

IN RESPONSE, PLEASE REFER  
TO: M980605B

June 10, 1998

MEMORANDUM TO: John F. Cordes, Acting Director  
Office of Commission Appellate Adjudication

Carlton R. Stoiber, Director  
Office of International Programs

FROM: John C. Hoyle /s/

SUBJECT: STAFF REQUIREMENTS: AFFIRMATION SESSION, 11:35 A.M.,  
FRIDAY, JUNE 5, 1998, COMMISSIONERS CONFERENCE  
ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND  
(OPEN TO PUBLIC ATTENDANCE)

I. SECY 98-118 - PRIVATE FUEL STORAGE, L.L.C.; RULING BY CHIEF JUDGE OF  
ATOMIC SAFETY AND LICENSING BOARD PANEL TO ESTABLISH A SECOND  
BOARD, LBP-98-8 (APRIL 24, 1998)

The Commission<sup>1</sup> approved a Memorandum and Order granting a petition by the applicant, Private Fuel Storage, L.L.C. (PFS), for interlocutory review of a ruling by the Chief Judge of the Atomic Safety and Licensing Board Panel, and reversing the Chief Judge's decision in that ruling to reassign jurisdiction over all matters concerning the physical security plan for PFS's proposed independent spent fuel storage installation (ISFI at Skull Valley, Utah).

(Subsequently, on June 5, 1998, the Secretary signed the Memorandum and Order provided as attachment 1).

II. SECY-98-112 - PROPOSED LICENSE TO EXPORT HIGH ENRICHED URANIUM  
(HEU) FOR PRODUCTION OF MEDICAL ISOTOPES AT THE CANADIAN NRU  
(XSNM3012) AND MAPLE REACTORS (XSNM3013)

The Commission<sup>1</sup> approved a Memorandum and Order denying a request by the Nuclear Control Institute for a discretionary hearing and authorizing the issuance of two separate

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<sup>1</sup> Section 201 of the Energy Reorganization Act, 42 U.S.C. Section 5841, provides that action of the Commission shall be determined by a "majority vote of the members present". Commissioner Dicus was not present when this item was affirmed. Accordingly, the formal vote of the Commission was 3-0 in favor of the decision. Commissioner Dicus, however, had previously indicated that she would approve this item and, had she been present, would have affirmed her vote.

licenses to export highly enriched uranium to Canada.

(Subsequently, on June 5, 1998, the Secretary signed the Memorandum and Order provided as attachment 2).

III. SECY -98-109 - HYDRO RESOURCES, INC., DOCKET NO. 40-8968-ML, MEMORANDUM AND ORDER DENYING MOTION FOR STAY AND REQUEST FOR PRIOR HEARING, LIFTING TEMPORARY STAY, DENYING MOTIONS TO STRIKE AND FOR LEAVE TO REPLY), LBP-98-5

The Commission<sup>1</sup> approved a Memorandum and Order denying a petition for review of LBP-98-5 and dismissing as moot a separate motion for staying the effectiveness of the NRC staff's grant of a materials license to Hydro Resources, Inc., and lifting the temporary stay granted in CLI-98-4 on April 16, 1998.

(Subsequently, on June 5, 1998, the Secretary signed the Memorandum and Order provided as attachment 3).

IV. SECY 98-124 - HYDRO RESOURCES, INC., DOCKET NO. 40-8968-ML, MEMORANDUM AND ORDER (DENIAL OF MOTION TO DISQUALIFY PRESIDING OFFICER), LBP-98-11

The Commission<sup>1</sup> approved a Memorandum and Order denying a motion by the Eastern Navajo Dine Against Uranium Mining and the Southwest Research and Information Center to disqualify the Presiding Officer from sitting in this Subpart L proceeding.

(Subsequently, on June 5, 1998, the Secretary signed the Memorandum and Order provided as attachment 4).

Attachments:  
as stated

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<sup>1</sup> Section 201 of the Energy Reorganization Act, 42 U.S.C. Section 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Dicus was not present when this item was affirmed. Accordingly, the formal vote of the Commission was 3-0 in favor of the decision. Commissioner Dicus, however, had previously indicated that she would approve this item, and, had she been present, would have affirmed her prior vote.

cc: Chairman Jackson  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
EDO  
OGC  
CIO  
CFO  
OCAA  
OCA  
OIG  
Office Directors, Regions, ACRS, ACNW, ASLBP (by E-Mail)  
PDR  
DCS

**ATTACHMENT 1**

**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**COMMISSIONERS:**

**Shirley Ann Jackson, Chairman**

**DOCKETED 6/5/98**



resolving proceedings expeditiously, we conclude that a second Board was not called for here, given the procedural posture of the case. Once the initial Board rules on the admissibility of all pending contentions, including the security contentions, the Chief Judge may reconsider whether a second Board would be desirable.

### I. Background

The initial three-member Board designated to preside over this proceeding was established on September 15, 1997, with Judge G. Paul Bollwerk, III, as its chairman. See 62 Fed. Reg. 49263 (Sept. 19, 1997). It received numerous petitions for intervention, including a petition from the State of Utah, seeking admission of a total of approximately ninety contentions. Of the ninety contentions, Utah filed nine that concerned the applicant's physical security plan; they were designated "Security-A through Security-I." In January, Judge Bollwerk's Board held a site visit in Utah and also convened a prehearing conference where it heard the parties' oral arguments on standing and on the admissibility of the ninety contentions. The Board permitted only a limited presentation on the nine security contentions "to avoid any discussion of nonpublic safeguards or proprietary information." LBP-98-7, 47 NRC \_\_, slip op. at 17-18 (Apr. 22, 1998). The Board subsequently permitted the State, PFS, and the NRC staff to file post-argument pleadings on the admissibility of the security contentions. Id.

Two months later, on March 26, before Judge Bollwerk's Board had ruled either on standing or on the admissibility of any contentions, the Chief Judge established a second Board, chaired by Judge Thomas S. Moore, to rule on all matters concerning Utah's nine security plan contentions. See 63 Fed. Reg. 15,900 (Apr. 1, 1998). PFS promptly sought reconsideration of the decision to establish a second Board. The NRC staff supported PFS's petition for reconsideration.

In the meantime, while the petition for reconsideration of the Chief Judge's ruling was still pending, Judge Bollwerk's Board issued a lengthy Memorandum and Order on

standing and on the admissibility of the approximately eighty remaining contentions. LBP-98-7, 47 NRC \_\_\_ (Apr. 22, 1998). The Bollwerk Board did not rule on the nine security contentions that the Chief Judge had reassigned to the Moore Board. LBP-98-7, 47 NRC at \_\_\_, slip op. at 21-22. Twenty-five contentions were admitted, and several parties, including the State of Utah, were accorded standing. Several parties subsequently filed motions for reconsideration.

The next day, on April 23, the Chief Judge denied PFS's request for reconsideration of his determination to establish a second Board to handle the security contentions. Rejecting PFS's claim that he lacked jurisdiction to establish a second Board, the Chief Judge pointed to prior precedent where the Chief Judge had established two or more Boards to decide separate issues in one proceeding. The Chief Judge further reasoned that inherent in the authority to establish multiple Boards is the authority to terminate the jurisdiction of the first Board with respect to the issues that are given to the second. As for the circumstances here, the Chief Judge stated that "the Panel's docket can be most effectively managed and that this proceeding can be more efficiently and expeditiously resolved by establishing a second licensing board." LBP-98-8, 47 NRC \_\_\_, slip op. at 4 (April 23, 1998).

On May 6, Judge Moore's Board issued a scheduling order that set June 17 as the date for a prehearing conference on the security plan issues. That Board indicated that it deemed the State of Utah's physical security plan contentions and all parties' pleadings relating to those contentions, previously filed with Judge Bollwerk's Board, to be part of the record before the new Board.<sup>2</sup>

## II. Interlocutory Review

The Commission does not readily review interlocutory Licensing Board rulings, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with

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<sup>2</sup>On May 18, Judge Bollwerk's Board ruled on the parties' motions for reconsideration of its decision on the admissibility of contentions. See LBP-98-7, 47 NRC \_\_\_ (1998).

immediate and serious irreparable impact” or (2) “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.” 10 C.F.R. § 2.786(g)(1) and (2); see Oncology Services Corporation, CLI-93-13, 37 NRC 419 (1993). PFS invokes the second prong of our standard.

The decision to create a second Board is not unheard of in our practice, but it is certainly an unusual event, particularly where, as here, the Chief Judge reassigns to a second Board threshold admissibility questions that already are ripe for decision by the initial Board. We agree with PFS and the NRC staff that a ruling of this sort “affects the basic structure of the proceeding,” by arguably mandating duplicative or unnecessary litigating steps, and therefore is reviewable now. Cf. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989).

### III. Authority of the Chief Judge to Create a Second Board

PFS (but not the NRC staff, which takes no position on the matter) insists that the Chief Judge lost all authority to establish a second Board once he initially assigned the entire proceeding to Judge Bollwerk’s Board. We disagree.

As a general matter dividing discrete issues between two Boards has the potential to expedite proceedings. It would therefore make little policy sense for the Commission to bar this practice. As a matter of law, nothing in our rules withholds from the Chief Judge the authority to manage the Panel’s docket efficiently by dividing work between two Boards. Such authority follows from the Chief Judge’s broad authority to establish Boards in the first place. See 10 C.F.R. §§ 2.704, 2.721. Largely for these reasons, the former Atomic Safety and Licensing Appeal Board found that there is “no room for serious doubt that ... the Chief Administrative Judge of the Licensing Board Panel is empowered to both (1) establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another.” Public Service Co. of

New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989)  
(footnote omitted).

We agree with the Appeal Board. It is true, as PFS points out, that 10 C.F.R. § 2.717 specifically states that a Board's jurisdiction ceases at the end of the proceeding or upon the disqualification of an individual judge. However, the rule does not state or imply that these are the only circumstances under which a Board's jurisdiction may be terminated. In our view, section 2.717 does not abrogate the Chief Judge's inherent authority to manage the Panel's caseload efficiently through reassignments of pending adjudications in whole or in part. Although establishing multiple Boards can be an effective tool for expediting proceedings, the Commission recognizes that it also creates a risk of conflicting decisions and duplicative work for the Boards and parties. The Commission therefore expects the Chief Judge to exercise his authority to establish multiple Boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple Boards than by a single Board; and (3) the multiple Boards can conduct the proceeding in a manner that will not burden the parties unduly. We do not believe that this test was met in the present case.

#### IV. Timing of Establishment of a Second Board

In our judgment, under the current posture of this proceeding, it is inefficient to have a second Board presiding over the issues related to the security contentions. Those contentions may or may not be admissible; it may be appropriate to combine some or all of them, or to litigate one or more of them together with a previously admitted contention. We believe that Judge Bollwerk's Board, having acted on all other standing and admissibility questions in this proceeding, including motions to reconsider, and having already held a site visit and prehearing conference on the security contentions, is better positioned than the newly established Board to act

quickly on these admissibility issues. Had the Chief Judge not stepped in, we have every reason to believe that by now Judge Bollwerk's Board, which resolved the admissibility of the other eighty contentions with admirable dispatch, would also have determined the admissibility of the security contentions.

The newly-established second Board, by contrast, intends to conduct its own prehearing conference, currently set for June 17, before resolving the admissibility of the contentions. It also is not in a position to combine any of the security contentions with the twenty-five previously admitted contentions, because it has jurisdiction over only the former. Given these circumstances, we think it would invite delay to establish a second Board at this time. We therefore reverse Judge Cotter's ruling and reinstate the initial Board's jurisdiction to decide the admissibility of the security contentions.

We do not mean to suggest that establishing a second Board for the security contentions, or for any other discrete set of contentions, might not at some later date be a prudent means to expedite this adjudication. But the Chief Judge should not address that question until the first Board decides the pending admissibility issues.

PFS and the NRC staff argue that the separate Board contemplated here is inherently unworkable because the security contentions are so intertwined with other contentions that duplicative or conflicting rulings, arguments and pleadings are inevitable. We agree that, as a general principle, a separate Board should not be established if it would likely result in duplicative work or conflicting rulings, but we do not here rule on whether the security contentions are so intertwined with other contentions that such duplication or conflict would be inevitable. Instead, as part of its ruling on admissibility, we expect Judge Bollwerk's Board to decide, as it did with respect to numerous other issues raised in this proceeding, whether the security plan contentions overlap with any others in such a way that they should be combined or litigated with other contentions. See e.g., LBP-98-7, 47 NRC at \_\_, slip op. at 93. Then,

keeping in mind the three principles we set forth in section III of this decision, the Chief Judge could reconsider whether to establish a second Board to handle the security (or any other) contentions, in the interest of expedition and efficiency.

**V. Conclusion**

For the foregoing reasons, we reverse the Chief Judge's decision to establish a second Board to handle the security contentions. Instead, those contentions will remain under the jurisdiction of the initial Board until that Board rules on their admissibility and on any motions for reconsideration of that determination. Subsequent to those rulings, the Chief Judge may consider, consistent with the discussion contained in this opinion, whether to establish a second Board to further adjudicate any of the admitted contentions.

**IT IS SO ORDERED.**

**For the Commission,<sup>3</sup>**

**[Original signed by  
John C. Hoyle]**

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**John C. Hoyle  
Secretary of the Commission**

**Dated at Rockville, Maryland,  
this 5th day of June, 1998.**

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<sup>3</sup> Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

**ATTACHMENT 2**



## II. BACKGROUND

Transnuclear seeks a license from the Commission for authorization to export to Canada 3.005 kilograms of HEU for use as target material in the production of medical molybdenum (Mo-99) in the new MAPLE research reactors, to be operated by Atomic Energy of Canada, Limited (AECL). Transnuclear also seeks a license for authorization to export to Canada 26.738 kilograms of HEU for use as targets in the production of Mo-99 at the existing NRU reactor operated by AECL. By letter dated March 13, 1998, the Executive Branch informed the Commission of its judgment that all applicable criteria under the Atomic Energy Act of 1954 (AEA), as amended, had been met and that it supported issuance of the requested licenses.

NCI asserts that it is a nonprofit, educational corporation based in the District of Columbia and, inter alia, is actively engaged in disseminating information to the public concerning the proliferation and other risks associated with the use of weapons-useable nuclear materials. Petition at 2-3. NCI seeks intervention to argue that: 1) the proposed export would be inconsistent with Section 134 of the AEA (commonly known as the “Schumer Amendment”) (Petition at 17-18), which sets forth three conditions that must be met before the Commission can authorize the export of HEU for use as target or fuel in a research or test reactor<sup>5</sup>; and 2) the proposed export, if authorized, would be inimical to the common defense and

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<sup>5</sup>Section 134 of the AEA, which was added to the AEA by the Energy Policy Act of 1992, Pub. L. No. 102-486 (Oct. 24, 1992), permits the issuance of a license for export of uranium enriched to 20 percent or more in the isotope-235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to other requirements of the AEA, the NRC determines that “(1) there is no alternative nuclear reactor fuel or target enriched in the isotope-235 to a lesser percent than the proposed export, that can be used in that reactor [Section 134a.(1)]; (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium [Section 134a.(2)]; and (3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor [Section 134a.(3)].” Pursuant to Section 134b., “a fuel or target ‘can be used’ in a nuclear research or test reactor” if “the fuel or target has been qualified by the Reduced Enrichment Research and Test Reactor [RERTR] Program of the Department of Energy and use of the fuel or target will permit the large majority of ongoing and planned experiments and isotope production to be conducted in the reactor without a large percentage increase in the total cost of operating the reactor.” The RERTR program, a program to develop LEU fuel and targets for research and test reactors, is run by Argonne National Laboratory under contract with the Department of Energy.

security of the United States. Petition at 18-20. NCI requests that the Commission grant NCI's petition for leave to intervene and order a full and open public hearing at which interested parties may present oral and written testimony and conduct discovery and cross-examination of witnesses. Petition at 25-30.

Transnuclear, on behalf of AECL, opposes NCI's intervention and hearing request.<sup>6</sup> It asserts that NCI lacks standing to invoke any hearing right afforded to persons whose interest may be affected under Section 189a. of the AEA and that all applicable statutory criteria for the export have been satisfied.<sup>7</sup>

### III. THE PETITIONER'S STANDING

#### A. NCI Does Not Have Standing to Intervene as a Matter of Right

In another export licensing proceeding, Transnuclear, Inc., CLI-94-1, 39 NRC 1, 4-6 (1994), NCI asserted a claim of interest for standing under Section 189a. of the AEA based on essentially the same institutional interests it asserts now with respect to the current license application. The Commission in Transnuclear denied NCI's request for hearing as a matter of right under Section 189a., explaining that it "has long held that institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a." 39 NRC at 5. In reply to Transnuclear's Opposition to NCI's intervention request, NCI "concedes" that the Commission

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<sup>6</sup>Transnuclear's pleadings in opposition to NCI's intervention and hearing requests were filed Feb. 2, 1998 (Appl. Opposition) and Feb. 23, 1998 (Appl. Reply).

<sup>7</sup>Transnuclear also argues that NCI's Petition should be denied as untimely with respect to License No. XSNM-3013. Opposition at 9-13. Under 10 C.F.R. § 110.82(c)(2), intervention petitions and hearing requests are due within 15 days after notice of receipt in the Public Document Room. Transnuclear's application for License No. XSNM-3013 was received in the Public Document room on Nov. 12, 1997; NCI's Petition was filed on Dec. 29, 1997 (which was within 30 days of the Federal Register publication of notice of the application for License No. XSNM-3012 and therefore timely filed as to that application). Since we are denying NCI's petition on other grounds, we need not reach the question of whether the petition should be denied on grounds of untimeliness. We note, however, that NCI's Petition was filed at an early stage in the proceeding, several months before the Commission had received the Executive Branch's views on the application. In fact, briefing on the issues raised in NCI's Petition was completed before the Commission's receipt of the Executive Branch's views. Therefore, the lateness per se of Transnuclear's intervention request, had it been granted, would have resulted in minimal, if any, disruption or delay in the proceeding.

has already determined that it “did not meet the judicial standing tests which the Commission has consistently applied in export licensings.” Pet. Reply at 3. NCI also clarifies in its reply that it “does not intend...to argue that it has an ‘interest’ which the Commission has found it does not” and that it is seeking a hearing as a matter of Commission discretion under 10 C.F.R. § 110.84(a) (discussed infra). Pet. Reply at 3.

The rationale employed by the Commission in Transnuclear in denying NCI intervention and a hearing as a matter of right applies equally with respect to NCI’s current intervention and hearing request. The Commission in that case amply reviewed the applicable legal principles and case law supporting its decision. We see no reason to repeat that discussion here, particularly since NCI has acknowledged that it is unable to meet the Commission’s longstanding criteria for intervention as of right under Section 189a. See id. at 4-5.

B. A Discretionary Hearing Would Not Assist the Commission or be in the Public Interest

Even though NCI has not established a basis on which it is entitled to intervene as a matter of right under Section 189a. of the AEA, the Commission’s regulations under 10 C.F.R. §§ 110.84(a)(1) and (2) provide for a discretionary hearing if the Commission finds that a hearing would assist it in making the statutory determinations required by the AEA and be in the public interest. NCI maintains that a hearing should be held on two issues: 1) whether the proposed exports would be in compliance with the Schumer Amendment; and 2) whether the proposed exports would be inimical to the common defense and security of the U.S.

1. Schumer Amendment

a) NCI’s Contention

Regarding compliance with the Schumer Amendment, NCI is primarily concerned with the third criterion, set forth in Section 134a.(3) of the AEA. NCI asserts that the United States Government is not currently “actively developing” an “alternative nuclear reactor... target” -- i.e., a low-enriched uranium (LEU) target as defined under Section 134b.(1) -- that can be used for the production of medical isotopes in the MAPLE and NRU reactors. See, e.g., Pet. at 15; Pet. Reply at 19; Pet. Rejoinder at 3. The crux of NCI’s position is that an active program to develop

alternative LEU targets for the Canadian reactors could not currently be underway because, based on information it has gleaned from informal contacts with officials of Argonne National Laboratory, neither the Canadian government nor the commercial entities involved in producing Mo-99 in the Canadian reactors, AECL and MDL Nordion, have been providing Argonne with the requisite information and cooperation necessary for it to adapt the LEU targets developed under the RERTR program for specific use in the Canadian reactors. See, e.g., Petition at 17; Pet. Reply at 19. NCI also asserts that, given the lack of Canadian cooperation with Argonne in undertaking an active development of LEU targets for the Canadian reactors, the Commission cannot find that Canada has provided sufficient assurances that it will use an alternative target in lieu of highly enriched uranium as required under the second Schumer Amendment criterion in Section 134a.(2). Pet. at 18.

In its final pleading, NCI makes clear that its opposition to the requested exports hinges on the alleged lack of Canadian cooperation with the United States in undertaking an active LEU development program for the Canadian reactors. Pet. Rejoinder at 4. NCI concedes that, “[o]nce the needed cooperation for such a program is forthcoming, impediments to export will be removed.” Id. In its reply pleadings, Transnuclear disputes NCI’s contention that the Canadian government and/or AECL have refused to cooperate with Argonne. See, e.g., Appl. Opposition at 16; Appl. Reply at 7.

b) Discussion

We acknowledge that, at the time NCI filed its pleadings with the Commission, the nature and existence of an active program to develop LEU targets for use in the MAPLE and NRU reactors may not have been apparent. However, as explained below, any outstanding concerns have been sufficiently allayed by new information received from the Executive Branch subsequent to its initial letter of March 13, 1998.

Upon review of the Executive Branch’s March 13, 1998 letter and the pleadings of NCI and AECL, the Commission staff concluded that it should seek additional information from the Executive Branch before making a recommendation on the requested licenses. While the

Commission staff was satisfied that the Schumer Amendment criteria under Sections 134a.(1) and (2) had been met,<sup>8</sup> it had concerns regarding the criterion under Section 134a.(3), particularly in light of the significant issue raised by NCI regarding the alleged lack of Canadian cooperation with Argonne. The third criterion under Section 134a.(3) requires that an active LEU development program be linked to the particular reactor to which the HEU exports are being made. The Executive Branch's March 13, 1998 letter, however, stated only that "Argonne National Laboratory has an active DOE-funded program underway for the development of low-enriched uranium targets for production of medical isotopes."

Inasmuch as the Executive Branch's letter was ambiguous on its face regarding the linkage between the existing DOE-funded program and the Canadian reactors, the Commission staff, by letter dated May 6, 1998, sought clarification from the Executive Branch as to whether the "active DOE-funded program underway at Argonne National laboratory...is aimed specifically at developing [LEU] targets that can be used for the production of [Mo-99] in both the MAPLE and NRU reactors." The Executive Branch, by letter dated May 7, 1998, responded unequivocally that "there is currently an active DOE-funded program underway at Argonne National Laboratory aimed specifically at developing LEU targets for production of Mo-99 in both the MAPLE and NRU reactors." The Executive Branch also offered that, "[t]o further [the active LEU development] effort, a series of meetings has been initiated between Argonne and AECL/Nordion of Canada to establish a framework for the exchange of technical information and LEU target development cooperation on a commercial basis."<sup>9</sup> Finally, the Commission recently received a classified Department of State cable, dated April 24, 1998, which confirms

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<sup>8</sup>The Executive Branch's March 13, 1998 letter conveyed the Department of Energy's confirmation that no LEU target for use in the MAPLE or NRU reactors had been qualified by the RERTR program, which satisfies Section 134a.(1). The Executive Branch also provided us with copies of diplomatic notes exchanged between the Embassy of the United States in Canada and the Canadian Ministry of Foreign Affairs which, consistent with Section 134a.(2), reflect Canada's assurance that it will use LEU targets once such targets become available and such use does not result in a large percentage increase in the total cost of operating a reactor.

<sup>9</sup>The Commission staff's May 6, 1998 letter and the Executive Branch's May 7, 1998 response were placed in the Commission's Public Document Room and served upon the participants in this proceeding.

that formal bilateral consultations between official U.S. and Canada representatives were initiated on April 9, 1998, to further discussions as to the exchange of technical data and commercial non-disclosure issues pertinent to Argonne's development of LEU targets for the Canadian reactors.

Based upon our assessment of the new information that the Commission has received from the Executive Branch, we are satisfied that an active program is underway for the development of LEU targets for the MAPLE and NRU reactors, as required under Section 134a.(3). For several years, AECL had an Mo-99 production program, with a long term goal to phase out use of fresh HEU and eventually use LEU targets; but in the early 1990s, AECL determined that the program would not be commercially viable and discontinued it. AECL and MDS Nordion have no requirement that would lead them to undertake the development and use of a LEU target. They are nevertheless prepared to provide on a commercial basis, to the extent of their capabilities, information and services to Argonne in its LEU target research and development efforts. While the dialogue and exchanges toward this effort may be in the early stages, we believe that the U.S. and Canadian principals are acting in good faith toward concluding a formal agreement to complete the LEU target development program linked to the Canadian reactors.

## 2. Common Defense and Security

NCI also seeks a discretionary hearing to assess the impact of the proposed HEU exports on the common defense and security of the United States. NCI essentially argues that a positive Commission licensing action on the proposed HEU exports would imply United States' approval of foreign and domestic use of HEU in research and test reactors and consequently discourage foreign reactor operators that still use HEU from participating in the RERTR program to convert to LEU as well as encourage other countries to export HEU. Petition at 18-19. NCI also maintains that approval of the pending applications would increase the nuclear proliferation and terrorism risks associated with placing HEU in international commerce. Id.

The Commission believes that it already has ample information to make a determination regarding the common defense and security impact of the proposed HEU exports. As reflected in the March 13, 1998 transmittal of views, the Executive Branch has determined that “the proposed exports in no way would be inimical to the common defense and security of the United States.” Judgments of the Executive Branch regarding the common defense and security of the United States involve matters of foreign policy and national security, and the Commission can properly rely upon those judgments. See Natural Resources Defense Council v. NRC, 647 F.2d 1345, 1364 (D.C. Cir. 1981). Moreover, contrary to NCI's position that permitting the proposed exports would signal to the international community a United States' sanction of the use of HEU, approval of the exports conditioned on Canadian assurances to use LEU targets once they are developed and the existence of an active program to develop such LEU targets for the Canadian reactors furthers, rather than undermines, the objective reflected in the Schumer Amendment and various United States policy initiatives to reduce the world commerce in bomb-grade nuclear material.

In sum, although we are denying NCI's request for a discretionary hearing, NCI has, in effect, obtained the end result -- Canadian cooperation permitting an active LEU target development program for the Canadian reactors -- that it appears ultimately to be seeking. We wish also to point out that our review of these export applications was significantly aided by NCI's participation, albeit not in a formal hearing context. Indeed, our decision regarding the consistency of the proposed exports with the statutory criteria was made only after requesting additional information -- prompted in large part by the concerns highlighted by NCI -- from the Executive Branch.

### III. CONCLUSION

For the reasons stated in this decision, we find that NCI has not established a basis on which it is entitled to intervene as a matter of right under the AEA, and that a hearing as a matter of discretion is not necessary in light of the recent information provided to the Commission by the Executive Branch as to the existence of an active program and Canadian

cooperation in developing LEU targets for the MAPLE and NRU reactors.

#### IV. ISSUANCE OF LICENSES

The Commission has determined that the export licensing criteria set forth in the AEA are satisfied and directs the Office of International Programs to issue licenses XSNM-3012 and XSNM-3013 to Transnuclear Inc. Specifically the Commission finds that the export licensing criteria set forth in Sections 127, 128, and 134 of the Atomic Energy Act have been met.

Moreover, pursuant to Sections 53 and 57 of the AEA, issuance of these licenses would not be inimical to the common defense and security or constitute an unreasonable risk to the health and safety of the public.

With respect to the issuance of XSNM-3013, the Commission notes that Transnuclear seeks this license as a contingency to allow production of Mo-99 at the NRU reactor in the period 2000-2002 if extended delays are experienced in starting up the MAPLE reactors and shifting MO-99 production to those reactors. To ensure that this material is exported only if needed, the license should be conditioned to require the licensee to inform the NRC in writing 30 days prior to each export under the license, specifying the amount of material to be shipped and a statement from AECL explaining its need for the material in the context of its then-current

inventory and the projected rate and durations of its HEU use to produce medical isotopes at the NRU reactor.

It is so ORDERED.

For the Commission<sup>10</sup>

[Original signed by

John C. Hoyle]

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JOHN C. HOYLE  
Secretary of the Commission

Dated at Rockville, Maryland  
this 5th day of June, 1998.

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<sup>10</sup>Commissioner Dicus was not available for the affirmation of this Memorandum and Order. Had she been present, she would have affirmed the Memorandum and Order. The concurring opinion of Commissioner Diaz is attached.

Concurring Opinion of Commissioner Nils J. Diaz:

I concur in the Commission's decision to deny the hearing request and to authorize the issuance of the two export licenses to Canada. The applicable licensing criteria have been satisfied and Canada's commitment to nonproliferation is exemplary. Nonetheless, I believe it is important that substantial progress be made towards developing LEU targets for use in the MAPLE reactors before those reactors become fully operational. Therefore, I would have required, as a condition of our approval, that the Executive Branch, in consultation with Argonne National Laboratory, provide the Commission with a schedule for the development of LEU targets that could be used in the MAPLE reactors and with periodic status reports thereafter until the program has been successfully completed.

**ATTACHMENT 3**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**DOCKETED 6/5/98**

Shirley Ann Jackson, Chairman

Greta J. Dicus

Nils J. Diaz

Edward McGaffigan, Jr.

**SERVED 6/5/98**

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In the Matter of

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HYDRO RESOURCES, INC.

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Docket No. 40-8968-ML

2929 Coors Road, Suite 101

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Albuquerque, NM 87120

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CLI-98-8

MEMORANDUM AND ORDER

This proceeding under 10 C.F.R. Part 2, Subpart L, concerns a materials license application which Hydro Resources, Inc. (“HRI”) filed under Part 40 of our regulations, seeking authority to conduct an in situ leach uranium mining and milling operation in Church Rock and Crown point, New Mexico.<sup>11</sup> The NRC staff issued the requested license (SUA-1508) on January 5, 1998. Ten days later, the Southwest Research & Information Center and the Eastern Navajo Diné Against Uranium Mining (collectively “petitioners”) requested the Presiding Officer to stay the effectiveness of HRI’s license pending both a health-and-safety hearing on the application pursuant to Section 189 of the Atomic Energy Act (“AEA”), 42 U.S.C. § 2239 et seq., and an historic property review pursuant to Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470f. This latter statutory Section and its implementing regulations (36 C.F.R. Part 800) provide that, prior to issuing a license, an agency must take into account the effects of the license issuance on historic properties.

On January 23, 1998, the Presiding Officer temporarily stayed the license’s effectiveness (LBP-98-3, 47 NRC 7), but subsequently lifted the temporary stay and denied petitioners’ motion for a full stay. LBP-98-5, 47 NRC \_\_\_\_ (April 2, 1998). In addition to rejecting petitioners’ stay argument that the license should not go into effect prior to the completion of a hearing, the Presiding Officer in LBP-98-5 also denied petitioners’ motions to strike the staff’s response to petitioners’ stay motion, and denied petitioners’ motion for leave to reply to both the staff’s above-mentioned response and HRI’s response to petitioners’ stay motion.

Petitioners filed with the Commission a petition for review of LBP-98-5 and also a request for both a temporary stay of that order and a longer stay until the Commission has ruled upon their petition for review of LBP-98-5. On April 16, 1998, we granted a temporary stay of LBP-98-5, thereby effectively reinstating the Presiding Officer’s temporary stay of the license.

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<sup>11</sup> According to HRI, the in situ leach process begins with the injection of groundwater fortified with oxidizing agents (lixiviant) into a body of uranium ore, causing the uranium to dissolve. The resulting solution is then pumped from the ore body to the surface, where it is processed into a dried form of uranium.

CLI-98-4, 47 NRC \_\_\_\_\_. We now turn to the petition for review and the request for a longer stay. For the reasons set forth below, we deny the former, dismiss the latter,<sup>12</sup> and lift the temporary stay imposed in CLI-98-4.

## **BACKGROUND**

In 1988, HRI applied for a materials license to conduct in situ leach uranium mining and processing in Church Rock, New Mexico, and later amended the application to include similar activities in two other locations -- Crownpoint, New Mexico, and Unit 1 (near Crownpoint). HRI plans to locate some of the mines and processing facilities near residential areas and existing drinking water wells. HRI's activities also have the potential for disturbing historic and architectural sites.

The development and operation of HRI's facilities are scheduled to occur over a twenty-year period. In January 1997, the NRC staff proposed to limit its initial review under the NHPA to the first five years of this period, thereby taking a "phased review" approach under the NHPA. The staff considered this approach appropriate because HRI intends to develop this project incrementally, the project's potential area of disturbance is vast, and the resource methodologies and interpretations could change during the proposed twenty-year license term. Five months later, the staff announced its intent to defer the NHPA Section 106 review of Unit 1 and Crownpoint, because the Crownpoint site would allegedly not be developed during the first five-year period and because access to the Unit 1 site was difficult.

On January 5, 1998, the staff issued the requested license to HRI for a five-year term, subject to renewal. The licensed operations are expected to begin in Section 8 at Church Rock. The license prohibits HRI from injecting lixiviant at either Unit 1 or Crownpoint prior to successfully demonstrating groundwater restoration at Section 8 of Church Rock. However, the license does permit HRI to commence pre-injection activities associated with the construction

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<sup>12</sup> On April 22, 1998, the Navajo Nation filed a motion for leave to file a brief amicus curiae regarding petitioners' petition for review of LBP-98-5 if we grant the petition for review. Because we are denying the petition for review, we dismiss the Navajo Nation's motion as moot.

and operation of a processing facility at either Crownpoint or Unit 1. It also permits ground-disturbing activities at all three sites (e.g., ground clearing, construction of access roads, and the digging of trenches for installation of well field process fluid trunk lines and gathering lines).

### **PETITIONERS' ARGUMENTS TO THE COMMISSION**

Petitioners' NHPA arguments assert that HRI's pre-mining activities will irreparably harm archaeological sites and traditional cultural properties which have great meaning to the history and day-to-day lives of the Navajo and Pueblo peoples. Petitioners also criticize as inadequate HRI's documentation of traditional cultural properties. Petitioners further object to the staff's "phased review" approach and assert instead that HRI must defer all its activities until after the NRC has completed the NHPA review for the entire geographical area covered under HRI's license application. According to petitioners, "irreparable damage may be implied from the Staff's issuing the license without completing the NHPA § 106 process and without adequately conditioning the license to prevent harm to historic properties before the process is completed." Petition for Review, dated April 11, 1998, at 7. Petitioners also assert that the irreparable "[h]arm must be considered 'immediate' ... if it is likely to occur before completion of the hearing." Id. at 8.

Petitioners' AEA arguments assert that the grant of the license will, before the end of the hearing, cause irreparable harm to their health, safety and property in general and to their drinking water from the mining at Unit 1 in particular. More specifically, they claim that contaminants released by the mining of Unit 1 will escape detection by HRI's allegedly inadequate monitoring system, will quickly migrate into Crownpoint's drinking water wells, and will cause the wells' water to exceed safe concentrations of uranium and other contaminants. Id. at 7-8; Motion for Stay, dated April 11, 1998, at 5-6 and n.9.

Finally, petitioners challenge certain procedural rulings by the Presiding Officer and seek a stay pending the Commission's consideration of their petition for review.

### **DISCUSSION**

#### **A. Criteria for Reviewing a Petition for Interlocutory Review**

Our Subpart L regulations governing informal hearings in materials licensing proceedings do not explicitly provide for a petition for review of an interlocutory order (see 10 C.F.R. § 2.1253, providing for petitions for review only of initial decisions), nor do they contain provisions establishing criteria for judging such petitions. But, as we do under our more formal Subpart G process, we are willing to entertain petitions for review of interlocutory rulings in Subpart L cases in the rare situations where such rulings (1) threaten a party with serious, immediate and irreparable harm or (2) affect the basic structure of the proceeding in a pervasive or unusual manner.<sup>13</sup>

Petitioners seek interlocutory review of LBP-98-5 under the first of these two criteria. See Petition for Review at 1 n.2. Petitioners complain that the Presiding Officer departed from established NHPA law, made erroneous findings of fact, improperly denied petitioners' request for a pre-licensing hearing, and committed prejudicial procedural error in denying petitioners' motion for leave to reply to the staff's response to petitioners' motion for stay. Id. at 1.

The Presiding Officer's rulings in LBP-98-5 were undoubtedly significant. However, the mere issuance of important rulings does not, without more, merit interlocutory review. See Sequoyah Fuels, CLI-94-11, 40 NRC at 63. Even legal error does not necessarily justify interlocutory review.<sup>14</sup> Instead, petitioners need to demonstrate that they are threatened with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated

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<sup>13</sup> 10 C.F.R. § 2.786(g). See Sequoyah Fuels Corp. & General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991). The Commission of course has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review. Indeed, its now-defunct Appeal Board occasionally did so in the certified-question context where the ruling at issue involved a question of law, had generic implications and had not been addressed previously on appeal. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990), and cited authority. However, we see no reason to exercise our plenary review authority in this instance.

<sup>14</sup> See, e.g., Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994) (declining interlocutory review even though a Licensing Board ruling may be "incorrect" and even though "aspects of the Licensing Board's decision ... appear highly questionable"); Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983) ("the fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review").

through a petition for review of the presiding officer's final decision." 10 C.F.R. § 2.786(g)(1). As we rule in sections B, C, and D, infra, petitioners have not shown that their alleged harm under the AEA and NHPA is either irreparable or immediate. We therefore deny their request for interlocutory review of the Presiding Officer's denial of a stay. If circumstances change in such a way that the harm becomes irreparable and immediate as well as serious, petitioners are free to renew their motion for a stay before the Presiding Officer.<sup>15</sup> Such a motion must be filed promptly, and the words "immediate" and "irreparable" are to be construed in a way that is consistent with our discussion of them below.

### **B. Immediacy of Harm -- NHPA and AEA.**

We do not agree with petitioners' general statement that irreparable "[h]arm must be considered 'immediate' ... if it is likely to occur before completion of the hearing." Petition for Review at 8. Such a reading of the word "immediate" stretches the definition of that word quite beyond recognition.<sup>16</sup> Given the early stage of this case, it would not be unusual if the "completion of the ... hearing" to which petitioners refer occurs months from now. By contrast, the Commission (and, earlier, the Appeal Board) have granted interlocutory review in situations where the question or order must be reviewed "now or not at all."<sup>17</sup> The Commission faces no

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<sup>15</sup> As petitioners correctly point out, section 2.1263 of our Informal Hearing Regulations provides that "any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later." Stay Request at 6, citing 10 C.F.R. § 2.1263. We do not, however, construe section 2.1263 to preclude participants such as these petitioners from later renewing their stay request if they are subsequently threatened with serious, immediate and irreparable harm.

<sup>16</sup> The Random House Dictionary of the English Language at 712 (Unabridged Ed., NY, 1973) defines that word as "(1) occurring or accomplished without delay; instant ...; (2) of or pertaining to the present time or moment ...; (3) following without a lapse of time ..."

<sup>17</sup> Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) ("Because the adverse impact of [the] release [of a report by the NRC's Office of Investigations] would occur now, the alleged harm is immediate.... Unlike most discovery orders, the instant order must be reviewed now or not at all" under section 2.786(g)) (emphasis in original); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981) (Licensing Board's order to disclose names of individuals who had been promised anonymity "must be examined now or not at all"); Kansas Gas and Elec. Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413 (1976) (Licensing Board's order denying protective order "must be reviewed now or not at all"). Cf. Georgia (continued...)

“now or never” situation here. Petitioners make no compelling case under the AEA that HRI’s preliminary activities will result in immediate health and safety harms. And both the presence of protective conditions in the license<sup>18</sup> and HRI’s own oft-repeated commitment to “comply fully with the NHPA prior to conducting any land disturbance”<sup>19</sup> make us skeptical of whether the alleged NHPA injury will occur at all, much less immediately.

### **C. Irreparability of Harm -- NHPA**

We do not agree with petitioners that the NRC staff’s alleged failure to comply with

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<sup>17</sup>(...continued)

Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (“Although, typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review, here an erroneous disclosure of documents ruled later to be absolutely privileged could prove irreparable”).

<sup>18</sup> See, e.g., Condition 9.12, which provides that:

Before engaging in any construction activity not previously assessed by the NRC, the licensee shall conduct a cultural resources inventory. All disturbances associated with the proposed development will be completed in compliance with the [NHPA].

In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with [NHPA regulations], and no disturbance shall occur until the licensee has received written authorization to proceed from the State and Navajo Nation Historic Preservation Offices.

<sup>19</sup> HRI’s Response to Petitioners’ Application for Review of LBP-98-5, dated April 23, 1998, at 6 (emphasis in original). See also id. at 8 (HRI “is committed to full compliance with the letter and spirit of the NHPA and therefore will not engage in any land disturbance that does not comply with the NHPA”) (emphasis in original); HRI’s Response to Petitioners’ Application for Stay, dated April 23, 1998, at 3 n.9 (“the NRC staff and HRI will complete Section 106 review for each phase of the proposed project before initiating any actual construction”), 4 (“HRI has no intention of conducting any land disturbance activities in any part of the [Crownpoint Uranium Project] properties until the NHPA process has been completed for that piece of property”), 6 (“HRI’s license would require the company to refrain from land disturbing activities until the NHPA process is complete.... [N]o cultural resources will be disturbed in violation of the NHPA”), and 7 (“HRI’s license forbids any ground disturbing activities that would violate the NHPA.... HRI has no intention of performing any ground disturbing activities in violation of the NHPA”) (emphasis in original); HRI’s Response to the Navajo Nation’s Motion for Leave to File a Brief Amicus Curiae ..., dated May 4, 1998, at 3 and n.6 (“HRI’s license prohibits the company from conducting any land disturbing activities that are not in full compliance with the ... NHPA”; “the company’s commitment to a policy of ‘total avoidance’ of archaeological resources ensures that there will be no disturbance that will harm any cultural or archaeological resources” (emphasis in original)).

Section 106 of the NHPA “implies” the “irreparable” injury necessary for interlocutory review.<sup>20</sup> To obtain such review, petitioners are required to show the threat of irreparable harm, not merely to “imply” it.

The only case that petitioners cite in support of their “implication” argument, Colorado River Tribes v. Marsh, 605 F. Supp. 1425, 1439-40 and n.11 (C.D. Calif. 1985) (where the court reached its conclusion by analogizing NHPA to the National Environmental Policy Act (“NEPA”)), is insufficient to support their claim of irreparable injury. The plaintiffs in that case had established probable success on the merits and had submitted evidence that “unquestionably” indicated the importance of the historical and archaeological sites at issue in the case. Here, by contrast, the Presiding Officer found that petitioners had failed to establish likelihood of success on the merits (LBP-98-5, 47 NRC at \_\_\_\_, slip op. at 8-10). Moreover, the petition for review, stay motion and accompanying documents have all been quite vague as to both the identity and importance of any historically and archaeologically significant sites at Unit 1 and Crownpoint.<sup>21</sup>

More fundamentally, Colorado River’s holding that a statutory violation equates to a showing of irreparable injury cannot be squared with the current state of the law as reflected in two Supreme Court environmental law decisions, Weinberger v. Romeo-Berkeley, 456 U.S. 305 (1982), and Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987). The more recent of these two decisions, Amoco, expressly rejected a Ninth Circuit holding -- essentially identical to petitioners’ argument -- that “[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action” and “only in a rare

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<sup>20</sup> Petition for Review at 7. We do not reach on the merits the question whether the staff has complied with Section 106.

<sup>21</sup> Petitioners provide the Commission with only a few general claims that many traditional cultural properties may be affected and instead focus the bulk of their comments on the alleged shortcomings of HRI’s and the staff’s efforts to comply with the NHPA. See, e.g., Affidavit of William A. Dodge, dated Jan. 9, 1998, passim; Affidavit of Dr. Klara B. Kelley, dated Jan. 8, 1998, passim.

circumstance may a court refuse to issue an injunction when it finds a NEPA violation.”<sup>22</sup>

Absent “a clear Congressional statement,” adjudicatory tribunals “should not infer that Congress intended to alter equity practices” such as the standards for reviewing stay requests.<sup>23</sup> The NHPA contains no such “clear Congressional statement.”<sup>24</sup>

Finally as to the irreparability of NHPA harm, we are not convinced by petitioners’ argument that the NRC and HRI are prohibited from taking a “phased review” approach to complying with the NHPA -- the legal position that forms the foundation of petitioners’ NHPA arguments regarding severe, immediate and irreparable injury. The statute itself contains no

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<sup>22</sup> People of Village of Gambell v. Hodel, 774 F.2d 1414, 1423 (9th Cir. 1985) (emphasis added; internal quotation marks omitted).

<sup>23</sup> Natural Resources Defense Council v. Texaco Refining & Marketing, Inc., 906 F.2d 934, 939 n.6 (3d Cir. 1990) (regarding Federal Water Pollution Control Act Amendments of 1972), citing Flynn v. United States By and Through Eggers, 786 F.2d 586, 591 (3d Cir. 1986).

Numerous other cases hold that a plaintiff seeking injunctive relief must prove irreparable harm, and that mere violation of NEPA or other environmental statutes is insufficient to merit an injunction. See Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1496 (9th Cir. 1995) (NEPA; Forest and Rangeland Renewable Resources Planning Act of 1974); Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) (NEPA); Town of Huntington v. Marsh, 884 F.2d 648, 651-54 (2d Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (NEPA; where the Second Circuit held that, in the area of environmental statutes, an injunction does not follow as a matter of course upon a finding of statutory violation, but rather “a threat of irreparable injury must be proved, not assumed and may not be postulated *eo ipso* on the basis of procedural violations of NEPA”); Town of Huntington v. Marsh, 859 F.2d 1134, 1143 (2d Cir. 1988) (NEPA); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157-58 (9th Cir. 1988) (NEPA; Federal Coal Leasing Amendment Act of 1976); National Wildlife Fed’n v. Burford, 835 F.2d 305, 318, 323-24 (D.C. Cir. 1987) (Federal Land Policy and Management Act of 1972); United States v. Lambert, 695 F.2d 536, 540 (11th Cir. 1983) (Federal Water Pollution Control Act Amendments of 1972; environmental lawsuits are not exempt from the four-pronged test for injunctive relief). Even the First Circuit, which has held repeatedly that a violation of NEPA does constitute irreparable injury, does not go so far as to conclude that this kind of irreparable injury necessarily requires an injunction. See Conservation Law Foundation v. Busey, 79 F.3d 1250, 1272 (1st Cir. 1996), Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989), and Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983), in all three of which cases the First Circuit stated that “[t]his is not to say that a likely NEPA violation automatically calls for an injunction; the balance of harms may point the other way.” (Emphasis in originals).

<sup>24</sup> Compare NHPA, 16 U.S.C. § 470(f) with, e.g., 39 U.S.C. § 3007 (“the United States district court ... shall ... upon a showing of probable cause to believe [that 39 U.S.C. § 3005] is being violated, enter a temporary restraining order and preliminary injunction....”). See Natural Resources Defense Council, 906 F.2d at 940.

such prohibition,<sup>25</sup> federal case law suggests none,<sup>26</sup> and the supporting regulations are ambiguous on the matter, even when read in the light most favorable to petitioners.<sup>27</sup>

#### **D. Irreparability of Harm -- AEA**

We cannot conclude that petitioners have shown a threat of irreparable and immediate harm to their well water. As the Presiding Officer held, petitioners have not explained why the license's conditions (see License Conditions 10.12 - 10.32), together with the assurances presented in the staff's and HRI's affidavits, are inadequate to prevent contamination of the well water supply. See LBP-98-5, 47 NRC at \_\_\_\_, slip op. at 14-15. It was petitioners' burden to show irreparable injury sufficient for a stay. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-21, 14 NRC 795, 797 (1981). Petitioners here have presented their evidence and arguments favoring a stay, but the Presiding Officer was not convinced. In such a fact-specific area of disagreement, and at such an early stage of the proceeding, the appellate forum's deference to the trier of fact is quite high. We see nothing in the appeal documents that convinces us to second-guess the Presiding Officer on this matter, particularly given his greater familiarity with the record and the thoroughness of his decision.

#### **E. Other Arguments**

Finally, we reject petitioners' request that we intervene to reverse the Presiding Officer's

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<sup>25</sup> Section 470f of the statute provides, in relevant part, only that a federal agency shall, "prior to the issuance of any license ... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."

<sup>26</sup> See City of Grapevine v. Department of Transportation., 17 F.3d 1502, 1508-09 (D.C. Cir.), cert. denied, 513 U.S. 1043 (1994) (rejecting claims that completion of the NHPA review process was required prior to agency approval of a project, where the agency's approval was conditioned on its subsequent completion of that process).

<sup>27</sup> Although section 800.3(c) of the Advisory Council on Historic Preservation's ("ACHP") regulations states that "Section 106 requires [a federal agency] to complete the section 106 process ... prior to issuance of any license or permit," the next sentence in the same section provides that the ACHP "does not interpret this language ... [as] prohibit[ing] phased compliance at different stages in planning." 36 C.F.R. §§ 800.3(c). Moreover, the immediately preceding subsection (800(b)) states that the ACHP "regulations may be implemented ... in a flexible manner ... as long as the purposes of section 106 ... and these regulations are met." 36 C.F.R. § 800.3(b).

denial of their motion for leave to reply to staff's and HRI's response to petitioners' motion for stay. LBP-98-5, 47 NRC at \_\_\_\_, slip op. at 29. Just as procedural rulings involving discovery and admissibility of evidence or the scheduling of hearings rarely meet the standard for interlocutory review,<sup>28</sup> likewise the Presiding Officer's denial of petitioners' motion for leave to file a reply brief does not rise to the level meriting the Commission's interlocutory review. On such interlocutory matters, we generally defer to the Presiding Officer.<sup>29</sup> Moreover, the arguments proffered by petitioners regarding leave to reply (i.e., that their response was necessary to correct misstatements of fact and law, and that petitioners in their stay motion could not anticipate that the staff and HRI would misrepresent facts and law, see Petition for Review at 9-10) could be expected to be raised in many, if not most, challenges to a Presiding Officer's denial of a motion for leave to reply.

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<sup>28</sup> See, e.g. Texas Util. Elec. Co. (Comanche Peak Steam Elec. Station, Unites 1 and 2), ALAB-870, 26 NRC 71, 74 (1987) (discovery); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84 (1981) (admissibility); United States Department of Energy, Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474 (1982) (scheduling).

<sup>29</sup> See generally Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994), and Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995), both of which stated that, in the absence of a clear misapplication of the facts or misunderstanding of the law, the Licensing Board's judgment at the pleading stage that a party has standing is entitled to substantial deference.

**F. Motion for Stay**

Finally, Petitioners have sought to stay LBP-98-5 for only so long as the Commission needs to consider their petition for review of that order. Because we have denied the petition for review, petitioners' stay motion is moot.

**CONCLUSION**

For the reasons set forth above, we deny the petition for interlocutory appeal, dismiss as moot the motion for stay, and lift the temporary stay which we issued on April 16, 1998.

It is so ORDERED.

For the Commission,<sup>30</sup>

[Original signed by  
John C. Hoyle]

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John C. Hoyle  
Secretary of the Commission

Dated at Rockville, Maryland  
this 5th day of June, 1998

**ATTACHMENT 4**

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<sup>30</sup> Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



1997, he had met with four Shaw Pittman attorneys (none of whom represents HRI in this proceeding), that he had twice met with two of those attorneys for lunch (at which he paid for his own meals), and that he had spoken with them about six times on the phone. These discussions ended when Shaw Pittman informed the Presiding Officer that they did not wish to employ him. The Presiding Officer further indicated in his May 26th Memorandum and Order that he has no further interest in seeking employment from Shaw Pittman.

In his May 26 order, the Presiding Officer capsulized why he declines to recuse himself: “It is not clear why a person who has been denied employment by a law firm would be biased in favor of that firm in the future.” Slip op. at 5 n.4. Also on May 26th, the Presiding Officer referred the disqualification motion to the Commission “pursuant to 10 C.F.R. § 2.704(c)” which provides that “if the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred [by the Licensing Board] to the Commission which shall determine the sufficiency of the grounds alleged.”

The Commission could avoid addressing the disqualification issue at all, on the grounds that petitioners expressly posed their disqualification and disclosure motions “in the alternative,” suggesting that they would be satisfied with a grant of either one,<sup>31</sup> and that the Presiding Officer’s May 26th order, by all appearances, fully addressed all issues on which petitioners sought disclosure.<sup>32</sup> However, given this agency’s established practice of refusing to use procedural technicalities to avoid addressing disqualification motions, we will consider the recusal issue.

This is the first time the Commission has itself been faced with a disqualification motion

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<sup>31</sup> This interpretation finds support in petitioners’ assertion that “if the presiding officer refuses to recuse himself, he should make full disclosure regarding his employment contacts with Shaw, Pittman.” Motion at 8.

<sup>32</sup> Specifically, he addresses the duration of the employment discussions (beginning as early as the Spring of 1997 and lasting until August or September of that same year), their seriousness (serious enough to merit two lunches and six phone calls), the identity of the person who initiated and terminated those discussions (the Presiding Officer and the law firm, respectively), the basis on which the discussions were terminated (Shaw Pittman decided not to offer the Presiding Officer a job), and the possibility of future employment (the Presiding Officer precludes this possibility).

in a Subpart L proceeding. The Subpart L procedural regulations do not address the issue of disqualification of presiding officers, and the regulatory history of the Subpart is silent as to the reason for this omission. It is therefore unclear whether the Commission intended that the subject be covered instead by 10 C.F.R. § 2.704(c). That regulation is meant to ensure both the integrity and the appearance of integrity of the Commission's formal hearing process.<sup>33</sup> Because this rationale applies with equal force to Subpart L informal proceedings, we conclude that section 2.704(c) should be applied to those proceedings as well.

Before dealing with the merits of the motion, we must first address petitioners' failure to support their motion with an affidavit as required by section 2.704(c). Under quite similar circumstances to those in this proceeding, the Commission's Appeal Board considered such an affidavit unnecessary:

[T]he absence of an affidavit here is not crucial. The Illinois motion is founded on a fact to which the Board itself had called attention in its March 1, 1978, order ruling upon various intervention petitions .... Further, in light of the narrow scope of the State's challenge to Dr. Remick's continued participation, an affidavit was not needed to reduce "the likelihood of an irresponsible attack upon the probity or objectivity of the Board member . . . in question."<sup>34</sup>

Here too, the Presiding Officer himself revealed all the facts on which petitioners based their motion, and the scope of petitioners' challenge calls into question neither the probity nor objectivity of the Presiding Officer. Under these circumstances, we do not believe that the omission of an affidavit is fatal to the motion. This conclusion is also consistent with our practice of refusing to use procedural technicalities as a means to avoid reaching the merits of

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<sup>33</sup> See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-907, 28 NRC 620, 623 (1988) ("parties in an adjudicatory proceeding have a right to an impartial adjudicator, both in reality and in appearance to a reasonable observer"), quoting Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI- 85-5, 21 NRC 566, 568-69 (1985).

<sup>34</sup> Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 303 n.3 (1978). See also Joseph J. Macktal, CLI-89-14, 30 NRC 85, 91 (1989) (where the Commission addressed a motion to disqualify all Commissioners, despite Mr. Macktal's failure to submit supporting affidavits); Northern Indiana Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), LBP-74-80, 8 AEC 770, 772 n.1, aff'd, ALAB-239, 8 AEC 658 (1974) (because the facts on which the disqualification motion was based were uncontested, the Board did not base its denial of the motion upon the absence of an affidavit).

a disqualification motion.

We now turn to the merits of petitioners' disqualification motion. Petitioners seek the Presiding Officer's recusal under three legal standards. The first is 28 U.S.C. § 455(a), which requires recusal whenever a federal justice's, judge's or magistrate's "impartiality might reasonably be questioned." Licensing Board members are governed by the same disqualification standards (actual or perceived bias or prejudice) that apply to Federal judges. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982). We see no reason to conclude that the Presiding Officer's impartiality "might reasonably be questioned" in this proceeding. His job discussions ended more than six months before he was designated to sit in this proceeding, and the firm towards which he is supposedly biased rejected his job application. We do not believe that this situation comes even remotely close to the "very high threshold for disqualification" which the Commission applies generally to recusal motions. Joseph J. Macktal, CLI-89-14, 30 NRC 85, 92 n.5 (1989) (referring to motions alleging actual bias).

The second legal standard on which petitioners rely is found in the executive-wide Standards of Ethical Conduct, 5 C.F.R. § 2635.604, promulgated by the Office of Government Ethics. Subsection (a) of that regulation provides that an executive branch employee "seeking employment" shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment...." This standard is inapplicable to the instant factual situation. The Presiding Officer was not "seeking employment" with Shaw Pittman at or after the time he was designated as Presiding Officer in this proceeding. Therefore, he did not violate section 2635.604.<sup>35</sup>

Section 2635.606(b) of 5 C.F.R. sets forth the third legal standard on which petitioners

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<sup>35</sup> See generally 5 C.F.R. § 2635.604(c), Example 4: "A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effects of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification."

rely. It provides that, even where an offer of employment is rejected or not made, an agency “may determine that an employee” who has sought but is no longer seeking employment “shall nevertheless be subject to a period of disqualification upon the conclusion of employment negotiations.” (Emphasis added.) This regulation gives “the agency designee” (here, Chief Judge Cotter) the option of disqualifying an employee of his office from working on a matter, even though the employee had not run afoul of any specific provision of the Office of Government Ethics’ regulations. The Commission could, of course, exercise its inherent supervisory authority to disqualify the Presiding Officer. However, in the absence of any information that would present a concern as to the integrity of the process, we decline to take such action here.

For these reasons, we affirm the Presiding Officer’s order of May 26, 1998, LBP-98-11.

It is so ORDERED.

For the Commission,<sup>36</sup>

[Original signed by  
John C. Hoyle]

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John C. Hoyle  
Secretary of the Commission

Dated at Rockville, Maryland  
this 5th day of June, 1998.

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<sup>36</sup> Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.