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November 20, 2009

Ann Marshall Young, Chair
Dr. Gary S. Arnold
Dr. Alice C. Mignerey
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Comanche Peak Nuclear Power Plant, Units 3 & 4, Docket Nos. 52-034, 52-035

Dear Judges Young, Arnold and Mignerey,

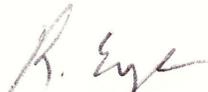
Pursuant to your direction during the arguments on November 12, 2009, we offer the following authorities on the question of whether 10 C.F.R. § 50.54(hh)(2) may be construed to infer that there is a requirement for the mitigative strategies in question to be demonstrably effective.

1. "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement **effective** mitigative measures for large fires and explosions...." 74 Fed Reg 13958
2. "[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that a statute should be construed so that effect is given to all its provisions" A "regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretations." "[A]dministrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language" *In the Matter of Hydro Resources*, 63 N.R.C. 483,491 (2006).
3. Courts will not construe legislative enactments as establishing statutory schemes that are illogical, unjust, or capricious. *Barrientos v. 1801-1825 Morton LLC*, 583 F. 3d 1197, 1210 (9th Cir. 2009). Here, failure to infer that the 10 C.F.R. 50.54(hh)(2) requires demonstrably "effective" mitigative strategies creates a regulatory scheme that is illogical, unjust and capricious.
4. Interpretations of statutes and regulations should not cause an "unreasonable and irrational loophole" that is contrary to "common sense" and undermines an underlying statutory/regulatory purpose. *Mackamaux v. Day Kimball Hosp.*, __ F.Supp. 2d __, 2009 WL 2913248 at *4 (D. Conn., Sept. 8, 2009). Not inferring a criterion that the mitigative strategies in question be effective would create an "unreasonable and irrational loophole" that is contrary to "common sense" and undermines the underlying regulatory purpose that "licensees will be able to implement effective mitigative measures." 74 Fed Reg 13958.

5. “It is consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency. See 2 A.J. Sutherland, *Statutory Construction* s 47.36, at 164 (Sands ed. 1973)” *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (C.A. Cal. 1981). Here, the “unresolvable inconsistency” is that that while 10 C.F.R. 50.54(hh)(2) is silent about whether the mitigative measures are to be demonstrably effective, to allow otherwise is inconsistent with the underlying regulatory purpose as expressed at 74 Fed. Reg. 13958 and the protection of public health and safety, AEA 42 U.S.C. 2133(d).

6. “The power to substitute or add is denied where the word substituted or added affects the essence of the act or where the statute is unambiguous. Sutherland, *supra*, s 47.36, at 164. See *Harris v. Commissioner*, 178 F.2d 861, 863-64 (2d Cir. 1949) (Hand, J.)” (error or omission must be plain before substitution allowed) *Id.* at 592, fn. 11. Here, leaving out the effectiveness criterion would be a plain omission. Inferring that 10 C.F.R. 50.54(hh)(2) requires demonstrably effective mitigative measures does not cause any harm to the essence of the regulation and is consistent with the regulatory purpose. Such an inference removes ambiguity about whether the regulation is intended to require demonstrably effective mitigative measures.

Respectfully submitted,



Robert V. Eye