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NUCLEAR REGULATORY COMMISSION

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Materials License Suspension

Docket Number: 30-5980/5982-EA

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SECY 02

1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3 + + + + +

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 SCHEDULING ORDER FOR HEARING

6 ON MOTION TO SET ASIDE IMMEDIATE

7 EFFECTIVENESS OF ORDER SUSPENDING LICENSE

8 + + + + +

9 ----------x

10 In the matter of : Docket No.

11 SAFETY LIGHT CORPORATION : 30-5980/5982-EA

12 Bloomsburg, Pennsylvania Site :

13 Materials License Suspension :

14 ----------x

15 Friday,

16 January 14, 2005

17

18 The above-entitled matter came on for

19 hearing, pursuant to notice, at 1:00 p.m.

20 BEFORE:

21 ADMINISTRATIVE JUDGE E. ROY HAWKENS, CHAIR

22 ADMINISTRATIVE JUDGE PETER S. LAM

23 ADMINISTRATIVE JUDGE ALAN S. ROSENTHAL

24

25

1 APPEARANCES:

2 On Behalf of the Nuclear Regulatory Commission:

3 GEORGE PANGBURN

4 NRC Region I

5 475 Allendale Road

6 King of Prussia, PA 19406

7 (610) 337-5281

8

9 MICHAEL A. WOODS, ESQ.

10 Office of the General Counsel

11 Mail Stop - O-15 D21

12 U.S. Nuclear Regulatory Commission

13 Washington, D.C. 20555-0001

14 (301) 415-3269

15

16 On Behalf of the Applicant, Safety Light

17 Corporation:

18

19 ALVIN H. GUTTERMAN, ESQ.

20 of: Morgan, Lewis & Bockius, LLP

21 1111 Pennsylvania Avenue, NW

22 Washington, D.C. 20004

23 (202) 739-5468

24 (202) 739-3001 fax

25

1 On Behalf of the Applicant, Safety Light
2 Corporation:
3 WILLIAM E. LYNCH, JR., VICE PRESIDENT
4 Safety Light Corporation
5 4150-A Old Berwick Road
6 Bloomsburg, PA 17815
7 (570) 784-4344
8 (570) 784-1402 fax
9
10
11
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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 JUDGE HAWKENS: Let's go on record.

4 Good afternoon. My name is Roy Hawkens.

5 I'm a legal judge, and I'll be the chair of this

6 board.

7 I am joined today by Judge Alan Rosenthal,

8 who is also a legal judge, and by Dr. Peter Lam, who

9 is a technical judge.

10 This case is in the matter of Safety Light

11 Corporation, Docket Nos. 30-5980-EA and 30-5982-EA.

12 We'll be hearing argument on Safety

13 Light's motion to set aside the immediate

14 effectiveness of NRC's order of December 10th, 2004,

15 which suspended Safety Light's licenses. And in our

16 view, about 45 minutes per side should provide the

17 parties with ample time to present their arguments,

18 and we'd like to hear from Safety Light first, to be

19 followed by a response from the staff, and if Safety

20 Light wishes, it can reserve time for rebuttal.

21 Would you like to save time for rebuttal?

22 MR. GUTTERMAN: Yes.

23 JUDGE HAWKENS: And if so, how much?

24 MR. GUTTERMAN: Fifteen minutes, please.

25 JUDGE HAWKENS: All right.

1 MR. GUTTERMAN: I suspect I won't need
2 even a half an hour for the presentation.
3 JUDGE HAWKENS: Although we think 45
4 minutes should be ample time, the parties should not
5 feel compelled to expand their argument to fill the
6 entire time.
7 (Laughter.)
8 JUDGE HAWKENS: Please can you help us out
9 with the timing?
10 All right. You may proceed.
11 MR. GUTTERMAN: Would you prefer that I be
12 up here or --
13 JUDGE HAWKENS: Yes, please.
14 MR. GUTTERMAN: My name is Alvin
15 Gutterman. I'm with the law firm of Morgan, Lewis &
16 Bockius, and I'm speaking on behalf of Safety Light
17 Corporation.
18 As you said, Judge Hawkens, the subject is
19 the December 10th order suspending license. The order
20 charges Safety Light with wilful violation based on an
21 Office of Investigations' report that found that
22 Safety Light failed to make payments into the
23 decommissioning trust fund that was required by
24 license condition, conditions of two of their licenses
25 actually, and that Safety Light knew the conditions

1 required those payments.

2 Safety Light's position is that it admits

3 that it did not make all of the payments on time. It

4 has subsequently made all of the payments, but did not

5 make them monthly as required by the license

6 conditions. But it denies that this was a wilful

7 violation.

8 JUDGE ROSENTHAL: Would you define

9 "wilful" for me as you understand the term in this

10 context?

11 MR. GUTTERMAN: I understand the term

12 "wilful" to connote some flouting of the regulatory

13 requirements and more than just understanding them,

14 but it is some intent to ignore, to not comply. It's

15 more than just knowledge. It's a real intent to

16 violate the law.

17 JUDGE ROSENTHAL: Well, intent to violate

18 the law. There was an intent not to pay these sums

19 into the fund. Isn't that intentional?

20 MR. GUTTERMAN: I don't think that can say

21 it was an intent not to pay. I wouldn't agree with

22 that characterization.

23 JUDGE ROSENTHAL: Well, it wasn't

24 accidental.

25 MR. GUTTERMAN: It was not accidental. It

1 was a question of the ability to pay. It requires
2 money to make payments into the fund, and the reason
3 that Safety Light didn't pay is that they did not have
4 the money to do it.
5 JUDGE ROSENTHAL: Are you telling me that
6 the staff couldn't take into account the inability to
7 pay?
8 MR. GUTTERMAN: I think they could have
9 and should have, but they did not, and that is, in a
10 sense, part of our position.
11 JUDGE ROSENTHAL: I don't know what you
12 mean when you say they didn't take that into account.
13 They have suspended your license effective immediately
14 because of your failure or your client's failure to
15 have made these payments; isn't that right?
16 MR. GUTTERMAN: That's true.
17 JUDGE ROSENTHAL: So that they've taken
18 into account that failure irrespective of what the
19 reason was, whether it was because of inability or
20 whether it was because of a deliberate flouting of the
21 requirement.
22 MR. GUTTERMAN: They certainly are aware
23 of the financial circumstances the company found
24 itself in; were told about that during their
25 investigation and their pre-decisional enforcement

1 conference.

2 In our view, they should have viewed that

3 fact as undercutting any conclusion that there was a

4 wilful violation.

5 JUDGE HAWKENS: Do you have any precedent

6 or any NRC documents which would support your

7 interpretation of "wilfulness"?

8 MR. GUTTERMAN: That wilfulness involves

9 an intent to violate? I think that's -- let me see

10 what I have here. Actually I have a good, clear

11 definition in NRC precedent. There's plenty of

12 Court of Appeals cases that talk about what wilful

13 means. I've got a --

14 JUDGE HAWKENS: What's your best one or

15 two cites and tell me what it says, please, in the

16 context.

17 MR. GUTTERMAN: Okay. Babcock & Wilcox

18 Company v. Occupational Safety and Health Review

19 Commission, 622 F.2d 1160, 1165. It's a 3rd Circuit,

20 1980 case; describes wilfulness in this way. It says,

21 "Wilfulness connotes defiance or such reckless

22 disregard of consequences as to be equivalent to a

23 knowing, conscious, and deliberate flaunting of the

24 act. Wilful means more than mere voluntary action or

25 omission. It includes an element of obstinate refusal

1 to comply."

2 JUDGE ROSENTHAL: Well, now, are you

3 telling us that the staff couldn't take into

4 consideration the fact that you hadn't made these

5 payments, given that the reason you hadn't done it was

6 an inability?

7 You're saying that because it was

8 inability rather than a deliberate flouting, the staff

9 couldn't take into consideration the failure to make

10 those payments. Is that what you're telling us.

11 MR. GUTTERMAN: I'm not saying the staff

12 couldn't take the failure to make the payments. What

13 I'm saying is their failure to make the payments does

14 not reflect a careless disregard for the requirements

15 of the act. It is not a failure that has the nature

16 that should lead the Commission to conclude that this

17 is a licensee that cannot be trusted to comply with

18 regulatory requirements.

19 The fact that they found themselves in

20 that position was not something that any reasonable

21 person would be surprised by. It's a fact of economic

22 life that businesses cannot always come up with the

23 funds they hope to come up with, and it was a fact,

24 that concern about their ability to pay, was one that

25 Safety Light expressed when the condition was being

1 negotiated and written.

2 And, in fact, one of the letters

3 expressing that very concern about ability to pay is

4 incorporated by reference into one of the licenses.

5 JUDGE ROSENTHAL: I'm still not clear as

6 to whether in your view the fact that the failure to

7 pay was due to an inability precluded the entry of

8 this immediately effective suspension order. Wasn't

9 the staff entitled to --

10 MR. GUTTERMAN: My answer to that is, yes,

11 it does preclude it.

12 JUDGE ROSENTHAL: It does preclude it.

13 MR. GUTTERMAN: Yes.

14 JUDGE ROSENTHAL: So what was the staff's

15 remedy? I mean, the staff is looking at you had a

16 commitment to make these payments.

17 MR. GUTTERMAN: Yes.

18 JUDGE ROSENTHAL: You didn't make the

19 payments. You say because of an inability to pay.

20 The staff is concerned about the fact that these

21 payments are not made. What remedy does it have if it

22 can't rely on the inability or can't rely on the

23 failure to make the payments, given that the reason

24 was inability?

25 MR. GUTTERMAN: Well, if the licensee has

1 no money, there aren't a whole lot of ways to get
2 money from that licensee, Your Honor.
3 JUDGE ROSENTHAL: But why can't they
4 suspend the license? They're concerned about the fact
5 that these payments are not being made. They're
6 concerned about what this means down the road, and
7 they say as a regulatory matter if Safety Light isn't
8 making these payments, whatever may be the reason,
9 they shouldn't continue to operate under that license.
10 Now, you're telling me that they can't do
11 that if the reason for the nonpayment is an inability,
12 and I'm asking you what can they do.
13 MR. GUTTERMAN: Well, you've got a number
14 of assumptions in your question, Judge Rosenthal, and
15 I'd like to discuss them with you because you assume
16 that the inability to pay has an effect down the road;
17 that perhaps the licensee is creating contamination
18 that is going to create a large clean-up cost, and the
19 more they operate, the more contamination is going to
20 be there and the bigger the clean-up cost.
21 I think in that circumstance, definitely
22 the Agency can and should stop the licensee from
23 creating that contamination.
24 That was not the circumstance here. What
25 we're dealing with here is a company that has a larger

1 inventory of wastes that were accumulated under prior
2 operations over the course of operations from the late
3 '40s forward. Most of those liabilities relate to
4 materials that the company has not used or been
5 authorized to use for decades.
6 In fact, a large part of that
7 contamination is not even regulated by the Nuclear
8 Regulatory Commission. It's radium, which is
9 regulated by the State of Pennsylvania.
10 If the ongoing operations of Safety Light
11 were creating decommissioning costs and the company
12 was actively creating additional costs without being
13 able to fund clean-up of that, absolutely, I think the
14 Agency could and should step in and stop that.
15 That's not the circumstance we have here.
16 Over the course of the whole five years that the
17 company was operating under the term that just
18 expired, the company was cleaning up the waste
19 associated with the ongoing operations. It was
20 dealing with those, paying for them out of their
21 operating expenses. It wasn't dipping into this
22 decommissioning trust to pay for that. That
23 decommissioning trust at one point had $1.6 million or
24 thereabouts, perhaps more in it, and it was being
25 spent solely to clean up what we've been calling

1 legacy wastes.

2 The '02 license that's referred to is a

3 legacy license because it relates specifically to the

4 clean-up decommissioning activities that are primarily

5 associated with the operations before the most recent

6 term.

7 The problem I have with this order is that

8 it draws an inference about the character of the

9 company or that's the only justification I could

10 possibly see for making the order immediately

11 effective because the net effect of this order is that

12 it takes the company, which is slowly paying in some

13 funds into the decommissioning trust, and it tell sit

14 to stop earning money so that it won't be able to make

15 any further payments.

16 Nothing in that order tells them to do

17 anything specific about the waste other than to

18 continue to supply the utilities and to properly

19 continue some of the controls they've been doing all

20 along. There's nothing about this order that somehow

21 protects public health and safety.

22 It is, as I describe it to my colleagues,

23 the visceral reaction of everybody is it's kind of cut

24 your nose to spite your face because it's stopping the

25 generation of income that's being the source of the

1 contributions to the decommissioning fund.

2 JUDGE LAM: Now, Mr. Gutterman, without

3 addressing the consequence of this order, if I may go

4 back to your answer to Judge Rosenthal's earlier

5 question, is it true; am I understanding your

6 correctly? The central theme of your argument is

7 Safety Light's inability to pay does not rise to the

8 level of defiance and reckless disregard. Therefore,

9 it is not wilful and, therefore, this order should not

10 be immediately effective.

11 Is that the central theme of your

12 argument?

13 MR. GUTTERMAN: Yeah, I think that's fair,

14 Judge Lam.

15 JUDGE LAM: Then if I may follow up on

16 Judge Rosenthal's question, then what is the

17 consequence? In your pleading you talk about hardship

18 implicitly.

19 MR. GUTTERMAN: Yes.

20 JUDGE LAM: What type of hardship is

21 Safety Light facing, this immediate effectiveness

22 order?

23 MR. GUTTERMAN: There has been an order

24 published that says this company has to stop

25 production by the end of March. The only way this

1 company could continue as a viable business is to
2 continue its relationships with its customers, to be
3 able to get orders from those customers so that it can
4 log a backlog of orders and continue production to
5 fill those orders.
6 When you tell the customers, "This is not
7 a reliable supplier. They're going to be out of
8 business in a couple of months," you make it very hard
9 for them to market, and --
10 JUDGE HAWKENS: Assuming it did go out of
11 business in a couple of months, who would then be
12 responsible for the security of the facility and for
13 the clean-up costs?
14 MR. GUTTERMAN: That is a good question,
15 Judge Hawkens. You know, obviously Safety Light will
16 be responsible, but its assets are very limited, and
17 it won't take very long before they'll have to declare
18 bankruptcy and dissolve. That would be my expectation
19 anyway.
20 But who would have responsibility then?
21 It would fall to government agencies.
22 JUDGE LAM: But does this immediately
23 effective order, does it prolong any inevitable
24 outcome?
25 MR. GUTTERMAN: I don't think it does,

1 Judge Lam. I do not think it does.

2 JUDGE LAM: So there's hope for Safety

3 Light financially?

4 MR. GUTTERMAN: When these payments were

5 missed, Safety Light was going through a very

6 difficult cash flow situation. It arose after the

7 September 11th terrorist attacks, and there was a

8 general downturn in business in the U.S. economy.

9 Their lights go into big buildings. If people stop

10 building big institutional buildings, they don't buy

11 safety lights. So their orders went down.

12 Their cash flow was interrupted also by

13 customers whose orders for buildings were going down

14 and who couldn't make the payments. So they had a

15 period there where they just were barely able to

16 survive.

17 Since then business picked up. They have

18 made all of the payments that they were behind. They

19 are completely current on the decommissioning trust

20 fund.

21 JUDGE ROSENTHAL: Is their entire current

22 business under the NRC license?

23 MR. GUTTERMAN: They have a series of

24 licenses, Judge Rosenthal. The principal source of

25 their income is the --

1 JUDGE ROSENTHAL: The license that's --

2 MR. GUTTERMAN: It's the issue that's at

3 issue.

4 JUDGE ROSENTHAL: -- that's at issue.

5 MR. GUTTERMAN: There are distribution

6 licenses they have where they could distribute

7 products produced by other companies.

8 JUDGE ROSENTHAL: But the loss of this

9 license would have a very significant impact, I take

10 it, on their overall health.

11 MR. GUTTERMAN: Yes, it would have a very

12 substantial impact. The employment, I think the

13 number I heard was 28 employees who are at risk

14 because of the order.

15 JUDGE HAWKENS: My problem with your

16 definition of "wilful," and I'd much prefer to see

17 some Commission precedent rather than an OSHA

18 regulation, but "wilful" it seems to me could just as

19 readily be interpreted as meaning knowing what the

20 obligation is and a knowing failure to comply with the

21 obligation.

22 And here the obligation was an unqualified

23 obligation to which -- you look skeptical.

24 MR. GUTTERMAN: Well, I am skeptical, but

25 I didn't mean to interrupt your question.

1 JUDGE HAWKENS: On its face, it would
2 appear the obligation is unqualified, and it's
3 unqualified because the consequence is you're no
4 longer exempt from the decommissioning funding
5 requirements of the regulation.
6 So you refer to the letter which says you
7 put the staff on notice before you executed the
8 license that you may not be able to comply. I saw the
9 letter, but the problem is that license, which Safety
10 Light agreed to seems to me to be pretty black and
11 white, have an unqualified obligation, and Safety
12 Light concedes that it was aware of the obligation,
13 and yet because it couldn't, it nevertheless failed to
14 do that, to comply.
15 MR. GUTTERMAN: Yes, yes.
16 JUDGE HAWKENS: And to me there is case
17 law out there, and I suspect that the NRC staff will
18 point us in the direction of it, which would lead us
19 to the conclusion that that satisfied the wilfulness
20 component.
21 MR. GUTTERMAN: If you interpret it that
22 way, Judge Hawkens, you're interpreting the wilfulness
23 criterion to have no level of intent to violate. When
24 the company got to the point where they could not make
25 the payments, there really weren't any options for

1 them.

2 This is not a case where a licensee is

3 authorized -- I guess the Advance Medical case is an

4 example where they had technicians performing work

5 that required qualifications that the technicians

6 didn't have.

7 That company could have not done that

8 work. That's not an option that Safety Light had when

9 it found itself short of funds. There was no way.

10 You know, they had a license that said over the term

11 of this license you will make 60 payments into this

12 decommissioning trust fund. In their judgment and the

13 Office of Investigations did an investigation that

14 reviewed their detailed financial records for a whole

15 year and did not question this judgment; in their

16 judgment if they had made those payments in lieu of

17 paying their employees, in lieu of paying the

18 suppliers who supplied the essential materials from

19 which they make their product, that they would have

20 promptly destroyed their business and destroyed their

21 ability to generate funds to make the payments.

22 The approach --

23 JUDGE HAWKENS: And I agree, and it's a

24 real Hobson's choice, but it appears to be

25 contemplated in the license in that condition.

1 MR. GUTTERMAN: Well, Judge Hawkens, I
2 must admit that for most of my career I've dealt with
3 reactor licenses rather than materials licenses, and
4 every reactor license tracks through and says you're
5 required to have this. If you don't, here's what you
6 do.
7 In excruciating detail all sorts of
8 instruments are listed out, and the license says you
9 have to have four of these seven instruments operable.
10 If you only have three, you have to take the following
11 actions. If you only have two, you have other
12 actions, up to the point of shutting down the reactor.
13 There's nothing here.
14 JUDGE ROSENTHAL: This isn't reactor
15 licensing.
16 MR. GUTTERMAN: It certainly is not, but
17 I would point out to you, Judge Rosenthal and Judge
18 Hawkens, the license required the company to do
19 certain things on a regular basis that took money. It
20 required leak tests, inventories, surveys.
21 JUDGE ROSENTHAL: I think I understand
22 that. Let me ask you this. At bottom here, is the
23 issue really this? Whether we accept your definition
24 of "wilful" or the staff's contrary definition, it
25 doesn't seem to me offhand that there is much of a

1 dispute of fact here as to why the payment was not
2 made; the fact that in other respects your operation
3 passed muster. I don't see any disagreement there.
4 It seems to me that at bottom we're not
5 dealing here with any issues or disputes with respect
6 to fact, but it comes down largely to whether your
7 definition of "wilful" or the staff's seeming contrary
8 definition is accepted. Now, am I wrong about that?
9 And if the issue is broader than that, I would be
10 interested in --
11 MR. GUTTERMAN: Yes.
12 JUDGE ROSENTHAL: -- what you regard it as
13 being.
14 MR. GUTTERMAN: I do consider it broader
15 than that.
16 JUDGE ROSENTHAL: Okay. Well, tell me.
17 MR. GUTTERMAN: And the reason I consider
18 it broader than that is whether or not you call the
19 failure to pay a wilful violation, you still have the
20 question of whether an immediately effective order was
21 justified.
22 JUDGE ROSENTHAL: And what does that turn
23 on?
24 MR. GUTTERMAN: It turns on whether it was
25 necessary to have an immediately effective order to

1 protect the public health and safety.

2 JUDGE ROSENTHAL: All right. So that the

3 second question, I gather, is whether or not, as you

4 see it, is whether or not even if one accepted the

5 staff's definition of wilful, the order was justified

6 given -- would you at least insist there was no threat

7 to the public health and safety that required the

8 suspension order being made immediately effective? Do

9 I understand you correctly?

10 MR. GUTTERMAN: Yes.

11 JUDGE ROSENTHAL: So we have two prongs.

12 First, as you see it, the deliberate or wilfulness,

13 whatever wilfulness means, and the second one is

14 irrespective of how one comes out on that, whether

15 there's a public health and safety question.

16 MR. GUTTERMAN: Yes.

17 JUDGE LAM: No, no, no. Mr. Gutterman,

18 the way I read the regulation, 2.205, it's either/or.

19 The immediate effectiveness order hinges on two

20 factors. Either it's a wilful violation or it has

21 impact on public health and safety.

22 MR. GUTTERMAN: It is phrased that way,

23 Judge Lam. I agree with that, but I don't think the

24 intent of the regulation or the logic of the

25 regulation intends that just because you can

1 characterize a violation as wilful you must or should
2 assume that the fact that that occurred creates a risk
3 to the public health and safety.
4 I mean, the general principle that people
5 who flout the regulations cannot be relied upon by the
6 Agency to comply with regulatory requirements is
7 certainly correct, and I heartily endorse that.
8 JUDGE LAM: Right. The point of my
9 question is in order for you to prevail, you need to
10 prevail on both of these factors.
11 MR. GUTTERMAN: I don't think so because
12 whether you say that this failure was -- whether you
13 choose to call it wilful, there was no evidence of any
14 intent to flout or ignore the requirements. And
15 without that kind of intent it would make no sense to
16 generalize that this is a licensee who cannot be
17 trusted to comply with other regulatory requirements.
18 And I think the case law at the NRC is
19 pretty clear that in judging whether a licensee is
20 qualified from the point of view of its character, the
21 agency should look at the totality of the
22 circumstances.
23 JUDGE ROSENTHAL: This is a character
24 issue? I didn't think that this regulation makes the
25 pivotal consideration whether the licensee is found to

1 have a good character or not.

2 MR. GUTTERMAN: I don't see that word

3 "character" in the regulation. Although for the

4 staff's pleadings, I think it's inherent in the

5 reference to wilfulness. The reason that wilful is a

6 particular concern from a regulatory point of view has

7 to do with the character of the licensee, has to do

8 with whether the Agency can rely on this licensee to

9 comply with the terms of the license. That's what

10 it's all about.

11 I agree with you the word "character" is

12 not there, but as I understand it and as I believe the

13 staff has argued their position, it's their view that

14 that's what it's about, whether the Agency should

15 decide it cannot trust this licensee to comply based

16 on this conduct.

17 And the circumstances here I do not

18 believe justify that kind of an assumption. In fact,

19 the facts, history over decades of their conduct shows

20 that they do comply with the regulatory requirements

21 when they're capable of it.

22 There are violations committed by lots of

23 licensees. Occasionally licensee employees commit

24 wilful violations. If the licensee adequately

25 addressed that, the Agency doesn't suspend their

1 license. There is not a requirement that just because
2 there was a wilful violation, a finding of wilful
3 violation, that the Agency will suspend the license.
4 It does require some thought.
5 JUDGE HAWKENS: I have a quick question.
6 MR. GUTTERMAN: Yes.
7 JUDGE HAWKENS: The burden would be here
8 on the staff to show that adequate evidence, I think,
9 supports, number one, their conclusion that a
10 violation of the licensing condition existed and,
11 number two, for present purposes that it was wilful.
12 And you're saying that in addition to
13 showing that it was wilful, assuming we don't accept
14 your --
15 MR. GUTTERMAN: Yes.
16 JUDGE HAWKENS: -- definition of it, they
17 would have to show another component, namely, that it
18 shows that Safety Light could not --it suggested an
19 unwillingness or an inability to comply in the future.
20 MR. GUTTERMAN: Yes, that is my position.
21 JUDGE HAWKENS: And they would have to
22 show adequate evidence of that, which would not be a
23 very high evidentiary standard, would it?
24 MR. GUTTERMAN: I don't think it's an
25 enormous standard, but I think it has to take into

1 consideration the other facts the staff knew about
2 this licensee, and that the order did not do.
3 In fact, the order was accompanied by a
4 summary describing the background of the licensee that
5 suggested the licensee's conduct was consistent with
6 regulatory requirements for protection of the health
7 and safety as far as radiation protection, control of
8 licensed materials.
9 JUDGE HAWKENS: Of course, the regulations
10 do establish that to preserve public health, safety,
11 and interest, there should be a decommissioning trust
12 fund which you were exempted from.
13 MR. GUTTERMAN: That's true.
14 JUDGE HAWKENS: Does the fact that the
15 repeated failure to comply with the licensing
16 condition, even though there was an intention when
17 Safety Light had the funds to make it up, how does
18 that cut or does it not cut, given the lack of funds?
19 MR. GUTTERMAN: Well, given the lack of
20 funds, I would ask you to take a look at the
21 circumstances they were in, what the license told them
22 to do in those circumstances.
23 The answer is the license and the
24 regulations were silent. The staff pleadings make --
25 JUDGE HAWKENS: Although the consequence

1 in the licensing condition was that they were
2 automatically then in violation of the regulation
3 because they note they could not comply with 30.35.
4 MR. GUTTERMAN: That's just to what I was
5 going to get to to address because I find that an
6 interesting -- you know, certainly the condition says
7 that. It doesn't say what happens when that happens.
8 JUDGE HAWKENS: Right.
9 MR. GUTTERMAN: Of course, the condition
10 says if you don't make the payments, your exemption is
11 terminated. It says if you violate the condition. It
12 may not be the same thing.
13 If you interpret the condition as
14 requiring payments if the funds were available. But
15 if, for argument's sake, there was a violation, the
16 condition on its own terms now says the exemption is
17 over, what was the consequence of that? Where do we
18 find a consequence for that in the license, in the
19 regulations?
20 I don't see any because what they were
21 exempted from was a requirement that has to be met to
22 get a license. They already had the license, and
23 neither the regulation nor the license said what the
24 consequence would be if the exemption were suddenly
25 voided.

1 JUDGE HAWKENS: In imposing the immediate
2 effective aspect of the order, could the staff have
3 taken into consideration, properly taken into
4 consideration a fact that Safety Light, although it
5 states in its pleadings that it volunteered the
6 information, it certainly did not promptly volunteer
7 the information.
8 MR. GUTTERMAN: That's true.
9 JUDGE HAWKENS: And, in fact, if you look
10 at the Office of Investigation reports when it
11 interviewed Mr. Lynch and Mr. Harmon, one could
12 interpret those interviews as indicating that as long
13 as the NRC didn't find out, they'd be pleased about
14 that.
15 MR. GUTTERMAN: As long as the NRC didn't
16 say anything about it, they would be pleased about
17 that.
18 JUDGE HAWKENS: We can just not --
19 MR. GUTTERMAN: You can see in Mr. Lynch's
20 testimony that he believed the NRC had that
21 information. The NRC was getting the bank statements
22 regularly. So his indication was he was surprised
23 that the staff didn't know, but he certainly wasn't
24 going to bring the issue up and put it on the table so
25 that it had to be confronted. I would concede that.

1 JUDGE HAWKENS: And can the staff take
2 that into account as perhaps a troubling factor that
3 could support the immediate effective order here?
4 MR. GUTTERMAN: It might if that violated
5 a regulatory requirement, if there was some indication
6 that Safety Light had an obligation to volunteer that,
7 but the staff actually investigated whether that was
8 a violation of their regulatory requirements and
9 concluded that it was not. It was a standard for
10 notifying the NRC, and the staff concluded that the
11 site was not considered as posing a healthy risk to
12 the public, and therefore, they concluded that it
13 wasn't a violation of 10 CFR 30.9(b), I think, that
14 requires licensees to notify the Agency if there's a
15 significant risk to the public.
16 JUDGE LAM: Mr. Gutterman, when did Safety
17 Light make current the trust fund payments? And where
18 did that money come from?
19 MR. GUTTERMAN: Safety Light was able to
20 start paying off the arrears in December of 2003, I
21 believe, and they made payments towards the arrears
22 several times during the year. At the time that they
23 notified the region that they had not been making
24 payments, I think the order says they were in arrears
25 by $81,000, and I think at the time that the order was

1 issued, they had paid that down to $36,000, and they
2 made that last $36,000 payment plus interest towards
3 the end of December.
4 And I think if you look at the transcript
5 of the enforcement conference, Mr. Lynch talks there
6 about business picking up and having a backlog of
7 orders that were going to result in cash coming in
8 later in the year, and that's consistent with what
9 actually happened.
10 And I gather my time is up.
11 PARTICIPANT: If you keep your 15 minutes.
12 MR. GUTTERMAN: Yes.
13 JUDGE HAWKENS: All right. Thank you.
14 MR. GUTTERMAN: Thank you.
15 MR. WOODS: Thank you, Your Honors.
16 My name is Michael Woods, representing the
17 NRC staff.
18 Ten CFR 2.202(a)(5) provides that the NRC
19 may issue an order to remedy regulatory violations,
20 and that if that violation was wilful or if the public
21 health, safety, or other interest requires, that the
22 Commission may make such order immediately effective.
23 Such order --
24 JUDGE ROSENTHAL: Let me get your
25 definition of "wilful."

1 MR. WOODS: Your Honor, "wilfulness" has
2 been defined most recently by the Commission in
3 statements of consideration which promulgated
4 revisions to 30.10 prohibiting wilful misconduct,
5 which was 55 Federal Register 12,374 and 12,375.
6 The Commission explained that a violation
7 is wilful if an individual either knew the conduct was
8 prohibited or had a careless disregard for whether it
9 was. In NRC parlance, these are two different types
10 of wilfulness.
11 JUDGE ROSENTHAL: There's not a careless
12 disregard here, is there?
13 MR. WOODS: No, Your Honor. You're
14 correct. In this case the violation was investigated
15 and determined to be wilful under the subset of
16 deliberateness. Careless disregard is a separate form
17 of wilfulness, if you will, that the NRC investigates.
18 JUDGE ROSENTHAL: In your view it's
19 totally irrelevant what was at the bottom of the
20 failure of the licensee to have made these payments.
21 The fact that it was due to an inability to pay, as
22 the old saying goes, you can't get blood out of a
23 turnip.
24 MR. WOODS: Right, right.
25 JUDGE ROSENTHAL: That's entirely

1 relevant.

2 MR. WOODS: Your Honor, yes, to the extent

3 that federal cases on which the NRC also relies to

4 color its definition of wilfulness. We've cited you

5 those in our response to Safety Light's motion to set

6 aside immediate effectiveness, one of which is

7 Lawrence v. Commodities Future Trading Commission.

8 It's a 9th Circuit case which informs that wilful

9 conduct only requires an action that is consciously

10 and deliberately committed with knowledge that it

11 violates some legal duty.

12 That is the bare minimum that is needed to

13 inform the finding of wilful conduct.

14 According to --

15 JUDGE ROSENTHAL: What was that definition

16 again? And that was in the Lawrence case?

17 MR. WOODS: Yes, Lawrence v. CFTC.

18 Conduct that is consciously and deliberately committed

19 with knowledge.

20 According to the Commission, wilfulness

21 alone may serve as the basis for an immediately

22 effective order, as well as a finding that the order

23 is necessary to protect the public health, safety, or

24 other interests.

25 Therefore, the staff had --

1 JUDGE ROSENTHAL: Will you explain to me
2 how this order protects the public health and safety?
3 I would think that the absolute opposite
4 is likely the case in that if this order is made
5 immediately effective and this company is forced out
6 of business, they would then not have presumably the
7 funds that would be needed to accomplish a reclamation
8 of the site, which presumably would be in the interest
9 of the public health and safety.
10 It seems to me that the last thing in the
11 world that this staff would want to do in these
12 circumstances is to put this company out of business
13 in circumstances where at present apparently business
14 has picked up to the point where they're able to make
15 the payments in arrears and to make current payments.
16 I mean, I fail to see what regulatory
17 purpose, besides just relying on the world "wilful" as
18 you interpret it, is served by making this order
19 immediately effective. It seems to me that this
20 counters the protection of the public health and
21 safety.
22 MR. WOODS: Your Honor, according to the
23 Commission, its requirements for decommissioning
24 funding are directly related to protection of public
25 health and safety, and if --

1 JUDGE ROSENTHAL: But if they go out of
2 business, the funds are not available. I mean, what
3 I am suggesting to you is that at least on the record
4 before us that the likelihood of there being funds
5 available to effect the reclamation of the site is
6 enhanced, not reduced by allowing this company to
7 remain in business.
8 MR. WOODS: Well, Your Honor, in this
9 case, related to Safety Light's 1999 renewal, it was
10 recognized that total reclamation and decontamination
11 costs for this site would total somewhere in the range
12 with unrestrictive release from 94 million to 120
13 million. It is evident to the staff that Safety Light
14 will probably never be able to fully fund these costs,
15 but the staff weighed the pros and cons of renewal and
16 determined that so long as Safety Light demonstrated
17 a commitment to doing its part of partial funding of
18 these costs, that renewal would be a good thing.
19 In this case, however, the staff found
20 that Safety Light committed continual violation of
21 these requirements that were geared toward meeting
22 these objectives of the Commission's decommissioning
23 funding rules.
24 Therefore, the staff did not have
25 confidence in this licensee' ability to comply with

1 NRC requirements, and the staff also believed that
2 allowing the licensee to continue their activities was
3 not consistent with public health and safety because
4 it did not conform their conduct consistent with the
5 Commission's objectives of its decommissioning funding
6 rules and the alternative --
7 JUDGE ROSENTHAL: Are you suggesting some
8 kind of misconduct? I mean, the claim of Safety
9 Light, which I don't recall seeing the staff
10 challenge, is that they ran into, as did an enormous
11 number of other American corporations, a decrease in
12 business in the wake of the events of 9/11; that this
13 wasn't a matter of inefficiency in the conduct of
14 their business. It wasn't a matter of deliberately
15 flouting Commission regulations. They were caught in
16 a circumstance that was beyond their control. That's
17 what the papers before me reflect.
18 Now, in that circumstance, I don't
19 understand your argument.
20 MR. WOODS: Well, Your Honor, under the
21 definition of "wilfulness," court decisions have
22 informed that wilful violation does not require some
23 sort of evil motive. It strictly requires, at a
24 minimum, they intend to do the act which does not
25 conform to a certain legal duty or standard of

1 conduct.

2 JUDGE ROSENTHAL: Are you telling us that

3 if the failure to make the payment is deliberate,

4 which is what you seem to equate with wilful, that

5 that's the end of the matter? It doesn't make any

6 difference, one, what was the cause of the failure to

7 make it; two, it doesn't make any difference what

8 might be the consequences in terms of the business or

9 in terms of their ability to pay at least part of the

10 cost of reclamation. Just as long as it's deliberate,

11 that's all that we look at.

12 MR. WOODS: Yes, Your Honor.

13 JUDGE ROSENTHAL: So that actually there's

14 no case here from your standpoint because if you

15 interpret deliberate as meaning intentional, there's

16 no question it was intentional in the sense that it

17 wasn't inadvertent. They knew what they were doing.

18 MR. WOODS: Yes, Your Honor. It is our

19 position that there are two independent grounds to

20 sustain the order, and one of them was wilfulness

21 alone, which has formed the basis for issuance of

22 immediately effective orders under Commission

23 regulations in 2.202 since at least 1962, in which the

24 Commission has noted --

25 JUDGE HAWKENS: And is that because the

1 conclusion that the licensee engaged in a wilful
2 violation, that gives rise to a regulatory presumption
3 that the staff can no longer be assured that they will
4 comply in the future with the licensing conditions and
5 regulations?
6 MR. WOODS: Well, as the Commission said
7 in 1992, wilfulness alone can serve as the basis for
8 issuing an immediately effective order because the NRC
9 relies on the integrity of individuals involved in
10 licensed activities to insure compliance with NRC
11 requirements.
12 JUDGE ROSENTHAL: Integrity? Well, wait
13 a moment. Let's stop there. We're talking about
14 integrity.
15 MR. WOODS: Right.
16 JUDGE ROSENTHAL: What basis is there --
17 if you accept the proposition that the downturn in
18 their business left them without the money to make
19 these payments when due, if you accept that, where is
20 the integrity question? I don't see that at all.
21 MR. WOODS: Well, I didn't mean integrity.
22 That was just the language of the Commission in that
23 instance.
24 JUDGE ROSENTHAL: Well, you cited it.
25 MR. WOODS: Well, yes. I know that

1 management integrity and character is a separate line
2 of decisions before the Commission. I don't think
3 that's what the Commission was specifically referring
4 to. I just meant integrity and reliability generally.
5 JUDGE ROSENTHAL: Is the staff raising any
6 issue here as to the integrity of Safety Light's
7 management?
8 MR. WOODS: In accordance with the
9 management character and integrity line of cases, no.
10 JUDGE ROSENTHAL: So that's not a factor
11 at all in the decision to suspend their license
12 effective immediately?
13 MR. WOODS: Not directly as a grounds for
14 this order, no.
15 JUDGE HAWKENS: But it's a matter of
16 lacking confidence in their future compliance; is that
17 right?
18 MR. WOODS: Yes. As the Commission said,
19 that when an individual wilfully violates Commission
20 requirements, Commission reliance on that licensee is
21 undermined.
22 JUDGE ROSENTHAL: Do you know why there
23 wasn't compliance?
24 MR. WOODS: On this?
25 JUDGE ROSENTHAL: This, again, Safety

1 Light's situation was by no means unique. A very
2 substantial percentage of the American industrial
3 complex, if you will, was badly affected by 9/11
4 events, and if you believe what you read in the
5 newspapers, it has turned around to some extent, and
6 apparently it has for Safety Light.
7 Now, where is there a basis at this point
8 for saying that, well, because they didn't make these
9 payments on occasion in the past because of, again,
10 economic circumstances, we can't count on them making
11 them in the future?
12 MR. WOODS: Two points in response to
13 that, Your Honor. First, Safety Light here missed 13
14 out of 60 required deposits over the course of its
15 license. That approximates to 22.7 percent.
16 Therefore, nearly a quarter of the time or between a
17 quarter and one-fifth of the time, they were in
18 noncompliance for this condition.
19 To the NRC this demonstrates a significant
20 pattern of noncompliance.
21 With regard to their stated reasons for
22 their inability to meet their license conditions due
23 to a downturn in business and an unfavorable economic
24 situation in which it found itself, Safety Light's
25 obligation nonetheless, as stated in its license

1 conditions, has a plain meaning, and it was not
2 dependent on the state of their business prospects.
3 The conditions required payments out of
4 operating funds or any other funds, except insurance
5 litigation funds. They argue that it's not deliberate
6 here because they didn't intend to avoid payments as
7 long as they had the financial wherewithal to do so.
8 However, Commission decisions have held --
9 JUDGE HAWKENS: What should Safety Light
10 have done?
11 My first question: does the staff not
12 dispute Mr. Lynch's statement that to have paid these
13 monies into the trust fund would have given rise to a
14 significant risk that the company would have gone
15 belly up? Do you accept that?
16 MR. WOODS: Yes, I do. That's a
17 possibility that the staff was aware of.
18 JUDGE HAWKENS: So the staff under these
19 conditions would have preferred Safety Light to go out
20 of business?
21 MR. WOODS: Not -- not --
22 JUDGE HAWKENS: That's a consequence.
23 MR. WOODS: That is a consequence, Your
24 Honor. That is correct. I would just hypothesize
25 perhaps Safety Light would have come in, pointed out

1 its inability and work something out. That's not what
2 happened here though.
3 What happened here was a continual pattern
4 of noncompliance that we found out about.
5 JUDGE HAWKENS: So a part of, an aspect of
6 the immediate effective order or a factor that you
7 relied upon was Safety Light's failure to come forward
8 sooner with the information; is that right?
9 MR. WOODS: Primarily it was just their
10 wilful violation. That's what it rests on. I'm just
11 hypothesizing in response to your question that
12 perhaps circumstances might have turned out
13 differently. I mean, I don't know.
14 JUDGE LAM: Do you know, Mr. Woods, what
15 would happen to Safety Light's assets and liability
16 relative to the clean-up of nuclear waste and
17 material; what would happen to that liability if and
18 when Safety Light goes out of business?
19 MR. WOODS: In all probability, Your
20 Honor, it would most likely have become a governmental
21 or probably a federal liability, but the Commission
22 has long been aware that that was a prospect with this
23 site.
24 JUDGE LAM: So the staff is well aware of
25 that potential liability --

1 MR. WOODS: Yes.

2 JUDGE LAM: -- or this issue?

3 MR. WOODS: Yes. Those have been in the

4 back of the staff's mind for some time now.

5 JUDGE ROSENTHAL: And that's a "no, never

6 mind." I mean, if I understand the situation

7 correctly, here is a company which fell on hard times

8 through basically no fault of its own, circumstances

9 beyond its control; falls on hard times. There's a

10 period of time when it can't make its obligations,

11 meet its obligations. It comes forth now when times

12 have changed. It fulfills these responsibilities.

13 But notwithstanding that, notwithstanding

14 the fact it was beyond its control, the staff says,

15 "Well, because you didn't make these payments, no

16 matter what the reason, there was a wilful failure to

17 comply with an obligation and, therefore, we're

18 prepared to put you out of business even though the

19 consequence of that is that the taxpayers are going to

20 have to pick up the result."

21 Now, it seems to me -- now, maybe I'm

22 wrong -- but when you get down to the bottom of this,

23 that's exactly what the position of the staff seems to

24 be, and I find it -- maybe it's something that's

25 within the outer bounds of the staff's authority, but

1 it seems to me to make absolutely no sense.

2 MR. WOODS: Well, respectfully, Your

3 Honor, as I repeated a response to the last question,

4 the staff was aware that that was always a probability

5 that might come to fruition. Nevertheless, you know,

6 common sense dictates to the staff that all

7 businesses, all NRC licensees depend on a favorable

8 business environment, but the duty of licensees to

9 comply with NRC regulations and requirements doesn't

10 and shouldn't depend on economics.

11 Even if it was, the staff knows that

12 Safety Light was given significant economic advantage

13 in this case in the form of an exemption from

14 regulations that posed a financial obligation and

15 burden to come up with either financial assurance for

16 decommissioning or a decommissioning funding plan that

17 all of the licensees in this position must bear.

18 Nevertheless, decision of the Commission

19 have consistently held that economic interests are not

20 within the zone of interest cognizable under the

21 Atomic Energy Act. Therefore, the staff is of the

22 position that economics to this extent should not be

23 relevant to their duty to comply.

24 Safety Light also pointed to past staff

25 dispositions of enforcement actions of wilful

1 violations where a different result obtained. The
2 staff wishes to note here that these other enforcement
3 actions, whatever they may be, are not relevant.
4 The specific ones they cite in their
5 pleadings, first of all, they involve the imposition
6 of a civil monetary penalty. That was not the case
7 here, and they involved other different circumstances
8 as well.
9 As the Commission has stated in decision,
10 such as Advanced Medical Systems, CLI 94-6, 39 NRC
11 285-320, uniformity and sanctions is not required, and
12 the Agency has discretion to make enforcement
13 decisions on a case-by-case basis in its informed
14 judgment.
15 Therefore, I do not think you should give
16 much credence to that argument.
17 JUDGE ROSENTHAL: Now, in circumstances
18 where there is a wilful, as the staff sees it, failure
19 to comply with an obligation, is the staff in that
20 circumstance required to suspend the license effective
21 immediately, or does the staff exercise some
22 discretion in that regard?
23 And if it exercises some discretion, what
24 was it in this particular instance that led it to
25 conclude that an immediately effective suspension was

1 required?

2 MR. WOODS: In this instance, Your Honor,

3 the staff had, like I said, two bases for the order.

4 One was that there was a continual pattern of wilful

5 noncompliance.

6 JUDGE ROSENTHAL: I asked you the first

7 part of this. Does the staff regard itself as having

8 discretion or, if it determines that there's a wilful

9 violation as it sees "wilful," is it mandated that is

10 suspend the license?

11 MR. WOODS: No, Your Honor, that result is

12 never mandated. Staff --

13 JUDGE ROSENTHAL: All right. So I want

14 more than you're telling me that this was just wilful.

15 I want to know why in these circumstances did the

16 staff believe it was justified in using the fact that

17 it was wilful to effect this immediately effective

18 suspension.

19 MR. WOODS: Your Honor, in this case, the

20 staff felt that that would be the appropriate course

21 of action because in conjunction with this licensee's

22 last renewal in 1999, Safety Light was granted an

23 exemption from certain requirements of decommissioning

24 funding which have safety, public health and safety,

25 implications.

1 Granting these exemptions in expectation
2 that the licensee will comply fully with these
3 exemptions were material to the granting of its
4 license in the first place. Once the licensee
5 demonstrated a consistent pattern of wilful
6 noncompliance, as I stated, nearly a quarter of the
7 time, that to the staff warranted taking the action
8 which it took in this order.
9 JUDGE ROSENTHAL: Now, the license was up
10 for renewal and the staff was not going to renew it.
11 Now, supposing that the staff instead of suspending it
12 on an immediate effective basis had said simply,
13 "We're not prepared to renew it, and we'll then go
14 through the adjudicatory proceeding on the question of
15 renewal."
16 Now, just what threat to the public health
17 and safety would have been involved had the staff
18 pursued that route, letting the license remain in
19 effect until there had been a full scale adjudicatory
20 hearing?
21 MR. WOODS: Are you speaking towards the
22 doctrine -- Your Honor, or not?
23 JUDGE ROSENTHAL: What I'm talking about
24 is what would have happened if you had not suspended
25 the license on an immediate effectiveness basis.

1 There would presumably have then been a consideration
2 of your refusal to renew the license; isn't that
3 right?
4 MR. WOODS: Yes, Your Honor.
5 JUDGE ROSENTHAL: And they would have been
6 entitled to presumably an evidentiary hearing on that.
7 MR. WOODS: Yes, Your Honor.
8 JUDGE ROSENTHAL: All right.
9 MR. WOODS: And to have a requested
10 hearing on that.
11 JUDGE ROSENTHAL: All right. Request a
12 hearing and they get a hearing. Now, what I'm asking
13 you is how was the public health and safety threatened
14 by not pursuing that course, letting them have a
15 hearing on the matter of their entitlement in effect
16 to continue to operate under an NRC license?
17 MR. WOODS: Your Honor, the staff's
18 action, effective immediately suspending the license
19 you are correct was wrapped up with their renewal and
20 they were all dispositioned on the same date. The
21 staff's action was the culmination of three things:
22 the licensee's inability to satisfy financial
23 assurance requirements in its renewal application;
24 inability to comply with conditions that granted
25 exemptions to those requirements in its about to

1 expire license; combined with its wilful, conscious
2 and deliberate repeated decision to violate those
3 requirements of its license.
4 These three things together resulted in
5 the staff determining that an immediately effective
6 order in this case was appropriate.
7 JUDGE LAM: Now, Mr. Woods, during that
8 period of noncompliance financially, were there any
9 major violations of safety rules and practices by this
10 licensee?
11 MR. WOODS: No, Your Honor, and opposing
12 counsel was correct that the staff has found that
13 their radiation safety program has been in conformance
14 generally with NRC requirements.
15 However, they did misspeak to one point.
16 Safety Light here is responsible for the conditions of
17 not only this legacy of waste, what we are talking
18 about, but also the waste from ongoing operations,
19 which under the '02 license conditions 18 and 19, they
20 were obligated to by a certain date dispose of all
21 waste generated from their ongoing tritium operations
22 by January 1st, 2000 as well as all of the tritium
23 waste generated thereafter within two years from its
24 generation.
25 Safety Light, however, did not comply with

1 these license conditions as of December 31st, 2004.

2 JUDGE ROSENTHAL: Do you agree with Mr.

3 Gutterman that there are really no factual genuine

4 issues of fact in dispute; that this is basically

5 questions of law involved here?

6 MR. WOODS: Yes, Your Honor, I think that

7 would be an appropriate characterization. The basic

8 facts aren't in dispute. It's just a question of how

9 one views the law to be correctly applied here.

10 Your Honors, Safety Light has noted in its

11 pleadings that the amounts -- or orally -- that the

12 amount due is obligated to accrue. There was an

13 arrears. There was at varying times $81,000 at the

14 time of November 2003, and at the time the order was

15 issued, only $36,000.

16 The staff recognizes these are a small

17 fraction of the total amount that would ever be

18 necessary for decontamination and decommissioning

19 costs. However, Safety Light was unable to even amass

20 this small fraction of monies that may one day be

21 necessary to mediate this site.

22 And on that basis here, the staff had

23 little confidence that Safety Light could ever be

24 expected to furnish the balance of its share.

25 In conclusion, if you have no further

1 questions, the staff's position is that there comes a
2 point when the licensee must be willing to comply and
3 conform their conduct to NRC requirements for the NRC
4 to be able to have confidence in them.
5 The immediate effectiveness determination
6 in this case was based on adequate evidence on two
7 independent bases and was well founded.
8 If you have no further questions, I have
9 completed my presentation.
10 JUDGE HAWKENS: I have one question. What
11 is the significance of Footnote 6, your reference to
12 the EPA proposing to include the Bloomsburg site on
13 the national priorities list?
14 MR. WOODS: With respect to that footnote,
15 Your Honor, that is a matter of common general
16 knowledge to both the NRC, Safety Light, the
17 Commonwealth of Pennsylvania, and the general public
18 if they read the Federal Register. It's just
19 pertinent background information, and that's why it's
20 in a footnote.
21 JUDGE ROSENTHAL: Is that of any operative
22 significance here?
23 MR. WOODS: No, Your Honor. It was not a
24 basis for the order. It didn't need to be in the
25 pleading necessarily. It was just inserted in the

1 course of, you know, writing.

2 JUDGE HAWKENS: Any further questions?

3 (No response.)

4 JUDGE HAWKENS: Thank you.

5 MR. WOODS: Thank you, Your Honor.

6 MR. GUTTERMAN: I have a couple of points

7 I'd like to make. I don't think I will, unless you

8 have a lot of questions, use my 15 minutes.

9 First of all, I guess the things that was

10 mentioned last about failureship, some of the wastes

11 within the period provided by the licensed conditions.

12 First of all, we disagree about whether the wastes

13 have been shipped. They have been removed from the

14 license. We agree that it was not within the two-year

15 limit.

16 The most important point is it's not a

17 basis for the order, and the reason that the waste

18 wasn't shipped within the two-year limit is because

19 Safety Light had an active dialogue with the region

20 about the remediation of the waste at the site, of the

21 fact that the higher activity wastes, the legacy

22 wastes, were more significant to the public health and

23 safety. And Safety Light proposed a schedule for

24 remediation. They spent all of the funds that were

25 available on remediating the legacy wastes instead of

1 addressing these lower activity wastes that were
2 covered by that licensed condition.
3 It does not reflect on their character.
4 They weren't flouting the license condition. It was a
5 matter they had discussed with the staff as part of a
6 discussion of how best to proceed with the funds
7 available.
8 JUDGE HAWKENS: I had a question when I
9 was reading your briefs and the record in this case.
10 In November of '03, when Ms. Miller was getting
11 together with Mr. Lynch and others, and it sort of
12 vaguely stated in the briefs that it was discovered
13 that there was a $180,000 shortfall, but then later on
14 it indicates that Safety Light was in arrears by
15 81,000.
16 MR. GUTTERMAN: Yes.
17 JUDGE HAWKENS: And I didn't get the
18 difference between the $180,000 shortfall and the
19 $81,000 arrears.
20 MR. GUTTERMAN: Yes. That "shortfall"
21 word is kind of misleading because it sounds like
22 there was less in the fund than there was expected to
23 be by that amount, and that's not what it represents.
24 It represents the difference between the
25 cost of shipping off the waste they had hoped to ship

1 off site and the amount of funds that were available
2 in the fund. There was $180,000 less in the fund than
3 it was going to take to ship off site for disposal all
4 of the wastes that had been packaged and prepared to
5 ship off site.
6 The costs were being accumulated by a
7 contractor who was doing the remediation, and Safety
8 Light wasn't on top of the costs as they were on a
9 day-to-day basis. They would get periodic cost
10 estimates and projections from the contractor.
11 And at this meeting they put the
12 projections together with the bank statements and saw
13 the contractor is expecting $180,000 more for waste
14 disposal than is available. Of that amount $81,000
15 was the arrearage. Actually I think at the meeting it
16 was 72,000, but another payment came due shortly
17 thereafter.
18 JUDGE HAWKENS: And as a result of the
19 $180,000 shortfall, was there a failure to make a
20 scheduled waste removal?
21 MR. GUTTERMAN: Yes. The waste was kept
22 in storage.
23 JUDGE HAWKENS: Now, if you had the 72 or
24 $81,000, would the company -- not Safety Light, but
25 the waste removal -- have been able to make a more

1 limited waste removal?

2 MR. GUTTERMAN: Logic would say they must

3 have been, and I don't know the answer to that beyond

4 the logic. I just can't answer the question. I've

5 tried to find out, and there isn't a clear record on

6 that.

7 I wanted to call your attention to a

8 quotation in the staff's response to Safety Light's

9 motion in discussing the adequate evidence test. It

10 says that, "The adequate evidence test is similar to

11 the probable cause test necessary for an arrest and

12 exists when 'facts and circumstances within the NRC

13 staff's knowledge of which it has reasonably

14 trustworthy information are sufficient to warrant a

15 person of reasonable caution to believe that the

16 charges specified in the order are true."

17 And the point that I wanted to make is

18 that it goes on to say, "And that the order is

19 necessary to protect the public health, safety or

20 interest."

21 And I just want to emphasize that the

22 facts in this case do not make the order necessary to

23 protect the public health and safety and interest.

24 I guess one point that should be obvious

25 and I had not mentioned it before, and perhaps it's

1 not appropriate for rebuttal, but the name of the
2 company is Safety Light because they make lights that
3 protect people in the event of fires. They are
4 producing a product that does contribute to the safety
5 of the public.
6 They also produce products that are used
7 in the national defense as the central components for
8 fighter planes and radar used by the military. There
9 are significant contributions this company makes to
10 the health and well-being of the country that are
11 going to be stopped by this order and its immediate
12 effectiveness.
13 And, of course, the whole general
14 principle that led the Commission to adopt the
15 provisions for this hearing, for a prompt opportunity
16 to challenge and ask that the effectiveness be set
17 aside is that the Supreme Court and lower courts have
18 interpreted the Constitution to require some weighing
19 and balancing between the government's interest and
20 the harm to the company that's subject to the order.
21 And certainly if there is not a risk to
22 the public health and safety, that balance tips
23 towards the company, and it should be entitled to
24 present its case and have a fair hearing on the merits
25 of the charge before it is confronted with the adverse

1 consequences of the staff's decision on this.

2 JUDGE ROSENTHAL: The staff counsel put

3 out that the regulation seemed to talk in terms of --

4 maybe it was Judge Lam -- seemed to talk in terms of

5 either deliberate or impact upon the public health and

6 safety, with the suggestion that it was your client's

7 burden to demonstrate both forks operate in its favor,

8 in other words, have to show both --

9 MR. GUTTERMAN: Yes.

10 JUDGE ROSENTHAL: -- that it wasn't wilful

11 and that the public health and safety would not be

12 impacted. Just demonstrating one of them would not be

13 enough.

14 Now, what do you have to say to that?

15 MR. GUTTERMAN: Well, what I'd say is

16 wilful is a tag that's being put on this conduct, but

17 the Commission's explanation for its use of the word

18 talks about reliance on the conduct of the licensee.

19 It talks about relying on the integrity of the

20 licensee, and you're still brought back to the

21 question of whether this conduct that's alleged should

22 lead a reasonable person to conclude that this

23 licensee lacks the integrity necessary for the

24 Commission to rely on them to comply with Commission

25 regulations.

1 JUDGE ROSENTHAL: But the staff says,
2 "We're not talking about integrity. We're talking
3 about wilfulness," which they interpret as meaning
4 deliberate. So if they're right about that, that it
5 was done deliberately and that that's enough, then we
6 don't have to worry about integrity, do you?
7 MR. GUTTERMAN: Well, I think you do
8 because the intent of the Commission in using the word
9 "wilful" was to talk about conduct that raised an
10 integrity question.
11 I must admit I'm not familiar with all of
12 the cases that have been cited on wilfulness, but I
13 was struck by the quotes that they talk about acts,
14 and somebody taking an act with knowledge.
15 What we're talking about here is an
16 omission, not an affirmative act, and I think there's
17 a difference there. These were people who are
18 confronted with a situation in which they really did
19 not have alternatives that would let them comply
20 JUDGE LAM: Now, when you say "omission,"
21 now the failure to pay is an act of commission. Since
22 the company had no money, it chose not to pay. I'm
23 not judging the merits of it.
24 MR. GUTTERMAN: Yes.
25 JUDGE LAM: But it's an act of commission.

1 MR. GUTTERMAN: Well, that is the
2 argument, but I've never been able to pay for
3 something when I didn't have money, and I don't know
4 how this company could have.
5 JUDGE LAM: Right. I'd like to hear your
6 response to the staff's argument. The staff raised
7 another rationale for this order, is that there is a
8 pattern of repeated violation. Independent of what
9 the definition of wilfulness is, that fact isn't in
10 dispute. There is a pattern of repeated violation, 13
11 out of 60 payments missed. Therefore, the staff now
12 asserts it lacks confidence in the company in the
13 future to comply with the staff's regulation.
14 Now, in a way they are saying this pattern
15 of violation makes a mockery of the staff's
16 enforcement and oversight process. Therefore,
17 something has to be done.
18 How would you respond to that?
19 MR. GUTTERMAN: Well, I have a few points
20 I would make to that. Certainly there were repeated
21 occurrences where the payment was not made in the
22 month it was required. Several of those payments that
23 were missed, not made in the requirement month, were
24 made subsequently before there was any discussion with
25 the staff about the fact that they had been missed.

1 So the pattern of conduct showed an intent
2 to catch up when they could.
3 The fact that it happened repeatedly, the
4 cause is still the same: the lack of money, and if
5 all of those payments were required on the same day or
6 required in increments, if you don't have the money,
7 you don't have the money, and it still doesn't reflect
8 on your character.
9 JUDGE HAWKENS: How would you respond to
10 a staff argument that even though this effective
11 immediately order is not based exclusively on the
12 failure to be more forthcoming with their omission,
13 it's nevertheless a factor that can be taken into
14 account, and if they're not comply with this because
15 they're hoping that eventually they'll be able to
16 comply, and if it's not known it's not a problem; this
17 type of attitude which was held by senior management
18 officials may carry over into the other operational
19 aspects?
20 MR. GUTTERMAN: Well, I think we discussed
21 that a little bit before. The staff has reporting
22 requirements. The staff did have the records in their
23 files that they could have seen the payments weren't
24 being made.
25 Frankly, the company, in retrospect,

1 should have been more forthcoming. I think the
2 company management has said that. But the prospect of
3 having an inability to pay as a result of a downturn
4 in business was one that was discussed from the
5 beginning. The staff never said, "Well, if that
6 happens, tell me quickly."
7 So it cuts both ways. There was a certain
8 element of "see no evil, say no evil." Staff didn't
9 do anything until the company finally called up and
10 said, "Well, the reason we're short, in part, is due
11 to the fact that we're behind on our payments." Put
12 the issue on the table.
13 You know, I don't know whether the staff
14 was conscious of the fact that they had missed
15 payments before and paid them late, was conscious that
16 they had fallen as far behind. I have no reason to
17 think that they did. I know the staff people are very
18 busy with lots of licensees to watch and may not have
19 looked at these records.
20 But to go from there to assume something
21 negative about their character when there's no
22 requirement to report is really judging them with a
23 different violation than the violation that starts
24 there.
25 I haven't had an opportunity to read the

1 Supreme Court's decision this week on the sentencing
2 guidelines, but my understanding was --
3 JUDGE HAWKENS: I don't think it's
4 governing precedent here.
5 (Laughter.)
6 MR. GUTTERMAN: I don't think it is, but
7 my understanding was the rationale about it had to do
8 with making decision on consequences without a fact
9 finding on the facts that were being relied on to
10 decide what the sentence should be, and in essence the
11 staff wasn't putting them on trial for not reporting.
12 I mean, the answer is there was no
13 regulatory requirement. It might have been a prudent
14 thing to do, but they didn't do it.
15 JUDGE HAWKENS: Is the staff barred from
16 considering that as a factor in imposing this
17 sanction?
18 MR. GUTTERMAN: I think it is because
19 implicitly by treating it as a basis for imposing the
20 sanction you're making it a requirement, and you're in
21 essence creating a new regulatory requirement without
22 incorporating it into a license, without putting it in
23 the regulations.
24 And certainly you wouldn't want to do that
25 as a basis for punishing a particular licensee who

1 wasn't warned that this was going to be a regulatory
2 requirement and a yardstick for judging sanctions.
3 PARTICIPANT: Two minutes.
4 MR. GUTTERMAN: I think that's all I --
5 JUDGE LAM: Now, Judge Rosenthal asked the
6 staff this question, which I'd like you to answer:
7 what harm is there by removing the immediate
8 effectiveness order here and let the license renewal
9 process take its usual course?
10 MR. GUTTERMAN: Well, of course, Judge
11 Lam, that's what we want to see. That's what we think
12 should have happened and should happen, and I do not
13 believe there's any harm to the public health and
14 safety. It really benefits the public health and
15 safety. It allows this company to present its
16 evidence and make its case and for the Commission to
17 consider that in due course rather than in an
18 expedited proceeding that necessarily limits the
19 ability to hear witnesses and view their demeanor and
20 make judgments about their character.
21 JUDGE ROSENTHAL: Well, what witnesses
22 would be heard here if, as both you and staff counsel
23 seem to agree, there are no genuine issues of material
24 fact?
25 MR. GUTTERMAN: Well, if I understood what

1 the staff counsel was saying, that he agrees that the
2 Safety Light Corporation personnel did not have an
3 element of scienter in their conduct in that they did
4 not want to violate the regulations. They were not
5 trying to convert this money for some private use, but
6 just they knew the requirements and they did not make
7 the payments.
8 Perhaps there is not a lot to try. I will
9 concede that.
10 JUDGE ROSENTHAL: It might be possible
11 that it could go on summary disposition.
12 MR. GUTTERMAN: I think that is possible,
13 Judge Rosenthal. Frankly, I'm kind of new to the
14 facts of the case. So I haven't given it as much
15 thought as I'd like to about what --
16 JUDGE ROSENTHAL: I just say I didn't see
17 on the basis of the stack of papers that I've read any
18 genuine --
19 MR. GUTTERMAN: I agree.
20 JUDGE ROSENTHAL: -- issues of material
21 fact, and I think that's why I asked both you and
22 staff counsel what your view was on that.
23 MR. GUTTERMAN: I agree with you. The
24 only disagreement I've heard today about facts is the
25 question of whether the wastes that were required to

1 be shipped off site within two years have been shipped
2 off site, and that may be just a question of timing,
3 and I don't think it's material to the issue today.
4 Thank you very much. I appreciate your
5 attention.
6 JUDGE HAWKENS: Thank you.
7 An argument has been submitted on the
8 motions. I thank you. There's a couple of
9 housekeeping items which I'd like you to help us out
10 with.
11 First, we have a pending motion from
12 Safety Light for leave to reply and for other relief,
13 and the staff responded it opposed that motion, and in
14 its opposition it explained some of the redactions and
15 provided some additional information.
16 And I was wondering with the explanation
17 and with that provision of the previously redacted
18 material, did that satisfy Safety Light that the
19 information that had been previously withheld is
20 now -- it has the material that it does need?
21 MR. GUTTERMAN: I think we have sufficient
22 material that we don't need any delays or extensions.
23 JUDGE HAWKENS: All right.
24 MR. GUTTERMAN: I think we have had an
25 opportunity to respond to the OI report, which was

1 clearly --

2 JUDGE HAWKENS: So your request for other

3 relief then has been mooted by their response. You

4 still have, of course --

5 MR. GUTTERMAN: Yes.

6 JUDGE HAWKENS: -- your motion for relief

7 to reply.

8 MR. GUTTERMAN: Yes.

9 JUDGE HAWKENS: But that will remain

10 pending.

11 Second, ten years ago, about, Safety Light

12 was in a somewhat similarly precarious position,

13 ongoing administrative litigation, and during the

14 course of that litigation, Safety Light and the staff

15 were able to reach a settlement, and I throw this out

16 right now. Does either side think it would be

17 worthwhile to appoint a settlement judge for purposes

18 of the enforcement action, or is this something you

19 need to discuss?

20 MR. GUTTERMAN: I think from Safety

21 Light's point of view, settlement sounds like the less

22 expensive, most efficient way to proceed, and it

23 certainly is anxious to discuss settlement with the

24 staff.

25 JUDGE HAWKENS: Okay.

1 MR. WOODS: Your Honor, staff does not
2 feel that would be a prudent course of action at this
3 time.
4 JUDGE HAWKENS: All right. I would
5 encourage -- I understand both parties' positions, but
6 given that one side does think that settlement is not
7 beyond the realm of possibility, I would encourage
8 both sides to be open to further discussion on this
9 matter amongst themselves.
10 Finally, putting aside the license renewal
11 application and the denial of that application and
12 dealing just with the enforcement aspect of the case,
13 I'd like to hear from both sides as far as if it has
14 any suggestions how we should proceed at this point.
15 Safety Light is, of course, entitled to a
16 formal hearing on the merits of the suspension order.
17 If I heard you correctly, depending on the outcome of
18 this proceeding, let's assume the motion to set aside
19 is denied for purposes of this discussion. Did I
20 understand you correctly that in your view this could
21 well be resolved if we established a briefing schedule
22 and then if the parties wanted argument on it hearing
23 argument?
24 MR. GUTTERMAN: I think that's a
25 possibility. I haven't identified anything else that

1 would require life testimony of witnesses. There
2 doesn't seem to be significant disputes of fact.
3 JUDGE HAWKENS: Does the staff?
4 MR. WOODS: I think staff is in agreement
5 with Safety Light.
6 JUDGE HAWKENS: All right. Again,
7 without tipping our hand one way or the other on the
8 outcome of this proceeding, what would be a reasonable
9 schedule from both sides for establishing that
10 briefing order? A two-week time frame for --
11 MR. WOODS: A question, Your Honor.
12 Without taking account of our obligations under
13 Subpart G to put forward and enter a disclosure file
14 or --
15 JUDGE HAWKENS: Would Safety Light want to
16 put that in the record? Do you feel like there's
17 sufficient evidence in the record right now?
18 MR. GUTTERMAN: I guess I'd want to ponder
19 whether I'd want to add an affidavit or something like
20 that,b ut as far as adding delays by having mandatory
21 disclosure, my instinct is it's not worth wasting the
22 time on.
23 MR. WOODS: All I was speaking to is under
24 Subpart G, as well as 2.336(b), the staff is obligated
25 to undertake certain disclosures of all relevant

1 documents related to its enforcement action. That can
2 be a time consuming process. Thus, staff could need
3 advisement as to whether they would be allowed the
4 full amount of time under the regulations or there
5 would be a scheduling order entertained or what other
6 mechanism, that we needed to provide whatever
7 documents in lieu of all the required disclosures
8 contemplated by the rules that opposing counsel would
9 require.
10 JUDGE HAWKENS: My sense is that Safety
11 Light would be in favor of an expedited proceeding,
12 that we would issue a scheduling order which would
13 accelerate the time frames, but an order on that would
14 be forthcoming.
15 MR. WOODS: Okay.
16 MR. GUTTERMAN: You're correct, Your
17 Honor.
18 JUDGE HAWKENS: Okay. Unless we hear
19 otherwise from the parties, and if you could let us
20 know by tomorrow if either side feels differently, we
21 will go ahead and take a look at what would be the
22 amount of time you would need for this --
23 MR. WOODS: Just to raise another point
24 that just occurred to us, I believe that under new
25 Subpart N, which is for an expedited proceeding, I

1 think if both parties agree those procedures could be
2 used. So perhaps that can also and opposing counsel
3 could discuss this later on.
4 JUDGE HAWKENS: I'll tell you what. I
5 like that idea. Why don't you discuss, and if you
6 could coordinate that, take the lead and would you be
7 able to get back to us by close of business tomorrow?
8 MR. WOODS: Certainly, perhaps even
9 sooner.
10 JUDGE HAWKENS: Great. We'd appreciate
11 that.
12 All right. Anything else from either
13 side?
14 MR. WOODS: Providing that Safety Light's
15 counsel is available, of course.
16 MR. GUTTERMAN: I will be.
17 JUDGE HAWKENS: I think he said he will
18 make himself available.
19 Thank you very much. The case is
20 submitted.
21 (Whereupon, at 2:31 p.m., the hearing in
22 the above-entitled matter was concluded.)
23
24
25

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Safety Light Corporation
Materials License Suspension

Docket Number: 30-5980/5982-EA

Location: Rockville, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

William Click

William Click
Official Reporter
Neal R. Gross & Co., Inc.