarding the Synergistic Effects of Through-Wall Cracking of Multiple Safety-Class Components

The majority of reactor internals are fabricated from high-toughness materials such as stainless steel and were designed with significant margins on allowable stresses. As such, cracking must be severe to adversely impact plant safety. It is unlikely that Licensee inspections would not find such severe degradation. In fact, identification and sizing of the cracks in the H4 location on the OCNCS core shroud are good examples of the effectiveness of the inspections. In addition, NRC Staff evaluation of the results from internals inspections performed to date at OCNCS resulted in the conclusion that ASME Code safety margins have been maintained.

The Licensee has not provided an analysis to NRC that addresses the synergistic effects of cracking in multiple safety-class components. The NRC Staff does not consider the lack of such an analysis to be a safety concern because of the inspection requirements that pertain to reactor internals and the results of inspections performed to date. *See* Section III.A, *supra*.

Continued monitoring of reactor vessel internals as required by the ASME Code and the Licensee's inservice inspection program will provide information about the structural integrity of reactor vessel internals in the long term. The NRC has asked the BWR Vessel Internals Project (BWRVIP), an industry group, to develop an assessment to address cracking in BWR reactor vessel internals. A report from the BWRVIP is expected on the long-term effects of reactor vessel internals cracking in late 1995. In addition, the NRC has undertaken a longer-term evaluation of the effects of cracking in multiple reactor vessel internal components that will be approached with appropriate treatment of the key variables (safety function, material susceptibility, loading, environment, etc.).

Based on the above, the Staff has concluded that suspension of the Oyster Creek Nuclear Generating Station license, due to the lack of an analysis of the synergistic effects of through-wall cracking of safety-class reactor internal components, is not warranted.

IV. CONCLUSION

The Petitioners requested that the NRC suspend the operating license of Oyster Creek Nuclear Generating Station until: (1) the Licensee inspects, repairs, or replaces all safety-class reactor internal components subject to embrittlement and cracking; and (2) the Licensee provides an analysis regarding the synergistic effects of through-wall cracking of multiple safety-class components. For the reasons discussed above, I conclude that the issues raised by the Petitioners are being adequately addressed and that there is no basis for suspending the OCNGS operating license or taking the other requested action. Accordingly, the Petitioners' above-referenced requests are denied.

A copy of this Partial Director's Decision will be filed with the Secretary of the Commission for review as stated in 10 C.F.R. § 2.206(c). This Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 4th day of August 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-293
(License No. DRP-35)

BOSTON EDISON COMPANY
(Pilgrim Nuclear Power Station)

August 31, 1995

The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a petition dated March 10, 1995, submitted by Mary Elizabeth Lampert and sixty-two other individuals pursuant to 10 C.F.R. § 2.206, and which requests action with regard to the Pilgrim Nuclear Power Station (Pilgrim), operated by the Boston Edison Company (Licensee).

Petitioners' request that the NRC not permit restart of Pilgrim until repairs are performed and corrective action is taken with respect to a number of certain reactor internals, parts, and components was denied because all potential problems identified by Petitioners had been satisfactorily addressed by the Licensee. Petitioners' request to terminate the NRC policy of issuing notices of enforcement discretion to reactor licensees was denied. Petitioners' request for a public meeting in Plymouth, Massachusetts, was granted.

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

I. INTRODUCTION

Ms. Mary Elizabeth Lampert and sixty-two other individuals (Petitioners) submitted a petition dated March 10, 1995, pursuant to 10 C.F.R. § 2.206 requesting action with regard to the Pilgrim Nuclear Power Station (Pilgrim), operated by the Boston Edison Company (Licensee).

The petition requested that: (1) during the refueling outage and In-Vessel Visual Inspection scheduled for March 25, 1995, by the Licensee, certain technical concerns be addressed, and that before Pilgrim goes back on-line, appropriate repairs be made or corrective action be taken; (2) the U.S. Nuclear Regulatory Commission (NRC or Commission) discuss the status of such repairs or corrective actions with the public in Plymouth, Massachusetts; and (3) the NRC terminate its policy of issuing Notices of Enforcement Discretion (NOEDs) and begin enforcing the regulations again.

As the bases for these requests, the Petitioners identified three groups of technical concerns: (1) age-related deterioration of twenty-five safety-related reactor internals; (2) parts and components "known to be a problem at Pilgrim," including the core shroud, water-level indicators, quality assurance for fuel pool cooling system during loss-of-coolant accident/loss of offsite power, motor-operated valves, containment integrity, drywell liner corrosion vulnerability, station blackout vulnerability, and Rosemount transmitters; and (3) parts and components "potentially a problem at Pilgrim," including potential fuel rod corrosion and substandard and/or counterfeit parts. The Petitioners contend that allowing the reactor to operate under a NOED cannot pose less risk to the public health and safety than keeping the reactor shut down until NRC regulations are met.

II. BACKGROUND

By letter dated April 19, 1995, the NRC acknowledged receipt of the petition and offered a public meeting, which was held in Plymouth, Massachusetts, on May 11, 1995. At that meeting, the results of the Licensee's inspections conducted during the outage were discussed.

I have completed my evaluation of the petition. As explained below, Petitioners have failed to raise any safety concern that would warrant delaying restart of the Pilgrim Nuclear Power Station (which occurred on June 2, 1995), and the Petitioners' request that the NRC terminate the use of NOEDs is denied.

III. DISCUSSION

A. Age-Related Deterioration of Reactor Internals

Many components inside boiling-water reactor (BWR) vessels (i.e., internals) are made of materials such as stainless steel and various alloys that are susceptible to corrosion and cracking. As materials age, they degrade. This degradation can be accelerated by stresses from temperature and pressure changes, irradiation effects on material properties, chemical interactions, and other corrosive

environments. As BWRs age, the amount of cracking is expected to increase. Several cases of internals cracking and degradation have been reported to the NRC over the years. In a number of cases, the NRC has concluded that full-power operation of the reactor with time-dependent degradation, related to the operating environment, of reactor vessel internals is acceptable as long as the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code) safety margins are satisfied and maintained. In the remaining cases, replacement or repairs were performed on the degraded components or internals. The NRC has met with industry every year since 1988 to review the generic safety implications of reactor internals potentially susceptible to age-related cracking. Additionally, a special industry review group, the Boiling Water Reactor Vessels and Internals Project (BWRVIP), was formed to focus on resolution of reactor vessel and internals degradation.

Several industry standards and regulatory requirements and guidelines are in place to address inservice inspections (ISIs) of reactor components. Moreover, the NRC and industry have responded as new issues emerge. For example, NRC issued Generic Letter (GL) 94-03, "Intergranular Stress Corrosion Cracking of Core Shrouds (IGSCC) in Boiling Water Reactors," in July 1994 requesting licensees to inspect their shrouds and provide an analysis justifying continued operation until inspections could be completed. General Electric issued Services Information Letter (SIL) No. 588, "Top Guide and Core Plate Cracking," in February 1995 providing specific recommendations for inspections of BWR top guides and core plates. In addition to addressing emerging issues, the BWRVIP is working on a comprehensive plan that will provide detailed guidance on managing cracking in all BWR internals. The plan will address cracking susceptibility, safety consequences, inspection scope and methodology, flaw evaluation, repair strategies, and mitigation of degradation. Several top-level executives and technical staff of the Licensee are on the various BWRVIP committees that are developing generic standards for ISI and repairs.

Petitioners request that twenty-five components be inspected during the 1995 refueling outage (RFO No. 10), and that they be free of any signs of IGSCC or other kind of fatigue. During RFO No. 10, the Licensee indicated completion of the ISI examinations for the third period of the second Pilgrim 10-year inspection interval in accordance with section XI of the ASME Code (1980 Ed. with Winter 1980 Addenda). This included all twenty-five components requested by the Petitioners, except the steam separator, neutron source holder, and surveillance sample holders which are not safety-related components. The in-core neutron flux monitor components, in-housings, guide tubes, dry tubes, the vessel head cooling spray nozzle, and the fuel supports are not required by NRC regulations to be inspected. The NRC inspected Pilgrim's ISI program and related activities during the 1994 RFO No. 9 and concluded that the second interval program plan was sufficiently comprehensive to ensure safety and met the requirements

of the ASME Code, and thus 10 C.F.R. § 50.55a(a)(2). The ISI examinations conducted in RFO No. 10 included the core support structure, control rod drive housing, core spray internal piping and spargers, and feedwater spargers.

Augmented examinations were also conducted in which various internals were examined, including the shroud support and access hole covers, jet pump riser braces, shroud head bolts, jet pump sensing lines, steam dryer support, steam dryer baffle plate, top guide, core plate, and control rod stub tubes.

Control blades (control rods for BWRs) are replaced at specified intervals. The Licensee also implemented a preemptive repair of its core shroud due to the high susceptibility to IGSCC. *See* Section III.B.1, below. As discussed during the May 11, 1995 meeting between the NRC and the public, the inspection results from RFO No. 10 did not reveal any indications of significant time-dependent deterioration of the reactor internals.

The NRC Staff concludes that the inspections, examinations, and repairs performed by the Licensee during RFO No. 10 and previous outages are sufficient to provide reasonable assurance that no age-related failure of components or internals would occur during the next operating cycle, which is scheduled to end March 21, 1997. Design features, plant procedures, and operator training are developed to ensure safety in the unlikely event that a failure were to occur. The NRC will continue to take regulatory action on a plant-specific or generic basis, as may be appropriate, when time-dependent degradation issues are identified. During the next refueling outage, the Licensee will again conduct an in-vessel inspection of safety-related interval components.

Accordingly, Petitioners have not raised a safety concern regarding age-related degradation of reactor internals at Pilgrim that would have warranted prohibiting restart after RFO No. 10.

B. Parts and Components Known To Be a Problem at Pilgrim

1. Core Shroud

Petitioners express concern about the type of repairs that would be done to the core shroud during RFO No. 10, based on "the different approach taken in Germany at the Wuergassen NPS and at the Oyster Creek NPS in NJ." Petitioners state that German nuclear regulators required replacement of shrouds with cracking, rather than repair of the shroud. Petitioners state that at Oyster Creek, ten tie rods are attached to holes in Type 304 stainless steel, which is subject to IGSCC and is welded to the bottom of the core shroud assembly. Petitioners are concerned that if the same approach were used at Pilgrim, there would be problems with the structural integrity of the materials the tie rods are welded to and with "loose parts."

Officials of PreussenElektra AG, the owner of Wuergassen, initially intended to replace the core shroud at Wuergassen, as reported in *Nucleonics Week* on November 24, 1994. Differences in the design of Wuergassen and NRC-licensed BWRs exist that would make replacement of the core shroud at Wuergassen less complicated than at NRC-licensed plants. For example, the shroud at Wuergassen is bolted on to the shroud support, whereas shrouds of NRC licensees are welded. However, in a press release issued June 1, 1995, PreussenElektra AG decided to decommission the Wuergassen NPS based on economic considerations. As a result, replacement of a BWR core shroud, foreign or domestic, has yet to be undertaken.

By letter dated November 25, 1994, the NRC Staff issued the "Safety Evaluation Regarding the Oyster Creek Core Shroud Repair," which approved the scheduled repair as an acceptable alternative to the standards of the ASME Boiler and Pressure Vessel Code. See 10 C.F.R. § 50.55a(a)(2) and 50.55a(a)(3)(i). Oyster Creek and Pilgrim are utilizing similar tie-rod assemblies to structurally replace the core shroud during normal and accident conditions. The difference in the number of tie-rod assemblies used, i.e., ten tie-rod assemblies at Oyster Creek and four tie-rod assemblies at Pilgrim, is related to the contracted vendor's loading distribution design and the associated hardware on the tie-rod assembly. The NRC Staff has thoroughly reviewed the Pilgrim repair design and conducted inspections during the core shroud repair process. The Staff issued the "Safety Evaluation Regarding Pilgrim Nuclear Power Station Core Shroud Repair," dated May 12, 1995. A synopsis of our review follows.

The design of the Pilgrim shroud repair consists of four (4) stabilizer assemblies, which are installed 90° apart in the shroud/reactor vessel annulus, between attachment points at the top of the shroud and the gusset assemblies on the lower shroud support plate. Each stabilizer assembly consists of a tie rod, an upper spring, a lower spring, an upper bracket, and other smaller parts. The tie rod provides the vertical load transfer from the upper bracket to the reactor pressure vessel (RPV) gusset attachment and supports the springs. The upper spring provides radial load transfer at the top guide elevation from the shroud to the RPV. The lower spring provides radial load transfer from the shroud at the core plate elevation to the RPV. The upper bracket provides an attachment to the top of the shroud and restrains the upper shroud weld. Upper-mid and lower-mid supports along the tie-rod length provide radial load transfer for the midsections of the shroud and increase the natural frequency of the tie rods to reduce flow-induced vibration. Two wedges between the core support plate and the shroud are also installed at each stabilizer location to prevent relative motion of the core plate to the shroud. Each cylindrical section of the shroud between welds H1 through H9 is prevented from unacceptable lateral motion by the stabilizers. The section between H9 and H10 is prevented from unacceptable motion by the existing gussets. The lower end of the stabilizers is attached to pins that are

placed in holes cut into gusset plates at the bottom. The gusset assemblies and their welds are Inconel and are not considered subject to cracking by industry and the NRC Staff. Inconel is a nickel-based alloy which is less likely to corrode and degrade than stainless steel, which is an iron-based alloy. However, these welds, including those attaching the gussets to the vessel and to the lower shroud support plate (which must resist the vertical stabilizer loads) have been inspected for cracks during this outage, and no crack indications were found. Together, the tie rods and lateral restraints resist both vertical and lateral loads resulting from normal operation and design accident loads, including seismic loads and postulated pipe ruptures.

The NRC Staff found that the proposed repair does not affect the ability of operators to insert control rods, the performance of the ECCS, particularly the core spray system, or the ability to reflood and cool the core. The Staff concluded that the proposed repair does not pose adverse consequences to plant safety; therefore, plant operation is acceptable with the proposed core shroud repair installed.

In compliance with section 50.55a(a)(3)(i), the core shroud repair has been designed as an alternative to the requirements of the ASME Code. Based on a review of the shroud modification hardware from structural, systems, materials, and fabrication considerations, the NRC Staff concludes that the proposed modifications of the Pilgrim core shroud would provide an acceptable level of quality and safety. The Staff has determined that the Licensee's repair of the core shroud will not result in any increased risk to the public health and safety and is, therefore, acceptable.

2. *Water-Level Indicators*

Petitioners assert that because of a pipe design deficiency, water-level indicators at Pilgrim are not fully operable due to high-pressured gas in the water, and that operator training is not the appropriate solution.

Level anomalies were observed in reactor vessel water-level indication at several BWRs during controlled depressurization, while commencing plant outages or following reactor trips. These anomalies consisted of "spiking" or "notching" of level indication, and in one instance, a sustained error in level indication. The root cause of these level indication anomalies is the effect of noncondensable gas dissolved in the reference leg of "cold-reference-leg" type water-level instruments. Under rapid depressurization conditions, noncondensable gases can cause significant errors in the level indication.

Cold-reference-leg water-level instruments measure reactor vessel water level by measuring the differential pressure of two columns of water, i.e., the variable leg and the constant-height reference leg. The reference leg is maintained filled to a constant height of water by the condensate chamber. Steam is condensed

in the condensate chamber and keeps the reference leg full. Excess condensate is returned to the vessel through the steam supply line. Noncondensable gases, such as hydrogen and oxygen, formed by radiolysis in the reactor vessel, are present in the steam supplied to the condensate chamber. The gases can collect in the condensate chamber and can accumulate to high partial pressures. The gases then become dissolved in the water at the top of the reference leg, and the dissolved gases can be transported down the reference leg by small leaks in valves and fittings at the bottom of the reference leg, diffusion, and/or thermal convection.

Dissolved gases in the reference leg do not present a problem unless the instrument is depressurized. When depressurized, the gases come out of solution and form bubbles that travel up the reference leg. During slow depressurization, level indication has been seen to temporarily "spike" or "notch" while a bubble moves through the vertical sections of the piping. Significant spiking may automatically actuate such systems as the primary containment isolation system (PCIS). This occurred at the Pilgrim plant. After spiking, which is of short duration, the indicated water level returns to actual level. Level spiking is of little significance. Bubbling of the gases may eject a significant amount of water from the reference leg. Loss of reference leg inventory will cause an erroneously high-level indication. This occurred during a normal plant cooldown on January 21, 1993, at Washington Nuclear Power Unit 2 (WNP-2), resulting in a 32-inch error in level indication that gradually recovered over a period of 2 hours. If the reactor is rapidly depressurized, as would occur during a design-basis loss-of-coolant accident (LOCA) or opening of the automatic depressurization system (ADS) valves, even larger errors in the level indication could result. However, analyses presented by the industry indicated that significant errors would not be expected until the reactor is depressurized below approximately 450 psi.

The NRC Staff has taken several actions to address this problem. The BWR Owners Group (BWROG) Regulatory Response Group (RRG) was activated during July 1992. The Staff also issued Information Notice 92-54 in July 1992, GL 92-04 in August 1992, and Information Notice 93-27 in March 1993 to alert licensees to the potential problem and to request information concerning actions taken or planned by licensees in response to potential errors in level indication. The BWROG conducted a test program to support their efforts to resolve this issue. The results of the BWROG reference-leg de-gas test program confirmed that no significant errors in level indication will occur until the reactor is depressurized below 450 psig, and that large errors in level indication are possible once the reactor is depressurized to lower pressures.

The NRC Staff received additional information from the BWROG pertaining to reactor vessel water-level instrumentation inaccuracies during normal depressurization due to the effects of noncondensable gas. At the Staff's request, the BWROG submitted a report on May 20, 1993, discussing the impact of level

errors on automatic safety system response and operator actions during transients and accidents initiated from reduced-pressure conditions during plant cooldown (shutdown mode). Based on this information, in addition to the January 21, 1993 WNP-2 event, and data from the reference-leg de-gas testing that was conducted by the BWROG, the Staff concluded that additional short-term actions needed to be taken for protection against potential events occurring during normal cooldown. On May 28, 1993, NRC Bulletin (NRCB) 93-03, "Resolution of Issues Related to Reactor Vessel Water Level Instrumentation," was issued, in which the Staff requested each BWR licensee to implement additional short-term compensatory actions, and to implement a hardware modification to resolve this issue at the next cold shutdown after July 30, 1993.

The Staff has received responses to NRC Bulletin 93-03 from all licensees. All licensees completed short-term compensatory actions and committed to install hardware modifications. Licensees for all affected plants have either completed installation of hardware modifications or are currently shut down and will install the hardware modifications prior to restart.

To solve the problem identified in NRC Bulletin 93-03, Pilgrim installed a backfill modification to all safety-related water-level instrumentation in July 1993. Non-safety-related control instrumentation was not modified by Pilgrim, because such instrumentation was not covered by the actions requested in NRC Bulletin 93-03.

As Petitioners note, an event occurred at Pilgrim on November 8, 1993, involving the non-safety-related water-level instrumentation. This event was caused by failure of the Licensee to backflush the feedwater control instrumentation reference legs prior to restart due to procedural inadequacy and failure to cross-check multiple indications of reactor vessel water level during startup due to operator error. This event is not safety significant for the following reasons:

- (a) event initiation was the result of two independent errors that are not expected to have a high frequency of recurrence;
- (b) safety systems and nonsafety systems are separated by design; thus, the availability and capability of the safety systems should not be impacted by errors in the nonsafety instrumentation and the ability of safety systems to protect the plant should not be compromised; and
- (c) the safety systems responded to the event as expected.

This issue is closed because the Licensee took adequate corrective actions in response to the November 8, 1993 event. *See* NRC Inspection Report 50-293/93-20, dated January 11, 1994.

Based on the above, Petitioners have not raised a substantial safety concern regarding safety-related water-level instrumentation at Pilgrim.

3. *Quality Assurance for Fuel Pool Cooling System During LOCA/LOOP*

The Petitioners asserted that workers would be exposed to fatal levels of radiation while manually activating the backup cooling system during a LOCA.

In November 1992, two engineers working under contract at Susquehanna Steam Electric Station filed a 10 C.F.R. § 21.21 report. The report detailed design concerns at Susquehanna that could lead to the sustained loss of forced cooling for the stored spent fuel under certain accident or abnormal conditions. The engineers postulated that the environmental conditions developed following a loss of forced cooling would adversely affect equipment necessary for safe shutdown and accident mitigation. The engineers concluded that these issues had generic implications.

Between November 1992 and October 1994, the NRC Staff performed an extensive evaluation of the Susquehanna spent fuel pool cooling design concerns. The Staff concluded that these concerns were of low safety significance in the "Final Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding Loss of Spent Fuel Pool Cooling Events," dated June 19, 1995. This conclusion was based on the fact that the probability of recovering forced cooling of the stored spent fuel with access to the necessary equipment was high, and the probability of experiencing a severe core damage accident, which may prevent access to systems need to cool the spent fuel pool, was low.

The Staff issued Information Notice 93-83, "Potential Loss of Spent Fuel Pool Cooling Following a Loss of Coolant Accident" (October 7, 1993), describing the section 21.21 report related to Susquehanna. The information notice did not require specific action by licensees. Recognizing the plant-specific design features and operational controls of most spent fuel pool cooling system designs, the Staff concluded that further evaluation of spent fuel pool storage safety issues at other plants was warranted to determine the need for further generic action.¹

The Staff has developed and begun implementing a generic action plan to evaluate generic issues. Onsite safety assessments of spent fuel storage at selected reactor facilities have been completed. Monticello Nuclear Power Plant is similar to Pilgrim and was one of the nuclear facilities assessed during the week of March 27, 1995. The assessment team concluded that the potential for a sustained loss of spent fuel pool cooling or a significant loss of spent fuel pool coolant inventory at the site visited was remote based on observed design features and operational controls. Based on the above, the NRC Staff has concluded that the Petitioners have not identified any safety concerns at Pilgrim regarding spent fuel pool cooling during a LOCA/LOOP.

¹ In the near future, the Staff will issue an additional information notice describing the results of its detailed evaluation of the Susquehanna facility. This information notice will be an interim communication and will not represent the end of the Staff's generic review.

4. Motor-Operated Valves

Petitioners request information on the status of the motor-operated valve (MOV) program at Pilgrim and inquire why Pilgrim has not been required to fix all MOVs during the March 1995 outage.

The NRC issued GL 89-10, "Safety-Related Motor-Operated Valve Testing and Surveillance" (June 28, 1989) to request that licensees verify the capability of all safety-related MOVs to perform their design-basis functions. GL 89-10 requested that licensees complete differential pressure and flow testing for the verification of MOV design-basis capability within 5 years after the issuance of GL 89-10 or three refueling outages after December 1989, whichever was later.

Pilgrim is scheduled to complete its MOV Design-Basis Capability Verification by April 1997. Although this is somewhat later than some other plants, the Licensee is being given the same number of outages (three outages with 24-month cycles) as other licensees to complete the verification, and the program commenced somewhat later at Pilgrim due to the 1990 restart from an extended outage.

During the implementation of GL 89-10, licensees have discovered more MOV concerns and experienced greater difficulty in conducting MOV tests at full design-basis differential pressure and flow than envisioned when the GL 89-10 schedule was established. Where significant MOV problems are identified, the NRC ensures that licensees resolve these problems promptly. Further, when the evaluation of NRC-sponsored MOV test results indicated potential problems with specific MOVs in high-pressure systems at boiling-water reactor (BWR) nuclear power plants, the NRC issued Supplement 3 to GL 89-10 in October 1990. Supplement 3 requested that BWR licensees promptly evaluate the capability of MOVs used for containment isolation in the steam lines of the high-pressure coolant injection and reactor core isolation cooling systems and in the supply line to the reactor water cleanup system. Further, the Staff issued Supplement 5 to GL 89-10 in June 1993, requesting that licensees ensure that new information on the increased inaccuracy of MOV diagnostic equipment be addressed. These two actions were satisfactorily completed by Pilgrim.

The NRC Staff has been monitoring the progress of the GL 89-10 program at Pilgrim closely. From December 13 to 17, 1993, and March 22 to 25, 1994, the NRC Staff conducted an inspection of the GL 89-10 program at Pilgrim. As stated in NRC Inspection Report 50-293/92-80, the NRC Staff had the following findings as a result of the March 1992 inspection:

- (a) The method used to set the MOV torque switches using diagnostic testing equipment was inadequate;
- (b) the torque switch settings on several safety-related MOVs were not set in accordance with the plant design documents;

- (c) corrective actions taken in response to an internal audit of the GL 89-10 Program regarding the torque switch settings of safety-related valves were inadequate;
- (d) the GL Supplement 3 response for the reactor water cleanup system isolation valve 1202-5 was inadequate;
- (e) plans for conducting design-basis differential pressure testing have not been clearly established;
- (f) the current work instructions for performing design-basis reviews and switch setting calculations lack adequate detail; and
- (g) a considerable effort remains to implement the GL 89-10 program in a timely manner.

The NRC Staff found considerable progress in the Licensee's MOV program since the initial NRC team inspection in March 1992. Particularly, the Staff concluded that the findings from the March 1992 inspection had been satisfactorily addressed. See Inspection Report No. 50-293/93-22 (April 14, 1994). In addition, the testing of differential pressure and/or static pressure of all of the Priority 1 (highest risk) MOVs that can be tested was completed by the end of RFO No. 10. Additionally, the Licensee has evaluated all of the GL 89-10 MOVs for susceptibility to pressure locking and thermal binding and, by the end of RFO No. 10, completed modifications on the few valves that were considered susceptible. The Staff concludes that the Licensee is on schedule to meet its April 1997 completion date.

Based on the progress made to date by the Licensee in implementing its GL 89-10 program at Pilgrim, the NRC Staff did not consider it necessary that the Licensee complete its GL 89-10 program during RFO No. 10. In addition to review of the Licensee's submittals in response to GL 89-10 and its supplements, the NRC Staff is conducting an extensive inspection program to evaluate the MOV program implemented in response to GL 89-10 at Pilgrim, as well as at other nuclear power plants. The NRC Staff concludes that the Licensee has substantially reduced the concerns with MOV operation under design-basis conditions and is progressing significantly toward completing the GL 89-10 program. Nevertheless, if significant MOV problems are identified at Pilgrim, the Licensee will be responsible for addressing those problems in accordance with their safety significance, irrespective of the GL 89-10 completion schedule. Further, the NRC will continue to take regulatory action on a plant-specific or generic basis, as appropriate, when MOV problems are identified.

Based upon the actions taken to date by the Licensee to address safety-related MOV issues and the NRC's inspections regarding the Licensee's actions on the GL 89-10 program, the NRC Staff concludes that no corrective actions are required.

5. Containment Integrity

Petitioners ask whether the hardened wetwell vent system (HWWVS), referred to as the "Torus Vent," which "allows venting of radioactive effluents directly into our atmosphere," will be corrected in RFO No. 10.

The Licensee installed the HWWVS modification during the 1986-1988 outage, thus providing the capability to establish alternate containment decay heat removal if RHR torus cooling capability is lost. The direct torus venting minimizes the potential for core damage and containment failure. The HWWVS has the capability of mitigating a wide range of events including many that are beyond the design-basis accidents for the facility. Its installation, along with the procedures for its use, will reduce the likelihood of a core melt from accident sequences involving the loss of long-term decay heat removal. This is accomplished by preventing any further damage to safety equipment in the reactor building by ensuring that the piping from the containment to the venting stack will not fail. Further, as a mitigation measure, the vent pathway is located in the wetwell air space. This location ensures that the vented noncondensable gases will pass through the suppression pool, thereby significantly scrubbing the fission products. The HWWVS is an improvement that the NRC Staff recommended in its Mark I Containment Performance Improvement Program, which identified plant modifications that could enhance the capability to both prevent and mitigate the consequences of severe accidents.

The HWWVS has valves that are kept closed during plant operation, ensuring containment integrity. Additionally, the HWWVS design incorporates a device called a rupture disc, which provides an additional leaktight barrier to further prevent the transport of the containment atmosphere in the wetwell to the atmosphere. The HWWVS is not in use during normal plant operation, nor is it expected to be used during anticipated transient conditions. Petitioners have not demonstrated any basis why this system should be "corrected."

6. Drywell Liner Corrosion

Petitioners request information on the status of drywell liner corrosion vulnerability and ask whether it would be corrected during RFO No. 10.

The NRC issued GL 87-05, "Request for Additional Information — Assessment of Licensee Measures to Mitigate and/or Identify Potential Degradation of Mark I Drywells," as a result of the November 1986 discovery of corrosion of the Oyster Creek steel drywell in the area of the sand cushion. GL 87-05 did not establish any regulatory requirements other than for Mark I licensees to provide the Staff with information as to what actions, if any, were being taken as a result of the Oyster Creek finding. The Licensee responded to GL 87-05 by letter dated May 11, 1987. The Licensee implemented a surveillance program

to detect whether a corrosive environment exists on the external surface of the drywell. This is done by checking the drywell liner air gap drain lines for the presence of water during every refueling outage.

In January 1987, prior to issuance of GL 87-05, the Licensee conducted ultrasonic inspections of the interior of the drywell liner in the area of the sand drains, which confirmed liner integrity. In January 1988, the drain lines were verified not to be blocked by using a boroscope. As of the last surveillance, conducted on March 31, 1995, no water leakage had been detected. Petitioners have not demonstrated any basis for correcting this system.

7. Station Blackout

Petitioners request information on station blackout vulnerability and ask whether it would be corrected during RFO No. 10.

On December 23, 1993, the NRC issued "NRC Pilot Station Blackout Team Inspection," a report concerning the Pilgrim plant, Inspection Report 50-293/93-80. The purpose of that inspection was to review Pilgrim's programs, procedures, training, equipment and systems, and supporting documentation for implementing the Station Blackout (SBO) Rule, 10 C.F.R. § 50.63. The actions taken to implement the station blackout rule are important because many of the systems required for decay heat removal and containment cooling are dependent on the availability of alternating current (ac) power. In the event of a station blackout, relatively few systems that do not require ac power are depended upon to remove decay heat, until ac power is restored.

The Staff concluded in Inspection Report 50-293/93-80 that:

- (a) Pilgrim had sufficient condensate inventory to cope with an 8-hour SBO duration;
- (b) all areas which contained equipment needed for SBO coping had proper cooling;
- (c) there was sufficient evidence that the torus temperature and the reactor vessel conditions would be maintained according to the plant TSs;
- (d) the overall communications capability available during an SBO were adequate;
- (e) adequate emergency lighting was available to support plant personnel operations during a station blackout; and
- (f) plant modifications were properly installed, and post-modification and pre-operational tests were conducted in accordance with proper test procedures. Quality assurance and maintenance practices, operator training, and staffing levels were appropriate to cope with an SBO.

Accordingly, the Pilgrim plant is in compliance with section 50.63 and the plant does not have an SBO vulnerability requiring "correction" during RFO No. 10.

8. Rosemount Transmitters

Petitioners request information on the status of Rosemount transmitters at Pilgrim and ask whether all would be inspected and corrected during RFO No. 10.

On December 22, 1992, the NRC Staff issued Bulletin 90-01, Supplement 1, "Loss of Fill-Oil in Transmitters Manufactured by Rosemount," which requested that licensees take appropriate corrective actions for Model 1153, Series B and D, and Model 1154 Rosemount transmitters manufactured before July 11, 1989, and used in safety-related applications or Anticipated Transient Without Scram (ATWS) systems. The performance of a transmitter that is leaking fill-oil gradually deteriorates and may eventually lead to failure. Although some failed transmitters have shown symptoms of loss of fill-oil prior to failure, it has been reported that in some cases the failure of a transmitter that is leaking fill-oil may be difficult to detect during operation. Transmitter failures that are not readily detectable increase the potential for common-mode failure and may result in the affected safety system not performing its intended safety function. Supplement 1 identified specific actions for replacement or enhanced surveillance monitoring of these transmitters, used in high-pressure (greater than 1500 psi), medium-pressure (greater than 500 psi and less than 1500 psi), and low-pressure (less than 500 psi) applications.

The Licensee responded to the requested actions of Bulletin 90-01, Supplement 1, on March 5, 1993, and August 30, 1993. There are a total of forty Model 1153B transmitters currently in service, fourteen medium-pressure transmitters and twenty-six low-pressure transmitters. The Licensee committed to include each of these transmitters in its enhanced surveillance monitoring program. The Licensee stated that there were no Model 1153D or 1154 transmitters currently in service.

The Licensee also stated that there were thirty-three Model 1153B transmitters, manufactured after July 1989, in service. Such transmitters are not subject to the Bulletin 90-01, Supplement 1, requested actions because Rosemount corrected the oil leakage problem by an improved manufacturing and quality assurance process. Although Supplement 1 does not require these transmitters to be included in an enhanced surveillance monitoring program, the Licensee has chosen to include them in its program. The Licensee's enhanced surveillance program is based on both the trending of operating drift data and calibration drift data, and is in accordance with Rosemount Technical Bulletin No. 4.

The NRC, with assistance from its contractor, reviewed the Licensee's response to Supplement 1, and in a letter dated November 29, 1994, concluded that the Licensee satisfied the reporting requirements and conformed to the requested actions of Bulletin 90-01, Supplement 1. Accordingly, no further

actions by the Licensee were required with respect to this Rosemount Issue during RFO No. 10.

C. Parts and Components Potentially a Problem at Pilgrim

1. Fuel Rod Corrosion

Petitioners request information regarding the status of zirconium alloy tubes installed at Pilgrim and ask if their susceptibility to nodular corrosion would be corrected during RFO No. 10.

Nodular corrosion is a phenomenon seen in plants that have copper in the reactor water at a concentration in the 20-30 part per billion (ppb) range. Pilgrim systems design limits copper levels to less than 1 ppb in the reactor water. Additionally, all fuel rod cladding in use at Pilgrim has been subject to the GE Nuclear Energy in-process heat treatment (IPHT) process,² which is a heat treatment process that evenly distributes the composition of the alloy, thus lowering the susceptibility to nodular corrosion. Pilgrim has not experienced nodular corrosion, and failure of fuel rods is not expected from this phenomenon.

The NRC Staff conducted two inspections of Teledyne Wah Chang Albany (TWCA), the manufacturer of zirconium alloy tubes. In April 1990, an employee of Teledyne Wah Chang Albany (TWCA) raised two concerns regarding the efficacy of TWCA's "beta quench" process, a step in the manufacture of zircaloy tube shells that improves the corrosion resistance of that product: (1) the accuracy of temperature-indicating devices as a predictor of the temperature of the bulk profile of the zircaloy billet that the beta quench process was measuring, and (2) even if the profiles of the induction furnaces are accurate, the induction furnaces cannot reproduce the profile conditions for each production zircaloy billet as the heating in the furnace is very sensitive to the position of the billet in the furnace.

Neither of the two NRC inspections substantiated the employee's concerns. See Inspection Reports 99901229/91-01 (November 27, 1991) and 99901229/94-01 (January 31, 1995). These inspection reports are available in the NRC Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC. TWCA also investigated these concerns. In a letter to the NRC, dated January 10, 1991, TWCA forwarded the results of its investigation, concluding that these concerns were unfounded, although the employee continued to have concerns.

Based on the above, Petitioners have not demonstrated any basis for fuel rod corrosion corrective actions.

²TWCA does not produce fuel clad tubing, but supplies an intermediate product form to customers that do, including GE Nuclear Energy, who performs the IPHT on the forms.

2. *Substandard and/or Counterfeit Parts*

Petitioners state that Pilgrim was one of several plants identified in a 1990 study by the United States Government Accounting Office as using parts that did not meet government standards, but that the NRC has not asked plants such as Pilgrim to replace those parts. Petitioners request information on the status of substandard or counterfeit parts at Pilgrim, such as nuts, bolts, pipe fittings, circuit breakers, and fuses, and whether corrective action would be required during RFO No. 10.

The NRC has been pursuing the issue of counterfeit and substandard parts as a two-prong process for a number of years. The first process is reactive, directly addressing the possibility that substandard or counterfeit parts may have been supplied to nuclear power plants, assessing the safety significance and, if needed, replacing the parts. The second process is a proactive approach of improving the assurance that parts are of a high quality before they are put into use.

Since 1988, the NRC has performed over 200 inspections of vendors. During these inspections, the Staff occasionally identified suspect practices and referred those cases to the Office of Investigations to determine if wrongdoing had been committed. The NRC also quickly published and disseminated the information to the entire nuclear industry. Over the past several years, the NRC has issued numerous Bulletins and Information Notices having to do with *potential* counterfeit and/or substandard parts and material. However, the Staff has not yet identified an issue that, from a safety standpoint, resulted in any plant shutdowns. Nonetheless, the NRC determined that several issues could potentially reduce the margin of safety in some plants and requested some actions by licensees, usually through a Bulletin.

If the NRC obtains information that some licensees are identified as potential customers of a vendor suspected of supplying counterfeit or substandard parts, an Information Notice is issued. The issuance of an Information Notice does not mean that the identified licensee(s) did, in fact, receive the questionable parts, but rather that they were potential customers. The licensees are responsible for reviewing their own procurement records to identify if they received the suspect parts. Their actions are subject to NRC review and inspection.

The 1990 GAO report, "Nuclear Safety and Health: Counterfeit and Substandard Products Are a Governmentwide Concern," lists a wide range of products as having been received or suspected of having been received by nuclear plants. The information provided by the GAO report regarding products used in nuclear operations was obtained from the NRC and all of the information was made public through various NRC Information Notices and Bulletins. The Pilgrim Station was listed in the GAO report as having received counterfeit or substandard fasteners and circuit breakers. Pilgrim was also listed as being suspected of receiving counterfeit or substandard pipe fittings/flanges and fuses.

On November 6, 1987, the NRC issued Bulletin 87-02, "Fastener Testing to Determine Compliance with Applicable Material Specifications." The Bulletin requested all licensees to review their receipt inspection requirements and internal controls for fasteners and to determine, through testing, whether fasteners in stores at their facilities met required mechanical and chemical material specification requirements. Licensee responses were summarized in NUREG-1349, "Compilation of Fastener Testing Data Received in Response to NRC Compliance Bulletin 87-02." NUREG-1349 identified that, of over 3500 fasteners tested, 8% of safety-related and 12% of non-safety-related fasteners were found to be nonconforming. However, only 2% of the safety-related fasteners were found to be sufficiently out of specification to cause a concern regarding their ability to perform their intended safety function. As a result of the licensees' responses to Bulletin 87-02, the NRC issued a temporary inspection instruction to ensure that licensees verified that fasteners used in nuclear plants met the requisite specifications and that operability of safety-related components was not affected.

In response to Bulletin 87-02, Pilgrim tested thirty-five safety-related and twenty-nine non-safety-related fasteners. Three safety-related and six non-safety-related fasteners were identified as having hardness values slightly out of specification. These slight deviations were not considered safety significant since the hardness deviations consisted of only 1 to 2 Rockwell points which is very close to the test accuracy of ± 1.0 Rockwell point. Furthermore, it is commonly recognized in the industry that this property is most easily influenced by variations in chemistry, heat treatment, and surface treatments.

On May 6, 1988, the NRC issued Bulletin 88-05, "Nonconforming Materials Supplied by Piping Supplies, Inc. at Folsom, New Jersey and West Jersey Manufacturing Company at Williamstown, New Jersey." That Bulletin required NRC licensees to submit information regarding materials supplied by the named companies and requested the licensees to assure that the materials complied with ASME Code § III, Subarticle NCA-3800 and design specification requirements, or were suitable for their intended use, or to replace the materials. Following the issuance of that Bulletin and actions taken by licensees, the NRC met with representatives of the Nuclear Management and Resources Council (NUMARC) to discuss the status of licensee actions. NUMARC presented information on licensee and NUMARC/Electric Power Research Institute (EPRI) testing and evaluation methodology of numerous flanges. The information presented at that meeting showed that the material in question had acceptable strength and that continued use of the fittings and flanges did not present a safety problem. Therefore, the NRC issued Supplement 2 to Bulletin 88-05 on August 3, 1988, announcing that it was appropriate to suspend the actions requested by the Bulletin. NUMARC followup reports were analyzed by the Staff and judged acceptable. Therefore, no further actions were required.

In response to Bulletin 88-05, Pilgrim identified and tested a number of suspect flanges. All were found to be satisfactory, with the exception of one which tested low in hardness. An engineering evaluation performed by Pilgrim determined that the flange was acceptable and did not need to be replaced.

On July 8, 1988, the NRC issued Information Notice 88-46, "Licensee Report of Defective Refurbished Circuit Breakers," which alerted licensees to the possibility of defective circuit breakers being supplied to the nuclear industry. Following the issuance of the notice, the NRC issued Bulletin 88-10, "Non-conforming Molded-Case Circuit Breakers," which requested licensees to take action to provide reasonable assurance that those molded-case circuit breakers that did not have verifiable traceability to the circuit breaker manufacturer were able to perform their safety function. In response to the Bulletin, Pilgrim identified only 1 of 978 circuit breakers in its warehouse as not being traceable to the original equipment manufacturer. That breaker was the only one purchased on its purchase order and was subsequently discarded.

On April 26, 1988, the NRC issued Information Notice 88-19, "Questionable Certification of Class 1E Components," to alert licensees to a possible problem with the certification of Class 1E components by Planned Maintenance Systems (PMS) of Mt. Vernon, Illinois. Information provided to the NRC by a licensee raised questions regarding the validity of certifications issued by PMS for Class 1E fuses that PMS supplied. In response to Information Notice 88-19, the Licensee reviewed its procurement/QAD documents. There was no indication that the Licensee had procured any material from PMS directly or through Bechtel or General Electric. Furthermore, the NRC review of PMS records indicated that PMS did not supply material or services through intermediate suppliers to the Pilgrim Station.

In addition to the Information Notices and Bulletins that identified specifics about potential counterfeit or substandard materials, the NRC Staff has issued two generic letters providing information to the industry regarding procurement program improvements to help prevent the acceptance and use of counterfeit and/or substandard material. The industry, through the efforts of the Nuclear Energy Institute (NEI, successor to NUMARC), has also taken a strong approach to improve procurement programs by means of a Comprehensive Procurement Initiative, which addressed five areas that included general procurement, vendor audits, tests and/or inspections, obsolescence, and information exchanges. The Comprehensive Procurement Initiative has greatly reduced the incidence of substandard and/or counterfeit parts in the industry.

In view of the above, no action regarding substandard or counterfeit parts needed to be taken by the Licensee before startup of the Pilgrim plant following RFO No. 10.

D. NRC Oversight and Enforcement Discretion

Petitioners state that since September 1989, the NRC has either waived or chosen not to enforce regulations at nuclear reactors more than 340 times, and that of the last 100 industry requests for enforcement discretion, the Commission has granted every one. Petitioners also state that the NRC has granted at least seven NOEDs to Pilgrim since 1989. Petitioners assert that permitting a reactor to operate cannot pose less risk to public health and safety than keeping the reactor shut down until it meets regulations.

The NRC Enforcement Policy, Section VII.C, permits the Staff to exercise discretion not to enforce applicable TSs or license conditions by issuance of a NOED. Such enforcement discretion may be exercised only if the NRC Staff is clearly satisfied that the action is consistent with protecting the public health and safety, in cases when a licensee's compliance with a TS Limiting Condition for Operation or other license condition would involve:

- (a) an unnecessary plant transient; or
- (b) performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions; or
- (c) unnecessary delays in plant startup without a corresponding health and safety benefit.

For an operating plant, the NOED is intended to (1) avoid undesirable transients as a result of forcing compliance with the license condition and thus minimize potential safety consequences and operational risks or (2) eliminate testing, inspection, or system realignment that is inappropriate for the particular plant conditions. For plants in a shutdown condition, the NOED is intended to reduce shutdown risk by avoiding testing, inspection, or system realignment that is inappropriate for the particular plant conditions, in that it does not provide an overall safety benefit, or may, in fact, be detrimental to safety in the particular plant condition.

For plants attempting to start up, the need for exercising enforcement discretion is expected to occur less often than for operating plants, because delaying startup does not usually leave a plant in a condition in which it could experience undesirable transients. Thus, the issuance of NOEDs for plants attempting to start up must meet a higher threshold.

The use of enforcement discretion does not change the fact that a violation of a license requirement will occur, nor does it imply that enforcement discretion is being exercised for any violation that may have led to the violation for which the licensee requests issuance of a NOED. Where the NRC Staff has chosen to issue a NOED, enforcement action is normally considered for the root causes, to the extent violations led to the noncompliance for which enforcement discretion was used.

Petitioners have provided no basis warranting a change in the Commission's policy regarding the exercise of enforcement discretion pursuant to Section VII.C of the Enforcement Policy.

IV. CONCLUSION

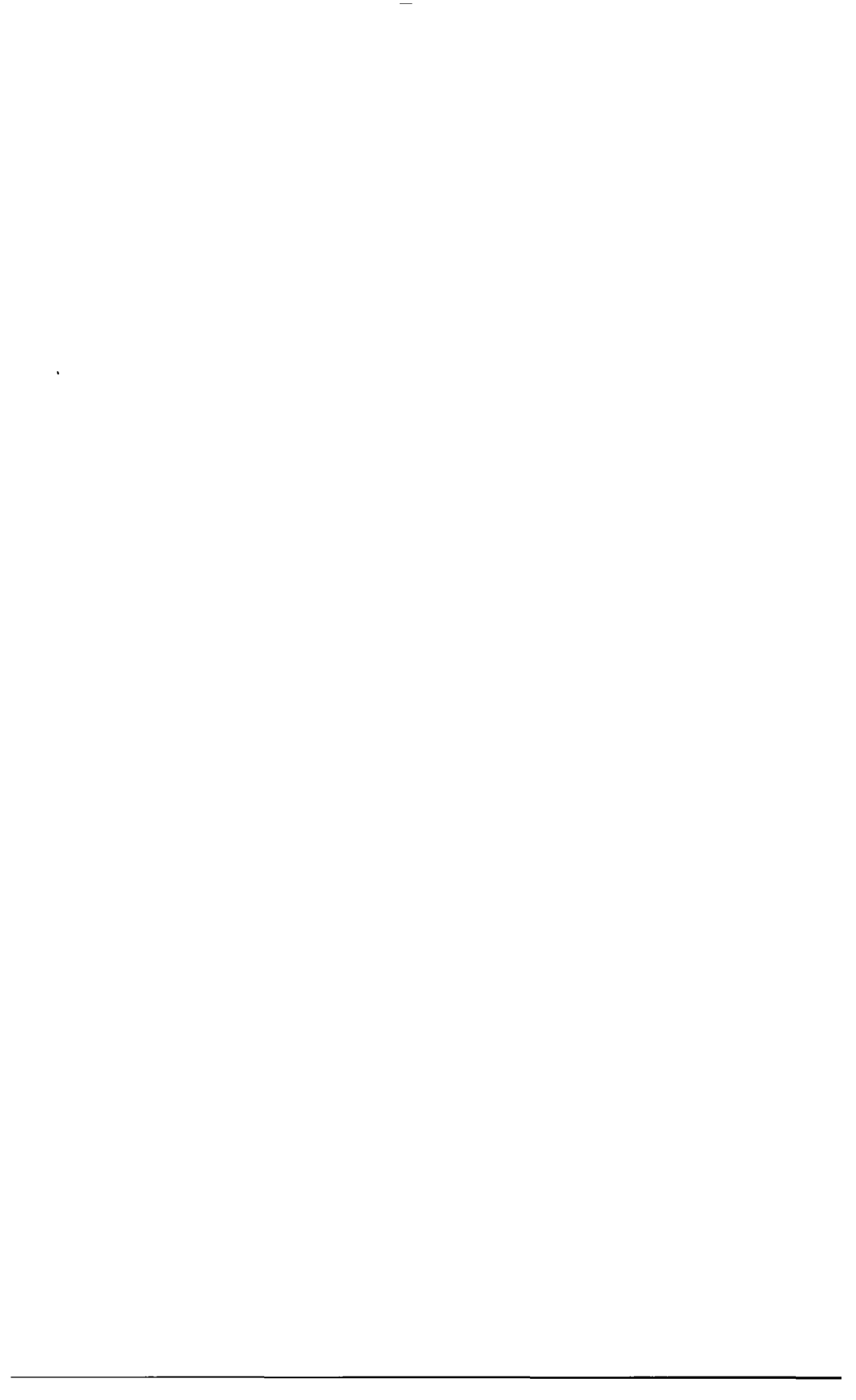
The institution of proceedings in accordance with section 2.206, as requested by the Petitioners, is appropriate only where substantial safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard I have applied to the petition. Petitioners have not raised any substantial safety concerns regarding age-related deterioration of reactor internals, or with other parts and components at Pilgrim. To the contrary, all potential problems identified by Petitioners regarding reactor internals and components have been satisfactorily addressed by the Licensee at Pilgrim. Therefore, Petitioners' request to delay startup of the Pilgrim plant is denied. Additionally, for the reasons discussed above, Petitioners' request to terminate the NRC policy of issuing notices of enforcement discretion to reactor licensees is denied. Petitioners' request for a public meeting was granted.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of August 1995.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket No. IA-94-001
(ASLBP No. 94-694-05-EA)
(Re: Allegation of
Deliberate Violations)

HARTSELL D. PHILLIPS, JR.
(West Virginia)

September 19, 1995

The Board dismissed this case by adopting a settlement agreement reached by Mr. Phillips and the Staff of the Nuclear Regulatory Commission. The Settlement occurred after Mr. Phillips pled guilty to a one-count Superseding Information stating a violation of law. The terms of the agreement, which the Board adopted, provided for Mr. Phillips to be suspended from participation in the nuclear industry for a period of time.

MEMORANDUM AND ORDER
(Dismissal Pursuant to Agreement)

On September 14, 1995, the parties to the above-captioned proceedings, Hartsell Phillips (Phillips) and the Staff of the United States Nuclear Regulatory Commission (Staff), informed the Atomic Safety and Licensing Board ("Licensing Board") of the following developments concerning this matter:

First, on June 5, 1995, Mr. Phillips pled guilty to a one-count Superseding Information stating a violation of law, related to the matters that are the subject

of this proceeding. A copy of the United States District Court's Order of June 6, 1995, adjudging Mr. Phillips to be guilty and convicting him of the count charged in the Information, is attached. Sentencing of Mr. Phillips was conducted by the Court on August 22, 1995, in accordance with the Court's Order of June 6, 1995.

Second, the parties have reached an agreement in settlement of this proceeding. Accordingly, we approve of the stipulation in the agreement and provide the requested relief.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 19th day of September 1995, **ORDERED** that:

1. Hartsell D. Phillips, Jr., is permitted to withdraw his request for hearing on the Staff's "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," dated March 10, 1994, and he is dismissed as a party in the proceeding pertaining to that Order;
2. The attached Stipulation is adopted as an order of this Board; and
3. The proceeding is dismissed, with prejudice.

THE ATOMIC SAFETY AND LICENSING BOARD

**Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Frederick J. Shon
ADMINISTRATIVE JUDGE**

**Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE**

Rockville, Maryland

STIPULATION FOR SETTLEMENT OF PROCEEDING

THIS AGREEMENT is made by and between Hartsell Phillips ("Phillips") and the Staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff"), to wit:

WHEREAS Logan General Hospital, Logan, West Virginia ("Logan" or the "Licensee"), holds License No. 47-19919-01 issued by the NRC pursuant to 10 C.F.R. Parts 30 and 35, which license authorizes possession and use of byproduct material in accordance with the conditions specified therein; and

WHEREAS Phillips was employed by Logan, commencing in January 1991, as Chief Technologist, Radiation Safety Officer ("RSO") and Chairman of the Radiation Safety Committee ("RSC"), with responsibilities, *inter alia*, involving compliance with NRC requirements for radiation protection, until a date on which his employment was suspended by Logan in or about February 1994; and

WHEREAS on March 10, 1994, the NRC Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 54 Fed. Reg. 13,346 (Mar. 21, 1994), based, *inter alia*, upon a finding that Phillips had engaged in deliberate misconduct in violation of 10 C.F.R. § 30.10, which caused the Licensee to be in violation of a number of NRC regulatory requirements; and

WHEREAS the Order prohibited Phillips, pending further action by the NRC, from participation in any respect in NRC-licensed activities, to include licensed activities of (1) an NRC licensee, (2) an Agreement State licensee conducting licensed activities in NRC jurisdiction pursuant to 10 C.F.R. § 150.20, and (3) an Agreement State licensee involved in distribution of products that are subject to NRC jurisdiction; and

WHEREAS on March 30, 1994, Phillips filed a "Request for Hearing and Answer of Hartsell D. Phillips" concerning the Order, pursuant to 10 C.F.R. § 2.202, in response to which adjudicatory proceedings have been convened and remain pending before an Atomic Safety and Licensing Board ("Licensing Board") at this time; and

WHEREAS the undersigned parties recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise of the matters now pending in litigation between them, including, without limitation, the elimination of further litigation expenses, uncertainty and delay, and other tangible and intangible benefits, which the parties recognize and believe to be in the public interest; and

WHEREAS, pursuant to 10 C.F.R. § 2.203, the Staff and Phillips have stipulated and agreed to the following provisions for settlement of the above-captioned proceeding, subject to the approval of the Licensing Board, before the taking of any testimony or trial or adjudication of any issue of fact or law; and

WHEREAS Phillips is willing to waive his hearing and appeal rights regarding this matter, in consideration of the terms and provisions of this Stipulation and settlement agreement; and

WHEREAS the terms and provisions of this Stipulation, once approved by the Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*;

NOW, THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Phillips agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities up to and including March 9, 1999, five years from the date of the NRC "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," dated March 10, 1994. In addition to the definition of "NRC-licensed activities" set forth above, said definition is understood to include any and all activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

2. For a period of five years after the above-specified five-year period of prohibition has expired, *i.e.*, from March 10, 1999, through March 9, 2004, Phillips shall, within 20 days of his acceptance of each and any employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined above, provide written notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities, and a detailed description of his duties and the activities in which he is to be involved.

3. In the first notification provided pursuant to Paragraph 2 above, Phillips shall include a statement of his commitment to compliance with regulatory requirements and an explanation of the basis why the Commission should have confidence that he will comply with applicable NRC requirements.

4. The parties agree that, as an integral part of this Stipulation and upon execution hereof, and subject to the approval of this Stipulation by the Licensing Board, (a) Phillips will withdraw his March 30, 1994 request for hearing on the NRC Staff's Order of March 10, 1994, and (b) the parties will file a joint request for dismissal of the proceedings on that Order, with prejudice, it being

understood and agreed that the Staff will take no further enforcement or other action against Phillips in connection with that Order.¹

5. It is understood and agreed that nothing contained in this Agreement shall be binding on, or preclude lawful action by, any other Government agency or department, including, without limitation, the United States Department of Justice and/or the United States Attorney.

IN WITNESS WHEREOF, we set our hand and seal this *14th* day of September, 1995.

FOR HARTSELL PHILLIPS:

[signed]
Charles L. Woody
Counsel for Hartsell Phillips

FOR THE NRC STAFF:

[signed]
Sherwin E. Turk
Counsel for NRC Staff

[signed]
Hartsell D. Phillips, Jr.

¹ The parties recognize and agree that nothing in this Agreement shall be deemed to prohibit the NRC Staff from taking enforcement or other action (a) against Phillips for violation of this Agreement, or (b) against persons other than Phillips in connection with or related to any of the matters addressed in the Order of March 10, 1994, should the Staff determine, in its sole discretion, that it is appropriate to do so.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-390
50-391

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant)

September 13, 1995

The Director of the Office of Enforcement denies a petition dated February 25, 1994, filed with the Nuclear Regulatory Commission (NRC or Commission) by George M. Gillilan (Petitioner), and supplemented by letters dated June 16, June 28, July 6, 1994, and February 24 and 28, 1995, requesting enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The petition requested that the NRC: (1) immediately impose a \$25,000 per day fine on Tennessee Valley Authority (TVA) until all reprisal, intimidation, harassment, and discrimination actions involving the Petitioner are settled to his satisfaction, and (2) appoint an independent arbitration board to review all past DOL suits and EEO complaints filed against TVA concerning Watts Bar.

After an evaluation of the petition, the Director concluded that the Petitioner's claims are unsubstantiated and that enforcement action is not necessary at this time.

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

I. INTRODUCTION

On February 25, 1994, George M. Gillilan (Petitioner) filed a request for enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The Petitioner requested that the Nuclear Regulatory Commission (NRC or Commission): (1) immediately impose a \$25,000 per day fine on Tennessee Valley Authority

(TVA or Licensee) until all reprisal, intimidation, harassment, and discrimination actions involving Petitioner are settled to his satisfaction, and (2) appoint an independent arbitration board to review all past DOL suits and EEO complaints filed against TVA concerning Watts Bar. Since the latter remedy is beyond the scope of the Commission's authority, it was denied in a letter to Petitioner dated April 7, 1994, which acknowledged receipt of the petition.¹

Petitioner supplemented his petition by letter dated June 16, 1994, rebutting the Licensee's May 20, 1994 letter responding to the petition. On June 28 and July 6, 1994, Petitioner reiterated his allegation that the Licensee was continuing to discriminate against him and described the Licensee's actions to deny Petitioner his nuclear plant access security clearance. In a letter dated February 24, 1995, Petitioner stated that TVA's continued pattern of harassment and intimidation had resulted in Petitioner's being "blackballed" in the nuclear industry. In a letter dated February 28, 1995, Petitioner advised the NRC that he had been terminated by TVA.

II. BACKGROUND

As the basis for his February 25, 1994 request, Petitioner asserted that he had reported safety concerns to the Commission and that, as a result, TVA management had subjected him to continuous intimidation, harassment, discrimination, and reprisal actions, that his name had been placed on a blackball list that had been circulated nationwide preventing him from obtaining suitable employment outside of TVA, and that these actions by TVA had affected his mental and physical health. In a letter dated February 28, 1995, Petitioner asserted that TVA's pattern of harassment and intimidation had culminated in the termination of his employment with TVA.

III. DISCUSSION

Specific Allegations

Petitioner bases his requests for sanctions on his assertion that he was a victim of unlawful discrimination pursuant to 10 C.F.R. § 50.7. Petitioner alleges a general pattern of discrimination, and mentions several specific acts by TVA: (1) putting his name on TVA's list of whistleblowers (Petitioner's February 24, 1995 letter), (2) failure to select Petitioner for a position (Petitioner's June 16, 1994 letter), (3) denying him plant access by withholding his security

¹ The letter also denied Petitioner's request for immediate action.

clearance (Petitioner's June 28 and July 6, 1994 letters), and (4) terminating him (Petitioner's February 28, 1995 letter).

The allegation that Petitioner was subjected to discrimination by having his name put on a list of whistleblowers² by TVA was investigated by the TVA Inspector General (TVA/IG) which concluded that the creation of this list was not discriminatory. Furthermore, the Department of Labor (DOL) investigated a complaint with respect to the same list filed by another individual and found that creation of the list of individuals who had filed complaints under section 210/211 of the Energy Reorganization Act (ERA) with DOL did not constitute discrimination (Case No. 90-ERA-024, Secretary of Labor's Final Decision and Order of Dismissal, July 3, 1991, slip op. at 4-6). The Staff finds that the inclusion of Petitioner's name on a list of ERA cases did not constitute discrimination or violate section 50.7.

Petitioner also alleges that he was blacklisted from the industry because the list discussed above was distributed nationwide. In Case No. 90-ERA-024 discussed above, the Secretary of Labor said that "the record contains no evidence that TVA disseminated these documents to the newspaper or to other outside sources," concluding that Petitioner did not establish a *prima facie* case that the TVA memorandum and accompanying list of ERA cases was used for a discriminatory purpose (*id.* at 4-5). Petitioner has not provided to the NRC evidence that shows that the list was used to "blackball" those on the list. Therefore, we are not able to find that the creation and alleged distribution of the list was discrimination against Petitioner or warrants the enforcement action requested by Petitioner.

With respect to TVA's failure to select Petitioner for a position for which he had applied, Petitioner's complaint on this matter (dated October 10, 1991) was dismissed by the Secretary of Labor as untimely filed (Case Nos. 92-ERA-046 and 50, Final Decision and Order, April 20, 1995, slip op. at 3-5). The TVA/IG investigated this complaint and found that Petitioner did not return phone calls or respond to a registered letter inviting him to schedule an interview for the position and, thus, the individual was not selected. The TVA/IG consequently concluded that the failure to select Petitioner was not discriminatory. Based on a review of the TVA/IG investigation and the limited information provided by the Petitioner, the NRC Staff concludes that Petitioner has not provided information that would show that he was discriminated against in this instance.

With respect to withholding Petitioner's security clearance, Petitioner filed a complaint with the DOL on September 1, 1994. On November 4, 1994, the DOL Area Director concluded there was no discrimination in that case and his ruling was not appealed by Petitioner. The TVA/IG investigated this issue

²The list was a status report of complaints filed by TVA employees with the Department of Labor.

and determined that Petitioner's security clearance was suspended following a psychological evaluation relating to fitness-for-duty issues and the TVA/IG concluded that the suspension was not discriminatory. After reviewing the TVA/IG investigation and information provided by the Petitioner, the Staff concludes that Petitioner has not provided information that would show that TVA's suspension of Petitioner's security clearance was discriminatory.

With respect to Petitioner's allegation of discriminatory termination in September 1994, on April 27, 1995, the DOL Area Director dismissed Petitioner's complaint as untimely filed. Petitioner appealed this finding and the appeal is pending before the DOL Administrative Law Judge (ALJ) (Case No. 95-ERA-026). The issue was investigated by the TVA/IG who concluded that Petitioner's termination was due to his arrest for carrying a concealed weapon. The NRC's Office of Investigations (OI) reviewed documentation from the DOL and TVA/IG on this matter and concluded that there was insufficient evidence to substantiate Petitioner's allegation that his termination was discriminatory (OI Case No. 2-94-042, April 24, 1995). Based on a review of documentation by OI, DOL, and TVA/IG, the NRC Staff concludes that there is not sufficient evidence to establish that TVA's termination of Petitioner's employment was discriminatory.

General Allegations

In addition to the specific acts of discrimination alleged by Petitioner, he also referred to a continuing pattern of discrimination by the Licensee against him. While such general allegations are difficult to investigate, the Staff decided to review all the Department of Labor complaints filed by Petitioner to assess the likelihood that there is some form of generalized discriminatory treatment of Petitioner that goes beyond the specific acts that he alleges in the petition. This broader review was undertaken as an attempt to evaluate Petitioner's otherwise unsupported general claim that he was subject to a continuing pattern of discrimination and to determine whether some action against the Licensee would be appropriate at this time.

TVA notes, in its May 20, 1994 response to the petition, that Mr. Gillilan has filed thirteen complaints with the Department of Labor (DOL). NRC's records reflect that some of these were filed as supplements to earlier complaints; only nine are distinct complaints. Three of these complaints deal directly with the specific acts of discrimination alleged by Petitioner, as discussed above. In addition, Petitioner filed several complaints with DOL dealing with allegations of discrimination not raised in his petition. These complaints allege a pattern of behavior purported to demonstrate that TVA has discriminated against Petitioner. They are addressed below.

Petitioner's complaint to DOL filed on March 2, 1989, was dismissed by the ALJ as settled. The Secretary of Labor disapproved that settlement because one of the conditions required that the record be sealed, a condition that is incompatible with the requirement to make records of discrimination complaints available to the public. The Secretary remanded the case to the ALJ (Case No. 89-ERA-040, Order to Submit Briefs, May 13, 1994, slip op. at 1) and a decision is pending. The DOL Area Director found no discrimination with regard to Petitioner's complaint of November 16, 1990, involving Petitioner's assignment to evening shift and alleged harassment and intimidation by a supervisor. The Area Director also found in that case that the complaint of violation of an earlier settlement agreement was untimely filed. This decision was appealed, assigned Case No. 91-ERA-031, and consolidated with Case No. 91-ERA-034. Ruling in both 91-ERA-031 and 91-ERA-034, the ALJ determined that certain of Petitioner's allegations did not involve discrimination and that the remainder were untimely filed. In accordance with a request by both parties to dismiss 91-ERA-034, the Secretary of Labor dismissed it but remanded 91-ERA-031 to the ALJ for further proceedings, including an evidentiary hearing, noting that in remanding this case, he reached no conclusions regarding the timeliness or the merits of the allegations.³ (Decision and Remand Order, August 28, 1995). A decision is pending in that case.

Petitioner's combined complaints received by DOL on November 17 and 26, 1991, and January 10, 1992 (combined with that received on October 10, 1991, Case No. 92-ERA-046) were dismissed by the Secretary of Labor, who found that Petitioner had failed to present an issue of material fact with respect to these complaints, and therefore had not demonstrated discrimination.⁴ In Petitioner's combined complaints of December 21 and 29, 1993, the DOL Area Director concluded there was no discrimination and the ruling was not appealed. Petitioner's combined complaints of June 10 and August 26, 1993, were originally found by the DOL Area Director to involve discrimination, but after appeal to the ALJ, the hearing was cancelled because Petitioner was deemed "not . . . mentally capable to withstand trial." (Case No. 94-ERA-005, Order Transferring the Record, January 23, 1995, slip op. at 1). A decision is still pending in this case, pending Petitioner's ability to resume the case at trial. In Petitioner's complaint of November 6, 1994, the DOL Area Director concluded that Petitioner's removal was not motivated by his protected activities; therefore there was no discrimination. The ruling was appealed and a decision is pending in that case. *See* Case No. 95-ERA-009.

³ The Secretary directed that the Acting Chief ALJ first review and decide whether to consolidate Case No. 91-ERA-031 with Case No. 89-ERA-040.

⁴ Note that while the Secretary combined the four complaints received October 10, November 17 and 26, 1991, and January 10, 1992, he addressed the October 10 complaint separately. *See* Case No. 92-ERA-046, Final Decision and Order, April 20, 1995.

Although Petitioner's complaints before DOL are numerous, the DOL findings thus far do not establish a pattern of continuing discrimination against Petitioner. After reviewing the status of Petitioner's DOL complaints, the NRC cannot conclude that enforcement action is necessary against the Licensee at this time. In accordance with its normal practice, the NRC will monitor those complaints that remain before DOL and consider the need for enforcement action based on the results of the DOL proceedings.

IV. CONCLUSION

Based on a review of the petition and supplemental submissions, the Licensee's response dated May 20, 1994, the report of NRC's Office of Investigations (OI Report No. 2-94-042), the results of the investigations of the TVA/IG, and the decisions of the Department of Labor on several of Petitioner's complaints, I have concluded that Petitioner has provided insufficient information or evidence to indicate that TVA has engaged in a pattern of harassment, intimidation, or discrimination against Petitioner in violation of section 50.7, or to warrant additional NRC investigation of general harassment and intimidation with regard to Petitioner. I conclude that Petitioner's claims of harassment, intimidation, and discrimination have not been substantiated. Accordingly, the request for daily civil penalties is denied.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 13th day of September 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

**Docket No. 50-160-Ren
(Renewal of License No. R-97)**

**GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)**

October 12, 1995

The Commission considers the appeal of an Atomic Safety and Licensing Board decision, LBP-95-6, 41 NRC 281 (1995), which granted a request for intervention and for hearing on an application submitted by the Georgia Institute of Technology (Georgia Tech), and admitted two contentions. In a previous order, CLI-95-10, 42 NRC 1 (1995), the Commission remanded one contention to the Board. The Commission denies the appeals by Georgia Tech and the Nuclear Regulatory Commission (NRC) Staff, and affirms LBP-95-6, finding that the Petitioner meets threshold requirements for standing and an admissible contention.

RULES OF PRACTICE: STANDING TO INTERVENE

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.

¹This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

RULES OF PRACTICE: STANDING TO INTERVENE

To derive standing from a member, an organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE

Unless there has been a clear misapplication of the facts or law, the Licensing Board's judgment that a party has established standing is entitled to substantial deference.

RULES OF PRACTICE: STANDING TO INTERVENE

A presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that 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.

RULES OF PRACTICE: CONTENTIONS

A contention must include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. The petitioner must also demonstrate the existence of a genuine dispute with the applicant on a material issue of law or fact.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management. The past performance of management may help indicate whether a licensee will comply with agency standards.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

Allegations of management improprieties or lack of "integrity" must be of more than historical interest: they must relate directly to the proposed licensing action.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding concerns an application by the Georgia Institute of Technology (Georgia Tech) to renew the license for the Georgia Tech Research Reactor (GTRR). In LBP-95-6, 41 NRC 281 (1995), the Atomic Safety and Licensing Board granted a request by the Georgians Against Nuclear Energy (GANE) for intervention and admitted two contentions. Pursuant to 10 C.F.R. § 2.714a, Georgia Tech and the NRC Staff appealed the Board's decision. On appeal, Georgia Tech argues that GANE lacks standing, and both Georgia Tech and the NRC Staff contest the two admitted contentions. In a previous order, the Commission remanded one of the contentions to the Board. CLI-95-10, 42 NRC 1 (1995). The Commission now affirms LBP-95-6 in all other respects.

II. BACKGROUND

On September 26, 1994, the NRC Staff published in the *Federal Register* a notice of opportunity for hearing on a license renewal application filed by Georgia Tech.² The renewal would extend by 20 years Georgia Tech's license to operate the GTRR, located on Georgia Tech's campus in Atlanta. GANE filed its initial petition for leave to intervene on October 26, 1994.³ In a Memorandum and Order dated November 23, 1994, the Licensing Board found that GANE had not demonstrated standing, but pursuant to 10 C.F.R. § 2.714(a)(3), provided GANE an opportunity to amend its petition, and scheduled a prehearing conference. GANE timely filed an amended petition on December 30, 1994.⁴ Attached were the affidavits of forty-four individuals, claiming health and safety concerns about the GTRR, and stating their interest in having GANE represent

²"Georgia Institute of Technology; Consideration of Application for Renewal of Facility License," 59 Fed. Reg. 49,088 (Sept. 26, 1994).

³See Georgians Against Nuclear Energy Petition for Leave to Intervene in Consideration of Application for Renewal of Facility License ("Petition") (Oct. 26, 1994).

⁴Amended Petition for Leave to Intervene in Consideration of Application for Renewal of Facility License ("Amended Petition") (Dec. 30, 1994).

them. The affidavits contained the individuals' home and work addresses, and the distances from the addresses to the reactor site. The Amended Petition also set forth GANE's ten contentions.

Because none of the affiants claimed membership in GANE, the Licensing Board conducted a telephone conference call to inquire whether any of the forty-four individuals were GANE members. In the conference call, GANE representative Ms. Glenn Carroll informed the Board that several of the individuals indeed were members. The Board then authorized GANE to supplement its Amended Petition to identify the organization members. GANE in response filed a supplemental affidavit of Mr. Robert Johnson, who affirmed his membership in GANE, and attached a copy of his application for membership.⁵ Both Georgia Tech and the NRC Staff opposed GANE's intervention on the grounds that GANE lacked standing to intervene and failed to submit an admissible contention.

In LBP-95-6, the Licensing Board agreed with GANE that its standing could rest on the interests of member Mr. Robert Johnson, who works approximately 1/2 mile from the reactor, and believes his "life and health are jeopardized" by the reactor's continued operation.⁶ The Board reasoned that Mr. Johnson works within sufficient proximity of the reactor that he can be presumed to be affected by operation of the facility. 41 NRC at 287. In addition, the Board found sufficient for standing the statement of GANE's representative, Ms. Glenn Carroll, that she drives by the reactor "a couple of times a day." 41 NRC at 289 n.5.

The Board also admitted two of GANE's ten submitted contentions. One admitted contention challenges the GTRR's security (Contention 5), and the other alleges that management problems at the GTRR render the facility unsafe (Contention 9). The Board found the security contention admissible, on the ground that even if the existing GTRR security plan complies with Commission regulations, regulatory authority exists to temporarily modify the security plan to account for special circumstances — in this case, security enhancements alleged necessary for the 1996 summer Olympic Games in Atlanta. 41 NRC at 291-96. The Board also found GANE's management contention admissible, because it raised pertinent material questions about the GTRR's director and current management organization. 41 NRC at 295-99. The Board found GANE's other eight contentions inadmissible. 41 NRC at 299-308.

Georgia Tech and the NRC Staff appealed the Licensing Board's decision. Georgia Tech also requested the Commission to stay discovery pending the appeal. The NRC Staff joined in the request for a stay. On June 9, 1995,

⁵ Georgians Against Nuclear Energy Supplemental Affidavit of Robert Johnson Affirming Membership in GANE (Jan. 13, 1995).

⁶ Affidavit, Robert Johnson, at 1, attached to GANE's Amended Petition.

the Commission issued a temporary stay of discovery on GANE's security contention.⁷ A month later, in July, the Commission vacated the Licensing Board's original ruling on the admissibility of the security contention (Contention 5), and remanded that contention to the Board for reconsideration in the light of the new facts. CLI-95-10, *supra*. The Commission also lifted as unnecessary the earlier-imposed temporary stay of discovery on the security contention. The Commission now addresses the other issues, GANE's standing and its management contention, which remain pending on appeal from LBP-95-6.

III. ANALYSIS

A. GANE's Standing

Under section 189a of the Atomic Energy Act (AEA), the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). To determine whether a petitioner has alleged a sufficient interest to intervene, the Commission has long applied judicial concepts of standing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (*Perry*). For standing, the 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. *See generally Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Perry*, 38 NRC at 92. Injury may be actual or threatened. *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995); *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). To evaluate a petitioner's standing, we construe the petition in favor of the petitioner. *See Kelley v. Selin*, 42 F.3d at 1508.

An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).

At the heart of the arguments on standing in this case are the parties' estimations of the geographic area that could be affected by an accidental release of radiation from the Georgia Tech reactor. Georgia Tech submits that even a worst-case accident at the reactor, as depicted in the GTRR's Safety Analysis

⁷ Order Issuing Housekeeping Stay (June 9, 1995).

Report (SAR), cannot affect public health and safety beyond a 100-meter radius.⁸ Georgia Tech therefore argues that Mr. Johnson and Ms. Carroll are beyond the “zone of danger” for the GTRR.⁹ GANE, on the other hand, believes that a serious accident at the GTRR could result in radiation escaping the containment building and dispersing at least ½ mile, to “where [GANE member] Rob Johnson works . . . [i]f the wind’s blowing in that direction.”¹⁰

The Licensing Board concluded that Mr. Robert Johnson, whose office is approximately ½ mile from the reactor site, “works close enough to the GTRR to be presumed to be affected by operation of the facility.” 41 NRC at 287. The Board also found that GANE’s standing alternatively could be derived from GANE representative Ms. Glenn Carroll, who drives by the reactor “a couple of times a day.” *Id.* at 289 n.5.

Unless there has been a clear misapplication of the facts or law, the Licensing Board’s judgment that a party has established standing is entitled to substantial deference. *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). “[W]e are not inclined to disturb a Licensing Board’s conclusion that the requisite affected interest . . . has been established unless it appears that that conclusion is irrational.” *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494 (1975).¹¹

The Licensing Board’s judgment that GANE has shown sufficient interest for standing is reasonable. A presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994) (*SFC*); *Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982) (*AFRI*); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1, 45 (1990). *Cf. Lujan*, 112 S. Ct. at 2142-43 n.7. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into

⁸ Georgia Tech’s Notice of Appeal from the ASLB’s Memorandum and Order dated April 26, 1995 (Georgia Tech Appeal Brief) at 8 (May 11, 1995).

⁹ *See id.* at 8-11.

¹⁰ Georgia Tech Research Reactor Prehearing Conference Transcript at 89 (January 31-February 2, 1995) (“Transcript”); *see also* Transcript at 81, 82, 105, 108. Only Georgia Tech raises standing on appeal. The NRC Staff does not.

¹¹ *Quoting Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973), *aff’d on other grounds*, CLI-73-12, 6 AEC 241 (1973), *aff’d sub nom. BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974). *See also Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); *cf. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

account the nature of the proposed action and the significance of the radioactive source. See *SFC*, 40 NRC at 75 n.22; *AFRI*, 16 NRC at 153-54.

Here, for threshold standing purposes, the Board found it neither “extravagant” nor “a stretch of the imagination” to presume that some injury, “which wouldn’t have to be very great,” could occur within 1/2 mile of the research reactor.¹² The Board noted that Georgia Tech’s own SAR describes accident scenarios in which noble gases could be dispersed beyond the reactor site. LBP-95-6, 41 NRC at 287. Under questioning by the Board, the GTRR’s director conceded that noble gases would escape the steel containment building if the reactor core melted.¹³ Georgia Tech stresses that such hypothetical scenarios described in the SAR are simply “incredible” because they would first require three independent redundant safety systems to fail.¹⁴ The Board, however, was not convinced that a combined failure of three systems altogether strains credibility. The Board’s view is not “irrational.” See *River Bend*, 40 NRC at 47-48. At the threshold standing stage, the Commission will not disturb the Board’s presumption that some injury could occur within a 1/2 mile radius of the reactor.¹⁵

Alternatively, the Licensing Board reasonably held that GANE’s standing can be based on Ms. Glenn Carroll, a GANE member who daily “drives by” the reactor.¹⁶ See *North Anna*, 9 NRC at 57 (recreational canoeing in vicinity of plant sufficient for standing); *Pathfinder*, 31 NRC at 45 (regular commute once or twice a week past plant site to be decommissioned found sufficient to establish requisite interest that petitioner might be affected by decommissioning). Ms. Carroll’s commute presumably brings her even closer to the reactor site than 1/2 mile. Like Mr. Johnson, Ms. Carroll can be presumed to frequent regularly a geographic area potentially at some risk of radiation releases, and therefore to have a personal stake in the license renewal proceeding.

B. GANE’s Management Contention

A petitioner for intervention must proffer at least one admissible contention. See 10 C.F.R. § 2.714(b)(2) and (d)(2). A contention must include a specific statement of the issue of law or fact to be raised or controverted, a brief

¹² Transcript at 10.

¹³ *Id.* at 22-23.

¹⁴ *Id.* at 23-24; Georgia Tech Appeal Brief at 8-9.

¹⁵ Georgia Tech argues that Mr. Johnson joined GANE too late — i.e., after GANE’s request for a hearing — to serve as the source of GANE’s standing. But, as the Board found, there is ample evidence that GANE considered Mr. Johnson a member, and that Mr. Johnson actively participated in GANE affairs, prior to GANE’s request for a hearing. See LBP-95-6, 41 NRC at 288-89. By contrast, there is no evidence that GANE contrived Mr. Johnson’s membership merely to sustain standing. The Commission declines to rest its standing determination on the technicality of when he signed his membership card. Cf. *South Texas*, ALAB-549, 9 NRC at 649.

¹⁶ Transcript at 35.

explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. Additionally, the petitioner must present sufficient information to show a genuine dispute with the applicant on a material issue of law or fact. Proffered contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. See *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

An intervenor need not, however, prove its case at the contention stage. The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form, or be of the quality necessary to withstand a summary disposition motion.¹⁷ What is required is a "minimal showing" that material facts are in dispute, indicating that a further inquiry is appropriate.¹⁸

The Licensing Board admitted only two of the ten contentions proffered by GANE. One admitted contention (Contention 5) alleges deficient physical security at the GTRR. New facts received after the Board's decision may have rendered this contention moot. The Commission therefore has remanded the security contention to the Board for reconsideration. See CLI-95-10, *supra*.

The only contention remaining before us; Contention 9, alleges that management problems at the GTRR are so great that public safety cannot be ensured. Specifically, GANE alleges that:

- 1) The Commission in the late 1980s shut down the reactor for safety reasons following a cadmium-115 contamination incident that arose from poor management. The same management is still in place.
- 2) The current director of the GTRR is the same director who in 1987 withheld information from the NRC about the cadmium-115 contamination incident.
- 3) A safety officer who advised the NRC of the cadmium incident was later demoted and left the GTRR claiming harassment.
- 4) Since the cadmium incident, the GTRR has been restructured. The restructuring has increased the authority of the director over the Office of Radiation Safety.
- 5) Although the GTRR safety officer can report directly to individuals with higher authority than the director, he may be reluctant to do so because he works for the director and "the threat of reprisal would be a huge disincentive to defying the director."

Amended Petition at 10; *see also* Petition at 5.

¹⁷ *River Bend*, 40 NRC at 51; Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

¹⁸ *Id.*

GANE's central concern appears to be that there is a need to restructure the GTRR's management to make radiation safety personnel "independent" of the director, and to ensure independent oversight over the director's office.¹⁹ GANE believes that the GTRR director withheld safety-related information from the NRC, and was responsible for alleged retaliation against radiation safety personnel who reported the cadmium-115 contamination incident to the NRC in the late 1980s. GANE alleges that management changes after the 1987 incident further "consolidat[ed] the power under the harasser,"²⁰ making it less likely that radiation safety personnel would feel free to report safety concerns. GANE also questions the effectiveness of the Nuclear Safeguards Committee, a committee of twelve safety experts tasked with monitoring the GTRR's operations.²¹ Because the GTRR's management is now "being put forth again to be re-okayed," GANE requests that the current structure not be reapproved.²²

In accepting the contention, the Board noted that GANE had presented evidence of a serious incident in 1987, allegedly involving the GTRR's current director, and that simply because the NRC Staff had been satisfied with the resolution of the incident, a party is not precluded from now raising the adequacy of the reactor's management, particularly when this is the first time a member of the public could seek to adjudicate the management issue. *See* LBP-95-6, 41 NRC at 297.

Both Georgia Tech and the NRC Staff stress on appeal that GANE has failed to demonstrate any problem with the GTRR's current management, and at best points only to a 1987 incident that was long ago investigated and resolved to the NRC Staff's satisfaction.²³ The Staff rejects any link between the cited 1987 cadmium-115 incident and a license renewal to authorize future operations.²⁴ Staff explains that the cadmium incident resulted in an exhaustive review by the NRC Office of Investigations (OI), and that by November of 1988, the NRC Staff had determined that the Licensee had corrected any major deficiencies and should be permitted to restart.²⁵ Staff thus concludes that GANE "must show . . . something in recent history which would give you a reason to think that the plant is not being operated safely or may not be expected to operate safely in the future."²⁶ Georgia Tech argues that because "[t]he Commission has approved the current management, and as long as the GTRR continues to operate within

¹⁹ Transcript at 365.

²⁰ *Id.* at 399.

²¹ *See id.* at 349-50, 396-97.

²² *See id.* at 398.

²³ *See* Georgia Tech Appeal Brief at 16-18; NRC Staff's Petition for Commission Review and Appeal of the Atomic Safety and Licensing Board's Prehearing Conference Order of April 26, 1995 (Staff Appeal Brief) at 26-28 (May 11, 1995).

²⁴ Staff Appeal Brief at 29.

²⁵ Transcript at 373.

²⁶ *Id.* at 377.

the regulations, the Board has no basis upon which to act.”²⁷ Both parties also claim that, having admitted the contention despite a lack of factual basis, the Board now improperly has allowed GANE discovery to attempt to uncover a basis for the contention.²⁸

At the outset, the Commission rejects Georgia Tech’s broad claim that a license renewal proceeding is *per se* an inappropriate forum in which to raise management allegations. As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee’s corporate organization and the integrity of its management.²⁹ When relevant, the Commission has evaluated whether a licensee’s management displays the “climate,” “attitude,” and “leadership” expected.³⁰ In determining whether to grant a license (or, by logical extension, to renew a license), the Commission makes what is in effect predictive findings about the qualifications of an applicant.³¹ The past performance of management may help indicate whether a licensee will comply with agency standards.³² When a licensee files a license renewal application, it represents “an appropriate occasion for apprais[ing] . . . the entire past performance of [the] licensee.”³³ Of course, the past performance must bear on the licensing action currently under review.

Moreover, the NRC Staff conclusion in 1988 that Georgia Tech had corrected all deficiencies and could be permitted to restart operations is not itself enough to preclude GANE from raising questions about the GTRR’s management, particularly in the absence of any clear prior opportunity for GANE to pursue claims at a hearing. A Staff conclusion alone does not defeat the right to litigate a contention. *River Bend*, 40 NRC at 52.

Allegations of management improprieties or poor “integrity,” of course, must be of more than historical interest: they must relate directly to the proposed licensing action.³⁴ Accordingly, this proceeding cannot be a forum to litigate whether Georgia Tech made mistakes in the past, but must focus on whether

²⁷ Georgia Tech Appeal Brief at 2.

²⁸ See Staff Appeal Brief at 29-32; Georgia Tech Appeal Brief at 17-18.

²⁹ See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 30 (1993) (Vogtle).

³⁰ *Vogtle*, CLI-93-16, 38 NRC at 31; *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1137 (TMI), *aff’d sub nom. In re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

³¹ See *Vogtle*, CLI-93-16, 38 NRC at 31.

³² See *id.*; *Hamlin Testing Laboratories, Inc.*, 2 AEC 423, 428 (1964) (*Hamlin*), *aff’d sub nom. Hamlin Testing Laboratories v. AEC*, 357 F.2d 632 (6th Cir. 1966).

³³ *Hamlin*, 2 AEC at 428.

³⁴ See, e.g., *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, *aff’d*, ALAB-470, 7 NRC 473 (1978) (whether Detroit Edison violated Commission regulations in the past not within scope of proceeding on adding new owners); *TMI*, CLI-85-9, 21 NRC at 1128 (1985) (personnel changes mooted the significance in restart proceedings of leak rate falsifications from 6 years before).

the GTRR as presently organized and staffed can provide reasonable assurance of candor and willingness to follow NRC regulations.

Here, while the question is a close one, the Commission declines to disturb the Board's finding that GANE's management allegations are relevant to the proposed license renewal. This is a proceeding to extend a license for 20 years. GANE seeks assurance that the facility's current management encourages a safety-conscious attitude, and provides an environment in which employees feel they can freely voice safety concerns. GANE's allegations bear directly on the Commission's ability to find reasonable assurance that the GTRR facility can be safely operated. If GANE can prove that the GTRR's current management either is unfit or structured unacceptably, it would be cause to deny the license renewal or condition renewal upon modifications.

Contrary to suggestions by Georgia Tech and the NRC Staff, this is not a case where the Licensing Board simply relied on a years-ago incident to allow GANE an opportunity to uncover additional information through discovery. Although the Board expressed some concern about GANE's ability to have obtained documents that may have "buttress[ed]" the contention, the Board clearly found the information GANE actually submitted, as clarified and further detailed in the prehearing conference, a sufficient basis for the contention.³⁵ The Board's view of the contention is reasonable.

GANE's allegations may well turn out to lack any factual substance, and if so, they will not survive summary disposition. But as required by the Commission's contention rule, GANE at this stage has presented "alleged facts or expert opinion"³⁶ and made a "minimal showing" that material facts about the GTRR's management organization are in dispute and that further inquiry may be appropriate. GANE refers not just to the 1987 cadmium incident, but also to the NRC inspection and investigation reports on the incident, the GTRR's own SAR in support of its license renewal request, newspaper articles, and, significantly, to at least one expert witness in support of the contention.

Although the cadmium-115 incident that GANE highlights is far from recent, it was a significant Severity Level III violation that resulted in two immediately effective suspension orders, an NRC investigation, an enforcement conference, and a civil penalty,³⁷ and ultimately was attributed to management failures that "could have resulted in very serious safety consequences."³⁸ The incident involved allegations of harassment and reprisals by Georgia Tech management

³⁵ See LBP-95-6, 41 NRC at 297-98.

³⁶ See 10 C.F.R. § 2.714(b)(2).

³⁷ See Georgia Institute of Technology, Order Modifying License, Effective Immediately, 53 Fed. Reg. 2663 (Jan. 29, 1988); Georgia Institute of Technology, Confirmatory Order Modifying License, Effective Immediately, 53 Fed. Reg. 9718 (Mar. 24, 1988); NRC Office of Investigation Report No. 2-88-003; Enforcement Action 88-32.

³⁸ See Letter to Dr. J.P. Crecine, President, Georgia Tech, from Malcolm Ernst, Acting Regional Administrator, NRC, at 3 (Nov. 15, 1988).

against employees who reported safety concerns to the NRC. These allegations led to an extensive NRC Office of Investigations (OI) review that proved inconclusive.³⁹ GANE takes the view that the management problems leading to the 1987 incident remain and indeed have been exacerbated by more recent changes in the GTRR management structure.

The 1987 incident is not one in which all of the principal individuals alleged to have played a role have since left the facility or moved to positions unassociated with day-to-day operations. *Compare TMI*, CLI-85-9, 21 NRC at 1128 (personnel changes diminished significance of violations alleged to have occurred 6 years before). The GTRR director at the time of the 1987-1988 events continues as the facility's director, responsible for ensuring the safe day-to-day operation of the reactor.⁴⁰ GANE alleges that the reactor operator responsible for the cadmium incident also remains at the facility.⁴¹

In light of what GANE calls the "public history" of alleged reprisals against employees who report safety issues,⁴² GANE's contention particularly raises questions about the appropriateness of having the manager of the Office of Radiation Safety work under and directly report to the GTRR director, an arrangement depicted in the management hierarchy chart found in the GTRR's SAR. GANE points to this chart on the facility's management organization as indicative of the need for "checks and balances" to ensure that radiation safety personnel will not hesitate to report safety concerns.

GANE also concludes, based on the GTRR SAR, that the director's office lacks sufficient independent oversight, and indeed now receives less independent review than at the time prior to the cadmium incident. Although select officers other than the director — Georgia Tech's President, and the Vice President for Interdisciplinary Affairs, for example — have authority to shut down the reactor, GANE claims these individuals may either lack (1) the nuclear physics expertise or (2) sufficient day-to-day knowledge of ongoing reactor affairs to recognize a need to shut down operations or take other corrective action.⁴³

³⁹ OI did, however, conclude that one of the reasons two health physics technicians were fired was "specifically related to [their] discussing or reporting potential health and safety concerns with [the] NRC." NRC Office of Investigations Report No. 2-88-003 at 6. The report also characterized the general GTRR environment as conducive to potential reprisals, and in a severe state of disharmony due to poor management at all levels. See Letter to J.P. Crecine, President, Georgia Tech, from Malcolm Ernst, Acting Regional Administrator, NRC, at 2-3 (Nov. 15, 1988).

⁴⁰ See Safety Analysis Report for the 5 MW Georgia Tech Research Reactor (SAR) at 156 (April 1994).

⁴¹ See Transcript at 339 (citing January 1994 "Alternatives" magazine article).

⁴² Transcript at 343-44, 346-47. GANE believes that the current director was personally responsible for reprisals against the individual who allegedly reported the 1987 contamination incident. GANE bases its belief upon a November 1987 newspaper article in the *Atlanta Journal-Constitution*, entitled "Radiation expert resigns to protest changes at the Neely Nuclear Research Center." Transcript at 342.

⁴³ *Id.* at 395-96, 398. The NRC Staff in a recent Board Notification (95-15) advises that effective October 1, 1995, the position of the Vice President for Interdisciplinary Affairs was replaced with the position of the Dean of the College of Engineering. The Licensing Board has requested the parties to comment on whether this organizational

(Continued)

To support its position that the GTRR's current management setup is inappropriate, GANE seeks to call as a witness an individual with the Environmental Protection Division of Georgia (EPD), who informed GANE that the EPD had strongly objected to the GTRR's management changes.⁴⁴ GANE asserts that the EPD "may have expressed problems with [the changes] and may have been overruled by the NRC, who I think ultimately did sanction these changes."⁴⁵ In addition, GANE informed the Board that it gleaned information about problems associated with the management changes from an anonymous "expert" witness who once worked for the GTRR director, but resigned after being demoted, allegedly in retaliation for protesting his position being made "unindependent."⁴⁶ GANE also relies upon magazine articles on the GTRR, including one article that refers to the current manager of the GTRR Office of Radiation Safety as "confirm[ing] that the setup which has his department under the control of the director is unusual."⁴⁷

In response, Georgia Tech stresses the oversight role of the Nuclear Safeguards Committee, comprised of twelve independent safety experts charged with reviewing and approving all safety matters.⁴⁸ The Licensing Board, however, surmised that the descriptions in the SAR (cited by GANE) depict the Nuclear Safeguards Committee and the various officers tasked with overseeing the director as "appear[ing] to exercise . . . audit-type functions, as claimed by GANE (Tr. 349), rather than day-to-day operational functions." LBP-95-6, 41 NRC at 296. GANE notes from the SAR that one of the Nuclear Safeguards Committee's chief functions is to review "reportable occurrences."⁴⁹ GANE, though, fears that the Nuclear Safeguards Committee will not be able to provide adequate independent oversight if "reportable occurrences" are not reported to it.⁵⁰

In sum, the Commission declines to second-guess the Licensing Board's decision that GANE satisfied the minimum threshold for showing that material facts about the current GTRR management are in dispute. GANE has raised

change has any significant effect upon Contention 9. See Memorandum and Order (Effect of Organizational Changes on Contention 9) (Sept. 26, 1995). We leave to the Licensing Board the task of assessing the significance of this change.

⁴⁴ Transcript at 342-43, 367.

⁴⁵ *Id.* at 343.

⁴⁶ Transcript at 353-54. GANE does not wish to unveil this person but hopes that he will of his own accord overcome his "fear to come out and discuss these issues about the reactor." After being informed by the Board that this individual could be subpoenaed, GANE told the Board to disregard this potential witness as a basis for the contention because he had not consented to making his knowledge public. Transcript at 365.

⁴⁷ "Checking Out the Hottest Spot on Campus," *Creative Loafing* at 28 (Dec. 17, 1994). As evidence of recent problems at the GTRR, GANE refers to one inspection report provided by the NRC Staff on a 1994 violation. See Transcript at 329, 336, 338 (referring to Inspection Report 50-160/94-01).

⁴⁸ Georgia Tech Appeal Brief at 16.

⁴⁹ See SAR at 158.

⁵⁰ Transcript at 349-50.

questions about the appropriateness and effect of an alleged "consolidation" of authority by the GTRR director over the office of radiation safety, and the adequacy of independent oversight over the director's office. Whether the present GTRR management's structure and staffing satisfy all Commission requirements and provide reasonable assurance that any past failings are unlikely to be repeated are matters left for the Licensing Board's consideration when the merits of the dispute are reached, either on summary disposition or after a hearing.

IV. CONCLUSION

For the reasons stated in this Decision, the appeals by Georgia Tech and the NRC Staff are *denied*, and the Licensing Board's order in LBP-95-6 is *affirmed*. It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

Docket No. 50-344

PORTLAND GENERAL ELECTRIC
COMPANY

(Trojan Nuclear Power Station)

October 12, 1995

The Commission decides that under *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), the Licensee is not required to halt its substantially completed Large Component Removal Project (LCRP), but finds that the Licensee cannot conduct any further "major dismantling" of the Trojan facility until final NRC approval of the Trojan decommissioning plan, thus restoring effect to the NRC's pre-1993 interpretation of its 1988 decommissioning rules.

REGULATIONS: DECOMMISSIONING

The NRC will exercise its enforcement discretion and not halt a substantially completed Large Component Removal Project (LCRP); where both the Licensee and the NRC Staff have prepared safety analyses that conclude that the LCRP presents no undue risk to public health and safety; where the party seeking to stop the LCRP has failed to ask for a hearing in a timely fashion; where the balance of harm to the parties does not weigh heavily against either party; and where there will be an opportunity for a hearing on the remaining 99% of the decommissioning plan.

¹This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with his Decision.

NEPA: ENVIRONMENTAL ASSESSMENT

In some limited cases, NRC Staff review of a Licensee's preliminary environmental document may satisfy the requirement for an Environmental Assessment.

REGULATIONS: DECOMMISSIONING

Where the radioactivity involved in a Licensee's LCRP is only 1% of the facility's total nonfuel radioactivity, halting further dismantling at the facility pending final decommissioning plan approval gives ample effect to a court decision concerned that the "decommissioning plan approval process" should be followed before "the actual decommissioning activities are already completed[.]"

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commission has before it the question whether the First Circuit's decision in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), prevents further decommissioning activities at the Trojan reactor which is owned by the Portland General Electric Company ("PGE"). We recently solicited public comments on this question. See 60 Fed. Reg. 46,315 (Sept. 6, 1995). The Don't Waste Oregon Council ("DWOC") and other groups opposed to PGE's current decommissioning activities ("Petitioners") have asked for a halt in these activities, pending NRC approval of a decommissioning plan for Trojan. PGE seeks to proceed with its decommissioning activities, including its Large Component Removal Project or "LCRP," which currently is nearing its end.

The Commission has decided that under *Citizens Awareness Network* PGE cannot conduct any further "major dismantling" of the Trojan facility until completion of the NRC's decommissioning plan approval process. The Commission has also decided not to interfere in PGE's completion of its LCRP, which is almost done and affects just 1% of (nonfuel) radioactivity from the plant. The LCRP "involves the removal of Trojan's four steam generators and the pressurizer from the containment building, preparing the components as transportation packages, and transporting the component packages from the Trojan site. . . ." See PGE's Sept. 18, 1995 Comments at 1.

II. BACKGROUND

As recounted in *Citizens Awareness Network*, prior to 1993 the Commission interpreted its regulations on decommissioning (10 C.F.R. §§ 50.82, 50.75,

51.53, 51.95) to require Commission approval before a licensee may in the course of decommissioning make "major structural changes to radioactive components of the facility or other major changes. . . ." 53 Fed. Reg. 20,418, 24,025-26 (1988).² In 1993, the Commission issued a Staff Requirements Memorandum altering this interpretation and permitting licensees to take any decommissioning action authorized under their licenses in advance of decommissioning plan approval, including actions that could be justified under 10 C.F.R. § 50.59. See *Citizens Awareness Network*, 59 F.3d at 289.

In *Citizens Awareness Network*, the First Circuit struck down the Commission's interpretive change as "arbitrary and capricious" because in the court's view it had not been adequately explained, it had not been preceded by notice-and-comment or any form of hearing, and it was "seemingly irrational." 59 F.3d at 291-92. The court's ruling has the effect of restoring the Commission's pre-1993 interpretation of its decommissioning rules.

III. ANALYSIS AND DISCUSSION

The Petitioners, including DWOC, have stated their opposition to further decommissioning at Trojan in court filings and comments to the agency. In their view the Commission should order an immediate halt to the LCRP. If the LCRP presented a significant safety problem, the Commission would clearly have the authority to issue such an order and would unquestionably exercise it. However, both the Licensee and the NRC Staff have prepared safety analyses that conclude that the LCRP presents no undue risk to public health and safety. DWOC has not shown any flaws in these analyses.³

DWOC does say that *Citizens Awareness Network* renders further work on the LCRP in violation of the Commission's pre-1993 rule interpretation. But that is not obviously correct. PGE argues that there are significant differences between the Trojan LCRP and the Yankee Nuclear Power Station removal program at issue in *Citizens Awareness Network*. PGE points out that the LCRP affects less than 1% of nonfuel residual radioactivity from the plant, in contrast to the

² See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992).

³ Petitioners allege that the NRC has not prepared an EA or an EIS for the LCRP in compliance with the National Environmental Policy Act and that the LCRP must be halted for this reason alone. See *Citizens Awareness Network*, 39 F.3d at 292-93. While it is true that the NRC has not prepared either document for the LCRP, the NRC will prepare the appropriate document for the decommissioning plan. In addition, PGE prepared an environmental review ("ER") of the LCRP, which found that the impacts of the LCRP were within the EIS issued in connection with the operation of Trojan and the GEIS issued by the NRC in connection with decommissioning in general. The NRC Staff reviewed this ER and found it to be accurate and acceptable. The NRC review of the ER is adequate for purposes of NEPA compliance at this point. See *Friends of the River v. FERC*, 720 F.2d 93, 106-08 (D.C. Cir. 1983).

90% affected by the program at Yankee. PGE argues that the Trojan program therefore does not violate the Commission's pre-1993 decommissioning rules.

The Commission finds this question a close one. Removal of the four Trojan steam generators and the pressurizer undoubtedly has to be characterized as a "major structural change," and these components do contain some residual radioactivity. On the other hand, PGE is correct that the radioactivity involved in the LCRP is only a miniscule part (1%) of Trojan's total (nonfuel) radioactivity. In this sense it could be concluded that the Trojan LCRP is not a "major" segment of the decommissioning process to which the Commission's decommissioning regulations should be strictly and literally applied.

The Commission need not resolve this question definitively, however, because there are several additional reasons why the Commission should not interfere with the LCRP. PGE entered upon the program in reliance upon the NRC's assurance, given prior to the *Citizens Awareness Network* decision, that it complied with the Commission's regulations. In contrast to the component removal program at the Yankee Nuclear Power Station that led to the *Citizens Awareness Network* litigation, no parties requested an NRC hearing on the Trojan LCRP. While PGE continued its implementation, DWOC and the other petitioners participated in a state-law process for review of the LCRP and made no effort, until September 25, to seek any relief from the NRC. PGE in the meantime incurred substantial costs and now faces the prospect of losing favorable contracts, incurring additional costs, and idling its trained work force, should the program be summarily halted.

In addition, the *Citizens Awareness Network* court itself did not direct the halt of preliminary removal and transport operations already under way. Here, PGE reports that the program to remove and transport off site the Trojan steam generators and pressurizer is about 70% complete and, if not stopped by the Commission, will be finished by late October or early November 1995. Because the LCRP remains in compliance with all NRC safety requirements, the Commission believes that fairness and the public interest will best be served by not taking any action to interrupt this program on the eve of its completion. See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 383 (D.C. Cir. 1983).

Any further significant decommissioning activities beyond the LCRP must await completion of the NRC approval process for the Trojan decommissioning plan. This restores effect to the Commission's original interpretation of its decommissioning rules, as required by *Citizens Awareness Network*, and the Commission expects PGE to comply with that interpretation. When (and if) the NRC Staff is prepared to issue an order approving the Trojan decommissioning plan, the Commission intends to follow its pre-1993 practice of giving notice of an opportunity for an adjudicatory hearing on the plan. The Commission intends to order an expedited hearing process.

The Commission believes that, with 99% of Trojan's nonfuel radioactive contamination still in place, halting further major dismantling at Trojan pending final decommissioning plan approval gives ample effect to the concern of the *Citizens Awareness Network* court that the "decommissioning plan approval process" be followed before "the actual decommissioning activities are already completed[]" 59 F.3d at 292.

IV. SUMMARY

In summary, the Commission will not require PGE to halt its LCRP, which is slated to be completed within the next few weeks. However, the Commission expects PGE to adhere to current NRC decommissioning rules and to take no further decommissioning actions involving major dismantling at Trojan until final NRC approval of the Trojan decommissioning plan. The Commission directs PGE to inform the Commission promptly, within no more than 14 calendar days, of the steps it is taking to come into compliance with the reinstated rule interpretation announced in this Decision.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

Docket No. 50-029

YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

October 12, 1995

On remand from the First Circuit Court of Appeals, the Commission holds that the Court's decision (*Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995)), reinstating the NRC's pre-1993 decommissioning policy, requires issuance of a notice of opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. The Commission directs the Licensee to inform it promptly of the steps it will take to come into compliance with the reinstated rule. The Commission notes that NRC regulations prohibit Yankee Atomic from conducting further major dismantling or decommissioning activities until after completion of the hearing process.

REGULATIONS: DECOMMISSIONING

The NRC has defined "major dismantling" under the 1988 regulations as "major structural changes to radioactive components of the facility or other major changes" See 53 Fed. Reg. 24,018, 24,025 (1988) ("Statement of Considerations," 1988 decommissioning rule).

¹ This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

REGULATIONS: DECOMMISSIONING

Under the Commission's pre-1993 interpretation of its 1988 decommissioning regulations, a nuclear power plant licensee may not conduct major decommissioning activities prior to final NRC approval of a decommissioning plan.

REGULATIONS: DECOMMISSIONING

Prior to 1993, the Commission had consistently interpreted its 1988 regulations on decommissioning as requiring an adjudicatory hearing prior to the NRC's final approval of a licensee's decommissioning plan.

REGULATIONS: DECOMMISSIONING

A licensee's argument that the NRC's provision of an adjudicatory hearing on a previously approved decommissioning plan may result in financial hardship to the licensee due to decommissioning delays, does not excuse the Commission from providing a meaningful remedy to effectuate a Court of Appeals decision.

REGULATIONS: DECOMMISSIONING

Where a Court of Appeals has recognized in its decision that a licensee has virtually completed major decommissioning of a nuclear power plant, but that a continued removal of radioactive material will continue to pose safety and health questions, the NRC considers itself duty bound to take the only action available to it that gives meaning to the Court's decision — provide an adjudicatory hearing on the licensee's decommissioning plan in accordance with the Commission's pre-1993 interpretation of its regulations.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a remand from the United States Court of Appeals for the First Circuit. *See Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995). The Commission issued a *Federal Register* notice soliciting public comments on how it should implement the remand order. *See* 60 Fed. Reg. 46,317 (Sept. 6, 1995). The Citizens Awareness Network ("CAN") has filed comments asking for a hearing on the decommissioning plan for the Yankee Nuclear Power Station ("Yankee NPS"), which is owned and operated by the Yankee Atomic Electric Company ("YAEC"). However,

that decommissioning plan has already been approved by the NRC Staff — albeit without an adjudicatory hearing. In its comments, YAEC argues that the Commission should not hold such a hearing.

In light of the First Circuit's decision, the Commission has decided that it must reinstate its pre-1993 interpretation of its decommissioning regulations. See generally 60 Fed. Reg. 46,317 (Sept. 6, 1995). Pursuant to this interpretation, and for the reasons stated below, the Commission will issue a Notice of Opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. The Commission intends to order an expedited hearing process. In the meantime, in accordance with the pre-1993 interpretation, the Commission expects YAEC not to conduct any further "major" dismantling or decommissioning activities until final approval of its plan after completion of the hearing process.² See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992).

II. BACKGROUND

Briefly, on several occasions from late 1992 through early 1994, CAN asked the NRC to offer an opportunity for an administrative hearing regarding decommissioning activities being conducted by YAEC at the Yankee NPS. These activities were known as the Component Removal Project or "CRP."

The Commission denied each of CAN's requests, based upon a new interpretation of its decommissioning regulations, issued on January 14, 1993, and CAN sought review of the last denial before the First Circuit. On July 20, 1995, the First Circuit issued a decision that held that the Commission had improperly changed its interpretation of its decommissioning regulations. *Citizens Awareness Network*, 59 F.3d at 292. The First Circuit remanded the case to the Commission after finding illegal the Commission's 1993 shift in policy and its failure (1) to hold a hearing on the CRP activities and (2) to issue either an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") on the CRP. *Citizens Awareness Network*, 59 F.3d at 291-92, 292-93, 294-95.

In response to the First Circuit's decision, the Commission issued a *Federal Register* notice (1) advising the parties and the general public that it did not intend to seek further review of the *Citizens Awareness Network* decision; (2)

² As explained in the statement of considerations accompanying the NRC's 1988 decommissioning rule, "major dismantling" means "major structural changes to radioactive components of the facility or other major changes" 53 Fed. Reg. 24,018, 24,025 (1988).

advising the public that it understood the decision to require a return to the interpretation of NRC decommissioning regulations that were in effect prior to January 14, 1993; and (3) asking for public comments on whether the Commission should order Yankee Atomic to cease ongoing decommissioning activities pending any required hearings, and any other matters connected with this issue.

III. PUBLIC COMMENTS

The Commission has received numerous comments from both members of the public and industry organizations, including CAN and YAEC, the two parties to the *Citizens Awareness Network* lawsuit. In its comments, CAN argues that the NRC should hold formal adjudicatory hearings on the Yankee decommissioning plan based upon the language in the First Circuit decision and on its own generalized concerns about the alleged hazards associated with decommissioning.

YAEC, on the other hand, argues that the First Circuit's requirement of a hearing on remand is moot, because the CRP has been completed, and that the First Circuit's NEPA remand is moot because the NRC Staff issued an EA when it approved the Yankee NPS decommissioning plan, which included a review of the activities conducted under the CRP.³ Moreover, YAEC points out that the NRC Staff has already approved its decommissioning plan, *see* 60 Fed. Reg. 9870 (Feb. 22, 1995), and argues that nothing in the First Circuit's decision invalidates that approval. Finally, YAEC argues that "no useful safety or environmental purpose would be served" by halting decommissioning pending a hearing and that such a halt would "greatly increase the costs to the ratepayer."

IV. ANALYSIS

The question before the Commission on remand is not whether YAEC's current decommissioning activities are safe or environmentally benign but whether they are legal. Under the Commission's pre-1993 interpretation of its

³ The First Circuit issued the *Citizens Awareness* decision on July 20, 1995, exactly 4 months after the day that YAEC now informs us the "last scheduled CRP activity initiated during the last phase of the CRP" was completed. *See* YAEC "Response to Request for Additional Information" (Sept. 25, 1995) (filed in this docket). But YAEC never claimed before the First Circuit that its March completion of the CRP rendered CAN's grievance moot or informed the Court of the CRP's completion. Therefore, YAEC is ill-positioned to claim mootness now, *after* the First Circuit has issued its decision and with additional decommissioning work remaining to be done. *See* 59 F.3d at 293 n.8.

The Commission agrees with YAEC, however, that the claimed lack of a NEPA review has been rendered moot by the subsequent preparation of the EA associated with the NRC Staff's review of the Yankee decommissioning plan. But CAN may still raise NEPA issues in any hearing request it files.

regulations, now reinstated, YAEC may not conduct “major” decommissioning activities prior to final NRC approval of a decommissioning plan. And under the Commission’s consistent pre-1993 practice, final decommissioning plan approval came only after an opportunity for an adjudicatory hearing. In this case, the NRC approval of YAEC’s plan was not preceded by an adjudicatory hearing — a fact that CAN stressed at the “informal public hearing” conducted on August 16, 1994, at Greenfield, Massachusetts. *See generally* Transcript of August 16, 1994. Thus, the NRC’s approval of the Yankee NPS decommissioning plan cannot be accorded further legal effect, pending a hearing opportunity.

We now turn to YAEC’s principal arguments why the Commission should not hold hearings on the decommissioning plan. First, YAEC maintains that “[t]his matter could be remedied if the NRC were to publish a full explanation of the policy change” Yankee Atomic Comments (Sept. 15, 1995) at 2-3. However, that option is unworkable. The First Circuit not only found the new rule interpretation unexplained, but also “seemingly irrational” and incapable of cure without a full hearing or rulemaking proceeding. *See* 59 F.3d at 291-92. Whether or not the First Circuit was correct in its view, its decision is the law that the Commission must follow on remand in this case. Therefore, the Commission could not simply reinstate the 1993 policy, certainly not any time soon, and certainly not fast enough to avoid a decision whether to halt YAEC’s current decommissioning activities at Yankee NPS.⁴ In fact, it is quite possible that the Commission’s currently pending proposed rule change on decommissioning will be ready for issuance before a rulemaking on the old policy could be perfected. Thus, the Commission declines YAEC’s invitation to attempt to comply with the First Circuit decision by codifying through rulemaking the now-invalidated 1993 policy.

In addition, YAEC argues that the Rancho Seco decommissioning proceeding (the only proceeding in which a hearing was actually initiated) constitutes merely a “precedent of one” for the proposition that decommissioning plan approval requires a prior hearing. YAEC argues that its decommissioning plan can be distinguished from the only other plans that were subject to the previous opportunities for a hearing, namely the Ft. St. Vrain and Shoreham plans, because unlike those plans the Yankee plan does not require the NRC to grant any amendments to the Yankee NPS license. *See* section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a) (requiring hearings on license amendments).

These arguments are unpersuasive. First, YAEC essentially concedes that its case is indistinguishable from Rancho Seco, where the Commission did not allow major dismantling prior to a hearing on the proposed decommissioning plan. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating

⁴ The Commission ordinarily is not free to issue a new rule months from now and give it *nunc pro tunc* or retroactive effect. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1993).

Station), CLI-93-12, 37 NRC 355 (1993). Second, the Commission did not offer the Shoreham and Ft. St. Vrain plans for public hearing on the basis of any amendments they might have involved. Rather, those plans (like Rancho Seco's) were offered for hearing for the purpose of approving the licensee's overall plan for decommissioning. Approval of any amendments (or changes to the plant's technical specifications) was incidental to the approval of the process and goals contained in each plan. Third, YAEC's facts are incorrect: the Shoreham decommissioning plan, like the Yankee NPS plan, did not involve the issuance of any license amendments.

Finally, YAEC points out that the First Circuit did not address the Yankee NPS decommissioning plan, as such, in *Citizens Awareness Network* because that issue was not before the Court. Moreover, argues YAEC, the NRC has already approved the Yankee decommissioning plan, which places it beyond review now. But the Commission cannot accept the rather formalistic response to *Citizens Awareness Network* that YAEC urges because, with the completion of the CRP, YAEC's position would result in no remedy at all for CAN on remand and would require the Commission to ignore the First Circuit's clearly expressed view that CAN should receive a hearing opportunity prior to further major dismantling at Yankee NPS. See *Citizens Awareness Network*, 59 F.3d at 292 ("Why offer the public an opportunity to be heard on the decommissioning plan if the actual decommissioning activities are already completed?").

The First Circuit was fully aware that the CRP was virtually complete, but nonetheless expected the Commission to offer CAN some relief on remand:

We recognize that this holding comes too late to prevent much of the CRP activity. There remains, however, a significant amount of radioactive material and structures at the Yankee NPS site, the removal of which will continue to affect CAN members. This continued removal will undoubtedly continue to pose health, safety, and environmental questions, thereby requiring NRC oversight and NEPA compliance.

59 F.3d at 293 n.8. The Commission can only understand this statement to mean that CAN remained entitled to whatever process it was still possible for the Commission to offer. While it is true that YAEC's activities until now have proceeded according to the NRC's own view of its regulations, that view has now been struck down by the First Circuit. The Commission considers itself duty bound to take the only action available to it that gives meaning to the Court's decision: provide an adjudicatory hearing on YAEC's decommissioning plan in accordance with the pre-1993 interpretation of our regulations.

Understandably, YAEC expresses some frustration that it may suffer financially if hearings on its decommissioning plan result in decommissioning delays.⁵

⁵ Other commenters, including the states of Massachusetts, Vermont, and Rhode Island, have expressed similar cost-based concerns.

Much of what YAEC alleges seems tied to a speculative fear that South Carolina authorities may again close the Barnwell waste disposal facility. Nonetheless, because of the Commission's court-directed change of course and YAEC's claim of financial hardship, the Commission in its hearing notice will direct an expedited hearing process in this case.

The long and short of this situation is that the Commission and YAEC *lost* this lawsuit in the First Circuit. Possible delay and financial impacts flowing from that defeat cannot excuse the Commission from providing CAN a meaningful remedy to effectuate the court's decision.

V. CONCLUSION

In summary, the Commission holds that *Citizens Awareness Network's* reinstatement of the pre-1993 decommissioning policy requires issuance of a notice of opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. Until that plan gains approval after the completion of the hearing, NRC regulations do not allow YAEC to conduct further "major" decommissioning activities at the Yankee NPS facility. The Commission directs YAEC to inform it promptly, but within no more than 14 calendar days, of the steps it is taking to come into compliance with the reinstated rule interpretation announced in this Decision.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

Docket No. 50-440-OLA-3
(ASLBP No. 90-605-02-OLA)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, *et al.*

(Perry Nuclear Power Plant,
Unit 1)

October 4, 1995

The Licensing Board grants the Intervenors' motion for summary disposition in this proceeding involving a license amendment to remove from the facility technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens.

STATUTORY CONSTRUCTION: GENERAL RULES

Because Appendix H of Part 50 is legislative in character, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning. 1A Sutherland, *Statutory Construction* § 31.06 (5th ed. 1992).

STATUTORY CONSTRUCTION: GENERAL RULES

Where the meaning of a regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. We must enforce the regulation as written.

STATUTORY CONSTRUCTION: GENERAL RULES

We may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written. *See 2A Sutherland, Statutory Construction* §46.01 (5th ed. 1992).

STATUTORY CONSTRUCTION: GENERAL RULES

To discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in a unambiguous one.

MEMORANDUM AND ORDER **(Ruling on Motions for Summary Disposition)**

In CLI-93-21, 38 NRC 87 (1993), the Commission reversed and remanded our ruling in LBP-92-4, 35 NRC 114 (1992), that Ohio Citizens for Responsible Energy (OCRE) and Susan L. Hiatt, lacked standing to intervene in this operating license amendment proceeding. Thereafter, we admitted the Intervenor's sole proffered contention. As admitted, that contention states:

The portion of Amendment 45 to License No. NPF-58 which removed the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule.

We then invited the Intervenor to file a motion for summary disposition on their contention and the Applicants to file a cross-motion for summary disposition. Those motions are now before us. The NRC Staff opposes the Intervenor's motion and supports the Applicants' cross-motion. For the reasons set forth below, we grant the Intervenor's motion for summary disposition and deny the Applicants' cross-motion for summary disposition.

A. Our earlier ruling on standing in LBP-92-4 set forth the regulatory background underlying this license amendment proceeding and we need not repeat that history here. It suffices to note that section 182a of the Atomic Energy Act (AEA), 42 U.S.C. § 2232(a), requires that an application for a nuclear power plant operating license include technical specifications for the facility. It further provides that the technical specifications become part of the operating license. The Commission's regulation, 10 C.F.R. § 50.36, implements the statutory directive and generally describe the types of items that must be included in the technical specifications.

In 1987 the Commission initiated a program designed to encourage licensees to improve voluntarily the technical specifications of their facilities. As part of that program, the Staff issued Generic Letter 91-01 (Jan. 4, 1991) providing guidance on the preparation of a license amendment to remove from the technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens. Specifically, the letter explains the function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to prevent reactor vessel embrittlement. It then states that it is duplicative to retain regulatory control over the schedule through the license amendment process because the Commission's regulations in 10 C.F.R. Part 50, Appendix H, § II.B.3 already require that a licensee obtain NRC approval for any changes to the withdrawal schedule. Finally, the generic letter provides that a licensee must commit to maintain the specimen withdrawal schedule in the updated safety analysis report.

The Intervenors' contention challenges the procedural consequences of removing the material surveillance specimen withdrawal schedule from the Applicants' technical specifications. They assert that such action deprives them of notice and an opportunity for hearing on future schedule changes in violation of the hearing provisions of section 189a of the Atomic Energy Act. In its summary disposition motion, the Intervenors state that their contention raises this single legal issue and that there are no factual matters in dispute.

Initially, the Intervenors assert that the withdrawal schedule traditionally has been part of the facility technical specifications and that, because of the hearing requirements of section 189a, technical specifications could be changed only after notice and an opportunity for hearing on the proposed change. Next, the Intervenors state that the amendment removing the withdrawal schedule from the technical specifications permits the Applicants to change the schedule without any notice or public participation even though 10 C.F.R. Part 50, Appendix H, § II.B.3 of the Commission's regulations requires the NRC to review and approve the changes to the withdrawal schedule. Thus, according to the Intervenors, the only effect of the amendment is to remove the public from the process in violation of section 189a.

In support of their argument, the Intervenorers rely upon *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir. 1984), for the proposition that section 189a requires hearings on material licensing issues and *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980), for the proposition that an action granting a licensee the authority to do something it otherwise could not have done under existing authority is a license amendment within the scope of section 189a. The Intervenorers then argue that the agency action at issue

violates the Atomic Energy Act in that changes to the reactor vessel material specimen withdrawal schedule, which the NRC's regulations make material by requiring prior approval by the NRC, will be de facto license amendments, but will not be formally labeled as license amendments and noticed as such in the Federal Register with opportunity for a hearing. . . .

Changes to the reactor vessel material specimen withdrawal schedule, with approval by the NRC, will give Licensees the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is in violation of the Atomic Energy Act.¹

In opposing the Intervenorers' summary disposition motion, the Applicants and the Staff agree that the Intervenorers' contention raises a single legal issue and that there are no factual matters in dispute. Both parties also take the same position regarding the substance of the Intervenorers' motion.

The Applicants and the Staff first argue that neither section 182a nor 10 C.F.R. § 50.36 requires that the withdrawal schedule be included in the facility technical specifications. Specifically, they assert that the statute and regulations give the agency broad discretion in determining what information should be included in technical specifications. Additionally, they assert that applicable agency precedents provide that information such as the withdrawal schedule, which is unrelated to conditions or limitations required to obviate an abnormal situation or an event giving rise to an immediate threat to public health and safety, should not be placed in the technical specifications. And, because the withdrawal schedule is not required by statute or regulation to be included in the facility technical specifications, the Applicants and the Staff maintain that there is no basis for requiring it to remain there even if it traditionally has been included in the technical specifications in the past.

Next, the Applicants and the Staff argue that the removal of the withdrawal schedule from the technical specifications, with the consequence that future changes to the schedule are without notice and an opportunity for a hearing, does not violate the hearing provisions of the Atomic Energy Act. For their part, the Applicants assert that section 189a requires a hearing only as to issues that are material to the agency's license issuance or amendment decision. They

¹ Motion for Summary Disposition (Feb. 7, 1994) at 4-5 [hereinafter Intervenorers' Motion].

argue that here the withdrawal schedule is not material to the agency's license issuance decision so it can be removed without running afoul of section 189a. In support of their argument, the Applicants do not independently seek to establish the immateriality of the withdrawal schedule to the license issuance decision. Rather, the Applicants rely solely upon the Staff's assertion contained in the Staff's answer to the Intervenor's motion that the withdrawal schedule is not material to the Staff's license issuance decision. Finally, the Applicants argue that, because the withdrawal schedule is not material to the license issuance decision, the schedule properly can be removed from the technical specifications and future changes in the schedule will not be de facto license amendments that are outside the Applicants' licensing authority.

Similarly, the Staff does not directly challenge the legal proposition asserted by the Intervenor that agency action granting a licensee permission to operate in ways in which it otherwise could not, is a licensing action within the meaning of AEA section 189a and that a change in the withdrawal schedule is such an action. Rather, the Staff argues that the removal of the withdrawal schedule from the facility technical specifications does not violate the hearing provisions of section 189a because all changes in the withdrawal schedule do not require prior agency approval and therefore such changes are not material to the agency's license issuance decision. Contrary to the Intervenor's argument that the withdrawal schedule is material to the agency's license issuance decision because the Commission's regulations require NRC approval of changes to the withdrawal schedule, the Staff asserts that the Intervenor has misinterpreted 10 C.F.R. Part 50, Appendix H, § II.B.3, and that the regulation is ambiguous. According to the Staff, the regulatory history of Appendix H, which it presents through a Staff affidavit and a Staff memorandum to the Commission, SECY-83-80 (Feb. 25, 1983), shows that the Commission intended to incorporate the applicable American Society for Testing and Materials (ASTM) Code into the regulation. Further, the Staff asserts the regulatory history establishes that changes to a withdrawal schedule that conform to the ASTM Code need not be submitted to, and approved by, the agency. Rather, the argument continues, only changes to the schedule that do not conform to the applicable ASME Code, and hence the regulation, "would likely require prior Commission approval in the form of a license amendment."² Thus, the Staff argues that the withdrawal schedule can be removed from the technical specification without violence to section 189a.

B. We need not belabor the arguments of the Applicants and the Staff that the removal of the withdrawal schedule from the facility technical specifications does not violate section 182a of the Atomic Energy Act or 10 C.F.R. § 50.36. The Intervenor concedes this point and readily admit that removal of the

² NRC Staff Response to Intervenor's Motion for Summary Disposition (Mar. 7, 1994) at 27 [hereinafter NRC Staff Response].

withdrawal schedule from the technical specifications does not violate any legal strictures.

The Intervenor's do not agree, however, with the Staff's additional assertion that this admission is fatal to their motion for summary disposition. According to the Staff, the fundamental issue here is whether the withdrawal schedule is required by law or regulation to be included in the facility technical specifications. If not, the Staff claims there can be no basis for requiring the withdrawal schedule to remain in the technical specifications and the Intervenor's summary judgment motion should be denied. The Intervenor's, on the other hand, argue that the focus of their contention is not on whether the withdrawal schedule remains in the technical specifications and that the "Intervenor's are not insisting that the schedule be included in the Technical Specifications."³ Rather, the Intervenor's assert that their contention deals with the loss of hearing rights on future changes to the withdrawal schedule in violation of AEA section 189a as a consequence of the challenged license amendment.

Contrary to the Staff's assertion, the Intervenor's concession, i.e., that the removal of the withdrawal schedule does not violate the Commission's regulations, is not fatal to their motion. Similarly, the issue whether the withdrawal schedule is required by law or regulation to be included in technical specifications is not the fundamental question before us. Rather, the only issue before us is the one presented by the Intervenor's contention. That contention focuses exclusively on the asserted violation of AEA section 189a hearing rights caused by future changes in the withdrawal schedule without notice and an opportunity for hearing due to the removal of the schedule from the facility technical specifications. As the Commission stated in reversing our earlier ruling that the Intervenor's lacked standing, "[w]ith the license amendment in effect, future changes to the withdrawal schedule no longer require notice and an opportunity for a hearing under section 189a."⁴ Thus, the fundamental issue before us is whether the lack of notice and opportunity for hearing on future changes to the withdrawal schedule violates the Intervenor's section 189a hearing rights. And, the parties' approach to this AEA section 189a hearing rights issue⁵ has further narrowed the question to whether a change in the withdrawal schedule is a material license issuance decision.

The Intervenor's argument in support of this question is premised on the legal proposition announced in *Union of Concerned Scientists v. NRC*, 735 F.2d at 1451, that section 189a requires a hearing on issues material to the agency's licensing issuance decision. From this premise, the Intervenor's argue that, because 10 C.F.R. Part 50, Appendix H, § II.B.3 requires revisions in

³Intervenor's Motion at 6.

⁴CLI-93-21, 38 NRC at 93.

⁵See *supra* pp. 140-41.

the withdrawal schedule to be approved by the NRC prior to implementation, changes in the schedule are material licensing decision issues and, as such, can only be made in conformance with section 189a after notice and an opportunity for hearing. The linchpin of the Intervenor's argument, therefore, is their assertion that the Commission's regulations require prior agency approval of any changes to the withdrawal schedule.

In opposing the Intervenor's position, the arguments of both the Applicants and the Staff accept the Intervenor's premise that material licensing issues trigger section 189a hearing rights. They both argue, however, that future changes to the withdrawal schedule are not material licensing issues. The Staff reaches this conclusion by arguing that the Intervenor has misinterpreted the Commission's regulations and that Appendix H does not require that all revisions to the withdrawal schedule be submitted to the agency for approval before implementation. The Applicant reaches this same conclusion by relying exclusively on the Staff's assertion that revisions in the schedule are not material. Thus, the crux of the Staff's opposition, and, in turn, the Applicant's opposition to the Intervenor's argument, is the Staff's interpretation of the Commission's regulations. Accordingly, resolution of the Intervenor's summary disposition motion rests upon the proper interpretation of Appendix H, § II.B.3. If the Intervenor's interpretation is correct, then their summary disposition motion must be granted and the Applicants' cross-motion must be denied. Contrarily, if the Staff's interpretation is correct, then the Intervenor's motion must be denied and the Applicants' cross-motion must be granted.

C. The starting point for analyzing any regulation is the language and structure of the regulation itself,⁶ here Appendix H of Part 50 titled "Reactor Vessel Material Surveillance Program Requirements." Because Appendix H is legislative in character, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning.⁷ Therefore, in construing any part or section of Appendix H, § II.B.3, that portion of the regulation may not be considered in isolation but must be considered in reference to the entire regulation so as to produce a harmonious whole.⁸ In doing so, we first turn to the text of the Commission's regulation.

Section I, of Appendix H, labeled "Introduction," begins by stating that the purpose of the material surveillance program is to monitor changes in the fracture toughness properties of ferritic materials in the beltline region of reactor vessels resulting from neutron irradiation and the thermal environment. It next indicates

⁶ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, review declined, CLI-88-11, 28 NRC 603 (1988). See *Pennsylvania Welfare Department v. Davenport*, 495 U.S. 552, 557-58 (1990).

⁷ 1A Sutherland, *Statutory Construction* § 31.06 (5th ed. 1992).

⁸ 2A *id.* § 46.05.

that fracture toughness test data from the material specimens in surveillance capsules periodically withdrawn from the reactor are to be used as described in Appendix G of Part 50. That Appendix specifies, inter alia, the fracture toughness requirements for reactor vessels. The introduction for Appendix H concludes by stating that editions E 185-73, -79, and -82 of the ASTM Code "Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels" referenced in Appendix H have been approved for incorporation by reference by the Director of the *Federal Register* and that notice of any changes to the material incorporated by reference will be published in the *Federal Register*.

Section II of the regulations, titled "Surveillance Program Criteria," first provides in paragraph A, that no surveillance program is required for reactor vessels for which it can be conservatively demonstrated that peak neutron fluence at the end of the design life of the vessel will not exceed 10^{17} n/cm². For reactor vessels that cannot meet this requirement, paragraph B provides that they must have their beltline materials monitored in accordance with Appendix H.

Subparagraph B.1 then states:

That part of the surveillance program conducted prior to the first capsule withdrawal must meet the requirements of the edition of ASTM E 185 that is current on the issue date of the ASTM Code to which the reactor vessel was purchased. Later editions of ASTM E 185 may be used, but including only those editions through 1982. For each capsule withdrawal after July 26, 1983, the test procedures and reporting requirements must meet the requirements of ASTM E 185-82 to the extent practical for the configuration of the specimens in the capsule. For each capsule withdrawal prior to July 26, 1983 either the 1973, the 1979, or the 1982 edition of ASTM E 185 may be used.

Subparagraph B.2 then details the various requirements for the placement and attachment of surveillance capsules in the reactor vessel followed by Subparagraph B.3, which states:

[a] proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The proposed schedule must be approved prior to implementation [emphasis supplied].

Finally, paragraph C of section II addresses the requirements for integrated surveillance programs for multiple reactors. The last part of Appendix H, section III, titled "Report of Test Results," sets forth the various reporting requirements for the surveillance program.

In support of their argument that changes to the withdrawal schedule are material licensing issues, the Intervenor's argue simply that "the plain language of Appendix H requires licensee submittal of the schedule and prior NRC approval

of the schedule before implementation.”⁹ The Staff, on the other hand, argues that the language of section II.B.3 is ambiguous and that the meaning of the provision must be found in its regulatory history. Specifically, the Staff asserts that the regulation “does not explicitly address changes to an approved schedule, nor does it indicate that prior approval is required for any change to an approved schedule, no matter how insignificant.”¹⁰ As previously mentioned, the Staff claims that the regulatory history of Appendix H indicates that only changes in the withdrawal schedule that do not conform to the applicable ASTM Code need to be approved by the agency prior to implementation.

Contrary to the Staff’s argument, however, its claim that Appendix H is ambiguous cannot be squared with the plain meaning of the regulation. On its face, section II.B.3 clearly and unambiguously states that “[a] proposed withdrawal schedule must be submitted” to the agency and “[t]he proposed schedule must be approved prior to implementation.” This language cannot reasonably be understood to mean anything other than what it plainly says, i.e., the NRC must approve proposed schedules before they are implemented.¹¹ As the Supreme Court has stated

in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”¹²

Thus, where, as here, the meaning of the regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. Rather, we must enforce the regulation as written. Similarly, we may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written.¹³ Further, to discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one.

In this instance, however, the Staff would disregard the plain meaning of the regulation to invent an ambiguity where none exists. It does this in a transparent

⁹ Intervenor’s Answer to NRC Staff Response to Intervenor’s Motion for Summary Disposition and Licensees’ Cross Motion for Summary Disposition (Apr. 5, 1994) at 4.

¹⁰ NRC Staff Response at 19-20.

¹¹ Cf. *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1310 (D.C. Cir. 1984), *vacated in part and reh’g en banc granted on other issues*, 760 F.2d 1320 (1985); *aff’d en banc*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986).

¹² *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); (citations omitted)). See *Reves v. Ernst & Young*, 122 L. Ed. 2d 525, 535 (1993); *United States v. Clark*, 454 U.S. 555, 560 (1982); *Howe v. Smith*, 452 U.S. 473, 483 (1981).

¹³ See 2A *Sutherland*, *supra*, § 46.01.

attempt to avoid the consequences of the plain meaning rule, thereby permitting it to delve into regulatory history in an attempt to support an argument that section II.B.3 of Appendix H only requires agency approval of proposed withdrawal schedules that differ from the schedules contained in the incorporated ASTM Code. According to the Staff, the regulation is ambiguous because it does not explicitly address changes, including insignificant changes, to an already approved schedule. To make the regulation conform to its ambiguity argument, however, the Staff necessarily reads a word into section II.B.3 that is not there. It seeks, in effect, to insert the word "initial" before the term "proposed withdrawal schedule" in the first sentence of the regulation to convey the meaning that there only can be one withdrawal schedule for a reactor vessel and that any change or revision to that one schedule, or even a new subsequent schedule, is an amendment to the single, original schedule. Only by this unwarranted insertion of a word into the regulation can it rationally be argued that the regulation is ambiguous.

But neither any imagined word nor any ambiguity is in the regulation. When the words of section II.B.3 are given their ordinary meaning, the regulation speaks to the very circumstances the Staff recites. In simple and straightforward language, the regulation states that a proposed withdrawal schedule must be submitted to the Staff and approved before implementation. By definition, a schedule that is "proposed" is one that is offered "for consideration, discussion, acceptance, or adoption."¹⁴ Thus, under its literal terms, a new schedule or any change to an already implemented schedule, significant or otherwise, must be considered a "proposed" schedule and, as such, must be submitted to the agency and approved prior to implementation. This is what the plain words of the regulation say and this is what it means. Accordingly, section II.B.3 is unambiguous and there is no need to consult the regulatory history of the provision to discern its meaning as the Staff argues.

Nonetheless, assuming *arguendo* that the language of this regulation is ambiguous so that we may turn to the regulatory history of the provision to aid in its interpretation, we still do not find the Staff's argument persuasive. As originally promulgated, Appendix H specified the number of capsules and the specific withdrawal schedules to be followed.¹⁵ It also provided that "[p]roposed withdrawal schedules that differ from those specified in paragraphs a. through f. shall be submitted, with a technical justification therefor, to the Commission for approval. The proposed schedule shall not be implemented without prior Commission approval."¹⁶ In 1983, the Commission amended the regulation

¹⁴ *Webster's Third New International Dictionary* 1819 (1971).

¹⁵ See 10 C.F.R. Part 50, Appendix H, § II.C.3.a-f (1974).

¹⁶ *Id.* at 3.g.

essentially to its current form.¹⁷ Specifically, it deleted the withdrawal schedules from the original version and in their place incorporated by reference in section II.B the various editions of the ASTM E 185 Code, including Table 1 of each of those editions that contains a withdrawal schedule.¹⁸ At the same time, the Commission changed the provision dealing with agency approval of nonconforming schedules to state that “[a] proposed withdrawal schedule must be submitted with a technical justification therefore to the Director, Office of Nuclear Reactor Regulation, for approval. The proposed schedule must be approved prior to implementation.”¹⁹ Subsequently, in 1986 the latter provision was again amended to its current form when the Commission, by referencing 10 C.F.R. § 50.4, sought to standardize document submission requirements throughout the agency’s regulations.

The Staff is correct that the 1983 amendment of Appendix H incorporated by reference the various editions of the E 185 ASTM Code (including Table 1 of those editions) into the regulation. The introduction to Appendix H and the agency response to certain public comments on the proposed rule that are part of the rulemaking record²⁰ make that clear. There is absolutely no regulatory history, however, to support the remainder of the Staff’s argument that Appendix H, § II.B.3 means that only those changes in a proposed withdrawal schedule that do not conform to the applicable ASTM Code E 185 Table 1 need to be approved by the agency before implementation.²¹ The Commission’s 1983 deletion of specific withdrawal schedules from the original regulation and its incorporation by reference of various ASTM Code withdrawal schedules — a substitution of qualitatively similar but quantitatively different schedules — does not advance the Staff’s argument. The Staff’s argument overlooks the fact that along with this change the Commission deleted the provision that specifically limited any requirement for prior agency approval of schedules only to those that differed from the schedules set forth in the regulation and substituted a new comprehensive requirement that the agency approve *all* proposed schedules

¹⁷ See 10 C.F.R. Part 50, Appendix H (1984).

¹⁸ See Proposed Rule, 45 Fed. Reg. 75,536, 75,537 (1980) (noting deletion of withdrawal schedules from regulation “because the requirements for withdrawal schedules contained in the 1979 edition of ASTM E 185 provide satisfactory criteria for scheduling surveillance information gathering”).

¹⁹ 10 C.F.R. Part 50, Appendix H, § II.B.3 (1984).

²⁰ See NRC Staff Response at 23 & n.32.

²¹ In support of its argument dealing with the regulatory history of Appendix H, the Staff partially relies upon an affidavit of several staff members. See, e.g., NRC Staff Response at 20 (“[s]ome of the regulatory history for Appendix H is provided in the attached affidavit”). To the extent that the affidavit contains more than a recitation of primary sources of regulatory history, i.e., final rules, proposed rules, statements of considerations, and matters in the rulemaking record, it is not a legitimate source of regulatory history. Only contemporaneous regulatory history can reflect the intent of the Commission that promulgated the regulation. See, e.g., *Resolution Trust Corp. v. Cityfed Financial Corp.*, 57 F.3d 1231, 1242 (3rd Cir. 1995). Subsequent revisionist history is not valid regulatory history. See *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (“Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously. . . .”) (Scalia, J., concurring in part).

prior to implementation.²² The amendment of this provision imparts a meaning to Appendix H, § II.B.3 exactly the opposite of the meaning the Staff asserts. Indeed, only if the 1983 amendment of the nonconforming schedule provision had retained the gist of its original form would the Staff argument have any plausibility. Thus, even if we accept for the sake of argument that section II.B.3 is ambiguous so that we may turn to the regulatory history to aid in its construction, the Staff's interpretation finds no support there. In sum, the text of section II.B.3 of Appendix H, even when read in conjunction with the selected portions of regulatory history relied upon by the Staff, simply cannot be read reasonably to mean that only those proposed withdrawal schedules that do not conform to the applicable ASTM Code need be approved by the agency prior to implementation. Moreover, as should be obvious, the Commission's policy on improving facility technical specifications cannot alter the plain language or meaning of Appendix H.²³

D. For the foregoing reasons, the Intervenor's motion for summary disposition is *granted*. Correspondingly, the Applicants' cross-motion for summary disposition is *denied*. Our grant of the Intervenor's motion, however, does not invalidate the license amendment at issue or require that the withdrawal schedule be returned to the technical specifications. The Intervenor is not insisting that the withdrawal schedule be included in the facility technical specifications. Rather, the Intervenor's contention only challenges the consequences of the amendment that would deprive them of notice and an opportunity for hearing on any future changes to the withdrawal schedule. Because Appendix H, § II.B.3 currently requires that a proposed withdrawal schedule be approved

²² See 48 Fed. Reg. 24,008, 24,008 (1983) (where in statement of considerations accompanying final rule the Commission notes that it changed the reporting requirement in part III of the regulation from a proposed 90 days of capsule withdrawal to one year from that time "because capsule withdrawal schedules [already] must be approved by the Director, Office of Nuclear Reactor Regulation, as provided in paragraph II.B.3. of Appendix H").

²³ Additionally, we note that the Staff's interpretation before us of Appendix H, § II.B.3 conflicts with its interpretation of that same provision in Generic Letter 91-01. The letter to all NRC reactor license holders accompanying the generic letter states that "Section II.B.3 of Appendix H to 10 CFR Part 50 requires the submittal to, and approval by, the NRC of a proposed withdrawal schedule for material specimens before implementation. Hence, the placement of this schedule in the [technical specifications] duplicates the controls on changes to this schedule that have been established by Appendix H." Letter to all Holders of Operating Licenses or Construction Permits for Nuclear Power Reactors from James G. Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation (Jan. 4, 1991). In like vein, the generic letter itself states that "[t]he removal from the [technical specifications] of the schedule for the withdrawal of reactor vessel material surveillance specimens will not result in any loss of regulatory control because changes to this schedule are controlled by the requirements of Appendix H to 10 CFR Part 50." Generic Letter 91-01 (Jan. 4, 1991) at 2. See also CLI-93-21, 38 NRC at 89 (where the Commission characterizes the generic letter as indicating that "the Commission's regulations under 10 CFR Part 50, Appendix H, § II.B.3, already mandate prior NRC approval of any changes to the withdrawal schedule"). In its response to the Intervenor's summary disposition motion, the Staff euphemistically describes in a footnote its earlier conflicting interpretation of Appendix H, § II.B.3 by stating that "[i]n hindsight, it appears that [Generic Letter] 91-01 does not express the Staff's views on this matter with precision." NRC Staff Response at 27 n.33. The Staff also indicates that it is developing clarification for the statements in the generic letter and considering whether a rulemaking is necessary. No such clarification or rulemaking has occurred to date. Needless to say, it appears that the Staff's interpretation of Appendix H, § II.B.3 in the generic letter is correct.

by the agency prior to implementation, any such requested change is a request for a material licensing action that triggers section 189a hearing rights.²⁴ Thus, as long as this regulatory provision remains in its current form, the grant of the Intervenor's motion requires that the agency treat any future proposed withdrawal schedule as a license amendment and provide notice and an opportunity for a hearing in accordance with section 189a of the Atomic Energy Act.

With our resolution of these motions for summary disposition, there are no further matters for decision in the proceeding and the proceeding is *terminated*. In accordance with 10 C.F.R. § 2.786(b)(1), Commission review of this Memorandum and Order may be sought by filing a petition for review within 15 days after service of this Memorandum and Order. Requirements regarding the length and content of a petition for review and the timing, length, and content of an answer to such a petition are set forth in 10 C.F.R. § 2.786(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 4, 1995

²⁴ See *Union of Concerned Scientists v. NRC*, 735 F.2d at 1451. See generally *Citizens Awareness Network v. NRC*, 59 F.3d 284, 294 (1st Cir. 1995).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

Thomas D. Murphy, Alternate Board Member

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

October 26, 1995

MEMORANDUM AND ORDER
(Approval of Settlement Agreement)

Pending before the Board is a proposed Settlement Agreement (hereinafter Agreement) submitted by the Nuclear Regulatory Commission (Staff) and Sequoyah Fuels Corporation (SFC).¹ Native Americans for a Clean Environment and the Cherokee Nation (Intervenors) filed objections to the Agreement, and replies to the objections have been submitted by the Staff and SFC.² The Board

¹ Joint Motion for Approval of Settlement Agreement (Aug. 24, 1995).

² Intervenors' Response to Joint Motion (Sept. 8, 1995); NRC Staff Reply to Intervenors' Response (Sept. 22, 1995); SFC's Reply to Intervenors' Response (Sept. 15, 1995). In the interest of completeness, the Board grants, and considers herein, the Intervenors' Motion for Leave to Reply to SFE and NRC Staff (Sept. 25, 1995) and SFC's Motion for Leave to Respond to Intervenors' Motion (Sept. 29, 1995).

received objections to the Agreement submitted by the Tulsa District Corps of Engineers to the NRC Staff.³ SFC, Intervenor, and the Staff filed comments on the Corps of Engineers' concerns. The Staff's counsel has also forwarded a letter from the Office of the Attorney General of Oklahoma requesting additional time to review the Agreement.⁴

BACKGROUND

This proceeding involves an NRC October 15, 1993 Order to SFC and its parent corporation, General Atomics (GA), concerning fulfilling a regulatory obligation for ensuring decommissioning funding of SFC's licensed facilities located at Gore, Oklahoma. The Agreement, appended hereto, proposes to release SFC from liability under the Order and the pending litigation in exchange for SFC's agreement pledging all its net assets and revenues to the decommissioning completion.

Intervenor's objections are based on four assertions: first, that due to a provision in the Agreement that SFC's obligations thereunder are "subject to the rights of senior lien-holders," the Board should authorize discovery concerning the particulars of such liens to prevent creditors from plundering SFC's assets. Intervenor, in particular, allege that a lien involving a note to the Kerr-McGee Corporation (Kerr-McGee) does not appear to be the sole responsibility, if any, of SFC (Intervenor's Response to Joint Motion at 4-8); second, the Agreement does not protect from SFC creditors funds from two accounts (decommissioning reserve and escrow) that have been previously set aside for decommissioning (*id.* at 8-14); third, that a review of the "reasonableness" of SFC's business contractual arrangements with an organization, ConverDyn, needs to be undertaken (*id.* at 14-15); and fourth, since the Agreement, based on SFC's commitments thereunder, rescinds the October 15, 1993 NRC Order against it, the NRC should not permit SFC to be exempt from future assessments for decommissioning in the event SFC resumes business operations. Nor should any successors in title to SFC's property be absolved from liability for decommissioning funding (*id.* at 14-16).

The Corps of Engineers, Tulsa District, complains that the Agreement limits financial commitments by SFC and GA for decommissioning costs and would foreclose future action on enforcement of such costs in the event of a failure to fully fund remediation of federally owned areas adjacent to the SFC facility. These areas presumably are under the jurisdiction of the Corps of Engineers. On behalf of the Department of Wildlife Conservation, the Oklahoma Attorney

³ Letter, Sanford to NRC Counsel (Sept. 11, 1995).

⁴ Letter, Hale to NRC Counsel (Sept. 29, 1995).

General's Office expresses a concern that the Agreement may permit creditors to divert SFC resources and its letter hints of SFC's financial difficulty and a possible bankruptcy plan.

DISCUSSION

The Agreement defines SFC's net assets as the company's gross assets, subject to SFC's obligations to ConverDyn and the rights of senior lien-holders; net revenues are defined as SFC's gross revenues after paying necessary expenses subject again to SFC's obligations to ConverDyn and the rights of senior lien-holders. See Agreement, *Definitions*, ¶¶ 1.d and 1.e. The Staff and SFC stipulate that SFC cannot provide funds for decommissioning in excess of its net assets and net revenues, as those terms are defined, and cannot obtain financial assurances for decommissioning beyond pledging its net assets and revenues. See Agreement at 1 (p. 160, *infra*). Intervenors' first question concerning the possible plundering of SFC's revenue and assets by creditors raises the issue as to what SFC can commit for decommissioning costs after it pledges all its possessions in terms of assets or revenues. Intervenors concentrate on a lien on SFC's property supporting a Kerr-McGee promissory note which is also an obligation of two other subsidiaries of GA. See Intervenors' Reply to SFC and NRC Staff at 2-6. In Intervenors' view, GA might influence SFC to pay the indebtedness to Kerr-McGee alone thus diverting funds required for decommissioning for an obligation partially owed by GA's other subsidiaries. *Id.* at 3.

Intervenors do not present arguments of substance here. Whatever the legal status of creditors' claims against SFC, they are unaffected by the terms of the Agreement proposed. Such claims, if any, can only be resolved by action between the claimant and SFC. The NRC is neither impacted by nor involved in the resolution of other parties' legal disputations. And the same conclusion holds for the arguments advanced concerning the SFC debt to Kerr-McGee.⁵ It is immaterial to the consideration of the Agreement before us. The legal rights and duties related to this obligation exist regardless of the action contemplated by the proposed Agreement and have no relevance to whether the Agreement should be ratified. The NRC is not left helpless in the event of any deception on the part of SFC. As the Staff points out, any transfer of SFC assets and revenues to claimants who had no legal entitlement to them would subject SFC to "an enforcement action (by the NRC) . . . for violating the Settlement Agreement."

⁵ Although not relied on for this opinion, it should be noted that SFC has submitted a letter reflecting Kerr-McGee's intention not to seek legal action against the SFC until after the pending Settlement Agreement is approved and implemented and decommissioning completed. SFC's Motion for Leave to Respond to Intervenors' Motion, Attachment 1.

Under the Agreement, SFC must commit all of its net assets and revenues to the completion of decommissioning. See Staff Reply to Intervenor's Response at 4-5. It is also noted that SFC is obligated to provide the Staff with copies of annual audited financial statements as well as make financial records available for Staff inspection. Agreement at 5 (p. 164, *infra*).

The reasoning underlying the Board's conclusions concerning Intervenor's first objection, *supra*, also negates any validity to the second — that concerning the protection of two decommissioning accounts from the claims of creditors. Both the Staff and SFC point out that the Intervenor misconstrue the nature of these accounts and that neither is affected in any manner by the Settlement Agreement. Suffice it to state that these accounts are required to be established pursuant to SFC's license and NRC regulations, and neither is impacted by the Agreement. The net assets and revenues of SFC are to be utilized for decommissioning expenses under the Agreement and, if any funds considered in either or both reserve accounts are secured for decommissioning, such allocations are not changed by the pending Agreement. The Agreement is not intended to, nor does it, permit any financial allocations or obligations for decommissioning previously committed by SFC to be obviated by the terms therein. The Agreement and SFC and Staff statements concerning this matter make it evident that any monies committed or obligated for such purposes would simply become part of the net assets and revenues that, after the payment of reasonable and necessary expenses, are pledged by the Licensee to decommissioning. See NRC Staff's Reply to Intervenor's Response at 5-7; SFC's Reply to Intervenor's Renewed Opposition at 4-9.

In regard to Intervenor's third argument, that the "reasonableness" of SFC's arrangements with ConverDyn be reviewed, we fail to understand how the Board can undertake an analysis of the merits of SFC's business transactions or what objective such scrutiny would serve. Intervenor offer no suggestion as to the criteria the Board should utilize in any evaluation of SFC's contractual arrangement with ConverDyn. In the Agreement, SFC commits itself to "diligently pursue" its contractual rights with ConverDyn until decommissioning has been satisfactorily completed. And it should be noted that the Staff retains enforcement authority to compel SFC's compliance with the Agreement. See Agreement at 4 and 6 (pp. 163 and 164-65, *infra*).

Finally, Intervenor's contentions raise the specter of the Agreement failing to obligate SFC for decommissioning expenses, if the Corporation pursues other profitable business activities, and that successors in title to SFC's property would be absolved from decommissioning indebtedness. Intervenor's first argument has no foundation since it is clear, as the Staff points out, that the Agreement reaches SFC's present and future assets and revenues from all sources and, with regard to the second, no provision of the Agreement immunizes any successors in title

from decommissioning expenses. See Staff Reply to Intervenors' Response at 8-9.

As indicated, *supra*, the Tulsa District Corps of Engineers in correspondence to the Staff has submitted objections to the proposed Agreement. Although the letter purports to reflect the participation of the Corps as a partner in "any Settlement Agreements," the Tulsa District is not a party in this proceeding. Consequently, the allegations contained in this correspondence cannot be considered in the evaluation of the Agreement. It does appear that a misunderstanding may exist on the part of the District Office concerning the provisions of the Agreement, since, despite allegations to the contrary, the Agreement does provide for financial commitments on the part of SFC and does not exempt General Atomics from the NRC October 25, 1993 Order. With respect to the letter addressed to NRC Counsel from the Oklahoma State Attorney General's Office, the correspondence indicates, on behalf of the State's Department of Wildlife Conservation, concern over certain terms of the Agreement and requests additional time to consider its effect on State interests. Similar to the opinion expressed above, the State of Oklahoma is not a party to the proceeding herein and, consequently, the Board lacks jurisdiction to review the concerns raised in the State's communication.

In light of the foregoing, and all of the circumstances of this proceeding, the Board finds no basis for disapproving the proposed Agreement. A settlement of contested proceedings has long been encouraged by the Commission. See 10 C.F.R. §§ 2.759, 2.1241. In guidance to boards on licensing proceedings, the Commission's policy statement encourages boards to conduct settlement conferences for the purpose of resolving contentions by negotiation. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981).

In evaluating agreements on enforcement orders, the Staff's position for settlement, under the Commission's prescriptions of 10 C.F.R. § 2.203, is required to be provided "due weight" by the Board but if required in the "public interest," an adjudication of the issues involved therein may be ordered. The premise underlying the terms of the Agreement appears to be that the agency will receive from SFC all that the NRC would be entitled to receive in the absence of an agreement and a decision issued in NRC's favor. Even in the event of the financial failure of the organization producing a bankruptcy filing as intimated by the State of Oklahoma correspondence, *supra*, the Staff would be in no worse position than a bankruptcy filing during or after a decision in the present litigation. The result would be the same since the agency would receive from the licensee all that a Bankruptcy Court Judge would allow under existing bankruptcy laws. It should be noted that the possibility of bankruptcy filings are always weighed in the development of settlement agreements and we have

no reason to suspect its impact — or lack thereof — has not been evaluated here.⁶

In summary, the avoidance of protracted and needless litigation is in the public interest and an objective of settlement negotiations.⁷ The appropriateness of the Agreement submitted for our approval should be viewed in the light of the allegations made by the Staff in the October 15, 1993 Order that forms the foundation of this proceeding. The fundamental charge of that order is that the funding plan SFC proposes for decommissioning its facility at Gore, Oklahoma, is not adequate to meet the Commission's regulations and that GA, as an active parent organization, is responsible for providing for any deficiencies therein. Although settlement negotiations are currently being undertaken with GA,⁸ there is no waiving of the agency's claims against GA expressed or implied by the terms of the Agreement before us. Accordingly, since the charges against GA still exist and SFC pledges to furnish all of its assets and revenues that it would have to provide if a judgment were to issue against it in the proceeding, we cannot conclude that there is an issue herein that requires an adjudication in the public interest.

Pursuant to the Commission's regulations (10 C.F.R. § 2.203), and upon consideration of the Joint Motion for Approval of the Settlement Agreement, we find that settlement of this matter as to Sequoyah Fuels Corporation's participation as a party, as proposed by the parties to the Settlement Agreement should be approved. Accordingly, upon consent of the parties to the Settlement Agreement, and giving due weight to the views of other parties to this proceeding, the Settlement Agreement is hereby approved and incorporated into this Order, pursuant to section 63 and subsections (b), (i), and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2093, 2201(b), 2201(i), and 2201(o), and is subject to the enforcement provisions of the Commission's regulations and Chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* Sequoyah Fuels Corporation is hereby dismissed as a party to this proceeding.

In accordance with 10 C.F.R. §§ 2.760 and 2.786, this Order constitutes the final action of the Commission 40 days after the date of issuance, unless any party petitions for Commission review or the Commission takes review of the decision *sua sponte*. Commission review of this Order may be sought by filing a petition for review within fifteen (15) days after service of this Decision. Any other party to the proceeding may, within 10 days after service

⁶It should not be expected that environmental protection of the public health and safety can be vitiated by bankruptcy proceedings. See *Midlantic Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

⁷The Staff indicates that settlement negotiations and deliberations have consumed a 6-month period of time. See NRC Staff Reply to Intervenor's Response to Joint Motion for Approval of Agreement at 1.

⁸See Board Order Extending Discovery Stay (Oct. 13, 1995).

of a petition for review, file an answer supporting or opposing Commission review. Requirements regarding the length and content of a petition for review or an answer to such petition are specified in 10 C.F.R. § 2.786(b)(2)-(3).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD⁹

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 26, 1995

Separate Statement by Bollwerk, J.

Because I have concerns about certain aspects of the proposed settlement agreement between Sequoyah Fuels Corporation (SFC) and the NRC staff, I am not prepared at present to make the requisite "public interest" finding pursuant to 10 C.F.R. § 2.203. Specifically, I would ask for additional clarification from SFC and the staff regarding several matters.

I. STAFF ENFORCEMENT AUTHORITY UNDER THE AGREEMENT

Paragraph 7 of the agreement states that "[n]othing in this Agreement shall limit the NRC Staff's ability to take appropriate enforcement action to enforce SFC's compliance with this Agreement" In responding to concerns expressed by intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation regarding the improper dissipation of SFC assets and

⁹ Copies of this Order are being sent this date to counsel for Sequoyah Fuels Corporation, General Atomics, and Intervenors NACE and the Cherokee Nation by facsimile transmission and to Staff counsel by E-mail transmission through the agency's wide area network system.

revenues,¹ both SFC and the staff suggest that this provision gives the staff the necessary authority to rectify any problems in this regard. See SFC's Reply to Intervenor's Opposition to Settlement Agreement (Sept. 15, 1995) at 6-7 [SFC Reply]; NRC Staff's Reply to Intervenor's Response to Joint Motion for Approval of Settlement Agreement (Sept. 22, 1995) at 4-5 [Staff Reply]. According to the staff, this clause provides ample protection because it allows the staff to "bring an enforcement action against SFC seeking sanctions for violating the Settlement Agreement if SFC did not seek the return of such funds to be added to its pool of assets or revenues." Staff Reply at 5.

The October 1993 enforcement order at issue in this proceeding makes it apparent that an essential staff concern is the possibility that SFC revenues and assets will ultimately be insufficient fully to cover the costs of decommissioning SFC's Gore, Oklahoma facility. See 58 Fed. Reg. 55,087, 55,089 (1993). Consequently, a central component of the public interest assessment of the SFC/staff settlement agreement now before the Board must be the degree to which the agreement ensures that the already limited assets and revenues of SFC will be protected from inappropriate dissipation so as to be available for decommissioning. And if, as the staff's own description suggests, staff enforcement authority does not reach beyond requiring SFC to ask for the improperly disbursed funds back, a legitimate question seemingly exists about the degree to which the proposed agreement serves the public interest function of properly maintaining the pool of decommissioning funds.²

Undoubtedly, this potential problem of improper disbursement and recapture of SFC funds would be of considerably less concern if the agency has the authority to maintain an action to recover improperly disbursed funds from the party receiving those funds. Whether this authority exists is, at best, problematic. Therefore, before approving the agreement, I would explore with the parties the question of the agency's authority in this regard. And, if it turns out that the agency's enforcement arsenal does not include this authority, the sufficiency of the staff's oversight efforts relative to the reasonableness of SFC expenditures and disbursements likely should be the subject of further scrutiny as well.³

¹ Although none of the parties have raised or addressed the point, as a procedural matter there is a question whether the concerns about the settlement agreement expressed by NACE and the Cherokee Nation in response to the joint motion for approval of the settlement agreement should be considered as, and assessed under the standards governing the admissibility of, late-filed contentions. See 10 C.F.R. § 2.714(a)(1).

² In considering the sufficiency of the protection afforded by the proposed agreement, the constraints on SFC's assets and revenues suggests that any staff enforcement action against SFC for improperly disbursing assets is not likely to produce more decommissioning funds.

³ Paragraph 5 of the proposed agreement provides that the staff will have the right to receive SFC annual audited financial statements and to have reasonable access to SFC financial records and books for audit purposes. The staff has declared that it did not seek further measures relating to oversight of SFC expenditures, such as prior staff approval, because of a concern about intrusion into the management of the daily affairs of SFC. See Staff Reply
(Continued)

II. BANKRUPTCY AND NOTICE TO THE STAFF

In responding to intervenor concerns about the dissipation of assets to repay the claims of SFC creditors, SFC indicates that it has few secured creditors. The largest appears to be the Kerr-McGee Corporation, which holds a \$10.6 million note giving Kerr-McGee a lien on SFC's property, plant, and equipment. See SFC Reply at 3-4. While SFC seemingly is in default on this note because it has not made any principal or interest payments since August 1993, Kerr-McGee apparently will not make any attempt to foreclose on or otherwise enforce the note until decommissioning is completed.⁴

The degree to which SFC's response puts these intervenor concerns to rest is tempered by a recent submission from the State of Oklahoma that SFC may be considering bankruptcy. The Board has not provided the parties with an opportunity to respond to the State's suggestion, leaving me unable fully to assess its validity.⁵ On its face, however, it raises the specter that, because the agency seeking decommissioning funds in a bankruptcy proceeding may well be only an unsecured creditor, see *Dollar Savings Association v. Eisen (In re METCOA, Inc., fdba The Pesses Co.)*, Case No. B83-00415, Adv. No. B85-0092, slip op. at 17-18 (Bankr. N.D. Ohio Nov. 18, 1986), some SFC assets will fall beyond the agency's reach for dedication to funding decommissioning activities.

Current agency regulations require that a source materials licensee like SFC need only inform the staff of a bankruptcy after it has occurred. See 10 C.F.R. § 40.41(f). Prior to approving this agreement, however, I would seek information from SFC and the staff regarding the likelihood of bankruptcy. At the same time, I would explore with the staff the question of whether, if the agreement provided for reasonable prior notice from SFC of its intent to file for bankruptcy, the staff

at 5 n.2. If the agency has no authority to recapture improperly disbursed funds, then the question of whether the staff oversight mechanisms included in the agreement are adequate seemingly is an issue that merits further exploration.

⁴ As part of an additional reply filing, SFC supplied a letter from a senior Kerr-McGee official stating that Kerr-McGee has no plans to initiate collection on the \$10.6 million note until decommissioning is completed. See SFC's Reply to Intervenors' Renewed Opposition (Sept. 29, 1995) at 3-4. Kerr-McGee's action in this regard is not particularly surprising, given that foreclosure on the note likely would bring the SFC property back into Kerr-McGee's hands, along with the accompanying responsibility for clean-up of contamination on the property.

⁵ This submission is in a September 29, 1995 letter from the Attorney General of Oklahoma to staff counsel, a copy of which was provided to the Board by staff counsel by letter dated October 5, 1995.

The State of Oklahoma is not a party to this proceeding. Nonetheless, under the agency's rule governing interested governmental entities, it readily could become a participant in this case. See 10 C.F.R. § 2.715(c). Moreover, the recognized limitation that the State must "take the proceeding as it finds it," see *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980), likely would not preclude the State from commenting on the proposed settlement. Particularly in the context of the Board's "public interest" determination regarding the pending settlement proposal, giving the State's concerns minimal recognition by affording the other parties an opportunity to address them does not seem untoward.

would be able to take any action prior to bankruptcy that would provide it with a preferential claim to secure SFC assets for the purpose of decommissioning.

III. GLOBAL SETTLEMENT

General Atomics (GA), the other object of the October 1993 enforcement order, and the staff currently are engaged in negotiations in an attempt to settle the staff's claims that GA is jointly and severally liable for decommissioning funding for the Gore facility. Based on the information now before me, I am unable to conclude that action now to approve a separate settlement between SFC and the staff — as opposed to waiting to give "global" consideration to all settlements encompassing GA, SFC, and the staff — is in the public interest.

Putting aside any jurisdictional questions about the extent and nature of GA control over SFC, there is a clear linkage between GA and SFC by reason of their parent-subsidary relationship and the involvement of GA and its subsidiaries, including SFC, in the ConverDyn partnership agreements under which a substantial portion of any SFC revenue purportedly is to be generated. In light of these inter-relationships, it would seem that the Board's best opportunity fully to understand and assess the implications of any staff settlement with either GA or SFC would come when the Board has before it staff settlements with both parties that would resolve this case in toto.⁶

Because of this concern, before approving this settlement agreement I would request additional briefing by the parties on the question of why delaying a Board ruling on the SFC/staff agreement until the conclusion of the ongoing settlement negotiations between GA and the staff is inconsistent with the public interest in ensuring that the settlements reached in this proceeding provide adequate funding for decommissioning SFC's Gore facility.

⁶ Also in this regard, in contrast to the stated conclusion in the staff's October 1993 order that the ConverDyn agreements were inadequate to fulfill the decommissioning funding requirements of 10 C.F.R. §§ 40.36, 40.42, in the absence of funding commitments from GA, *see* 58 Fed. Reg. 55,091-92, it is not now apparent whether the SFC/staff agreement is consistent with these regulatory requirements. The agreement does not provide any specific decommissioning funding figure for which SFC is liable, whether through the ConverDyn agreements or otherwise, and GA's contribution to decommissioning funding, if any, is still indeterminate because of the pendency of settlement negotiations. By decoupling the settlement agreements of GA and SFC, the Board has not abandoned its prerogative, in assessing whether the public interest will be served by any GA settlement, to consider whether the decommissioning funds generated under the SFC settlement agreement and the GA settlement agreement, in combination, will cover the total costs of decommissioning the Gore facility and the ramifications of any funding shortfall.

ATTACHMENT

SETTLEMENT AGREEMENT

THIS AGREEMENT is made by and between Sequoyah Fuels Corporation ("SFC") and the Staff of the United States Nuclear Regulatory Commission ("NRC" or "Commission"), to wit:

WHEREAS, on October 15, 1993 the Commission issued an order to SFC and General Atomics ("GA") (58 Fed. Reg. 55087 (Oct. 25, 1993)) (the "Order"), relating to the site decontamination and decommissioning funding for the facilities located in Gore, Oklahoma that are licensed under NRC License No. SUB-1010, Docket No. 40-8027 ("Sequoyah Facility"); and

WHEREAS, a hearing on the Order is now being held before an Atomic Safety and Licensing Board (the "Board") in Docket No. 40-8027-EA, and SFC and the NRC Staff are parties in such hearing; and

WHEREAS, the NRC Staff and SFC understand and acknowledge that, in meeting any obligations that SFC has under existing regulations or may have under future regulations, SFC cannot provide funds for decommissioning the Sequoyah Facility in excess of all of its "net assets" and "net revenues," as those terms are defined in this Agreement, and is unable to obtain and provide financial assurance for decommissioning beyond pledging all of its net assets and net revenues; and

WHEREAS, the NRC Staff and SFC understand and acknowledge that it is in the public interest to avoid the dissipation of their manpower and financial resources in litigation, particularly since it is in the public interest that SFC's resources be devoted to completion of decommissioning of the Sequoyah Facility; and

WHEREAS, both the NRC Staff and SFC have engaged in negotiation and compromise because they recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise of the controverted matters now pending; and

WHEREAS, the NRC Staff and SFC believe that this Agreement is in the public interest.

NOW, THEREFORE, in consideration of the mutual promises made herein, SFC and the NRC Staff agree as follows:

1. *Definitions.* The following terms used in this Agreement are defined as follows:
 - a. "Gross assets." SFC's gross assets include, but are not limited to, cash and cash equivalents on hand, accounts receivable, materials and supplies inventories, prepaid expenses, unbilled receivables,

property, plant and equipment, and any other known or future assets owned or acquired by SFC.

- b. "Gross revenues." SFC's gross revenues include, but are not limited to, standby fees and additional standby fees received by SFC under the "Sequoyah Fuels Corporation Standby Agreement" (Nov. 19, 1992) with ConverDyn, revenues received by SFC under the "Sequoyah Fuels Corporation Conversion Services Agreement" (Nov. 19, 1992) with ConverDyn (these foregoing two agreements are hereafter collectively referred to as the "ConverDyn Arrangements"), revenues received by SFC under contracts for conversion services with entities listed in Schedule C of the foregoing agreement, revenues from the sale or salvage of plant, equipment, material or supplies, cash flow from financing activities, and any other known or future revenues derived by SFC from whatever source.
- c. "Reasonable and necessary expenses." SFC's reasonable and necessary expenses include:
 - (1) reasonable and necessary expenses paid by SFC that are consistent with SFC's obligations under this Agreement and its business needs and sound judgment, exercising due care to preserve its assets and revenues for the completion of decommissioning; and
 - (2) salaries and benefits of SFC personnel and expenses for contractor personnel that are reasonable and commensurate with salaries and benefits of personnel performing similar functions for other companies engaged in activities of similar complexity in the nuclear industry; and
 - (3) payments for taxes, utilities, reasonable and necessary insurance expenses, reasonable and necessary professional services, license fees, inspection fees, and any other payments made to fulfill SFC's contractual obligations; and
 - (4) payments for conversion services provided by ConverDyn in satisfaction of SFC's current conversion contracts; and
 - (5) reasonable and necessary costs incurred in meeting SFC's ongoing decontamination and decommissioning obligations, in complying with regulatory requirements, and in complying with orders or otherwise fulfilling obligations imposed by competent federal, state, and local governmental authorities; and

- (6) reasonable and necessary costs incurred in the sale or salvage of SFC's plant, equipment, materials and supplies; and
 - (7) costs paid for goods and services provided to SFC by GA and/or its parent companies, affiliates and subsidiaries ("Related Companies") that are rendered to SFC at rates consistent with those charged by GA, and/or Related Companies, to other customers for comparable services, and not in excess of rates otherwise available to SFC for performance of such services; and
 - (8) general and administrative expenses and overhead costs and expenses allocated to SFC by GA and/or Related Companies (not covered by the services charges referred to in section 1.c.(7) immediately above) that are allocated in accordance with established practices for allocating expenses among related privately held corporations, consistently applied, and consistent with generally accepted accounting principles; and
 - (9) payments of debts incurred by SFC including principal and interest payments to SFC's creditors, including, but not limited to, those made in accordance with the two revolving notes, for \$4.5 million and \$2.5 million, respectively, currently in place with GA (the two notes together are hereinafter referred to as the "Lines of Credit"). All such payments shall be made in accordance with the reasonable and ordinary terms and conditions of SFC's agreements with its creditors.
- d. "Net assets." SFC's net assets are its gross assets, subject to its obligations to ConverDyn and subject to the rights of senior lien-holders.
 - e. "Net revenues." SFC's net revenues are its gross revenues that are available after SFC has paid its reasonable and necessary expenses, subject to its obligations to ConverDyn and subject to the rights of senior lien-holders.
2. SFC will carry out the funding plan described in the Preliminary Plan for Completion of Decommissioning submitted to the NRC on February 16, 1993, by devoting all of its net assets and net revenues to the completion of decommissioning of the Sequoyah Facility, in accordance with the requirements of the NRC, the Environmental Protection Agency, and any other state or federal agency with jurisdiction, until the NRC Staff determines that such decommissioning has been satisfactorily completed.

3. SFC specifically pledges by this Agreement to devote all of its net assets and net revenues to completion of decommissioning and pledges to diligently pursue and use its best efforts to preserve all of its contractual rights under the ConverDyn Arrangements, until the NRC Staff determines that such decommissioning has been satisfactorily completed.
4. In committing its net assets and net revenues to the completion of decommissioning, SFC's expenditure of funds to pay its reasonable and necessary expenses shall be consistent with its business needs and sound judgment within the following terms and conditions:
 - a. SFC shall not enter into any agreement, or any amendment to an agreement, with GA and/or Related Companies which would require SFC to pay interest charges or fees in excess of those charges and fees normally charged by GA and/or such Related Companies for such loans to a similarly situated Related Company or to accept terms and/or pay interest charges or fees higher than those that would be available to SFC in a similar transaction negotiated at arms length with another lender; and
 - b. acknowledging and understanding that GA has deposited sums of money in two cash collateral accounts held by GA at a financial institution so that SFC could obtain a letter of credit for purposes of compliance with Oklahoma's workmen's compensation requirements (\$500,000) and a letter of credit for purposes of compliance with 10 CFR § 40.36 (\$750,000), that GA's deposit of these sums of money reduces the funds available to SFC pursuant to the Lines of Credit currently being provided by GA to SFC, and that SFC is obligated to repay these sums of money and would do so under the terms of the Lines of Credit, nothing in this Agreement shall be construed to prohibit or limit: (1) the return to GA of its funds currently held in the cash collateral accounts which support SFC's letters of credit; (2) the substitution of SFC funds for the cash collateral accounts held by GA, if SFC has the funds available to do so; or (3) the repayment of funds to GA by SFC under the terms of its Lines of Credit and in fulfillment of its obligations, if SFC has the funds available to do so; and
 - c. any sale or disposition of assets, as appropriate, reasonable and warranted in SFC's discretion, including the sale or transfer of assets to GA or Related Companies, shall be made at prices that assure that SFC receives payment at fair market value or salvage value upon the sale of such assets, such prices to be established either in good faith

arms length negotiations, exercising sound business judgment, or by obtaining an objective evaluation by an expert third party; and

- d. SFC will exercise due care to preserve its entitlement to standby fees and additional standby fees by fulfilling its contractual obligations pursuant to the ConverDyn Arrangements.
5. Until the NRC Staff determines that the decommissioning of the Sequoyah Facility has been satisfactorily completed, SFC will provide the NRC Staff with copies of those annual audited financial statements in which SFC's financial information is consolidated. In addition, SFC will make its financial records and books available for audit by the NRC Staff at any reasonable time.
6. The NRC Staff and SFC agree that SFC's commitments in the Agreement represent a good faith effort to provide for the funding of the decommissioning of the Sequoyah Facility and to assure that its assets and revenues are effectively utilized to fulfill SFC's obligations and to complete decommissioning. Therefore, the NRC Staff hereby rescinds the Order insofar as it applies to SFC and accepts the terms of this Agreement in lieu of those provisions of the Order that are directed to SFC. Subject to the provisions of section 7 below, the NRC Staff also agrees to forbear from taking any enforcement or other action against SFC or its current or former officers, directors or employees (relating to their actions in their official capacities), (a) based upon any alleged requirement to provide funds for decommissioning the Sequoyah Facility or to provide financial assurance for decommissioning the Sequoyah Facility beyond the commitments of all of SFC's net assets and net revenues provided for in this Agreement, whether such requirement arises under any current NRC regulations or under any future regulation that might alter, redefine or clarify the currently applicable requirements, or (b) based upon the facts alleged in the Order and/or those reasonably known by the NRC that are related to the subject matter of the Order.
7. Nothing in this Agreement shall limit the NRC Staff's ability to take appropriate enforcement action to enforce SFC's compliance with this Agreement, or to take appropriate enforcement action based upon material information that is not currently available to or known by the NRC Staff or based upon evidence that any representation in this Agreement is incomplete or inaccurate in a material respect. The NRC Staff and SFC acknowledge that the terms and provisions of this Agreement, once approved by the Board, shall be incorporated by reference into an order issued by the Board, as the term "order" is used in subsections (b), (i) and (o) of section 161 of the Atomic Energy Act of 1954, as amended

(the "Act"), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*

8. Nothing in this Agreement shall be construed to limit the NRC Staff's ability to continue to pursue litigation with GA regarding those provisions of the Order, and any related factual allegations in the Order, that are directed to GA.
9. The NRC Staff and SFC understand and acknowledge that this Agreement is the result of a compromise and shall not for any purpose be construed as an admission of the facts alleged or conclusions of law drawn in the Order, as an admission of the alleged joint and several responsibilities of SFC included in Section VII.A and other sections of the Order, or as an admission by SFC of any violation of 10 CFR § 40.36, 10 CFR § 40.42, or of any statute, regulation, license condition, or other regulatory requirement.
10. The NRC Staff and SFC agree that no inference adverse to either party shall be drawn based upon the parties having entered into this Agreement. They further agree that any factual findings or conclusions of law reached in any proceedings against GA relating to the Order shall not be binding on SFC, and SFC shall not be prejudiced by such findings or conclusions in any subsequent administrative or judicial proceedings involving SFC.
11. The NRC Staff and SFC agree to file a joint motion requesting that the Board approve this Settlement Agreement and dismiss SFC from the proceeding, pursuant to the Commission's regulations in 10 CFR § 2.203. Upon approval of this Settlement Agreement by the Board, without any substantive modification by the Board, the NRC Staff and SFC agree that they will not appeal the Board's approval or otherwise seek judicial review of such approval. If this Agreement is not approved by the Board, or if this Agreement is approved by the Board but is modified in any substantive manner by the Board, or if any body or court to which the Board's approval is appealed reverses such approval or affirms the approval but modifies the Agreement in any substantive manner, either the NRC Staff or SFC may void this Agreement by giving written notice to the other party within ninety (90) days of such action by the Board, body or court, unless such 90-day period is extended by written agreement of both parties. The NRC Staff and SFC agree that under such circumstances and upon request they will negotiate in good faith to resolve differences.

12. This Agreement shall become effective upon final action approving this Agreement by the Board.

IN WITNESS WHEREOF, the NRC Staff and SFC have caused this Settlement Agreement to be executed by their duly authorized representatives on this 18th day of August, 1995.

FOR SEQUOYAH FUELS
CORPORATION:

John H. Ellis
President

FOR THE NUCLEAR
REGULATORY COMMISSION

Hugh L. Thompson, Jr.
Deputy Executive Director for
Nuclear Materials Safety,
Safeguards and Operations Support

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of

Docket No. 40-8027

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Facility)

October 23, 1995

The Director of the Office of Nuclear Materials Safety and Safeguards denies in part a petition dated March 11, 1995, filed with the Nuclear Regulatory Commission (NRC) by Native Americans for a Clean Environment (NACE), requesting that the NRC take action with respect to the Sequoyah Fuels Corporation (SFC) facility in Gore, Oklahoma. The petition requests that the NRC: (1) reverse the NRC Staff's decision to permit SFC to proceed with site characterization without submitting a final Site Characterization Plan (SCP) by issuing an Order or a Confirmatory Action Letter obliging SFC to submit a final SCP by a date certain; (2) obtain a copy of the Environmental Protection Agency's (EPA) title search or perform a title search of all property used in connection with the SFC license in order to clarify the identity and ownership of all property subject to NRC License No. SUB-1010; (3) issue an order forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or any other associated corporation that holds title to property under NRC License No. SUB-1010 from transferring any interest in any of its property before SFC applies for and receives a license amendment authorizing transfer; and (4) before issuing any such license amendment, find reasonable assurance that any entity acquiring an interest in the SFC property fully understands the nature of the liabilities and responsibilities it is undertaking for cleanup and long-term care of the site and that it has the financial capability to carry out those responsibilities.

The Petitioner's request that SFC be ordered to submit a written final SCP by a date certain is denied. Petitioner's request that NRC perform a title search of property subject to NRC License No. SUB-1010 was satisfied by EPA's provision of a copy of the title search it had performed. Action on

Petitioner's request for an order forbidding the transfer of any interest in land subject to NRC License No. SUB-1010 before SFC applies for and receives a license amendment permitting such transfers is unnecessary because applicable regulations address Petitioner's concerns. Likewise, Petitioner's request that, before granting such a license amendment application, NRC ensure that potential purchasers of property be subject to NRC License No. SUB-1010 to be fully apprised of their obligations for site remediation and long-term care and that NRC ensure that such potential purchasers are financially qualified to do so, is unnecessary because applicable regulations address Petitioner's concerns.

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

I. INTRODUCTION

Native Americans for a Clean Environment (NACE) submitted to the Nuclear Regulatory Commission (NRC), a "Petition for an Order Requiring Sequoyah Fuels Corporation to File a Final Site Characterization Plan (SCP) and for an Order to Obtain a License Amendment" (Petition) dated March 11, 1995. NACE requested NRC to take action with respect to the Sequoyah Fuels Corporation (SFC or Licensee) pursuant to 10 C.F.R. § 2.206. The Petitioner requests that NRC:

- (1) reverse the NRC Staff's decision to permit SFC to proceed with site characterization without submitting a final SCP, by issuing an Order or a Confirmatory Action Letter obliging SFC to submit a final SCP by a date certain;
- (2) obtain a copy of the Environmental Protection Agency's (EPA) title search or perform a title search of all property used in connection with the SFC license, in order to clarify the identity and ownership of all property subject to NRC License No. SUB-1010;
- (3) issue an order forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or any other associated corporation that holds title to property under NRC License No. SUB-1010 from transferring any interest in any of its property before SFC applies for and receives a license amendment authorizing transfer; and
- (4) before issuing any such license amendment, find reasonable assurance that any entity acquiring an interest in the SFC property fully understands the nature of the liabilities and responsibilities it is undertaking for cleanup and long-term care of the site, and that it has the financial capability to carry out those responsibilities.

The petition alleges the following bases for its requests:

- (1) The NRC Staff illegally and improperly excused SFC from its obligation to submit a final SCP;
- (2) SFC is presenting a "Trust Indenture" to several towns and the county of Sequoyah for the creation of an industrial park;
- (3) Neither SFC's letter to Mr. Main (Secretary of Commerce, Oklahoma Department of Commerce), the Fact Sheet, nor the Trust Agreement, itself, refers to the fact that SFC has been ordered by NRC and EPA to characterize the extent of the contamination in the 1400 acres that surround the 85-acre processing area, the focus of site characterization and remediation efforts; nor do those documents refer to the other sources of potential contamination, consisting of groundwater migration from the admittedly contaminated processing area, effluent streams and ditches, and the Carlisle School (located on the land proposed for an industrial park, and used by SFC as a laboratory);
- (4) The Trust Indenture depicts the 1400 acres of land subject to NRC License No. SUB-1010 as the candidate area for the industrial park; SFC has made conflicting representations regarding the size of the "facility" or "site" to NRC and in the Trust Indenture.

SFC responded to the petition by a letter dated March 29, 1995, and requests that the petition be denied in all respects.

By letter dated March 31, 1995, NACE supplemented its petition. NACE states that SFC is conducting site characterization by utilizing the EPA Facility Investigation Workplan (FIW), which was prepared for the EPA pursuant to requirements of the Resource Conservation and Recovery Act (RCRA). Petitioner asserts that by relying on the FIW to conduct site characterization, SFC has neither understood nor implemented NRC Staff criticisms of the draft SCP. Petitioner asserts that NRC should require SFC to submit a written final SCP because the FIW does not:

- (1) Resolve NRC comments related to site hydrogeology and vertical and lateral contamination;
- (2) Resolve NRC sample density concerns; or
- (3) Provide for characterization of the DUF₄ processing, decorative pond, and parking lot areas.

By letter dated May 10, 1995, the Director, Office of Nuclear Material Safety and Safeguards acknowledged receipt of the petition, and informed the Petitioner that the petition would be evaluated under section 2.206 of the Commission's regulations.

I have completed my evaluation of the matters raised by the Petitioner and have determined that, for the reasons stated below, the petition is denied in part, was satisfied in part, and NRC regulations address the Petitioner's concerns related to the requests for issuance of orders related to transfer of property.

II. BACKGROUND

From 1970 until July 6, 1993, SFC operated a uranium conversion facility at a site located in Gore, Oklahoma, under the authority of NRC License No. SUB-1010, issued pursuant to 10 C.F.R. Part 40. The main process was the conversion of uranium oxide (yellowcake) to uranium hexafluoride. A second process, initiated in 1987, consisted of the conversion of depleted uranium hexafluoride to uranium tetrafluoride, the first step in producing depleted uranium metal.

After the discovery of contaminated soil surrounding structures used by SFC for its licensed activities, NRC Staff issued an order suspending SFC's authorization to operate its conversion facilities. See "Order Modifying License (Effective Immediately) and Demand for Information," EA 91-067 (Oct. 3, 1991). After studies by SFC, operational and organizational changes by SFC, extensive NRC inspections, and several public meetings, NRC, on April 16, 1992, lifted the order suspending the SFC license and authorized SFC to resume operation of its conversion facility.

In November 1992, SFC (and subsequently in writing) informed NRC that operation of its main process for the conversion of uranium oxide (yellowcake) to uranium hexafluoride was permanently terminated and that the second process, the conversion of depleted uranium hexafluoride to uranium tetrafluoride, would be terminated by July 1993. SFC formally notified NRC of its intentions to terminate all conversion processes and seek license termination in accordance with 10 C.F.R. § 40.42(e), in a letter dated February 16, 1993. In addition, a proposed plan to address decommissioning issues related to the SFC facility, entitled "Preliminary Plan for Completion of Decommissioning (PPCD)," was enclosed in its letter of February 16, 1993.

By letter dated March 23, 1993, NRC Staff notified SFC that its 10 C.F.R. § 40.42(e) notification had been accepted, and that activities at the site should be limited to those related to decommissioning. By letter dated July 7, 1993, SFC notified NRC Staff that SFC had ceased all operational licensed activities. Since that time, SFC has restricted its activities to disposal of contaminated material and planning for decommissioning.

On August 4, 1993, SFC and EPA Region VI signed an Administrative Order on Consent (AOC), establishing a schedule for compliance with section 3008(h) of the Solid Waste Disposal Act, as amended by the RCRA, as further amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928(h). The AOC required SFC to perform a number of tasks aimed at monitoring site conditions, site characterization, corrective measures, and financial assurance. A key element of the AOC is the RCRA Facility Investigation (RFI) Workplan. The RFI Workplan data needs closely parallel those of an NRC SCP. For SFC's site, both the RFI Workplan and the SCP involve characterization of much of the same property. The major difference between the RFI Workplan and the

SCP rests only on the constituents that are analyzed (nonradioactive materials for EPA and radioactive materials for NRC).

Common to both plans is the characterization of the soil, bedrock, and groundwater underlying the site. SFC agreed to drill a series of wells to the next lower water-bearing strata to better define the geology underlying the site and to sample for contamination. These wells are in addition to the 100 wells previously installed by SFC at the site. Whether or not the deeper wells planned by SFC to address EPA concerns will also satisfy NRC concerns related to the vertical extent of radiological contamination will have to await the evaluation of sample analyses.

To avoid unnecessary duplicative regulatory actions, EPA and NRC drafted a site-specific Memorandum of Understanding (MOU). Under the terms of this MOU, EPA and NRC will exchange pertinent documents, keep each other informed of planned actions, and, to the extent possible, coordinate major characterization and remediation tasks on similar schedules. The MOU was signed by EPA on September 21, 1995, and by NRC on September 25, 1995.

SFC submitted to EPA a draft RFI Workplan in January 1994. EPA reviewed the draft RFI Workplan and provided SFC comments in a letter dated August 25, 1994. Based on the comments provided by EPA, SFC made changes to the draft RFI Workplan and a final Workplan was approved by EPA in December 1994. In accordance with the requirements of the AOC, SFC must submit a final RFI Report to EPA by December 1995.

SFC submitted a draft SCP to NRC in January 1994. Interested persons, including EPA, the United States Geological Survey (USGS), and NACE reviewed the draft SCP and provided comments to NRC. Consistent with the Staff's commitment to NACE, in a letter from J. H. Austin (NRC) to D. Curran (NACE), dated December 9, 1993, to keep NACE involved in the review process, the NACE comments were discussed with representatives of NACE, NRC, and SFC in a May 31, 1994 meeting.

NRC Staff performed an extensive review of the draft SCP and of all the comments regarding the draft SCP. Where appropriate, NRC Staff factored those comments into NRC Staff's comments, which were transmitted to SFC by letter dated November 3, 1994. The essence of NRC Staff's comments was that SFC must do substantially more sampling than proposed in the draft SCP. Additional sampling is necessary to reliably identify the types and extent of contamination on and around the SFC site. NRC Staff requested that SFC address the Staff's comments, or provide the basis for not making changes to the SCP.

In its November 1994 quarterly report to EPA, required by the AOC, SFC raised concerns related to possible duplication of SFC's decontamination and decommissioning efforts that could result in unnecessarily increased costs.

In January and February 1995, NRC Staff engaged in technical discussions with SFC regarding the November 3, 1994 comments of the Staff concerning

the draft SCP. The discussions covered a broad range of issues related to site characterization and scheduling.

By letter dated February 5, 1995, the Director, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, confirmed NRC Staff's understanding of SFC's verbal commitment, by telephone in early February 1995, to use NRC Staff's comments of November 3, 1994, during site characterization and in SFC's preparation of its Site Characterization Report (SCR). Furthermore, NRC agreed with SFC that the schedule for the SCR should parallel that for the RFI Report, in order to minimize possible redundancy and associated costs, and to facilitate the effective utilization of SFC resources. Accordingly, NRC gave SFC a due date of January 15, 1996, for submission of a draft SCR. The Staff also reminded SFC that NRC may establish legally binding requirements, if necessary, to ensure timely and effective remediation of Site Decommissioning Management Plan (SDMP) sites. The SFC facility is an SDMP site. In its March 29, 1995 response to the petition, SFC again committed to address the NRC's comments on the SCP during conduct of the site characterization effort. SFC confirmed its understanding of the Staff's November 3, 1994 comments by a letter dated June 2, 1995, in which SFC again committed to incorporate those Staff comments into its SCR.

III. DISCUSSION

A. **Petitioner Requests That NRC Staff Reverse Its Decision To Permit SFC To Proceed with Site Characterization Without Submitting a Revised SCP, by Issuing an Order or Confirmatory Action Letter Requiring SFC To Submit a Written Final SCP**

Petitioner contends that by not requiring SFC to submit a written final SCP, NRC Staff illegally and improperly excused SFC from its obligations in violation of the:

- (a) Timeliness in Decommissioning Rule;
- (b) NRC's "Action Plan to Ensure Timely Cleanup of Site Decommissioning Management Plan Sites" (Action Plan), 57 Fed. Reg. 13,389 (Apr. 16, 1992);
- (c) NRC's December 29, 1992 Demand for Information to SFC;
- (d) MOU between NRC and EPA; and
- (e) NRC's commitments to Petitioner in a letter dated December 9, 1993, that SFC would be required to demonstrate how it would sample all potentially contaminated areas as part of the SCP.

NRC Staff weighed the potential benefits, and the increased costs of and delays in decommissioning, of requesting SFC to revise its draft SCP in accordance with NRC Staff comments or to incorporate these revisions into the site

characterization process and to demonstrate that the NRC comments were accommodated in the proposed decommissioning plan. SFC understood the NRC comments and had already agreed to incorporate into the site characterization process and SCR. Therefore, NRC Staff concluded that the objectives of site characterization could be met, and data appropriate to support a proposed decommissioning alternative could be produced, if NRC Staff's comments were implemented during site characterization. NRC Staff's action was intended to avoid potentially costly delays in decommissioning and to prevent duplication of regulatory actions, based on work already under way as a part of the EPA-approved RFI Workplan.

Additionally, the Staff's action was consistent with agency efforts to streamline the Site Decommissioning Management Plan (SDMP) regulatory review process.¹ The SFC site is an SDMP site. This streamlining involves, among other things, discontinuance of NRC Staff review of SCPs and SCRs prior to the submittal of decommissioning plans. Site characterization information will be considered by NRC Staff in its review of decommissioning plans. NRC regulations do not require the submission of SCPs or SCRs, but do require site characterization data to be submitted with the decommissioning plan. *See* 10 C.F.R. § 40.42(f)(4)(i). Streamlining the SDMP process is consistent with NRC regulations.

Streamlining promotes a more coordinated and focused review of the licensee's characterization information and places greater emphasis on issues that affect the selection and implementation of a decommissioning approach.

Contrary to Petitioner's assertion, NRC Staff's action was consistent with the Timeliness in Decommissioning rule. Those amendments to NRC regulations establish specific time periods for submission of a decommissioning plan and completion of decommissioning, and were intended to reduce potential risk to public health and the environment at facilities after licensed activities have ceased. *See* "Timeliness in Decommissioning of Materials Facilities," 59 Fed. Reg. 36,026 (July 15, 1994). The Staff's February 5, 1995 letter allowed SFC to proceed with site characterization on the condition that SFC include in its SCR the Staff's November 3, 1994 comments regarding the draft SCP. The Staff determined that inclusion of those comments would produce adequate site characterization and would reduce delay. Although site characterization and the data derived during site characterization are necessary inputs to a decommissioning plan,² SCPs and SCRs are not expressly required by NRC regulations. The Staff did not release SFC from the "timeliness" rule or

¹ On May 19, 1995, the NRC Staff briefed the Commission on SDMP Policy and Program issues, including the Staff's implementation of streamlining.

² The licensee's decommissioning plan must include a description of the site, buildings, and outside areas affected by licensed activities. 10 C.F.R. § 40.42(f)(4)(i).

from the requirement to submit a decommissioning plan. See 10 C.F.R. § 40.42(f)(1). The Staff's action reduced potential delays in site characterization and decommissioning, and cannot be considered to have contributed to any delay in SFC's decommissioning the SFC site.

Contrary to being in violation of the NRC's Action Plan, NRC Staff's February 5, 1995 letter to SFC was consistent with the plan. The Action Plan was intended to encourage compliance with NRC timeliness in decommissioning regulations. The Action Plan is not itself a rule and contains no enforceable standards. The Action Plan refers to submittal of an SCP, but does not require NRC approval. The Action Plan encourages licensees to enter into early consultation with NRC Staff regarding site characterization and decommissioning issues. Such consultation is intended to address site-specific conditions to ensure that site characterization is appropriately planned and conducted, and of sufficient depth to support a selected decommissioning option. Consistent with the Action Plan, NRC Staff engaged in site-specific technical discussions with SFC regarding not only NRC's comments on the draft SCP, but also the comments of NACE, the USGS and EPA. See Section II, *supra*. The NRC Staff's February 5, 1995 letter to SFC was consistent with the Action Plan, and cannot be considered to have contributed to any delay in compliance with timeliness requirements for decommissioning, for the same reasons that the Staff's action was consistent with the Timeliness in Decommissioning Rule.

Petitioner does not explain, nor is it apparent how, the NRC Staff's February 5, 1995 letter contravened the December 29, 1992 Demand for Information (DFI) to SFC. As Petitioner notes, the February 13, 1993 Preliminary Plan for Decommissioning, submitted by SFC in response to the DFI, commits SFC to submission of an SCP to NRC and to implementation of the SCP by early 1994. The Staff in its February 5, 1995 letter did not delay the submission or implementation of the SCP. To the contrary, the Staff permitted SFC to proceed expeditiously with an SCP that NRC had reviewed and considers adequate, as long as the Staff's November 3, 1994 comments are incorporated, which SFC has undertaken to do.

Contrary to Petitioner's assertion, NRC Staff's action in its letter of February 5, 1995, did not violate the (then draft) MOU between NRC and EPA. The then draft MOU, as well as the final MOU, state that NRC will ensure that SFC develops and implements an SCP, which NRC Staff has done. Moreover, in the spirit of the EPA and NRC site-specific MOU, NRC and EPA have worked together to avoid unnecessary duplicative regulatory actions and their attendant costs. Specifically, after consultation with the EPA, NRC Staff agreed in its February 5, 1995 letter to SFC's request that the schedule for site characterization and submission of the SCR should parallel that of the EPA RFI Workplan. The development of the EPA MOU and NRC MOU was a major consideration in NRC Staff's action allowing SFC to proceed with site characterization and to

incorporate NRC Staff's comments in the SCR, rather than to require submission of yet another version of the SCP.

Contrary to the Petitioner's assertions, NRC Staff's action by its letter of February 5, 1995, did not violate NRC's commitments to Petitioner, made in a letter dated December 9, 1993, that SFC would be required to demonstrate how it would sample all potentially contaminated areas as part of the SCP. The December 9, 1993 letter also stated that NACE's concerns would be addressed during NRC Staff's review of the SCP.

NRC Staff met these commitments to NACE. NACE reviewed the SFC draft SCP and provided comments to NRC Staff. NACE's comments were discussed in a meeting on May 31, 1994, with representatives from NACE, NRC, and SFC. All applicable NACE comments were incorporated into NRC Staff's comments and transmitted to SFC by letter dated November 3, 1994. SFC verbally committed, by telephone in early February 1995, to use NRC Staff's comments of November 3, 1994, during site characterization and in SFC's preparation of its SCR. SFC confirmed its understanding of the Staff's November 3, 1994 comments by a letter dated June 2, 1995, in which SFC again committed to incorporate those Staff comments into its SCR. Accordingly, contrary to Petitioner's assertion, there is no basis to conclude that NACE's concerns will not in fact be addressed. Moreover, NRC remains committed to ensuring that SFC conduct a complete and accurate characterization of all radiological contamination on the SFC site and on property affected by SFC's licensed activities, through reviews of SFC's SCR and a subsequent decommissioning plan.

By letter dated March 31, 1995, NACE supplemented its petition. NACE states that SFC is conducting site characterization by utilizing the RCRA Facility Investigation Workplan. Petitioner asserts that by relying on the EPA Workplan to conduct site characterization, SFC has neither understood nor implemented NRC Staff criticisms of the draft SCP. Petitioner asserts that NRC should require SFC to submit a written final SCP because the EPA Workplan does not:

- (1) Resolve NRC comments related to site hydrogeology and vertical and lateral contamination;
- (2) Resolve NRC sample density concerns; or
- (3) Provide for characterization of the DUF₄ processing, decorative pond, and parking lot areas.

As explained above, NRC Staff concluded after a series of discussions with SFC, that SFC does understand the Staff's November 3, 1994 comments regarding the draft SCP. Moreover, SFC has committed itself to incorporating those Staff comments during site characterization and in the SCR. In addition, NRC Staff concludes, after review of the EPA-approved RFI Workplan, that:

- (a) The approved RFI Workplan adequately addresses NRC comments regarding questions of hydrogeology and the vertical and lateral extent of contamination;
- (b) The RFI Workplan, draft SCP, and the SFC commitment to incorporate NRC Staff's comments on the draft SCP into site characterization activities will together ensure adequate sampling for site characterization; and
- (c) The SCP provides for adequate characterization of the DUF₄ processing area (Unit 29), the decorative pond (Unit 26), and parking lot (Unit 31) (see Figure 2 of the SCP).

NRC Staff has neither violated nor excused SFC from complying with any NRC regulatory requirements, the MOU between NRC and EPA, any NRC Staff commitments to Petitioners, or the December 29, 1992 DFI to SFC. Petitioner has raised no health and safety concern arising from NRC Staff's action by letter of February 5, 1995, permitting SFC to address and implement the Staff's November 3, 1994 comments during site characterization and in the SCR. Additionally, the Staff's action was consistent with agency efforts to streamline the SDMP review process. Furthermore, to require submission of a written final SCP would unnecessarily delay decommissioning of the SFC site and unduly raise the costs of decommissioning. Finally, and most importantly, NACE comments on the draft SCP were incorporated into the final NRC comments on the draft SCP. The Licensee intends to conduct site characterization in accordance with these comments and must demonstrate this before the NRC approves the decommissioning plan.

In view of the above, there is no basis to require SFC to submit a written final SCP.

B. Petitioner Requests That NRC Obtain from EPA a Copy of Its Title Search or Perform a Title Search of All Property Used in Connection with the SFC License

By letter dated April 20, 1995, Mark W. Potts (EPA Region VI), provided to Lance Hughes, on behalf of NACE, a copy of a document entitled "Preliminary Property Search Document; Sequoyah Fuels Corporation; Gore, Oklahoma." The document is dated July 26, 1994, and was prepared by PRC Environmental Management, Inc., for EPA. The document identifies SFC as the sole owner of the 85-acre process area of the Sequoyah Fuels facility and the approximately 2100 acres of land surrounding the facility. A copy of this report has been placed in the SFC licensing docket and is available through either NRC's Public Document Room (PDR) at 2120 L St. NW, Washington, DC 20037, or the local PDR (LPDR) at the Stanley Tubbs Memorial Library, 101 E. Cherokee, Sallisaw, OK 21801.

Petitioner has identified no inconsistencies between the Trust Indenture and any representations to NRC regarding the size of the "facility" or "site." The land subject to NRC license SUB-1010 is principally the 85-acre site along with any adjacent lands that have been affected by licensed activities.³ The copy of a "Trust Indenture" submitted by Petitioners neither describes the SFC facility or site, nor does it describe any lands subject to the Trust Indenture.⁴ Article V merely identifies the Trust Estate as all property coming into the possession of the trustees pursuant to the Trust Indenture. The enclosure to a letter dated August 18, 1994, from John Ellis, President, SFC, to the Oklahoma Department of Commerce, both of which were attached to the petition, describes the proposed industrial park as a site of 1430 acres on the east bank of the Kerr-McClelland Waterway. Clearly the proposed industrial park surrounds or includes, in part, the SFC site, but is not identified by the Trust Indenture as all or part of the property subject to NRC License No. SUB-1010.

Petitioners have not raised a safety concern regarding the identity and ownership of lands subject to NRC License No. SUB-1010. Moreover, because EPA provided a copy of its title search, the Petitioner's request has been satisfied.

C. Petitioner Requests That, Before Permitting Transfer of Land Subject to License No. Sub-1010, NRC Find Reasonable Assurance That Any Entity Acquiring an Interest in the SFC Property Fully Understands the Nature of the Liabilities and Responsibilities It Is Undertaking for Cleanup and Long-Term Care of the Site and That It Has the Financial Capability To Carry Out Those Responsibilities

NRC regulations 10 C.F.R. § 40.42(c)(2) and 40.42(d), and License Condition No. 14 of NRC License No. SUB-1010, require that any real property subject to the License or affected by licensed activities must be remediated by SFC in accordance with an approved decommissioning plan, such that the property is suitable for release in accordance with NRC requirements. This means that SFC may not transfer or release, by sale or any other means, property subject to NRC License No. SUB-1010, or property affected by SFC's licensed activities, until SFC remediates such property and SFC demonstrates that the property meets NRC criteria for release.

³ Licensed activities do not include raffinate spreading because the treated raffinate is released for unrestricted use prior to spreading. However, if NRC determined that treated raffinate spreading significantly affected adjacent lands, then NRC would consider the need for additional characterization and remediation.

⁴ SFC denies having contributed any corporate resources to drafting or developing the proposed Trust Indenture or in circulating it to local communities, but states that it has openly pursued development of an industrial park with local and state officials to replace jobs lost as a result of closing the SFC plant. SFC states that a local community group, SAFEST, has been working on the Trust Indenture with the Sequoyah County Commission. See Letter of John H. Ellis, President SFC, dated March 29, 1995, to James M. Taylor, Executive Director for Operations, NRC.

It is not apparent from the NACE petition, and no information has come to the attention of NRC Staff to indicate, that there has been a transfer of any real property subject to or affected by activities conducted pursuant to NRC License No. SUB-1010. It does appear that several local governmental authorities, including Sequoyah County and the cities of Gore, Vian, and Webbers Falls, have entered into an agreement to participate in the proposed Trust Indenture.

In its response to the petition, SFC committed to inform NRC of any proposal SFC receives for transfer of property adjacent to the industrial area, before SFC acts on any such proposal. SFC also states that at some future time, SFC may dispose of real property unaffected by licensed operations at the SFC facility, and would do so only after notifying NRC. In the case of affected areas, SFC states that it will dispose of such property that has been released by NRC, after SFC demonstrates that appropriate criteria have been met.

Before real property used in connection with or affected by activities conducted pursuant to NRC License No. SUB-1010 could be transferred to a person without authority to engage in NRC-licensed activities, that property must be decommissioned to meet the criteria for release for unrestricted use. *See* 10 C.F.R. §§ 40.4 and 40.42, and License SUB-1010, Condition 14. Since the proposed Trust Indenture would involve the transfer of land for the purposes of an industrial park, it appears that the potential transferees have no plan to engage in NRC-licensed activities. Thus, the decommissioning criteria for release of such property would be for unrestricted use.⁵ If SFC were to decommission property used in connection with its licensed activities to meet NRC criteria for release for unrestricted use, the transferee would assume no obligation to remediate or to engage in long-term care of such property, and NRC would have no regulatory authority over the transfer of or the transferees of such property.

If property used in connection with activities conducted pursuant to NRC License No. SUB-1010 were transferred to a person who seeks authority to engage in NRC-licensed activities, including decommissioning activities such as remediation or long-term care, SFC would be required to obtain written permission from NRC prior to the transfer. *See* 10 C.F.R. § 40.46. At that time, it would be appropriate for NRC to ensure that the transferee is capable of meeting NRC requirements for decommissioning and all other applicable licensing requirements and the transferee must obtain an NRC license.

In view of the above, Petitioner's concerns about the potential transfer of property to the Trust and state, and potential transferees of such property, are adequately addressed by applicable regulations.

⁵ The Commission is currently evaluating proposed changes to the rules governing release criteria. *See* "Radiological Criteria for Decommissioning," 59 Fed. Reg. 43,200 (Aug. 22, 1994). SFC will have to comply with all NRC requirements for release to unlicensed individuals under any revised rules.

D. Petitioner Requests That NRC Staff Issue an Order Forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or Any Other Associated Corporation That Holds Title to Property Subject to NRC License No. SUB-1010, from Transferring Any Interest in Such Property Before SFC Applies for and Receives a License Amendment Authorizing Such a Transfer

As explained above, SFC owns the land subject to NRC License No. SUB-1010. Before SFC may transfer or release any property used in connection with, or affected by, its licensed activity to a person not authorized to engage in NRC-licensed activity, that property must be remediated in accordance with an approved decommissioning plan to meet NRC criteria for release for unrestricted use. *See* Section III.C, *supra*. There is no NRC requirement that a licensee obtain NRC permission to transfer property that has been remediated to meet NRC's criteria for release for unrestricted use.

If SFC were to transfer property subject to the license or affected by licensed activity to persons for the purpose of engaging in licensed activity, section 40.46 requires that SFC obtain written permission from NRC before transferring such property and the transferees must obtain an NRC license. Petitioners, however, have provided no evidence that such a transfer is contemplated or imminent.

Petitioners have raised no safety concern regarding a potential transfer of property used in connection with or affected by activities pursuant to NRC License No. SUB-1010, or potential transferees of such property. *See* Section III.C., *supra*. Moreover, since protection of the public health and safety, in the event of a transfer of such property to the proposed Trust Indenture, is already accomplished by NRC regulations, there is no justification to issue the requested order.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899 (1984). This is the standard I have applied to determine whether the action requested by Petitioner is warranted. For the reasons given above, Petitioner's request that SFC be ordered to submit a written final SCP by a date certain is denied. Petitioner's request that NRC perform a title search of property subject to NRC License No. SUB-1010 was satisfied. Action on Petitioner's request for an order forbidding the transfer of any interest in land subject to NRC License No. SUB-1010 before SFC applies for and receives a license amendment permitting such transfers is unnecc-

essary because applicable regulations address Petitioner's concerns. Likewise, Petitioner's request that, before granting such a license amendment application, NRC ensure that potential purchasers of property be subject to NRC License No. SUB-1010 to fully be apprised of their obligations for site remediation and long-term care and that NRC ensure that such potential purchasers are financially qualified to do so, is unnecessary because applicable regulations address Petitioner's concerns.

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

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards**

**Dated at Rockville, Maryland,
this 23d day of October 1995.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

**Docket Nos. 50-424-OLA-3
50-425-OLA-3**

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

November 21, 1995

The Commission reviews an interlocutory Atomic Safety and Licensing Board decision made orally on the record (Sept. 6, 1995, Tr. at 13,154-58), ordering the Licensee to produce notes taken by the Licensee's attorney on communications with a Licensee employee. The Commission concludes that the notes are protected under the attorney-client privilege, and vacates the Licensing Board's order.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW
(DISCOVERY ORDERS)**

Typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW
(DISCOVERY ORDERS)**

Immediate review may be appropriate in exceptional circumstances, when the potential difficulty of later unscrambling and remedying the effects of an

¹This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

improper disclosure of privileged material would likely result in an irreparable impact.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

The attorney-client privilege protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. The privilege is applicable when a corporation is the client.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

Not every communication by an employee to counsel is privileged. Communications made for business or personal advice are not covered by the privilege. Privileged communications concern matters within the scope of the employee's duties.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

The attorney-client privilege protects only the communications of facts from client to attorney, not the underlying facts themselves.

MEMORANDUM AND ORDER

I. INTRODUCTION

We have before us a petition by the Georgia Power Company (GPC) for interlocutory review of an Atomic Safety and Licensing Board order made orally on the record on September 6, 1995 (Tr. at 13,154-58). The order compels GPC to produce notes taken by a GPC attorney on communications with a GPC employee, Ms. Ester Dixon. GPC claims the attorney notes are protected from disclosure under both the attorney-client privilege and the work-product doctrine. The NRC Staff takes no position in this dispute. The Commission grants

interlocutory review, concludes that the notes are privileged, and accordingly vacates the Licensing Board's order.

II. BACKGROUND

The Intervenor, Allen Mosbaugh, seeks notes taken by John Lamberski, an attorney for GPC, during 1992 interviews with Ester Dixon, a GPC employee (the "Dixon notes"). In her capacity as a secretary at the Vogtle facility, Ms. Dixon typed certain documents that were used by GPC in a presentation to the NRC made on April 9, 1990. These documents are relevant to the Intervenor's allegations that GPC misled the NRC about the condition of the Vogtle diesel generators following a loss of offsite power that occurred at Plant Vogtle on March 20, 1990. The Intervenor alleges that GPC presented false and misleading information on the number of successful consecutive starts of the diesel generators. Particularly at issue is a factual dispute over the sequence in which GPC prepared two documents on the diesel generator starts.

The Intervenor deposed Ms. Dixon in July 1994. She testified in this proceeding on June 9, 1995. The Intervenor claims that Ms. Dixon's testimony before the Board is inconsistent with her earlier deposition statements, and that on both occasions she has been unable to recall significant facts. To resolve any differences in Ms. Dixon's statements between the 1994 deposition and the 1995 hearing testimony, and to obtain factual information that Ms. Dixon may have since forgotten, the Intervenor seeks the notes of Ms. Dixon's 1992 statements to GPC counsel.

On June 30, 1995, the Intervenor moved to compel production of the Dixon notes. GPC asserted both the attorney-client privilege and work-product immunity. GPC stated that the notes were taken by Mr. Lamberski during his own investigations into allegations of inaccurate diesel start information. Those allegations arose first in 1990 and prompted an NRC Office of Investigations (OI) investigation and a Department of Justice inquiry. In response to these inquiries, GPC's counsel, John Lamberski, conducted his own investigation into the events surrounding the diesel generator starts. Mr. Lamberski states that, in August 1992, he interviewed Ms. Dixon on one occasion at the Vogtle facility, and later spoke with her on the telephone on three occasions.² He took three pages of notes on these discussions. GPC states that Ms. Dixon was aware that the purpose of the interviews was for the corporation to obtain legal advice.

²Lamberski Affidavit at 3, attached to Georgia Power Company's Petition for Review of Order to Produce Attorney Notes of Privileged Communications (GPC Appeal Brief) (Sept. 20, 1995).

The Licensing Board ordered GPC to present the notes for an *in camera* inspection. LBP-95-15, 42 NRC 51 (1995). After GPC moved for reconsideration of the Board's order, the Board requested the parties to brief the standards for the attorney-client privilege provided under *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (Tr. at 10,820-21). The Board subsequently denied the motion for reconsideration (Tr. at 12,942). Following an *in camera* inspection of the notes, the Board concluded that "there was no material that required protection because it's attorney's work product and would reveal the workings of Mr. Lamberski's mind," and ordered release of the notes to the parties (Tr. at 13,154).

GPC indicated that it would appeal and moved for a stay of the Board's order, pending appellate review. The Commission on September 13, 1995, stayed the effectiveness of the order, pending receipt of the parties' briefs and a Commission decision on whether to take review. The Commission now grants GPC's petition for review and, for the reasons in this Decision, vacates the Licensing Board's order.

III. INTERLOCUTORY REVIEW

The Commission does not ordinarily entertain interlocutory appeals. See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). A petitioner for interlocutory review must demonstrate that review is warranted because the Board order affects the proceeding in a "pervasive or unusual manner" or because it results in "irreparable impact." See 10 C.F.R. § 2.786(g)(1)-(2). See also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994). Given the circumstances in this proceeding, GPC has satisfied the "irreparable impact" criterion. Although, typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review, here an erroneous disclosure of documents ruled later to be absolutely privileged could prove irreparable. The potential difficulty of unscrambling and remedying the impact of an improper disclosure in this lengthy, complex, and contentious proceeding, which spans years of litigation and has generated a massive record, presents exceptional circumstances, making immediate review appropriate.³ This dispute poses a discrete legal question, more easily resolved now, lest we be unable later to tailor meaningful relief. Moreover, "maintenance of the attorney-client privilege up to its proper limits

³ See, e.g., *In re Bieter Co.*, 16 F.3d 929, 931-32 (8th Cir. 1994); *Admiral Insurance Co. v. United States District Court for the District of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989).

has substantial importance to the administration of justice,"⁴ and here the Licensing Board's decision appears in conflict with federal common law standards on the privilege.

IV. ANALYSIS

Pursuant to 10 C.F.R. § 2.740(b)(1), parties in formal administrative proceedings may obtain discovery regarding any matter "not privileged," relevant to the subject matter involved in the proceeding. The oldest common law privilege for confidential communications, the attorney-client privilege, protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. *See Upjohn*, 449 U.S. at 389-96. It has long been established that the attorney-client privilege also applies when a corporation is the client. *See id.* at 390. In *Upjohn*, the Supreme Court addressed the scope of the privilege as applied to communications by corporate employees, and held that each case should be evaluated individually to determine whether applying the privilege would further its underlying purposes. *See id.* at 396-97.

One such purpose, the Court observed, is to "encourage full and frank communication between attorneys and their clients." *Id.* at 389. Sound legal advice "depends upon the lawyer's being fully informed by the client." *Id.* Therefore, the lawyer's first task when faced with a legal problem is to obtain the full factual background, "sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. Because the employees who possess relevant information needed by counsel to render legal advice often are middle- and lower-level employees, the Court in *Upjohn* rejected limiting application of the privilege to the "control group" of a corporation, i.e., officers and agents. *Id.* at 392. Accordingly, the Court ruled that questionnaires sent by corporate counsel to corporate managers abroad, regarding questionable payments to foreign officials, and the memoranda and notes of interviews conducted by counsel with the recipients of the questionnaires, fell within the scope of the attorney-client privilege. The Court noted that the communications between the *Upjohn* Company employees and counsel (1) were needed as a basis for legal advice sought by the corporation; (2) involved matters within the scope of the employee's duties; (3) were made by employees sufficiently aware that they were being questioned for the corporation to obtain legal advice; and (4) were considered confidential when made and maintained confidential. *Id.* at 394-95.

⁴ *In re Bieter Co.*, 16 F.3d at 931 (quoting *Harper & Row Publishing Co. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971)).

Here, the Licensing Board found *Upjohn* distinguishable. In *Upjohn*, reasoned the Board, the managers who responded to counsel's questions might have feared consequences to themselves from revealing possible illegal activities, and therefore the confidentiality of communications with counsel was crucial. In contrast, Ms. Dixon's "interest in confidentiality was at a minimum" because "[t]he only thing she needed to do was to share basically ministerial-type facts" (Tr. at 12,942-43).

In its petition for review, GPC submits that whether or not the information provided by Ms. Dixon was "ministerial" is irrelevant, and instead what matters is that Ms. Dixon was questioned about information needed by GPC counsel to advise the corporation. GPC Appeal Brief at 5. GPC argues that the circumstances here are closely analogous to those of *Upjohn*. Specifically, GPC contends that (1) the information Ms. Dixon provided was necessary as a basis for providing legal advice to the corporation, and was not available from "control group" officers; (2) the interviews concerned matters within the scope of Ms. Dixon's duties; (3) the statements were considered confidential when made and kept so; and (4) Ms. Dixon was aware that the purpose of the questioning was for the corporation to obtain legal advice. GPC Appeal Brief at 6.

Applying *Upjohn's* principles, the Commission finds the Dixon notes protected by the attorney-client privilege. GPC sufficiently has shown that the notes would not have been created but for GPC's need for legal counsel. At the time of the August 1992 conversations with Ms. Dixon, GPC was already the subject of inquiries by OI and the Department of Justice into Intervenor's allegations concerning the diesel generator starts. Mr. Lamberski states that he interviewed Ms. Dixon as part of his own investigation, as GPC's counsel, into the diesel generator matter. He next states that his questions to Ms. Dixon focused on the typing of documents, a function within her duties at GPC. Mr. Lamberski also states that Ms. Dixon was aware at the time of the interview that she was being questioned for GPC to obtain legal advice concerning the diesel allegations. He further states that the interview notes have been treated as privileged material.⁵

The Intervenor claims that because Ms. Dixon's actions did not subject GPC to possible liability, she was in effect a mere third-party "fact witness" to the actions of others.⁶ The Intervenor relies upon a state-court decision in Arizona, which held that the memoranda of interviews conducted with a nurse and scrub technician present during an operation were not privileged because "[i]f the employee is not the one whose conduct gives rise to potential corporate liability,

⁵ See generally Lamberski Affidavit. None of the facts stated in Mr. Lamberski's affidavit has been called into dispute by counteraffidavits or other evidence.

⁶ See Intervenor's Opposition to GPC's Petition for Review of Order to Produce Attorney Notes (Intervenor's Appeal Brief) (Oct. 3, 1995) at 10-11.

then it is fair to characterize the employee as a 'witness' rather than as a client." *Samaritan Foundation v. Goldfarb*, 176 Ariz. 497, 862 P.2d 870, 877 (1993).

The Commission declines to follow this interpretation of *Upjohn*. To the Commission's knowledge, it is espoused nowhere else but in *Samaritan*. That case is not controlling here. Cf. Fed. R. Evid. 501 (federal courts apply federal common law of privilege, except where state law governs particular controversy). The Commission notes, additionally, information recently brought to our attention by GPC, indicating that the Arizona legislature by statute specifically has overruled *Samaritan*, to bring the elements of Arizona's attorney-client privilege into accord with the approach of federal courts.⁷

The federal common law standard, derived from *Upjohn*, focuses upon the primary purpose of the communication, not the specific behavior of the employee. Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know.⁸ These factors "form the crux of the justification for the privilege and allow courts to apply the privilege on a case by case basis."⁹

Not every communication by an employee to counsel is privileged, however. Otherwise, a corporation could conceal information simply by routing it to counsel. Communications made for business or personal advice, for example, are not covered by the privilege.¹⁰ Accordingly, a corporate status report or the minutes of a meeting do not become protected simply because they are transmitted to counsel, where no request for legal advice was involved.¹¹

Upjohn thus has been interpreted as finding privileged "communications made by corporate employees concerning matters pertinent to their job tasks, regardless of echelon, if sought by the corporation's attorney in order to formulate and render legal advice to the corporation."¹² Contrary to the approach taken by the Arizona Supreme Court in *Samaritan*, the federal courts have articulated no apparent exception for communications made by employees who have not

⁷ See Letter from Ernest L. Blake, Jr., GPC counsel, to Office of Commission Appellate Adjudication (Oct. 25, 1995), referencing Arizona Revised Statutes § 12-2234 (signed into law Apr. 26, 1994).

⁸ See *Securities and Exchange Commission v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 681 (D.D.C. 1981).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385 n.9 (1978).

¹² *In re LTV Securities Litigation*, 89 F.R.D. 595, 602 (N.D. Tex. 1981). See also *First Chicago International v. United Exchange Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (privileged communication resulted from corporation's need for legal advice); *Command Transportation, Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 96 (D. Mass. 1987) (*Upjohn's* "legacy" is to encourage focus on whether applying privilege would promote flow of information to counsel regarding issues on which corporation seeks legal advice); *Leucadia, Inc. v. Reliance Insurance Co.*, 101 F.R.D. 674, 679 (S.D.N.Y. 1983) (counsel's factual investigation for purpose of rendering legal advice), *cert. denied*, 490 U.S. 1107 (1989); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385, 387 (D.D.C. 1978) (focus on relevance of the communication to particular legal problem).

embroiled the corporation in legal conflict. *See, e.g., In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (accountant hired only after period of questionable activity aided corporate counsel in counsel's internal investigation of accounting improprieties).

The attorney-client privilege "rests on the need of the advocate and counselor to know *all* that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Upjohn*, 449 U.S. at 389 (emphasis added) (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980)). The Supreme Court rejected the "control group" test because it would hamper the communication of "relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. That concern is difficult to reconcile with *Samaritan*. Limiting application of the privilege to those communications made by employees whose actions necessarily have subjected the corporation to liability, as *Samaritan* proposes, would frustrate the ability of corporate counsel to obtain critical information particular employees may have gleaned in the course of their corporate duties.¹³

The corporate employee's personal "interest in confidentiality," apparently the focus of the Licensing Board, is not determinative. In the corporate setting, the attorney-client privilege does not belong to the employee; it belongs to the corporation and can be waived by the corporation. Any interest the employee may have had in the confidentiality of the communications will be protected only so long as the corporation chooses.

The Intervenor also argues that the attorney notes must be disclosed because Georgia Power employed Mr. Lamberski not for legal advice, but merely "to investigate facts associated with the submission of false information concerning diesel starts,"¹⁴ which, in the Intervenor's view, was a "business function," unencompassed by the attorney-client privilege.¹⁵ The Commission cannot agree. That GPC officers could have themselves undertaken an investigation of the allegations and drafted a response to the NRC does not eclipse the special role and training that an attorney might bring to bear in "sifting through the facts" for the legally relevant,¹⁶ particularly given that at the time GPC was the subject of at least two federal investigations into alleged serious regulatory and criminal violations.

Of course, the attorney-client privilege protects only the communications of facts from client to attorney, not the underlying facts themselves. *Upjohn*, 449 U.S. at 395-96. Ms. Dixon herself can be and has been questioned by the

¹³ Moreover, it would be no easy task to discern whether a particular employee's actions may have subjected a corporation to liability. Employees performing even "ministerial-type" duties might be knowing participants in an illegal scheme.

¹⁴ Intervenor's Appeal Brief at 16.

¹⁵ *See generally id.* at 15-18.

¹⁶ *Upjohn*, 449 U.S. at 390-91; *see also In re LTV Securities Litigation*, 89 F.R.D. at 601.

Intervenor's counsel about the documents that she typed. During the hearing the Intervenor had the opportunity to question Ms. Dixon about any changes or discrepancies between her deposition statements and her testimony before the Board. Given the absolute nature of the attorney-client privilege, the Intervenor cannot use Mr. Lamberski's notes to obtain further information on Ms. Dixon's activities.¹⁷

The Commission adds a final word of caution. Many companies — including NRC licensees — employ attorneys to investigate incidents involving possible regulatory or statutory violations. While the Commission has ruled above that *Upjohn* may confer an attorney-client privilege upon communications between the attorney involved in such an investigation and a company employee, it is equally clear that *Upjohn* does not eliminate any reporting requirements imposed by NRC regulations or any other authority. Accordingly, if an attorney investigating a matter for a client discovers information that is required to be reported to the NRC, that reporting requirement is still legal, valid, and binding upon the company. *Upjohn* may not be used as a shield to avoid providing required information.

V. CONCLUSION AND ORDER

The Commission agrees with GPC that the Dixon attorney notes are protected from discovery under the attorney-client privilege. Consistent with the foregoing opinion, the Commission hereby orders:

(1) The Georgia Power Company's petition for review dated September 20, 1995, is *granted*.

(2) The Atomic Safety and Licensing Board's order made orally on the record on September 6, 1995, compelling production of Mr. Lamberski's notes, is *vacated*.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 1995.

¹⁷ Having found the notes privileged material, we need not address the applicability of the work-product doctrine.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-Ren
ASLBP No. 95-704-01-Ren
(Renewal of Facility
License No. R-97)

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

November 1, 1995

With respect to a contention challenging the physical security of the site during the 1996 Summer Olympic Games, the Licensing Board determines that the Applicant's proposed removal of fuel from the site prior to the Olympic Games and not replacing it until after the Olympic Games makes the contention moot, notwithstanding the Applicant's failure to remove other radioactive materials under the control of the State of Georgia as an Agreement State (concerning which the Board lacks jurisdiction).

*Corrected version.

RULES OF PRACTICE: MOOTNESS

Mootness is not necessarily dependent upon a party's views that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists.

PARTIAL INITIAL DECISION (Mootness of Security Contention)

Georgia Institute of Technology (Applicant) and the NRC Staff each appealed to the Commission this Board's admission (by majority vote) of Contention 5 of Georgians Against Nuclear Energy (GANE or Intervenor), concerning security of the site during the forthcoming 1996 Olympic Games. LBP-95-6, 41 NRC 281 (1995). By its Memorandum and Order dated July 26, 1995, CLI-95-10, 42 NRC 1, the Commission vacated our decision on this contention and remanded it to us for reconsideration in light of newly emerging circumstances.

The newly emerging circumstances arose as a result of the Applicant's advice to the Commission, by documents dated June 21, 1995, July 12, 1995, and July 25, 1995, that it would remove the high-enriched uranium (HEU) fuel currently in the reactor prior to the Olympic Games and replace it with low-enriched uranium (LEU) fuel after the Olympic Games are concluded.¹ In its remand, the Commission inquired as to whether the contention is now moot. By Memorandum and Order (Consideration of Mootness of Contention 5), dated August 1, 1995 (unpublished), we directed the parties (and permitted the Staff) to confer on this subject and report back to us as to whether Contention 5 is indeed moot, together with some related inquiries. All three parties responded.

A. Positions of the Parties

GANE claims that its contention encompasses "all of the radioactive materials" at the site.² GANE commends the Applicant for offering to remove both the HEU fuel and a cesium-137 source, but it claims that its contention is not moot "as long as Georgia Tech plans to retain the 250,000 curies of cobalt-60

¹ By Order dated June 16, 1995, the Staff ordered Georgia Tech to convert from HEU fuel to LEU fuel. In response to a Notice of Opportunity for Hearing on that order, published in 60 Fed. Reg. 32,516 (June 22, 1995), GANE has petitioned to intervene in that proceeding to challenge certain procedural aspects of the change, although not the change itself. That proceeding is pending before a licensing board with the same members as this Board.

² Georgians Against Nuclear Energy (GANE) Comments on Security at the Georgia Tech Reactor Facility Following Georgia Tech's Decision to Remove the Reactor Fuel Before the 1996 Olympic Games (GANE Response), dated August 31, 1995.

on the site.” GANE goes on to describe some of the dangers that the cobalt-60 may pose to Olympic visitors. GANE recognizes that the cobalt-60 is under the jurisdiction of the State of Georgia but claims that NRC has authority to override that authority under “special circumstances,” such as the occurrence of the Olympic Games.

For their parts, the Applicant and the Staff each took the position that Contention 5 is indeed moot, inasmuch as Georgia Tech will remove from the site all the radioactive materials of concern to GANE other than the cobalt-60, and this Board has no jurisdiction over the cobalt-60.³ As set forth by the Staff, “the cobalt-60 located at the facility is not covered by the NRC license and is not an appropriate subject for consideration in this NRC license renewal proceeding.”⁴ In addition, both the Applicant and Staff take the position that the security of the cobalt-60 was not part of the initial contention, which (they claim) was focused solely on the HEU fuel.

The Staff further asserts that the residual materials that GANE generally references (most particularly, the cobalt-60) are not sufficient to comprise an admissible contention, under the generally applicable contention requirements of 10 C.F.R. § 2.714(b)(2) and (d)(2), which require that contentions must fall within the scope of matters appropriate for hearing in a particular proceeding and that they cannot constitute an attack on applicable statutory requirements. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Staff asserts that we should dismiss Contention 5, subject to the Licensee’s timely performance of the commitments set forth in its letter of July 25, 1995.⁵

In response to our further inquiry concerning the scope of NRC’s authority to override an Agreement State,⁶ both the Applicant and Staff opined that this Licensing Board, for varying reasons, has no authority to do so.⁷ The Applicant essentially rested its response on its previously expressed view that the cobalt-60 is not encompassed within Contention 5. The Applicant additionally provided examples of how the State is exercising control over the cobalt-60, through ongoing inspections. For its part, the Staff reiterated its view that cobalt-60 is not within the scope of Contention 5 but, additionally, provided a reasoned and thorough discussion of circumstances under which NRC has taken action

³ Georgia Institute of Technology’s Statement as to Issue of Mootness of Contention 5, dated August 28, 1995 [Applicant 8/28/95 Response]; NRC Staff’s Response to Licensing Board’s Memorandum and Order of August 1, 1995, dated September 1, 1995 [Staff 9/1/95 Response].

⁴ Staff Response at 5-6.

⁵ *Id.* at 4, 8.

⁶ Memorandum and Order (Responses Concerning Mootness), dated September 7, 1995.

⁷ Georgia Institute of Technology’s Response to Board’s Memorandum and Order of September 7, 1995, dated September 18, 1995 [Applicant 9/18/95 Response]; NRC Staff’s Response to Licensing Board’s Memorandum and Order of September 7, 1995, dated September 22, 1995 [Staff 9/22/95 Response].

to override or take back state authority, concluding that no such circumstances exist here.

B. Board Ruling

At the outset, we reject the Applicant's and the Staff's position that cobalt-60 was not intended to be part of GANE's contention. We construe GANE's reference to "hazardous materials" in its Contention 5 as intended to encompass the onsite cobalt-60 — that material was explicitly referenced in other proposed contentions (1 and 2) and was thoroughly discussed at the first prehearing conference (e.g., Tr. 65-68, 70, 75, 81, 109-12, 116, 126-27, 132, 138). Our opinion on mootness, therefore, is not based on the alleged failure of Contention 5 to include cobalt-60.

But we agree with the NRC Staff that this Licensing Board has no jurisdiction at this time to consider the security protection of the cobalt-60 (as well as the cesium-137 source) to be provided during the Olympic Games. As set forth by the Staff, the cobalt-60 is licensed to Georgia Tech by the State of Georgia, under Georgia Radioactive Material License No. GA 147-1 (SNM), Amendment No. 50 (June 23, 1993).⁸ The cesium-137 source is likewise licensed by the State under the same license. To the extent that GANE seeks to have us consider the security of the cobalt-60 or the cesium-137 source during the Olympic Games, therefore, we must deny that request.

In our view, as set forth by the Staff, the Commission and Agreement States (such as Georgia) do not share "dual or concurrent jurisdiction" over such materials. Full authority rests with the State. The Commission, however, would have authority to override the transfer of authority to Georgia in extraordinary circumstances. Under section 274j of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(j), the Commission is empowered to suspend or terminate a state's regulatory authority over materials if the Commission were to find that such action is required to protect the public health and safety.

The Olympic Games appear to present a circumstance where the Commission might choose to exercise such authority were Georgia providing inadequate protection. We have no indication, however, that such is the case here, although GANE claims that the State has been unresponsive to its concerns.⁹ Although we express no conclusion on this question, the State inspection reports that Georgia Tech provided to us with its September 18, 1995 Response could be deemed to suggest that Georgia is taking its regulatory responsibilities seriously. In any

⁸ Staff September 22, 1995 Response at 4.

⁹ GANE Response at 6.

event, we must leave it to the Commission to take any additional action that it considers appropriate. As the Staff has observed, a full panoply of cooperative measures, including discussions, are available to the Commission to enhance the protection to the public from radioactive materials provided by a State.¹⁰

Mootness, in our view, is not necessarily dependent upon a party's view that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. *See, generally, Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993)*. That is the case here, notwithstanding GANE's view that the cobalt-60 and the cesium-137 source also should be removed from the site during the Olympic Games — relief that we are not authorized to grant.

We agree with the Staff, however, that timely performance by the Applicant of its commitments to remove fuel from the site prior to the Olympic Games is necessary to ensure mootness of GANE's claims. As a condition of our resolution of Contention 5, and subject to enforcement by the Staff, we are conditioning any license renewal that may be warranted upon the successful completion of commitments made by Georgia Tech to remove the fuel from the site prior to the Olympic Games and not to bring the new LEU fuel back until the Games have been completed.

In the meantime, we call upon the Staff to provide assurance that the Applicant's commitments are carried out in a timely fashion. We are separating our decision on the security contention from that on the remainder of the proceeding and, to ensure applicability prior to the Olympic Games, we find good cause for making this condition immediately effective.

C. Order

Based on the entire record, and for the reasons stated, it is, this 1st day of November 1995, ORDERED:

1. Contention 5, concerning security of the site during the 1996 Olympic Games, is *resolved*, subject to a condition requiring Georgia Tech to remove all fuel from the site prior to the 1996 Olympic Games and barring return of fuel until after completion of the Olympic Games.

2. The security provided for the only residual radioactive materials as to which GANE seeks further action (cobalt-60 and the cesium-137 source) is not within our authority to resolve and hence cannot comprise an acceptable contention under 10 C.F.R. § 2.714(b) and (d).

¹⁰ Staff September 22, 1995 Response at 11-12. The Staff acknowledges the broad authority of licensing boards and concludes that the Commission could appoint boards to oversee state agreements but asserts that the Commission has instead delegated such authority to the Office of State Programs. *Id.* at 15-16. We see no reason to disagree.

3. A copy of this Partial Initial Decision will be transmitted to the Commission, for its information or further action, as appropriate.

4. For good cause shown, and as set forth in 10 C.F.R. § 2.764, this Partial Initial Decision shall be immediately effective.

5. This Partial Initial Decision is subject to review by the Commission pursuant to 10 C.F.R. § 2.786. To seek review, any party may file a petition for review within fifteen (15) days after service of this Decision. Such petition must comply with the requirements spelled out in 10 C.F.R. § 2.786.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Dr. Peter S. Lam
ADMINISTRATIVE JUDGE**

Rockville, Maryland
November 1, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

James P. Gleason, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8681-MLA-3
(ASLBP No. 94-693-02-MLA-3)
(Source Material License
No. SUA-1358)

ENERGY FUELS NUCLEAR, INC.

November 3, 1995

MEMORANDUM AND ORDER
(Terminating Proceeding)

This informal proceeding convened under 10 C.F.R. Part 2, Subpart L, involves an amendment application submitted by Energy Fuels Nuclear, Inc. ("Licensee" or "EFN") proposing to dispose of United States Department of Energy ("DOE") mill tailings at EFN's White Mesa Mill near Blanding, Utah. Subsequent to the submittal of EFN's amendment request, Norman Begay, a member of the White Mesa band of the Ute Mountain Native American Tribe, petitioned for a hearing and the petition was granted.¹

During the early stages of this proceeding, EFN informed the parties that the Department of Energy had made a decision to utilize a disposal site other than the White Mesa Mill facility. Intervenor Begay then sought to discontinue the proceeding by arguing that the amendment application had become moot by DOE's decision. At that time, EFN was actively pursuing discussions with DOE in an attempt to reverse the DOE decision not to use the White Mesa Mill as a

¹ LBP-94-33, 40 NRC 151 (1994).

disposal site. After consultation with the parties, the Presiding Officer found no reason to discontinue the proceeding. EFN was given until October 1, 1995, to conduct negotiations with DOE, at which time the matter was set to be revisited by the Presiding Officer and the parties.²

On October 2, 1995, Counsel for EFN submitted a Motion to Dismiss Hearing Request. As grounds for the Motion, EFN states that on September 29, 1995, it notified the NRC Staff that EFN has withdrawn its request for an amendment to License No. SUA-1358 for disposal of the DOE mill tailings. The withdrawal request was "conditioned [by EFN] upon the option of EFN to re-open the request at some future date without prejudice or bias."³

The NRC Staff's Response to the Licensee's Motion suggests that the Presiding Officer should dismiss this proceeding as moot, without prejudice either to EFN's ability to refile its license amendment application in the future or to Intervenor Norman Begay's right to request a hearing on any such future application. The Staff correctly argues that the sanction of a dismissal with prejudice should be reserved for "unusual situations which involve substantial prejudice to the opposing party or to the public interest in general."⁴

Under the Commission's Rules of Practice, withdrawal of a license application after the issuance of a notice of hearing may be conditioned upon such terms as the presiding officer may prescribe.⁵ In supporting conditions on the withdrawal of a license application, the record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate.⁶ An intervenor has an affirmative duty to demonstrate a legal injury to a private or public interest, as a proponent of any conditions being placed on the withdrawal of a license application.⁷

In the record before us, there is nothing to support placing onerous conditions on the withdrawal of the EFN license application. Given ample opportunity to do so, the Intervenor has not come forward with any demonstration of harm to himself or his interests that would flow from the withdrawal of the application. If

² Memorandum and Order (Extending Proceeding in Abeyance and Establishing Conference Date) (July 12, 1995) (unpublished); for further background see Memorandum and Order (Teleconference of January 17, 1995) (Feb. 1, 1995) (unpublished), Tr. 51-60.

³ Letter from Harold R. Roberts, President, Energy Fuels Nuclear, Inc., to Joseph J. Holonich, Branch Chief, High Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, dated September 29, 1995. As a procedural matter, this proceeding could only be "reopened" if the proceeding was ongoing, i.e., held in abeyance. What EFN seeks is no less than a termination of the proceeding by a "dismissal" of the Begay hearing request. Thus, the Licensee's motion would have been more appropriately addressed as a motion to terminate the proceeding. It is so considered here.

⁴ NRC Staff's Response to Licensee's Motion to Dismiss Hearing Request at 2, citing *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981), and *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981).

⁵ 10 C.F.R. § 2.107(a).

⁶ See *Sequoyah Fuels Corp.*, LBP-93-25, 38 NRC 304 (1993), *aff'd*, CLI-95-2, 41 NRC 179 (1995); *Fulton*, ALAB-657, *supra* note 4, 14 NRC at 978-79.

⁷ *Sequoyah*, CLI-95-2, *supra* note 6, 41 NRC at 192-93.

EFN chooses to refile a new license amendment application in the future, under the Commission's Rules of Practice, Mr. Begay would again be afforded the opportunity to petition to intervene in the proceeding. However, the Presiding Officer finds meritorious the Staff's suggestion that the Licensee provide written notice to Mr. Begay of any future filing of a license amendment application to dispose of the DOE mill tailings at the White Mesa Mill.⁸

Therefore, on the basis of the record before me, it is hereby ORDERED:

1. As a condition of the Licensee's withdrawal of its license amendment application, the Licensee shall provide written notice to Mr. Begay (at his last known address) of any filing of a new license amendment application to dispose of the DOE mill tailings at the White Mesa Mill site at the time such application is submitted to the NRC Staff;

2. With the single condition listed immediately above, the motion of Energy Fuels Nuclear, Inc., to withdraw its license amendment application is hereby granted and this proceeding is terminated without prejudice to the Licensee's ability to submit a new license amendment application for the disposal of DOE mill tailings at the White Mesa Mill site.

This Memorandum and Order is effective upon issuance and will constitute the final action of the Commission thirty (30) days after issuance, unless any party petitions the Commission for review pursuant to 10 C.F.R. § 2.786 or the Commission takes review *sua sponte*. Any petition for review must be filed within fifteen (15) days of service of this Memorandum and Order.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 3, 1995

⁸ Staff Response at 3.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. IA-94-011
(ASLBP No. 94-696-05-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement in
NRC-Licensed Activities)

November 13, 1995

MEMORANDUM AND ORDER
(Approving Settlement Agreement
and Dismissing Proceeding)

By immediately effective order dated May 10, 1994, the NRC Staff (1) prohibited Dr. James E. Bauer from being named on an NRC license in any capacity and from otherwise performing licensed activities for a period of five years from the date of the order; and (2) required for two years thereafter that Dr. Bauer notify the NRC of any involvement in licensed activities to assure that the NRC can monitor the status of Dr. Bauer's compliance with the Commission's regulatory requirements. *See* 59 Fed. Reg. 25,673 (1994). This proceeding was convened at the request of Dr. Bauer to contest the validity of the Staff's order. *See* 59 Fed. Reg. 30,376 (1994). Now, by joint motion dated November 2, 1995, Dr. Bauer and the Staff request that we approve a settlement agreement they have provided and dismiss this proceeding.

Among other things, the settlement agreement reduces to three years the prohibition on Dr. Bauer's involvement in licensed activities. It also outlines the Staff's agreement not to take any additional enforcement action against Dr. Bauer based on either the facts set forth in the May 10, 1994 order or the

facts and assertions revealed by a related Staff investigation (No. 1-93-065R). Additionally, it provides that the settlement should not be considered as either an admission regarding or a resolution of any of the matters that formed the basis for the May 1994 Staff enforcement order.

Pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2111, 2201(b), 2201(o), and 10 C.F.R. § 2.203, we have reviewed the parties' settlement accord to determine whether approval of the agreement and termination of this proceeding is in the public interest. Based on that review, and according due weight to the position of the Staff, we have concluded that both actions are consonant with the public interest. Accordingly, we grant the parties' joint motion to approve the settlement agreement and dismiss this proceeding.

For the foregoing reasons, it is, this 13th day of November 1995, ORDERED that:

1. The November 2, 1995 joint motion of the parties is *granted* and we *approve* their November 3, 1995 "Settlement Agreement," which is attached to and incorporated by reference in this Memorandum and Order.¹
2. This proceeding is *dismissed*.

THE ATOMIC SAFETY AND
LICENSING BOARD²

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 13, 1995

¹The settlement agreement attached to the parties November 2, 1995 motion was dated November 1, 1995. This document was a facsimile copy that did not have the original signatures of Dr. Bauer and his counsel. By letter dated November 7, 1995, Staff counsel provided the settlement agreement with the original signatures of Dr. Bauer and his counsel. That document, which is dated November 3, 1995, is attached to this Memorandum and Order.

²Copies of this Memorandum and Order are being sent this date to counsel for Dr. Bauer by facsimile transmission and to Staff counsel (without the accompanying attachment) by E-mail transmission through the agency's wide area network system.

ATTACHMENT 1

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. IA-94-011
(ASLBP No. 94-696-05-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement In
NRC-Licensed Activities)

SETTLEMENT AGREEMENT

On May 10, 1994, the staff of the Nuclear Regulatory Commission (Staff) issued an "Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately)" (Staff's Order) to Dr. James E. Bauer. 59 Fed. Reg. 25,673 (May 17, 1994). On May 26, 1994, Dr. Bauer answered the Staff's Order, denying the violations alleged in the Staff's Order and requesting a hearing. "Answer and Request for Hearing of James E. Bauer, M.D. M.Div. to May 10, 1994 Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)."

The parties to the above-captioned proceeding, the Staff and James E. Bauer, M.D., agree that it is in the public interest to terminate the above-captioned proceeding, without further litigation and agree to the following terms and conditions:

1. Dr. Bauer agrees to withdraw his request for a hearing, dated May 26, 1994.
2. Dr. Bauer further agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities for a period of three years from the date of the Order Prohibiting Involvement in NRC-Licensed Activities, i.e., from May 10, 1994, through May 10, 1997. Such prohibition includes any and all activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

3. For a period of two years following the above-specified three-year period, i.e., from May 10, 1997, through May 10, 1999, in the event that Dr. Bauer becomes involved with NRC-licensed activities, Dr. Bauer agrees to provide, within 20 days of his acceptance of any employment offer involving NRC-licensed activities or any time he otherwise becomes involved in NRC-licensed activities, written notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 of the name, address, and telephone number of the employer or the licensed entity where the licensed activities are or will be conducted and a detailed description of his duties and activities in which he is or will be involved.

4. In consideration of Dr. Bauer's agreement to the conditions of paragraphs 2 and 3 of this Settlement Agreement, the Staff agrees not to take any further enforcement action against Dr. Bauer based on (a) the same facts outlined in the Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately), dated May 10, 1994 and (b) any other facts or assertions revealed as a result of the NRC's Office of Investigation's investigation (No. 1-93-065R) relating to Dr. Bauer's activities. In the event that Dr. Bauer fails to comply with the conditions set forth in either paragraph 2 or 3 of this Settlement Agreement, the Staff expressly reserves the right to take whatever action necessary and appropriate to enforce the terms of this Settlement Agreement.

5. The Staff and Dr. Bauer understand and agree that this Settlement Agreement is limited to the issues in and the parties to the above-captioned proceeding.

6. The Staff and Dr. Bauer agree that this Settlement Agreement does not constitute and should not be construed to constitute any admission or admissions in any regard by Dr. Bauer regarding any matters set forth by the NRC in the Order Prohibiting Involvement in NRC-Licensed Activities.

7. The Staff and Dr. Bauer also agree that the matters upon which the Order is based have not been resolved as a result of this Settlement Agreement. This Settlement Agreement shall not be relied upon by any person or other entity as proof or evidence of any of the matters set forth in the Order Prohibiting Involvement in NRC-Licensed Activities.

8. The Staff and Dr. Bauer shall jointly move the Atomic Safety and Licensing Board for an order approving this Settlement Agreement and terminating the above-captioned proceeding.

FOR JAMES E. BAUER, M.D.:

FOR THE NRC STAFF:

Marcy L. Colkitt
Counsel for James E. Bauer, M.D.

Marian L. Zabler
Counsel for NRC Staff

James E. Bauer, M.D.

Dated at Rockville, Maryland,
this 3d day of November 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry Kline
Dr. Charles Kelber

In the Matter of

Docket Nos. 30-32190-EA
30-32190-EA-2
IA-94-024
(ASLBP Nos. 94-699-09-EA
95-702-01-EA-2
95-703-02-EA)

WESTERN INDUSTRIAL X-RAY
INSPECTION COMPANY, INC., and
LARRY D. WICKS

November 16, 1995

The Atomic Safety and Licensing Board dismissed this case based on an agreement among the parties. After holding a telephone conference, the Board was persuaded that it should dismiss the case because it had no further questions about why the agreement might not be consistent with the public interest.

FINAL INITIAL ORDER
(Approval of Settlement and Dismissal)

Western Industrial X-Ray Inspection Co., Inc. (WIX), Larry D. Wicks, and the Staff of the United States Nuclear Regulatory Commission (Staff) have reached an agreement in settlement of these proceedings, the terms of which agreement are set forth in full in Attachment A, "Stipulation for Settlement of

Proceedings." After studying this agreement, the Atomic Safety and Licensing Board had some questions concerning the appropriateness of the settlement. Accordingly, it held a transcribed teleconference, on November 3, 1995, which resolved the Board's questions.

In the course of the teleconference, we became satisfied that:

- WIX has an adequate reason for selecting Mr. Heath as Radiation Safety Officer. Though he is not a trained RSO, he has an engineering degree and radiation safety background and will be required to take appropriate training. Paragraph 5 of the Settlement Agreement provides further assurance by requiring audits of operations. The Staff is satisfied with this arrangement. Tr. 17-19.
- Mr. John Phillips, who has a one-third financial interest in the company and is the company lawyer and a local municipal court judge, will take management responsibility. Mr. Larry Wicks will be restricted to a role in sales and business acquisition and as an advisor to Mr. Phillips about commercial practices in the industry. Mr. Wicks will not play any role in employee evaluation. Tr. 20-25, 29-30, 30-32.
- Although Mr. Wicks may be reinstated in WIX after two years upon application to the Staff, this process will not be automatic and will entail Staff discretion. Tr. 25-29, 32-33, 34.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 15th day of November 1995, ORDERED that:

1. The Western Industrial X-Ray Inspection Co., Inc. (WIX) motions to withdraw its requests for hearing are *granted*. The withdrawn requests for hearing relate to (a) the Staff's Order to WIX of June 16, 1994 ("Order Suspending License (Effective Immediately) and Demand for Information," 59 Fed. Reg. 33,027 (June 27, 1994) ("Suspension Order"), dated July 1, 1994) and (b) the Staff's Orders to WIX of September 27, 1994 ("Order to Transfer Material (Effective Immediately) and Order Revoking License," 59 Fed. Reg. 50,931 (Oct. 6, 1994) ("Revocation Order"), dated October 14, 1994).

2. WIX is dismissed as a party in the proceedings pertaining to those orders and to this proceeding.

3. The motion of Larry Wicks to withdraw his request for hearing on the Staff's Order to Mr. Wicks of September 27, 1994 ("Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 59 Fed. Reg. 50,932 (Oct. 6, 1994) ("Prohibition Order"), dated October 14, 1994) is *granted*.

4. Mr. Wicks is dismissed as a party in the proceeding pertaining to that Order.

5. The "Stipulation for Settlement of Proceedings," contained in Attachment A to this Memorandum and Order is adopted as an Order of this Atomic Safety and Licensing Board.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry Kline
ADMINISTRATIVE JUDGE

Dr. Charles Kelber
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

11/2/95

ATTACHMENT A¹

STIPULATION FOR SETTLEMENT OF PROCEEDINGS²

THIS AGREEMENT is made by and between Western Industrial X-Ray Inspection Co., Inc. ("WIX" or "the Licensee"), Larry D. Wicks ("Wicks") and the Staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff"), to wit:

WHEREAS WIX holds Byproduct Material License No. 49-27356-01 issued by the NRC pursuant to 10 C.F.R. Parts 30 and 34, which license authorizes WIX to possess sealed sources of iridium-192 in various radiography devices for use in performing industrial radiography activities in accordance with the conditions specified therein, and is due to expire on August 31, 1996; and

¹The heading contained in the stipulation of the parties has been omitted as redundant. Page numbers have been changed for consistency with this document.

²In the course of the Teleconference of November 3, the Board admitted two exhibits. Tr. 16. On further consideration, it is not necessary that those exhibits be admitted. This Attachment is sufficient. Accordingly, the two Board exhibits shall not be admitted. This Order and its attachment may be read in conjunction with the official Transcript. No further exhibits are necessary.

WHEREAS Wicks is and has been at all times relevant hereto the principal shareholder, President, and Radiation Safety Officer ("RSO") of WIX, with responsibilities, *inter alia*, involving compliance with NRC requirements for radiation protection; and

WHEREAS on June 16, 1994, the NRC Staff issued an "Order Suspending License (Effective Immediately) and Demand for Information," 59 Fed. Reg. 33,027 (June 27, 1994) ("Suspension Order"), based, *inter alia*, upon a finding that WIX had engaged in numerous violations of NRC radiation safety regulatory requirements, including several violations which were found to be of a recurring nature and/or were committed deliberately by Licensee employees, including WIX's President and RSO, in violation of 10 C.F.R. § 30.10; and

WHEREAS the Suspension Order suspended License No. 49-27356-01, pending further order, effective immediately, and also demanded information from the Licensee in order to assist the NRC in determining whether the license should be revoked and whether Wicks should be prohibited from performing NRC-licensed activities; and

WHEREAS on September 27, 1994, the NRC Staff issued (1) further Orders directed to WIX, "Order to Transfer Material (Effective Immediately) and Order Revoking License" 59 Fed. Reg. 50,931 (October 6, 1994) ("Revocation Order"); and (2) an Order directed to Wicks, "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 59 Fed. Reg. 50,932 (October 6, 1994) ("Prohibition Order"), based, *inter alia*, upon a finding that the NRC lacked adequate assurance that the public health and safety would be protected if WIX retains possession of licensed material, or if licensed activities are conducted by WIX and/or its President and RSO in the future; and

WHEREAS the Revocation Order required the Licensee, *inter alia*, to transfer all NRC-regulated material in its possession to the manufacturer or other person authorized to possess the material and revoked License No. 49-27356-01, effective immediately; and

WHEREAS the Prohibition Order, *inter alia*, prohibited Wicks from engaging in NRC-licensed activities (including any supervising, training or auditing) for either an NRC licensee or Agreement State licensee performing licensed activities in areas of NRC jurisdiction in accordance with 10 C.F.R. § 150.20 for a period of five (5) years from the date of that Order; and

WHEREAS requests for hearing were filed by WIX concerning the Suspension Order and Revocation Order on July 1 and October 14, 1994, respectively, and a request for hearing was filed by Wicks concerning the Prohibition Order on October 14, 1994, in response to which adjudicatory proceedings have been convened and remain pending before an Atomic Safety and Licensing Board ("Licensing Board") at this time; and

WHEREAS the undersigned parties recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise

of the matters now pending in litigation between them, including, without limitation, the elimination of further litigation expenses, uncertainty and delay, and other tangible and intangible benefits, which the parties recognize and believe to be in the public interest; and

WHEREAS, pursuant to 10 C.F.R. § 2.203, the Staff, WIX and Wicks have stipulated and agreed to the following provisions for settlement of the above-captioned proceedings, subject to the approval of the Licensing Board, before the taking of any testimony or trial or adjudication of any issue of fact or law; and

WHEREAS WIX and Wicks are willing to waive their hearing and appeal rights regarding these matters, in consideration of the terms and provisions of this Stipulation and settlement agreement; and

WHEREAS the terms and provisions of this Stipulation, once approved by the Licensing Board, shall be incorporated by reference into an order, to be issued in accordance with subsections b, i, and o of section 161 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2201, and into License No. 49-27356-01, issued pursuant to section 81 of the Act, 42 U.S.C. § 2111, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*;

NOW, THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Wicks agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities up to and including June 15, 1999, five years from the date of the NRC "Order Suspending License (Effective Immediately)," dated June 16, 1994. For purposes of this Stipulation and Agreement, the definition of "NRC-licensed activities," as set forth above, is understood to include any and all activities that are conducted pursuant to a specific license issued by the NRC or general license conferred by NRC regulations, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20, but does not include marketing, other business activities or ownership of an interest in WIX.

2. For a period of five years after the above-specified five-year period of prohibition has expired, i.e., from June 16, 1999, through June 15, 2004, Wicks shall, within 20 days of his acceptance of each and any employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined above, provide written notice to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76011, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities, and a detailed description of his duties and the activities in which he is to be involved.

3. In the first notification provided pursuant to Paragraph 2 above, Wicks shall include a statement of his commitment to compliance with NRC regulatory

requirements and an explanation of the basis why the Commission should have confidence that he will comply with applicable NRC requirements.

4. Notwithstanding the above, it is understood that Wicks may request reconsideration of the Prohibition Order after WIX has conducted two (2) years of resumed NRC-licensed activities; however, it is understood that the NRC Staff shall have the sole discretion to determine whether any such reconsideration is warranted, with respect to which determination Wicks hereby waives any right to or opportunity for hearing or appeal before the NRC and/or a court of law.

5. It is hereby agreed by the parties that WIX shall be allowed to resume its conduct of NRC-licensed activities upon approval of this Stipulation and Agreement by the Licensing Board, but it is expressly understood and agreed that Wicks is prohibited from participation in the conduct of any such activities in accordance with Paragraph 1 above. In furtherance of this understanding, WIX and Wicks further agree that License No. 49-27356-01 shall be modified to include the following requirements, prior to any resumption of NRC-licensed activities, which shall remain in effect up to and including June 15, 1999, or until such other time as may be explicitly stated herein:

(a) WIX (1) shall retain Mr. Ray Heath, or other person approved by the NRC Staff to serve as RSO or successor RSO until at least June 15, 1999, who shall at all times be responsible for performing the duties of an RSO and shall be responsible for maintenance of all NRC-required records; (2) shall establish the minimum number of hours to be devoted to RSO duties; and (3) shall describe the responsibilities and audits to be performed by the RSO under the radiation safety program. WIX shall submit the qualifications of any person it proposes to serve as RSO, other than Mr. Heath, to the NRC Staff for prior approval; the statement of qualifications should demonstrate that the person has not previously been employed by WIX, that he/she is likely to exercise independence from Wicks, and that he/she meets the NRC's minimum criteria established for an RSO.

(b) Prior to restart, Mr. Heath (if he is selected by WIX to serve as RSO) must successfully complete an Industrial Radiography course of at least 40 hours duration. Within six months of restart, Mr. Heath must successfully complete a Radiography Radiation Safety Officer training course of at least three days duration. Courses selected by the licensee to satisfy this condition must receive prior approval by NRC Region IV.

(c) If Mr. Heath is selected to serve as RSO, WIX shall name an Assistant Radiation Safety Officer to the license. The designated Assistant RSO must have at least five years experience as an industrial radiographer. The assistant RSO shall be readily available to respond to incidents and emergencies and shall be on call by means of a

pager, telephone, or radio at all times when radiographic operations are scheduled or in progress.

(d) If Mr. Heath is selected to serve as RSO, the RSO and Assistant RSO shall be identified by name on the license. An Assistant RSO shall be carried on the license until Mr. Heath has gained the appropriate practical radiography training and experience, or a minimum of one year.

(e) The RSO shall have full authority for radiation protection and safety, entirely independent from any involvement or interference by Wicks, with full authority to direct all aspects of radiography operations including the authority to shut down operations that are unsafe or which violate the license or NRC requirements. The RSO shall report to the person who is retained pursuant to paragraph 5(g) below, and the RSO shall have the authority to report any concerns directly to the NRC. The RSO shall notify the NRC immediately if Wicks participates or becomes involved in any NRC-licensed activities, or interferes with the RSO's independence in any way.

(f) The RSO shall certify to the NRC Staff in advance of commencing NRC-licensed activities that he/she understands (1) the terms of this Stipulation and Agreement, the license requirements, and the Commission's regulations associated with radiography, (2) that he/she may be held personally accountable for violations of the license or Commission requirements under 10 C.F.R. § 30.10 for deliberate misconduct, (3) that he/she is responsible for making reports required by NRC regulations, and (4) that Wicks is prohibited from having any involvement in NRC-licensed activities, and that the RSO is required to notify the NRC immediately if Wicks participates or becomes involved in any NRC-licensed activities, or interferes with the RSO's independence in any way.

(g) WIX will retain the services of a person, to be approved in advance by the NRC Staff, to be responsible for management of those aspects of the company's business that could affect the RSO or the conduct of radiation safety-related activities, including the authority (1) to hire and terminate the employment of the RSO or other employees engaged in the conduct of NRC-licensed activities, (2) to make and execute salary and other financial decisions which may affect such persons including the RSO, and/or the safe conduct of NRC-licensed activities, and (3) to have control over financial resources (e.g., through the establishment of an escrow account) sufficient to ensure the safe and proper conduct of NRC-licensed activities. This individual shall also notify the NRC immediately if he/she determines that Wicks is or has been involved in NRC-licensed activities.

(h) Neither Wicks nor any person related to, or in privity with, him shall have any direct or indirect involvement in or exercise control

over NRC-licensed activities, including management, supervision and financial control or participation in hiring and firing decisions which may affect the RSO and/or the safe and proper conduct of NRC-licensed activities. In addition, while Beverly Wicks (Wicks' wife) may continue to serve as WIX' secretary, she shall not participate in or have any involvement in NRC-licensed activities (including, without limitation, such tasks as mailing and receiving film badges or radiation exposure reports, handling or distributing dosimeters, and any other tasks related to radiation safety).

(i) WIX shall retain an outside independent auditor (and any successor auditor), who is to be approved in advance by the NRC Staff based upon a review of the auditor's qualifications. The auditor (and any approved successor) shall submit an audit plan for NRC approval that describes the items to be audited and the methodology to be employed, including the number of field inspections and the percentage of employees engaged in radiography who will be audited in the field. The auditor is to provide copies of all draft and final audit reports to the NRC Staff at the same time that such reports are provided to WIX. WIX shall provide a written response to the audit findings within 30 days after receipt thereof, including a description of any corrective actions taken or an explanation of why such actions were not taken. The auditor shall perform audits and examinations of the radiation safety program and operations, including the performance of field audits, as follows: An independent program audit will be performed at about three months, and no later than six months, following the resumption by WIX of NRC-licensed activities, with the results of the audit submitted to NRC Region IV for review. Following the initial audit, audits will be performed every six months. One year after restart, the NRC RIV Regional Administrator may consider, at the request of the licensee, relief in the audit requirements based on good cause shown. Further, the timing and scope of such audits shall not be disclosed to WIX or Wicks in advance; and the auditor shall be informed in advance that Wicks is prohibited from participation in any NRC-licensed activities.

(j) Any notification required to be made pursuant to this Paragraph 5 shall be made in writing to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76011.

(k) The Regional Administrator, NRC Region IV, may relax or rescind any of the conditions set forth in this Stipulation and Agreement upon a demonstration of good cause; however, it is understood that the Regional Administrator shall have the sole discretion to determine whether any such reconsideration is warranted, with respect to which

determination WIX and Wicks hereby waive any right to or opportunity for hearing or appeal before the NRC and/or a court of law.

6. The parties agree that, as an integral part of this Stipulation and upon execution hereof, and subject to the approval of this Stipulation by the Licensing Board, (a) WIX and Wicks will withdraw their July 1 and October 14, 1994 requests for hearing on the Suspension Order, Revocation Order and Prohibition Order, and (b) the parties will file a joint request for dismissal of the proceedings on the Suspension Order, Revocation Order and Prohibition Order, with prejudice, it being understood and agreed that this Stipulation and Agreement resolves all outstanding issues with respect to those Orders, that WIX and Wicks hereby waive their hearing and appeal rights regarding the matters which are the subject of these Orders, and that the Staff will take no further enforcement or other action against WIX or Wicks in connection with those Orders, subject to the terms of this Stipulation and Agreement.

7. WIX and Wicks hereby agree that a failure on their part to comply with the terms of this Stipulation and Agreement will constitute a material breach of this Agreement, and that any such breach may result in the immediate revocation or suspension of the license, effective immediately, if the NRC Staff, in its sole discretion, determines such action to be appropriate, and may result in further enforcement or other action as the NRC Staff may be determine, in its sole discretion, to be appropriate.

8. It is understood and agreed that nothing contained in this Stipulation and Agreement shall relieve the Licensee from complying with all applicable NRC regulations and requirements. Further, it is understood and agreed that nothing contained in this Agreement shall be deemed to prohibit the NRC Staff from taking enforcement or other action (a) against any entity or person for violation of this Stipulation and Agreement, or (b) against persons other than WIX or Wicks in connection with or related to any of the matters addressed in the Suspension Order, Revocation Order or Prohibition Order, should the Staff determine, in its sole discretion, that it is appropriate to do so.

9. It is understood and agreed that this Stipulation and Agreement is contingent upon prior approval by the Licensing Board and dismissal of the instant adjudicatory proceedings.

10. This Stipulation and Agreement shall be binding upon the heirs, legal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, we set our hand and seal this 2nd day of November, 1995.³

FOR WESTERN INDUSTRIAL X-RAY
INSPECTION CO., INC., and
LARRY D. WICKS:

FOR THE NRC STAFF:

Larry D. Wicks, individually and
as President, Western Industrial
X-Ray Inspection Co., Inc.

Sherwin E. Turk
Counsel for NRC Staff

John C. Phillips
Counsel for Western Industrial
X-Ray inspection Co., Inc.
and Larry D. Wicks

³The signed original was filed with the Board.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-OM
(ASLBP No. 95-710-01-OM)
(Order Modifying Facility
Operating License No. R-97)

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

November 22, 1995

In a proceeding involving the proposed conversion of fuel in a research reactor from high-enriched fuel (HEU) to low-enriched fuel (LEU), the Licensing Board determines that the single petitioner for intervention has standing but has not proffered an acceptable contention and, accordingly, denies the petition for leave to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

Where there are two ongoing proceedings involving the same facility, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding.

MEMORANDUM AND ORDER

(Denial of Petition for Leave to Intervene)

I. BACKGROUND

This proceeding involves the conversion of fuel used in the Georgia Tech Research Reactor from high-enriched uranium (HEU) fuel to low-enriched uranium (LEU) fuel, in accordance with the requirements of 10 C.F.R. § 50.64 and an Order issued by the NRC Staff on June 16, 1995. As set forth in our Memorandum and Order (Intervention Petition), dated July 31, 1995, LBP-95-14, 42 NRC 5, a timely petition for leave to intervene was filed by Georgians Against Nuclear Energy (GANE). In LBP-95-14, we stated that GANE is permitted by 10 C.F.R. § 2.714(b)(1) to amend its petition to intervene with respect both to its standing and to file a contention. We permitted GANE to file its amended petition by August 21, 1995, and set a schedule for responses by Georgia Institute of Technology (Georgia Tech or Licensee) and the NRC Staff.

GANE timely filed its amended petition on August 21, 1995.¹ Georgia Tech and the NRC Staff each filed responses opposing GANE's petition.² We held a prehearing conference to consider the petition on November 15, 1995, in Atlanta, Georgia.³

As recently reiterated by the Commission, acceptance of a petition for leave to intervene (such as that submitted here by GANE) requires that the petitioner demonstrate that it has an interest in the proceeding — i.e., standing — and that it proffer at least one admissible contention. CLI-95-12, 42 NRC 111, 115, 117 (1995). Georgia Tech and the Staff challenge GANE's petition in both respects. We turn here to these questions.

II. STANDING

Under section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), the Commission must grant a hearing to any person whose interest may be affected by a proceeding. To establish standing, an organization such as GANE may rely on the interest of a member; GANE has elected to rely on the interest of one of its members, Mr. Robert Johnson.

¹ Georgians Against Nuclear Energy Amended Petition for Leave to Intervene, dated August 21, 1995.

² Georgia Institute of Technology's Response to GANE's Amended Petition for Leave to Intervene, dated August 28, 1995; NRC Staff's Response to Amended Petition for Leave to Intervene on Conversion Order Filed by Georgians Against Nuclear Energy, dated September 11, 1995.

³ See Notice of Prehearing Conferences, dated October 24, 1995, published in 60 Fed. Reg. 55,287 (Oct. 30, 1995).

In LBP-95-14, we discussed a proceeding in which GANE was also a participant where the Licensing Board held that, where there are two ongoing proceedings involving the same reactor, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding. LBP-95-14, *supra*, 42 NRC at 7, citing *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). We ruled that we would accept GANE's statement of standing in the ongoing license-renewal proceeding as satisfying standing requirements in this proceeding, as long as Mr. Johnson, the member upon whom GANE based its standing in both proceedings, indicated that he also wished to be represented by GANE in this proceeding.⁴ (In its amended petition, GANE stated only that it "represents" Mr. Johnson in this proceeding.)

Mr. Johnson appeared at the prehearing conference and affirmed that he wishes GANE to represent his interests in this proceeding as well as the license-renewal proceeding (Tr. 4-5). His workplace, less than a mile from the reactor, permits us to presume that he may be affected by the results of this proceeding. That being so, we hold that GANE has established its standing to participate in this proceeding.

III. CONTENTION

In its amended petition, GANE stated that it agrees that the change from HEU to LEU fuel, as directed by the Staff Order, is beneficial. It commends Georgia Tech for undertaking the conversion. Its sole contention is that the reactor core must be properly reconfigured prior to using the LEU fuel, an operation that (according to GANE) would cost "several million dollars." GANE adds that, "[i]n lieu of a straight-forward, albeit expensive, approach to conversion, Georgia Tech has submitted various theories and paper proofs that the reactor as currently configured will operate, and operate safely, by inserting extra LEU into the reactor."⁵

The Licensee terms this contention "vague and difficult to interpret" and opposes its admission as lacking information called for by 10 C.F.R. § 2.714(b) and (d) — namely, a brief explanation of the contention, a concise statement of the alleged facts or expert opinion supportive of such contention, or sufficient information to show that a genuine dispute exists on a material issue of law or fact."⁶ For its part, the Staff claims that GANE has not satisfied the longstanding

⁴ The Commission has upheld our ruling on standing in the license-renewal proceeding. CLI-95-12, *supra*, 42 NRC at 115-17.

⁵ GANE Amended Petition at 2.

⁶ Licensee's Response to GANE's Amended Petition at 2-3 (pages not in fact numbered).

basis requirement for contentions. According to the Staff, GANE questions whether the Licensee has sufficient information at this time to support continued use of the current reactor configuration with the LEU fuel, but does not provide any reason to believe the reactor configuration authorized by the Conversion Order is unsafe.

The Staff further discusses section 2.15 of the Safety Evaluation Report (SER), which GANE references for its claim that the "startup testing program" is experimental and information gained from the program will be needed to provide basic information on the acceptability of the existing core configuration. The Staff claims that GANE has misinterpreted the SER by failing to recognize that the startup report is not the source of the Staff's analysis and only will be used to verify calculations predicted by past experience at other converted reactors and by applicable safety design analyses. (The SER, *inter alia*, referenced analyses of the Oak Ridge Research Reactor.) At the prehearing conference, the Staff indicated that the initial calculations of core configuration (performed in the 1960s or 1970s) could not be located so that Georgia Tech and the Staff performed new analyses of core configuration, based both on the parameters of this reactor and comparisons with other reactors (Tr. 19-22).

GANE indicated at the prehearing conference that it earlier believed it had expert support for its claim that the core should be reconfigured. However, it also acknowledged that the expert was not willing to appear for GANE and, in any event, the expertise would not have qualified the individual to testify on this claim. As GANE's representative conceded, "basically I had all of my eggs in one basket and it turned out he wasn't an expert." (Tr. 11).

In these circumstances, having provided GANE an extra opportunity to perfect its contention (and GANE having failed to identify the source of its claim in its amended petition), we indicated at the conference (Tr. 25, 30) that GANE had failed to proffer an admissible contention and, accordingly, its petition for leave to intervene would have to be rejected. The Staff can thus order Georgia Tech to substitute LEU fuel for HEU fuel — subject, of course, to Georgia Tech's agreement in the license-renewal proceeding that it will not bring LEU fuel to the site until after the conclusion of the 1996 Summer Olympic Games.

IV. ORDER

For the reasons stated, and based on the entire record of this proceeding, it is, this 22d day of November 1995, ORDERED:

1. The petition for leave to intervene filed by Georgians Against Nuclear Energy, dated July 6, 1995, and supplemented by the amended petition dated August 21, 1995, is hereby *denied*.

2. This Order is effective immediately and will constitute the final order of the Commission in this proceeding, subject to appeal to the Commission under 10 C.F.R. § 2.714a.

3. This Order denying an intervention petition is appealable to the Commission pursuant to 10 C.F.R. § 2.714a. Such appeal must be filed within 10 days of service of this Order and shall be asserted by filing a notice of appeal and accompanying supporting brief.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Dr. Peter S. Lam
ADMINISTRATIVE JUDGE**

**Rockville, Maryland
November 22, 1995**



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

**Docket No. 40-8027-EA
(Decontamination and
Decommissioning Funding)**

**SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site)**

December 14, 1995

The Commission reverses the portion of the Atomic Safety and Licensing Board's Order, LBP-95-5, 41 NRC 253 (1995), that entered a provision in a protective order restricting the NRC Staff from referring confidential information obtained through discovery to other NRC offices without first obtaining Board approval. The Commission vacates that provision and directs the Board to enter a new provision in accordance with this opinion.

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTION

The Atomic Safety and Licensing Board may not place itself in the position of deciding whether the NRC Staff should be permitted to refer information obtained through discovery to NRC investigatory staff offices.

ADJUDICATORY BOARDS: RESPONSIBILITIES

The licensing board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence.

¹ This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTIONS

The regulation permitting the Board to enter protective orders, 10 C.F.R. §2.740, is procedural and may not be read to enlarge the Licensing Board's authority into areas that the Commission has clearly assigned to other offices.

MEMORANDUM AND ORDER

On June 29, 1995, the Commission granted the NRC Staff's petition for interlocutory review of an Atomic Safety and Licensing Board order issued on April 18, 1995. LBP-95-5, 41 NRC 253. That order imposed a protective order, the terms of which were unobjectionable to all parties, except for paragraph 7. Paragraph 7 restricts the NRC Staff from referring confidential information obtained through discovery to other NRC offices without first obtaining Board approval. The NRC Staff opposes paragraph 7 on the ground that a requirement for prior Board approval interferes with NRC investigatory and enforcement activities. The Staff asks the Commission to reverse the Board's order with respect to paragraph 7. The Licensee, Sequoyah Fuels Corporation (SFC), and its parent, General Atomics (GA), support the Board's decision.²

The proceeding is currently being held in abeyance pending settlement negotiations between the NRC Staff and GA. The Board recently approved a settlement agreement between the NRC Staff and SFC. LBP-95-18, 42 NRC 150 (1995) (Petition for Review Pending). Some discovery already has taken place and more likely will ensue should the proceeding resume. Therefore, despite the delay in the proceeding and despite GA's suggestion that issuance of a decision with the Commission not at "full strength" (*see* note 1, *supra*) would be "imprudent," the Commission believes that this matter should be resolved now.³

For the reasons stated below, the Commission reverses LBP-95-5 with respect to paragraph 7 of the protective order and vacates paragraph 7. In addition, the Commission directs the Board to enter a new paragraph 7 in accordance with this opinion.

BACKGROUND

This proceeding stems from an NRC Staff enforcement order holding SFC and GA jointly and severally liable for providing financial assurance for the

²Native Americans for a Clean Environment and the Cherokee Nation are also parties to this proceeding. They did not participate in this appeal.

³*See* GA's Answer to NRC Staff's Brief in Support of Partial Reversal of LBP-95-5 (July 28, 1995), at 4.

decontamination and decommissioning of SFC's facility near Gore, Oklahoma. *See* 58 Fed. Reg. 55,087 (Oct. 25, 1993). The present controversy began after initial discovery requests were filed by the NRC Staff, SFC, and GA. These parties attempted to reach an agreement on the terms of a protective order proposed by SFC to control access to its confidential documents requested in discovery, but these attempts failed. As a result, SFC filed before the Licensing Board a motion under 10 C.F.R. § 2.740(c) requesting that the Board approve a protective order to control the disclosure and use of confidential discovery material obtained by Staff. GA joined in this motion seeking the same restrictions for its confidential documents.

Because the NRC Staff agreed that a document-by-document review to determine if a document may be considered exempt from public disclosure would significantly delay discovery, *see* 10 C.F.R. § 2.790(b), it agreed to the concept of a protective order. However, the NRC Staff, SFC, and GA could not agree on language for the order's paragraph 7. The Licensing Board ultimately imposed essentially the version of paragraph 7 proposed by SFC and GA.⁴

The version of paragraph 7 acceptable to SFC/GA and the one entered by the Licensing Board states:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order without first obtaining the approval of the Licensing Board.

41 NRC at 269. The NRC Staff proposal, supported by Native Americans for a Clean Environment and the Cherokee Nation but rejected by the Board, states:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from disclosing such to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff, but such NRC Staff shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order. Notwithstanding any other provision contained in this Protective Order, the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their Staff may use or refer such Protected Discovery Materials as is appropriate in the legitimate exercise of their respective duties.

41 NRC at 255-56.

⁴Judges Gleason and Kline ruled in favor of imposing the protective order, including the current version of paragraph 7. Judge Bollwerk dissented with respect to paragraph 7, but otherwise concurred in the majority's decision.

The principal difference between the two proposals is that the SFC/GA version requires the Staff to seek prior Board approval before it may refer confidential information, even information that it believes evidences wrongdoing, to NRC investigative or enforcement offices. The staff's version of paragraph 7 would permit "in-house" referral to other NRC offices, including the Office of the Inspector General (OIG), the Office of Investigations (OI), and the Office of the Executive Director for Operations (EDO) "as is appropriate in the legitimate exercise of their respective duties."

The Board imposed the SFC/GA version on the ground that SFC and GA had adequately substantiated the need for protection from inadvertent releases by demonstrating that some discoverable financial and commercial documents are legitimately confidential or privileged information. The Board noted that on a showing of good cause it had the authority "to issue orders to protect against discovery disclosures of a party's trade secrets, confidential research, development, or commercial information or to require that disclosures of such information be made in a designated way." 41 NRC at 258 (citing 10 C.F.R. § 2.740(c)). The Board concluded that the Staff is not exempt from section 2.740(c) and that pursuant to this section the Board is authorized to restrict intraoffice Staff dissemination of information where good cause for such restrictions is demonstrated. In weighing the interests of the parties, the Board found compelling the advantage to be gained by imposing the blanket protective order to avoid the parties proceeding "*seriatim* pursuant to the regulations governing the obtaining of protected information, 10 C.F.R. §§ 2.740(c) and 2.790 . . . [which would] requir[e] the observance of good cause and other procedural requirements of the regulations, [and] would consume further argument and unnecessary time." 41 NRC at 264.

Under the Board order, if the Staff believes that information should be referred to investigative or enforcement offices, the Staff is permitted to make an *in camera, ex parte* presentation to the Board on why the matter should be referred. 41 NRC at 265. The Board would then "rapidly" make a determination on whether to permit the referral. 41 NRC at 257. Apparently the Board would apply a "reasonableness" standard in making this determination. *Id.* If the Board deems the referral unreasonable, the matter would be sent immediately to the Commission for resolution.

Judge Bollwerk dissented from the majority with respect to paragraph 7. He expressed grave concern "with the Board's incursion into a regulatory area in which it has no authority or expertise." 41 NRC at 273. He would have modified paragraph 7 to delete any requirement of preclearance by the Board and instead require that, if Staff litigators determined that a referral was necessary, the Staff simultaneously with the referral would inform the Commission, rather than the Board, of its action. 41 NRC at 278.

ANALYSIS

The central issue before the Commission is the appropriate role, if any, of the Licensing Board in determining whether the Staff may refer confidential information obtained through discovery to NRC investigatory offices. This issue raises a number of complex and difficult questions that the Commission has not previously faced. After careful consideration the Commission concludes that the screening of investigatory information is not an appropriate function of the Board. The circumstances of this case warrant some protection to GA and SFC's documents, but not the type of protection contemplated under the current version of paragraph 7 of the protective order.

Protective orders are an important procedural device in Commission adjudicatory practice. The Commission encourages the Licensing Board to use protective orders to expedite discovery and at the same time protect legitimate interests in confidentiality. In this instance, parties on both sides of the controversy seem to agree that without a protective order discovery would be significantly delayed. Although the Staff contested the Board-imposed version of paragraph 7, it agreed to the desirability of a protective order to avoid the burdens of *seriatim* review. NRC Staff's Reply to General Atomics' Brief in Support of Motion for a Protective Order at 7-8 (Jan. 6, 1995).

The Commission agrees that the imposition of a protective order to avoid *seriatim* review is necessary and useful in the circumstances of this case. The Commission does not agree, however, that the protective order should establish the Licensing Board as a screen between NRC Staff and NRC investigatory offices.

The Licensing Board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence. Even in enforcement cases or in instances where one party is accused of making a material false statement or omission in its representations to the Board, the Board is not required to consider the policy priorities inherent in deciding whether and when to institute an investigation or enforcement action.⁵ Yet the type of Board review contemplated by the current protective order puts the Board in exactly that role by making it in effect an investigatory gatekeeper. The Board may have to decide whether certain information should be reviewed by NRC investigatory or enforcement offices, or whether any investigation at all is appropriate. These inquiries may have nothing at all to do with the matters at issue in the adjudicatory controversy before the Board. They are functions clearly delegated

⁵ See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1239-40 (1982) (alleged material false statement had an indirect relevance to the Licensing Board proceeding, but OI is not bound by the suggestions of the Licensing Board regarding the course of further investigation).

to the Staff, not the Board.⁶ As the dissenting Licensing Board Judge stated, reviewing factual information for its investigatory significance is an inquiry “that a Board’s experience and expertise make[] it ill-equipped to make.” 41 NRC at 275.

Not only is the gatekeeper role outside the Board’s traditional functions, it also seems unworkable in practical terms, as demonstrated by the Board’s own vagueness on how it would exercise its review in this case. The Board referred only to a general “reasonableness” standard. 41 NRC at 257, 265. If “reasonableness” means a searching Board inquiry into the need for an investigation or the relevance of certain information to an investigation, the Commission cannot approve such a Board role, for it is outside the Board’s expertise and authority. If, on the other hand, “reasonableness” means simply ensuring that discovery documents contain the information the NRC Staff says they do, the Board role becomes so minimal as to offer meaningless “protection” to GA and SFC. The Commission, in short, is unwilling to approve a vague reasonableness review that either establishes a meaningless procedural step or poses the risk of unnecessarily entangling the Board in investigatory matters that are clearly outside of the scope of its responsibilities.

The Board incorrectly relied on section 2.740 to give it authority to conduct the type of review contemplated under the protective order. This regulation is procedural and may not be read to enlarge the Licensing Board’s authority into areas that the Commission has clearly assigned to other offices. As the Licensing Board itself recognized, it could not exercise its “protective order” powers to prohibit the Staff from referring to other Staff offices information obtained through discovery that has immediate public health and safety implications. 41 NRC at 264. The Commission concludes that the same is true of investigatory or enforcement information.

While GA’s brief suggests in elliptical fashion that as a matter of law the NRC Staff might be barred from referring documents obtained through discovery to NRC investigatory or enforcement offices, this case at bottom involves no such claim. The protective order, for example, does not even apply to nonconfidential documents, so there is no restriction whatever on their dissemination. Moreover, the order explicitly permits intrastaff referral of confidential material, albeit with prior approval from the Board. The Board and GA cite various judicial cases on protective orders, but none bars an agency receiving discovery documents in its

⁶ As part of its mission, the NRC is authorized to “make such studies and investigations” and “obtain such information” as is necessary to assist it in exercising its statutory authority. Atomic Energy Act, § 161(c); 42 U.S.C.A. § 2201(c). The Commission has delegated to OI the Commission’s authority pursuant to section 161(c) to conduct investigations into allegations of wrongdoing of licensees, applicants, their contractors or vendors. NRC Management Directive 9.8, chap. 0119-03; *see also* 10 C.F.R. § 1.36(a). And, by statute, the OIG is given broad powers to investigate possible agency fraud, waste, and abuse. *See* Inspector General Act, 5 U.S.C. app. § 7(a); *see also* 10 C.F.R. § 1.12(d).

own adjudicatory proceeding from referring them to its investigative offices. See LBP-95-5, 41 NRC at 263-64; GA's Answer to NRC Staff's Brief in Support of Partial Reversal of LBP-95-5 (July 28, 1995), at 7-9. At most these cases stand for the proposition that a corporation's interest in confidentiality may provide good cause for restricting agencywide dissemination of discovery material. See, e.g., *Harris v. Amoco Production Co.*, 768 F.2d 669, 684-85 (5th Cir. 1985). The cases certainly do not require the Board-review device created by paragraph 7.

Although the Commission does not approve the Board's version of paragraph 7, the Commission agrees with the Board that GA and SFC have demonstrated a legitimate, significant interest in protecting their confidential documents. Thus, the question remaining is what device is appropriate to protect the interest of GA and SFC. The Commission fails to see why the Board's review of a Staff referral is essential to protect the confidentiality of GA's and SFC's business documents. Indeed, upon analysis, such review provides very little protection of confidentiality. Under the current protective order the NRC Staff must determine that a document contains evidence of possible wrongdoing and then seek the Board's approval for a referral. The Board must then approve or disapprove the Staff's reasons for the referral before any documents are transferred. Virtually all of the Staff requests presumably would be approved.⁷ Once the Board gives its approval, the current paragraph 7 provides no limits on further dissemination within the Staff.

Because the current paragraph 7 is deficient, the Commission imposes a substitute provision that eliminates any prescreening by the Board and, in the Commission's view, provides more protection than what now exists. The new paragraph 7 shall provide:

- (1) The NRC litigation staff is to refer confidential documents to staff investigatory or enforcement offices, not involved in the litigation, only after it has made a threshold determination that the documents reasonably contain evidence of possible wrongdoing.
- (2) Once referred, further dissemination within the NRC Staff will be limited to a "need to know" basis.
- (3) Upon any referral, the Staff will inform the Board in writing, *in camera* and *ex parte*, that a referral was necessary and that the referral is consistent with the restrictions contained in paragraph 7.

The Licensing Board is free to consider motions to modify the protective order. As the Board has already stated in this case, "[i]n the event that the

⁷ A Board finding against referral seems highly unlikely. As Judge Bollwerk stated "any instance that [the Board] would withhold information would probably be information that is so far off track that [it is] hard to believe the Staff would . . . be interested in turning [it] over to OI anyway." Transcript of Oral Argument on the Terms of Protective Order at 13 (Jan. 27, 1995).

parties desire to pursue additional discussions regarding the provisions of this order, they are of course free to do so." 41 NRC at 266.

CONCLUSION

For these reasons, the Commission *REVERSES* LBP-95-5 with respect to paragraph 7 of the protective order and vacates paragraph 7. The Commission directs the Board to enter a new paragraph 7 in accordance with this opinion.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman*

In the Matter of

Docket Nos. 70-00270
30-02278-MLA
(TRUMP-S Project)
(Byproduct License
No. 24-00513-32; Special
Nuclear Materials License
No. SNM-247)

CURATORS OF THE UNIVERSITY
OF MISSOURI

December 14, 1995

The Commission denies the Intervenors' petition for reconsideration of an order (CLI-95-11, 42 NRC 47 (1995)) imposing a condition upon the University of Missouri regarding its TRUMP-S experiments. The Commission rules that the NRC Chairman had sufficient authority to approve CLI-95-11 despite the absence of a three-person Commission; the Commission's acknowledgment in CLI-95-11 that the site of the experiments is highly accessible to the public did not necessitate a reexamination of the safety of the TRUMP-S Project; and a challenged licensing condition, imposed by the Commission in CLI-95-11, regarding the Licensee's actions during an Alert is adequate to protect the public.

NRC REORGANIZATION PLAN NO. 1 OF 1980

Pursuant to section 3 of the NRC Reorganization Plan No. 1 of 1980, an order may be issued on the authority of only one Commissioner rather than the quorum of three called for by the Energy Reorganization Act of 1974.

*This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

**EMERGENCY PLAN: AMENDMENT; CONTENT (CHANGES);
LICENSING CONDITION; PUBLIC HEALTH AND SAFETY**

An amendment to an Emergency Plan is unnecessary if it would not enhance the public safety and would not make a requirement previously imposed by a Commission order any more enforceable than it already is.

**RULES OF PRACTICE: AD HOMINEM ATTACKS; ATTORNEY
CONDUCT; CANON OF ETHICS; RESPONSIBILITIES OF
COUNSEL; SANCTIONS**

Counsel's derogatory description of the NRC Staff constitutes intemperate, even disrespectful, rhetoric and is wholly inappropriate in legal pleadings.

**ADJUDICATORY PROCEEDINGS: STATUS OF NRC STAFF
ADMINISTRATIVE TRIBUNALS: AUTHORITY
NUCLEAR REGULATORY COMMISSION: AUTHORITY;
DELEGATION TO STAFF
RULES OF PRACTICE: STAFF MEETING WITH PARTIES**

An adjudicator at the Commission has the authority to delegate to the NRC Staff the responsibility of verifying that the licensee or applicant has responded adequately to a license condition imposed by the adjudicator. Because meetings between NRC Staff and a licensee under such delegated authority are public, such delegation does not deprive Intervenor's of an opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. The Intervenor's would receive advance notice of, and would be permitted to attend, such meetings.

**ADJUDICATORY PROCEEDINGS: STATUS OF NRC STAFF
ADMINISTRATIVE TRIBUNALS: AUTHORITY
NUCLEAR REGULATORY COMMISSION: AUTHORITY;
DELEGATION TO STAFF; SUPERVISORY AUTHORITY
RULES OF PRACTICE: STAFF MEETING WITH PARTIES
ENFORCEMENT ACTIONS**

If the Intervenor's disagree with conclusions reached at a meeting between Staff and licensee regarding whether the licensee had complied with the Commission's licensing conditions, the Intervenor's may seek further agency action

by filing a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission itself.

MEMORANDUM AND ORDER

(Petition for Reconsideration)

The Intervenors seek reconsideration of a Commission decision issued on August 22, 1995. CLI-95-11, 42 NRC 47. In that decision, the Commission denied the University of Missouri's petition for reconsideration of an emergency classification issue and *sua sponte* ordered the University either to (i) require evacuation of all persons (except emergency personnel) to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials or (ii) provide the NRC Staff sufficient information to allow it to determine that the existing Emergency Plan and procedures (or any proposed modifications of the Plan and procedures) adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials.

The Intervenors assert that CLI-95-11 is flawed in three respects: (1) the NRC Chairman's alleged lack of authority to approve the order; (2) a failure to reexamine the safety of the TRUMP-S Project in light of the Commission's acknowledgment that the site of the experiments is highly accessible to the public; and (3) the alleged inadequacy of one of the Commission's remedial conditions. The Commission finds these claims to be without merit and therefore denies the Intervenors' petition for reconsideration.

A. Chairman Jackson's Authority to Authorize Issuance of CLI-95-11

The Intervenors first argue that the order was issued on the authority of only one Commissioner (Chairman Jackson) rather than the quorum of three called for by the Energy Reorganization Act of 1974, § 201(a)(1), 42 U.S.C. § 5841. The Intervenors assert that, because section 3 of the NRC Reorganization Plan No. 1 of 1980 (5 U.S.C. App. I, § 3) gives the Chairman authority to act alone only in an emergency, CLI-95-11 was *ultra vires*. Petition at 2-3. The flaw in this argument is that the Chairman exercised authority to issue the order not under section 3, which deals with emergencies, but rather under section 1, which allows the Commission to delegate authority to one of its members. See 60 Fed. Reg. 34,561-62 (July 3, 1995).

B. Ramifications of Commission's Conclusions Regarding the Openness of the MURR Facility Site

Next, according to the Intervenor, the Commission's belated acknowledgment in CLI-95-11 that there is no "site boundary" around the Alpha Lab undercuts the Commission's earlier safety findings, and those findings must therefore be reconsidered. Petition at 5. The Intervenor's argument ignores the fact that CLI-95-8 recognized that there is no "site boundary," in the sense of a fence, around the University's research reactor (MURR) facility which houses the Alpha Lab, and that the Commission factored this into its safety findings. *See* CLI-95-8, 41 NRC 386, 391-92 (1995). *See generally* CLI-95-1, 41 NRC 71, 153 (1995); CLI-95-11, 42 NRC at 48.

C. Adequacy of Remedies Regarding University's Actions During an Alert

The Intervenor asserts that neither of the two alternative remedial conditions concerning the University's actions during an Alert is adequate to protect the public. First, the Intervenor argues that the Commission should require the University to amend its MURR Facility Emergency Plan to include the first alternative remedy (i.e., to require evacuation of all persons [except emergency personnel] to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials). Petition at 5. The Commission sees nothing to be gained by such a modification. Such an amendment would not make the requirement imposed by CLI-95-11 any more enforceable than it already is, would not enhance the public safety, and is therefore unnecessary.

The Intervenor also argues that the second alternative remedy (permitting the University to provide the NRC Staff sufficient information to determine that the existing Emergency Plan and procedures, or any proposed modifications thereto, adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials) deprives the Intervenor of any opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. Petition at 4.

According to the Intervenor, a resolution of this safety issue through a private conversation between Staff and the University would deprive the Intervenor of their statutory right to a hearing and their constitutional right to due process.¹

¹In support of this contention, the Intervenor asserts that this alternative remedy leaves the safety determination in the hands of NRC Staff which, in the Intervenor's words, "is totally incapable of making that determination in a sensible fashion." *Id.* Intervenor counsel's derogatory description of NRC Staff is another example of
(Continued)

The Intervenor's fears are unfounded. The second alternative would not deprive Intervenor of an opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. Meetings such as one contemplated under the second alternative are public meetings. The Intervenor would receive advance notice of, and would be permitted to attend, such meetings.² If the Intervenor concludes that an alternative to which Staff and the University agree does not provide equivalent protection to the public as compared with the 150-meter evacuation alternative,³ the Intervenor would then be free to seek further agency action by filing a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission itself.

Finally, we note that it is hardly unusual for an adjudicator at this Commission to delegate to the NRC Staff the authority to verify that the licensee or applicant has responded adequately to a license condition imposed by the adjudicator.⁴ Indeed, the Presiding Officer in this very proceeding did exactly that in his Final Initial Decision — without complaint or appeal from the Intervenor.⁵

the "intemperate, even disrespectful, rhetoric" (CLI-95-8, 41 NRC 386, 392 (1995)) that has characterized their pleadings throughout this proceeding. Such language is wholly inappropriate in legal pleadings. See 10 C.F.R. § 2.713(a), (c)(1); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-38 (1974); American Bar Association's *Model Code of Professional Responsibility* ("Model Code"), DR 7-101(A)(1), found in *ABA/BNA Lawyers' Manual on Professional Conduct* ("Manual") at p. 01:338 (1995); Model Rule 3.5, Comment, found in *Manual* at 01:151. Cf. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 627, *aff'd*, ALAB-849, 24 NRC 523 (1986).

Intervenor also claim that Staff's prior determinations in this proceeding have been determined by both the Administrative Judge and the Commission to be "hopelessly wrong." *Id.* The Commission can find nothing in either its own or the Licensing Board's decisions that even remotely supports this proposition.

² See NRC Management Directive 3.5, "Public Attendance at Certain Meetings Involving the NRC Staff" (Oct. 13, 1994); NRC Handbook 3.5, "Public Attendance at Certain Meetings Involving the NRC Staff" (Oct. 13, 1994).

³ CLI-95-11 stated that any alternatives to the 150-meter requirement must provide "adequate[] protect[ion]." 42 NRC at 49. This statement implies equivalence between the 150-meter requirement and any alternative approach.

⁴ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-91-3, 33 NRC 49, 50-51 (1991) (directing Staff to oversee compliance with commitments); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-20, 31 NRC 581, 587-88 (1990) (directing Staff to ensure that the evacuation time estimates conformed to the provisions of a related Appeal Board order); *Wrangler Laboratories*, LBP-89-39, 30 NRC 746, 788 (1989) (barring licensees from taking certain actions prior to Staff's confirmation of the licensees' compliance with the conditions of the Board order), *rev'd on other grounds*, ALAB-951, 33 NRC 505 (1991); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 436, 650 (1989) (directing Staff to verify applicant's conformance with the Board's findings, provisos, conditions, and expectations and granting the Staff "broad discretion in the timing and manner of conformance consistent with the [Board's] findings and . . . intent"), *aff'd as to this ruling*, CLI-90-3, 31 NRC 219, 251 (1990), *aff'd sub nom. Massachusetts v. Nuclear Regulatory Commission*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991).

⁵ See *Curators of the University of Missouri*, LBP-91-31, 34 NRC 29, 130 (1991), instructing the University to take three safety-related actions and to report the details of those actions to Staff, and then instructing Staff to "verify the adequacy of those actions."

D. Conclusion

The petition for reconsideration is DENIED. The Commission will consider no further Petitions for Reconsideration in this proceeding.⁶
It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 1995.

⁶ See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980) ("Reconsideration is at the discretion of the Commission"), citing *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy, Alternate Member

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

December 18, 1995

ORDER
(Modification of Protective Order)

In a Memorandum and Order dated December 14, 1995, CLI-95-16, 42 NRC 221, the Commission reversed a prior decision of this Board with regard to paragraph 7 of a Protective Order limiting the conduct of discovery between the parties to this proceeding. Under the direction of the Commission, we hereby amend our prior acceptance of the Protective Order by deleting the original paragraph 7 in its entirety and replacing it with the following language:

7.a. Upon determining that Protected Discovery Materials reasonably contain evidence of possible wrongdoing, NRC Staff authorized to receive Protected Discovery Materials shall refer such documents to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staffs for such use as

is appropriate in the legitimate exercise of their respective duties, but NRC Staff making the referral shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order.

b. Once Protected Discovery Material has been referred to NRC Staff investigatory or enforcement offices in accordance with clause (a) of this paragraph, further dissemination within the NRC Staff shall be limited to a "need to know" basis as determined by those NRC Staff investigatory or enforcement offices receiving the material, and those persons to whom further dissemination is made shall be informed by the NRC Staff investigatory or enforcement office making the disclosure that the material was obtained from documents covered by this Protective Order.

c. Upon any referral of Protected Discovery Material in accordance with clause (a) of this paragraph, NRC Staff making the referral shall inform the Board in writing, *in camera* and *ex parte*, that such referral is necessary and is consistent with the restrictions contained in this paragraph.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 18, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. James C. Lamb III
Lester S. Rubenstein

In the Matter of

Docket No. 30-32493-CivP
(ASLBP No. 95-709-02-CivP)
(EA 93-072)
(Byproduct Materials License
No. 29-28685-01)

RADIATION ONCOLOGY CENTER
AT MARLTON
(Marlton, New Jersey)

December 20, 1995

In a civil penalty proceeding, the Licensing Board enters a Prehearing Conference Order setting forth issues in controversy and establishing schedules for the proceeding.

CIVIL PENALTIES: DISCRETIONARY CHARACTER

Although recognizing the Staff's broad discretion in determining the amount of a civil penalty, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case. A nexus to the current proceeding would have to be shown, and differing circumstances might well explain seemingly disparate penalties in various cases.

PREHEARING CONFERENCE ORDER

(Issues and Schedules for Proceeding)

On October 11, 1995, the Licensing Board held a prehearing conference at the NRC headquarters in Rockville, Maryland, to define appropriate issues for litigation in this enforcement proceeding.¹ Participating, in addition to the Licensing Board, were representatives of Radiation Oncology Center at Marlton (ROCM or Licensee) and the NRC Staff.

Prior to the conference, at the request of the Licensing Board, ROCM and the Staff each had filed proposed statements of issues to be litigated. The Staff stated that it did not wish to raise any specific issues beyond those set forth in the Order Imposing Civil Monetary Penalty and which may be properly raised by the Licensee.² For its part, the Licensee set forth seventy-six issues that it wished to litigate.³

At the conference, the Board considered the following questions:

1. Motion to Stay Proceedings

On August 31, 1995, ROCM had filed a Motion to Stay Proceedings. The Staff on September 20, 1995, filed its response in opposition to ROCM's motion. At the conference, ROCM indicated it was withdrawing its motion to stay, and the Board accepted that withdrawal (Tr. 4-5).

2. Applicable Enforcement Policy

All parties agreed (Tr. 6-7) that the enforcement policy governing this proceeding is that one set forth in 10 C.F.R. Part 2, Appendix C, as in effect during the period of the alleged violation. Subsequent to that time, effective June 30, 1995, those provisions were superseded by a General Statement of Policy and Procedures for NRC Enforcement Actions (NUREG-1600), which differed in some respects from the Appendix C Statement of Policy.

3. Issues: Comparison with Other Proceedings

One of the major matters of disagreement between the parties is the manner in which the Staff exercises enforcement discretion in assessing penalties. The

¹ See Notice of Prehearing Conference, dated August 28, 1995, published at 60 Fed. Reg. 45,750 (Sept. 1, 1995). See also this Licensing Board's Memorandum and Order (Agenda for Prehearing Conference), dated September 28, 1995.

² NRC Staff Response to Memorandum and Order (Schedules for Proceeding), dated July 24, 1995.

³ Preliminary Report on Issues for Adjudication and Related Discovery, dated July 24, 1995.

Staff stated that it would defend at the hearing its use of discretion in this proceeding but strongly objected to any comparison with the results reached or the manner in which the Staff had exercised discretion in other seemingly similar cases (Tr. 9-10). On the other hand, ROCM sought to compare the Staff's exercise of discretion here with its exercise in other cases. It claims that the penalty in this case far exceeds those imposed in other similar cases (Tr. 13-15).

The Board ruled that, although recognizing the Staff's broad discretionary authority in enforcement matters, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case (Tr. 22). Such possible abuse of discretion is, of course, well within our authority to consider. "While [NRC's] enforcement discretion may be at its zenith as the agency decides whether to initiate enforcement action, that discretion does not negate the participatory rights in agency proceedings under statute or regulation once a proceeding has been initiated or a matter set for hearing." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994). Licensing boards previously have considered penalties in other cases. See *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297 (1991).⁴ The Board stated that it would permit the Licensee to raise questions about differing Staff treatment in similar cases, although a nexus to the current proceeding will have to be shown (Tr. 21-22, 91-92). Further, the Board observed that, as claimed by the Staff, differing circumstances might well explain seemingly disparate penalties in various cases (Tr. 22).

4. Issues: Specific Matters

Following our ruling on the foregoing issue (comparison with penalties assessed in other proceedings), the Staff suggested that many of its differences with the Licensee could be resolved by rewording some of ROCM's issues. We recessed the conference to permit the parties to reconcile their differences (Tr. 79). They later requested that they be permitted to submit a revised list of issues at a later date (deleting at least two to which they agreed to stipulate, and eliminating others that appeared repetitive or subsets of broader issues), and the Board accepted their request. On October 25, 1995, the Staff forwarded the joint list of issues to the Board, taking into account the ruling with respect to

⁴In one civil penalty proceeding, however, an Administrative Law Judge declined to consider penalties in other cases that the Staff was attempting to advance to justify the penalty it was there seeking. *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 236-37 (1987). We find ample reason to distinguish Hurley from this case. There, the Staff attempted to bring in other proceedings to justify a level of penalty, whereas here a Licensee is attempting to establish that it is being unfairly singled out. Further, the ALJ in *Hurley* premised his ruling in part on lack of adequate notice to the Licensee, based on failure of the Notice of Violation (NOV) to have included the references sought to be included in Staff testimony (*id.* at 237 n.5) — a ruling not relevant here.

other proceedings set forth above, together with certain clarifications of ROCM's issues discussed at the conference.

Set forth in the Appendix to this Order are those issues approved by the Board. We have basically accepted all of the issues submitted to us, although we have made several minor modifications that do not appear to change the intent of ROCM's issues.

5. *Discovery*

At the prehearing conference, the Licensee and Staff each expressed preference to defer setting discovery schedules until a schedule in a related case (*Oncology Services Corp.*, Docket No. 030-31765-CivP) became better known (Tr. 94-95). On October 30, 1995, the Licensing Board in that case issued a Memorandum and Order denying a motion to stay that proceeding and establishing a schedule for pre-discovery dispositive motions. With that in mind, this Board held a telephone prehearing conference on Thursday, December 14, to establish a discovery schedule. Participating were Judges Bechhoefer and Rubenstein (Judge Lamb was unavailable to participate), representatives of the Licensee and Staff, as well as Lee Dewey, counsel to the Atomic Safety and Licensing Board Panel.

Based on the discussion during that call, the Board hereby approves the following agreed-upon schedule:

Monday, January 29, 1996	Last day for filing interrogatories and requests for production of documents.
Friday, March 15, 1996	Filing of responses to interrogatories and requests for production of documents.
Friday, July 12, 1996	Termination of discovery (including depositions).
Friday, August 30, 1996	Filing of prefiled testimony or (where oral testimony is to be presented) names and background statements of oral witnesses, including a summary description of proposed testimony.

Under this schedule, the hearing would likely be held in mid to late September or early October 1996.

* * *

Pursuant to 10 C.F.R. § 2.752(c), objections to this Order may be filed by ROCM within five (5) days after service of the Order. The Staff may file objections within ten (10) days after service.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 20, 1995

APPENDIX

Specific Issues

The Board accepts the following issues (numbers reference the revised statement of issues and comparable ROCM proposed issues, several of which have been slightly rewritten by the Board):

1. Whether, if all of the violations did occur, as alleged by the NRC, a penalty of \$80,000 is consistent with penalties imposed by the NRC on other licensees based on similar severity-level violations.

2. Whether it was appropriate for the NRC to use its enforcement policy discretion in this matter.

3. Purpose of NRC in imposing the \$80,000 penalty.

4-6. [Withdrawn.]

7. Whether the corrective action taken by the Licensee (as set forth in exhibits A and B to ROCM's proposed issues) were appropriately considered by the NRC in assessing the civil penalties.

8. Whether corrective actions by licensees in general are taken into consideration by the NRC and, if so, the precise criteria utilized by the NRC in such considerations.

9. Whether it was inappropriate not to reduce the penalty in light of the fact that items A3 and G of the Notice of Violation (NOV) were withdrawn by the NRC. (*Cf. Tulsa Gamma Ray*, LBP-91-40, *supra*.)

10. [Withdrawn.]

11. In what specific situations does and has the NRC used its enforcement policy discretion.

12. Whether the Licensee had "notice" that such a penalty could and/or would be used for such alleged violation.

13. Whether it is appropriate for the Licensee to be chosen at random to be the example for other licensees engaged in similar activities.

14. Whether the NRC has ever used its enforcement policy discretion in a similar matter and, if so, when, where and why.

15-16. The Board rejects issues concerning the constitutionality of certain alleged Staff practices for discovery purposes but will permit argument of these issues in proposed findings of fact and conclusions of law, based on facts established at the evidentiary hearing. *See* Tr. 55-77. Factual bases for such questions are encompassed in other issues set forth herein.

17. Whether a misadministration ever occurred at the Licensee's facility.

18. Whether a recordable event ever occurred at the Licensee's facility.

19. Whether having the RSO or physicist present in the Center on June 4, September 16, and December 9, 1992, was adequate to meet NRC requirements.

20. Whether if the RSO or physicist did not observe source exchanges on June 4, September 16, or December 9, 1992, there was a serious risk to health or safety.

21. Whether having the RSO or physicist inside the facility during source exchanges but not physically present in the treatment room would, standing alone, constitute a violation and, if so, what severity level.

22. Whether the actions or inactions by the Licensee as stated in the NOV ever posed a serious threat to public health or safety.

23-25. [Withdrawn.]

26. Whether "observation" as it is used in the license requires physical presence in the treatment room.

27. Whether having the RSO or physicist inside the facility, but not observing source exchanges, created a risk to public health and safety and, if so, why.

28. Whether surveys of radiation levels in adjacent areas and controlled areas were performed by anyone during the source exchanges on March 5, June 4, September 16, and December 9, 1992.

29. Whether, if surveys of radiation levels in certain adjacent areas and controlled areas were performed by Omnitron for the benefit of the Licensee during source exchanges on March 5, June 4, September 16, and December 9, 1992, a violation of the license occurred.

30. Whether, if surveys of radiation levels in certain adjacent areas and controlled areas were not performed, did such pose a threat to public health and safety.

31. Whether, if surveys of radiation levels in certain adjacent areas and/or controlled areas were not performed and if such constituted a license violation, at what level would such violation, standing alone, be typically classified.

32. [Withdrawn.]

33. Whether and under what circumstances it is appropriate for the NRC to aggregate multiple penalties typically classified at levels IV and V to create a level II violation.

34. Whether the matters set forth in the Notice of Violation are so significant that they support a severity level II violation.

35. [Withdrawn.]

36. Whether the "HDR operator/users" did individually demonstrate competence in the emergency procedures during "dry run" emergencies.

37. [Withdrawn.]

38. Whether, if the HDR operator/users were trained in emergency procedures but did not individually do multiple types of dry runs, such created a public health and/or safety risk.

39. Whether, if the HDR operator/users were trained in emergency procedures but did not individually do multiple types of dry runs, such, standing alone, typically constitutes a violation and, if so, what severity level.

40. Whether, if all the facts alleged in the Order are true and constitute a violation, an order imposing a penalty of \$80,000 would be supported or should be sustained.

41. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such satisfies item 9.1.C of the license.

42. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such constituted a violation of the license or created a risk to public health and safety.

43. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such standing alone constitutes a violation and, if so, what severity level.

44. Whether the Licensee violated 10 C.F.R. § 19.12.

45. Whether the Licensee violated 10 C.F.R. § 35.25(a)(1).

46. [Withdrawn.]

47. Whether the dosimetrist was instructed in the proper use of the hand-held radiation survey meter.

48. Whether the dosimetrist knew the meaning of the error messages from the HDR machine.

49. If the Licensee violated 10 C.F.R. § 19.12, at what severity level would such violation, standing alone, typically be classified.

50. If the Licensee violated 10 C.F.R. § 35.25(a)(1), at what severity level would such violation, standing alone, typically be classified.
51. [Withdrawn.]
52. Whether the Licensee violated 10 C.F.R. § 35.31.
53. If the Licensee violated 10 C.F.R. § 35.31, whether such violation constituted a threat to public health and safety.
54. If the Licensee violated 10 C.F.R. § 35.31, at what severity level would such violation, standing alone, typically be classified.
55. [Withdrawn.]
56. Whether, from March 1992 through December 1992 the Licensee had a quality management program in place.
57. Whether, as of February 5, 1993, the Licensee had established and maintained a written quality management program as required by 10 C.F.R. § 35.32.
58. Whether failure to have the apparent exposure rate conspicuously noted on a check source (along with the date of calibration) in itself typically constitutes a violation and, if so, at what severity level.
59. Whether, where the Licensee had present at the facility current copies of the license, 10 C.F.R. Parts 19 and 20, and form NRC-3, but where those documents were in a file and not actually posted, such constitutes a public health or safety risk.
60. Whether, where the Licensee had present at the facility current copies of the license, 10 C.F.R. Parts 19 and 20, and form NRC-3, but where those documents were in a file and not actually posted, such standing alone typically constitutes a violation and, if so, at what severity level.
61. Whether, if the matters set forth in the NOV constitute a severity level II violation, it is appropriate for the NRC to use its discretionary enforcement policy in order to impose a civil penalty of \$80,000.
62. Whether any precedent exists for the actions of the NRC in imposing an \$80,000 civil penalty for multiple violations that, standing alone, typically would be evaluated at no more than severity level IV or V violations.
63. [Withdrawn.]
64. Whether precedent of any nature exists for the monetary actions taken by the NRC against the Licensee and, if so, what are they.
65. [Withdrawn.]
66. Whether the surveys that were completed on March 5, June 4, September 16, and/or December 9, 1992, were adequate to satisfy item 10.12 of the license.
67. Whether failure to have a quality management program in place between March 1992 and December 1992 constitutes a violation of 10 C.F.R. § 35.32.

68. Whether the matters cited constitute a violation of 10 C.F.R. § 35.21(a).

69. Whether a violation of 10 C.F.R. § 35.21(a), standing alone, typically would constitute a severity level II violation.

70. Whether a severity level II violation has ever given rise to a civil penalty of \$80,000 or use of the NRC's enforcement policy discretion.

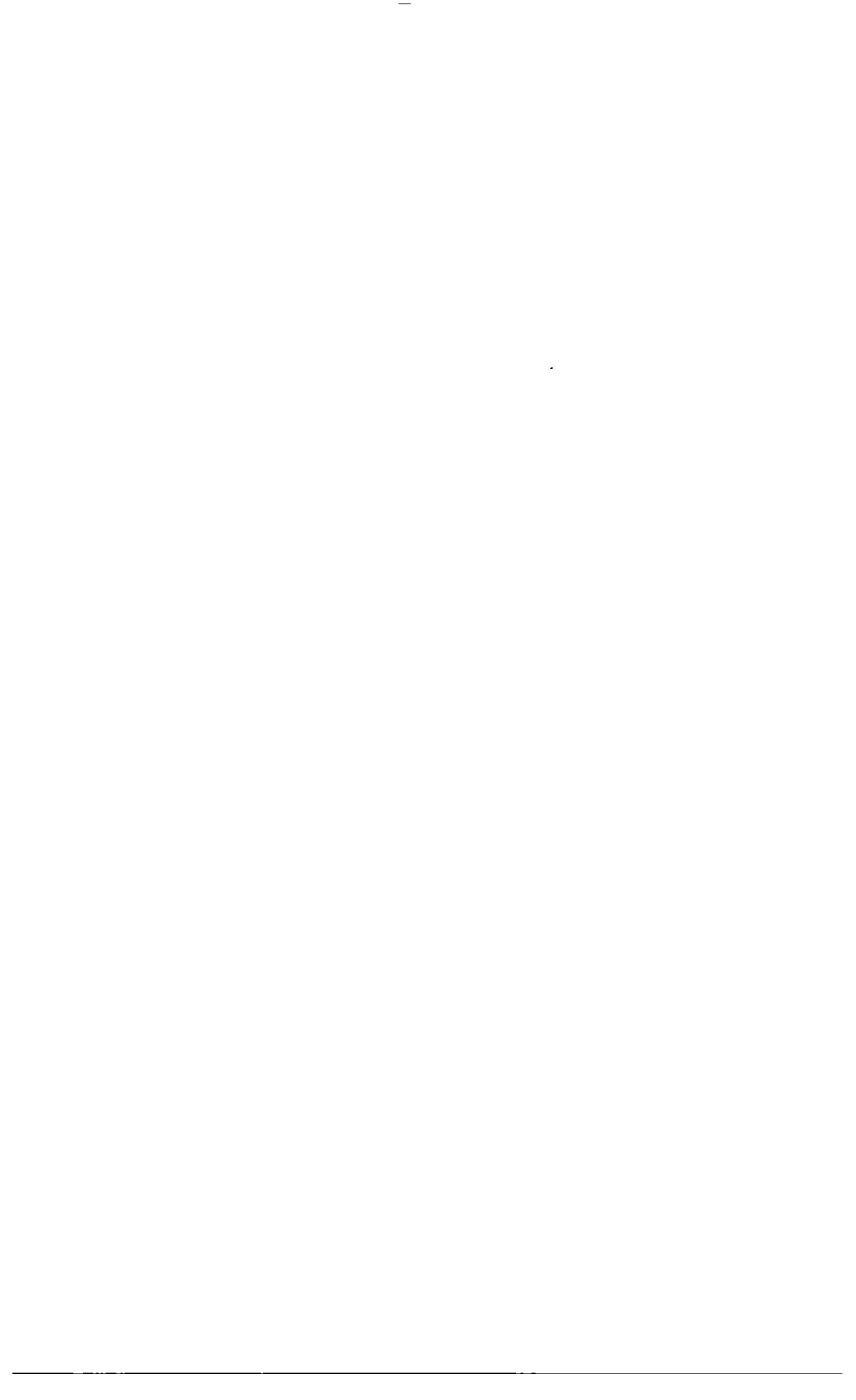
71. Whether the violation involved a "high potential impact on the public."

72. Whether it is legally appropriate for the NRC to link the Indiana, Pennsylvania accident to this separate Licensee and, if so, why.

73. What cases, if any, did the NRC rely on to determine what penalty should be imposed herein.

74. Whether there was a failure of Licensee management in this action.

75-76. [Withdrawn.]



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Plant)	Docket No. 50-309 (License No. DPR-36)
OMAHA PUBLIC POWER DISTRICT (Fort Calhoun, Unit 1)	Docket No. 50-285 (License No. DPR-40)
BALTIMORE GAS AND ELECTRIC COMPANY (Calvert Cliffs, Units 1 and 2)	Docket Nos. 50-317 50-318 (License Nos. DPR-53, DPR-69)
NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Unit 2)	Docket No. 50-336 (License No. DPR-65)
FLORIDA POWER AND LIGHT COMPANY (St. Lucie Nuclear Power Plant, Unit 1)	Docket No. 50-335 (License No. DPR-67)
	December 6, 1995

The Director of the Office of Nuclear Reactor Regulation has denied a petition filed by John F. Doherty, J.D., requesting that six pressurized-water reactors be shut down and that the steam generator tubes at each of those plants be inspected. The petition is based on a recent inspection of the Maine Yankee plant using the Point Plus system which allegedly revealed steam generator tubes on the verge of rupture. Because the other plants identified in the petition were built by the same manufacturer and are of similar operating age, Mr. Doherty asks that they be shut down and immediately inspected using the Point Plus probe system. The reasons for the denial are fully set forth in the Decision.

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

I. INTRODUCTION

On May 2, 1995, Mr. John F. Doherty, J.D. (Petitioner), filed a petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206. The Petitioner requested that the following six pressurized-water reactors be immediately shut down: Maine Yankee, Fort Calhoun Unit 1, Calvert Cliffs Units 1 and 2, Millstone Unit 2, and St. Lucie Unit 1. In addition, the Petitioner requested that steam generator tubes be inspected immediately at those plants. The Petitioner stated that an inspection by the licensee in April 1995 of the Maine Yankee plant using the newly developed Point Plus system revealed that the steam generator tubes are on the verge of rupture, threatening the release of radioactive liquid and gaseous material into the environment and consequent harm to human health and safety. Because the other plants the Petitioner identified were built by the same manufacturer (Combustion Engineering, or CE) and are of similar operating age, the Petitioner asked that they, along with Maine Yankee, be immediately shut down and that all steam generator tubes be immediately inspected using the Point Plus probe system.

On June 28, 1995, I informed the Petitioner that the petition had been referred to my office for preparation of a Director's Decision. I further informed the Petitioner that his request for immediate shutdown and inspection was denied because continued operation of these units until their next scheduled outage posed no undue risk to public health and safety. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time.

II. DISCUSSION

The Petitioner requested that six CE-designed plants be shut down and their steam generator tubes be inspected with the Plus Point inspection probe. The request appears to be based on concerns that without inspections using the Plus Point probe, the steam generators in these plants may be susceptible to one or more steam generator tube ruptures (SGTRs). However, the results of examinations of tubes removed from the Maine Yankee steam generators and in-situ pressure tests of the most severely degraded tubes in the Maine Yankee steam generators have demonstrated that the tubes, although severely degraded, still had a significant margin before failure even under postulated accident conditions. Furthermore, the NRC has taken actions to ensure that other plants have performed appropriate steam generator tube inspections to ensure tube integrity. These important actions are discussed below in greater detail.

The NRC applies a defense-in-depth approach toward protecting public health and safety from the potential consequences of events involving the rupture of steam generator tubes. Steam generator tube degradation is managed through a combination of several different elements, including inservice inspection, tube repair criteria, primary-to-secondary leak rate monitoring, water chemistry, and analyses to ensure that safety objectives are met.

The primary means for assessing steam generator tube degradation is through inservice inspections. Plant technical specifications require a periodic inspection of the steam generator tubes. Any tubes with identified degradation in excess of the repair criteria are repaired or removed from service. In order to assess the condition of steam generator tubing, the industry primarily relies on eddy-current inspection techniques, which include the motorized rotating pancake coil (MRPC) test. Circumferential cracking in steam generator tubing has been identified at expansion transitions, small-radius U-bends, dented tube support plate intersections, and sleeved joints. Based on the utilities' responses to GL 95-03, the inservice CE steam generators (i.e., not including retired CE steam generators) have been inspected in these areas with techniques capable of detecting circumferential cracking and, to date, such cracking was found only at the expansion transitions.

Experience to date, including experience at the Maine Yankee plant, shows that the standard MRPC probe is a reliable means for detecting structurally significant cracking in steam generator tubes. The use of an MRPC probe in conjunction with adequate inspection procedures is a reliable means for detecting circumferential cracking in steam generator tubes. As discussed above, metallographic examinations of removed tubing and in-situ pressure testing of degraded tubes continue to support the Staff's conclusion that properly conducted MRPC inspections can identify circumferential cracking before the cracking exceeds the structural limits.

In addition to requiring periodic steam generator tube inspections, the NRC requires an operational leak rate limit to provide reasonable assurance that, should a primary-to-secondary leak be experienced during service, it will be detected and the plant will be shut down in a timely manner before rupture occurs and with no undue risk to public health or safety. Requiring operation within these limits decreases the possibility that steam generators may be vulnerable to tube ruptures during postulated accidents such as a main steamline break or a loss-of-coolant accident.

Inspection findings at Maine Yankee in 1994 revealed indications of large circumferential cracks that had been missed in previous inspections because of inadequacies in MRPC test and analysis procedures. The test and analysis procedures were upgraded accordingly. However, subsequent inspections at Maine Yankee performed with the MRPC in early 1995 revealed circumferential indications that were more numerous and larger than expected based on the short

operating interval since the previous inspection. The 100% MRPC inspection of the expansion transitions were supplemented by inspections with the recently developed Plus Point probe and a specially wound high-frequency MRPC coil. These latter probes offer improved sensitivity to inner-diameter-initiated circumferential cracks of the type present at the Maine Yankee expansion transitions and identified substantial numbers of relatively small circumferential cracks not detected with the conventional MRPC.

Three tubes were removed from these steam generators in early 1995. Before the tubes were removed, they were tested by ultrasonic, visual (fluorescent penetrant dye), and eddy-current techniques to confirm the nature of the indications. Eddy-current methods included examination with a standard rotating pancake coil, a Plus Point coil, and a high-frequency pancake coil. The indications were sized with various techniques and the tubes were then destructively examined so that the actual size of the indications could be determined. The results of the destructive examinations are provided in NRC Information Notice 95-40, "Supplemental Information Pertaining to Generic Letter 95-03, 'Circumferential Cracking of Steam Generator Tubes.'" The destructive-examination results and data obtained with a high-frequency pancake coil suggest that many of the indications may not have been as structurally significant as the standard pancake coil appeared to indicate.

In-situ pressure tests were conducted on the tubes with the largest MRPC indications, and the results indicate acceptable margins against burst under normal operating and postulated accident conditions. The NRC had a review conducted by an independent contractor of the in-situ test method used at Maine Yankee and determined that it provides a reasonable simulation of the hydraulic pressure loads induced during a postulated main steamline break.

Thus, it has been demonstrated that the tubes with the largest indications at Maine Yankee continued to exhibit adequate structural integrity at the time they were found. This finding is attributable to the morphology of the cracks as determined from metallographic examinations of pulled tube specimens from Maine Yankee. This morphology consists of cracks that were not coplanar but, rather, of short circumferential length and staggered around the circumference over a short axial region with ligaments of material between the cracks. These ligaments add considerably to the strength of the tube, but these ligaments are generally not detectable by the MRPC.

The findings at Maine Yankee nevertheless raised the concern that large undetected circumferential cracks could possibly exist at other plants. Therefore, the NRC issued Generic Letter (GL) 95-03, "Circumferential Cracking of Steam Generator Tubes," on April 28, 1995, notifying licensees of the Maine Yankee experience and requesting that they evaluate recent operating experience concerning the detection and sizing of circumferential cracks and the potential applicability of this experience to their plants. On the basis of the results of this

evaluation, past inspections and the results thereof, and other relevant factors, licensees were requested to develop a safety assessment justifying continued operation until the next scheduled steam generator tube inspections were to be performed. The generic letter also requested that licensees develop and submit their plans for the next steam generator tube inspection as they pertain to the detection of circumferential cracks. The utilities were required to respond to GL 95-03 within 60 days. By now, the utilities that own the six plants listed in the petition have responded to GL 95-03 and the responses have been evaluated by the Staff.

Based on the utilities' responses to GL 95-03, with the exception of Millstone Unit 2, the CE plants listed in the petition have been inspected in those areas susceptible to circumferential cracking with improved eddy-current inspection probes equally capable to the Point Plus system in detecting circumferential cracking. All tubes with detected cracks have been removed from service. The licensee for Millstone Unit 2 replaced the original CE steam generators during an outage that ended in January 1993. The new steam generators incorporated many new design features that are expected to eliminate or greatly reduce the potential for circumferential tube cracking. These include the use of Inconel 690, a material that has significantly greater resistance to cracking and hydraulic expansion of tubes, which reduces the potential for cracking in the expansion transitions. The limited operational time, improvements in design, and favorable plant operating conditions minimize the potential for the development of circumferential cracking in the Millstone Unit 2 steam generators. Millstone Unit 2 steam generators will continue to be inspected during refueling outages.

The NRC has studied the risk and potential consequences of a range of SGTR events in NUREG-0844, "NRC Integrated Program for the Resolution of Unresolved Safety Issues A-3, A-4, and A-5 Regarding Steam Generator Tube Integrity." The Staff estimated the risk contribution due to the potential for single and multiple SGTRs. The study also examined the expected consequences of SGTR scenarios, including beyond-design-basis situations, such as the potential for release as a result of containment bypass because of failed tubes concurrent with a breach of secondary system integrity. A combination of circumstances and conditions is required to produce such simultaneous failures: (1) main steamline break or other less severe loss of secondary system integrity, (2) the potential that a population of tubes susceptible to rupture exists in a particular steam generator, (3) the potential that operators would not take actions to avoid high differential pressures, and (4) the probability that a large number of tubes would actually fail simultaneously. In the NUREG-0844 assessment, the Staff concluded that the probability of simultaneous multiple tube failure was small (approximately 10^{-5}), and that the risk resulting from releases during SGTRs with loss of secondary system integrity was small (about 10^{-7} latent fatalities per reactor year).

III. CONCLUSION

Based on the fact that (1) adequate steam generator tube inspections have been performed, (2) primary-to-secondary leakage is being monitored on a continuing basis, and (3) the risk of multiple SGTR events is low, I have concluded that an immediate shutdown and Plus Point probe inspection of Maine Yankee, Fort Calhoun Unit 1, Calvert Cliffs Units 1 and 2, St. Lucie Unit 1, and Millstone Unit 2 are not warranted.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 6th day of December 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-245
(License No. DPR-21)

**NORTHEAST NUCLEAR ENERGY
COMPANY**

(Millstone Nuclear Power Station,
Unit 1)

December 19, 1995

The Director of the Office of Nuclear Reactor Regulation has denied a petition by Anthony J. Ross. The Petitioner requested that the NRC take enforcement action against certain individuals at Millstone Nuclear Power Station Unit 1 for deliberate misconduct in connection with the site paging and site siren evacuation alarm system in the facility maintenance shop. Following a review of the issues raised by the Petitioner, the Director has concluded that no substantial health and safety issues have been raised that would warrant the action requested by the Petitioner.

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: emergency plans.

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

I. INTRODUCTION

On January 8, 1995, Mr. Anthony J. Ross (Petitioner) filed a petition with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206. In the petition, the Petitioner raised

concerns regarding the site paging and site siren evacuation alarm system in the Millstone Nuclear Power Station, Unit 1 maintenance shop.

The Petitioner alleged that on numerous occasions since January 1994, his department manager had instructed the Petitioner's coworkers to shut off or turn down the volume on the site paging and site siren evacuation alarm system in the Millstone Unit 1 maintenance shop, and the Petitioner's first-line supervisor and coworker had complied with this request in violation of Technical Specification (TS) 6.8.1 and NUREG-0654. The Petitioner requested that the NRC impose at least three sanctions against his department manager, and impose sanctions against the Petitioner's coworker and maintenance first-line supervisor for engaging in deliberate misconduct in violation of 10 C.F.R. § 50.5.

On February 23, 1995, I informed the Petitioner that the petition had been referred to me pursuant to section 2.206 of the Commission's regulations. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the specific concerns raised in the petition. On the basis of a review of the issues raised by the Petitioner as discussed below, I have concluded that no substantial health and safety issues have been raised that would warrant the action requested by the Petitioner.

II. DISCUSSION

In the petition, the Petitioner raised a concern that on numerous occasions since January 1994, his department manager had instructed the Petitioner's coworkers to shut off or turn down the volume on the site paging and site siren evacuation alarm system in the Millstone Unit 1 maintenance shop, and the Petitioner's first-line supervisor and coworker had complied with this request in violation of TS 6.8.1 and NUREG-0654.

Licensees for nuclear power plants are required to have emergency plans that meet the standards of 10 C.F.R. § 50.47(b) and the requirements of 10 C.F.R. Part 50, Appendix E. Under 10 C.F.R. § 50.47(b)(8), adequate emergency facilities and equipment to support the emergency response must be provided and maintained. Appendix E of Part 50 establishes minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness. Section IV.E.9, in part, requires at least one onsite communications system.

NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," provides guidance for developing radiological emergency plans and improving emergency preparedness. Section II.F.1.e states that each emergency plan shall include provisions for alerting or activating emergency personnel in each response organization. Section II.J.1 states that each licensee shall establish

the means and time required to warn or advise onsite individuals and individuals who may be in areas controlled by the licensee. Technical Specification 6.8.1, in part, requires that procedures be established, implemented, and maintained covering emergency plan implementation.

The topic of this petition was one of the maintenance-related issues the NRC Staff raised to Northeast Nuclear Energy Company (NNECO), Licensee for Millstone Unit 1, in letters dated December 5 and 28, 1994. In those letters, the NRC Staff requested NNECO to review the issues and submit a written response. Specifically, the NRC requested NNECO to review the following: (1) that NNECO management had shut off the site paging and site siren evacuation alarm system or directed workers to shut off the system in the Unit 1 maintenance shop during morning meetings, (2) that on several occasions the system was not turned back on for hours, and (3) that the on/off switches for the speakers in question had been installed without a work order.

The Licensee's investigation into this matter, which was described in its January 26, 1995 response to the NRC request, confirmed that the site paging and site siren evacuation alarm system had been routinely turned off at one of the two speakers located in the Millstone Unit 1 maintenance shop area during meetings, and that this practice was not consistent with Emergency Preparedness Department guidance and NUREG-0654.¹ However, NNECO management stated that it was confident that personnel could still hear the other speaker. This configuration was also tested during a special test conducted by NNECO. The results of the test verified that one of the two speakers had sufficient capacity to support event notification in the maintenance shop area. Since the single speaker could be heard, personnel in the maintenance area would be alerted if an emergency existed. NNECO's investigation also concluded that the on/off switches were installed without a work order in 1973 consistent with work performance processes at that time.

NNECO's corrective actions to address this concern included prohibiting the use of any switch that disables any feature of the site paging and site siren evacuation alarm system, removing the two speaker switches, and performing a walkdown of all other system speakers to verify that no other similar switches existed in the system.

The NRC conducted a special safety inspection from May 15 through June 23, 1995, at the Millstone station. During this inspection, the Staff reviewed a number of the concerns, the topic of this petition being one of them, and issued

¹NUREG-0654, ¶J.1, states that each licensee shall establish the means and time required to warn or advise onsite individuals and individuals who may be in areas controlled by the licensee. Emergency Preparedness Department guidance (Emergency Plan Administrative Procedure [EPAP] 1.15), at the time, required that the unit services director monitor and maintain emergency preparedness facilities and equipment. In Attachment 2 of EPAP 1.15, the Unit 1 public announcement speakers and evacuation alarm were included as emergency preparedness equipment.

the findings in Inspection Report (IR) 50-245/95-22, 50-336/95-22, 50-423/95-22 (95-22), dated July 21, 1995.

The NRC inspector reviewed the results of the monthly page and siren tests, which were done in accordance with Procedure C-OP-605, and the separate test conducted in the Millstone Unit 1 maintenance shop area. The review of the last two monthly tests showed that the site alarm was audible over ambient noise in all the tested areas. The review of the separate Millstone Unit 1 maintenance shop test showed that either switch, when in the off position, would not disable the system and that with one of the speakers turned off, the other speaker had sufficient capacity to support event notification.

Emergency Preparedness Department guidance (EPAP 1.15) required that emergency preparedness equipment be maintained. The purpose of the guidance, as it related to the speakers, was to warn or advise onsite individuals. Since the single speaker could still be heard, the Petitioner's department manager stated in a meeting with the NRC inspectors that he believed the Emergency Preparedness Department guidance was still being met. Therefore, the Petitioner has not supported his assertion that the department manager and, indirectly, his first-line supervisor and coworker, deliberately violated Millstone procedures or technical specifications, 10 C.F.R. § 50.47(b), or 10 C.F.R. Part 50, Appendix E, or failed to meet the guidance in NUREG-0654.

The inspector reviewed NNECO's corrective actions and confirmed that a work order had been processed to disconnect and remove the cutoff switches and that this work was completed. The inspector reviewed several Millstone site daily news articles ("To the Point") that reinforced the message of not adjusting speaker volume. The articles clearly stated that management expectations and emergency preparedness guidance were that personnel were not to tamper with emergency preparedness equipment. The inspector also discussed the results of a walkdown of the entire system with a Licensee representative. The representative stated that one additional speaker on/off switch had been found in the Unit 3 instrumentation and controls area. This speaker's on/off switch was subsequently removed.

NNECO's investigation had also concluded that the switches were installed in 1973 without the use of a work order. The work control process has been enhanced significantly at Millstone Unit 1 since 1973. Performing modifications to equipment important to safety, such as the site paging and site alarm siren evacuation system, would now require engineering and operations department review. It would also require consideration of relevant regulatory requirements. During these reviews it would be expected that modifications of this type (i.e., done without such a work order) would be rejected and not implemented. The NRC inspector concluded that NNECO's current work control practices would require an automated work order for this type of modification and that these switches could not have been installed without such a work order under

the current work control procedures. Therefore, since a work order for this modification was not required in 1973, no enforcement action is warranted.

The NRC inspector concluded in the Inspection Report that turning off the site paging and site siren evacuation alarm system speaker was in violation of the Licensee's emergency preparedness plan (and thus a violation of TS 6.8.1) and not in conformance with the guidance in NUREG-0654. Therefore, this issue and three others were collectively cited as a Severity Level IV violation.² However, the Inspection Report stated that since the operators in the maintenance shop were still able to hear information provided by the other speaker in the maintenance area, this event was of low safety significance and that it appeared NNECO had taken effective corrective action to correct the problem.

The NRC Staff has concluded that the enforcement action already taken is sufficient in this case and, therefore, no additional enforcement action is warranted. The NRC Staff has also concluded that although the Petitioner's department manager turned off or had the Petitioner's coworkers turn off one of the speakers, the Petitioner has not supported his assertion that his department manager and coworkers deliberately violated NRC regulations or the Millstone Unit 1 operating license and, thereby, violated the provisions of section 50.5.

III. CONCLUSION

The institution of proceedings pursuant to section 2.206 is appropriate only if substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner, or other enforcement action, is warranted.

On the basis of the above assessment, I have concluded that no substantial health and safety issues have been raised regarding Millstone Nuclear Power Station, Unit 1, that would require initiation of additional enforcement action as requested by the Petitioner.

The NRC has taken appropriate enforcement action for the events referenced in the petition. The Petitioner's request for additional action is denied. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. This Decision will

²The three other issues involved violations of Millstone Procedure ACP-QA-4.02B, "Receipt, Control and Identification of QA Material," ACP-QA-4.01A, "System and Component Housekeeping," and DC-1, "Administration of Millstone Procedures and Forms" (NRC Inspection Report 50-245/95-22, 50-336/95-22, 50-423/95-22, dated July 21, 1995).

constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**William T. Russell, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 19th day of December 1995.**

CASE NAME INDEX

BALTIMORE GAS AND ELECTRIC COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-317, 50-318 (License Nos. DPR-53, DPR-69); DD-95-22, 42 NRC 247 (1995)

BOSTON EDISON COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-293 (License No. DRP-35); DD-95-19, 42 NRC 78 (1995)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Motions for Summary Disposition); Docket No. 50-440-OLA-3 (ASLBP No. 90-605-02-OLA); LBP-95-17, 42 NRC 137 (1995)

CURATORS OF THE UNIVERSITY OF MISSOURI

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