

April 24, 2007

MEMORANDUM TO: Michael F. Weber, Director
Office of Nuclear Material Safety and Safeguards

FROM: Thomas A. Bergman Chairman /RA/
Differing Professional Opinion Review Panel

SUBJECT: DIFFERING PROFESSIONAL OPINION ON MANAGEMENT POLICY ON
LICENSING NEW FUEL CYCLE FACILITIES (DPO-2006-005)

In a memorandum dated January 17, 2007, your predecessor appointed a panel to review a Differing Professional Opinion (DPO) concerning the licensing approach described in an August 4, 2006, memorandum from Mr. Robert Pierson, Director, Division of Fuel Cycle Facility Safety and Safeguards (FCSS) to FCSS staff titled, "United States Enrichment Corporation License Detail Regarding the Level of Information Needed for 10 CFR Part 70 Licensing" (the Memo). Marian Zabler and Michael Waterman served as panel members. The panel reviewed the DPO in accordance with the guidance outlined in U.S. Nuclear Regulatory Commission Management Directive 10.159, "The NRC Differing Professional Opinions Program."

The panel issued its final report on March 30, 2007 (Enclosure 1), to you and the submitters for review. Your comments were provided on April 6, 2007 (Enclosure 2), and the submitters' comments on April 16, 2007 (Enclosure 3). After careful consideration of your and the submitters' comments, the panel has determined that the March 30, 2007, report does not need to be revised and remains as the final version of the report for your use. The panel acknowledges, upon reviewing the submitters' comments on the report, that all of their concerns were not addressed as explicitly or using the terminology the submitters would have preferred. The panel conclusion remains that all of the issues in the DPO were addressed.

Due to the extensive comments received from the submitters, and because some of their comments state that the panel may not have addressed all their issues, we are addressing some of the more substantive comments in this memorandum to ensure that you understand the development of the report and why the report was not revised in light of these comments, as discussed below. We can discuss any questions regarding other comments, or any other aspect of the report, as you feel necessary.

1. Development of the statement of concerns: There are comments that the statement of concerns in the final report are inconsistent with the agreed statement of concerns as documented in an email dated February 20, 2007 (Enclosure 4). The panel does not agree with this statement and believes all concerns identified in that email, and the DPO, have been addressed.

The panel, in the course of developing the report, determined that more specificity with respect to the concerns was necessary to allow persons (including, potentially, the public) unfamiliar with the details of the DPO to understand what issues were being addressed. For example, the February 20 email states, "The Panel shall address in its review, and comment on, the points made in Sections b. and c. of the DPO." In order to address

those points, it was necessary to delineate the distinct issues identified in items (b)(1) - (b)(5) and (c)(1) - (c)(5) in the DPO. This is the principal difference between the February 20th email and the March 1, 2007, listing referred to by the submitters. We also determined that reorganizing the concerns would result in a document that had better flow; in particular, by organizing around two fundamental issues that, once they were resolved, would simplify the resolution of the more specific concerns.

As the report was further developed, the panel further refined the list of concerns, resulting in the listing seen in the final report. The only substantive difference between the March 1st version and the concerns in the report is in the organization, and tone (*i.e.*, the March 1st version is a set of directions to the panel, in the report they were restated as issues). The content is essentially unchanged. As an aid to understand the progression of the statement of concerns, we crafted a “map” (Enclosure 5) that cross-references the concerns in February 20th email and the DPO, to the issues as enumerated in the final report. The statement of concerns in the report and its appendix differs only in the level of detail - the report only summarized the concerns as indicated in the Statement of Concerns section of the report. Enclosure 6 is the March 1st version of the statement of concerns, which is provided for completeness.

In drafting the final report, the panel would have welcomed input from the submitters and, in hindsight, should have queried as to why there was no response. The panel proceeded without that input because the panel believed (and continues to believe) that it simply provided a more detailed breakdown of the concerns and did not change or remove concerns from its evaluation. Although the comments received in response to the final report may have resulted in some clarifications to the concerns as written, there would not have been any substantive changes to nor impact on the conclusions or recommendations in the final report. Therefore, the panel decided not to revise the final report.

2. Focus on Level of Detail Versus Level of Completeness: There are comments that the report focused on the level of detail submitted to support licensing and not on the level of completeness, and therefore the panel has not sufficiently addressed the level of completeness of the design and integrated safety assessment (ISA). In addressing the submitters' concern, the panel sought to understand the Commission's intent when it published subpart H to Part 70. To that end, the panel researched the rulemaking history. Much of the history focused on what an applicant would need to submit to support a license application. Consequently, much of the panel's understanding of the subpart H requires was informed by the level of detail that would be provided as part of an application. Hence, the report did focus on that level of detail necessary to be submitted as the basis for the panel's decision. The panel believes, however, that level of detail and level of completeness are intertwined. Level of detail, as used in the report, is not constrained to the amount of information about the design. Rather it is used more generally, and encompasses both the amount of information about the design and the amount of the design (*i.e.*, “completeness”). The panel views this to be more consistent with common usage, and more understandable to those not as familiar with the details of the DPO.

In hindsight, the panel should have perhaps use the term “level of information,” which is used in some places, in lieu of “level of detail,” though the panel sees no difference in

these terms. Regardless of what term and supporting definition could be developed, it is likely that substantial judgement would still be necessary in their application in the regulatory framework.

With respect to the *issue*, regarding the level of completeness, the panel believes the report is clear: *the design and the ISA are complete, in the context of Part 70, for the purpose of reviewing the license application*. This is stated throughout the report where it is stated that the process followed by the memo is consistent with Part 70. If the design or ISA were incomplete in the context of Part 70, the panel would not have made those statements. Therefore, the panel determined that there was no need to revise the final report.

3. Failure to address specific concerns: Comments received here include what the submitters appear to perceive as an aggregation of issues, and failure to address issues that were not explicitly addressed in any version of the statement of concerns.

Examples of the former include the submitters' comments on Concern 5 (Part 70 requirements) and Concern 8 (NUREG-1520). In both these cases, it was stated that the expectation was that each specific requirement would be addressed (guidance item for NUREG-1520). In the course of its review the panel considered such an approach; in the end it was considered unnecessary as the response to each requirement (guidance) would be essentially identical to the aggregated response. The panel saw no benefit to such redundant discussion.

An example of the latter is the question as to how Section 70.72 can be meaningfully applied when there is an incomplete baseline design against which to measure changes. The panel believes Section 70.72 is sufficiently addressed under Concern 5 in the appendix to the report, albeit not as directly as would be desired by the submitters. In that evaluation, the panel found that Section 70.72 would be used to address changes to the facility, the ISA, and the ISA Summary as the detailed design was completed. The inference here, and as is clear in the regulation, is that Section 70.72 encompasses "all" changes. Thus, the licensee must evaluate "all" changes from whatever level of information existed at the time of licensing, and from that point forward. This is further supported in the 1st paragraph of page 5 of the final report, with respect to changes that result in amendments to the facility.

There the final report notes only those changes that result in a change at the level the facility was described in the application (*i.e.*, at the programmatic level) should result in the need for a license amendment. Finally, regardless of whether the panel addressed

Section 70.72 in the manner as done in the final report or as an additional concern, this would not have affected the conclusions or recommendations of the final report. Therefore, the panel determined that the final report did not need to be revised.

Enclosure:
As Stated

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Enclosure:
As Stated

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