

February 16, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SAFETY LIGHT CORPORATION)	Docket Nos. 30-5980-MLA, 30-5982-MLA
Bloomsburg, Pennsylvania Site)	30-5980-EA and 30-5982-EA
)	
(Materials License Amendment and)	ASLBP Nos. 04-833-07-MLA and
Materials License Suspension))	05-835-01-EA

NRC STAFF POSITION AND PRESENTATION ON
MATERIALS LICENSE RENEWAL AND MATERIALS LICENSE SUSPENSION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1207 and the Order (Order Granting Hearings, Consolidating Proceedings, and Establishing Hearing Scheduled), dated January 27, 2005 (unpublished), the NRC staff (Staff) hereby submits its written statement of position, written testimony with supporting affidavits¹ and exhibits in the above-captioned consolidated proceeding that is being conducted under 10 C.F.R. Part 2, Subpart L, procedures. For the reasons set forth below, the denial of the two renewal applications and the license suspension order should be upheld.

II. BACKGROUND

Safety Light Corporation (SLC) is the holder of two Byproduct Materials Licenses issued pursuant to 10 C.F.R. Part 30 for the facility near Bloomsburg, Pennsylvania. License No. 37-00030-02 ("legacy license") authorizes SLC to characterize and decommission its contaminated facilities, equipment and land associated with manufacturing activities occurring at the site since the 1950s and License No. 37-00030-08 ("tritium license") authorizes SLC, *inter alia*,

¹ See attached Testimony of George C. Pangburn and Christopher Nolan Regarding Denial of Applications to Renew Licenses and the Order Suspending Licenses (Effective Immediately), Affidavit of George C. Pangburn, and Affidavit of Christopher Nolan (hereinafter "Staff Testimony").

to manufacture self-luminous signs and foils using tritium. *Safety Light Corp.* (Materials License Amendment), LBP-04-25, 60 NRC 516, 518-19 (2004). The licenses, last renewed on December 28, 1999, were to expire on December 31, 2004, and each included an exemption from the financial assurance for decommissioning requirements set forth in 10 C.F.R. §§ 30.32 and 30.35, requested by SLC based (1) on a lack of sufficient funds at the time to assure adequate financial ability to satisfy decommissioning funding requirements and (2) upon SLC's commitment (as codified in license conditions) that SLC make specified payments to a decommissioning trust fund. See LBP-04-25, 60 NRC at 519-20. Specifically, Conditions 16 and 20.A of SLC License Nos. 37-00030-02 and 37-00030-08, respectively, require SLC to make monthly payments (of \$7,000 per month in 2000, \$8,000 per month in 2001 and 2002, and \$9,000 per month in 2003 and 2004) to a decommissioning trust fund during the five-year license term to support decommissioning activities. Materials License No. 37-00030-02 (ML050460405) (Staff Exhibit 1 at License Condition 16); Materials License No. 37-00030-08 (ML050470061) (Staff Exhibit 2 at License Condition 20). The exemption included in these license condition expired by its own terms in the event that SLC failed to make the prescribed payments. Staff Exhibit 1 at License Condition 16; Staff Exhibit 2 at License Condition 20.²

In applications dated April 22, 2004, SLC sought to renew Licenses Nos. 37-00030-02 and 37-00030-08.³ See Notice of License Renewal Application for Safety Light Corporation, Bloomsburg, PA and Opportunity to Request a Hearing. 69 Fed. Reg. 39,515 (June 30, 2004). SLC requested a continued exemption from the decommissioning funding requirements of

² The tritium license also contained conditions addressing radioactive waste disposal, requiring Safety Light (1) to dispose of radioactive waste generated from licensed operations after January 2000, within two years of generation if a disposal site is available (Staff Exhibit 2 at License Condition 18, and (2) by December 31, 2004, to dispose of or otherwise remove from the site radioactive waste generated from tritium operations (Staff Exhibit 2 at License Condition 19).

³ Letter from Larry Harmon to Marie Miller [re 02 License], dated April 22, 2004 (ML041310318) (Staff Exhibit 9); Letter from William Lynch to Betsy Ulrich [re 08 License], dated April 22, 2004 (ML041310328) (Staff Exhibit 10).

10 C.F.R. § 30.35 and further requested that the due to an economic downturn that made it difficult for SLC to fulfill its obligations, that trust fund deposits be reduced to \$5,000 monthly for the 60 month renewal period of January 2005 to December 2009. See LBP-04-25, 50 NRC at 520; Staff Exhibit 10 at 3.

On November 9, 2004, the Board granted the August 30, 2004 hearing request of the Commonwealth of Pennsylvania, Department of Environmental Protection (PADEP), that opposed SLC's application for an amendment authorizing renewal of its materials license (No. 37-00030-08) and a continued exemption from decommissioning funding requirements in 10 C.F.R. § 30.35. LBP-04-25, 60 NRC at 520, 527-30.⁴ The sole issue admitted for litigation was a PADEP contention alleging that SLC should not be granted any further exemption from financial assurance requirements or a reduced rate of contribution into the escrow funds. *Id.* at 527-30.

On December 10, 2004, the Staff issued licensing and enforcement actions that impacted the SLC licenses and renewal applications. On that date, the Staff informed SLC that the license renewal applications were denied based on the failure of SLC to submit a decommissioning funding plan as required by 10 C.F.R. § 30.35, to make payments to its decommissioning trust fund as required by License Condition 16 (License No. 37-00030-02) and Condition 20.A (License No. 37-00030-08), and to demonstrate that an exemption should be granted. See Letter from Jack R. Strosnider, NRC, to C. Richter White, SLC, dated December 10, 2004 (December 10 Letter) (ML043440646) (Staff Exhibit 13).

Also enclosed in the December 10 Letter was an "Order Suspending License (Effective Immediately)" (Suspension Order), issued pursuant to 10 C.F.R. § 2.202, that suspended the two licenses held by SLC effective January 1, 2005, based on (1) SLC's willful failure to make payments to the decommissioning trust fund as required by License Conditions 16 and 20.A of

⁴ PADEP did not oppose the renewal of License No. 37-00030-02, which authorizes SLC to possess radioactive material existing in contaminated facilities at the Bloomsburg site and to characterize and decommission those portions of the site. See LBP-04-25, 60 NRC at 519 n.2.

License Nos. 37-0030-02 and 37-00030-08, respectively, and 10 C.F.R. § 30.35 and (2) the effect of this willful failure on the public health, safety and interest. Suspension Order (Staff Exhibit 13) at 2, 5-8; 70 Fed. Reg. 3,070, 3,071 (Jan. 19, 2005). The Suspension Order indicated that by December 10, 2004, SLC had failed to make required payments totaling \$36,000 plus interest to the decommissioning trust fund. Suspension Order (Staff Exhibit 13) at 4. The Suspension Order also required SLC to submit, by December 20, 2004, a plan for the orderly shutdown of SLC's license activities over the period January 1 through March 31, 2005. Suspension Order (Staff Exhibit 13) at 7; 70 Fed. Reg. 3,070, 3,071.⁵

The Staff provided SLC the opportunity to request, by December 30, 2004, a hearing on the December 10 Letter denying the renewal applications and the Suspension Order. See Suspension Order (Staff Exhibit 13) at 8; 70 Fed. Reg. at 3,071-72. Any other person adversely affected by the order suspending the licenses was offered the opportunity to request a hearing on the order. Suspension Order (Staff Exhibit 13) at 8; 70 Fed. Reg. at 3,072.

As required by the Order, on December 20, 2004, SLC submitted to NRC, Region I, a plan for orderly shutdown of its licensed activities. Letter from William Lynch to Samuel Collins, dated December 20, 2004 (ML043560017). The letter included a request that the January 1, 2005 date for shutdown of licensed activities be extended to January 31, 2005 to enable SLC to fulfill contractual obligations to existing customers, including national defense contractors, and to allow "shutdown of our licensed activities to be conducted in a manner that allows adequate time for our customers to adjust to this shutdown without undue disruption of their activities." *Id.* at 2. SLC provided additional confidential commercial information regarding its relaxation request by letters dated December 27 and 28, 2004. (ML050040074; ML050040079).

⁵ As required by 10 C.F.R. § 2.1202(a), the Staff informed the presiding officer and parties that the Staff had denied the two SLC renewal applications and that the Staff had issued an order suspending both licenses. See NRC Notice Staff Notice of Denial of License Renewal, dated December 10, 2004.

On December 29, 2004, the Staff determined that SLC had shown good cause to relax the Suspension Order and indicated that (1) SLC could continue to receive new light sources through January 31, 2005, in order to fulfill contractual obligations to customers, which include national defense contractors and (2) SLC could continue to receive and possess exit signs or other devices containing licensed materials, returned from its customers to the extent that SLC can transfer the tritium source tubes from those signs to an authorized recipient by March 31, 2005. See Letter from Samuel Collins, NRC, to William Lynch, SLC, dated December 29, 2004 (ML043650071) (Staff Exhibit 17).

By motion dated December 29, 2004, SLC asked that the Order be set aside, arguing that the Order and the need for immediate effectiveness were not based on adequate evidence but on mere suspicion, unfounded allegations, or error. See Safety Light Corporation Motion to Set Aside Immediate Effectiveness of Order Suspending License (Set Aside Motion), at 1, 14.

SLC also filed an answer to the Suspension Order (which was attested to by Mr. Lynch by Affidavit of December 29, 2004), admitting (1) that SLC had not made trust fund deposits on the schedule specified in License Conditions 16 and 20.A and (2) that the SLC owed \$36,000 (plus interest) when the order was issued. See Safety Light Corporation Answer to and Request for Hearing on Order Suspending License (Effective Immediately) (Answer), at 2.⁶

In addition, on December 30, 2004, SLC also requested a hearing on the denial of its renewal applications and that hearing request was referred to the Board previously established to conduct the proceeding on the noticed applications for amendments to renew the two licenses. See Memorandum (Hearing Request Referral), dated January 7, 2005 (unpublished).

On January 24, 2005, the Board denied SLC's motion to set aside the immediate effectiveness of the Suspension Order, finding the Staff's conclusion that a willful violation occurred

⁶ SLC also stated that it sent a \$36,949.61 trust fund deposit to the trustee on December 29, 2004. Answer at 2.

was based on adequate evidence and was alone sufficient to support the immediate effectiveness of the Suspension Order. See LBP-05-02, 60 NRC ____ (Jan. 24, 2005), slip op. at 1, 6-7, 12. The Board determined that there was adequate evidence to conclude the licenses each contained a condition that imposed “a mandatory and unqualified requirement on Safety Light to make monthly payments to the decommissioning trust fund,” that SLC admitted that during the term of its license it failed to make at least 11 of 60 scheduled monthly payments, and that SLC’s failure was willful. LBP-05-02, slip op. at 9, 12.

After convening telephonic conferences between the Board and parties on January 14, and 25, 2005, as well as considering the views of the parties on how to proceed and the procedural rules to be applied, the Board issued an order (1) granting SLC’s requests for hearing on the renewal denials and the Suspension Order, (2) consolidating the licensing and enforcement proceedings, (3) providing for the conduct of the proceeding under 10 C.F.R. Part 2, Subpart L (as agreed to by the parties), and (4) establishing the schedule for written presentations and an oral hearing. Order (Order Granting Hearings, Consolidating Proceedings, and Establishing Hearing Schedule), dated January 27, 2005 (unpublished).

III. DISCUSSION

A. SLC Failed to Satisfy the Requirements for Renewal of the Licenses

1. Issues in Licensing Proceedings and Evidentiary Standards

The issue to be litigated with respect to the denied renewal applications is whether the SLC applications satisfy the requirements of 10 C.F.R. §§ 30.32(h) and 30.35 such that the renewals should be granted. Similarly, the Board should determine whether SLC demonstrates that an exemption from financial assurance requirements for decommissioning should be granted for either license. In addressing this issue, the Board will necessarily rule on whether the PADEP contention asserting that SLC should not be granted an exemption for its tritium license is valid. See LBP-04-25, 60 NRC at 418.

Pursuant to 10 C.F.R. § 2.325, “[u]nless otherwise ordered by the presiding officer, the applicant . . . has the burden of proof.” See *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982) (licensee or applicant bears the ultimate burden of proof in a licensing proceeding); *Curators of Univ. of Mo.* (Trump-S Project), CLI-95-1, 41 NRC 71, 121 (1995).

While the ultimate burden of proof on the issue of whether a license should be issued rests with the applicant, an intervenor contending that for a specific reason the license should be denied has the burden of going forward with evidence in support of that contention. See *Consumers Power Co.* (Midland Plants, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996). This is also the case in a license denial proceeding. See *Graystar, Inc.* (Suite 103, 200 Valley Road, Mt. Arlington, NJ 07856), LBP-01-7, 53 NRC 168, 180 n.48 (2001). If an intervenor introduces sufficient evidence to establish a prima facie case, “the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the . . . license.” *Midland*, 6 AEC at 345.

“[T]he fundamental question in any licensing case is whether the applicant meets the requirements of the governing statute and regulations.” *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 90 (1992); “Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (apart from NEPA [National Environmental Policy Act] issues, the sole focus is on whether the application satisfies NRC regulatory requirements rather than on the adequacy of Staff performance). This principle applies to both nuclear power plant and materials licensing cases. *Curators of the Univ. of Mo.*, 41 NRC at 121 n.67. The test for the grant or denial of a license or amendment is not simply whether there is a deficiency or omission in the application, but whether statutory and regulatory findings have been satisfied. *Id.* at 95-96.

The “preponderance of the evidence” standard, which governs proceedings under the Administrative Procedure Act, applies to the ultimate conclusions in NRC adjudicatory proceedings. *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 302 n.22 (1994). Thus, Safety Light has the burden of demonstrating, by a preponderance of the evidence, that it met the applicable requirements for renewal of its licenses.

Because SLC admits that it did not make the required payments to the decommissioning trust fund and that the shortfall was \$36,000 plus interest when the Staff denied the renewals and issued the Suspension Order, see Answer at 2, the facts underlying the denial of the renewal application and the suspension of the license generally are not subject to dispute. See *also* Request for Hearing on Order Suspending License (Effective Immediately), dated December 29, 2004, at 2; Affidavit of William Lynch, dated December 29, 2004, at 1-3 (appended to Set Aside Motion). If the Staff’s denial of the renewals is upheld by the Board, litigation of the suspension order would be unnecessary since the unrenewed licenses would have expired on December 31, 2004, thus obviating the need for the Suspension Order, which suspended certain licensed activities beginning on January 1, 2005. Accordingly, the Staff presentation first addresses the denial of the two license renewal applications.

2. Because SLC Failed to Satisfy NRC Licensing Requirements,
and to Demonstrate That An Exemption Was Warranted,
Denial of the Renewal Applications Was Proper

SLC submitted applications for renewal of its licenses on April 22, 2004. See Testimony of George C. Pangburn and M. Christopher Nolan Regarding License Renewal Denial and Order Suspending License (Effective Immediately) (hereinafter “Staff Testimony”) at 7 (citing Staff Exhibits 9-10). By letter dated December 10, 2004, the Staff denied SLC’s application for renewal, because SLC had not demonstrated compliance with the financial assurance requirements of 10 C.F.R. § 30.35 or that an exemption from those requirements under 10 C.F.R. § 30.11(a) was warranted. See December 10 Letter (Staff Exhibit 13) at 1; Staff Testimony at 13-14.

Pursuant to 10 C.F.R. § 30.11(a), the Commission may grant an exemption from the regulations in 10 C.F.R. Part 30 “as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.” 10 C.F.R. § 30.11(a). The Board has stated previously in these proceedings that “[i]n making this determination, the threshold inquiry is whether, as [a] matter of financial fact, the licensee is able to comply with the requirements of section 30.35. If this threshold inquiry is resolved in the negative, the next inquiry is whether an exemption, and the accompanying licensing conditions related to that exemption, will be consistent with the standards in section 30.11(a).” LBP-04-25, 60 NRC at 528. The Board opined that this latter inquiry involves adjudication of relevant facts bearing on these standard, including SLC’s past compliance with applicable regulations and license conditions. *Id.*

a. PADEP Contention 3

Through its contention, PADEP asserts that “Safety Light should not be granted any further exemption from financial assurance requirements or a reduced rate of contribution into the escrow funds.” See “Commonwealth of Pennsylvania, Department of Environmental Protection’s Request for Hearing,” dated August 30, 2004, at 19 (Hearing Request). PADEP maintains that SLC operations under License No. 37-00030-08 “plainly meet the criteria under 10 CFR 30.35 requiring financial assurance and a decommissioning funding plan,” and that SLC should not be granted a further exemption from the requirements of 10 C.F.R. § 30.35. *Id.* PADEP claims that “current site conditions are such that significant environmental and public health hazards exist which will require significant funds to fully and properly remediate.” *Id.* PADEP notes that a 2001 decommissioning cost estimate indicates that SLC lacks sufficient funds to carry out site characterization and decommissioning (including remediation) activities, and that the lack of funds has resulted in delays in removal of waste as required by license conditions 18 and 19. *Id.* at 19-20 & n.22. PADEP asserts that SLC would similarly be unable to remediate the site at the reduced level of funding as

proposed in its current license renewal application. *Id.* Thus, PADEP argues that SLC's request for an exemption should be denied because of SLC's inability to decommission and remediate the site at current funding levels, let alone the reduced level requested in SLC's license renewal application. *Id.* at 20.

Resolution of PADEP's contention rests on whether SLC's application satisfies NRC requirements. As discussed further below, neither renewal application satisfied NRC requirements.

b. Compliance with Sections 30.32 and 30.35

Pursuant to 10 C.F.R. §§ 30.32(h) and 30.35(a)(1), applicants for licenses authorizing the possession and use of byproduct material in greater than specified quantities must submit a decommissioning funding plan in accordance with 10 C.F.R. § 30.35(e). The decommissioning funding plan must contain a decommissioning cost estimate, including means for adjusting cost estimates over the life of the facility, and provide for financial assurance of decommissioning funds by one of several allowed methods. 10 C.F.R. § 30.35(e)–(f). The decommissioning funding plan must contain a certification by the licensee that financial assurance in the amount of the cost estimate for decommissioning. 10 C.F.R. § 30.35(e). An applicant can demonstrate financial assurance by several methods permitted, including prepayment, the use of a surety (e.g., a bond, letter of credit, or line of credit), insurance, or guarantee method, or an external sinking fund (in which deposits are made at least annually) coupled with a surety method or insurance. 10 C.F.R. § 30.35(f)(1)–(4). The Commission provided wide latitude to applicants for providing financial assurance, in recognition of the wide variety of nuclear facilities. See “Decommissioning Criteria for Nuclear Facilities,” 50 Fed. Reg. 5,600, 5,607 (proposed Feb. 11, 1985).

The objective of the Commission's decommissioning funding requirements “is to require licensee to provide reasonable assurance that adequate funds are available to ensure that decommissioning can be accomplished in a safe manner and that lack of funds does not result in delays that may cause potential health and safety problems.” *Id.* at 5,602. In promulgating these

requirements, the Commission repeatedly emphasized that *the licensee* bears the responsibility to provide financial assurance for decommissioning, “[e]ven in the event that these efforts result in a shortfall of funds[.]” *Id.*; “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,036, 24,038 (June 27, 1988) (“These provisions make clear that *the licensee has the legal responsibility* to plan for and accomplish decommissioning of the facility by preparing the property for release for unrestricted use and that *this responsibility cannot be evaded.*”) (emphasis added). Further, the Commission’s expectation in promulgating 10 C.F.R. § 30.35 was that the licensee would “take into account changing economic and technical conditions” to adjust decommissioning funding plans. 53 Fed. Reg. at 24,036.

Licenses Nos. 37-00030-02 and 37-00030-08 both authorize SLC to possess and use quantities of byproduct material greater than those specified by 10 C.F.R. § 30.35(a)(1). Accordingly, the Licensee was required to submit an adequate decommissioning funding plan and to describe a chosen method for assuring the availability of funds for decommissioning. See Staff Testimony 2-4. Further, as directed by the Commission in a Staff Requirements Memorandum, the Staff, in the letters forwarding the 1999 renewals, informed SLC that the NRC expected SLC to demonstrate compliance with 10 C.F.R. § 30.35 at the time of its next application for renewal. See Staff Requirements Memorandum, “SECY-99-269 - Renewal of the Safety Light Corporation Licenses at Bloomsburg, Pennsylvania,” dated December 22, 1999 (ML003751986) (Staff Exhibit 3), at 1-2; Letter from Ronald R. Bellamy, NRC, to Larry Harmon, SLC, dated December 28, 1999 (ML050470126) (Staff Exhibit 4), at 1; Letter from John D. Kinneman, NRC, to Larry Harmon, SLC, dated December 28, 1999 (ML050460400) (Staff Exhibit 5), at 1; Staff Testimony at 4. While these statements did not impose binding requirements, they do indicate that the Commission and the Staff expected that SLC would make larger contributions to funding decommissioning costs for removal of waste generated by its predecessor companies and its past operations. Staff Testimony at 4, 14.

Contrary to these requirements and expectations, the Licensee did not demonstrate compliance with the requirements of section 30.35 in connection with its application, requesting instead that the Commission grant an exemption from these requirements. See Staff Exhibit 10, at 1. The Licensee's application provided no justification for its inability to satisfy section 30.35, other than generalized reference to a "difficult business environment" and an "economic downturn." *Id.* at 1, 3.

As stated by the Board in LBP-04-25, 60 NRC at 528, the threshold inquiry is whether SLC had the ability to demonstrate compliance in the first instance with 10 C.F.R. § 30.35 in connection with its application for renewal. Pursuant to NRC regulations, an applicant for license renewal of a byproduct material license must provide a decommissioning funding plan, containing a cost estimate for decommissioning and a certification of a method of financial assurance. 10 C.F.R. §§ 30.37(a), 30.32(h), 30.35(e). SLC has previously provided a decommissioning cost estimate that was reviewed by the Staff. See Letter from Larry Harmon, SLC, to Marie Miller, NRC, dated December 6, 2000 (ML003776303), at 4-1 (Dec. 6, 2000); Letter from Ronald R. Bellamy, NRC, to Larry Harmon, SLC, dated December 18, 2001 (ML013540366) (Staff Exhibit 6); Staff Testimony at 5. SLC did not, however, comply with the section 30.35 requirement to provide a decommissioning funding plan with its renewal application, including a certification of an acceptable method of financial assurance for the amount of its cost estimate. See Staff Testimony at 13.

In its applications, SLC failed to elucidate any efforts to provide financial assurance according to any of the prescribed methods. See Staff Exhibits 9-10; Staff Testimony at 8. Instead, Safety Light maintained that its non-compliance with the License Conditions requiring escrow account payments was rooted in the corporation's difficult financial situation. See Staff Exhibit 9 at 1; Staff Exhibit 10 at 1, 3. Other representations by Safety Light, however, belie the claim that the Licensee was unable to comply with section 30.35 for these same reasons. Notably, SLC officials indicated during the course of a July 20, 2004 Predecisional Enforcement Conference

(PEC) that Safety Light's business prospects had changed dramatically, stating that "[b]usiness looks to be very strong. In fact . . . we have the largest backlog of orders that we have ever had, certainly in my eight years of experience, and I believe in Mr. Harmon's as well, which is over 20 years." See Transcript of Predecisional Enforcement Conference: Safety Light Corporation, No. EA-03-219, dated July 20, 2004 (ML050350415) (Staff Exhibit 11), at 20 (Lynch). When asked whether, in light of the Licensee's markedly improved business climate, an alternate source of funding such as a commercial line of credit had been considered, *id.* Tr. at 48 (Collins), SLC officials responded that while a line of credit or other such funding methods "may very well be an option available to us[.]" this method of funding had not been considered, *id.* Tr. at 49 (Lynch).

Even if SLC's statements about financial difficulties are accurate, section 30.35(f) allows for a range of financial assurance methods. 10 C.F.R. § 30.35(f)(1)–(5). These methods do not require an applicant to certify that the total funds that will be necessary in the future to decommission a given site be available today, but rather allow an applicant a margin of flexibility to assure the Staff that funds will be available when they are needed. See 50 Fed. Reg. at 5,607. It stands to reason that, beginning in 1999, Safety Light could have endeavored to secure financial assurance through a combination of methods, including the use of a guarantee, insurance, surety, line of credit, and periodic deposits into an external sinking fund.⁷ *Id.* Given the latitude in acceptable funding methods for financial assurance allowed under section 30.35(f), it is not clear why Safety Light failed to demonstrate compliance with section 30.35 by the time of its 2004 applications for license renewal. Rather, Safety Light requested a further exemption from financial assurance requirements in an attempt to escape a responsibility that the Commission has stated *cannot be evaded*. See 53 Fed. Reg. at 24,038.

⁷ The Staff notes that SLC has been making periodic deposits into the equivalent of an external sinking fund, which is "a fund established and maintained by setting aside funds periodically in an account segregated from licensee assets and outside the licensee's administrative control[.]" 10 C.F.R. § 30.35(f)(3).

c. SLC Failed to Comply with License Conditions

In determining whether to renew a license, the Commission must make essentially predictive findings about an applicant's qualifications. *Ga. Institute of Tech.* (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 & n.31 (1995). In this regard, a licensee's record of compliance is probative of whether a licensee will comply with agency requirements in the future. *Id.* & n.32. Thus, "[w]hen a licensee files a license renewal application, it represents 'an appropriate occasion for apprais[ing] . . . the entire past performance of [the] licensee.'" *Id.* & n.33. A licensee's willful and continuing violation of Commission requirements accordingly may serve as the basis for denial of an application for license renewal. See *Hamlin Testing Labs., Inc.* (License Renewal Application), 2 AEC 423, 428 (Commission 1964) ("Our regulations require meticulous attention to detail to assure the adequate protection of the public health and safety, and a licensee who regards them as trivial demonstrates a lack of understanding of the Commission's, and Licensee's own, obligation with respect to the public health and safety), *aff'd sub nom. Hamlin Testing Labs. v. AEC*, 357 F.2d 632 (6th Cir. 1966).

When the licenses were last renewed in 1999, the NRC exempted SLC from the provisions of section 30.35, provided that SLC made prescribed payments to the trust fund in accordance with the schedule contained in Condition 16 of License No. 37-00030-02 and Condition 20.A. of License No. 37-00030-08. See Staff Exhibits 4-5; Staff Testimony at 3. The provision of monthly payments into the trust fund was material to both the granting of the exemption and the renewed licenses. See Staff Testimony at 3.

In reaching a decision on SLC's renewal applications, the Staff considered the licensee's performance. See Staff Testimony at 11-14. The Staff determined that Safety Light's willful violations of NRC requirements, together with its non-compliance with the license condition requiring the disposal of tritium waste generated before January 1, 2000, indicated that SLC may not comply with similar license conditions and NRC requirements that would aim to assure that the

site is decontaminated or decommissioned. See Staff Testimony at 13. Accordingly, the Staff concluded that it could not have reasonable assurance that Safety Light could be relied upon to comply with NRC requirements in the future, and denied the Licensee's applications for renewal. See Staff Testimony at 13-15.

d. SLC Did Not Demonstrate An Exemption Should be Granted
Under 10 C.F.R. § 30.11(a)

Section 30.11(a) provides: "The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part . . . as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."

The Commission's decommissioning financial assurance regulations, from which SLC requested an exemption, were promulgated pursuant to section 182 of the Atomic Energy Act of 1954, as amended (AEA), which provides that "[e]ach application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant[.]" AEA § 182a., 42 U.S.C. § 2232(a). These regulations are fundamental requirements that the Commission has determined to be important to protecting the public health and safety. See 53 Fed. Reg. at 24,018; 50 Fed. Reg. at 5,602. The exemption previously granted to SLC was a rare exception, stemming from a settlement agreement terminating prior litigation and the expectation that SLC would take steps to secure the requisite financial assurance if given additional time. See Staff Testimony at 13-14. SLC failed to show how the grant of a further exemption would be consistent with public health and safety or in the public interest.

As stated above, SLC was granted an exemption from 10 C.F.R. § 30.35 (a) through (f), provided that SLC set aside "from operating funds or any other funds, except insurance litigation funds" monthly payments into a trust fund in specified amounts (\$7,000 per month in 2000; \$8,000 per month in 2001 and 2002; and \$9,000 per month in 2003 and 2004). See Staff Testimony at

3, 14. Contrary to these requirements, SLC repeatedly violated this license condition by failing to make 13 of 60 required trust fund payments on schedule in a three-year period. See Staff Testimony at 8.

In light of SLC's failure to comply with licensing conditions associated with financial assurance for decommissioning in order to protect public health and safety by ensuring the availability of funds for decommissioning at a future date, the Staff lacked confidence that SLC could be relied upon to comply with the terms of a financial assurance exemption or its license in the future. See Staff Testimony at 13-15. In particular, statements made by SLC management indicated that SLC did not recognize the importance of adherence to license conditions and the terms of the exemption granted. See Staff Testimony at 14-15. Additionally, SLC provided no justification for why a further exemption should be allowed, given its repeated failure to comply with the terms of its licenses. See Staff Testimony at 13-14.

Due to the long term presence of contamination at the Bloomsburg site, it was important for SLC to demonstrate an increased commitment to providing financial assurance to enable cleanup of the site. See Staff Testimony at 14. SLC's responses to the Staff's August 18, 2004 Requests for Additional Information (RAIs) revealed that while SLC disposed of all tritium waste generated in the last five years, a large volume of tritium waste generated prior to January 1, 2000 remains in storage at the site. See Letter from Larry Harmon, SLC, to John Kinneman, NRC, dated October 26, 2004 (redacted version) (ML050460116) (Staff Exhibit 12), at 2-3.

Additionally, approximately 4,968 cubic feet of "legacy" waste exhumed from underground silos was stored on site as of November 7, 2003. See Safety Light Corporation, Weekly Report, Week Ending November 7, 2003, at 2 (ML050350049) (Staff Exhibit 14). Approximately 1,008 cubic feet of this waste was shipped for disposal, with the remainder stored on site in a combination of indoor and outdoor storage areas. See Safety Light Corporation, Weekly Report, Week Ending December 5, 2003 (ML050350050) (Staff Exhibit 15); Inspection Report Nos. 03005980/2004001

and 03005982/2004001 Safety Light Corporation, Bloomsburg, Pennsylvania, dated November 4, 2004 (redacted version) (ML050460102) (Staff Exhibit 16), at 2-3.

Thus, significant amounts of waste, both tritium and “legacy” waste, remain on site at the Licensee’s facility.⁸ Waste currently stored outdoors due to delays in disposal is vulnerable to deterioration from exposure to climatic conditions, creating a risk to public health and safety. See Staff Testimony at 11-12. It was important that SLC increase funding levels to support efforts to remove the contamination from the site. See Staff Testimony at 13-14.

Instead, SLC’s renewal applications proposed a reduced contribution into the decommissioning trust fund at a rate of \$5,000 a month. Staff Exhibit 8 at 3; Staff Testimony at 11. The proposed significant reduction of payments was contrary to the Commission’s expectation stated in the 1999 SRM and communicated to SLC when the licenses were last renewed, that SLC was to submit a plan incorporating revised cost estimates and demonstrating compliance with 10 C.F.R. § 30.35 requirements when it applied for its 2004 renewal. See Staff Testimony at 4, 13. This did not evidence an increased commitment to cleanup of the site. See Staff Testimony at 14.

In sum, SLC’s failure to demonstrate compliance with 10 C.F.R. §§ 30.32 and 30.35, to show that an exemption was warranted, and to comply with license conditions that were material to the renewal of its licenses in 1999 indicate that the licenses should not be renewed. Accordingly, the Board should uphold the Staff’s denial of SLC’s applications for license renewal.

B. The Evidence Shows That Issuance of the Suspension Order Was Warranted

1. Issues and Evidentiary Standard in an Enforcement Proceeding

The issue to be decided in an enforcement proceeding is whether the violation occurred and

⁸ The extent of contamination at the site was sufficient to warrant the U.S. Environmental Protection Agency to propose listing of SLC’s Bloomsburg, Pennsylvania site on the National Priorities List. See “National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 41,” 69 Fed. Reg. 56,970, 56,976 (Sept. 23, 2004).

the order should be sustained. *Consol. Edison Co.* (Indian Point, Units Nos. 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1084 (1973) (summary enforcement decision). Under 10 C.F.R. § 2.325, the Staff, as the proponent of the Suspension Order, has the burden of proof. *Accord Gen. Pub. Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 470, 474 n.33 (1987).

The preponderance of the evidence standard is customarily applied in Commission proceedings and is the standard of proof prescribed in the legislative history of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). See *Advanced Med. Sys.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 302 n.22 (1994) (citing *Radiation Tech., Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979)); *Steadman v. SEC*, 450 U.S. 91, 101-02 (1981) (preponderance of the evidence standard governs APA on-the-record proceedings, including adjudication of an order barring a petitioner from practicing his profession). See also "Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons," 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991). The preponderance of the evidence standard involves considering the weight of evidence for and against an issue and is "that degree of the evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to conclude that the matter asserted is more likely to be true than not." *Lloyd P. Zerr*, ALJ-94-1, 39 NRC 131, 134-35 (1994) (quoting *Hale v. FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985)).

In accordance with the regulations in 10 C.F.R. Part 30, the Director of Nuclear Materials Safety and Safeguards (NMSS) has the legal authority to issue and regulate byproduct materials licenses, to conduct investigations into licensed activities, and to enforce the terms of licenses. Section 30.61 provides, in pertinent part, that

(b) Any license may be . . . suspended, or modified, in whole or in part, . . . because of conditions revealed by . . . any report, record or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for violation of, or failure to observe any of the terms and

provisions of the Act or of any rule, regulation, or order of the Commission.

(c) Except in cases of willfulness or those which the public health, interest or safety requires otherwise, no license shall be . . . suspended . . . unless prior to the institution of proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee in writing and the licensee shall have been accorded an opportunity to demonstrate or achieve compliance with all lawful requirements.

The lawfulness of a suspension order issued under 10 C.F.R. §§ 2.200-2.206 and 30.61 is determined by whether or not a Director's decision to issue the order is based on reliable, probative and substantial evidence, *i.e.*, relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 557 (1990) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)) (grant of summary disposition regarding a suspension order). At hearing, the presiding officer determines on the basis of the hearing record whether the charges are sustained and the penalty warranted. *See Radiation Tech., Inc.*, 10 NRC at 536-37.⁹

Because the NRC relies on the integrity of individuals involved in licensed activities to comply with NRC requirements, when an individual willfully violates NRC requirements, that reliance is undermined. "Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective," 57 Fed. Reg. 20,194, 20,195 (May 12, 1992). Consequently, immediately effective orders have been issued in cases of willfulness in order to restore reasonable assurance that the public health, safety and interest would be protected. *Id.* In such cases the immediately effective order was not issued solely on a willful violation, but also on a "concurrent" conclusion that public health, safety and interest also dictated that need for immediately effective action. *Id.*

The Commission is empowered to impose sanctions for violations of a license and NRC

⁹ For example, the civil penalty assessed is the upper bound of the penalty which may be imposed at hearing and the judgment of the presiding officer, and later the Commission, may be substituted for judgment of the Director. *See Atl. Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980) (civil penalty).

regulations and to take remedial action to protect public health and safety. Within the limits of the agency's authority, "choice of sanction is quintessentially a matter of the Commission's sound discretion." *Advanced Med. Sys., Inc.*, CLI-94-6, 39 NRC at 312-313, *aff'd*, *Advanced Med. Sys., Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (Table). See also *Robinson v. United States*, 718 F.2d 336, 339 (10th Cir. 1982) ("once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion."). The NRC can impose sanctions for violations of NRC regulations and licenses and can take remedial action to protect public health and safety from the *potential* effect of such violation or other unsafe practices. See *Advanced Med. Sys.*, 39 NRC at 312. The Commission's safety regulations and license conditions "reflect the Commission's considered judgment as to what is required to protect the public as well as licensee's employees from the hazards inherent in industrial use of radioactive byproduct material." *Atl. Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 425 (1980). Violations of NRC requirements puts a violator at risk to suffer the full range of sanctions authorized under the Atomic Energy Act, including revocation of a license. See *Advanced Med. Sys.*, 39 NRC at 312.¹⁰

Under the guidance provided in the NRC Enforcement Policy, NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions," dated May 1, 2000, at 28, the NRC, where necessary or desirable, may issue an order in conjunction with or in lieu of civil

¹⁰ In ruling on immediate effectiveness and where an order has no continuing effect, it is appropriate to limit the Board's examination to evidence available to the NRC staff at the time the order was issued. See *Advanced Med. Sys.*, 39 NRC at 316-17. The staff is not be barred from relying on additional evidence gathered after an immediately effective order is issued to defend the continued effectiveness of the order under the preliminary "adequate evidence" test or at a full hearing on the merits of the order. *Id.* at 317 n.55.

Anyone who claims discriminatory enforcement must show that similarly situated licensees were treated differently and that no rational reason existed for the differential treatment. See *id.* at 319 (citing *Encyclopedia Britannica v. FTC*, 605 F.2d 964, 974 (7th Cir. 1979)). Even if it were shown that the sanction had not been applied to other licensees in its class that had engaged in identical unlawful activities, the sanction would not be invalid merely because it was more severe than that issued in other cases since enforcement decisions inherently involve the exercise of informed judgment on a case-by-case basis. *Id.* at 320 and cases cited therein.

penalties to achieve or formalize corrective action and to deter further recurrence of serious violations. For example, suspension orders are appropriate to remove a threat to public health and safety, when the licensee has not responded adequately to other enforcement action or for any reason for which license revocation is authorized, particularly when willful conduct is involved. *Id.* at 28-29.

The primary consideration in evaluating a Staff enforcement action is whether it protects public health, or interest. See 10 C.F.R. § 30.61(b). Concerns about public health and safety should guide Staff determinations regarding the appropriate enforcement action inasmuch as the AEA addresses protection of the public from radiological harm. See *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976). See also *Int'l Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998). The Commission recognizes that the Staff has considerable latitude in choosing “enforcement weapons,” and upholds Staff actions where the sanction chosen reflects the Staff’s sound discretion as to what is appropriate, fits the violation and best protects the public health and safety. See *Alaska Dep’t of Transp. & Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 409-10 (2004). When exercising its enforcement discretion to issue a license suspension order, the Staff is not required to let concerns about financial impact frustrate the NRC’s overall safety mission in protecting the public health and safety and the environment. See NUREG-1600, Section I, at 4. The Enforcement Policy provides that Suspension Orders may be used to remove a threat to the public health and safety, common defense and security, or the environment. NUREG-1600, Section VI.D, at 28.

The provisions of the Enforcement Policy illustrate the broad discretion the Commission and its Staff have to pursue enforcement strategies that, in their judgment, best serve this radiological safety interest of the AEA and the goals of enforcement. Accordingly, the Enforcement Policy provides that, “[w]here needed to ensure adequate protection of public health and safety, the NRC

may demand immediate license action, up to and including a shutdown or cessation of licensed activities.” NUREG-1600, Section I, at 4. Issues such as the interests as the business interests of private industry are beyond the scope of the AEA and the NRC’s regulatory responsibility.¹¹

Thus, the Staff’s order should be upheld if it demonstrates by a preponderance of the evidence that the prerequisite for enforcement action has occurred – namely, that the licensee violated the terms and conditions of its license, and that the violation – here, a willful violation – has adverse implications for public health and safety.

2. The Board Does Not Have Jurisdiction to Consider the Impact on the National Defense Industry in Reviewing the Suspension Order

The Board asked the parties to address whether the Board has jurisdiction to consider the impact of the suspension order on national security.¹² See Transcript of Telephone Conference, dated January 25, 2005, at 98-99 (Lam, Rosenthal, JJ.) (ML0504003890). The NRC Staff submits that the Board does not have jurisdiction to consider the impact on national security in reviewing the Staff’s decision to issue the suspension order. The only issue within the Board’s jurisdiction is whether the Staff has proven, by the preponderance of the evidence, that the Licensee has violated the terms of its license, thus warranting enforcement action. The type of enforcement measures chosen are a matter of the Staff’s discretion, and the Staff is not obligated to consider the private interests of the defense industry or the impact on national security in its decision-making process. See NUREG-1600, § 1, at 4. See also *Alaska Dep’t of Transp.*, 60 NRC at 409-10.

The NRC is authorized to issue, revoke, and modify licenses governing the use and

¹¹ For example, the economic interests of competitors or employees are not cognizable interests protected under either the AEA or the National Environmental Policy Act (NEPA). See *U.S. Enrichment Corp.* (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 276 & n.19 (2001) (citing cases that hold economic interests not associated with radiological harm as being outside the zone of interests of either the AEA or . . . [NEPA] and not cognizable for the purpose of policing a competitor’s compliance with licensing requirements).

¹² The Staff notes that even if SLC could demonstrate that it has a significant role in the national defense industry, it would not excuse SLC’s failure to comply with NRC requirements.

possession of nuclear material, as it deems appropriate to protect the common defense and security and provide adequate protection to the health and safety of the public. AEA §§ 186, and 187, 42 U.S.C. §§ 2236, and 2237 (1954). Issues that may affect the public health and safety or common defense and security may constitute grounds for denying, modifying, or revoking a license. See 10 C.F.R. §§ 30.9(b), 30.61(b). As previously stated, the Staff has considerable discretion in determining whether to initiate enforcement action, what remedies to pursue, and what factors mitigate or intensify the need for enforcement action. See NUREG-1600, at 3-4.

When exercising its discretion to issue a license suspension order, the Staff is not required to place any weight on the potential impact on the Licensee's private financial situation or on the potential impact on the national defense industry. The NRC's Enforcement Policy supports the NRC's responsibility for protecting the public health and safety, the common defense and security, and the environment. Enforcement Policy § I, at 4. The Staff is not required to consider any factors beyond public health, safety and interest in determining whether to pursue enforcement action and what measures are appropriate to address activities involving the possession and use of radioactive materials. While the Staff has considerable discretion in selecting which enforcement measures will best address a particular radiological safety concern, the bottom line is that "in no case will licensees who cannot achieve and maintain adequate levels of safety be permitted to continue to conduct licensed activity." *Id.* at § I, 4. Furthermore, "Where needed to ensure adequate protection of public health and safety, the NRC may demand immediate license action, up to and including a shutdown or cessation of licensed activities." *Id.* The Enforcement Policy provides a range of measures, including suspension orders, to be used in ameliorating a threat to the public health and safety, common defense and security, or the environment. *Id.* at § VI.D, 28.

Although the NRC is required to establish standards that are protective of the "common defense and security" (AEA § 161b., 42 U.S.C. § 2201(b)), this does not mean that the NRC is should consider the impact of its actions on national defense contractors in evaluating whether to

suspend the license of a supplier to that industry.¹³ The NRC and the courts have interpreted the Commission's responsibilities for the "common defense and security" to reflect congressional concern that commercial industrial needs for nuclear materials not preempt the requirements of the military; that such materials in private hands be secured against loss or diversion, and that such materials and classified information be kept from those whose loyalties are not to the United States. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), 4 AEC 9, 12-13 (Commission 1967) ("[W]e have . . . considered the common defense and security standard to refer principally to: the safeguarding of special nuclear material; the absence of foreign control over the applicant; the protection of Restricted Data; and the availability of special nuclear material for defense needs."), *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778, 784 (D.C. Cir. 1968). Actions are thus considered inimical to the common defense and security under the AEA principally when they impact non-proliferation concerns, "where there is an unacceptable likelihood of grave or exceptionally grave damage to the United States." *U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 375 (2004). The NRC's "common defense and security" responsibilities extend only as far as the underlying purpose of the AEA – to ensure the radiological safety of the United States.

In short, the NRC's "common defense and security" responsibilities do not translate into kid glove treatment for NRC licensees who supply national defense contractors, particularly at the expense of the NRC concerns about public health and safety. Accordingly, if the NRC Staff determines that safety concerns necessitate the suspension of a license, which is warranted in instances where a violation is willful, neither the potential economic impact of that suspension or

¹³ Notwithstanding the authority the NRC may have under § 161b to *promote* the common defense and security, the NRC has not issued any regulations or orders to this effect. NRC's primary responsibility is to ensure that a licensed activity is not inimical to the common defense and security. *See, e.g.*, 10 C.F.R. § 30.11(a) (licensed activities should not endanger life or property or the common defense and security). Promotion of the use of nuclear materials in furtherance of the common defense and security is not part of the NRC's mission under the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.*

general concerns about national defense are relevant.¹⁴

Thus, the Board must decide, by a preponderance of reliable, probative and substantial evidence that the violation occurred and the sanction of license suspension is warranted in order to protect the public health and safety, or to minimize danger to life or property.

3. SLC Repeatedly and Willfully Violated NRC Requirements

On December 10, 2004, the U.S. Nuclear Regulatory Commission staff (Staff) issued an "Order Suspending License (Effective Immediately)" (Suspension Order), pursuant to 10 C.F.R. § 2.202, suspending two licenses held by SLC based on (1) SLC's willful failure to make payments to the decommissioning trust fund as required by License Conditions 16 and 20.A of License Nos. 37-0030-02 and 37-00030-08, respectively, and 10 C.F.R. § 30.35 and (2) the effect of this willful failure on public health, safety and interest. See Suspension Order (Staff Exhibit 13) at 2, 5-8.¹⁵ As discussed below, the evidence shows that SLC repeatedly and willfully violated its license condition concerning financial assurance for decommissioning and that the Staff properly exercised its discretion under the Enforcement Policy to issue the order suspending the license effective January 1, 2005.

Licenses Nos. 37-00030-02 and 37-00030-08, when renewed on December 28, 1999, both contained a condition that exempted SLC from certain NRC financial assurance requirements for decommissioning in 10 C.F.R. § 30.32(a) through (f), provided that SLC make the prescribed

¹⁴ Similarly, the issue is not whether the enforcement action has a fair and equitable impact on one who violates NRC requirements. Cf. LBP-05-02, slip op. at 13.

¹⁵ By letter dated December 29, 2004 (Staff Exhibit 17), the Staff approved a shutdown plan submitted by SLC in response to the Order, and, based on Licensee's demonstration of good cause, relaxed Sections V.B.1, V.B.2, and V.B.4 of the Order to allow SLC (1) to receive new light sources through January 31, 2005, in order to fulfill contractual obligations and (2) receive and process exit signs or other devices containing licensed materials that are returned by its customers to the extent that SLC can transfer tritium source tubes from those signs to an authorized recipient by March 31, 2005. SLC indicates that regardless of whether its requested relief is granted, that SLC and its employees will be irreparably harmed and that there is a risk that SLC's business could be "destroyed" before any hearing on the Order is completed. See Motion at 2.

payments at specified intervals to a decommissioning trust fund during the term of the license. See Staff Exhibit 1 at License Condition 16; Staff Exhibit 2 at License Condition 20; Staff Testimony at 2-3.

SLC admits that it violated these conditions by failing to make at least 11 of 60 payments as required by the license condition and that the amount in arrears as of the date of the Order was \$36,000 plus interest. Lynch Affidavit at 3 (appended to Set Aside Motion). Based on evidence gathered by NRC Office of Investigations (OI) and statements made by SLC officials at a Predecisional Enforcement Conference held in July 2004, the Staff concluded that SLC repeatedly violated the license conditions (by failing to make 13 of 60 payments (over a three-year period) in accordance with the license requirements. See Staff Testimony at 8. Even though SLC Officials were aware of the license requirement, SLC consciously decided not to pay into the decommissioning trust fund, but to instead, make payments for its financial benefit (e.g., employee salaries and supplier bills viewed as non-optional business expenses). See Answer at 3; Lynch Affidavit at 3; Staff Testimony at 9. Thus, the preponderance of the evidence shows that SLC willfully violated NRC requirements. See Testimony at 7-10, 14-17.

SLC admits that the exemption was only valid until the date of any failure to comply with it, but asserts that it was only voidable and remains in effect. See Answer at 3-4. SLC denies the violation was deliberate or involved "significant health and safety implications" and that the NRC lacks reasonable assurance that SLC activities would be conducted in a manner that is protective of public health and safety, thus warranting the issuance of an order. See Answer at 4-8. SLC's failure to make required payments to the decommissioning trust fund led to delays in removal of legacy waste from the site. See Staff Testimony at 11-12, 15-16. Such delays raised the potential for adversely affect public health, safety and the environment due to inadequate financial assurance at a contaminated site.

Statements made to the NRC by SLC officials during the OI investigation and the

Predecisional Enforcement Conference indicated to the Staff that the SLC Vice President and Plant Manager were aware of the requirement in the license and consciously decided not to make the prescribed payments, and in fact to pay others instead of the NRC. See Office of Investigations Report No. 1-2003-056, dated March 4, 2004 (ML0503504140) (Staff Exhibit 8) (OI Report), at Exhibit 7 (Harmon Interview), Tr. at 7-9; OI Report Exhibit 6 (Lynch Interview), Tr. at 6-7; PEC Tr. (Staff Exhibit 11) at 18-19 (Lynch); Staff Testimony at 8-10, 15. Although not cited as a basis for the Suspension, the Staff was also aware that SLC had not disposed of waste generated from tritium operations prior to January 1, 2000, as required by License Condition 19 of License No. 37-00030-08. See Staff Testimony at 11-12. Safety Light also failed to comply with this license condition, related to waste generated from its ongoing operations. See Staff Testimony at 12.

William Lynch, Vice-President of SLC, admits that SLC had not paid the \$30,000 plus interest in arrears through November 30, 2004 as of the date of the Suspension Order. See Answer at 2; Lynch Affidavit (Set Aside Motion), at ¶ 6. Based on interviews with Mr. Lynch and the Plant Manager as well as statements by these officials during a July 20, 2004, predecisional enforcement conference, the Staff determined that it was primarily Mr. Lynch's decision not to pay the NRC, based on his judgment about possible harm to his business if the required escrow payments were made. See Staff Testimony at 9; OI Report (Staff Exhibit 8) at 9.¹⁶ The Office of Investigations concluded that, because SLC knew that monthly payments were a condition of its licenses and that its failure to make these payments violated the terms of the exemption granted in its license, SLC's decision to pay vendors, employees, and other contractors instead of the NRC was deliberate. See Staff Testimony at 8-9; OI Report (Staff Exhibit 8) at 11-12. Therefore, SLC's conduct was willful.

¹⁶ Mr. Lynch knew that both licenses contained a requirement that monthly deposits be made into the decommissioning trust fund, but made the conscious decision not to make those payments. See Lynch Affidavit at 2-4.

The requirement to make prescribed payment to the decommissioning trust fund set forth in its licenses was mandatory and not dependent upon SLC's interpretation of what was good for its business. See Staff Testimony at 3. The condition included in both licenses specifically provided that, pursuant to 10 C.F.R. § 30.11, SLC is exempted from the provisions of 10 C.F.R. §§ 30.32 (h) and 30.35(a) through 30.35(f), provided that SLC "set aside from operating funds or *any other funds*, except insurance litigation funds," the monthly payment in amounts ranging from \$7,000 to \$9,000 during the term of the license. See Staff Testimony at 3 (emphasis added). Significantly, each condition included a provision that "the exemption is valid until the date shown in Item 4 [the December 31, 2004 expiration date] or the date of any failure to comply with this license condition." *Id.* SLC assertions about a "down turn in business" or slow down in the economy, see Answer at 3, do not dispute that SLC management was knowledgeable about NRC licensing requirements as well as the terms of the exemption granted with the 1999 license renewal and, therefore, reflect a conscious, deliberate decision not to make timely escrow payments. The failure to make monthly payments as prescribed by Conditions 16 and 20.A of its licenses, in essence, invalidated the exemption granted and placed SLC in willful violation of NRC financial assurance requirements for decommissioning. See Staff Testimony at 14-16.¹⁷ Even assuming, arguendo, that the exemption remained valid, SLC's failure to make the required payment was still a willful violation of license requirements under facts in this proceeding.

The Staff's decision to issue an immediately effective order was reasonable under the NRC's enforcement policy and consistent with 10 C.F.R. § 30.61. The Staff determined, based on information supporting the OI finding that SLC deliberately failed to comply with the financial

¹⁷ SLC argues that the exemption was voidable and not "void" as of the dates of nonpayment and remains in effect. See Answer at 3-4. Because the exemption was granted on the express condition of payment of the prescribed amounts at the designated intervals, SLC's failure to make the required payments on a timely basis caused the exemption to expire by its own terms. In any event, the action taken by the Staff in suspending the license (as well as the Staff's denial of SLC's license renewals) makes it clear that the exemption is no longer valid.

assurance requirements for decommissioning, as well as information gathered at the predecisional enforcement conference and other information provided by SLC, that SLC officials were aware of the license conditions and knowingly and repeatedly violated the license conditions requiring payments into the decommissioning trust fund in the specified amounts at the prescribed intervals. See Staff Testimony at 8-10, 15-16. Rather than comply with the license requirements that were material to the renewals granted in 1999, SLC knowingly and deliberately chose not to make deposits into the fund, and, instead, to make payments to others. *Id.* These facts are not in dispute and provided an adequate basis to issue the Suspension Order based on willfulness.

4. Issuance of the Suspension Order was
Protective of the Public Health, Safety and Interest

The Order was also desirable based on protection of the public health, safety and interest. The objective of the Commission's decommissioning rule is to provide reasonable assurance that adequate funds are available to ensure that decommissioning can be accomplished in a safe manner and that the lack of funds does not result in delays that may cause health and safety problems. See "Decommissioning Criteria for Nuclear Facilities," 50 Fed. Reg. 5,600, 5,602 (proposed Feb. 11, 1985). The Commission has indicated that although "decommissioning is not an imminent health and safety problem, . . . [i]nadequate or untimely consideration of decommissioning, specifically in the areas of planning and financial assurance, could result in significant adverse health, safety and environmental impacts." See "General Requirements for Decommissioning Nuclear Facilities [Final Rule]," 53 Fed. Reg. 24,018, 24,019 (June 27, 1988). Such impacts "could lead to increased occupational and public doses, increased amounts of radioactive waste to be disposed of, and an increase in the number of contaminated sites." *Id.*

A fundamental aspect of the decision whether to grant a materials license (or renewal of such license) is a determination as to whether decommissioning financial assurance requirements have been met. 10 C.F.R. §§ 30.32(h), 30.35. Financial assurance for decommissioning in the form provided in the license conditions is safety significant because the required payments reflect

the basis for the exemption from decommissioning financial assurance requirements and provided the mechanism for accumulation of funds to be used for disposal of radioactive waste that is currently being stored at the facility. See Staff Testimony at 14-16.

The Order required that the licensee take immediate actions to ensure that SLC properly planned and conducted shutdown activities that were to commence beginning January 1, 2005 -- the date the licenses were suspended and the day following the expiration of the unrenewed licenses. See Staff Testimony at 13, 16. The failure of SLC to make required payments to the decommissioning trust fund resulted in insufficient funds being available to pay for disposal of certain radioactive waste exhumed from the silos at the Bloomsburg site. See Staff Testimony at 11-12. Given that providing financial assurance as set forth in the license conditions was material to the granting of the renewed licenses and, due to SLC's repeated willful violation of NRC requirements, the Staff had a safety concern about the ability or willingness of SLC to comply with NRC requirements in the future, and thus lacked reasonable assurance that SLC's operations could be conducted in compliance with NRC requirements and that public health and safety would be protected. See Suspension Order (Staff Exhibit 13) at 5-6; Staff Testimony at 3, 14-17. Therefore, suspension of the license was appropriate and consistent with 10 C.F.R. § 30.61(b). It reflected the exercise of the sound discretion of the Staff in determining a sanction that would address the underlying violation and protect the public health, safety and interest. See Staff Testimony at 14-17. Thus, the preponderance of the evidence shows that the Suspension Order was warranted.

CONCLUSION

For the reasons set forth above, the denial of the license renewal applications and the Suspension Order should be upheld.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville Maryland
this 16th day of February 2005