

# **NUCLEAR REGULATORY COMMISSION ISSUANCES**

## **OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS**

January 1, 1991 – June 30, 1991

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## PREFACE

This is the thirty-third volume of issuances (1 - 619) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Appeal Boards, Atomic Safety and Licensing Boards, and Administrative Law Judges. It covers the period from January 1, 1991 to June 30, 1991.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. Reg. 29, & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission--CLI, Atomic Safety and Licensing Appeal Boards--ALAB, Atomic Safety and Licensing Boards--LBP, Administrative Law Judges--ALJ, Directors' Decisions--DD, and Denial of Petitions for Rulemaking--DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.



## CONTENTS

### Issuances of the Nuclear Regulatory Commission

#### CURATORS OF THE UNIVERSITY OF MISSOURI

Dockets 70-00270, 30-02278-MLA

Memorandum and Order, CLI-91-7, May 31, 1991 ..... 295

#### FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Plant, Units 3 and 4)

Dockets 50-250-OLA-6, 50-251-OLA-6

Memorandum and Order, CLI-91-5, April 3, 1991 ..... 238

#### GOVERNOR OF IDAHO

(Request to Return to the United States the Idaho Program  
for the Licensing and Regulation of Byproduct Material as  
Defined in Section 11e(1) of the Atomic Energy Act of 1954,  
as Amended, Source Material and Special Nuclear Material in  
Quantities Not Sufficient to Form a Critical Mass)

Order, CLI-91-6, April 11, 1991 ..... 242

#### LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

Docket 50-322

Memorandum and Order, CLI-91-1, January 24, 1991 ..... 1

Memorandum Opinion and Order, CLI-91-2, February 21, 1991 ..... 61

Memorandum and Order, CLI-91-8, June 12, 1991 ..... 461

Docket 50-322-OLA

Memorandum and Order, CLI-91-3, February 28, 1991 ..... 76

Memorandum and Order, CLI-91-4, April 3, 1991 ..... 233

#### RICHARD E. DOW

Dockets 50-445, 50-446

Memorandum and Order, CLI-91-9, June 20, 1991 ..... 473

### Issuances of the Atomic Safety and Licensing Appeal Boards

#### CAROLINA POWER AND LIGHT COMPANY

(H.B. Robinson, Unit 2)

Docket 50-261

(Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4)

Dockets 50-400, 50-401, 50-402, 50-403

Order, ALAB-948, June 11, 1991 ..... 481

<b>FLORIDA POWER &amp; LIGHT COMPANY</b>	
(St. Lucie Nuclear Power Plant, Unit 2)	
Docket 50-389	
Order, ALAB-948, June 11, 1991 .....	481
(Turkey Point Nuclear Generating Plant, Units 3 and 4)	
Dockets 50-250-OLA-4, 50-251-OLA-4	
Decision, ALAB-950, June 24, 1991 .....	492
Dockets 50-250-OLA-5, 50-251-OLA-5	
Decision, ALAB-952, June 28, 1991 .....	521
<b>KANSAS GAS AND ELECTRIC COMPANY and</b>	
<b>KANSAS CITY POWER AND LIGHT COMPANY</b>	
(Wolf Creek Generating Station, Unit 1)	
Docket STN 50-482	
Order, ALAB-948, June 11, 1991 .....	481
<b>KERR-McGEE CHEMICAL CORPORATION</b>	
(West Chicago Rare Earths Facility)	
Docket 40-2061-ML	
Decision, ALAB-944, February 28, 1991 .....	81
<b>PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.</b>	
(Seabrook Station, Units 1 and 2)	
Dockets 50-443, 50-444	
Order, ALAB-948, June 11, 1991 .....	481
Dockets 50-443-OL, 50-444-OL	
Memorandum and Order, ALAB-943, January 7, 1991 .....	11
Memorandum Regarding Certified Question,	
ALAB-945, March 20, 1991 .....	175
Decision, ALAB-947, May 10, 1991 .....	299
Dockets 50-443-OL-1, 50-444-OL-1	
Memorandum and Order, ALAB-946, April 11, 1991 .....	245
Memorandum and Order, ALAB-949, June 21, 1991 .....	484
<b>VIRGINIA ELECTRIC AND POWER COMPANY</b>	
(North Anna Power Station, Units 1 and 2)	
Dockets 50-338, 50-339	
Order, ALAB-948, June 11, 1991 .....	481
<b>WRANGLER LABORATORIES, LARSEN LABORATORIES,</b>	
<b>ORION CHEMICAL COMPANY, and JOHN. P. LARSEN</b>	
Docket 9999004	
Decision, ALAB-951, June 25, 1991 .....	505

## Issuances of the Atomic Safety and Licensing Boards

<b>ADVANCED MEDICAL SYSTEMS, INC.</b> (One Factory Row, Geneva, Ohio 44041) Docket 30-16055-CivP Memorandum and Order, LBP-91-9, March 19, 1991 .....	212
<b>ARIZONA PUBLIC SERVICE COMPANY, et al.</b> (Palo Verde Nuclear Generating Station, Units 1, 2, and 3) Dockets 50-528-OLA-2, 50-529-OLA-2, 50-530-OLA-2 Memorandum and Order, LBP-91-4, February 19, 1991 .....	153
Memorandum and Order, LBP-91-13, April 24, 1991 .....	259
Memorandum and Order, LBP-91-18, May 3, 1991 .....	394
Memorandum and Order, LBP-91-19, May 9, 1991 .....	397
Memorandum and Order, LBP-91-20, May 14, 1991 .....	416
<b>BARNETT INDUSTRIAL X-RAY</b> Docket 30-30691-CivP Memorandum and Order, LBP-91-16, April 30, 1991 .....	274
<b>CURATORS OF THE UNIVERSITY OF MISSOURI</b> Dockets 70-00270, 30-02278-MLA Memorandum and Order, LBP-91-11, April 9, 1991 .....	251
Memorandum and Order, LBP-91-12, April 15, 1991 .....	253
Memorandum and Order, LBP-91-14, April 25, 1991 .....	265
<b>FEWELL GEOTECHNICAL ENGINEERING, LTD.</b> (Thomas E. Murray, Radiographer) Docket 030-30870-OM Initial Decision, LBP-91-29, June 25, 1991 .....	561
<b>FLORIDA POWER &amp; LIGHT COMPANY</b> (Turkey Point Nuclear Generating Plant, Units 3 and 4) Dockets 50-250-OLA-6, 50-251-OLA-6 Memorandum and Order, LBP-91-2, January 23, 1991 .....	42
<b>GEORGIA POWER COMPANY, et al.</b> (Vogtle Electric Generating Plant, Units 1 and 2) Dockets 50-424-OLA, 50-425-OLA Memorandum and Order, LBP-91-6, February 28, 1991 .....	169
Memorandum and Order, LBP-91-21, May 15, 1991 .....	419

<b>LONG ISLAND LIGHTING COMPANY</b>	
(Shoreham Nuclear Power Station, Unit 1)	
Docket 50-322-OLA	
Memorandum and Order, LBP-91-1, January 8, 1991 .....	15
Memorandum and Order, LBP-91-7, March 6, 1991 .....	179
Memorandum and Order, LBP-91-23, May 23, 1991 .....	430
Docket 50-322-OLA-2	
Memorandum and Order, LBP-91-26, June 13, 1991 .....	537
<b>NORTHERN STATES POWER COMPANY</b>	
(Prairie Island Nuclear Generating Plant, Units 1 and 2)	
Dockets 72-10, 50-282-RS, 50-306-RS	
Memorandum and Order, LBP-91-8A, March 14, 1991 .....	210
<b>NUCLEAR METALS, INC.</b>	
Docket 40-672-MLA	
Memorandum and Order, LBP-91-22, May 16, 1991 .....	427
Memorandum and Order, LBP-91-27, June 18, 1991 .....	548
<b>PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.</b>	
(Seabrook Station, Unit 1)	
Docket 50-443-OLA	
Memorandum and Order, LBP-91-28, June 18, 1991 .....	557
(Seabrook Station, Units 1 and 2)	
Dockets 50-443-OLR-3&5, 50-444-OLR-3&5	
Memorandum and Order, LBP-91-3, January 29, 1991 .....	49
Dockets 50-443-OLR-4, 50-444-OLR-4	
Memorandum, LBP-91-8, March 12, 1991 .....	197
Memorandum and Order, LBP-91-24, May 30, 1991 .....	446
<b>RHODES-SAYRE &amp; ASSOCIATES, INC.</b>	
Docket 30-29086-SC	
Memorandum and Order, LBP-91-15, April 25, 1991 .....	268
<b>SACRAMENTO MUNICIPAL UTILITY DISTRICT</b>	
(Rancho Seco Nuclear Generating Station)	
Docket 50-312-OLA	
Memorandum and Order, LBP-91-17, May 1, 1991 .....	379
<b>SEQUOYAH FUELS CORPORATION</b>	
Docket 40-08027-MLA	
Memorandum and Order, LBP-91-5, January 24, 1991 .....	163
<b>TENNESSEE VALLEY AUTHORITY</b>	
(Sequoyah Nuclear Plant, Units 1 and 2)	
Dockets 50-327-OLA, 50-328-OLA	
Memorandum and Order, LBP-91-10, March 18, 1991 .....	231

TULSA GAMMA RAY, INC.  
 Docket 30-12319-CivP  
 Memorandum, LBP-91-25, June 13, 1991 ..... 535

**Issuances of the Directors' Decisions**

ALL NUCLEAR FACILITIES  
 Director's Decision, DD-91-1, January 15, 1991 ..... 53

LONG ISLAND LIGHTING COMPANY  
 (Shoreham Nuclear Power Station, Unit 1)  
 Docket 50-322  
 Director's Decision, DD-91-3, May 14, 1991 ..... 453

NIAGARA MOHAWK POWER CORPORATION  
 (Nine Mile Point Nuclear Station, Unit 1)  
 Docket 50-220  
 Director's Decision, DD-91-2, April 2, 1991 ..... 279

**Issuances of Denials of Petitions for Rulemaking**

CHARLES YOUNG  
 Docket PRM 50-50  
 Denial of Petition for Rulemaking,  
 DPRM-91-1, January 11, 1991 ..... 55

NUCLEAR CONTROL INSTITUTE, *et al.*  
 Docket PRM 73-9  
 Denial of Petition for Rulemaking, DPRM-91-2, June 5, 1991 ..... 587

**Indexes**

Case Name Index ..... I-1

Legal Citations Index ..... I-5

  Cases ..... I-5

  Regulations ..... I-19

  Statutes ..... I-33

  Other ..... I-37

Subject Index ..... I-39

Facility Index ..... I-57



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kenneth M. Carr, Chairman**

**Kenneth C. Rogers  
James R. Curtiss  
Forrest J. Remick**

**In the Matter of**

**Docket No. 50-322**

**LONG ISLAND LIGHTING  
COMPANY**

**(Shoreham Nuclear Power Station,  
Unit 1)**

**January 24, 1991**

The Commission addresses policy questions concerning the operation of its decommissioning rules in relation to a request by LILCO for a Shoreham operating license amendment. The Commission determines that the amendment, if granted, would transform the Shoreham operating license into a "possession only" license; that such a "possession only" license may be issued without any preliminary or final decommissioning information; and that Petitioners' requests for a hearing prior to grant of the license amendment should be forwarded to the Licensing Board for consideration under 10 C.F.R. § 2.714.

**OPERATING LICENSE: "POSSESSION ONLY" LICENSE**

A licensee's request for an amendment of its facility's operating license which, if granted, would allow the licensee to "possess, use, but not operate" the facility, converts that operating license into a "possession only" license.

## **“POSSESSION ONLY” LICENSE (DECOMMISSIONING PLAN REQUIREMENTS)**

Neither regulations, NEPA, nor policy considerations require a decommissioning plan to be submitted in conjunction with a “possession only” license application.

## **“POSSESSION ONLY” LICENSE (DECOMMISSIONING PLAN REQUIREMENTS)**

Nothing in the decommissioning rule or in the Statement of Considerations accompanying that rule indicates that “possession only” license issuance would be tied to the preliminary decommissioning plan required by 10 C.F.R. § 50.75(f).

## **REGULATIONS: DECOMMISSIONING**

The NRC’s decommissioning regulations do not require a “possession only” license — the Statement of Considerations accompanying the decommissioning rule merely describes the “possession only” license as something the licensee may seek in order to be relieved of requirements not necessary for safety in a “possession only” mode.

## **“POSSESSION ONLY” LICENSE (NEPA CONSIDERATIONS)**

The Commission believes that the decommissioning rules do not contemplate that a “possession only” license would, in normal circumstances, need to be preceded by submission of any particular environmental information or accompanied by any NEPA review related to decommissioning.

## **“POSSESSION ONLY” LICENSE (NEPA CONSIDERATIONS)**

There may be special circumstances where some NEPA review for a “possession only” license may be warranted despite the categorical exclusion, for example, if the “possession only” license clearly could be shown actually to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact.

## MEMORANDUM AND ORDER

This matter is before the Commission on two virtually identical pleadings styled as "Comments on Proposed No Significant Hazards Consideration and Petition for Leave to Intervene and Request for Prior Hearing" and "Petition for Leave to Intervene and Request for Prior Hearing" filed by the Shoreham-Wading River Central School District ("School District") and the Scientists and Engineers for Secure Energy ("SE2") (collectively "Petitioners"). The petitions concern a request by the Long Island Lighting Company ("LILCO") for an amendment to its license to operate the Shoreham Nuclear Power Plant ("Shoreham"), located on Long Island in the state of New York. The amendment would change the license from one that authorizes LILCO to "possess, use, and operate" Shoreham to one that authorizes LILCO to "possess, use but not operate the facility."

We have delayed referring these petitions to a licensing board for action in order to address at the threshold some significant policy questions about the operation of our decommissioning regulations in the circumstances presented in this case. A major issue raised by the petitions is whether the requested amendment constitutes a "possession only" license ("POL") and if so, what if any requirements related to decommissioning does that fact impose on the parties and on the Commission.

In this case, we have determined (1) that the requested amendment would indeed transform the Shoreham operating license into a POL; (2) that such a POL may be issued without any preliminary or final decommissioning information; and (3) that the petitions should be forwarded to the Licensing Board for consideration under the Commission's normal Rules of Practice, *e.g.*, 10 C.F.R. § 2.714, consistent both with this order and our recent decision on other petitions filed by the same Petitioners. *See* CLI-90-8, 32 NRC 201 (1990) (Motion for Reconsideration filed Oct. 29, 1990).

### I. BACKGROUND

On March 3, 1989, we concluded the Shoreham operating license proceeding and authorized the issuance of the full-power operating license for the Shoreham facility. *See* CLI-89-2, 29 NRC 211 (1989). However, just prior to the issuance of CLI-89-2, on February 28, 1989, LILCO and the Intervenors in the NRC licensing proceeding — the State of New York, the County of Suffolk, and the Town of Southampton — reached an agreement memorialized in a signed settlement agreement or contract between LILCO and the State. Under the agreement, LILCO agreed, *inter alia*, to sell the Shoreham facility to the Long Island Power Authority ("LIPA"), an entity created by the New York legislature

for the express purpose of acquiring and decommissioning Shoreham. See New York Public Authorities Law § 1020, *et seq.* (McKinney Supp. 1990).<sup>1</sup>

The agreement became effective on or about June 28, 1989, upon its ratification by the LILCO Board of Directors. The agreement also provided that LILCO would not operate Shoreham as a nuclear power plant. Consistent with its commitment not to operate Shoreham, LILCO began defueling the Shoreham facility on June 30, 1989, and completed that process on August 9, 1989. LILCO has also initiated the process of reducing staff at the Shoreham facility and has at all times acted as if it intends to abide by the agreement.<sup>2</sup>

On January 5, 1990, LILCO filed an application for an amendment to its operating license that would transform the operating license into a "defueled operating license." The NRC Staff ("Staff") published notice of the requested amendment and a proposed finding of "No Significant Hazards Considerations." See 55 Fed. Reg. 34,098 (Aug. 21, 1990). On September 20, 1990, Petitioners filed their comments on the proposed finding of "No Significant Hazards Considerations," requested that the Commission hold prior hearings on the proposed amendment, and sought leave to intervene in the proceeding.

## II. ARGUMENTS

Briefly, the Petitioners argue that (1) the request for a "defueled operating license" constitutes a request for a "possession only" license ("POL"); (2) the Commission's decommissioning rule, 10 C.F.R. § 50.82, requires that the Licensee submit and the NRC Staff approve a decommissioning plan *prior* to the issuance of a POL; (3) the decommissioning "report" prepared by LIPA and submitted by LILCO on some unspecified date in April 1990 has not been approved as a "decommissioning plan" in accordance with the Commission's rules; and (4) the Staff must issue an Environmental Impact Statement ("EIS") considering "resumed operation" as an alternative to the decision to decommission the facility prior to the issuance of the POL. See *generally* SE2 Petition at 3-11; School District Petition at 3-11.

In response, on October 3, 1990, we issued an order directing the Staff and LILCO to respond to two questions: (1) Did the requested "defueled operating license" constitute a POL and (2) did the decommissioning rule require submission of a "decommissioning plan" prior to issuance of a POL? The October 3d Order also accepted comments filed by LIPA on October 12, 1990, and solicited comments from the Department of Energy ("DOE") and

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<sup>1</sup>The NRC Staff issued the Shoreham full-power license on April 21, 1989.

<sup>2</sup>For example, LILCO has successfully sought or is seeking various amendments to its operating license as well as exemptions from several applicable NRC regulations. The NRC has received petitions to intervene and requests for hearings regarding several of the requested license amendments. See CLI-90-8, *supra*.

the Council on Environmental Quality ("CEQ"). Both the CEQ and the DOE accepted our invitation and filed comments. Moreover, on November 15, 1990, we received comments by the State of New York.<sup>3</sup>

The Staff agreed with the Petitioners that the requested amendment would constitute a POL, but both the Staff and LILCO argued that the decommissioning rule did not require submission of a formal decommissioning plan prior to the granting of a POL. Briefly, the Staff, LILCO, and LIPA argue that (1) the Commission's regulations are silent regarding the timing or requirements for seeking a POL; and (2) the Statement of Considerations accompanying the Decommissioning Rule specifically notes that the Commission will normally issue a POL *prior* to issuing an order permitting decommissioning "to confirm the nonoperating status of the plant and to reduce some requirements which are important only for operation prior to finalization of decommissioning plans."

Moreover, Staff and LILCO argue that the Decommissioning Rule specifies only that in filing an application for a Decommissioning Order, "within two years following the permanent cessation of operations," a licensee must "apply to the Commission for authority to surrender [its] license voluntarily and to decommission the facility." They conclude that it is this application for a Decommissioning Order that is to be preceded or accompanied by the Licensee's formal decommissioning plan, while the POL need only be accompanied or preceded by a "preliminary decommissioning plan" that includes information analogous to that required by 10 C.F.R. § 50.75(f) and demonstrates compliance with the requirements of 10 C.F.R. § 51.101.

### III. ANALYSIS

#### A. The Possession-Only License

The Petitioners argue that the requested amendment constitutes a "possession only" license. The Staff agrees and LILCO does not object to treatment of its request as such. We agree that the requested amendment would, if granted, convert the Shoreham license into a "possession only" license.

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<sup>3</sup>The Order of November 15 granted a request from the State of New York to file comments in opposition to the Petitioners' Joint Motion for Reconsideration of CLI-90-8 (October 29, 1990) ("Joint Petition"). The order also noted that the comments filed by the CEQ and the DOE on the matter before us now included comments directed at the Motion for Reconsideration and agreed to consider those comments on that issue as well. Finally, LIPA has filed additional comments in response to the DOE and CEQ comments and in response to the Joint Petition. We hereby accept those comments in both proceedings. We note that the CEQ and DOE comments are focused on the issues discussed in CLI-90-8, *supra*, rather than the decommissioning issues discussed in this Memorandum and Order. To the extent they are applicable, we have considered all comments in the preparation of this Order.

## B. Decommissioning Requirements

Petitioners next argue that because the requested amendment constitutes a "possession only" license, the Commission must deny the request because LILCO has not yet submitted its "decommissioning plan" pursuant to 10 C.F.R. § 50.82(a). We disagree. Neither regulations, NEPA, nor policy considerations require a decommissioning plan to be submitted in conjunction with the POL application.

The regulation does require that the licensee submit its application "to surrender [its] license voluntarily and to decommission the facility . . . within two years following permanent cessation of operations," and that "[e]ach application must be accompanied, or preceded, by a proposed decommissioning plan." 10 C.F.R. § 50.82(a). But clearly, the requested amendment before us today does not constitute an "application to surrender a license voluntarily . . ." <sup>4</sup> Thus, it need not be accompanied or preceded by a full-scale decommissioning plan. 10 C.F.R. § 50.82(a), *supra*.

As the Staff points out, our regulations do contemplate that "[e]ach licensee shall at or about 5 years prior to the projected end of operation submit a preliminary decommissioning plan . . ." 10 C.F.R. § 50.75(f) (emphasis added). And the Statement of Considerations accompanying the decommissioning rule stated that the "overall approach to decommissioning must now be approved shortly after the end of operation rather than an amended possession only Part 50 license being issued without plans for ultimate disposition." 53 Fed. Reg. 24,024 (June 27, 1988).

However, this language merely reflects the normal situation under the rule whereby the preliminary plan will in fact have been filed before the POL application. *See* 10 C.F.R. § 50.75(f). Nothing in the rule itself or in the Statement of Considerations indicates that POL issuance would be tied to the preliminary plan required by section 50.75(f). In fact, our decommissioning regulations do not require any POL — the Statement of Considerations merely describes the POL as something the licensee may seek in order to be relieved of requirements not necessary for safety in a "possession only" mode.

Our decommissioning regulations also include amendments to 10 C.F.R. Part 51 to address NEPA requirements related to decommissioning. Notably, while the rules themselves included a Generic Environmental Impact Statement and required a supplemental environmental review in connection with approval of the final decommissioning plan, 10 C.F.R. § 51.95(b), the categorical exclusion applicable to issuance of POLs in 10 C.F.R. § 51.22(c)(9) was left unchanged. We believe that the decommissioning rules do not contemplate that a POL

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<sup>4</sup>In fact, LILCO has consistently stated that under the contract or settlement agreement with the State of New York and under New York State Law, only LIPA is entitled to decommission the Shoreham facility. *See* LILCO Response at 6-7.

would, in normal circumstances, need to be preceded by submission of any particular environmental information or accompanied by any NEPA review related to decommissioning. Accordingly, we do not believe that NEPA or 10 C.F.R. Part 51 serves as a basis for linking a POL with the filing or review of any preliminary decommissioning plan. Of course there may be special circumstances where some NEPA review for a POL may be warranted despite the categorical exclusion, for example if the POL clearly could be shown actually to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact. But, from the papers filed with us at this preliminary stage, no such special circumstance appears in this case. Indeed Petitioners are concerned not with alternative ways to decommission, but with operation as an alternative to decommissioning. We have addressed this latter matter in CLI-90-8.

### **C. Action Before the Licensing Board**

We hereby forward the two petitions before us now, with their assorted supplements and answers, in addition to the pleadings filed by LIPA, DOE, CEQ, and the State of New York, to the Licensing Board for further proceedings in accordance with the Commission's Rules of Practice, specifically 10 C.F.R. § 2.714(a)(2), and in accordance with the opinions expressed herein and in CLI-90-8.

The additional concurring views of Commissioner Curtiss and the dissenting views of Chairman Carr are attached.

It is so Ordered.

For the Commission

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 24th day of January 1991.

### **ADDITIONAL CONCURRING VIEWS OF COMMISSIONER CURTISS**

I agree with the majority's conclusion that the decommissioning rule does not require the submission of a decommissioning plan, either in preliminary or final form, prior to the issuance of a possession-only license (POL). With regard

to the question of whether the Commission should declare, as a matter of policy, that such a plan should be submitted prior to issuance of a POL, I am persuaded that such an approach would be unwise for the following reasons:

First, I see no connection between the objectives that have been articulated in the decommissioning rule and the suggestion that a decommissioning plan should be required prior to issuance of a POL. As the majority points out, there is no information that would indicate that issuance of a POL will in any way foreclose alternative approaches to decommissioning. Nor will issuance of a POL detract in any way from the ability of the Licensee to raise or maintain decommissioning funds. Indeed, insisting upon a decommissioning plan prior to issuance of a POL may well lead to exactly the opposite result, with the Licensee obligated to continue otherwise unnecessary expenditures to comply with the terms of its full-power operating license, when such funds would, in my view, be more properly husbanded to carry out the ultimate task of decommissioning the facility, once the Licensee has reached the decision that this is the course that it wishes to pursue.

Second, to the extent that the objective here, for those who are arguing that a decommissioning plan must be submitted and approved prior to issuance of a POL, is to continue the debate over whether the Shoreham facility should be preserved in a fashion that would permit it to operate at some future point in time, I do not believe that this agency should become the forum for debating such broad national policy questions. As a legal matter, we have addressed our responsibilities in CLI-90-8. Beyond that, we risk considerable damage to our position and responsibility as an independent arbiter of safety questions by entertaining what is essentially a policy dispute over the future of this facility. Moreover, the precedents that would necessarily be established to accommodate such a debate would almost certainly have significant adverse consequences for future proceedings in other cases, opening the door for both opponents as well as proponents of nuclear power to litigate broad national energy policy issues in NRC proceedings. Such a result would, in my judgment, quickly prove to be a costly mistake. In my view, if questions still remain as to whether the Shoreham facility should be preserved in a fashion that would permit it to operate at some future point in time, there are other more appropriate venues for the conduct of that debate.

#### **DISSENTING VIEWS OF CHAIRMAN CARR**

The Staff has argued and I agree that LILCO must submit a "preliminary plan" containing sufficient information prior to issuance of a defueled operating license or possession only license (POL) to provide the Commission the necessary assurance that adequate funding for safe decommissioning will be provided

on a timely basis. When it adopted its decommissioning rules, the Commission envisioned an orderly progression toward termination of operation and decommissioning of a facility. Licensees would provide assurance of the availability of funds for decommissioning well before the facility shutdown, by one of several specific means. See 10 C.F.R. § 50.75(a)-(e). Under 10 C.F.R. 50.75(f), 5 years before the projected end of facility operation, the licensee would submit a preliminary decommissioning plan containing a cost estimate for decommissioning and an up-to-date assessment of the major technical factors that could affect planning for decommissioning. To submit this information the licensee was expected to have evaluated the upcoming decommissioning of its facility sufficiently to anticipate the alternative to be used, the major steps necessary to carry out decommissioning safely, and whether the funds accumulated were sufficient to ensure safe decommissioning or whether the level of funds should be adjusted. Then, within 2 years of permanent cessation of operation, the licensee is required to submit a decommissioning plan with a detailed analysis and description of the steps necessary to safely remove a facility from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license.

The defueled license that Shoreham has applied for in this case is essentially the same as a possession-only license. While the Commission recognized when it issued its decommissioning rules that a possession-only license would ordinarily be issued before decommissioning plans were "finalized," i.e., before the 10 C.F.R. § 50.82 plans were reviewed and approved, some preliminary decommissioning information was needed. Indeed, that was the information expected to be provided under section 50.75(f). While literal application of section 50.75(f) is not possible in this case, that is no reason to abandon altogether the rationale behind the Commission's adoption of the stepwise approach to decommissioning requirements in the first place, i.e., to ensure that decommissioning of all licensed facilities will be accomplished in a safe and timely manner and that adequate licensee funds will be available for this purpose. Indeed, the Commission may have greater reason to be concerned about understanding how prematurely shutdown facilities intend to proceed with decommissioning and funding than for those that follow the normal 40-year progression to license termination. The more abrupt the shutdown, the less extensive will be any planning about decommissioning, and once a facility is no longer generating revenue for its owner, there is less incentive to proceed with a timely and safe decommissioning, because a source of funds derived directly from the plant will no longer be available for decommissioning.

I also believe that we need preliminary decommissioning information from the licensee prior to issuance of the POL in order to implement the course we established in CLI-90-8 to meet our obligations under the National Environmental Policy Act (NEPA). In that decision we indicated that the NRC Staff need

not prepare an environmental assessment or an environmental impact statement reviewing and analyzing resumed operation of Shoreham as a nuclear power plant as an alternative under NEPA. However, we concluded that the Commission did have an obligation to ensure that NRC action such as issuance of a possession-only license does not foreclose or materially affect a decommissioning option that will be subject to an environmental review upon consideration of the licensee's decommissioning plan. *See* CLI-90-8, 32 NRC at 207 n.3. Consequently, as Staff recognized in its filing with the Commission, the Commission would need some preliminary decommissioning information in order to assess the effect of activities to be carried out under the POL on the reasonable options available for decommissioning.

For these reasons, I believe that the licensee should submit a preliminary decommissioning plan, such as that contemplated under 10 C.F.R. § 50.75(f), before a possession-only license is issued, and I therefore respectfully dissent from the decision of my colleagues.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Alan S. Rosenthal  
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL  
50-444-OL  
(Offsite Emergency  
Planning Issues)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

January 7, 1991

The Appeal Board dismisses as premature a joint intervenor appeal of LBP-90-44, 32 NRC 433, and LBP-90-12, 31 NRC 427 (1990).

**RULES OF PRACTICE: FINALITY OF DECISIONS**

“The test of ‘finality’ for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board’s action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party’s right to participate; rulings which do neither are interlocutory.” *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975) (footnotes omitted).

## RULES OF PRACTICE: FINALITY OF DECISIONS

When issues are remanded to a Licensing Board as a part of an Appeal Board's consideration of a "major segment" of a proceeding, any appeal concerning the Licensing Board's resolution of any of those issues must await a final Board determination on all of the remanded matters associated with the major segment.

## MEMORANDUM AND ORDER

In ALAB-924,<sup>1</sup> on review of LBP-88-32,<sup>2</sup> we remanded four issues to the Licensing Board in this operating license proceeding involving the Seabrook nuclear facility: need for letters of agreement (LOAs) with school personnel; sufficiency of the special needs survey for the New Hampshire portion of the Seabrook plume exposure pathway emergency planning zone (EPZ); effect of advanced life support (ALS) patient preparation on evacuation time estimates (ETEs); and the adequacy of beach sheltering implementation. Thereafter, in LBP-90-12,<sup>3</sup> the Licensing Board both undertook to resolve the LOA and special needs survey issues and addressed (without resolving) the ALS patient and beach sheltering issues.

In ALAB-933,<sup>4</sup> on the motions of the applicants and the NRC staff we dismissed appeals taken by various intervenors from LBP-90-12. This action was founded on an application of the standard of appealability set forth many years ago in the *Davis-Besse* proceeding:

The test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.<sup>5</sup>

As we saw it, LBP-90-12 did not dispose of a "major segment" of this proceeding.

We now have before us a new notice of appeal filed jointly by intervenors Massachusetts Attorney General (MassAG) and the New England Coalition on Nuclear Pollution (NECNP). This notice addresses the Licensing Board's

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<sup>1</sup> 30 NRC 331 (1989), *petitions for review pending*.

<sup>2</sup> 28 NRC 667 (1988).

<sup>3</sup> 31 NRC 427 (1990).

<sup>4</sup> 31 NRC 491 (1990).

<sup>5</sup> *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975) (footnotes omitted).

December 18, 1990, memorandum and order (LBP-90-44),<sup>6</sup> in which the Board granted the applicants' motion for summary disposition on the ALS patient issue. In addition, the notice references those portions of LBP-90-12 that relate to the ALS patient and special needs survey issues.

Although the issuance of LBP-90-44 was apparently the genesis of intervenors' new appeal, the requisite finality was not achieved with the rendition of that decision.<sup>7</sup> Of the issues remanded in ALAB-924, there still remains for Licensing Board disposition the beach sheltering matter.<sup>8</sup> As suggested in ALAB-933,<sup>9</sup> there is no good reason why that sheltering issue should receive appellate review apart from the three other matters that ALAB-924 returned to the Licensing Board.

In this connection, it is significant that, as above noted, each of the four issues subject to remand was initially ruled upon in LBP-88-32, the Licensing Board decision concerned generally with the adequacy of the emergency plan for the New Hampshire portion of the EPZ. In other words, all of them are New Hampshire emergency planning issues and, as such, appropriate for appellate consideration as part of an entity comprising a "major segment" of the case.<sup>10</sup> Accordingly, any intervenor appeal concerning the Licensing Board's resolution in LBP-90-44 and LBP-90-12 of certain remanded issues must await a final determination of all the remanded matters associated with that major segment.<sup>11</sup>

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For the foregoing reasons, the joint appeal by the MassAG and NECNP from the Licensing Board's December 18, 1990 memorandum and order, LBP-90-44,

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<sup>6</sup>32 NRC 433 (1990).

<sup>7</sup>The Licensing Board that issued LBP-90-44 was constituted separately from the "offsite" Board that issued LBP-88-32. See 55 Fed. Reg. 47,411 (1990). In this instance, we find this administrative action of no consequence in analyzing whether the Board's determination on the ALS patient issue is "final" so as to be reviewable now.

<sup>8</sup>In ALAB-939, 32 NRC 165, 179-80 (1990), in response to questions referred by the Licensing Board we directed that the Board take any necessary steps to ensure that the record is clear with regard to several matters concerning sheltering for the beach population under the New Hampshire emergency plan. By orders dated November 14 and 26, 1990, the Licensing Board requested that the parties provide their views relative to these matters and indicated that the subject will be taken up at a prehearing conference now scheduled for January 23, 1991.

<sup>9</sup>31 NRC at 498. In ALAB-933, *id.* at 496-97, we also were confronted with the question of whether the Licensing Board's dismissal of one intervenor from further participation regarding the remanded issues fulfilled the *Davis-Besse* criterion of termination of a party's right to participate, and found that the Board's action was then reviewable. That finality yardstick is not implicated in this instance.

<sup>10</sup>In reviewing LBP-88-32, in addition to the four issues returned to the Licensing Board in ALAB-924, in ALAB-932, 31 NRC 371, 418-20 (1990), we also remanded an issue concerning the calculation of the ETEs utilized for the New Hampshire portion of the EPZ. It is our understanding, however, that in response to this remand the calculations have been revised and incorporated in the New Hampshire emergency plan. See Letter from T. Feigenbaum to NRC Document Control Desk (Aug. 15, 1990) (forwarding revised ETEs).

<sup>11</sup>The same analysis would apply with respect to the various issues that may be subject to remand in the course of our consideration (as yet uncompleted) of another major case segment, the Massachusetts emergency planning and June 1988 full participation exercise matters on review relative to the Licensing Board's determinations in LBP-89-32, 30 NRC 375 (1989), and related orders.

32 NRC 433, and its May 3, 1990 memorandum and order, LBP-90-12, 31 NRC 427, is *dismissed* as premature.

It is so ORDERED.

FOR THE APPEAL BOARD

Lucille Williams  
Secretary to the  
Appeal Board

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Morton B. Margulles, Chairman  
Dr. George A. Ferguson  
Dr. Jerry R. Kline**

In the Matter of

**Docket No. 50-322-OLA  
(ASLBP No. 91-621-01-OLA)  
(Confirmatory Order Modification,  
Security Plan Amendment, and  
Emergency Preparedness Amendment)**

**LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)**

**January 8, 1991**

**LICENSE AMENDMENT PROCEEDINGS: SCOPE**

In license amendment proceedings, the Commission hearing notice defines the scope of the proceeding, which binds the licensing board.

**LICENSE AMENDMENT PROCEEDINGS: STANDING**

A petitioner may base its standing upon a showing that an organization or its members are within the geographic zone that might be affected by an accidental release of fission products. However, absent situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken.

## LICENSE AMENDMENT PROCEEDINGS: PETITION TO INTERVENE

Petitioners may amend petitions to intervene to cure deficiencies found by the Licensing Board.

### MEMORANDUM AND ORDER (Ruling on Requests for Intervention)

#### I. INTRODUCTION

On March 29, 1990, NRC Staff (Staff) issued a "Confirmatory Order Modifying License (Effective Immediately)," which modified the Shoreham Nuclear Power Station (Shoreham) full-power operating license held by Long Island Lighting Company (LILCO). The Order prohibited LILCO from placing any nuclear fuel in the Shoreham reactor vessel without prior approval from the NRC. The *Federal Register* Notice of the action provided an opportunity for hearing to adversely affected persons. 55 Fed. Reg. 12,758, 12,759 (Apr. 5, 1990). On April 18, 1990, Scientists and Engineers for Secure Energy (Secure Energy) and Shoreham-Wading River School District (School District) filed separately a "Petition to Intervene and Request for Hearing" in response to the Notice. This matter will be referred to as the Confirmatory Order Modification.

LILCO on January 5, 1990, filed an application for an amendment to the Shoreham operating license that would allow changes in the physical security plan for the plant and a reduction in the security forces. A *Federal Register* Notice of this application filing was published together with Staff's proposed finding that the amendment did not involve a significant hazards consideration. The Notice provided an opportunity for hearing to affected persons. 55 Fed. Reg. 10,528, 10,540 (Mar. 21, 1990). In response, both Secure Energy and School District filed a separate "Petition to Intervene and Request for Hearing" on April 20, 1990. This matter will be referred to as the Security Plan Amendment.

Staff, on March 30, 1990, published a *Federal Register* Notice advising of a December 15, 1989 LILCO request for an amendment to its Shoreham license removing certain license conditions regarding offsite emergency preparedness activities and of a Staff proposed finding of "No Significant Hazards Consideration." The Notice offered an opportunity for hearing to affected persons. 55 Fed. Reg. 12,076 (Mar. 30, 1990). Secure Energy and School District filed separate requests to intervene and for a hearing to be held. This matter will be referred to as the Emergency Preparedness Amendment.

The full-power operating license for Shoreham, to which all of the changes relate, was issued to LILCO on April 21, 1989. LILCO and the State of New

York had reached an agreement on February 28, 1989, that LILCO would not operate Shoreham. Licensee would sell Shoreham to the Long Island Power Authority, which under New York State law is prohibited from operating Shoreham.

Pursuant to the agreement, LILCO has removed the nuclear fuel from the reactor vessel along with in-core instrumentation, core internals, and control-rod guide tubes. Water has been removed from the reactor vessel. It is attempting to sell the nuclear fuel that was used for startup activities and low-power testing. The Licensee has disbanded a portion of its technical staff and has begun training the remaining staff for defueled operation only. CLI-90-8, 32 NRC 201 (1990).

In CLI-90-8, the Nuclear Regulatory Commission (NRC or Commission) took up the six petitions and, *inter alia*, found:

In summary, the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how that decommissioning will be accomplished. Thus, it follows that NRC need be concerned at present under NEPA only with whether the three actions that are the subject of the hearing requests will prejudice *that* action. Clearly they do not, because they have no prejudicial effect on *how* decommissioning will be accomplished. Therefore, because decommissioning actions are directed solely at ensuring safe and environmentally sound decommissioning, it follows that alternatives to the decision not to operate the plant are beyond the scope of our review and need not be considered under NEPA. See *NRDC v. EPA*, 822 F.2d 104, 126-31 (D.C. Cir. 1987).

32 NRC at 208 (emphasis in original).

The Commission concluded that the Staff need not file an Environmental Assessment or an Environmental Impact Statement reviewing and analyzing resumed operations of Shoreham as a nuclear power plant as an alternative under the National Environmental Policy Act (NEPA). It forwarded the six petitions for handling by an Atomic Safety and Licensing Board (Board) with directions to "review and resolve all other aspects of these hearing requests in a manner consistent with this opinion."

Staff and LILCO filed timely responses to each of the six petitions requesting intervention and hearing. LILCO, who agreed to the Confirmatory Order Modification and seeks the Security Plan and Emergency Preparedness Amendments, opposes Petitioners' requests as does Staff.

Petitioners, in a joint petition to the Commission, dated October 29, 1990, requested that CLI-90-8 be reconsidered and vacated insofar as that order precludes the consideration of the alternative of renewed operation of Shoreham in the context of the proposal to decommission the plant. LILCO and Staff oppose the request.<sup>1</sup>

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<sup>1</sup> On November 8, 1990, the Board wrote to the participants in these three matters inquiring of their views on whether the Board should not proceed with review of the petitions taking into consideration the request for  
(Continued)

In this Memorandum and Order, the Board rules on the petitions requesting intervention and hearing. We find that in all instances Petitioners have failed to meet the requirements of 10 C.F.R. § 2.714(a)(2) to permit intervention. In accordance with Commission practice, Petitioners are given the opportunity to file amended petitions that may cure the defects that the Board has found.

## II. SCOPE OF PROCEEDINGS

### A. Hearing Notices

#### 1. *Confirmatory Order Modification*

The "Confirmatory Order Modifying License (Effective Immediately)," 55 Fed. Reg. 12,758, 12,759 (Apr. 5, 1990), recites that, consistent with LILCO's agreement not to operate Shoreham, it has completed defueling the reactor and reduced staff. It states that LILCO is proceeding with plans to discontinue maintenance for systems Licensee considers unnecessary to support operations when the reactor is defueled.

The Confirmatory Order asserts that the NRC has determined that the public health and safety require that the Licensee not return fuel to the reactor vessel without prior NRC approval because (1) the reduction in the Licensee's onsite support staff is below that necessary for plant operations; and (2) the absence of NRC-approved procedures for returning to an operational status systems and equipment that the Licensee has decided to deactivate and protect rather than maintain until ultimate disposition of the plant is determined.

It further asserts that on January 12, 1990, LILCO submitted a letter to NRC which stated that it would not place nuclear fuel back into the Shoreham reactor without prior NRC approval.

Staff found the commitment as set forth in the letter to be acceptable and necessary and that, with the commitment, plant safety is reasonably ensured. It further determined that the health and safety require that the commitment be confirmed by the Confirmatory Order.

Pursuant to 10 C.F.R. § 2.204, Staff also determined that the public health and safety require that the Confirmatory Order be effective immediately which was then ordered.

Persons adversely affected by the Confirmatory Order were given the opportunity to request a hearing. The Order defined the hearing issue to be "whether the Confirmatory Order shall be sustained." 55 Fed. Reg. at 12,759.

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reconsideration in *CLI-90-8*. Having considered their responses, we have decided to proceed with the review because the pendency of the request for reconsideration provides no sound reason for suspending review of the petitions.

## 2. Security Plan Amendment

By amendment request filed January 5, 1990, LILCO seeks changes in the Shoreham Security Plan that would result in the reclassification of certain portions of the plant designated as "Vital Areas" or "Vital Equipment." The changes would also eliminate, or modify, certain other safeguards commitments that reflect the reclassification. One of the modifications would be to reduce the security force to be consistent with the objectives of the revised security program.

The *Federal Register* Notice of the requested amendment contained a no significant hazards determination by Staff. Staff found, in support of the no significant hazard determination, that the proposed Security Plan change does not involve a significant increase in the probability, or consequences, of an accident previously evaluated; does not result in any physical changes to the facility affecting a safety system; and does not involve a reduction in any margin of safety. Licensee was offered the opportunity to file a request for hearing, and any person whose interest may be affected by the proceeding could file a written petition for leave to intervene.<sup>2</sup> 55 Fed. Reg. 10,528, 10,540 (Mar. 21, 1990).

## 3. Emergency Preparedness Amendment

In response to a proposed amendment of the Shoreham Emergency Preparedness Plan requested by LILCO, a *Federal Register* Notice containing a Staff proposed no significant hazards determination and an opportunity for hearing was published. 55 Fed. Reg. 12,076 (Mar. 30, 1990).

The amendment would allow the Licensee to cease certain offsite emergency preparedness activities if the reactor were void of all fuel assemblies and the spent fuel, with a burnup of approximately 2 effective full-power days, was stored in the spent fuel storage pool or other approved storage.

Staff found that the proposed amendment would (1) not involve a significant increase in the probability or consequences of an accident previously evaluated; (2) not create the possibility of a new or different kind of an accident from any accident previously evaluated; (3) not involve a significant reduction in a margin of safety.

Licensee was permitted to file a request for a hearing, and any person whose interest may be affected by the proceeding was given the opportunity to file a petition to intervene.<sup>3</sup> 55 Fed. Reg. at 12,076.

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<sup>2</sup> Amendment No. 4 was issued June 14, 1990, changing the Security Plan for a defueled Shoreham.

<sup>3</sup> Amendment No. 6 was issued July 31, 1990, changing the Emergency Preparedness Plan for a defueled Shoreham.

## **B. The Hearing Notice Defines the Scope of the Proceeding**

The Commission follows the rule in licensing matters that the hearing notice published by the Commission for the proceeding defines the scope of the proceeding and binds the licensing board. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

The hearing notices in the three matters before the Board define the scope of the proceedings as follows:

- (1) Should the Confirmatory Order be sustained?
- (2) Should the amendment of the Shoreham Security Plan be sustained?
- (3) Should the amendment of the Shoreham Emergency Preparedness Plan be sustained?

Petitioners, in each of the six petitions filed, state that they view each respective order as one part of the larger proposal to decommission Shoreham. They assert that each step in the decommissioning proposal that moves Shoreham closer to a fully decommissioned state and further away from the full-power operational status is in violation of the Atomic Energy Act of 1954 (AEA), as amended, and NEPA. They take the position that while the issues presented in the petitions directly relate to the respective orders permitting modifications to the Shoreham license, the petitions "necessarily include other unlawfully segmented actions taken and/or proposed by LILCO and the NRC Staff in furtherance of the decommissioning scheme."

Much of the petitions are given over to the issue that the modifications of the Shoreham license are individual actions in the proposal to decommission Shoreham and that injury results from this *inchoate* decommissioning for which standing should be afforded and relief granted.

LILCO and Staff take the position that the issue of decommissioning and its ramifications are beyond the scope of the proceeding and therefore should not be considered.

The Board agrees with the position of LILCO and Staff. A reading of the hearing notices for each of the modifications fails to indicate that any decommissioning of Shoreham, in whole or in part, is at issue in any of them.

The hearing notices are published to afford prospective participants notice of the matters at issue. If the Commission reviewed the modifications as part of any decommissioning of Shoreham, it would have said so. In the absence of any declaration by the Commission in the notices, inferred or expressed, that decommissioning of Shoreham is an issue in the requested hearings, we shall respect the orders and consider decommissioning outside the scope of the proceedings.

The Commission provided additional guidance that the scope of the proceedings did not involve decommissioning in its finding in *CLI-90-8*, cited above. It considered the question as to whether the three actions that are the subject of the hearing requests will prejudice decommissioning.<sup>4</sup> It answered the question by stating "Clearly they do not, because they have no prejudicial effect on *how* decommissioning will be accomplished." 32 NRC at 208 (emphasis in original). The Commission looked upon the modifications of the Shoreham license as not constituting a part of decommissioning because they do not determine how decommissioning is to be performed.

For the reasons given, the Board will not consider any alleged injuries or claims for relief by Petitioners based upon the assertion that the license modifications are part of the decommissioning of Shoreham.

### III. LEGAL REQUIREMENTS FOR INTERVENTION

Section 189(a)(1) of the Atomic Energy Act, which provides for a hearing to any person whose interest may be affected by the amending of a license, is implemented in 10 C.F.R. § 2.714. Section 2.714(a)(1) states that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition . . . to intervene."

Requirements for such petitions are contained in 10 C.F.R. § 2.714(a)(2), which provides:

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

To determine whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has held that a licensing board may apply judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause injury in fact and (b) the injury is arguably within the zone of interests protected by statutes covering the proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). A petitioner should allege, in an NRC proceeding, an injury in

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<sup>4</sup>Section 50.2 of 10 C.F.R. defines decommissioning as follows: "'Decommission' means to remove (as a facility) safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of license."

fact that is within the zone of interests protected by the AEA or NEPA. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983).

In addition, the petitioner must establish (1) that it personally has suffered, or will suffer, a distinct and palpable harm that constitutes an injury in fact; (2) that the injury can be traced to the challenged action; and (3) that the injury is likely to be remedied by a favorable decision granting the relief sought. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); see also *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

For an organization to have standing, it must show injury in fact to its organizational interests or to the interest of members who have authorized it to act for them. If the organization is depending upon injury to the interests of its members to establish standing, the organization must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).

A petitioner may base its standing upon a showing that an organization or its members are within the geographic zone that might be affected by an accidental release of fission products. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). Close proximity under those circumstances has been deemed standing alone, to establish the requisite interest for intervention. In such a case, the petitioner need not show that the concerns are well founded in fact. Distances of as much as 50 miles have been held to fall within the zone. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984).

The Commission does not allow the presumption to be applied to all license amendments. It only does so in those instances involving an obvious potential for offsite consequences. Those include applications for construction permits, operating licenses or significant amendments thereto, such as the expansion of the capacity of a spent fuel pool. Those cases involve the operation of the reactor itself, or major alterations to the facility with a clear potential for offsite consequences. Absent situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332 n.4. Those economic concerns are more properly raised before state economic regulatory

agencies. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2) CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984).

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individual or group in the nuclear regulatory adjudicatory process. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332.

#### IV. CONFIRMATORY ORDER MODIFICATION

##### A. Secure Energy's Position on Intervention

Secure Energy asserts that it meets all criteria for standing. It describes itself as an organization dedicated to correcting misunderstandings on fundamental scientific and technological issues permeating the "national energy debate." Petitioner offers its views, based on the expertise of its members, to the public and to governmental agencies with responsibility for the resolution of energy issues.

Many of its members are said to live, work, and have property interests in the vicinity of the nuclear plant. Secure Energy claims that the organization and its members have a special interest in the radiologically safe and environmentally benign operation of Shoreham to provide them with reliable electricity and to avoid the substitution of fossil fuel plants and their adverse effects, i.e., relying on imported gas and oil which have adverse effects on the physical environment, the trade deficit, and national energy security.

Secure Energy seeks organizational standing asserting, *inter alia*, that the Commission interferes with its informational purposes by its refusal to conduct a NEPA study which deprives the organization of its ability to carry out its organizational purposes.

Secure Energy asserted that it is injured by Staff's refusal to prepare an environmental impact statement on the decommissioning of Shoreham because that deprives Petitioner of the ability to (1) comment directly on the environmental report prepared by LILCO and the Draft Environmental Impact Statement prepared by the Staff; (2) advise its members of the environmental risks involved with each alternative explored by the environmental studies; and (3) report the findings and recommendations based upon the environmental evaluations to the public and political leadership as set forth in Secure Energy's charter.

Petitioner cites in support of its position *Competitive Enterprise Inst., v. National Highway Traffic Safety Admin.*, 901 F.2d 107 (D.C. Cir. 1990), for the proposition that organizational standing is established whenever the agency's

action interferes with the organization's informational purposes to the extent that it interferes with the organization's activities.

Representational standing is sought on the basis of five named individuals with mailing addresses in Shoreham, Port Jefferson, and Westbury, New York. They are said to live and/or work and have property interests within a 50-mile radius of Shoreham and have an interest in whether the Confirmatory Order provides reasonable assurance of their radiological health and safety under AEA and whether the decision on the Confirmatory Order and the larger proposal, of which it is a part, is made in accordance with NEPA.

Members have an interest in obtaining sufficient amounts of electricity at reasonable rates. They are concerned that dismantling Shoreham and building substitute oil- or gas-burning plants will delay any increase in energy production capacity and increase costs which will be passed on to the ratepayers. Secure Energy seeks to protect its members from adverse health consequences that would result from the substitute oil-burning plants.

Secure Energy views the Confirmatory Order Modification as an effort toward *de facto* decommissioning of Shoreham without an approved decommissioning plan, which it alleges is a *per se* violation of the AEA and a direct health and safety violation. It contends that LILCO's efforts to save money by shutting down the operation, eliminating staff, and permanently defueling the reactor endanger the health and safety of its members during the unapproved decommissioning.

Secure Energy further asserts that LILCO has failed to maintain the reactor at a full operational level and that the continuous refusal to abide by the terms of the full-power operating license has severely increased risk to the radiological health and safety of its members. It also states that NEPA mandates that an Environmental Impact Statement be prepared prior to agency decisionmaking on major federal actions significantly affecting the quality of the human environment, such as the *de facto* decommissioning of Shoreham that is taking place.

The specific aspects under NEPA that Secure Energy Security wishes to intervene on are (1) whether the Confirmatory Order is arbitrary, capricious, and/or an abuse of discretion and/or not supported by substantial evidence; (2) whether, if a decision is made to go to full-power operation at Shoreham, the Confirmatory Order gives reasonable assurance that such full-power operation would be conducted with reasonable assurance of protecting the public health and safety and national defense and security; and (3) whether, if a decision is made to decommission Shoreham, the Confirmatory Order gives reasonable assurance that such decommissioning will be conducted in accordance with the public health and safety and the national defense and security.

As to NEPA, Petitioner expects a full environmental review which must address all aspects of what it considers the *de facto* decommissioning of Shoreham.

Petitioner seeks fourteen remedies in the proceeding. The first two involve requesting an order permitting Petitioners' intervention and directing a hearing on the issues presented. The other remedies requested range from requesting an order vacating the Confirmatory Order *pendente lite* to a final decision and order finding that the Confirmatory Order must be permanently vacated. The Executive Director of the organization is a signer of the petition.

#### **B. Staff's Response to Secure Energy's Petition on Confirmatory Order Modification**

Staff submits that the petition fails to demonstrate that the Petitioner's interests will be adversely affected by the Confirmatory Order, or that Secure Energy is entitled to a hearing. It recommends that the petition be denied.

Staff asserts that Secure Energy does not directly identify any impacts that the Confirmatory Order may be expected to have upon its interest. Petitioner is said to be concerned with nonrelevant matters such as full-power operation and the alleged *de facto* decommissioning of Shoreham. Staff asserts that Secure Energy has failed to demonstrate their capacity to represent their members.

It is Staff's position that the Confirmatory Order does not authorize LILCO to take any actions that would affect the public health and safety or in any way alters the present status of the plant. Staff states that the Confirmatory Order merely recognizes that certain actions, already taken by LILCO, could have an adverse impact on public health and safety if the Licensee should later decide to refuel the reactor vessel and the order requires prior NRC approval for such an action. It does not consider this a *de facto* decommissioning of the plant. Staff asserts that it only provides that the plant may not be refueled absent the adoption of approved steps to ensure the protection of the public health and safety.

Staff considers the environmental aspects of Petitioner's concerns to be beyond the scope of any proceeding on the Confirmatory Order. Its asserts that the Confirmatory Order neither permits plant operation, nor forbids it, nor does it constitute part of a decommissioning of the plant. The issue at any hearing to be held has been defined as whether the Confirmatory Order should be sustained.

### **C. LILCO's Response to Secure Energy's Petition on Confirmatory Order Modification**

LILCO's view is that the petition is an attempt to keep Shoreham operating and that, although Secure Energy alleges that the Confirmatory Order results in a violation of law, it does not suggest that there is a significant safety issue associated with the Confirmatory Order. Secure Energy's allegations are said to depend on its view that the Confirmatory Order Modification is part of an eventual decommissioning.

LILCO views Secure Energy as attempting to require Licensee to maintain Shoreham in full readiness to operate regardless of circumstances, unless and until a decommissioning plan meeting all regulations is approved. LILCO states this would prevent the NRC from granting various kinds of relief routinely available to facilities in extended shutdown and inflicts totally avoidable costs on Licensee and its ratepayers. LILCO considers the Secure Energy petition as looking to block implementation of its settlement agreement with the State of New York not to operate the facility.

Licensee asserts that Petitioner seeks to use a hearing on the Confirmatory Order to raise the issue of LILCO's alleged *de facto* decommissioning of Shoreham which is beyond the scope of the proceeding. It also asserts that Secure Energy is attempting to expand the scope of the proceeding to require NRC to take enforcement action against LILCO for supposed violation of the AEA, Commission regulations, and the terms of the Shoreham license because of Shoreham not being maintained in operational readiness.

Licensee claims that Petitioner only feebly connects the Confirmatory Order with the harms that are said to result from LILCO's alleged illegal actions. LILCO questions whether Secure Energy's asserted interest in protecting the health and safety of its members is germane to its organizational interests, which appear primarily educational and informational in nature and are not directed toward advocacy against perceived health and safety threats from any specific nuclear plant.

LILCO claims Petitioner cannot credibly argue that the Confirmatory Order should not be sustained. To do so would in effect be arguing that LILCO should be allowed to place fuel back in the reactor, which would undercut the Secure Energy position. LILCO argues that if the current situation is unsafe as Petitioner argues, refueling the reactor would make it more unsafe.

Licensee also argues that the environmental harms that Petitioner perceives if Shoreham does not operate would not stem from any action by the NRC, much less by the issuance of the Confirmatory Order. LILCO asserts that the Confirmatory Order is not the reason that Shoreham will not operate. It is solely a matter of a LILCO decision.

LILCO requests that the petition for leave to intervene, and requests for hearing, should be denied.

#### **D. School District's Petition on the Confirmatory Order**

The School District petition differs from that of Secure Energy insofar as the description of the Petitioner including its organizational purpose, whom it seeks to represent, and the nature of their interest.

School District alleges that it seeks intervention in order to protect the interests of School District, its students, and employees.

The School District is reported to be about 12 square miles in size, with the Shoreham facility located within its boundaries. Petitioner asserts that it is located within the 50-mile limitation used by the Commission to determine whether an intervenor expressing contentions under the health and safety provisions of the Atomic Energy Act has an interest sufficient to allow intervention.

Petitioner depends on LILCO to meet the energy needs of its physical plant which includes five schools. School District's stated interest is to ensure an adequate supply of electricity at reasonable rates. In its view, any actions to dismantle the facility, and to build substitute oil-burning plants, will harm the region's electric energy production capacity and increase rates. Another economic interest of the School District is that the property taxes paid by LILCO for Shoreham constitute approximately 90% of School District's tax base.

School District also claims that it has an interest in protecting the health and environment of almost 2000 students and 500 employees who live and/or work in close proximity to the Shoreham facility, from the radiological impacts of the Confirmatory Order and the adverse health and other environmental consequences of non-operation of Shoreham. These are said to be air pollution produced by substitute oil and gas plants. The harm is said to be cognizable under NEPA. It seeks representational status for the President of the Board of Education who resides in Wading River, New York. The petition was signed by the Superintendent of Schools of School District.

#### **E. Staff's and LILCO's Responses to School District's Petition**

Staff filed a single response to the petitions of Secure Energy and School District, and there is no distinction made as to the two petitions.

LILCO, in response to the School District petition, asserted that it was not immediately apparent that an entity whose primary purpose is the operation of facilities for the education of schoolchildren has an organizational interest in protecting persons from the adverse radiological and environmental impacts stemming from the non-operation of a nuclear plant. It claimed that School

District's only real interest is an economic one, which is inadequate to establish standing.

#### F. Board's Ruling on Secure Energy's Petition on Confirmatory Order Modification

The Board finds that Secure Energy has failed to satisfy the requirements of 10 C.F.R. § 2.714(a)(2) to establish standing.

Secure Energy, as an organization, has not established that it will suffer a distinct and palpable harm that constitutes an injury in fact. Its organizational interest is educational and informational in nature on the subject of the "national energy debate." Although it may view the Confirmatory Order Modification as being in conflict with its views, this fact does not constitute a distinct and palpable harm that satisfies the interest requirement for intervention.

Secure Energy's organizational status is not unlike that of a petitioner whose "interests lie in the development of economical energy resources, including nuclear, which have the effect of strengthening the economy and increasing the standard of living." The Commission found that such broad public interest does not establish the particularized interest necessary for participation by a group in agency adjudicatory processes. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332. *See also Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), where the Supreme Court said that "a mere interest in a problem no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the APA."

Another defect in the Secure Energy petition is that it has failed to identify any injury that can be traced to the challenged action. *Dellums v. NRC*, *supra*, 863 F.2d at 971.

The action that can be challenged in the Confirmatory Order Modification proceeding is whether the agency was correct in determining that the public health and safety require that the Licensee not return fuel to the reactor vessel without prior NRC approval. Secure Energy did not identify any injury stemming from this determination.

The cause of Secure Energy's alleged injury is stated by Petitioner to result from the Commission permitting the *de facto* decommissioning of Shoreham which also involves the agency's failure to require LILCO to maintain a full-power operational status under the Shoreham full-power license. This alleged *de facto* decommissioning is said by Petitioner to be violative of AEA and NEPA. The Confirmatory Order Modification is never treated by Secure Energy to be more than incidental to the action cited as the proximate cause of Petitioner's injury.

As discussed previously, under section II.B, the matter of the alleged *de facto* decommissioning of Shoreham and what it is said to entail is beyond the scope of this proceeding. This places Secure Energy in the position of having failed to link the subject challenged action to any resulting injury.

Petitioner's reliance on *Competitive Enterprise Inst., supra*, does not bolster Secure Energy's case. The Court held that "[a]llegations of injury to an organization's ability to disseminate information may be deemed sufficiently particularized for study purposes where that information is essential to the injured organization's activities." Furthermore, "to sustain informational standing, organizations must point to concrete ways in which their programmatic activities have been harmed." They must show how the lack of an assessment has significantly harmed their ability to educate and inform the public about a zone of interest protected by NEPA whose purpose is to protect the environment.

Secure Energy has not made the necessary showing. Its focus has been on decommissioning and restart, two matters not at issue in this proceeding. Petitioner has not shown how, in a concrete way, the lack of an environmental assessment of the Confirmatory Order Modification would injure its ability to disseminate information that is essential to its programmatic status and is in the zone of interest protected by NEPA.

As to representational standing, Secure Energy has not stated that its organizational purpose provides authority to represent members in adjudicatory proceedings such as this one. Even if this can be inferred from the fact that its Executive Director is a signator to the Petition, Secure Energy has not satisfied the requirements for representational standing.

Petitioner states that the five members whom it seeks to represent have authorized it to do so. Their interests were not broken down individually but were stated collectively by Petitioner.

For an organization to rely upon injury to the interests of its members, it must provide, with its petition, identification of at least one of the persons it seeks to represent, a description of the nature of injury to the person, and demonstrate that the person to be represented has in fact authorized such representation. *Limerick, LBP-82-43A, supra*, 15 NRC at 1437. No supporting statement containing that information was submitted from any member sought to be represented, as is required.

Although the members are said to live and/or work and have property interests within a 50-mile radius of Shoreham, this does not create a presumption of standing because it is not a proceeding for a construction permit, an operating license, or a significant amendment that would involve an obvious potential for offsite consequences. *St. Lucie, CLI-89-21, supra*.

Shoreham is a defueled nuclear power plant that has not been used commercially. To satisfy standing requirements, it would have to be shown by Secure Energy that a member's particularized injury in fact results from the

Confirmatory Order which requires that LILCO not refuel Shoreham without prior NRC approval. Petitioner has failed to make this showing.

Member interest, in part, is described as obtaining sufficient amounts of electricity at reasonable rates. It is very well settled in Commission practice that a ratepayer's interest does not confer standing in NRC licensing proceeding.

As to Secure Energy wanting to protect its members from adverse health consequences that would result from substitute oil-burning plants, there was no nexus shown between the Confirmatory Order and the alleged resultant construction of substitute oil-burning plants and the harm that would be created. Absent such connection, no purpose would be served in discussing whether construction of oil-burning plants is a cognizable harm that the Commission can overcome.

Secure Energy has not established the requisite interest for standing, organizationally or representationally.

As to the specific aspects on which Petitioner seeks to intervene, the one relating to whether the Confirmatory Order is supported by substantial evidence, is relevant. Those alleged aspects that relate to decommissioning and operating Shoreham at full power are not issues in this proceeding and are therefore irrelevant.

#### **G. Board's Ruling on School District's Petition on Confirmatory Order Modification**

The Board finds that School District has failed to satisfy the requirements of 10 C.F.R. § 2.714(a)(2) to establish standing.

School District's organizational interest is that of a ratepayer and a tax recipient. These are economic concerns which are outside of the Commission's jurisdiction. The Commission has no regulatory responsibility for rates and tax distribution. They do not confer standing in NRC licensing proceedings and therefore School District has no basis for organizational standing.

As to its representational standing, School District wishes to protect the health and environment of its employees, one of whom has been identified as the President of the Board of Education. No supporting statement was received stating that the person had in fact authorized such representation. Such a statement is required before representational standing can be granted.

Again, the fact that the individual may reside and work in close proximity to the nuclear facility does not create a presumption of standing. There is no obvious potential for offsite consequences where the action complained of requires that the Licensee not refuel a defueled reactor without prior NRC approval.

The School District's petition fails to particularize any injury that it traces to the Confirmatory Order. Although the School District claims that it wants to

protect the health and safety of employees from the radiological impacts of the Confirmatory Order, it does not identify what those radiological impacts are. This is a defect in its claim for representational standing.

As for its claim to want to protect its employees from alleged adverse health and other environmental consequences of non-operation of Shoreham, it is beyond the scope of the proceeding and cannot provide a basis for standing. Non-operation of Shoreham is not at issue.

School District has failed to establish the requisite interest for standing organizationally or representationally.

The Board similarly rules on School District's specific aspects and request for relief as it did for Secure Energy for the reasons given.

## **V. SECURITY PLAN AMENDMENT**

### **A. Secure Energy's Position on Intervention**

Secure Energy's "Petition to Intervene and Request for Hearing," dated April 20, 1990, fundamentally is a repeat of its petition to intervene on the Confirmatory Order Modification. To avoid repetition, we will discuss the petition to intervene on the Security Plan Amendment to the extent that it differs from that previously considered and decided.

Petitioner asserts that the proposed reduction in physical security of vital plant systems, with a reduction in onsite security personnel, would unacceptably increase the risk of radiological sabotage and hence adversely affect the radiological health and safety of Petitioner, its employees, and their property. Secure Energy also claims that the action interferes with the organization's informational purposes.

Petitioner asserts that to reclassify equipment and areas deemed vital for Shoreham as not vital would deprive that equipment and those areas of the degree of physical security that was deemed essential for protection against radiological sabotage in the granting of Shoreham's full-power operating license. Secure Energy states that such increased vulnerability to radiological sabotage, by definition, would significantly increase the risk of such sabotage and, hence, unavoidably and significantly increases the direct and/or indirect endangerment of Petitioner members' radiological health and safety.

Secure Energy claims that the increased risk of sabotage and risk to the Shoreham equipment constitute adverse environmental impacts and would increase the risk that the choice of reasonable alternatives under NEPA would be limited.

Specific aspects on which Secure Energy seeks intervention under the AEA include whether the Settlement Agreement prohibits further operation of the Shoreham facility and matters relating to LILCO's compliance with its Shoreham

full-power operating license. Another issue raised is whether NRC should take action on increasing physical security requirements at Shoreham because of an October 16, 1989 License Event Report stating that two whiskey bottles were found inside the protected area.

An aspect that Secure Energy wants considered under NEPA is its allegation that the change in the physical security plan is another step in the decommissioning process and that, before this step can be taken, there be an environmental evaluation of the decommissioning plan as a whole. It also raises as an aspect the obligation of LILCO to conform to its full-power operating license and the imposition of remedial measures to accomplish it.

## **B. Staff's and LILCO's Responses to Secure Energy's Petition on Security Plan Amendment**

Staff's response to the new matters introduced by Secure Energy in its petition on the Security Plan Amendment is as follows:

Staff claims that Petitioner has failed to set forth with particularity how the proposed amendment could have any adverse impacts upon its interests. Petitioner asserts that Staff had determined that despite the proposed changes to the physical security plan, the plan will continue to have a level of protection that is adequate to meet a test of radiological sabotage. Petitioner has failed to confront this determination, in terms of demonstrating with particularity, that the proposed reductions in physical security could adversely affect its interests. Staff states that Petitioner's bare allegation of adverse impacts is simply insufficient to afford it standing to participate in a proceeding on the application.

Staff asserts that many of the purported aspects that Secure Energy seeks to participate in are beyond the scope of any proceeding on the proposed amendment.

LILCO filed a single response to Secure Energy's petitions for intervention on the Confirmatory Order Modification and the Security Plan Amendment. It answered the new material in the petition to intervene on the Security Plan Amendment as follows.

LILCO states that its security plan was better than that required by regulation and that the plan's relative effectiveness in the context of a non-operative and defueled reactor was not affected by the revision which meets NRC regulation.

LILCO claims that the amended security plan will still be in compliance with applicable NRC requirements. Licensee asserts that Staff has made such a finding and that Petitioner's bare allegation, that the proposed amendment is not in compliance with the AEA and implementing regulations and that there is a lack of reasonable assurance of the protection of health and safety and the national defense and security, merely begs the question.

Licensee further claims that Petitioner's generalized allegation of harm is insufficient. It states that a conclusory assertion of danger is totally inadequate to establish any injury in fact. This is said to be particularly true since Shoreham is not operating and is in a defueled configuration.

LILCO also argues that under NEPA implementing regulations, NRC need not perform an environmental review before approving the amendment. It cites 10 C.F.R. §§ 51.14(a) and 51.22 which set forth categorically excluded actions. Specifically listed under 10 C.F.R. § 51.22(c)(12) is the

[i]ssuance of an amendment to a license pursuant to Parts 50 . . . of this chapter relating solely to safeguards matters (i.e., protection against sabotage or loss or diversion of special nuclear material) or issuance of an approval of a safeguards plan submitted pursuant to Parts 50, 70, 72, and 73 of this chapter, provided that the amendment or approval does not involve any significant construction impacts. These amendments and approvals are confined to (i) organizational and procedural matters, (ii) modifications to systems used for security and/or materials accountability, (iii) administrative changes, and (iv) review and approval of transportation routes pursuant to 10 CFR 73.37.

Licensee asserts that its proposed amendment to the physical security plan is of an organizational and procedural nature, and that the NRC need not perform an environmental review before approving the amendment.

### **C. School District's Petition on Security Plan Amendment**

School District's petition to intervene on the Security Plan Amendment, like that of Secure Energy, fundamentally repeats its petition to intervene on the Confirmatory Order Modification and is virtually identical to Secure Energy's petition on the Security Plan Amendment.

No purpose would be served in repeating the positions taken by the Petitioner that have already been decided in regard to the Confirmatory Order Modification or again restating the new material that Secure Energy has presented in its petition on the Security Plan Amendment which School District reiterates.

A new matter that the School District's petition raises is that the organization seeks to represent the interest of the Superintendent of Schools of the School District, who resides in Centerport, New York. This differs from its Confirmatory Order Modification petition in which it seeks to represent the interest of the President of the School District's Board of Education.

### **D. Staff and LILCO's Responses to School Board's Petition on Confirmatory Order Modification**

Staff and LILCO treated the School Board's and Secure Energy's petitions as identical and did not submit a different response to the School Board's petition.

## **E. Board's Ruling on Secure Energy and School Board's Petitions on Security Plan Amendment**

As with the petitions on the Confirmatory Order Modification, which the subject petitions essentially duplicate, Secure Energy and School District have failed to satisfy the requirements of 10 C.F.R. § 2.714(a)(2) to establish standing.

For the reasons stated under section IV.F, Secure Energy has not established that it is entitled to organizational standing because it has not shown itself to have suffered an injury in fact recognized in law. It has not established how, in a concrete way, the lack of an environmental assessment on the Security Plan Amendment would injure its ability to disseminate information that is essential to its programmatic activities and is in the zone of interest protected by NEPA.

As to representational standing, it has not submitted the supporting statement required for such representation, as specified in Limerick, LBP-82-43A, *supra*, 15 NRC at 1437. The petition is therefore deficient.

Furthermore, Secure Energy has the burden of showing that a member's particularized injury in fact results from the Security Plan Amendment. Secure Energy has failed in this requirement.

Secure Energy's claims of injury are alleged to emanate from the *de facto* decommissioning of Shoreham and LILCO's failure to maintain a full-power operational status under the Shoreham full-power license. As previously discussed, those are not the issues in this proceeding. The issue in this proceeding is the Security Plan Amendment for a defueled plant and its ramifications. There was no nexus shown between Secure Energy's alleged adverse health consequences to its members that are said would result from the construction of substitute oil-burning plants and the changes in Shoreham's security plan. No meritorious claim of possible injury in that area was presented.

Similarly, Secure Energy has not otherwise established that any of its members will suffer a distinct and palpable harm constituting an injury in fact resulting from the amendment to the security plan.

Petitioner's assertion, that to reclassify as not vital, equipment and areas deemed vital to Shoreham under its full-power operating license would deprive the equipment and areas of physical security, which in turn would increase vulnerability to radiological sabotage and the risk of such sabotage and result in an increase in danger to members' radiological health and safety, does not satisfy the requirements of showing a particularized injury in fact.

That which Petitioner has presented is an abstract argument that is unconnected to the legal and factual issues in the proceeding. The issue in this proceeding is whether the security changes for a defueled plant that has never been in commercial operation can result in harm. This issue was never addressed by Petitioner.

Furthermore, there is no factual predicate to Petitioner's claim of increased risk to members' radiological health and safety. Secure Energy arrives at its claim of increased radiological health and safety risk by building inference on inference which does not result in a supportable conclusion.

There was no information provided to show that the changes in the security plan for a defueled plant that was never in commercial operation will result in increased vulnerability to sabotage or the risk of such sabotage. Even if it were shown that there were such increased vulnerability and risk of sabotage, there was no showing that it could result in radiological harm. How would the sabotage translate into radiological harm? For example, would the theft of spent fuel with a burnup of approximately 2 effective full-power days or its destruction in storage result in radiological harm to offsite members?

Secure Energy had the burden of providing such information, which it failed to do. The Commission has held that absent situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken. *St. Lucie*, CLI-89-21, *supra*, 30 NRC at 329.

Whether the changes in the security plan are categorically excluded from an environmental review as LILCO contends cannot be decided by the Board at this time. Insufficient information was provided to the Board to make that determination.

Secure Energy has not established the requisite interest for standing, organizationally or representationally.

The aspects of the subject matter of the proceeding as to which Petitioner wishes to intervene relate to Secure Energy's allegations of decommissioning of Shoreham, the failure of LILCO to operate the facility at full power, or the need for increasing security requirements, none of which are issues in this proceeding.

Petitioner has failed to establish standing.

School District's petition on the Security Plan Amendment is virtually identical to that of Secure Energy except as to organizational purpose and does not differ in any material respect. We make the same rulings on the School District's petition as we did on Secure Energy's. Petitioner has also failed to establish standing.

## VI. EMERGENCY PLAN AMENDMENT

### A. Secure Energy's Position on Intervention

The subject amendment would release LILCO from complying with five licensing conditions on offsite emergency preparedness if (1) the reactor is void of all fuel assemblies; and (2) the spent fuel, with a burnup of approximately

2 effective full-power days, is stored in the spent fuel storage pool or other approved storage configuration.

The five licensing conditions in LILCO's full-power operating license NPF-82 require LILCO to shutdown Shoreham at least 24 hours prior to commencement of a strike by its workers, 2.C(9); place Shoreham into shutdown in the event of a hurricane in the Long Island area, 2.C(10); modify its offsite emergency plan so as to provide that a knowledgeable LERO<sup>5</sup> representative will be sent to the Suffolk County Emergency Operations Center (EOC) upon the declaration of an alert or higher Emergency Classification Level (ECL), 2.C(11); have a trained person available 24 hours a day, whenever Shoreham is operating above 5% rated power, to expedite conversion of LILCO's Brentwood facility into a LERO EOC upon declaration of an alert or higher ECL, 2.C(12); and conduct quarterly training drills, with full or partial participation by LERO, 2.C(13).

In its petition, Secure Energy again repeats what is contained in its two petitions that we previously reviewed. There is no need to repeat those matters here.

New material presented is Petitioner's claim that the amendment would allow the cessation of certain emergency planning activities including required exercises or drills. It asserts that such cessation of practice would greatly reduce the effectiveness of LERO "and thus greatly delay and prejudice LILCO to return to full power operation with the same degree of reasonable assurance of the public health and safety offered by the regular practice and training currently required." It states that such vulnerability to radiological harm significantly increases the risk of such harm and, hence, unavoidably increases the threat to members' radiological health and safety. Secure Energy also alleges that these increased risks of radiological harm also constitute adverse environmental impacts and would also increase the risk that the choice of reasonable alternatives would be limited.

Again, most of the specific aspects of the subject matter that Petitioner seeks to intervene on deal with full-power operations and LILCO's obligation to adhere to the Shoreham full-power license, both of which are not relevant to this proceeding. It also raises the questions of whether the Emergency Plan Amendment should not be heard with the Security Plan Amendment; whether Federal Emergency Management Agency findings are required on the subject issue; and whether the license amendment, which permits discontinuance of quarterly drills, involves a significant reduction in the margin of safety and increase the probability of radiological harm.

In addition to making its previous arguments on NEPA aspects, based on the contention that this is but a step in a *de facto* decommissioning, Secure

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<sup>5</sup>LERO is an organization created by LILCO and staffed by some 3,000 of its own employees and contractors in order to provide an offsite emergency response capability that is adequate to meet the regulatory standards.

Energy raises the matter of whether an environmental assessment is required if, assuming *arguendo*, the Emergency Plan Amendment is a discrete action. Secure Energy asserts that the proposed action is not among those listed in 10 C.F.R. § 51.20(b) that require preparation of an Environmental Impact Statement nor is it listed in 10 C.F.R. § 51.22(c) or (d) which provides for categorical exclusions and other actions not requiring environmental review. It claims that then under 10 C.F.R. § 51.21, an environmental assessment is required. It states that the environmental assessment will provide a basis for discussion of whether the proposed action merits preparation of an Environmental Impact Statement or a finding of no significant impact.

## **B. Staff's and LILCO's Responses to Secure Energy's Petition on Emergency Plan Amendment**

Staff responds to new matters introduced by Secure Energy as follows:

Staff asserts that the amendment would only be effective while the plant is in a defueled condition and that Petitioner has failed to show that any injury might result from the reduced level of emergency preparedness which would exist while the plant is in this position. It claims that Petitioner does not contend that it would be endangered by granting the subject amendment, which would only suspend emergency planning activities while the plant remains in a defueled condition. Staff asserts that Petitioner's claim is only concerned with lessened emergency preparedness at such time that the Licensee seeks to began full-power operation. Staff states that under these circumstances, Petitioner has failed to set forth "with particularity" how the proposed amendment could adversely affect its interests.

Staff alleges that Petitioner's list of specific aspects are more related to decommissioning and are beyond the scope of a proceeding on the proposed amendment.

LILCO alleges that Petitioner does not confine itself to the Emergency Plan Amendment but extends itself to a request by Licensee for an exemption under 10 C.F.R. § 50.12 whereby LILCO would cease offsite emergency preparedness activities and disband LERO. It cites Petitioner's claim that the "proposed license amendment . . . effectively eliminates the offsite Emergency Response Plan and disperses the organization which is charged with implementation of that Plan . . . ."

Licensee asserts that Secure Energy never confronts the fact that Shoreham is shut down and defueled and that no credible accident requiring an offsite emergency response can occur. It claims that Petitioner's assertions are legalistic rather than factual and that no showing was made of a connection between the amendment and any specific injury.

### **C. School District's Petition on Emergency Plan Amendment and Staff's and LILCO's Responses**

The School District's petition on the Emergency Plan Amendment does not differ in any significant way from that of Secure Energy, except as to organizational purpose. Staff and LILCO each filed single responses to both petitions and made no distinction between the petitions.

### **D. Board's Ruling on Secure Energy and School Board's Petitions on Emergency Plan Amendment**

As with the other petitions, which they essentially duplicate, the Secure Energy and School District petitions on the Emergency Plan Amendment fail to satisfy the requirements of 10 C.F.R. § 2.714(a)(2) to establish standing.

Secure Energy has not established that it is entitled to organizational standing because it has not shown itself to have suffered an injury in fact recognized in law. This matter was fully discussed under section IV.F on the Confirmatory Order Modification.

As to representational standing, Secure Energy has not submitted the supporting statement required for such representation, as discussed in *Limerick*. Like its other two petitions, this petition is similarly deficient.

Again, Secure Energy's claims of injury are alleged to emanate from the *de facto* decommissioning of Shoreham and LILCO's failure to maintain a full-power operational status under the Shoreham full-power license. They are matters not at issue in this proceeding. At issue is the Emergency Plan Amendment which releases LILCO from complying with five emergency planning license conditions when the reactor is void of all fuel assemblies and the spent fuel, which had limited use, is stored in the spent fuel pool or in other approved storage.

Secure Energy's claims of injury are unconnected with this situation which is a condition precedent to the lifting of the license conditions.

Secure Energy's claims of injury are not organizationally and representationally related in any way to a plant that will be defueled and will have its spent fuel in storage before any of the conditions can be removed. No particularized injury was identified that can be traced to the challenged action.

Again, Petitioner presented an abstract argument that is unconnected with the legal and factual issues in the proceeding. Secure Energy complains that the amendment will reduce the effectiveness of LERO and will cause delay in returning LILCO to full-power operation. Full-power operation is not at issue. How effective does LERO have to be for a defueled plant and what radiological consequences can be expected from a less effective LERO when the facility

is defueled and not operating? These critical questions are not addressed by Secure Energy although it is its responsibility to do so if it is to obtain standing.

There was no credible showing that the amendment would increase the risk of radiological harm to members' health and safety. There was no factual basis offered to support the bare argument.

Because Petitioner's claim of injury is premised on the erroneous belief that the issues in the proceeding are the decommissioning of Shoreham and Licensee's failure to maintain its operational status at full power as authorized by its license, which are not at issue, it has failed to show an injury in fact to itself or to its members that is protected by the AEA or NEPA.

LILCO's claim that Petitioners erroneously extended the scope of the proceeding to include a separate request by LILCO to cease all offsite emergency preparedness activities is not a significant matter. We agree that the 10 C.F.R. § 50.54(q) exemption request by LILCO which would allow it to cease its off-site emergency preparedness activities is not within the scope of this matter. However, Security's basic claim is that the amendment will render LERO less effective. That is the issue the Board has considered.

Those specific aspects of the subject matter of the proceeding as to which Petitioner seeks to intervene include matters in issue as well as those that are outside the scope of the proceeding. The latter include those dealing with *de facto* decommissioning and requiring LILCO to operate at full power. Certainly, whether the license amendment which permits discontinuance of quarterly drills involves a significant reduction in the margin of safety and increases the probability of radiological harm would be a valid subject of a hearing.

Security Energy has provided no authority to support the issue it raises as to whether Federal Emergency Management Agency findings are required on the issue. Section 50.47 of 10 C.F.R. calls for such agency findings prior to issuing an operating license for a nuclear power reactor. That is not the nature of this proceeding.

At this time, there is no basis to consider on hearing the Emergency Plan Amendment with the Security Plan Amendment. No standing has been established by Secure Energy in either proceeding.

If a hearing were granted, the aspect that Petitioner would participate in, whether under 10 C.F.R. § 51.21 an environmental assessment is required of the proposed amendment, appears to be a matter at issue.

For the reasons given, Secure Energy has not established the requisite interest for standing, organizationally or representationally.

School District's petition on the Emergency Plan Amendment is virtually identical to that of Secure Energy. We make the same rulings as to both petitions. Petitioner also has failed to establish standing.

## V. CONCLUSION

The Board having reviewed each "Petition to Intervene and Request for Hearing" has determined that Petitioners have failed to establish standing in each of the three matters, as required by 10 C.F.R. § 2.714(a)(2). Also, in the case of the Security Plan Amendment, they have not identified a specific aspect relevant to the subject matter of the proceeding, as provided for in section 2.714(a)(2). The deficiencies that have been found to exist have been discussed in detail in this Memorandum.

Petitioners have basically predicated their cases on the claim that these matters are part of the *de facto* decommissioning of Shoreham and are concerned about resumed operation of the facility.

The Commission's ruling in *CLI-90-8* did not find Petitioners' position to be meritorious. The Commission found that resumed operation of Shoreham is not to be considered as an alternative in an environmental review of decommissioning under NEPA. It further found that the license changes that we are to consider do not foreclose any NEPA alternative that must be considered in that assessment. The three license changes now before this Board are not an impermissible segmentation of any decision to decommission. The Commission's decision stripped away Petitioners' main arguments for standing.

Petitioners did not have the benefit of the Commission's precedential decision on decommissioning in *CLI-90-8* at the time that they filed their various petitions to intervene. Their petitions focused on matters that the Commission subsequently determined to be beyond the scope of consideration under NEPA in any proceeding on reactor decommissioning. The Board concludes that because of these circumstances Petitioners should be afforded the opportunity to amend their petitions to intervene to take into account the recent Commission decision and the deficiencies in their petitions that are specified in this order.

This conclusion is predicated in part on the Commission being rather liberal in permitting petitioners the opportunity to cure defective petitions to intervene. It has done so on the bases that, "the participation of intervenors in licensing proceedings can furnish valuable assistance to the adjudicatory process." *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973).

### Order

Based upon all of the foregoing, Petitioners are afforded the opportunity to amend their petitions to cure the defects found by the Board.

Amended petitions are required to be filed within twenty (20) days after service of this Order. LILCO shall file its response within ten (10) days of

service of the amended petitions, and Staff shall have an additional five (5) days within which to respond.

**FOR THE ATOMIC SAFETY  
AND LICENSING BOARD**

**Morton B. Margulies, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
January 8, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman  
Dr. Charles N. Kelber  
Dr. David R. Schink

In the Matter of

Docket Nos. 50-250-OLA-6  
50-251-OLA-6  
(ASLBP No. 91-625-02-OLA-6)  
(Emergency Power  
System Enhancement)

FLORIDA POWER AND LIGHT  
COMPANY  
(Turkey Point Nuclear Generating  
Plant, Units 3 and 4)

January 23, 1991\*

The Licensing Board denies a petition to intervene because Petitioner failed to demonstrate that he resides and/or works in the vicinity of the plant in question and thus has standing.

**RULES OF PRACTICE: INTERVENTION**

Section 2.714(a) of 10 C.F.R. requires that a petitioner state his or her interest with particularity and how that interest may be affected by the proceeding. Judicial concepts of standing are applicable.

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\*Reserved January 25, 1991.

## **RULES OF PRACTICE: INTERVENTION**

As a general proposition, a person whose base of normal, everyday activities is within 25 miles of the site can fairly be presumed to have an interest which might be affected by reactor construction and/or operation, thus satisfying the "injury in fact" test. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

## **RULES OF PRACTICE: INTERVENTION**

The burden rests with the petitioner to demonstrate that he or she satisfies the requirements of 10 C.F.R. § 2.714(a). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

## **MEMORANDUM AND ORDER** **(Ruling on Petition to Intervene)**

In July and September, 1990, Florida Power and Light Company (FPL) proposed a number of design changes for its Turkey Point Plant located in Dade County, Florida. These changes, part of its Emergency Power System enhancement project, would add two emergency diesel generators, two battery chargers, a battery bank, and associated support and electrical distribution equipment. FPL also seeks permission to modify the Technical Specifications to reflect these changes.

Following receipt of FPL's application, the Commission's Staff published a notice indicating that this application was under consideration.<sup>1</sup> This notice offered an opportunity for interested persons to petition for a hearing with regard to these changes. Thomas J. Saporito, Jr., filed a timely request for hearing and petition for leave to intervene in response to the notice.<sup>2</sup> Both FPL and Staff oppose the petition on the ground that Mr. Saporito has not demonstrated that he has standing to intervene.

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<sup>1</sup> See 55 Fed. Reg. 39,331 (Sept. 26, 1990). The Notice also indicated that the Commission proposed making a "no significant hazards" determination under 10 C.F.R. § 50.92 which, pursuant to 10 C.F.R. § 50.91(a)(4), would permit the issuance of the license amendment requested by FPL in advance of the completion of any hearing held as a result of a request filed in response to the Notice. On December 28, 1990, the Commission issued the requested amendment.

<sup>2</sup> The Nuclear Energy Accountability Project (NEAP) was also included with Mr. Saporito as a Petitioner, but subsequently moved to withdraw its petition. The motion represented that NEAP would be dissolved on December 31, 1990. This motion was granted on December 12. Consequently, NEAP's petition is not further considered in this Memorandum and Order.

The Commission's requirements with regard to standing are set out in 10 C.F.R. §2.714(a). This provision requires that a petitioner state his or her interest with particularity, how that interest may be affected by the proceeding, and why he or she should be permitted to intervene. The Commission has held that judicial concepts of standing are to be utilized in its proceedings. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Thus, in order to be successful, a petitioner must allege an injury in fact to his or her interests and that that injury is within the zone of interests protected by an applicable statute. It is well settled that "as a general proposition, a person whose base of normal, everyday activities is within 25 miles of the site can fairly be presumed to have an interest which *might* be affected by reactor construction and/or operation," thus satisfying the "injury on fact" test. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974) (emphasis in original). In *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989), the Commission affirmed this proposition, noted that living within a specific distance from the plant would confer standing on individuals in proceedings on major amendments to a power plant license. The Commission has held that the burden rests with the petitioner to demonstrate that he or she satisfies the requirements of 10 C.F.R. §2.714(a). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

Mr. Saporito's petition recites that he

lives and works in and about the City of Miami, Florida as the Executive Director of NEAP and as a self-employed individual with the Airflow Service Corporation. The interests of Mr. Saporito could be adversely affected if a serious nuclear accident occurred at the Turkey Point nuclear plant as a direct or indirect result of the [granting of the license amendment under consideration].<sup>3</sup>

The petition makes no other representations with regard to the standing of Mr. Saporito to request a hearing and to intervene in the proceeding.

FPL asserts that the meaning of the quoted statement is unclear. It notes that the statement that Mr. Saporito works for NEAP and Airflow Service Corp. "in and about" Miami does not address the extent to which his work occurs in Miami as opposed to some other place.<sup>4</sup> Moreover, FPL notes that recently it was brought out in Mr. Saporito's deposition taken in connection with an unrelated proceeding before the Department of Labor that, in the course of its 3-year existence, Airflow Service had generated revenues of about \$600-\$700. Thus this work could not be extensive.

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<sup>3</sup> Petition at 2.

<sup>4</sup> Assuming that NEAP has now been dissolved, work for that organization would no longer exist.

Further, FPL notes that the representation that Mr. Saporito lives in Miami does not exclude other places of abode. It observes that in a related Commission proceeding concerning the Turkey Point Plant (the OLA-5 proceeding), a brief filed on Mr. Saporito's behalf on September 5 stated that his residence was in Jupiter.<sup>5</sup>

Following submission of its response to the petition, FPL brought to the Board's attention the fact that it had received two change-of-address notices from Mr. Saporito. The first of these, received on November 29, indicated that Mr. Saporito's mailing address was changed to 8135 S.W. 62nd Place, Miami, Florida 33143. FPL represents that this notice recited that it became effective in July and notes that if this is so, it conflicts with Mr. Saporito's sworn testimony given in August in the Department of Labor proceeding to the effect that his address was in Jupiter, Florida. The second, received on December 2, stated that the mailing address was changed to P.O. Box 129, Jupiter, Florida 33468-0129.<sup>6</sup> FPL notes that the apparent inconsistency in Mr. Saporito's representations raises serious questions concerning the location of his abode.<sup>7</sup>

Staff also asserts that Mr. Saporito has failed to demonstrate that he has standing, noting that he has given insufficient information concerning both his residence and employment. Staff notes that Mr. Saporito did not state in his petition where he resides in Miami. Nor did he provide sufficient elaboration of the extent of his work activities in that city.<sup>8</sup>

On December 5, we afforded Mr. Saporito an opportunity to respond to the answers filed by FPL and Staff, including FPL's response to the notices of change of address. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979). On December 26, Mr. Saporito filed his reply. Although that reply stated that he had been directed to respond both to the answers opposing his petition and to FPL's comments prompted by the notices of change of address, Mr. Saporito addressed only the latter.<sup>9</sup> The substance of Mr. Saporito's reply is:

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<sup>5</sup> Mr. Saporito does not question FPL's and Staff's assertion that Jupiter is too remote from the Turkey Point Station to support standing. See Staff's Answer at 8; FPL's Answer at 8. In its response, FPL notes that Mr. Saporito represented that Jupiter is about 83 miles from the Turkey Point Station in an amended petition filed in the related "OLA-5" proceeding.

<sup>6</sup> The motion to withdraw NEAP's petition, filed on December 8, indicated that Mr. Saporito's mailing address was 8135 S.W. 62nd Place, S. Miami, Florida 33143.

<sup>7</sup> See FPL's November 9 Response to Petition at 11-14, and its response to the notices of change of address of December 5. FPL also takes the position that Mr. Saporito has not stated an admissible contention.

<sup>8</sup> Staff's November 14 Response to Petition at 8-9. Staff also takes the position that Mr. Saporito has failed to state an admissible contention.

<sup>9</sup> The reply noted in passing that FPL's answer to the petition had also suggested that there was some inconsistency between the representations made in this proceeding and in the Department of Labor's proceeding.

Mr. Saporito's mailing address remained at 1202 Sioux Street, Jupiter, Florida at that time and did not change until some time after July 1990 and well before the time that Petitioner filed a Request for Hearing and Leave to Intervene in this proceeding.<sup>10</sup>

Mr. Saporito addresses none of the other arguments raised by FPL and Staff.

Here some doubt exists as to where Mr. Saporito lives. The petition recites that he "lives and works in and about the City of Miami," but indicated an address in Jupiter, Florida, as did a brief filed on his behalf in the OLA-5 proceeding on September 5. A notice of a change of Mr. Saporito's mailing address received by FPL on November 29 and effective in July 1990, indicated that mail was to be send to him at a Miami address. This was followed by a second notice received by FPL on December 2 changing the mailing address back to Jupiter. The motion to withdraw NEAP's petition, filed 3 days following FPL's response to the notices of address change, indicated that all future filings should be directed to Mr. Saporito at the Miami address. When FPL pointed out that the first notice changing the mailing address to Miami was inconsistent with Mr. Saporito's sworn testimony in the Department of Labor proceeding indicating his residence in Jupiter, Mr. Saporito's response was that his mailing address "did not change until some time after July 1990 and well before the time" he filed his petition.

Mr. Saporito's representations as to his address may be summarized as follows:

Date	Document	Representation
September 5	Brief in OLA-5	Resides in Jupiter.
October 25	Petition in this proceeding	"Lives and works in and about the City of Miami." Address indicated in signature block is P.O. Box 129, Jupiter.
Received by FPL November 29	Change of address effective July 1990	Direct mail to 8135 S.W 62nd Place, Miami.
Received by FPL December 2	Change of address	Direct mail to P.O. Box 129, Jupiter.

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<sup>10</sup> Reply at 4. The statement that Mr. Saporito's mailing address remained in Jupiter "at that time" presumably refers to July 1990. In the preceding paragraph of the reply, Mr. Saporito states that NEAP's change of address to Miami from Jupiter became effective in July 1990.

December 8	Motion withdrawing NEAP's petition	Direct mail to 8135 S.W. 62nd Place, Miami.
December 26	Reply to FPL and Staff	Mailing address did not change to Miami from Jupiter until after July and before October 25.

In these circumstances, a representation that Mr. Saporito "lives and works in and about" Miami not far from the plant in question is insufficient to support standing. When confronted with objections that he had not adequately set forth a basis for standing by clearly indicating where he works and lives, Mr. Saporito responded only that at the time of the filing of his petition, his mailing address was in Miami. While we would ordinarily assume that an individual petitioner receives mail at his residence, in this case such an assumption is not warranted. The frequent changes of that address in a short period of time underscore the questions concerning Mr. Saporito's standing raised by FPL and Staff. It was incumbent on Mr. Saporito to affirmatively state where he resides and the extent to which his work takes place in proximity to the plant. Absent such a statement, we cannot conclude that his "base of normal, everyday activities" is close enough to the plant to support standing.

Mr. Saporito's failure to have affirmatively responded to the questions raised regarding his standing, when coupled with his representations made over a period of about 2 weeks in late November and early December that his mailing address changed three times in a period of less than 4 months, prevents us from concluding that he resides at the Miami mailing address and thus has standing. This is particularly so in light of the fact that the last change followed hard upon FPL's comments on the earlier two notices.

Accordingly, Mr. Saporito's petition filed in this proceeding is denied.<sup>11</sup> Pursuant to 10 C.F.R. § 2.714a(a), within 10 days after its service, Mr. Saporito may appeal this Memorandum and Order by filing a Notice of Appeal and

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<sup>11</sup> In light of this result, we do not consider whether Mr. Saporito has satisfied the other requirements of 10 C.F.R. § 2.714.

accompanying brief with the Commission. See 10 C.F.R. §2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944, Oct. 24, 1990).

It is so ORDERED.

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Dr. David R. Schink<sup>12</sup>  
ADMINISTRATIVE JUDGE**

**Dr. Charles N. Kelber  
ADMINISTRATIVE JUDGE**

**John H Frye, III, Chairman  
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland  
January 23, 1991**

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<sup>12</sup>Dr. Schink concurs in this Memorandum and Order, but was not available to sign it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Richard F. Cole  
Dr. Kenneth A. McCollom

In the Matter of

Docket Nos. 50-443-OLR-3 & 5  
50-444-OLR-3 & 5  
(ASLBP Nos. 90-619-03-OLR-3  
91-630-01-OLR-5)  
(Offsite Emergency Planning)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

January 29, 1991

**MEMORANDUM AND ORDER**  
(Resolving Issues Remanded in ALAB-937 and ALAB-942)

On January 18, 1991, respective counsel for the Massachusetts Attorney General, Staff of the Nuclear Regulatory Commission, and Public Service Company of New Hampshire (for the Licensees) filed a joint stipulation in which the Massachusetts Attorney General withdrew his Contention 47, Basis R, as remanded in ALAB-937 and Contention 56, Basis A, as remanded in ALAB-942.<sup>1</sup> The Licensing Board considered the joint stipulation in a prehearing conference conducted on January 23, 1991. The signatory parties, as well as counsel for the Federal Emergency Management Agency (FEMA) and counsel

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<sup>1</sup> Joint Stipulation Regarding Contentions Remanded in ALAB-937 and ALAB-942, January 18, 1991.

for New England Coalition on Nuclear Pollution (NECNP), stated positions on the joint stipulation.

### **ALAB-937**

The stipulation regarding ALAB-937 approves changes in the support plan providing for the use of route guides for ensuring adequate supervision of children evacuated to the School Host Facility at Holy Cross College in Worcester, Massachusetts. Since the stipulation anticipates that the changes will be subject to the oversight of the NRC Staff and FEMA, and since FEMA was not a party to the stipulation, the Licensing Board inquired whether FEMA is willing to undertake the oversight responsibilities. Counsel for FEMA reported that FEMA had been consulted and regards the stipulated changes as an enhancement to the plan and has no objections. The Board accepts counsel's statement as a commitment by FEMA. Tr. 28,456-57. NECNP also supports the stipulation as to both remands. Tr. 28,458. The stipulation regarding ALAB-937 is appropriate, as is the withdrawal of the associated contention.

### **ALAB-942**

The contention remanded by ALAB-942, Contention 56, Basis A, related to certain predetermined Protective Action Recommendations (PARs) based in significant part upon monitoring of radiation levels within containment. ALAB-942, 32 NRC 395, 418 (1990). The Massachusetts Attorney General now stipulates that the issues have been resolved by changes made in the Seabrook Plan for the Massachusetts Communities (SPMC) since the filing of the contentions as reflected in the form of the SPMC received into evidence. The Board reviewed Basis A and its eight subbases and recognizes that the subject matter in general was covered in the SPMC and the attendant litigation. No party objects to the stipulation regarding ALAB-942. Tr. 28,461-62. The Board accepts the Massachusetts Attorney General's stipulation that the issues raised by his own contention have been resolved and accepts the withdrawal of his Contention 56, Basis A.

### **ORDER**

The Board grants the Licensee's motion (Tr. 28,461) for an order: (1) accepting the joint stipulation, (2) declaring the issues remanded in ALAB-937 and ALAB-942 resolved, and (3) directing the NRC Staff, in cooperation

with FEMA, to oversee compliance with the commitments made in the joint stipulation. It is so ORDERED.

**FOR THE ATOMIC SAFETY  
AND LICENSING BOARD**

**Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
January 29, 1991**



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

ALL NUCLEAR FACILITIES

January 15, 1991

The Director of the Office of Nuclear Material Safety and Safeguards has denied a Petition submitted by Eldon V.C. Greenberg on behalf of Nuclear Control Institute and Committee to Bridge the Gap. The Petition asserted that there is an immediate possibility of terrorist attacks against domestic nuclear facilities which might accompany the outbreak of hostilities in the Middle East and requested that, therefore, the NRC on an emergency basis require that existing licensee contingency plans against truck bombs be put into effect immediately and that immediately thereafter, the NRC undertake an evaluation of the adequacy of the plans and require any such improvements as it deems necessary.

**NRC: REVIEW OF THREAT ENVIRONMENT**

In response to recent world events, the NRC is continually reviewing the threat environment associated with commercial nuclear facilities.

**DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**

This letter is to acknowledge receipt of the "Petition for Rulemaking and Request for Emergency Action" ("Petition") which you submitted to both the Secretary and the Executive Director for Operations of the U.S. Nuclear Regulatory Commission ("NRC") on January 11, 1991, on behalf of Nuclear Control Institute and Committee to Bridge the Gap ("Petitioners"). That portion of the Petition requesting emergency action is being considered by the NRC

Staff as a petition for emergency action pursuant to 10 C.F.R. § 2.206 and my Director's Decision is set out below. That portion of the Petition requesting rulemaking to amend 10 C.F.R. § 73.1 of the NRC regulations will be considered as a separate matter.

The Petitioners assert that there is an immediate possibility of terrorist attacks against domestic nuclear facilities which might accompany the outbreak of hostilities in the Middle East. To respond to this concern, Petitioners request the NRC, on an emergency basis, "forthwith to require that existing licensee contingency plans against truck bombs, as developed under Generic Letter No. 89-07, be put into effect at once" and immediately thereafter, the NRC "should undertake an evaluation of the adequacy of the plans and require such improvements therein, on a plant-by-plant basis, as it deems necessary to assure their adequacy."

In response to recent world events, the NRC is continually reviewing the threat environment associated with commercial nuclear facilities. Based on evaluation of Intelligence Community and other relevant data, we have determined that there continues to be no credible threat of terrorist actions against any NRC-licensed facility that warrants implementation of contingency plans against truck bombs at this time. Nevertheless, the situation resulting from activities in the Middle East continues to be closely monitored so that, if warranted, individual facility, regional, and national contingency plans can be implemented.

In summary, I have determined that, while the issues raised in the Petition are cause for ongoing vigilance by the NRC, no immediate action is necessary regarding these matters. I have reached this determination with the benefit of the ongoing NRC activities noted above. As I indicated, your petition for rulemaking will be considered separately.

FOR THE NUCLEAR  
REGULATORY COMMISSION

Robert M. Bernero, Director  
Office of Nuclear Material Safety  
and Safeguards

Dated at Rockville, Maryland,  
this 15th day of January 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kenneth M. Carr, Chairman**  
**Kenneth C. Rogers**  
**James R. Curtliss**  
**Forrest J. Remick**

**In the Matter of**

**Docket No. PRM 50-50**

**CHARLES YOUNG**

**January 11, 1991**

The Nuclear Regulatory Commission is denying a petition for rulemaking submitted on April 18, 1988, by Mr. Charles Young of Glen Ellyn, Illinois, in his own behalf which requests that the Commission rescind 10 C.F.R. § 50.54(x) and (y) to preclude deviation from license conditions or technical specifications for licensed nuclear power plants in an emergency when this action is immediately needed to protect the public health and safety and no action consistent with license conditions and technical specifications that can provide adequate or equivalent protection is immediately apparent.

**LICENSE CONDITION: COMPLIANCE DURING EMERGENCIES**

Unanticipated circumstances can occur during the course of emergencies. These circumstances may call for responses different from any considered during the course of licensing. For example, the need to isolate the accumulators to prevent nitrogen injection to the core while there was still substantial pressure in the primary system was not foreseen in the licensing process before TMI-2; thus, the technical specifications prohibited this action. Other circumstances requiring a deviation from license requirements can arise during emergencies involving multiple equipment failure or coincident accidents where plant emergency procedures could be in conflict, or not applicable to the circumstances.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 50.54(x) and (y))**

The Commission added paragraphs (x) and (y) to 10 C.F.R. § 50.54 (47 Fed. Reg. 35,996) because an accident can take a course different from that visualized when the emergency procedure was written, thus requiring a protective response at variance with a procedure required to be followed by the licensee. In addition, performance of routine surveillance testing, which might fall due during a period for which the plant is in an emergency status, may have to be delayed or cancelled because it could either divert the attention of the operating crew from the emergency or cause loss of equipment needed for proper protective action.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 50.54(x) and (y))**

Paragraph (x) of 10 C.F.R. § 50.54 is similar to the so-called "General Prudential Rule" contained in both the International Regulations for Preventing Collisions at Sea, 1972, and the Inland Navigational Rules Act of 1980. This rule states: "In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which make a departure from those rules necessary to avoid immediate danger." Thus, a Commanding Officer of a ship is permitted to deviate from written rules to the extent necessary to save the ship.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 50.54(x) and (y))**

Paragraph (x) of 10 C.F.R. § 50.54 is also very similar to a Federal Aviation Administration (FAA) rule governing the operation of aircraft, 14 C.F.R. § 91.3, which states that "[i]n an emergency requiring immediate action, the pilot in command may deviate from any rule . . . to the extent necessary to meet that emergency. Each pilot in command who deviates from a rule . . . shall, upon the request of the Administrator, send a written report of that deviation to the Administrator."

As the Commission stated in the Statement of Considerations for the final rule adopting 10 C.F.R. § 50.54(x) and (y), "[t]he Commission had both the General Prudential Rule and the FAA rule in mind when it framed the proposed rule" (48 Fed. Reg. 13,966, Apr. 1, 1983).

# DENIAL OF PETITION FOR RULEMAKING

## I. THE PETITION

By letter dated April 18, 1988, Charles Young, 262 Sheffield Lane, Glen Ellyn, Illinois, petitioned the U.S. Nuclear Regulatory Commission to rescind the provision that authorizes nuclear power plant operators to deviate from technical specifications during an emergency. The Petitioner notes that the technical specifications (a) prescribe settings for safety systems at nuclear power plants, such as the emergency core cooling system, so that action of a safety system will correct an abnormal condition before fuel design limits are exceeded; and (b) require an automatic safety system to operate as long as the abnormal condition that threatens the nuclear fuel exists in the plant. The Petitioner cites several cases of practices involving nuclear power reactors that he considers to be hazardous. In his opinion, these practices could lead to an accident similar to the one at Three Mile Island, Unit 2. The Petitioner claims that three official investigations have confirmed that damage to the nuclear reactor at Three Mile Island, Unit 2, could have been prevented if the operators had followed the requirements of the plant's operating license and technical specifications.

According to the Petitioner, the three investigations and their applicable findings are as follows:

- (1) The President's Commission found that reactor core damage would have been prevented if the high pressure injection system had not been throttled. [Kemeny Commission Finding No. 4 at 28.]
- (2) Calculations by the Special Inquiry Group show that use of the high pressure injection system would have prevented overheating of the fuel and release of radioactive material. [Rogovin, Vol. II, Part 2, ¶D.2.b, at 558, 561.]
- (3) The Special Investigation by the Senate Subcommittee on Nuclear Regulation found the cause of severe damage to the reactor core was the inappropriate overriding of automatic safety equipment by plant and managers. [Hart Report Chapter 2, Findings and Conclusions, No. 2, at 9.]

The Petitioner believes that the NRC should rescind the existing provisions in paragraphs (x) and (y) of 10 C.F.R. § 50.54 to adequately protect the public health and safety from the hazards of nuclear radiation from nuclear power reactors.

## II. PUBLIC COMMENTS ON THE PETITION

Notice of receipt of the petition and request for public comment was published in the *Federal Register* on August 26, 1988 (53 Fed. Reg. 32,624). On October

20, 1988, the original notice of receipt for PRM-50-50 was corrected to provide additional information in support of the Petitioner's original intent by revising two sentences in the Grounds for the Petition. The correction had the effect of increasing the number of plants included in the basis for the petition (53 Fed. Reg. 40,432). The 60-day comment period of the original petition expired on October 18, 1988. A total of seven (7) public-comment letters were received, representing eleven organizations. All of the commenters were opposed to the petition for rulemaking. The comment letters may be examined in the NRC public document room. All comment letters have been evaluated by the NRC Staff.

### III. REASONS FOR DENIAL

It is the Commission's position that emergency conditions can arise during which a license condition could prevent necessary protective action by the licensee. Technical specifications contain a wide range of operating limitations and requirements concerning actions to be taken if certain systems fail and if certain parameters are exceeded. Most technical specifications are devoted to keeping the plant parameters within safe bounds and keeping safety equipment operable during normal operation. However, technical specifications also require the implementation of a wide range of operating procedures which go into great detail as to actions to be taken in the course of operation to maintain facility safety. These procedures are based on the various conditions — normal, transient, and accident conditions — analyzed as part of the licensing process.

Nevertheless, unanticipated circumstances can occur during the course of emergencies. These circumstances may call for responses different from any considered during the course of licensing. For example, the need to isolate the accumulators to prevent nitrogen injection to the core while there was still substantial pressure in the primary system was not foreseen in the licensing process before TMI-2; thus, the technical specifications prohibited this action. Other circumstances requiring a deviation from license requirements can arise during emergencies involving multiple equipment failure or coincident accidents where plant emergency procedures could be in conflict, or not applicable to the circumstances.

An accident can take a course different from that visualized when the emergency procedure was written, thus requiring a protective response at variance with a procedure required to be followed by the licensee. In addition, performance of routine surveillance testing, which might fall due during a period for which the plant is in an emergency status, may have to be delayed or cancelled because it could either divert the attention of the operating crew from the emergency or cause loss of equipment needed for proper protective action.

It was for these reasons that the Commission added paragraphs (x) and (y) to 10 C.F.R. § 50.54 (47 Fed. Reg. 35,996).

Paragraph (x) of 10 C.F.R. § 50.54 is similar to the so-called "General Prudential Rule" contained in both the International Regulations for Preventing Collisions at Sea, 1972, and the Inland Navigational Rules Act of 1980. This rule states:

In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which make a departure from those rules necessary to avoid immediate danger.

Thus, a Commanding Officer of a ship is permitted to deviate from written rules to the extent necessary to save the ship.

Paragraph (x) of 10 C.F.R. § 50.54 is also very similar to a Federal Aviation Administration (FAA) rule governing the operation of aircraft, 14 C.F.R. § 91.3, which states that "[i]n an emergency requiring immediate action, the pilot in command may deviate from any rule . . . to the extent necessary to meet that emergency. Each pilot in command who deviates from a rule . . . shall, upon the request of the Administrator, send a written report of that deviation to the Administrator."

As the Commission stated in the Statement of Considerations for the final rule adopting 10 C.F.R. § 50.54(x) and (y), "[t]he Commission had both the General Prudential Rule and the FAA rule in mind when it framed the proposed rule" (48 Fed. Reg. 13,966, Apr. 1, 1983).

All of the public comments received by the Staff on the petition opposed any change to 10 C.F.R. § 50.54(x) and (y). Most of the commenters observed that technical specifications do not dictate mitigation strategies or recovery actions under accident conditions as the Petitioner states; rather, generic emergency operating procedures approved by the NRC are relied upon for this purpose instead. Examples of proceduralized deviations from technical specifications were cited. These examples included: inhibiting detrimental automatic plant responses; defeating interlocks to allow preferred flow paths; taking manual control of automatic systems; maintaining plant parameters (such as reactor water level) outside normal ranges; and cross-tying nonsafety equipment to perform accident mitigation functions.

One commenter noted that without 10 C.F.R. § 50.54(x) and (y), operators may be reluctant to take reasonable actions in an emergency immediately needed to protect the health and safety of the public. Another commenter noted that requiring operators to obtain permission from the NRC to deviate from technical specifications during an emergency could result in diversion of personnel resources at a critical time.

A third commenter, a legal firm representing five utility licensees, stated that even if the Petitioner's statement that the TMI accident would not have occurred had operators complied with technical specification and operating license conditions were true, this conclusion did not support elimination of 10 C.F.R. § 50.54(x) and (y). As the Kemeny Commission found, "[t]he accident at . . . TMI occurred as a result of a series of human, institutional, and mechanical failures." The commenter further stresses that "10 C.F.R. § 50.54(x) and (y) were promulgated subsequent to TMI." Furthermore, the commenter pointed out that one of the lessons learned from TMI is that the range of circumstances addressed by the technical specifications is limited and that strict adherence to them in an emergency can actually be hazardous to public health and safety.

The Petitioner has not shown that the requested rule change to rescind paragraphs (x) and (y) of 10 C.F.R. § 50.54 would enhance the public health and safety or lessen the impact on the environment. Hence, the Commission has decided to deny the petition for rulemaking.

**FOR THE NUCLEAR  
REGULATORY COMMISSION**

**SAMUEL J. CHILK  
Secretary to the Commission**

Dated at Rockville, Maryland,  
this 11th day of January 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

## COMMISSIONERS:

**Kenneth M. Carr, Chairman**  
**Kenneth C. Rogers**  
**James R. Curtliss**  
**Forrest J. Remick**

In the Matter of

Docket No. 50-322

LONG ISLAND LIGHTING  
COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

February 21, 1991

The Commission considers Intervenor's motion for reconsideration of — and amicus comments on — its denial, in CLI-90-8, of Intervenor's request for issuance of an environmental impact statement considering "resumed operation" of the Shoreham plant as an alternative to decommissioning of that facility. The Commission denies the motion because the Petitioners failed to demonstrate any legal flaw in CLI-90-8. However, in view of current world events, the Commission issues guidance to the parties regarding potential requests for NRC action to order operation of the Shoreham plant under Atomic Energy Act §§ 108, 186(c), or 188.

## NEPA: FEDERAL ACTION

The law is quite clear that only a "federal action" triggers NEPA requirements. *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976); *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 320-21 (1975). NEPA does not impose requirements on nonfederal actions. *E.g.*, *Natural Resources Defense Council ("NRDC") v. EPA*, 822 F.2d 104, 129 n.25 (D.C. Cir. 1987); *District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980).

## **NEPA: FEDERAL ACTION**

A "federal action" requires an "overt act"; simply acquiescing in a private party's action does not constitute federal action. *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-45 (D.C. Cir. 1980).

## **NRC: SCOPE OF AUTHORITY (DECOMMISSIONING)**

With regard to the Shoreham plant, the NRC action subject to NEPA is, by its broadest terms, confined to review and approval of the method of Shoreham decommissioning.

## **NEPA: ENVIRONMENTAL ANALYSIS; CONSIDERATION OF ALTERNATIVES (REASONABLENESS)**

When the NRC proceeds to review and approve a decommissioning plan for the Shoreham plant, it will decide what environmental evaluation will be required. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 209 (1990). In making that review "[t]he range of alternatives [in the EIS] need not extend beyond those reasonably related to the project." *Process Gas Consumers Group v. USDA*, 694 F.2d 728, 769 (D.C. Cir. 1981) (citing cases).

## **NEPA: CONSIDERATION OF ALTERNATIVES; REQUIREMENTS**

Operation of the Shoreham plant is surely an alternative to licensee's decision not to operate, but that decision is a private decision not subject to NEPA. *E.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

## **NEPA: NONFEDERAL ACTIONS**

Private, nonfederal actions undertaken prior to or leading to actions that do require federal permission do not, in and of themselves, trigger NEPA requirements.

## **NEPA: CONSIDERATION OF ALTERNATIVES (REASONABLENESS)**

In reaffirming the conclusion that "resumed operation" of the Shoreham plant is not currently a "reasonable alternative," the Commission relies on the undisputed facts and circumstances associated with the licensee's decision.

## **NRC: SCOPE OF AUTHORITY**

The Commission's finding that resumed operation is not a reasonable alternative was based on the circumstances surrounding and leading to the licensee's decision, and was not based on some legal principle that activities beyond the agency's authority are *per se* unreviewable.

## **NEPA: CEQ REGULATIONS**

While the Commission agrees that the CEQ's regulations are entitled to "substantial deference" where applicable, the CEQ regulations apply only to "federal actions" to which NEPA applies.

## **NEPA: CEQ REGULATIONS**

The NRC is not bound by those portions of the CEQ's NEPA regulations that have a substantive impact on the way in which the Commission performs its regulatory functions. 49 Fed. Reg. 9352 (Mar. 12, 1984).

## **NRC: SCOPE OF AUTHORITY**

### **AEA: SECTIONS 108, 186(c), AND 188**

The essential prerequisites to the NRC's authority to mandate operation of the Shoreham plant would include either a specified congressional declaration under AEA § 108 or the revocation of a license under AEA §§ 186(c) and 188. Those items are specific enough that the Commission can take judicial notice of their existence or non-existence at any particular time.

## **ENERGY REORGANIZATION ACT: RESPONSIBILITIES**

Under the Energy Reorganization Act, 42 U.S.C. § 5801, *et seq.*, which created the NRC and the DOE (at that time the Energy Research and Development Administration) from the Atomic Energy Commission, responsibility for action under AEA §§ 108, 186(c), and 188 rests jointly with both the NRC and the DOE. *See* S. Rep. No. 93-980, Appendix 2, § III.

## **ATOMIC ENERGY ACT: SECTION 108**

Under AEA § 108, once Congress "declares that a state of war or national emergency exists," the DOE must then issue a finding that "it is necessary to the common defense and security . . ." to order operation of a nuclear power

plant. DOE must then petition the Commission to issue an order authorizing operation of the plant.

#### **ATOMIC ENERGY ACT: SECTION 108**

Once Congress has declared a state of war or national emergency and the DOE has petitioned the NRC to authorize operation of a nuclear power plant, the Commission would then expect the DOE (1) to demonstrate that the congressional action satisfied the statutory prerequisite and (2) to explain who would bear the financial responsibility for the “[j]ust compensation” of licensee’s expenses necessary to operate the facility. *See* 42 U.S.C. § 2138.

#### **ATOMIC ENERGY ACT: SECTION 186(c)**

Under AEA § 186(c), after the revocation of any license, the DOE must issue a finding that operation of the nuclear facility is “of extreme importance to the national defense and security” of the United States. DOE must then petition the Commission for an order directing operation of the facility and demonstrate how the licensee will be justly compensated for the expenses necessary to operate the facility. *See* 42 U.S.C. § 2236(c).

#### **ATOMIC ENERGY ACT: SECTION 188**

Under AEA § 188, after the revocation of a nuclear power plant license, the DOE must issue a finding that operation of the facility is necessary for “public convenience and necessity” or its “production program” and then file a petition with the NRC, asking that the Commission issue an order directing operation of the facility and demonstrating how the licensee will be justly compensated for the expenses necessary to operate the facility. 42 U.S.C. § 2238.

#### **ATOMIC ENERGY ACT: SECTION 186**

Any person may petition the Commission under 10 C.F.R. § 2.206 to revoke a nuclear power plant license by alleging the conditions specified in AEA § 186.

#### **REGULATIONS: INTERPRETATION (10 C.F.R. §§ 50.75 AND 50.82)**

Major dismantling and other activities that constitute decommissioning under the NRC’s regulations must await NRC approval of a decommissioning plan. *See* 10 C.F.R. §§ 50.75, 50.82.

## **NEPA: SCOPE**

Petitioners cannot bootstrap NRC authority to mandate operation of a facility under the AEA on to NEPA. "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers." *NRDC v. EPA*, 822 F.2d at 129 (citing cases).

## **NRC: SUPERVISORY AUTHORITY**

The Commission has explicitly retained the authority to provide guidance at any point in the course of a proceeding. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990).

## **NRC: SUPERVISORY AUTHORITY**

Once the Commission determines that a particular form of requested relief is not required and is not appropriate, it is entirely proper for it to provide guidance to its lower tribunals at the earliest time possible, even if it is at the outset of the proceeding. E.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).

## **NRC: SUPERVISORY AUTHORITY**

A petitioner's procedural rights to intervene in an NRC proceeding are not violated when the Commission determines that a certain form of relief is not required and is not appropriate and then steps into a proceeding to issue guidance to its lower tribunals.

## **NEPA: SCOPING**

The scoping process is initiated only "[w]henver the appropriate NRC Staff director determines that an [EIS] will be prepared . . . ." 10 C.F.R. § 51.26(a). As a result, scoping is not a relevant issue prior to the decision to prepare an EIS.

## **NEPA: SCOPING (PARTICIPATION)**

Once petitioners have availed themselves of the opportunity provided by the scoping regulations, namely, to participate in a debate over the scope of any possible EIS, their claims on this point are academic.

## APA: JUDICIAL NOTICE

The Commission, in deciding an issue, can take into consideration “a matter beyond reasonable controversy” and one that is “capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.” *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) (citations omitted). The Shoreham settlement agreements are included in this category.

## NRC: SCOPE OF AUTHORITY

The fact that the NRC must approve the transfer of the Shoreham facility to LIPA does not *per se* give it authority to void the parties’ settlement agreement concerning the transfer; nor does it give the NRC the authority to direct the licensee to operate the facility.

# MEMORANDUM OPINION AND ORDER

## I. INTRODUCTION

On October 17, 1990, the Nuclear Regulatory Commission (NRC) issued an Order in response to six “Petition[s] to Intervene and Request[s] for Hearing[s]” filed by Petitioners Shoreham–Wading River Central School District (“School District”) and Scientists and Engineers for Secure Energy, Inc. (“SE2”) (collectively “Petitioners”). CLI-90-8, 32 NRC 201 (1990). In CLI-90-8, we forwarded the Petitioners’ request to the Atomic Safety and Licensing Board for routine processing under our normal Rules of Practice. However, before doing so we declined one form of relief requested: publication of an Environmental Impact Statement (“EIS”) considering “resumed operation” as an alternative to the decommissioning of the Shoreham facility. *See* 32 NRC at 209.

The Petitioners have filed a timely motion for reconsideration. The NRC Staff and the Long Island Lighting Company (“LILCO”) have responded. We have also received and considered amicus comments from the Secretary of Energy (“DOE”), the Council on Environmental Quality (“CEQ”), the Long Island Power Authority (“LIPA”), and the State of New York (“New York”). After careful consideration, we have decided to deny the motion for reconsideration because Petitioners have failed to demonstrate any legal flaw in CLI-90-8. However, in view of current world events, we have decided to issue guidance to the parties regarding potential requests for NRC action to order operation of Shoreham under sections 108, 186(c), or 188 of the Atomic Energy Act (“AEA”).

## II. BACKGROUND

In CLI-90-8, we reviewed the Petitioners' request for issuance of an EIS which would include discussion of "resumed operation" as an alternative to the proposed decommissioning of the Shoreham Nuclear Power Station ("Shoreham"). The Petitioners argued that various actions taken by the NRC Staff constituted approval of active steps toward decommissioning and preclusion of operation without the issuance of such an EIS in violation of the National Environmental Policy Act ("NEPA"). The actions at issue in CLI-90-8 included a Confirmatory Order Modifying License (Effective Immediately), which barred LILCO from placing nuclear fuel in Shoreham without first obtaining NRC approval, and two proposed license amendments that permitted changes in Shoreham's physical security plan and removed license conditions in the area of offsite emergency preparedness.

After a careful analysis of its regulatory authority, the Commission found in CLI-90-8 that it was responsible only for approving and supervising the *method* of decommissioning, not for the decision *whether* to operate the plant. The Commission determined that the decision not to operate Shoreham was a non-NRC action which did not require an EIS under NEPA. CLI-90-8, 32 NRC at 207-08. In the alternative, the Commission also found that under the NEPA "rule of reason," "resumed operation" would not have to be considered even if the decision not to operate Shoreham was an NRC action subject to NEPA, because given the existing agreements among LILCO, LIPA (the entity to which control of Shoreham will be transferred), and New York State, major changes in policy and legislation would have to occur for resumed operation to be a viable alternative. *Id.* at 208-09.

## III. PETITIONERS' MOTION FOR RECONSIDERATION

On October 29, 1990, Petitioners filed a Joint Petition for Reconsideration. In their Joint Petition, Petitioners again assert that NEPA demands consideration of the alternative of "resumed operation" and cite CEQ regulations on NEPA to buttress their claim. Petition at 3-11, 13-16. They argue that the federal action here is approval of the decision not to operate Shoreham and that operation is a reasonable "no action" alternative even if the NRC lacks authority to order operation, and even if the NRC action is confined to approval of the decommissioning plan. Petitioners also allege that CLI-90-8 violates NEPA scoping regulations. *Id.* at 11-13. Furthermore, they argue that CLI-90-8 misstates and misapplies the NRC's authority under sections 108, 186(c), and 188 of the AEA, to order a licensee to operate a facility. Petition at 16-20. Finally, Petitioners claim that the NRC denied Petitioners' procedural rights

under 10 C.F.R. § 2.714 by ruling prematurely on the availability of certain specified relief (*id.* at 22-24); and violated the APA by taking “judicial notice” of the validity of certain facts surrounding the Shoreham Settlement Agreement (*id.* at 25-27).

DOE argues that the decommissioning of Shoreham is a unique situation, since the plant is new and not “at the end of its useful life.” DOE Amicus Submission at 2-3. Specifically, DOE claims that the environmental impact of *not* operating Shoreham must be considered. Such impact would include those alternative energy sources put to use to replace Shoreham. *Id.* at 2-6. DOE also argues that preparation of an Environmental Assessment (“EA”) to supplement the generic EIS on the decommissioning rule is inadequate, and that a separate EIS is needed for any proposed decommissioning of Shoreham. That EIS would provide additional necessary information and allow for greater public participation. *Id.* at 6-13. DOE also argues that NEPA requires the NRC to study resumed operation as the “no action” alternative and that this option was within the NEPA “rule of reason” because, under certain circumstances, the DOE or NRC could order Shoreham’s operation. *Id.* at 13-21. Finally, DOE asserts that NEPA mandates NRC preparation of an EIS for the earliest Commission decision that could affect decommissioning. *Id.* at 21-24.

The CEQ presents arguments largely similar to those made by DOE, including the need for an EIS under NEPA which would address the “no action” alternative — what CEQ describes as “*not* decommissioning the facility.” CEQ Amicus at 6 (emphasis in original). The CEQ argues that the NRC must consider other “reasonable” alternatives including “mothballing” Shoreham and “resumed operation,” even if they are outside NRC jurisdiction. *Id.* at 4-7.

The NRC Staff, LILCO, LIPA, and the State of New York oppose the motion for reconsideration. The Staff argues that NEPA does not require consideration of unreasonable alternatives, such as resumed operation of Shoreham, where the alternative is outside the agency’s jurisdiction and the result of a nonfederal action. Instead, NEPA alternatives must be those that are “practically possible.” Staff Response at 5.

LILCO argues that NEPA review is not proper because no “federal action” has taken place, and that “resumed operation” is not an alternative to be considered. LILCO Response at 6-10. LILCO also argues that the environmental analysis need not consider the “no action” alternative because neither LILCO nor LIPA would restart the plant, and taking no action to decommission Shoreham would result in the plant remaining “in a state of limbo, neither operating nor decontaminated.” *Id.* at 10-11. Moreover, LILCO argues that the NEPA “scoping” requirements do not apply because the nonfederal decision not to operate Shoreham does not trigger any NEPA requirements. *Id.* at 12. Additionally, LILCO disputed Petitioners’ analysis of DOE’s and NRC’s emergency authority to take control of Shoreham. *Id.* at 12-15. Furthermore,

LILCO argues that: (1) the NRC need not make any findings regarding "common defense and security" at this time; (2) Petitioners were not denied any section 2.714 procedural rights; (3) the NRC need not defer to the CEQ's interpretation of NEPA regulations; and (4) CLI-90-8 was a correct interpretation of NEPA. *Id.* at 15-19. Finally, LILCO argues that neither the DOE nor CEQ comments recognized that no "federal action" for purposes of NEPA has occurred here. *Id.* at 19-22.

LIPA's submission raises substantially the same arguments presented above by LILCO regarding the existence of "federal actions" and the alternatives of "resumed operation" and "no action." LIPA Response at 4-10. Furthermore, LIPA asserts that NEPA scoping regulations were not violated because the NRC can discuss such issues when intervention petitions are filed, in order to resolve the question of standing. *Id.* at 13. LIPA also argues that because no decision has been made whether an EIS is required, the issue of EIS scope has not yet arisen. Finally, on scoping, LIPA argues that the aim of the scoping regulations was fulfilled in any event because the Petitioners have had the chance to express their views. *Id.* at 14. LIPA also disputes Petitioners' assertion that the NRC neglected its responsibilities under the AEA and NEPA and disagrees that the NRC must defer to CEQ recommendations. *Id.* at 15-17. Finally, LIPA argues that Petitioners' procedural rights under 10 C.F.R. § 2.714 were not violated.

New York makes many of the same arguments detailed above, including: (1) that no "federal action" for NEPA purposes has occurred; (2) that "resumed operation" of Shoreham is not a reasonable alternative; (3) that NEPA scoping regulations are not at issue; and (4) that the NRC does not need to prepare an EIS for Shoreham.

#### IV. PETITIONERS' STANDING

As a threshold matter, LILCO also suggests that Petitioners do not have standing to file a motion for reconsideration because neither petitioner has yet to be admitted as a "party." See LILCO Response at 4 n.2. For support, LILCO relies on *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989). We cannot agree because CLI-89-6 is inapposite to this situation.

In *Comanche Peak*, CLI-89-6, we addressed a situation where an individual sought reconsideration of an order that dismissed a petition submitted by another party and that was issued before the individual had been granted party status. We determined that the individual did not have standing to seek reconsideration of the prior decision in those circumstances. See 29 NRC at 354. In contrast, the decision that we are asked to reconsider today addressed previous filings by the same Petitioners. Petitioners clearly have standing to challenge a decision

addressed to their own prior petitions. Moreover, while we agree that the decision may not be "final" for purposes of judicial review because it is not the conclusion of an adjudicatory proceeding, it includes important instructions on the scope of the proceeding that strike at the heart of Petitioners' concerns. Therefore, it is appropriate for us to take up the motion for reconsideration on its merits.

## V. ANALYSIS

### A. The Nature of the Federal Action

The law is quite clear that only a "federal action" triggers NEPA requirements. *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976); *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 320-21 (1975). NEPA does not impose requirements on nonfederal actions. E.g., *Natural Resources Defense Council ("NRDC") v. EPA*, 822 F.2d 104, 129 n.25 (D.C. Cir. 1987); *District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980). Moreover, as the D.C. Circuit noted in *Defenders of Wildlife*, a "federal action" requires an "overt act"; simply acquiescing in a private party's action does not constitute federal action. 627 F.2d at 1244-45.

The fundamental flaw in Petitioners' and amici's arguments is their overly expansive view of the NRC actions at issue here. Petitioners correctly point out that LILCO plans to replace Shoreham's generating capacity with fossil-burning units. These units, the Petitioners allege, might have direct adverse environmental impacts which could be negated by the operation of Shoreham. Thus, argue the Petitioners, the decision not to operate Shoreham triggers requirements for a NEPA review of any alternatives to that decision. However, as we took pains to make clear in CLI-90-8, the NRC action subject to NEPA is, by its broadest terms, confined to review and approval of the method of Shoreham decommissioning.<sup>1</sup> Petitioners' argument that we have authority over the entire agreement to decommission Shoreham is simply incorrect.

Moreover, once it is seen that the NRC action is confined to review and approval of the method of decommissioning, it follows that the "no action" alternative is to reject a proposed decommissioning plan, not to reject any decommissioning altogether. As LILCO points out, that action would result in the plant being left in a state of limbo. LILCO's next step would likely be revision of the plan, not operation of the plant. Thus, operation of Shoreham

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<sup>1</sup>When the NRC proceeds to review and approve a decommissioning plan, it will decide what environmental evaluation will be required. 32 NRC at 209. In making that review, "[t]he range of alternatives [in the EIS] need not extend beyond those reasonably related to the project." *Process Gas Consumers Group v. USDA*, 694 F.2d 728, 769 (D.C. Cir. 1981) (citing cases).

is not, in this situation, the “no action” alternative. Operation of Shoreham is surely an alternative to LILCO’s decision not to operate, but this LILCO decision is a private decision not subject to NEPA. *E.g., Kleppe v. Sierra Club, supra*. Moreover, even if the NRC could at this point order operation of Shoreham for reasons unrelated to its role in overseeing decommissioning (a matter discussed separately below), the mere decision *not* to exercise this authority is not a federal action subject to NEPA. *Defenders of Wildlife, supra*.

Another way to examine Petitioners’ and amici’s arguments is to focus on the relative order of LILCO’s decision not to operate and subsequent future NRC actions. LILCO’s decision not to operate Shoreham occurs prior to (or “upstream from” in LIPA’s parlance) any “federal action” that may someday occur, i.e., a potential NRC order accepting a decommissioning plan for Shoreham under 10 C.F.R. § 50.82. It may be true that “but for” the decision not to operate Shoreham, LILCO would not be able to seek permission to decommission the facility. But private, nonfederal actions undertaken *prior* to or leading to actions that do require federal permission do not, in and of themselves, trigger NEPA requirements. For example, in *NRDC v. EPA, supra*, the court found that the private construction of a discharge facility was not a “federal action,” even though EPA licensing of later discharges from that facility was required under the Clean Water Act. 822 F.2d at 127-31. “Until the private owner applies for a discharge permit, then, EPA lacks authority to regulate the owner’s activities under NEPA and the Clean Water Act.” *Id.* at 128 (footnote omitted). *See also Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976) (authority of FDIC to license move by bank does not provide FDIC authority under NEPA to review bank’s decision to demolish historic residence in order to construct new facility).

## B. “Resumed Operation” Is Not a “Reasonable Alternative”

An agency’s environmental review “must consider not every possible alternative, but every *reasonable* alternative.” *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (emphasis added). *See also Piedmont Heights Civil Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981) (NEPA “requires consideration only of feasible, non-speculative alternatives”) (citing cases); *Miller v. United States*, 492 F. Supp. 956, 962-63 (E.D. Ark. 1980), *aff’d*, 654 F.2d 513, 514 (8th Cir. 1981). *See generally NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975); *NRDC v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972). In this case, we see no indication that either LILCO or the State of New York plans to disavow their agreement not to operate Shore-

ham. At this time, such an action would appear highly speculative at best.<sup>2</sup> After reviewing the numerous filings before us, we reaffirm our conclusion that “resumed operation” of Shoreham is not currently a “reasonable alternative.” In reaffirming this conclusion, we rely on the undisputed facts and circumstances associated with LILCO’s decision. In essence, we found that resumed operation is not a reasonable alternative because of the circumstances surrounding and leading to LILCO’s decision, not because of some legal principle that activities beyond the agency’s authority are *per se* unreviewable. If we thought that the parties might repudiate their agreement and favor a return to operation, we might not have made such a finding.<sup>3</sup>

### C. NRC-Mandated Operation Is Not Yet Warranted

In CLI-90-8, we noted that “absent highly unusual circumstances not present here, . . . the NRC lacks authority to direct [LILCO] to operate [Shoreham].” 32 NRC at 207. Petitioners now raise various arguments related to our authority to mandate operation of Shoreham under sections 108, 186(c), and 188 of the Atomic Energy Act. *See* 42 U.S.C. §§ 2138, 2236(c), and 2238. *See generally* Petition at 16-20. Petitioners argue that the NRC cannot find that the “highly unusual circumstances” do not exist without a hearing. We disagree. Congress clearly specified the circumstances necessary for such action. The essential prerequisites include either a specified congressional declaration under section 108 or the revocation of a license under sections 186(c) and 188. Those items are specific enough that we can take judicial notice of their existence or non-existence at any particular time.

Moreover, assuming *arguendo* that the recent congressional action authorizing military action in support of the United Nations in the Persian Gulf constitutes a “declaration of war or national emergency” within the meaning of section 108, Petitioners ignore the necessity for prior action on the part of DOE before the NRC can act under any of the three sections. Under the Energy Reorga-

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<sup>2</sup> The validity of the agreement between LILCO and the State of New York has been upheld in its initial test in the New York courts. *See Citizens for an Orderly Energy Policy v. Cuomo*, 144 Misc. 2d 281 (N.Y. Sup. Ct. 1989), *aff’d*, 159 A.D. 2d 141, 559 N.Y.S. 2d 381 (3d Dept. 1990), *leave to appeal granted*, — N.Y. 2d — (Feb. 19, 1991). Moreover, the State of New York still maintains substantial control over energy decisions within its borders. *See, e.g., Pacific Gas & Electric Co. v. Energy Resources Comm.*, 461 U.S. 190, 222-23 (1983).

<sup>3</sup> Similarly, Petitioners claim that CEQ regulations mandate NRC consideration of resumed operation in any Shoreham EIS. Petition at 13-16. While we agree that the CEQ’s regulations are entitled to “substantial deference” where applicable, the CEQ regulations apply only to “federal actions” to which NEPA applies. As previously explained, the decision not to operate Shoreham is a private decision. Moreover, in adopting the CEQ regulations, we stated that the “NRC is not bound by those portions of CEQ’s NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.” 49 Fed. Reg. 9352 (Mar. 12, 1984). At least one court has held that CEQ guidelines are not binding on the NRC if not expressly adopted. *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989); *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 740 n.16 (3d Cir. 1982).

nization Act, 42 U.S.C § 5801, *et seq.*, which created the NRC and the DOE (at that time the Energy Research and Development Administration) from the Atomic Energy Commission, responsibility for action under all three sections rests jointly with both the NRC and the DOE. *See* S. Rep. No. 93-980, Appendix 2, § III. Under section 108, once Congress “declares that a state of war or national emergency exists,” the DOE must then issue a finding that “it is necessary to the common defense and security . . . to order operation of the plant.” DOE must then petition the Commission to issue an order authorizing operation of the plant. At that time, we would expect the DOE (1) to demonstrate that the congressional action satisfied the statutory prerequisite and (2) to explain who would bear the financial responsibility for the “[j]ust compensation” of LILCO’s expenses necessary to operate the facility. *See* 42 U.S.C. § 2138.

Likewise, under section 186(c), after the revocation of any license, DOE must again issue a finding that operation of the facility is “of extreme importance to the national defense and security” of the United States. DOE must then again petition the Commission for an order directing operation of the facility and demonstrate how the “just compensation” requirement will be satisfied. *See* 42 U.S.C. § 2236(c). Finally, under section 188, again after the prerequisite revocation of LILCO’s license, the DOE must issue a finding that operation of Shoreham is necessary for its “production program” and then file a petition with the NRC, asking that the Commission issue an order directing operation of the facility and demonstrating how the “just compensation” requirement will be satisfied. 42 U.S.C. § 2238.

Both the Petitioners and DOE are free to seek revocation of the facility’s license.<sup>4</sup> More importantly, DOE is free to issue the necessary findings and petition the Commission for an appropriate order. In addition, we have taken no action that interferes with DOE’s assertion that it has independent authority to order operation of Shoreham. *See* DOE Response at 20, *citing* 16 U.S.C. § 824a(c). Furthermore, we have taken no action that prevents the DOE from “taking” Shoreham under the theory of eminent domain.<sup>5</sup> In sum,

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<sup>4</sup> Any person may petition the Commission under 10 C.F.R. § 2.206 to revoke the Shoreham license by alleging the conditions specified in section 186. Petitioners argue that we could not grant an operating license if we knew that the plant would not operate and therefore the operating license may now be revoked under section 186. But the withholding of a license in the face of an applicant’s decision not to operate would be based upon the desire to save NRC resources for more pressing needs, a matter that becomes irrelevant once the resources are spent and the license is issued.

<sup>5</sup> Although we have permitted LILCO to reduce staffing at Shoreham and to take other steps to reduce maintenance costs consistent with the plant’s defueled status, we have not authorized LILCO to begin any major dismantling of the facility. Major dismantling and other activities that constitute decommissioning under the NRC’s regulations must await NRC approval of a decommissioning plan. *See* 10 C.F.R. §§ 50.75, 50.82.

We recently addressed these matters when we addressed Petitioners’ hearing requests related to a proposed “possession only” license for Shoreham. *See* CLI-91-1, 33 NRC 1 (1991). A “possession only” license will not be ready to be issued before March 6, 1991. We would of course take appropriate action if, before that date, DOE specifically (1) declares that it will either petition the Commission to order

(Continued)

Petitioners' arguments on this point are directed at the wrong agency of the U.S. government.<sup>6</sup>

#### D. Additional Concerns Raised by Petitioners

Petitioners claim that our decision in CLI-90-8 violates our NEPA scoping regulations because the Commission barred consideration of resumed operation without benefit of NEPA's scoping process. Petition at 11-13. See 10 C.F.R. §§ 51.28, 51.29. We disagree. First, the Commission has explicitly retained the authority to provide guidance at any point in the course of a proceeding such as this. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990). See also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 515-17 (1977). Once we determined that the requested relief was not required and inappropriate, it was entirely proper to provide guidance to our lower tribunals at the earliest time possible — in this case, at the outset of the proceeding. *E.g.*, *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).<sup>7</sup>

Second, we explicitly pointed out that we have not yet determined that an EIS will even be necessary in this case. See CLI-90-8, 32 NRC at 209. The scoping process is initiated only “[w]henver the appropriate NRC staff director determines that an [EIS] will be prepared . . . .” 10 C.F.R. § 51.26(a). As a result, scoping is not a relevant issue because discussion of EIS scope cannot precede the decision to prepare an EIS.

Third, Petitioners have already availed themselves of the opportunity otherwise provided by the scoping regulations, namely to participate in the debate over the scope of any possible EIS. By filing numerous papers on this issue throughout 1989 and 1990, including their Joint Petition, Petitioners have had — and exercised — the chance to express their views. Thus, their claims on this point are academic.

Petitioners also object to the NRC taking “notice” of the agreements between LILCO, LIPA, and New York State. Petition at 25-27. However, the Petitioners have failed to demonstrate why the Commission should not be able to take notice of those matters. As a threshold matter, Petitioners have not even alleged

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operation of Shoreham, order operation of the plant under its own authority, or seize the plant by eminent domain; and (2) provides us with concrete plans to take such action, including the necessary findings and information as described above. See pp. 72-74, *supra*.

<sup>6</sup> Moreover, Petitioners cannot bootstrap NRC authority to mandate operation of Shoreham under the AEA to NEPA. “NEPA, as a procedural device, does not work a broadening of the agency’s substantive powers.” *NRDC v. EPA, supra*, 822 F.2d at 129 (citing cases).

<sup>7</sup> Petitioners have also claimed that their procedural rights under 10 C.F.R. § 2.714 have been violated. Petition at 22-24. We disagree. As we noted above, the Commission has the inherent authority to step into a proceeding and issue guidance at any time. See, *e.g.*, *Seabrook*, CLI-90-3, *supra*; *Seabrook*, CLI-77-8, *supra*.

that our recitation of the facts is not correct. Simply put, the existence of the settlement agreement is "a matter beyond reasonable controversy" and is "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) (citations omitted).

Here, all parties to this controversy have copies of the settlement agreement and are well versed in its terms and provisions. Moreover, the fact that the NRC must approve the transfer of Shoreham to LIPA does not give the NRC authority to void the settlement agreement *per se* or direct LILCO to operate Shoreham. Likewise, the fact that the parties to the settlement agreement have the ability to set the agreement aside does not prevent us from recognizing its current status. Similarly, there is no reason why we should not take notice of the current status of any legal challenges to the agreement. In sum, while the Petitioners may dispute the wisdom of the agreement, any *legal* challenge to the agreement itself appears properly to lie in the New York courts. *See* note 2, *supra*.

## VII. CONCLUSION

For all of the above reasons, the Joint Petition for Reconsideration tendered by the School District and SE2 on October 30, 1990, is hereby denied.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 21st day of February 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtiss  
Forrest J. Remick

In the Matter of

Docket No. 50-322-OLA

LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

February 28, 1991

The Commission dismisses, as interlocutory, Petitioners' appeal of the Licensing Board's denial of its request for an order that would restrain the Licensee from meeting and communicating with Commission adjudicatory employees and for other relief. Alternatively treating the papers before it as a request for discretionary certification, the Commission denies the request in that it does not support the criteria for a grant of such relief.

The Commission also finds that the Licensing Board did not abuse its discretion in failing to certify the issues before it to the Commission.

**RULES OF PRACTICE: INTERLOCUTORY APPEALS**

The Commission's Rules do not permit a person to take an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety. *See* 10 C.F.R. § 2.714a.

## **RULES OF PRACTICE: INTERLOCUTORY APPEALS (DIRECTED CERTIFICATION)**

The only procedural vehicle by which a party may seek review of interlocutory matters is a request for directed certification. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983).

## **RULES OF PRACTICE: INTERLOCUTORY APPEALS (DISCRETIONARY REVIEW)**

The grant of discretionary review by the Commission is reserved for those important licensing board rulings that, absent immediate appellate review, threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding. *Perry*, ALAB-736, *supra*, 18 NRC at 166 n.1.

## **MEMORANDUM AND ORDER**

This matter is before us on an appeal by the Shoreham–Wading River Central School District (“School District”) and the Scientists and Engineers for Secure Energy (“SE2”) (collectively “Petitioners”) from an order of the Atomic Safety and Licensing Board (hereinafter “Appeal”). The unpublished order denied Petitioners’ request for a restraining order and other relief. *See* Order of November 19, 1990 (ASLBP No. 91-621-01-OLA). The NRC Staff and the Long Island Lighting Company (“LILCO”), the licensee, have now responded. After due consideration, we have determined that the appeal is interlocutory in nature and thus improperly filed under 10 C.F.R. § 2.714a.

### **I. BACKGROUND**

This matter began when the Petitioners each filed petitions requesting intervention and hearings regarding three actions or proposed actions by the NRC Staff regarding the Shoreham facility. On October 17, 1990, the Commission forwarded those requests to the Licensing Board for further proceedings in accordance with 10 C.F.R. Part 2 and instructions contained in the Memorandum Opinion and Order. CLI-90-8, 32 NRC 201 (1990), *aff’d*, CLI-91-2, 33 NRC 61 (1991).

On October 24, 1990, Commissioner Curtis informed the parties that he would visit Shoreham on Tuesday, November 13, 1990. On Friday, November 9, 1990, Petitioners filed a motion that asked the Licensing Board to (1) restrain

LILCO and alleged interested persons not party to the proceeding from meeting and communicating with any Commission adjudicatory employees; (2) restrain the "restrained persons" from allowing any visits by Commission adjudicatory employees to the Shoreham facility; (3) require the restrained persons to submit memoranda describing contacts with any adjudicatory employees relating to the Shoreham docket since July 14, 1989; and (4) require the restrained persons to serve Petitioners with documents submitted to the Commission after July 14, 1990.

Briefly, Petitioners argued that the upcoming visit would violate the Commission's *ex parte* rule, 10 C.F.R. § 2.780, and the Government in the Sunshine Act. They also argued that a restraining order was needed to ensure continued adherence to those requirements as well as to protect their due process rights and to avoid the appearance of preferential treatment or partiality. In essence, the motion sought to restrain LILCO from receiving Commissioner Curtiss on November 13, 1990.

LILCO responded on Monday, November 12, 1990, which was a federal holiday (Veterans Day). LILCO argued that (1) the Curtiss visit was not concerned with the matters at issue in the petitions before the Licensing Board; (2) Petitioners had no standing to request an injunction of the site visit; (3) Petitioners had failed to exhaust their administrative remedies; and (4) Petitioners had created the emergency by unreasonably delaying their motion, having had notice of the proposed visit almost 3 weeks previously. LILCO proposed to respond to the non-emergency portions of the motion under the normal timetable in the Rules of Practice.

While Petitioners had advised the Licensing Board on Wednesday, November 7, 1990, that such a motion would be forthcoming, they waited until after the close of normal office hours on Friday, November 9, to telefax the motion to the Secretary of the Commission and to the Licensing Board. Order of November 19, 1990, slip op. at 6. Moreover, the Licensing Board found that the Petitioners did not advise either the Secretary or the Licensing Board of the impending arrival of an after-hours filing. *Id.* On Monday, November 12, Petitioners' counsel communicated with the presiding officer to advise him of the filings. *Id.* at 6-7.

## II. THE DECISION OF THE LICENSING BOARD

First, the Licensing Board denied the request for emergency relief. Because the day on which the Licensing Board was first able to act on the request was a federal holiday, the Licensing Board was not in possession of the filings in the case and the Chairman did not know the location of the other members of the Licensing Board. *Id.* at 7. Furthermore, the Licensing Board determined

that it was unreasonable to expect a response during a 3-day weekend when Petitioners had not provided any advance notice of the after-hours filing or the need for expeditious action. *Id.* Moreover, the Licensing Board found that delays by the Petitioners in filing the motion helped create any urgency that existed. *Id.* Therefore, the Licensing Board denied the request for emergency relief as untimely filed. *Id.*<sup>1</sup>

Second, the Licensing Board determined that it did not have jurisdiction to grant the requested additional relief. *Id.* at 8-11. Specifically, the Licensing Board found that the Petitioners had "raise[d] the question of whether the Licensee as well as the Commission and its staff are acting in accordance with the law and whether they should be enjoined to comply." *Id.* at 10. The Licensing Board believed that it would have to hold a hearing on all aspects of the Commission's interaction with LILCO, not just on the aspects of the issues before the Licensing Board. The Board found that this question was outside its jurisdiction. *Id.* at 10-11. However, the Board concluded that the Commission had jurisdiction to grant the Petitioners' request and dismissed the request to allow the Petitioners to seek relief from the Commission. *Id.* at 11.

### III. PLEADINGS BEFORE THE COMMISSION

The Petitioners have appealed from the Licensing Board's decision, claiming jurisdiction under 10 C.F.R. §2.714a. Briefly, the Petitioners allege that the Board was empowered to issue the requested order "as a merely prophylactic measure[] to protect Appellants, regardless of whether wrongdoing has previously occurred." Appeal at 4. Moreover, Petitioners allege that the "Board's Order makes no findings of fact and offers no conclusions of law" regarding their request for advance notification of any meetings regarding Shoreham. *Id.* at 5. Finally, the Petitioners allege that it was an abuse of discretion for the Licensing Board not to certify the question to the Commission for its determination of which body had jurisdiction over the issues involved. *Id.* at 5-6.

Both the Staff and LILCO argue that the petition constitutes an interlocutory appeal which is impermissible under 10 C.F.R. §2.714a. In the alternative, both the Staff and LILCO argue that the Licensing Board was correct on the merits of its decision.

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<sup>1</sup>The request for emergency relief was denied by the Board's Chairman after having been telephoned at home by Petitioners' counsel. The remaining members of the Board later concurred in the Chairman's decision. Order of November 19, 1990, slip op. at 7. Petitioners concede that any challenge to Commissioner Curtiss' visit to the Shoreham facility is now moot. See Appeal at 2 n.1.

#### IV. ANALYSIS

The Licensing Board Order before us is clearly interlocutory.

[The Commission's] Rules do not permit a person to take an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety. 10 CFR 2.714a; *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976), and cases there cited.

*Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980), citing, *inter alia*, *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

"The only procedural vehicle by which a party may seek review of interlocutory matters is a request for directed certification." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983). Moreover, the granting of such discretionary review "is reserved for those important licensing board rulings that, absent immediate appellate review, threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding." *Id.* (citation omitted). As the Staff correctly points out, Petitioners have failed to address these criteria in their appeal. See Staff Response at 7 n.10.

Therefore, treating the papers before us as an appeal from the Licensing Board's Order of November 19, we dismiss it as interlocutory. Treating the papers as a request for discretionary certification, we deny the request as unsupported. We also find that the Licensing Board did not abuse its discretion in failing to certify the issues before it to the Commission.

#### V. CONCLUSION

The appeal is dismissed.

For the Commission

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 28th day of February 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING APPEAL BOARD**

**Administrative Judges:**

**Thomas S. Moore, Chairman**  
**Christine N. Kohl**  
**Howard A. Wilber**

**In the Matter of**

**Docket No. 40-2061-ML**

**KERR-McGEE CHEMICAL  
CORPORATION**  
**(West Chicago Rare Earths  
Facility)**

**February 28, 1991**

Due to developments occurring while the appeals were pending, the Appeal Board vacates the Licensing Board's disposition of Contentions 4(c), 4(d), 4(e), 4(g), 2(k), 2(p), 2(s), 2(u), and 2(h), found in LBP-89-35, 30 NRC 677 (1989), and LBP-90-9, 31 NRC 150 (1990). Even if these new developments did not compel vacation of the Licensing Board's decisions, the Appeal Board concludes that reopening the record on these contentions would be warranted. In addition, the Appeal Board reverses the Licensing Board's disposition of these contentions, as well as Contention 4(a). Finally, the Appeal Board orders the Director of NMSS to revoke the materials license amendment authorized by LBP-90-9, and it terminates the entire proceeding.

**RULES OF PRACTICE: STAY OF AGENCY ACTION  
(IRREPARABLE INJURY)**

Whether the moving party will be irreparably injured unless a stay is granted is "[t]he most significant factor in deciding whether to grant a stay request." ALAB-928, 31 NRC 263, 267 (1990).

**NRC POLICY: TRANSFER OF JURISDICTION TO AGREEMENT STATE**

**ATOMIC ENERGY ACT (AEA): TRANSFER OF JURISDICTION TO AGREEMENT STATE**

The unquestionable intent of NRC policy on the state agreement process under section 274 of the AEA, is that jurisdiction is to be transferred to an "agreement state" in an orderly manner with minimal disruption to any pending licensing proceeding. See "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," 46 Fed. Reg. 7540, 7543 (1981).

**NRC POLICY: TRANSFER OF JURISDICTION TO AGREEMENT STATE**

**AEA: TRANSFER OF JURISDICTION TO AGREEMENT STATE**

The transfer of NRC's jurisdiction over section 11(e)(2) byproduct material to an agreement state in and of itself does not necessarily demand immediate termination of an existing NRC licensing proceeding.

**RULES OF PRACTICE: MOOTNESS (PENDING APPEAL)**

**ADJUDICATORY PROCEEDINGS: MOOTNESS (PENDING APPEAL)**

It is the duty of an appellate court, upon motion, to reverse or vacate the judgment below and remand with a direction to dismiss an action that has become moot "through happenstance" while pending on appeal. *United States v. Munsingwear, Inc.* 340 U.S. 36, 39-40 (1950).

**RULES OF PRACTICE: MOOTNESS**

**ADJUDICATORY PROCEEDINGS: MOOTNESS (PENDING APPEAL)**

The *Munsingwear* principle is applicable to unreviewed administrative decisions. See *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961).

**RULES OF PRACTICE: MOOTNESS**

**ADJUDICATORY PROCEEDINGS: MOOTNESS**

“Mootness” means the absence of a “case or controversy”; i.e., “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

**RULES OF PRACTICE: MOOTNESS**

**ADJUDICATORY PROCEEDINGS: MOOTNESS**

A party must overcome a “heavy” burden to demonstrate mootness. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

**RULES OF PRACTICE: MOOTNESS (PENDING APPEAL)**

**ADJUDICATORY PROCEEDINGS: MOOTNESS (PENDING APPEAL)**

Vacating the lower court’s decision is fitting only if “happenstance” prevents the completion of appellate review and if that procedure does not prejudice the rights of any of the parties. *Munsingwear*, 340 U.S. at 40. *See also Karcher v. May*, 484 U.S. 72, 83 (1987); *United States v. Garde*, 848 F.2d 1307, 1310 & n.6 (D.C. Cir. 1988).

**RULES OF PRACTICE: FINAL AGENCY ACTION**

Although a Licensing Board’s initial decision on appeal is “preliminary,” it nonetheless becomes “immediately effective” insofar as it provides the authority for license issuance, which latter action is considered final for purposes of judicial review. *See* 10 C.F.R. § 2.764(b); *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991); *Oystershell Alliance v. NRC*, 800 F.2d 1201 (D.C. Cir. 1986).

**RULES OF PRACTICE: MOOTNESS (PENDING APPEAL)**

**ADJUDICATORY PROCEEDINGS: MOOTNESS (PENDING APPEAL)**

“There is ample room for discretion in deciding whether a case is moot, or whether some practical purpose would be served by deciding the merits. If there is an adequate reason to preserve the judgment, the appeal should be decided.” 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and*

*Procedure* § 3533.10, at 430 (2d ed. 1984). See also *Pickus v. United States Bd. of Parole*, 543 F.2d 240, 242 (D.C. Cir. 1986).

**REGULATIONS: 10 C.F.R. PART 40, APPENDIX A**

**UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES**

Criterion 6 establishes the basic performance standard for a mill tailings disposal system — there must be reasonable assurance of control of radiological hazards for 1,000 years, and in any event for at least 200 years, and of limiting releases of radon-222 from uranium byproduct materials, and radon-220 from thorium byproduct materials, to the atmosphere. See 10 C.F.R. Part 40, App. A, Criterion 6.

**RULES OF PRACTICE: NEW MATERIAL; VACATION**

**ADJUDICATORY PROCEEDINGS: NEW MATERIAL; VACATION**

Agency case law makes clear that, when circumstances change while an adjudicatory decision is pending on appeal so as to supersede or to alter in a significant way the evidentiary basis of that decision, the decision should be vacated. See *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982).

**RULES OF PRACTICE: NEW MATERIAL; VACATION**

**ADJUDICATORY PROCEEDINGS: NEW MATERIAL; VACATION**

Vacation of a decision may be appropriate if the Appeal Board finds that new information is “material to the resolution of the issues before [it]” and that, “with appropriate opportunity for comment or rebuttal, [the information] might well have changed the outcome of the appeal.” *Browns Ferry*, ALAB-677, 15 NRC at 1393.

**RULES OF PRACTICE: NEW MATERIAL; VACATION**

**ADJUDICATORY PROCEEDINGS: NEW MATERIAL; VACATION**

**COMMISSION PROCEEDING(S): PRECEDENT**

If an Appeal Board decision “was based on a record that no longer represents the [current] situation . . . and will not be reviewed by the Commission, that decision [should be] vacated and shall be given no weight as a precedent.”

*Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982).

**RULES OF PRACTICE: NEW MATERIAL; VACATION**

**ADJUDICATORY PROCEEDINGS: NEW MATERIAL; VACATION**

If, while a Licensing Board's decision is pending on appeal, the applicant indicates its intention to alter its plans substantially, the Appeal Board may vacate the Licensing Board's decision without prejudice. *See Delmarva Power & Light Co.* (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979).

**RULES OF PRACTICE: NEW MATERIAL; VACATION**

**ADJUDICATORY PROCEEDINGS: NEW MATERIAL; VACATION**

**FEDERAL COURTS: VACATION**

Agency practice of vacating a decision when circumstances change so as to alter effectively the evidentiary record supporting a decision on appeal is fully consistent with federal court practice. Rule 60(b) of the Federal Rules of Civil Procedure provides that new evidence diligently discovered after trial and decision or "any other reason justifying relief" can deprive a judgment of its operative effect. The "other reason" language in Rule 60(b) simply "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949).

**RULES OF PRACTICE: BURDEN OF PROOF**

As the applicant of a license has the burden of proof, the principal focus of the hearing is accordingly on its presentation, not the staff's. *See Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, *review declined*, CLI-83-32, 18 NRC 1309 (1983).

## **ADJUDICATORY HEARINGS: CONSIDERATION OF NRC STAFF NEPA REVIEW**

### **NEPA: NRC RESPONSIBILITIES**

The adequacy of the staff's environmental review can be challenged in a hearing. *Diablo Canyon*, ALAB-728, 17 NRC at 807.

### **NEPA AND AEA: JURISDICTION; REQUIREMENTS**

A finding of adequate protection of radiological health and safety under the AEA and UMTRCA, does not necessarily mean that the NRC staff's environmental review under NEPA is sufficient. *See generally Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729-30 (3d Cir. 1989).

### **RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES (TO INFORM OF NEW INFORMATION)**

There is a long-established obligation imposed on all parties in NRC adjudicatory proceedings to call to the attention of both the Licensing Board and other parties "new information which is relevant and material to the matters being adjudicated." *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973).

### **STAFF TECHNICAL POSITIONS: APPLICATION**

#### **REGULATORY GUIDES: APPLICATION**

Staff technical positions and the like do not have the force of regulations; rather, they provide guidance to applicants as to acceptable methods for implementing regulatory criteria. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974); *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978). "Simply stated, [such] staff guidance generally sets neither minimum nor maximum standards." *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 n.10 (1983).

### **RULES OF PRACTICE: REOPENING OF RECORD**

Under the Commission's Rules of Practice, a closed record will not be reopened unless the movant satisfies the three criteria found in 10 C.F.R. § 2.734(a) — timeliness, safety or environmental significance, and materiality. In addition, "[t]he motion must be accompanied by one or more affidavits which

set forth the factual and/or technical bases for the movant's claim that the [three] criteria . . . have been satisfied." 10 C.F.R. § 2.734(b).

## **RULES OF PRACTICE: REOPENING OF RECORD**

### **STAFF TECHNICAL POSITIONS: SIGNIFICANCE**

A staff "working paper" that serves only to explore a new approach and that does not conflict with staff expert testimony in a proceeding is of no regulatory significance. *Consolidated Edison Co. of New York* (Indian Point Station, Unit No. 2), ALAB-209, 7 AEC 971, 973-75 (1974). As such, a motion to reopen based solely on such a working paper will be denied. *Id.* at 972-74.

### **APPEAL BOARD(S): AUTHORITY; ACTION ON NEW MATTERS**

Although an Appeal Board has the authority to hear evidence and decide matters in the first instance, the exercise of that authority has always been solely a matter of discretion, dependent upon the particular circumstances of the case and available resources.

### **UMTRCA: PURPOSE**

Congress enacted UMTRCA in 1978 to ameliorate the health and environmental hazards presented by uranium and thorium mill tailings. The purposes of UMTRCA are twofold: first, to provide a remedial action program at inactive mill tailings sites, Pub. L. No. 95-604, § 2(b)(1), 92 Stat. 3022 (1978); and second, to provide a program for the regulation of "mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations," *id.* § 2(b)(2), 92 Stat. 3022.

### **UMTRCA: NRC REGULATIONS**

The validity of the Commission's mill tailings regulations, specifically the 10 C.F.R. Part 40, Appendix A Criteria, has been upheld. *Quivira Mining Co. v. NRC*, 866 F.2d 1246 (10th Cir. 1989).

### **UMTRCA: NRC REGULATIONS; NRC RESPONSIBILITY; COST-BENEFIT ANALYSIS**

The UMTRCA cost-benefit analysis only requires the Commission to conduct "cost-benefit rationalization" in issuing regulations and managing mill tailings. *Quivira*, 866 F.2d at 1251-58. That standard "requires the agency merely to

consider and compare the costs and benefits of various approaches, and to choose an approach in which costs and benefits are reasonably related in light of Congress' intent." *Id.* at 1250 (citing *American Mining Congress v. Thomas*, 772 F.2d 617, 632 (10th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (AMC 7)).

#### **UMTRCA: NRC REGULATIONS; NRC RESPONSIBILITY; COST-BENEFIT ANALYSIS**

The agency's general endeavor to take into account the "'economics of improvements in relation to benefits to the public health and safety,'" set forth in the fifth paragraph of the Appendix A Introduction, 10 C.F.R. Part 40, ensures that in future licensing actions the costs of regulation bear a reasonable relationship to its benefits. *Quivira*, 866 F.2d at 1254.

#### **UMTRCA: APPLICATION; NRC REGULATIONS**

The fourth introductory paragraph to Appendix A in 10 C.F.R. Part 40, permitting licensees to propose equivalent alternatives to the Commission's criteria, fully meets all of UMTRCA's site-flexibility requirements. *Quivira*, 866 F.2d at 1259-60.

#### **UMTRCA: APPLICATION; NRC REGULATIONS**

The statutory language of UMTRCA makes no positive distinction between new and existing mill tailings sites, and the legislative history indicates only that NRC is to "consider possible differences in applicability of regulations to existing versus new tailings sites." *Quivira*, 866 F.2d at 1260 n.17.

#### **UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES**

Criterion 1 of Appendix A, 10 C.F.R. Part 40, sets forth the siting requirements of the Commission's mill tailings regulations. Among other things, Criterion 1 requires that the following three site features be considered in assessing the adequacy of a disposal site: (1) remoteness from populated areas; (2) hydrologic and other natural conditions that contribute to the isolation of tailings from groundwater; and (3) the potential for minimizing erosion over the long term. 10 C.F.R. Part 40, App. A, Criterion 1.

## **REGULATIONS: INTERPRETATION**

The starting point in interpreting any regulation is the language and structure of the provision itself. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review declined*, CLI-88-11, 28 NRC 603 (1988); 1A Sutherland, *Statutory Construction* § 31.06 (4th ed. 1984).

## **REGULATIONS: INTERPRETATION**

In interpreting a regulation, we must bear in mind the elementary canon of construction that the regulation should be interpreted so as not to render any part inoperative; the whole of the regulation must be given effect. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985); 2A Sutherland, *Statutory Construction* § 46.06.

## **REGULATIONS: INTERPRETATION**

"Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation." *Shoreham*, ALAB-900, 28 NRC at 288.

## **REGULATIONS: INTERPRETATION**

Disregarding portions of a regulation is a wholly unacceptable method of regulatory construction. Rather, the regulation must be read as it is written and in its entirety. *See Natural Resources Defense Council v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987). *See also Mountain States*, 472 U.S. at 249-50; 2A Sutherland, *Statutory Construction* § 46.06.

## **UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES**

In judging the adequacy of an existing tailings site against the three siting features of Criterion 1 in 10 C.F.R. Part 40, Appendix A, and then comparing that site to alternative sites measured against the same siting requirements, the differences between sites become matters of degree; they are nonetheless to be measured by the same yardstick.

## **REGULATIONS: INTERPRETATION**

While care must always be taken not to apply dictionary definitions mechanically in unintended contexts, *see Farmers Reservoir & Irrigation Co. v.*

*McComb*, 337 U.S. 755, 764 (1949), such application is appropriate where the purpose of the Commission's word choice is evident.

#### **UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES**

"[S]iting is of paramount importance in developing optimum tailings disposal programs. The problem of tailings disposal cannot be approached with the attitude that inadequate siting features can be compensated for by design." 45 Fed. Reg. 65,521, 65,524 (1980).

#### **UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES (NO ACTIVE MAINTENANCE)**

Criterion 12 of Appendix A, 10 C.F.R. Part 40, requires that the final disposition of mill tailings must be such that ongoing active maintenance is not necessary to preserve isolation. *See also* 10 C.F.R. Part 40, App. A, Criterion 1.

#### **UMTRCA: NRC REGULATIONS; TAILING DISPOSAL SITES**

##### **REGULATIONS: INTERPRETATION (10 C.F.R. PARTS 40 AND 61)**

It is clear from the Part 61 regulations themselves that the Commission did not intend for any part thereof to be applied to Part 40 mill tailings disposal. *See* 10 C.F.R. § 61.2.

##### **REGULATIONS: INTERPRETATION**

If regulations are to have any meaning, express exclusions and prohibitions must be obeyed. In some circumstances, if a regulation does not define a particular term, it may be acceptable to borrow the definition of a like term from another part of an agency's regulations. But this can never be the case where there are specific prohibitions against such application.

##### **RULES OF PRACTICE: SUMMARY DISPOSITION**

Only if there are no genuine issues of material fact and the moving party is entitled to a decision as a matter of law, may the presiding officer grant a motion for summary disposition. 10 C.F.R. § 2.749(d). *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units Nos. 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981) (citing *Virginia Electric and Power Co.*

(North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980)).

**RULES OF PRACTICE: SUMMARY DISPOSITION (MATERIAL FACT)**

A material fact is one that affects the outcome of the litigation or tends to resolve any of the issues raised by the parties. *See generally* 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, at 93-95 (1983).

**RULES OF PRACTICE: SUMMARY DISPOSITION (MATERIAL FACT)**

If a disputed issue of material fact exists, a motion for summary disposition must fail. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 345-47 (1989).

**RULES OF PRACTICE: SUMMARY DISPOSITION**

In weighing the evidence, it is well-settled that all inferences must be drawn in favor of the party opposing summary disposition. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

**RULES OF PRACTICE: SUMMARY DISPOSITION; EXPERT WITNESS(ES)**

As has been observed, “[e]xpert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not.” *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985). *See also* Fed. R. Evid. 703, 705.

**UMTRCA: NRC RESPONSIBILITY; COMPLIANCE WITH EPA REGULATIONS**

Concerning the longevity requirement of Criterion 6, the Commission recognized that “EPA’s primary design standard is 1,000 years. Accordingly, the Commission has no discretion to promulgate a different design standard for a shorter period.” 50 Fed. Reg. at 41,856 (1985). “The 200-year minimum longevity requirement [of Criterion 6] provides relief in those unique reclama-

tion situations where the 1,000-year criterion can be shown to impose too much of a cost hardship. The Commission views the EPA longevity standard to be 1,000 years unless site specific circumstances preclude meeting 1,000 years." *Id.* at 41,858.

## **UMTRCA: NRC REGULATIONS; EPA STANDARDS**

The concern of the Commission's mill tailings regulations that the design of tailings disposal sites effectively resist human intrusion can be traced, in part, to the EPA mill tailings regulations that are intended to inhibit the "misuse" of tailings. *See* 40 C.F.R. § 192.20(a)(1); *AMC I*, 772 F.2d at 632-33.

## **LICENSE: REVOCATION**

### **RULES OF PRACTICE: LICENSE REVOCATION**

There no longer being a record and decision to support authorization of a license amendment, it necessarily must be revoked as well. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 434, *review declined*, CLI-88-11, 28 NRC 603 (1988).

## **AEA: HEARING RIGHT; HEARING REQUIREMENT (MATERIALS LICENSE)**

The need for a new license amendment triggers the right to a hearing under section 189(a) of the Atomic Energy Act. 42 U.S.C. § 2239(a)(1). *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 n.163 (1984); *id.*, ALAB-778, 20 NRC 42, 48 (1984), *aff'd sub nom. Anthony v. NRC*, 770 F.2d 1066 (3d Cir. 1985).

## **ATOMIC ENERGY ACT (AEA): TRANSFER OF JURISDICTION TO AGREEMENT STATE; HEARING REQUIREMENT**

In any byproduct material licensing proceeding conducted by an agreement state, section 274(o)(3) of the AEA requires the State to provide procedures that include (1) an opportunity, after public notice, for written comments and a public hearing, with a transcript, (2) an opportunity for cross examination, and (3) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review. 42 U.S.C. § 2021(o)(3). *See* State Agreement Policy, 46 Fed. Reg. at 7544; 10 C.F.R. § 150.31(b)(3)(i).

## TECHNICAL ISSUES DISCUSSED

Byproduct Material  
Cell Design  
Erosion  
Half-lives  
Intrusion Barrier  
Mill Tailings  
Probable Maximum Precipitation (or PMP)  
Radioactivity Waste Storage  
Site Suitability.

## APPEARANCES

**William D. Seith**, Chicago, Illinois (with whom **Neil F. Hartigan**, Springfield, Illinois, and **Michelle D. Jordan**, **Matthew J. Dunn**, **Douglas J. Rathe**, **J. Jerome Sisul**, **Richard A. Verkler**, **Joseph Williams**, and **Joseph M. Claps**, Chicago, Illinois, were on the brief and pleadings), for the People of the State of Illinois.

**Joseph V. Karaganis**, Chicago, Illinois (with whom **James D. Brusslan**, Chicago, Illinois, and **Robert D. Greenwalt**, West Chicago, Illinois, were on the brief and pleadings), for the City of West Chicago, Illinois.

**Richard A. Meserve**, Washington, D.C. (with whom **Peter J. Nickles** and **Herbert Estreicher**, Washington, D.C., were on the brief and pleadings) for applicant Kerr-McGee Chemical Corporation.

**Bertram C. Frey** and **Marc M. Radell**, Chicago, Illinois, for *amicus curiae* United States Environmental Protection Agency.

**Ann P. Hodgdon** (with whom **Patricia Jehle** was on the brief and pleadings) for the Nuclear Regulatory Commission staff.

## DECISION

Pending before us are the appeals of the People of the State of Illinois ("the State") and the City of West Chicago ("the City") from the Licensing Board's February 1990 initial decision authorizing the issuance of a license amendment to the applicant, Kerr-McGee Chemical Corporation, for its West Chicago Rare

Earths Facility.<sup>1</sup> The license amendment permits Kerr-McGee permanently to dispose of approximately 376,400 cubic meters<sup>2</sup> of radioactive thorium “mill tailings” and other associated wastes in an engineered “disposal cell” on 27 acres of the site of its Rare Earths Facility — a facility that will then be decommissioned.<sup>3</sup> The site is located in the midst of a densely populated residential area in the City of West Chicago in DuPage County, Illinois. The waste is to be piled above grade, several meters over the water table, on compacted clay soils. A cap is to be placed over the waste, composed of several intermediate layers of clay, geotextile material, and sand and gravel, topped with a two-foot thick “intrusion barrier” of graded clays and cobble and a two-foot thick cover of topsoil and vegetation. All together, the waste pile is to be approximately 35 feet high, with side slopes of 1:5.<sup>4</sup>

While the appeals were pending, several significant developments occurred, including the Commission’s approval of an agreement under section 274 of the Atomic Energy Act (AEA)<sup>5</sup> transferring regulatory jurisdiction over “section 11(e)(2) byproduct material” — like the mill tailings involved here<sup>6</sup> — to the State of Illinois. These significant developments subsequent to the rendering of the Licensing Board’s decision prompted numerous motions and other filings over the last year from all of the parties, several of which remain undecided.

Upon consideration of the lengthy record in this proceeding, the initial decision and related rulings of the Licensing Board, and subsequent pertinent events, we conclude, as explained below, that the Licensing Board’s decisions must be vacated, or in the alternative reversed, and the license amendment necessarily must be revoked. We also conclude that this NRC proceeding must be terminated.

## I. BACKGROUND

Kerr-McGee produced thorium at the West Chicago facility from 1967, when it acquired the plant in a merger with American Potash & Chemical Company,

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<sup>1</sup> LBP-90-9, 31 NRC 150 (1990).

<sup>2</sup> According to counsel for the State, this amounts to about 500,000 tons. App. Tr. 8.

<sup>3</sup> “Tailings” are a sand-like substance defined in section 101(8) of the Uranium Mill Tailings Radiation Control Act of 1978 as “the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.” Pub. L. No. 95-604, 92 Stat. 3021, 3023 (1978). “[T]ailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content” is characterized as “byproduct material” under section 11(e)(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2014(e)(2).

<sup>4</sup> NUREG-0904, Supp. No. 1, “Supplement to the Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois” (Apr. 1989) [hereinafter SFES], at 3-3 to 3-7, 4-23, 4-85 to 4-87, B-6 to B-12.

<sup>5</sup> 42 U.S.C. § 2021.

<sup>6</sup> See *supra* note 3.

to 1973, when it ceased this operation. The NRC has had the disposal of the waste materials generated at the West Chicago site under consideration since at least 1976.<sup>7</sup> Shortly after Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA),<sup>8</sup> the NRC staff issued a notice to Kerr-McGee advising that its existing license for the West Chicago facility was being amended to include a requirement that Kerr-McGee submit a detailed plan for decontamination and decommissioning of the facility and disposal of the ore residues located at the site.<sup>9</sup> Kerr-McGee submitted a "stabilization plan" in August 1979, and several months later the Commission gave notice of its intent to prepare a draft environmental impact statement (DEIS) "to support future licensing action."<sup>10</sup> The DEIS was issued in May 1982, followed a year later by the Final Environmental Statement (FES). The FES prepared by the NRC staff considered eight alternatives, none of which involved permanent onsite disposal, as Kerr-McGee had proposed. The staff recommended approval of onsite storage of the thorium mill tailings for an indeterminate period of time, subject to monitoring before deciding whether to approve the site and cell design for permanent disposal.<sup>11</sup>

Soon thereafter, the Commission issued a notice of opportunity for hearing on the licensing actions recommended in the FES, thus initiating this licensing proceeding.<sup>12</sup> The State's request for a hearing was granted and it was admitted as a party to the litigation. Among the contentions it sought to raise was a challenge to the staff's proposal for indeterminate onsite storage as an improper segmentation under the National Environmental Policy Act (NEPA).<sup>13</sup> The State argued that Kerr-McGee's proposal for permanent onsite storage must be considered and rejected. The Licensing Board agreed that permanent onsite disposal must be considered, and, accordingly, it directed the staff to prepare and circulate a supplement to its FES addressing this subject.<sup>14</sup>

The instant proceeding essentially remained inactive until 1989, when the staff issued its Supplement to the FES (SFES).<sup>15</sup> The Licensing Board subsequently admitted several of the State's additional contentions based on the

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<sup>7</sup> See Letter from R.E. Cunningham to Kerr-McGee (Nov. 16, 1978) [hereinafter 1978 Notice].

<sup>8</sup> Pub. L. No. 95-604, 92 Stat. 3021 (codified in scattered sections of 42 U.S.C.).

<sup>9</sup> 1978 Notice.

<sup>10</sup> 44 Fed. Reg. 72,246 (1979). See generally *Kerr-McGee Corp. (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

<sup>11</sup> See LBP-84-42, 20 NRC 1296, 1299, 1308, 1313 (1984), *reconsideration denied*, LBP-85-3, 21 NRC 244 (1985).

<sup>12</sup> 48 Fed. Reg. 26,381 (1983). The Commission subsequently directed the formal hearing procedures of 10 C.F.R. Part 2, Subpart G, to apply to this adjudication. Commission Order of Nov. 3, 1983 (unpublished).

<sup>13</sup> 42 U.S.C. § 4321.

<sup>14</sup> LBP-84-42, 20 NRC at 1307-17 & n.45; LBP-85-3, 21 NRC at 251-56.

<sup>15</sup> See *supra* note 4.

SFES.<sup>16</sup> It also ruled on a staff motion to hold the proceeding in abeyance. The occasion for the staff's motion was a then-pending request by the State, asking the Commission to transfer its jurisdiction over section 11(e)(2) byproduct material, like the mill tailings involved here, to the State, pursuant to section 274 of the AEA. The staff estimated that it would take 6 to 12 months for the Commission to complete action on the State's request, and it expressed a desire not to devote further resources to this proceeding. The State supported the staff's motion to hold the proceeding in abeyance, and Kerr-McGee opposed it. After considering the equities involved and the resources already expended in the litigation, the Board denied the staff's motion and set a schedule for the filing of summary disposition motions and hearing.<sup>17</sup>

In the meantime, the United States Environmental Protection Agency (EPA) reviewed the SFES and expressed certain concerns about permanent onsite storage of the mill tailings.<sup>18</sup> Pursuant to its responsibility under UMTRCA, EPA has promulgated the general health and safety standards (the "Mill Tailings Standards," found in 40 C.F.R. Part 192), which the NRC applies and implements in regulating the disposal of mill tailings under its own regulations in 10 C.F.R. Part 40, Appendix A. After being apprised of EPA's concerns about the SFES, the Licensing Board solicited comments from the parties.<sup>19</sup> In addition, the City of West Chicago, which had not previously sought to participate in the proceeding,<sup>20</sup> petitioned for and was granted permission to participate as an interested government under 10 C.F.R. § 2.715(c).<sup>21</sup>

Following the filing of motions for summary disposition by both Kerr-McGee and the State, the Licensing Board resolved most of the issues in Kerr-McGee's favor, and scheduled a two-day hearing on two of the remaining issues for the next month.<sup>22</sup> On February 13, 1990, the Licensing Board issued the initial decision now before us on review. The Board concluded that EPA's concerns about the SFES had "no direct impact on the admitted contentions" and thus need not be considered.<sup>23</sup> It then went on to resolve all the remaining issues in Kerr-McGee's favor and, subject to two conditions, authorized the staff to issue a license amendment to Kerr-McGee permitting permanent onsite disposal of the

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<sup>16</sup>LBP-89-16, 29 NRC 508 (1989); Licensing Board Memorandum and Order of July 12, 1989 (unpublished) [hereinafter July 12 Order].

<sup>17</sup>LBP-89-16, 29 NRC at 516-18.

<sup>18</sup>Board Notification 89-6 (July 12, 1989); Letter from R. Springer to J. Swift (July 27, 1989), and Enclosure [hereinafter EPA Comments on SFES], attached to Letter from D.J. Rathe to J.H. Frye (Aug. 21, 1989).

<sup>19</sup>Licensing Board Memorandum and Order of Aug. 24, 1989 (unpublished).

<sup>20</sup>Early in the proceeding, the West Chicago Chamber of Commerce withdrew its petition to intervene. LBP-84-42, 20 NRC at 1299 n.1.

<sup>21</sup>Licensing Board Order of Sept. 5, 1989 (unpublished). This status allows a governmental entity to participate in a hearing and to file an appeal under 10 C.F.R. § 2.762 without sponsoring its own contentions. See 10 C.F.R. § 2.715(c).

<sup>22</sup>LBP-89-35, 30 NRC 677 (1989); Licensing Board Memorandum and Order of Nov. 14, 1989 (unpublished).

<sup>23</sup>LBP-90-9, 31 NRC at 154.

mill tailings in a cell as described in Kerr-McGee's application and supporting materials.<sup>24</sup>

The State and the City appealed and moved for a stay of the license amendment authorization. Both Kerr-McGee and the staff opposed the grant of a stay. On March 13, 1990, we denied the stay motion, explaining in a subsequent memorandum that we could not find, at that time, any irreparable injury — “[t]he most significant factor in deciding whether to grant a stay request.”<sup>25</sup> In this connection, we noted that

Kerr-McGee's activities and expenditures over the next few months will be quite limited and, for the most part, confined to site work that would have to be conducted regardless of whether the contaminated soils and sediments involved are ultimately disposed of onsite or at another location. This being so, Kerr-McGee's limited expenditures during the administrative appeal process cannot reasonably be said to skew the ultimate cost-benefit analysis, should it need to be revisited.<sup>26</sup>

During the briefing and consideration of the State's and the City's motions for a stay, several related events occurred. On February 23, the staff issued the license amendment to Kerr-McGee.<sup>27</sup> On or about March 6, however, the City issued a “stop work” notice and informed Kerr-McGee that it was obliged to comply with a local ordinance concerning dust control and erosion before commencing the onsite disposal operation. Kerr-McGee challenged the City's action in federal district court. The court denied Kerr-McGee's request for a preliminary injunction and was affirmed on appeal.<sup>28</sup> Thus, although Kerr-McGee's license amendment remains outstanding, disposal activities have apparently not yet begun.

Before either the State or the City filed their briefs on appeal, we invited EPA to file an *amicus curiae* brief expressing its views on the Licensing Board's decision.<sup>29</sup> EPA accepted our invitation. In its brief, EPA states that “the disposal method currently approved in the Initial Decision may not meet all of the applicable standards found in 40 C.F.R. Part 192,” and recommends that we remand the matter to the Licensing Board for further consideration of the

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<sup>24</sup> *Id.* at 194-95.

<sup>25</sup> ALAB-928, 31 NRC 263, 267 (1990).

<sup>26</sup> *Id.* at 268 (footnote omitted).

<sup>27</sup> The Commission's Rules of Practice authorize the Director of Nuclear Material Safety and Safeguards to issue license amendments like that here involved within ten days of the Licensing Board's initial decision, despite the pendency of an appeal. 10 C.F.R. § 2.764(b).

<sup>28</sup> *Kerr-McGee Chemical Corp. v. City of West Chicago*, 732 F. Supp. 922 (N.D. Ill.), *aff'd*, 914 F.2d 820 (7th Cir. 1990). The State also sought judicial intercession by the Illinois state court in this matter. It obtained a temporary restraining order, enjoining Kerr-McGee from beginning any construction activities at the site or from interfering with inspection of the facility by State officials. *State ex rel. Hartigan v. Kerr-McGee Chemical Corp.*, No. 90-CH-220 (Ill. 18th Cir. Mar. 14, 1990).

<sup>29</sup> Appeal Board Memorandum and Order of Mar. 21, 1990 (unpublished) (citing *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 315 n.2 (1981)).

comments EPA submitted to the agency in July 1989 in connection with the SFES.<sup>30</sup>

As a result of EPA's brief, specifying several areas in which that agency believes the Kerr-McGee disposal proposal fails to satisfy the Mill Tailings Standards, the NRC staff requested approximately two additional months in which to file its brief in response to those of the State, the City, and EPA. The staff's extension request noted that the EPA brief has a "potentially significant bearing on the arguments made by the State and the City."<sup>31</sup> The staff also asserted a need for more time to obtain additional information from Kerr-McGee and to analyze it to determine whether there is warrant for reconsideration of the staff's positions on certain issues in this proceeding, "for example, regarding probable maximum precipitation and associated design and maintenance implications."<sup>32</sup> We granted the staff's request.<sup>33</sup>

Over the next two months, the staff held several meetings with Kerr-McGee, obtaining additional information and details about the disposal cell.<sup>34</sup> At about this same time, the staff was also in the process of reevaluating its generic position on some of the same matters raised by the State during the hearing and questioned by EPA in connection with the SFES. On August 10, the staff filed its brief, opposing the State's and the City's appeals. The staff indicates that it has changed its position on certain issues from that asserted before the Licensing Board, and that its further, post-hearing review of Kerr-McGee's disposal cell has resulted in "engineering specifications that may vary from the engineering implications of conclusions reached by the Licensing Board."<sup>35</sup> The staff nonetheless concludes that the proposed onsite disposal is adequate to protect the public health and safety and satisfies the requirements of 10 C.F.R. Part 40, Appendix A, "provided . . . that the license is amended to incorporate the specifications for the protective rock and the other design details provided in Kerr-McGee's submissions [to the staff] of July 23, 1990 and July 31, 1990."<sup>36</sup> While the staff acknowledges that the other parties are entitled to an opportunity to respond to this new information, it urges that this process take place before us, without a remand to the Licensing Board.<sup>37</sup>

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<sup>30</sup> *Amicus Curiae* Brief of the United States Environmental Protection Agency (May 21, 1990) [hereinafter EPA Brief] at 2-3, 15. See *supra* p. 96.

<sup>31</sup> NRC Staff's Motion for an Extension of Time (May 30, 1990) at 1.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> Appeal Board Memorandum and Order of June 6, 1990 (unpublished).

<sup>34</sup> See, e.g., Board Notifications 90-04 (July 13, 1990); 90-05 (July 31, 1990, reissued Aug. 7, 1990); 90-06 (Aug. 3, 1990); 90-08 (Aug. 8, 1990). Although the State and City were permitted to attend these meetings, they were not allowed to participate.

<sup>35</sup> NRC Staff Brief in Response to the Briefs of the State of Illinois, the City of West Chicago and the U.S. Environmental Protection Agency (Aug. 10, 1990) [hereinafter NRC Staff Brief] at 38.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* at 38-39.

The staff's brief prompted a motion from the State and the City to vacate the license amendment issued to Kerr-McGee because

[t]he design approved by the [Licensing Board] is *not* the design now before the Appeal Board. Indeed, Kerr-McGee and the NRC staff have now rejected the design assumption of the [Licensing Board]-approved project and have offered a new design based on dramatically different technical assumptions.<sup>38</sup>

The State and the City request that this matter also be remanded to the Office of Nuclear Material Safety and Safeguards (NMSS) for processing as a new license amendment application. In the alternative, the movants contend that the adjudicatory record be reopened and remanded to the Licensing Board for consideration in the first instance. Kerr-McGee opposes the motion, arguing that any new developments occasioned by the staff's consideration of EPA's concerns are beyond the proper scope of this proceeding. While the staff contends that we should proceed with review of the Licensing Board's decision, at the same time it has no objection to reopening for our consideration of certain new information. The staff also repeats its earlier view that the other parties should have a chance to respond to this new information.

Following the receipt of the State's, the City's, and Kerr-McGee's briefs in reply to that of the staff, yet another event occurred that would have an effect on this protracted litigation. On October 17, the Commission approved the State's request, pursuant to section 274 of the AEA, for the authority to regulate section 11(e)(2) byproduct material.<sup>39</sup> This agreement, which took effect on November 1, 1990,<sup>40</sup> led to another round of motions. The State and the City now maintain that this proceeding is moot by reason of the Commission's transfer to the State of regulatory control over the mill tailings here involved. Asserting a lack of jurisdiction, they move for termination of the proceeding and vacation of the Licensing Board's initial decision. Kerr-McGee opposes both terminating the proceeding and vacating the Board's decisions, and it urges us to resolve the pending appeals. It also argues that, if we nonetheless terminate the proceeding, the Licensing Board's decision should be allowed to stand for equitable reasons. The NRC staff argues that the proceeding should be terminated but the decision below should not be vacated.

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<sup>38</sup> Motion to Vacate as Moot the License Amendment and to Remand . . . to [NMSS] or to Reopen the Record and Remand to Licensing Board (Aug. 31, 1990) [hereinafter Motion to Vacate] at 2 (emphasis in original).

<sup>39</sup> *State of Illinois*, CLI-90-9, 32 NRC 210, reconsideration denied, CLI-90-11, 32 NRC 333 (1990), petition for review pending sub nom. *Kerr-McGee Chemical Corp. v. United States*, No. 90-1534 (D.C. Cir. filed Nov. 14, 1990). The Commission had previously entered into an agreement transferring jurisdiction to the State over other types of nuclear material. See 52 Fed. Reg. 22,864 (1987), review denied sub nom. *Kerr-McGee Chemical Corp. v. NRC*, 903 F.2d 1 (D.C. Cir. 1990).

<sup>40</sup> 55 Fed. Reg. 46,591, 46,593 (1990).

Finally, on December 5, the Illinois Department of Nuclear Safety (IDNS) notified Kerr-McGee that, as a result of the State's recent assumption of jurisdiction over section 11(e)(2) byproduct material, it now has authority over the NRC license issued to Kerr-McGee for the onsite disposal of mill tailings at West Chicago. The IDNS went on to inform Kerr-McGee that its license would expire within 90 days of receipt of the letter (i.e., March 10, 1991), but that Kerr-McGee could apply for a new license with the IDNS.<sup>41</sup> Kerr-McGee quickly moved for a protective order from us, arguing that the IDNS letter revealed an inappropriate attempt to arrogate our authority to decide, among other matters, the State's and City's own pending motion to terminate and vacate. Kerr-McGee claims that a protective order is necessary to preserve our jurisdiction and the status quo, as well as to prevent unspecified irreparable harm to Kerr-McGee. The State, City, and staff all oppose Kerr-McGee's motion.

On January 16, 1991, we heard lengthy oral argument from all the parties (except *amicus* EPA) on the appeals; the motion to vacate the license amendment and to remand for consideration of recent new developments in this case; and the motion to terminate the proceeding for lack of jurisdiction and to vacate the Licensing Board's decision.

## II. THE EFFECT OF THE TRANSFER OF JURISDICTION TO ILLINOIS

The State and the City argue that, as a consequence of the Commission's October 17, 1990, approval of the agreement transferring regulatory authority over section 11(e)(2) byproduct material — the subject of this proceeding — to the State, the Commission has affirmatively relinquished its jurisdiction (and that of its adjudicatory boards) over the instant proceeding. In their view, this lack of jurisdiction makes the case now moot, and our decision in the *Sheffield* proceeding<sup>42</sup> requires that we immediately terminate this case and vacate the Licensing Board's decision, removing all operative effect.<sup>43</sup> In *Sheffield*, while the case was pending before us on the appeal of the respondent in that show-cause proceeding, the Commission agreed to transfer its regulatory authority over the Sheffield waste disposal site to Illinois pursuant to a section 274 agreement. Noting that the NRC staff had withdrawn (or was about to withdraw) its show-cause order that initiated the proceeding, and citing the Supreme Court's decision

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<sup>41</sup> Letter from J.G. Klinger to J.C. Stauter (dated Dec. 5, 1990, and stamped as "received" by Kerr-McGee on Dec. 10, 1990), attached as Exhibit 1 to Kerr-McGee's Motion for a Protective Order (Dec. 12, 1990).

<sup>42</sup> *US Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987).

<sup>43</sup> Motion to Terminate Proceeding and to Vacate Initial Decision for Lack of Jurisdiction (Oct. 22, 1990) at 1-3.

in *United States v. Munsingwear, Inc.*,<sup>44</sup> we vacated the Licensing Board orders pending on appeal and terminated the proceeding.<sup>45</sup>

Kerr-McGee strongly opposes the State's and the City's motion. It points out that, in responding to a petition for reconsideration of the decision approving the section 274 agreement with Illinois, the Commission explicitly declined to express an opinion as to how the motion to terminate and vacate should be decided.<sup>46</sup> Kerr-McGee also argues that "[t]he Commission has only approved the State regulatory program in general terms and not as applied to any specific site, including, in particular, the West Chicago facility."<sup>47</sup> In addition, it distinguishes *Sheffield* and asserts that, inasmuch as the propriety of Kerr-McGee's disposal plan remains a live controversy, the case is not moot, making the application of *Munsingwear* both inappropriate and unfair in the circumstances here.<sup>48</sup> The staff agrees with the State and the City that the proceeding must be terminated, but argues against vacation of the Licensing Board's decision, contending that neither *Sheffield* nor *Munsingwear* requires such action here.<sup>49</sup>

We think it clear that, in executing the section 274 agreement with Illinois last fall, the Commission did not intend for this proceeding to cease immediately simply by virtue of the existence of that agreement. Well aware of the status of this proceeding, the Commission had at least two opportunities to terminate the matter itself or to direct us to do so, and, as Kerr-McGee points out, it declined to do either.<sup>50</sup> The Commission's approval of the agreement with Illinois is also couched in unmistakably generic terms and refers to another potential, site-specific proceeding involving the West Chicago site.<sup>51</sup>

Further, the Commission policy on the state agreement process, pursuant to which the agreement was negotiated and executed, provides that,

[i]n effecting the discontinuance of jurisdiction, *appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer.*<sup>52</sup>

The unquestionable intent of this NRC policy is that jurisdiction is to be transferred to an "agreement state" in an orderly manner, with minimal disruption

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<sup>44</sup> 340 U.S. 36, 39-41 (1950).

<sup>45</sup> *Sheffield*, 25 NRC at 898-99.

<sup>46</sup> Kerr-McGee Opposition to State and City Motion to Terminate and Vacate (Nov. 13, 1990) at 2 (citing *Illinois*, CLI-90-11, 32 NRC at 334).

<sup>47</sup> *Id.* at 3 (citing *Illinois*, CLI-90-9, 32 NRC at 216-17, and *id.*, CLI-90-11, 32 NRC at 334).

<sup>48</sup> *Id.* at 3, 7-15.

<sup>49</sup> NRC Staff Response to Joint Motion to Terminate Proceeding and to Vacate Initial Decision (Nov. 19, 1990).

<sup>50</sup> See generally *Illinois*, CLI-90-9, 32 NRC 210; *id.*, CLI-90-11, 32 NRC 333.

<sup>51</sup> *Id.*, CLI-90-9, 32 NRC at 215-17.

<sup>52</sup> "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement" [hereinafter State Agreement Policy], 46 Fed. Reg. 7540, 7543 (1981) (emphases added).

to any pending licensing proceeding, such as that here.<sup>53</sup> The agreement with Illinois in this case contains no indication that “appropriate arrangements” have been made to assure this orderly process; indeed, it is silent as to its effect on any pending licensing or enforcement proceedings.<sup>54</sup> It is reasonable to infer from this and from the Commission’s statement declining to express an opinion on how the motion to terminate and to vacate should be decided,<sup>55</sup> however, that those “appropriate arrangements” are to be fashioned in and through this adjudicatory proceeding. Thus, in these circumstances, we find unpersuasive the argument that the transfer of jurisdiction to the State in and of itself demands immediate termination of this proceeding.

We also disagree with the State and the City that this proceeding is moot and that the *Munsingwear* case thus requires vacation of the decisions pending appeal. The Court in *Munsingwear* held that it is the duty of an appellate court, upon motion, to reverse or vacate the judgment below and remand with a direction to dismiss an action that has become moot “through happenstance” while pending on appeal.<sup>56</sup> “Mootness” means the absence of a “case or controversy”; i.e., “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”<sup>57</sup> But here, Kerr-McGee has not retreated from its onsite disposal plan, and the litigation over it promises to continue among the principal parties in a variety of federal, state, and administrative forums, amply demonstrating that the controversy is quite alive and active. The State and the City have thus failed to meet their “heavy” burden of demonstrating mootness.<sup>58</sup>

It is also clear from the case law that, even if this case can be considered technically moot by reason of the agreement transferring jurisdiction over byproduct material to the State, *Munsingwear* does not necessarily require

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<sup>53</sup> It cannot reasonably be disputed that “the processing of license applications” necessarily includes any hearing held thereon.

<sup>54</sup> See 55 Fed. Reg. 46,591. The original agreement with Illinois (see *supra* note 39) is similarly silent in this regard. See 52 Fed. Reg. at 22,864. Nor do the Commission’s “Agreement State” regulations shed any light on what happens to proceedings pending at the time a section 274 agreement is executed. See 10 C.F.R. Part 150.

<sup>55</sup> See *Illinois*, CLI-90-11, 32 NRC at 334.

<sup>56</sup> 340 U.S. at 39-40. The Court applied this principle to unreviewed administrative decisions in *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961).

<sup>57</sup> *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

<sup>58</sup> See *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)).

Because our decision in *Sheffield*, 25 NRC 897, represents a straightforward application of *Munsingwear*, it does not dictate a different outcome here. The State and the City cite to only one other case as support for their view that, in and of itself, a transfer of jurisdiction from one authority to another, prior to the completion of appellate review, renders a case moot and thereby requires the vacation of the underlying decision. Their reliance on excerpts taken out of context from our decision in *Kerr-McGee Chemical Corp. (Kress Creek Decontamination)*, ALAB-867, 25 NRC 900 (1987), however, is misplaced. We concluded there that the agreement in question had not transferred jurisdiction to Illinois over the particular type of nuclear material at issue in that proceeding. Thus, it was not necessary for us to decide how the proceeding should be terminated and if vacation was appropriate, and we explicitly declined to do so. *Id.* at 911 & n.15.

vacation of the judgment below. The Court stressed in *Munsingwear* that vacating the lower court's decision was fitting only if "happenstance" prevents the completion of appellate review and if that procedure does not prejudice the rights of any of the parties.<sup>59</sup> Relying on this reasoning in *Karcher v. May*, the Supreme Court dismissed the appeal for want of jurisdiction, but declined to vacate the lower court's decision. The Court concluded that the "controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."<sup>60</sup> So too, the court of appeals in *United States v. Garde* declined to vacate the lower court's decision, even though the case became moot while the appeal was pending. The court determined that it would be unfair to the parties that prevailed below to lose the ongoing benefits and operative effect of their victory in district court as a result of actions taken by the losing party while its appeal was pending.<sup>61</sup>

Although one can debate where the responsibility, in fact, lies for effecting the transfer of jurisdiction over mill tailings from the NRC to Illinois, no one can reasonably characterize this event as "happenstance" or an action "unattributable to any of the parties." The State actively sought this new regulatory authority, over the strong objections of Kerr-McGee.<sup>62</sup> This is not to imply culpable behavior on the part of the State in seeking the transfer of jurisdiction or on the part of the Commission in agreeing to it; indeed, section 274 of the AEA seemingly encourages such agreements. It does, however, render inapplicable the mechanical application of the *Munsingwear* doctrine.

The Supreme Court also did not expect rigid adherence to *Munsingwear* when the rights of any party might be prejudiced. While the extent of harm to Kerr-McGee's rights can be disputed, it cannot be gainsaid that the act of vacating the decision below, which would in turn necessarily require the revocation of the license amendment already issued to Kerr-McGee,<sup>63</sup> surely amounts to the kind of prejudice the Court in *Munsingwear* sought to avoid.<sup>64</sup> In other words,

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<sup>59</sup> 340 U.S. at 40. The "happenstance" that led to the mootness in *Munsingwear* was the decontrol of the price of the commodity sold by the respondent in that case. This contrasts with the case at bar, in which the regulation of the mill tailings at Kerr-McGee's West Chicago site has not been eliminated, but rather transferred to another authority.

<sup>60</sup> 484 U.S. 72, 83 (1987).

<sup>61</sup> 848 F.2d 1307, 1310 & n.6 (D.C. Cir. 1988).

<sup>62</sup> We note, however, that the City — also an appellant before us (see *supra* p. 96 & note 21) — was not a party to the State's request for the transfer of regulatory authority.

<sup>63</sup> See *infra* p. 149.

<sup>64</sup> In this regard, the Court made explicit reference to the fact that the decision mooted on appeal was "only preliminary." 340 U.S. at 40. Although the Licensing Board's initial decision before us on appeal is also "preliminary," it nonetheless became "immediately effective" insofar as it provided the authority for license issuance, which latter action is considered final for purposes of judicial review. See *supra* note 27; *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991); *Oystershell Alliance v. NRC*, 800 F.2d 1201 (D.C. Cir. 1986).

if the decision below is to be vacated and the license revoked, it should be thus after consideration on the merits, not as a consequence of applying the largely procedural rule of *Munsingwear*.

Both courts and commentators recognize that, if there is any doubt as to mootness, the better course is to decide the case. "There is ample room for discretion in deciding whether a case is moot, or whether some practical purpose would be served by deciding the merits. If there is an adequate reason to preserve the judgment, the appeal should be decided."<sup>65</sup> In short, the very principles that underlie the *Munsingwear* doctrine strongly militate against its application by rote in the circumstances here. Thus, insofar as the State's and the City's October 22 motion seeks the immediate termination of this proceeding and the corresponding vacation of the Licensing Board's initial decision, by reason of the Commission's approval of the agreement transferring jurisdiction over mill tailings to the State, the motion is *denied*.

### III. DEVELOPMENTS SINCE THE ISSUANCE OF THE INITIAL DECISION

As noted above, following the filing of the staff's brief on the merits in response to their appeals, the State and the City filed a joint motion to "vacate *as moot* the materials license amendment issued to Kerr-McGee" as a consequence of the Licensing Board's initial decision, to remand this matter to the Director of NMSS for review of "Kerr-McGee's new design," and, in the alternative, to reopen the record of this proceeding and to remand it to the Licensing Board for consideration of "whether Kerr-McGee's new cell design satisfies" 10 C.F.R. Part 40, Appendix A.<sup>66</sup> The State and the City argue that this action has become necessary because, subsequent to the issuance of the Licensing Board's decision, (1) Kerr-McGee has made design changes; (2) the NRC staff has reversed the position it took in the hearing below and has rejected the design approved by the Licensing Board; (3) Kerr-McGee, the staff, and EPA have submitted into the record of this proceeding substantial "additional material evidence that goes to the heart of this matter;" and (4) Kerr-McGee and the staff now rely on the rock riprap (i.e., clay-cobble) intrusion barrier (rather than the top vegetative cover)<sup>67</sup> as the primary means to prevent erosion.<sup>68</sup>

To understand the import of the State's and the City's motion, it is necessary to view it in the context of the pertinent contentions admitted for litigation and

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<sup>65</sup> 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 430 (2d ed. 1984). See also *Pickus v. United States Bd. of Parole*, 543 F.2d 240, 242 (D.C. Cir. 1986).

<sup>66</sup> Motion to Vacate at 1 (emphasis in original).

<sup>67</sup> See *supra* p. 94.

<sup>68</sup> Motion to Vacate at 2.

the governing regulatory criteria, found in 10 C.F.R. Part 40, Appendix A.<sup>69</sup> For example, Criterion 3 states that “[t]he ‘prime option’ for disposal of tailings is placement below grade,” but recognizes that full below grade burial may not always be “practicable.” In such cases, “it must be demonstrated that an above grade disposal program will provide reasonably equivalent isolation of the tailings from natural erosional forces.” Criterion 4 establishes certain site and design standards that “must be adhered to whether tailings or wastes are disposed of above or below grade.” For instance,

(a) Upstream rainfall catchment areas must be minimized to decrease erosion potential and the size of the floods which could erode or wash out sections of the tailings disposal area.

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(c) Embankment and cover slopes must be relatively flat after final stabilization to minimize erosion potential and to provide conservative factors of safety assuring long-term stability. . . .

(d) A full self-sustaining vegetative cover must be established or rock cover employed to reduce wind and water erosion to negligible levels.

Where a full vegetative cover is not likely to be self-sustaining due to climatic or other conditions, such as in semi-arid and arid regions, rock cover must be employed on slopes of the impoundment system. . . .

The following factors must be considered in establishing the final rock cover design to avoid displacement of rock particles by human and animal traffic or by natural process, and to preclude undercutting and piping:

Shape, size, composition, and gradation of rock particles (excepting bedding material average particles [sic] size must be at least cobble size or greater);

Rock cover thickness and zoning of particles by size; and

Steepness of underlying slopes.

Individual rock fragments must be dense, sound, and resistant to abrasion, and must be free from cracks, seams, and other defects that would tend to unduly increase their destruction by water and frost actions. . . .

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. . . In addition to providing for stability of the impoundment system itself, overall stability, erosion potential, and geomorphology of surrounding terrain must be evaluated to assure that there are not ongoing or potential processes, such as gully erosion, which would lead to impoundment instability.

Criterion 6 establishes the basic performance standard for a mill tailings disposal system — i.e., a design that

provides reasonable assurance of control of radiological hazards to (i) be effective for 1,000 years, to the exten[t] reasonably achievable, and, in any case, for at least 200 years, and (ii) limit releases of radon-222 from uranium byproduct materials, and radon-220 from thorium byproduct materials, to the atmosphere so as to not exceed an average release rate of 20

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<sup>69</sup> For a more in-depth discussion of UMTRCA and the Appendix A criteria promulgated thereunder, see *infra* pp. 123-29.

picoories per square meter per second . . . to the extent practicable throughout the effective design life determined pursuant to (i) above. [Footnote omitted.]

Finally, Criterion 12 requires that “[t]he final disposition of tailings or wastes at milling sites should be such that ongoing active maintenance is not necessary to preserve isolation.” State Contentions 4(c), 4(d), 4(e), and 4(g), admitted by the Licensing Board, alleged that the Kerr-McGee proposal would require “active maintenance” or would not minimize erosion, contrary to Criteria 3, 4, 6, and 12.<sup>70</sup>

In their motion to vacate, the State and the City focus on principally three matters addressed by the parties in their presentations and resolved by the Licensing Board against the position asserted by the State. First, they point out that Kerr-McGee and the staff maintained below that the top vegetative cover on the pile would provide the primary erosion protection.<sup>71</sup> Consequently, the Licensing Board found that it was not necessary to “scrutinize the parameters of the rock riprap intrusion barrier to determine if the barrier itself will prevent erosion,” as the State had urged.<sup>72</sup>

Second, the State and the City note that “the Licensing Board — at the urging of Kerr-McGee and Staff — adopted a narrow definition of active maintenance, such that Kerr-McGee’s anticipated maintenance of the vegetation cover could not be considered ‘active.’”<sup>73</sup> Specifically, under Kerr-McGee’s proposal, for the vegetative cover “to be sustained permanently as a prairie ecosystem[,] it must be burned or mowed every few years, otherwise natural vegetative succession will cause a forest to develop.”<sup>74</sup> As seen above, Appendix A Criterion 12 dictates that no “ongoing active maintenance” must be necessary in order to preserve isolation of the mill tailings.<sup>75</sup> Appendix A, however, does not define “active maintenance.” The Licensing Board thus looked elsewhere and adopted the definition of “active maintenance” in 10 C.F.R. Part 61, the NRC regulations governing the “Licensing Requirements for Land Disposal

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<sup>70</sup> See People of the State of Illinois’[s] Additional Contentions at 2-3, attached to Motion for Leave to Amend Contentions (May 15, 1989); People’s Reply to the NRC Staff’s and Kerr-McGee’s Responses to the People’s Motion for Leave to Amend Contentions (June 16, 1989), Exhibit B at 6-7; LBP-89-16, 29 NRC at 515, 517; July 12 Order at 4.

<sup>71</sup> See, e.g., Opposition to State Motion for Summary Disposition and Kerr-McGee Cross-Motion for Dismissal or Summary Disposition (Aug. 22, 1989) [hereinafter Kerr-McGee Cross Motion] at 37; NRC Staff Response in Opposition to Illinois’[s] Motion for Summary Disposition (Aug. 22, 1989) [hereinafter Staff Summary Disposition Response] at 16-17.

<sup>72</sup> Motion to Vacate at 3. See LBP-89-35, 30 NRC at 686-88.

<sup>73</sup> Motion to Vacate at 3-4.

<sup>74</sup> LBP-89-35, 30 NRC at 683-84.

<sup>75</sup> Criterion 1, as well, states that “[t]he general goal or broad objective in siting and design decisions is permanent isolation of tailings and associated contaminants by minimizing disturbance and dispersion by natural forces, and to do so without ongoing maintenance.” See *infra* pp. 132-40.

of Radioactive Waste.”<sup>76</sup> That definition excludes “custodial activities such as repair of fencing, repair or replacement of monitoring equipment, revegetation, minor additions to soil cover, minor repair of disposal unit covers, and general disposal site upkeep such as mowing grass.”<sup>77</sup> Accordingly, the Licensing Board concluded that “the maintenance contemplated by Kerr-McGee to preserve the prairie vegetation is clearly not ‘active maintenance’ as that term is defined in section 61.2.”<sup>78</sup>

Third, contrary to the State’s position,<sup>79</sup> Kerr-McGee and the staff contended that it was not necessary to consider how a “Probable Maximum Precipitation” (PMP) event would affect the erosion of the disposal cell. A PMP event is the “theoretically greatest depth of precipitation for a given duration that is physically possible over a particular drainage area at a certain time of year.”<sup>80</sup> The Licensing Board concluded that the analyses performed by Kerr-McGee and the staff, which were based on assumptions of storm magnitude somewhat less than a PMP event, were acceptable under Appendix A and demonstrated that “the topsoil of the cell will not be lost by erosion over its design life.”<sup>81</sup> The Board also found that

[t]he bare allegation that a larger storm event should have been considered is insufficient to call into question the analyses performed by Kerr-McGee and Staff. . . . Moreover, the definition of “active maintenance” contained in section 61.2 contemplates that certain minor repairs to the cell cover are permissible. The damage that Dr. Thiers [the State’s witness] alleges will take place appears to be of the sort that could be corrected by minor repairs.<sup>82</sup>

The State and, in most instances, the City challenge the Licensing Board’s rulings in regard to these matters in their briefs on appeal. They also note that EPA, in its *amicus* brief, expressed reservations about the same concerns — i.e., reliance on the vegetative cover as the primary erosion barrier, the definition of “active maintenance,” and use of a storm less than a PMP event.<sup>83</sup> Most significant, however, the State and the City contend that, during the pendency of their appeals, the NRC staff “has abandoned its position before the [Licensing Board] and has adopted virtually every concern related to erosion articulated by Illinois, West Chicago and EPA.”<sup>84</sup> They contend further that, as a consequence

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<sup>76</sup> LBP-89-35, 30 NRC at 682-83. *But see infra* pp. 140-44, concerning the Licensing Board’s reliance on this definition.

<sup>77</sup> 10 C.F.R. § 61.2.

<sup>78</sup> LBP-89-35, 30 NRC at 687.

<sup>79</sup> *See id.* at 685.

<sup>80</sup> American Meteorological Society, *Glossary of Meteorology* 446 (1959).

<sup>81</sup> LBP-89-35, 30 NRC at 688.

<sup>82</sup> *Id.* at 689, *reconsideration denied*, Licensing Board Memorandum and Order of Feb. 13, 1990 (unpublished) [hereinafter Feb. 13 Order].

<sup>83</sup> Motion to Vacate at 4-5. *See* EPA Brief at 7-12.

<sup>84</sup> Motion to Vacate at 5-6. *See id.* at 11-12.

of the staff's change in position on these various issues, Kerr-McGee has made design modifications in the clay-cobble intrusion barrier, diversion ditch, and sedimentation basin, and that the staff has acknowledged that these new specifications must be incorporated into a new license amendment.<sup>85</sup>

The State and the City therefore argue that these changes have rendered moot the license amendment approved by the Licensing Board and already issued to Kerr-McGee, and that it would be "inappropriate" for us "to review the original and *withdrawn* design" and the Licensing Board decision thereon.<sup>86</sup> They contend that the license amendment must be vacated and the design changes referred to the Director of NMSS for the usual pre-hearing review given by the staff to applications under 10 C.F.R. § 2.101(a).<sup>87</sup> In this connection, the State and the City note that under section 189 of the Atomic Energy Act<sup>88</sup> they are entitled to a hearing on any such license amendment, and they invoke that right here.<sup>89</sup> In the alternative, they move for a reopening of the record and remand to the Licensing Board for consideration of the new information generated since the issuance of that Board's initial decision.<sup>90</sup>

Kerr-McGee opposes the joint motion. It contends at the outset that both the EPA *amicus* brief and the NRC staff's response to EPA's concerns (presumably as set forth in the staff's August 10 brief on appeal) should be "disregarded."<sup>91</sup> Kerr-McGee denies that it has made any significant changes in the cell design and directs most of its reply to a discussion of the PMP issue. Relying on the "Erosion Evaluation" it submitted to the staff last summer in response to the latter's request for further information during the pendency of this appeal,<sup>92</sup> Kerr-McGee asserts that it has "demonstrated" the adequacy of the cell design to withstand a PMP event and erosion.<sup>93</sup> Again focusing solely on the PMP issue, Kerr-McGee also argues that none of the Commission's criteria for reopening a record has been satisfied by the State and the City in their motion.<sup>94</sup>

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<sup>85</sup> *Id.* at 9-10, 12.

<sup>86</sup> *Id.* at 12 (emphasis in original), 14.

<sup>87</sup> *Id.* at 14. As the staff notes, the actual relief that the State and the City mean to seek through their motion is a vacation of the Licensing Board decision authorizing the license amendment. NRC Staff Response to State of Illinois and City of West Chicago Motion to Vacate or to Reopen the Record (Sept. 17, 1990) [hereinafter Staff Response to Motion to Vacate] at 3 n.2.

<sup>88</sup> 42 U.S.C. § 2239.

<sup>89</sup> Motion to Vacate at 15 n.9, 19 n.13.

<sup>90</sup> *Id.* at 16-18 & n.11. The State and the City also note that EPA expressed concerns about radiation dose and groundwater pollution and that even the staff concedes that this latter issue has not yet been resolved. *Id.* at 5, 10-11, 15-16. See *infra* pp. 148-49.

<sup>91</sup> Kerr-McGee Opposition to Motion to Vacate (Sept. 10, 1990) [hereinafter Kerr-McGee Opposition] at 1.

<sup>92</sup> See "Erosion Evaluation: West Chicago Disposal Cell" (July 23, 1990) [hereinafter Erosion Evaluation], enclosed with Board Notification 90-05.

<sup>93</sup> Kerr-McGee Opposition at 14-15, 19. Indeed, Kerr-McGee unabashedly claims that it has made an "*unrebutted and unchallenged* showing that [its] design can withstand a PMP" event. *Id.* at 28 (emphasis in original).

<sup>94</sup> *Id.* at 21-29.

The NRC staff's reply to the State's and the City's motion is confusing at best. It notes that "Kerr-McGee has not withdrawn its design for the cell . . . , but has merely specified certain design details in response to [the staff's] request."<sup>95</sup> The staff fails to mention, however, that it requires a license amendment for these newly provided "design details."<sup>96</sup> As for the alternative motion to reopen, the staff does not object to reopening the record for consideration of the "new evidence" contained in the Erosion Evaluation and the staff's "Technical Evaluation Report" on that Kerr-McGee submission,<sup>97</sup> but urges us to receive and consider the parties' briefs in reply to the staff before making a reopening determination.<sup>98</sup>

A. We turn first to the movants' argument that the staff's changes in position and the corresponding design specifications added by Kerr-McGee warrant vacation of the Licensing Board's decision authorizing the issuance of the license amendment to Kerr-McGee.

Agency case law makes clear that, when circumstances change while an adjudicatory decision is pending on appeal so as to supersede or to alter in a significant way the evidentiary basis of that decision, the decision should be vacated. For example, in *Browns Ferry*, after we completed our appellate review of the Licensing Board's decision and while our decision was pending review by the Commission, we learned that the Tennessee Valley Authority (TVA) had substantially amended the waste disposal proposal at issue in that case through various submissions it had made to the staff.<sup>99</sup> Specifically, it transformed its proposal to reduce, incinerate, and store low-level radioactive waste during the life of the plant to a five-year onsite storage plan.<sup>105</sup> We rejected TVA's argument that this was not "a material alteration of its earlier presentation,"<sup>106</sup> noting that our prior decision in ALAB-664<sup>107</sup> turned on the very matters now addressed in TVA's latest submissions to the staff — i.e., "TVA's failure to explain on the record how five year storage was to be separated from the original integrated proposal including long-term storage and incineration."<sup>108</sup>

We thus found that the new information "was material to the resolution of the issues before us," and that, "with appropriate opportunity for comment or rebuttal, [it] might well have changed the outcome of the appeal."<sup>109</sup> Further, we

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<sup>95</sup> Staff Response to Motion to Vacate at 3.

<sup>96</sup> See NRC Staff Brief at 38.

<sup>97</sup> This staff report is attached to the NRC Staff Brief.

<sup>98</sup> Staff Response to Motion to Vacate at 7-8. The State, the City, and Kerr-McGee each filed such reply briefs on October 5, 1990.

<sup>99</sup> *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982).

<sup>105</sup> *Id.* at 1389.

<sup>106</sup> *Id.* at 1391.

<sup>107</sup> 15 NRC 1 (1982).

<sup>108</sup> ALAB-677, 15 NRC at 1392.

<sup>109</sup> *Id.* at 1393.

dismissed as “disingenuous” TVA’s assertions that its submission to the staff “did not constitute an amendment [of its application].”<sup>105</sup> In this regard, we noted that TVA’s submissions were in response to the staff’s requests for additional information, and that the staff had advised TVA to amend its application.<sup>106</sup>

At the time we learned of this significant change in circumstances, the *Browns Ferry* proceeding was pending before the Commission for review. Indeed, the Commission had already taken review and requested briefing of the issues. After being apprised of the changed circumstances, the Commission then determined that, “[s]ince ALAB-664 [the Appeal Board decision on appeal] was based on a record that no longer represents the situation in this case and will not be reviewed by the Commission, that decision is hereby vacated and shall be given no weight as a precedent.”<sup>107</sup> It also remanded the proceeding to us for further action.<sup>108</sup>

Vacating a decision in such circumstances is also fully consistent with federal court practice. For instance, Rule 60(b) of the Federal Rules of Civil Procedure provides that new evidence diligently discovered after trial and decision or “any other reason justifying relief” can deprive a judgment of its operative effect. As the Supreme Court has noted, the “other reason” language in Rule 60(b) simply “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”<sup>109</sup>

There can be no doubt that the staff’s changes in position on the vegetative cover as the primary erosion protection, the definition of active maintenance, and the use of the PMP event in erosion analyses — not just on a generic basis, but *in this case* — constitute “a material alteration of its earlier presentation”<sup>110</sup> to the Licensing Board. As the applicant and proponent of its cell design, Kerr-McGee, of course, has the burden of proof,<sup>111</sup> and the principal focus of the hearing is accordingly on its presentation, not the staff’s.<sup>112</sup> But, as discussed

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Id.* at 1393 n.5. *See id.* at 1389.

<sup>107</sup> *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982) (emphases added).

<sup>108</sup> *Ibid.* *See* ALAB-711, 17 NRC 30 (1983).

Similarly, in *Delmarva Power & Light Co.* (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979), while the Licensing Board’s decision approving the issuance of a limited work authorization was pending before us on appeal, the applicant indicated it intended to alter its plans substantially. On the applicant’s suggestion and without objection from any other party, we vacated the Licensing Board’s decision without prejudice. Although the facts of *Summit* suggest a basis for distinguishing that decision from the instant case, the fundamental principle pertains: when circumstances change so as to alter effectively the evidentiary record supporting a decision on appeal, that decision should be vacated.

<sup>109</sup> *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949).

<sup>110</sup> *Browns Ferry*, ALAB-677, 15 NRC at 1391.

<sup>111</sup> *See Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).

<sup>112</sup> *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, *review declined*, CLI-83-32, 18 NRC 1309 (1983). As *Diablo Canyon* notes, however, the adequacy

(Continued)

below, the staff's former position on each of the three identified issues amounted to a significant part of the evidentiary record and was accorded substantial weight by the Licensing Board.

As a consequence of Kerr-McGee's reliance on the top vegetative cover to provide the primary protection against erosion and the staff's then-support of that position, the Licensing Board rejected the State's efforts to pursue in greater detail the adequacy of the underlying clay-cobble intrusion barrier. The Board noted that Appendix A does not require such an "intrusion barrier," and that it was included in Kerr-McGee's design "to provide *added* assurance of cell stability in the event that the topsoil layer is lost for some unspecified reason during the design life of the cell."<sup>113</sup> It then specifically referred to a *staff* analysis showing

that erosion of the surface layer might take place on a time scale well in excess of the design life of the cell[,] . . . that it poses no credible mechanism by which the topsoil might be lost within 1000 years[,] . . . [and] that if the soil layer is lost by some unspecified mechanism the intrusion barrier would offer long-term protection.<sup>114</sup>

The Board thus concluded that "there is only a very remote possibility that the barrier will be *required* to perform an erosion control function within the design life of the cell."<sup>115</sup> The State criticized the absence of certain information concerning the size, composition, and distribution of rocks in the clay-cobble intrusion barrier. Acknowledging that the "final choice of materials has not been specified" and that "no computations that rely on graded particle sizes in the intrusion layer have been performed," the Board responded that the "allegation does not rebut Kerr-McGee's and Staff's evidence or establish the materiality of the missing data."<sup>116</sup>

The staff now "places no reliance on the vegetative cover."<sup>117</sup> Instead, for the purpose of satisfying the criteria of Appendix A, the staff regards the underlying clay-cobble layer in the Kerr-McGee cell design "as the principal erosion barrier."<sup>118</sup> This position is assertedly based on the recently completed "Final Staff Technical Position: Design of Erosion Protection Covers for Stabilization of Uranium Mill Tailings Sites" (May 1990 Draft) [hereinafter STP], which

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of the staff's environmental review can be challenged in a hearing. In the instant case, it would be extremely difficult to characterize the issues as *solely* relating to *either* radiological health and safety matters under the AEA and UMTRCA, or the adequacy of the staff's environmental review under NEPA. See generally *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729-30 (3d Cir. 1989).

<sup>113</sup> LBP-89-35, 30 NRC at 687 (emphasis added).

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* (emphasis added).

<sup>116</sup> *Id.* at 688 & n.17.

<sup>117</sup> NRC Staff Brief at 35. See Affidavit of T.L. Johnson [hereinafter Johnson Affidavit], attached to NRC Staff Brief, at 5.

<sup>118</sup> NRC Staff Brief at 36. See Johnson Affidavit at 5.

reflects a preference for rock, rather than vegetative, covers.<sup>119</sup> The staff also indicates that, based on its evaluation of the additional design details provided by Kerr-McGee last summer (i.e., specifications for the rock component of the clay-cobble layer<sup>120</sup>), the clay-cobble barrier will satisfy regulatory requirements.<sup>121</sup> The staff adds, however, that these specifications for the protective rock must be incorporated into a new license amendment for the cell.<sup>122</sup>

It is now apparent that the previously-lacking details and computations concerning the clay-cobble intrusion barrier — which the Licensing Board found to be immaterial in light of the role of the vegetative cover as the primary erosion protection — have become so material to the staff's analysis that they must be incorporated into a new license amendment. Nor can it still be said that "there is only a very remote possibility that the [clay-cobble] barrier will be required to perform an erosion control function within the design life of the cell";<sup>123</sup> the staff's new analysis assumes that is exactly the function that the clay-cobble layer will perform. It is of no moment here that the staff has reviewed these new design details and pronounced them sufficient to satisfy the pertinent regulatory criteria. The other parties, namely the State and the City, have not had an opportunity to undertake such a review and to challenge the new analyses within the hearing process, as is their right.<sup>124</sup> Moreover, the new information relating to the clay-cobble layer is now of concededly greater significance than was ascribed to it during the hearing and at the time the Licensing Board rendered its decision on summary disposition. In fact, as a result of the staff's change in position, the principal focus of erosion control — and thus compliance with Appendix A — is now on the clay-cobble layer of the cell, not the top vegetative cover. So, too, the principal focus of the hearing has necessarily changed.

Inextricably related to the staff's change in position on the primary protection against erosion is its about-face on what constitutes "ongoing active maintenance" prohibited by Criteria 1 and 12. As noted earlier, at Kerr-McGee's urging and without objection from the staff,<sup>125</sup> the Licensing Board borrowed the definition of "active maintenance" from other NRC regulations not specifically concerned with mill tailings disposal. The definition of "active maintenance"

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<sup>119</sup> STP at 7-8, 11-12, 13-14, 17. The STP was transmitted to the parties and us with a Memorandum from J.J. Swift to C.J. Haughney (June 12, 1990).

<sup>120</sup> See, e.g., Erosion Evaluation at 18-22, 33-37; Board Notification 90-06, Enclosure 2 (Letter from Kerr-McGee to C.J. Haughney (July 31, 1990), providing additional information and calculations).

<sup>121</sup> NRC Staff Brief at 36. See STP at 9-10, 18-19, concerning scrutiny of rock durability, quality, and placement.

<sup>122</sup> NRC Staff Brief at 36, 38; Affidavit of R.M. Bernero [hereinafter Bernero Affidavit], attached to NRC Staff Brief, at 4; Affidavit of J.J. Swift [hereinafter Swift Affidavit], attached to NRC Staff Brief, at 9.

<sup>123</sup> LBP-89-35, 30 NRC at 687.

<sup>124</sup> Indeed, at the time the State submitted its contentions, it did so on the basis that Kerr-McGee and the staff both viewed the vegetative cover as the primary erosion protection. Thus, it is not surprising that the State's contentions did not focus on "engineering details of the specificity [now] involved in Kerr-McGee's *Erosion Evaluation*." NRC Staff Brief at 38 n.17.

<sup>125</sup> See *id.* at 35.

contained in 10 C.F.R. § 61.2 and adopted by the Board excludes the mowing and related activities on which the Kerr-McGee proposal relies in order to maintain the prairie grasses in the top vegetative cover.<sup>126</sup> The Licensing Board relied on this definition in rejecting, on summary disposition, the State's complaints that the vegetative cover was flawed and did not provide the "reasonably equivalent isolation of the tailings from natural erosional forces" required by Appendix A Criterion 3<sup>127</sup> for above grade disposal.<sup>128</sup> The Board also concluded that, under its "active maintenance" definition, minor repairs to the cell necessitated by a PMP event could be performed.<sup>129</sup>

The staff, however, has changed the position it presented to the Licensing Board on "active maintenance."<sup>130</sup> The STP acknowledges that "the goal of any design for long-term stabilization to meet applicable design criteria should be to provide overall site stability for very long time periods, with no reliance placed on active maintenance."<sup>131</sup> To that end, the staff now defines the "active maintenance" prohibited by Appendix A Criteria 1 and 12 as "any maintenance that is *needed* to assure that the design will meet specified longevity requirements. Such maintenance includes even minor maintenance, such as the addition of soil to small rills and gullies."<sup>132</sup> As a result of applying this new definition to the case at bar,<sup>133</sup> Kerr-McGee's maintenance plan for the prairie grasses in the vegetative cover may not be taken into account in determining if the cell provides adequate erosion protection — explaining why the staff now regards the underlying clay-cobble layer as serving that purpose.<sup>134</sup>

As for consideration of a PMP event in determining whether the cell design can withstand erosion and meet the longevity requirements of Appendix A Criterion 6, the Licensing Board rebuffed the State's efforts, supported on summary disposition with an expert affidavit, to join this issue.<sup>135</sup> In doing so, the Board noted that "Appendix A does not specify particular criteria for assessing longevity based on a design flood or storm."<sup>136</sup> Thus, the Board relied on analyses of the staff and Kerr-McGee that used assumptions of storms of lesser magnitude than a PMP event and based calculations on variations of

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<sup>126</sup>LBP-89-35, 30 NRC at 682-83.

<sup>127</sup>10 C.F.R. Part 40, App. A, Criterion 3.

<sup>128</sup>See LBP-89-35, 30 NRC at 686-87.

<sup>129</sup>*Id.* at 689. The Board cited its "active maintenance" definition in summarily disposing of yet another issue, human intrusion. *Id.* at 690. For additional discussion of this contention, see *infra* pp. 147-48.

<sup>130</sup>NRC Staff Brief at 35.

<sup>131</sup>STP at 3.

<sup>132</sup>*Ibid.* (emphasis in original).

<sup>133</sup>Any doubt that the staff has applied its generic STP to Kerr-McGee's proposal is dispelled by a Letter from J. Swift to Kerr-McGee (June 25, 1990) [hereinafter Swift Letter], attached to Board Notification 90-04.

<sup>134</sup>Johnson Affidavit at 5.

<sup>135</sup>See *infra* pp. 145-47, concerning whether the Licensing Board erred, in any event, in granting summary disposition of this issue.

<sup>136</sup>LBP-89-35, 30 NRC at 688.

the Universal Soil Loss Equation, which the Board found did not use a PMP event as a parameter.<sup>137</sup> The staff's SFES, for example, used "a rainfall factor derived from 25 years of record expressed in annualized terms."<sup>138</sup> The staff also accepted the use of less than a PMP event because "the disposal cell could be repaired if a worse event damaged it," and, as noted above, the Licensing Board agreed.<sup>139</sup>

Once again the staff confesses that its current position on the PMP event differs from that presented to the Licensing Board. The STP provides that "[t]he design flood or precipitation event on which to base the stabilization plan should be one for which there is reasonable assurance of non-exceedance during the 1000-year design life." Thus, the STP concludes that the so-called "1000-year flood" — an event with a probability of 0.001 per year and a 63 percent chance of being equalled or exceeded during the 1000-year design life — would *not* meet the reasonable assurance test. But the STP does find the PMP event to be of "sufficiently low likelihood that the NRC staff concludes that there is reasonable assurance that larger events will not occur during the 1000-year design life. Therefore, the staff accepts the use of these events as design events for a stabilization plan."<sup>140</sup> Other events may be used, but only with detailed justification. *In this case*, however, the staff's affidavit makes clear that, as EPA has urged, "the disposal cell should be designed to withstand an occurrence of the PMP event because no other precipitation event provides reasonable assurance that a more severe event will not occur within 1000 years."<sup>141</sup>

Like the staff's revisionist view on what constitutes "active maintenance," its new-found reliance on the PMP event inexorably led to the staff's retreat from the vegetative cover to the underlying clay-cobble layer as the primary erosion barrier.<sup>142</sup> But after requesting and receiving additional specifications and analyses from Kerr-McGee on the clay-cobble layer, the staff determined that this layer can withstand a PMP event.<sup>143</sup> And, as noted above, the staff believes that the proposal now satisfies the requirements of Appendix A, provided Kerr-McGee's license is amended to incorporate the rock specifications and other design details. The staff nonetheless recognizes, however, that the other parties must be afforded an opportunity to address the new design details and analyses.<sup>144</sup>

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<sup>137</sup> *Id.* at 688-89.

<sup>138</sup> *Id.* at 688.

<sup>139</sup> NRC Staff Brief at 35; LBP-89-35, 30 NRC at 689; Feb. 13 Order at 1-4.

<sup>140</sup> STP at 5.

<sup>141</sup> Johnson Affidavit at 4. *See* NRC Staff Brief at 34-35.

<sup>142</sup> NRC Staff Brief at 35; Johnson Affidavit at 3.

<sup>143</sup> NRC Staff Brief at 36; Johnson Affidavit at 4.

<sup>144</sup> *See supra* pp. 98, 109.

The preceding discussion reveals that, as in the *Browns Ferry* proceeding, there has been "a material alteration" in an earlier presentation to the Licensing Board (i.e., the staff's),<sup>145</sup> and the decisions pending before us on appeal are "based on a record that no longer represents the situation in this case," warranting vacation of those decisions.<sup>146</sup> The Licensing Board gave substantial weight to the staff's views and analyses concerning the Kerr-McGee proposal, and the staff has now significantly altered those views in several critical areas. As the Director of NMSS delicately puts it, "the position on design for erosion protection that the NRC staff presented to the . . . Licensing Board . . . in this proceeding had apparently lagged behind other developments taking place within the NRC."<sup>147</sup> In a further example of the staff's gift of understatement, it notes that its (belated) review of the Kerr-McGee proposal "has resulted in engineering specifications that *may* vary from the engineering implications of conclusions reached by the Licensing Board," and that "[t]he basis for these conclusions is, in some respects, different from that reflected in the hearing record."<sup>148</sup> In fact, the changes are so significant that the license already issued by the staff to Kerr-McGee must now be further amended.<sup>149</sup>

Moreover, the staff's reevaluation of Kerr-McGee's proposal since the issuance of the Licensing Board's decision was not simply a matter of confirmatory, post-hearing review or an effort to "tie up loose ends." The staff's first written request to Kerr-McGee for additional information refutes any such notion:

At the present time [almost four months after the license was issued], it is not clear that the designs of the top and side slopes, the diversion channels, or the sedimentation basin are adequate to resist erosion to the extent that the requirements of 10 CFR 40 Appendix A are met. . . . The staff expects that, upon further evaluation and analysis, Kerr-McGee may decide to redesign several features.<sup>150</sup>

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<sup>145</sup> ALAB-677, 15 NRC at 1391.

<sup>146</sup> CLI-82-26, 16 NRC at 881.

<sup>147</sup> Bernero Affidavit at 1-2. We wonder how the staff position could "lag behind," inasmuch as a draft version of the STP was apparently in preparation by NMSS at about the same time as the SFES on Kerr-McGee's proposal (also prepared under the auspices of NMSS), and was made available for public comment about three weeks before the staff filed its response to the State's motion for summary disposition of the involved contentions and three months before the Licensing Board issued its summary disposition decision. See 54 Fed. Reg. 33,101 (1989). At a minimum, the staff was seriously remiss in the fulfillment of the long-established obligation imposed on all parties in NRC adjudicatory proceedings to call to the attention of both the Licensing Board and other parties "new information which is relevant and material to the matters being adjudicated." *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973). Had the staff done so, it is quite likely that this proceeding would now be in a different posture entirely.

See *infra* note 189, concerning the State's effort to bring the draft STP to the attention of the Licensing Board.

<sup>148</sup> NRC Staff Brief at 38 (emphasis added).

<sup>149</sup> *Ibid.* As Kerr-McGee notes, NRC staff theology has long maintained that only "significant" design changes require a license amendment. Kerr-McGee Opposition at 20 n.24 (citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-82-10, 16 NRC 1205, 1207 n.4 (1982)).

<sup>150</sup> Swift Letter, Enclosure 3 at 1 (emphasis added).

Referring to the clay-cobble layer, the staff stated that it “considers such analyses to be incomplete and unacceptable.”<sup>151</sup> The staff ultimately may have reached essentially the same outcome as before — i.e., the requirements of Appendix A are now met, subject to a new license amendment — but that conclusion is based on new information not presented to the Licensing Board, reviewed on the basis of significantly different staff standards, and untested in an adjudicatory context.

Kerr-McGee argues that the STP, on which the staff’s new position is based, “is of no binding regulatory significance.”<sup>152</sup> To be sure, staff technical positions and the like do not have the force of regulations; rather, they provide guidance to applicants as to acceptable methods for implementing regulatory criteria.<sup>153</sup> “Simply stated, [such] staff guidance generally sets neither minimum nor maximum standards.”<sup>154</sup> The issue here, however, is not whether the staff’s new STP on erosion protection for mill tailings covers is ultimately controlling vis-a-vis the pertinent regulatory requirements. The significance of the STP is that it represents a material change in the position and evidentiary presentation by the staff in the hearing below — a position to which the Licensing Board gave substantial deference in its decision. Whether the new staff position is “correct” or not remains to be seen. What is clear now is that the existing evidentiary basis for the Licensing Board’s decision on erosion issues has itself been eroded to a major extent.

Kerr-McGee also complains that “[t]he erosion issue has come to the fore chiefly as a result of a brief filed with this Board by the EPA,” a brief that allegedly “raises new issues.”<sup>155</sup> It thus urges us to disregard all such matters.<sup>156</sup> But the current posture of this proceeding cannot be attributed to the filing of EPA’s *amicus* brief on appeal. As has been shown, the State attempted to pursue its various contentions asserting non-compliance with the Appendix A criteria on erosion protection, but it failed on summary disposition of issues concerning the vegetative cover, active maintenance, and the PMP event — all issues on which the staff has now changed its views.

Moreover, the differing views of EPA in nine areas were made known to all the parties and the Licensing Board well before summary disposition motions were filed.<sup>157</sup> In August 1989, the Licensing Board requested the parties’ advice

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<sup>151</sup> *Ibid.*

<sup>152</sup> Kerr-McGee Opposition at 26.

<sup>153</sup> *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974); *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978).

<sup>154</sup> *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 n.10 (1983).

<sup>155</sup> Kerr-McGee Opposition at 11.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> See Board Notification 89-6 (noting that “EPA staff . . . wanted their comments brought effectively to the attention of the decision-makers, i.e., to the Atomic Safety and Licensing Board”); EPA Comments on SFES at

(Continued)

as to whether those EPA views related to any of the admitted contentions, but the Board did not issue *its* judgment thereon until the following February, when it rendered the initial decision completing its consideration of the case. The Board then concluded, with *no* explanation, that "EPA's concerns . . . have no direct impact on the admitted contentions" and "need not be considered in this proceeding."<sup>158</sup> In this connection, the Board stated that "Illinois found a nexus between most of the EPA concerns and its own admitted contentions while the Staff and Applicant find the relationship remote."<sup>159</sup> The Board's characterization of the parties' comments, however, does not square with the record.

The staff responded, also with the benefit of no explanation whatsoever, that "the EPA's concerns do not impact the admitted contentions."<sup>160</sup> Kerr-McGee acknowledged, however, that EPA's comments on the SFES related to several of the State's admitted contentions, including those concerned with long-term maintenance and siting.<sup>161</sup> Kerr-McGee stated that these concerns should nevertheless have no effect on this proceeding because, "[t]o the extent that the EPA concerns are encompassed by the admitted contentions, *those concerns will be addressed.*"<sup>162</sup> As we have seen, however, that prediction did not come true.

Thus, while many of the issues addressed in EPA's *amicus* brief coincide with the staff's changes in position and the bases for the State's and the City's motion to vacate, it is clear that these are not "new" issues, appearing for the first time on appeal. In any event, the fact that the staff may have changed its position due to a belated sensitivity to EPA's concerns is irrelevant; the dispositive fact is the staff's change in position, irrespective of the motivation for it.

We therefore agree with the State and the City that those portions of the Licensing Board's decision that concern the vegetative cover as the primary erosion barrier, "active maintenance," and erosion analyses that are not based on a PMP event must be *vacated*.<sup>163</sup> Specifically, this includes the Board's disposition of Contentions 4(c), 4(d), 4(e), and 4(g), as well as Contentions 2(k), 2(p), 2(s), 2(u), and 2(h), which the Board found were essentially duplicative.<sup>164</sup> We address in a later portion of this opinion the effect of this ruling on the future course of this proceeding and on the outstanding license issued to Kerr-McGee.<sup>165</sup>

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6-9 (concerning active maintenance, erosion, the 1000-year standard, compliance with NRC regulatory criteria, etc.).

<sup>158</sup> LBP-90-9, 31 NRC at 154.

<sup>159</sup> *Id.* at 153.

<sup>160</sup> NRC Staff's Response to Memorandum and Order of August 24, 1989 (Sept. 8, 1989) at 3.

<sup>161</sup> Kerr-McGee's Response to the Board's Questions (Sept. 8, 1989) at 3-4.

<sup>162</sup> *Id.* at 5 (emphasis added).

<sup>163</sup> *Browns Ferry*, CLI-82-26, 16 NRC at 881.

<sup>164</sup> LBP-89-35, 30 NRC at 680-90, 701-02; LBP-90-9, 31 NRC at 190.

<sup>165</sup> See *infra* pp. 149-50.

B. The State and the City have also moved, in the alternative, to reopen the record for further consideration by the Licensing Board of the new developments discussed above. We conclude that, even if the *Browns Ferry* decisions did not compel vacation of the Licensing Board's decision on the involved issues, reopening would clearly be warranted.

Under the Commission's Rules of Practice, a closed record will not be reopened unless the movant satisfies the following three criteria:

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety or environmental issue.
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>166</sup>

In addition, "[t]he motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the [three] criteria . . . have been satisfied."<sup>167</sup> The State's and the City's motion easily meets all of these requirements.

1. The motion was clearly timely. It was filed within just three weeks of the staff's brief, in which the staff confirmed for the first time through affidavits that it had, in fact, changed its position on the critical issues discussed above. Kerr-McGee complains, however, that, insofar as the PMP event is concerned, the motion is untimely.<sup>168</sup> In its view, the State only belatedly attempted to establish that a PMP event should be evaluated, and "the Licensing Board denied consideration of the matter in part on the basis that the issue should have been advanced earlier."<sup>169</sup> Thus, Kerr-McGee reasons that "[i]f the PMP issue was untimely when advanced before the Licensing Board, it obviously cannot be timely now."<sup>170</sup>

The problem with Kerr-McGee's argument is that the Licensing Board never rejected the PMP *issue* as untimely. When the Board first considered this matter on summary disposition, there is no discussion whatsoever about the timeliness of the issue.<sup>171</sup> Rather, the Board ruled against the State on the PMP issue for essentially three reasons: (i) it believed Appendix A does not require consideration of such an event; (ii) it found the State's argument and supporting

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<sup>166</sup> 10 C.F.R. § 2.734(a).

<sup>167</sup> *Id.* § 2.734(b).

<sup>168</sup> Kerr-McGee Opposition at 24-25. None of Kerr-McGee's arguments with respect to the motion to reopen addresses the active maintenance and vegetative cover issues. For its part, the NRC staff does not challenge the timeliness of the motion to reopen or object to reopening for consideration of certain information provided by Kerr-McGee and the staff. Staff Response to Motion to Vacate at 7.

<sup>169</sup> Kerr-McGee Opposition at 24-25 (citing Feb. 13 Order at 4).

<sup>170</sup> *Id.* at 25.

<sup>171</sup> See LBP-89-35, 30 NRC at 685, 688-89.

affidavit insufficient to withstand summary disposition, in light of the staff's and Kerr-McGee's analyses based on lesser magnitude rainfall events; and (iii) the definition of "active maintenance" adopted by the Board permits minor repairs to the cell cover that might be necessary as a result of a PMP event.<sup>172</sup> The State sought reconsideration and supplemented its earlier affidavit with additional references.<sup>173</sup> The Board, however, reaffirmed its prior ruling, noting that the additional documentation submitted by the State on reconsideration was available earlier and "should have been cited in connection with Illinois'[s] opposition to Kerr-McGee's cross-motion."<sup>174</sup> Thus, the Board did not find the PMP issue untimely, only some additional references supplied as support for the State's motion for reconsideration.

2. The significance of the matters raised in the State's and the City's motion is patent.<sup>175</sup> They go to the heart of the Commission's controlling regulatory requirements — i.e., the ability of the cell design to resist erosion, without ongoing active maintenance, and thereby to provide reasonable assurance that the radioactive waste thereunder will be isolated to the extent reasonably achievable for 1000 years, as required by Appendix A Criteria 1, 3, 4, 6, and 12. The staff itself acknowledged this last summer when it began its post-hearing, post-license-issuance (re)consideration of the Kerr-McGee design and solicited further information and technical analyses: "At the present time, it is not clear that the designs of the top and side slopes, the diversion channels, or the sedimentation basin are adequate to resist erosion to the extent that the requirements of 10 CFR 40 Appendix A are met."<sup>176</sup>

Consideration of the PMP event in erosion analyses, for example, is essential in order to assure compliance with the NRC's requirements established for mill tailings disposal. Although, as the Licensing Board found, Appendix A does not explicitly state that disposal systems must be designed to withstand a PMP event,<sup>177</sup> this necessarily follows from the 1000-year longevity requirement imposed by Appendix A Criterion 6. As EPA explains,

"reasonable assurance" of control of radiological hazards means use of the Probable Maximum Precipitation (PMP) event in disposal cell design, since no other reference precipitation event (100 year, 200 year storm, etc.) carries reasonable assurance (e.g., 95% probability)

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<sup>172</sup> *Id.* at 688-89. As will be seen, *infra* pp. 119-20, 145-46, 140-44, the Licensing Board erred on all three counts.

<sup>173</sup> One of those references was the August 1989 version of the STP. See *infra* note 189.

<sup>174</sup> Feb. 13 Order at 4.

<sup>175</sup> In this regard, Kerr-McGee argues that the staff's request for further information and reevaluation of Kerr-McGee's cell design "merely reinforces the validity of the Licensing Board's decision," that the STP has "no binding regulatory significance," and that, in any event, Kerr-McGee has now made an "unrebutted and unchallenged showing" of the ability of its design to withstand a PMP event. Kerr-McGee Opposition at 25, 26, 28. We have already disposed of the first two arguments *supra* pp. 115-16, and we address the third *infra* pp. 121-22.

<sup>176</sup> Swift Letter, Enclosure 3 at 1.

<sup>177</sup> LBP-89-35, 30 NRC at 688.

that a more severe event will not occur within 1,000 years. Hence, to be adequately protective of human health and the environment, a disposal cell design should be modelled to withstand the PMP event.<sup>178</sup>

The staff now agrees with and fully adopts this position in its STP and appellate brief.<sup>179</sup>

3. The materiality of the staff's changes in position subsequent to the rendering of the Licensing Board's decisions has already been demonstrated in connection with the State's and the City's motion to vacate.<sup>180</sup> Certainly the Licensing Board was influenced by the staff's former (1) acceptance and approval of the vegetative cover as the primary erosion protection for purposes of satisfying the Appendix A Criteria, and corresponding lack of analyses concerning the clay-cobble layer; (2) definition of "active maintenance" so as to include mowing, revegetation, and minor repairs; and (3) use of less than a PMP event in its erosion analysis. Had the current staff views been made known during the course of the proceeding below, the focus of the litigation would have been on the clay-cobble intrusion barrier, instead of the vegetative cover, and the composition of the evidentiary record would have been quite different.<sup>181</sup>

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<sup>178</sup> EPA Brief at 7. See also the Statement of Consideration for EPA's final rules on "Environmental Standards for Uranium and Thorium Mill Tailings at Licensed Commercial Processing Sites" (which are codified at 40 C.F.R. §§ 192.30-43), 48 Fed. Reg. 45,926, 45,936-37 (1983).

EPA also criticizes, correctly in our view, Kerr-McGee's reliance on, and the Licensing Board's acceptance of, precipitation estimates lower than a PMP event because the Department of the Interior's Bureau of Reclamation permits the use of such lower magnitude events in designing small dams. EPA points out that the Bureau of Reclamation permits the use of less than a PMP event

when property damage is the relevant consideration . . . , but allows no such modification when there is a potential for loss of life. As the princip[al] purpose of the Mill Tailings Standard is to protect human health and the environment, not to limit property damage, modifications to the PMP based upon criteria designed to protect against property loss do not appear to be appropriate to demonstrate compliance with the standard.

EPA Brief at 7-8.

<sup>179</sup> STP at 5; NRC Staff Brief at 34; Johnson Affidavit at 4.

<sup>180</sup> See *supra* pp. 110-17.

<sup>181</sup> Compare *Consolidated Edison Co. of New York* (Indian Point Station, Unit No. 2), ALAB-209, 7 AEC 971 (1974). An intervenor moved to reopen a closed record based on a staff "working paper" that the intervenor alleged was "'diametrically opposed' to the position [the staff] took in this proceeding." *Id.* at 971. The staff, however, characterized the document as simply "'a mechanism for exploring and formulating a possible new approach to the regulatory process,'" and resisted the notion that it "'present testimony on the contents of the working paper in this adjudicatory proceeding.'" *Id.* at 972-73 (emphasis added). We denied the motion to reopen, finding that the working paper alone had no regulatory significance. *Id.* at 973-74. In contrast to the case at bar, we also found "no conflict between the staff expert testimony in this proceeding and the content of the draft working document." *Id.* at 975 (footnote omitted). We noted in this regard, however, that, "in the event the staff expert testimony in this proceeding appeared to be impeached by subsequent staff expert opinion[,] . . . obviously the issue of the continuing validity of the staff expert testimony should be explored." *Id.* n.16.

See also *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984). While the case was pending on the applicant's appeal from a licensing board decision that denied its license request due to quality assurance (QA) problems, the applicant completed its QA reinspection program and the staff concluded its evaluation thereof. We granted applicant's request to reopen the evidentiary record for consideration of this new information and for further hearing on whether there was reasonable assurance that the facility had been constructed properly.

Kerr-McGee contends that a materially different result would not have been likely because “[t]he new information merely serves to show that the cell can withstand a PMP even if such a demonstration were required.”<sup>182</sup> But this assumes that the ability of the clay-cobble layer to withstand a PMP and otherwise to resist erosion has been irrefutably shown. To be sure, Kerr-McGee is confident in the new analyses that it has performed, and the staff has given the clay-cobble layer its blessing. But in their separate replies to the staff’s brief and attached affidavits, the State and the City challenge, through their own affidavits, the conclusion that the new analyses and design specifications recently supplied by Kerr-McGee to the staff satisfactorily address the erosion problem and meet regulatory requirements.

For example, the State’s expert, Dr. Gerald R. Thiers — who provided testimony, by way of affidavit, on behalf of the State before the Licensing Board — criticizes Kerr-McGee’s new design flow calculations. Specifically, he claims that both the runoff velocity and coefficient have been understated, and that the calculations have failed to account for a concentration of runoff on the east side of the disposal cell. As a result, according to Dr. Thiers, Kerr-McGee proposes to use smaller riprap than is necessary to prevent erosion.<sup>183</sup> Dr. Thiers also questions Kerr-McGee’s assumptions regarding the size, fines content (i.e., clay and silt), and specific gravity of the rock riprap used in the clay-cobble layer. He asserts that the assumptions used in the analysis are based on materials that differ significantly in both content and quality from those proposed for the West Chicago site.<sup>184</sup> As a consequence, Dr. Thiers believes that “the changes proposed will not prevent the likelihood of riprap erosion and breaching of the cell cover, leading to spreading of tailings into the environment, or at least requiring active maintenance to prevent spread of tailings.”<sup>185</sup> Dr. Thiers challenges the rock size proposed for the diversion ditches as well. Finally, he contends that, if larger size rock riprap is used — which Dr. Thiers believes is necessary — increased costs will be incurred and must be factored into the cost-benefit balance.<sup>186</sup> The City’s expert, Dr. George B. Levin, makes similar challenges to the new Kerr-McGee and staff analyses.<sup>187</sup>

In the face of these challenges to the new analyses, we conclude that “a materially different result . . . would have been likely had the newly proffered evidence been considered initially.”<sup>188</sup> This is not to say that the views of Dr.

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<sup>182</sup> Kerr-McGee Opposition at 28.

<sup>183</sup> Response of Illinois to the NRC Staff Brief (Oct. 5, 1990) [hereinafter Illinois Reply Brief] at 3-4; Affidavit of Dr. G.R. Thiers [hereinafter Thiers Oct. 5, 1990, Affidavit], attached to Illinois Reply Brief, at 4-5.

<sup>184</sup> Illinois Reply Brief at 4-6; Thiers Oct. 5, 1990, Affidavit at 5-8.

<sup>185</sup> Thiers Oct. 5, 1990, Affidavit at 8.

<sup>186</sup> Illinois Reply Brief at 6-8; Thiers Oct. 5, 1990, Affidavit at 9-12.

<sup>187</sup> See Affidavit of G.B. Levin, attached to West Chicago’s Response to NRC Staff’s August 10, 1990 Brief (Oct. 5, 1990), at 13-20.

<sup>188</sup> 10 C.F.R. § 2.734(a)(3).

Thiers and Dr. Levin alone would necessarily have been, or are, dispositive of the issue. But the combined effect of these challenges with the staff's changes in position and the significant amount of new information that has been generated since the Licensing Board's decision precludes the result reached earlier by the Licensing Board — i.e., a grant of summary disposition in Kerr-McGee's favor.<sup>189</sup> At a minimum, a hearing on these new disputed issues of material fact would be necessary.<sup>190</sup>

4. The motion to reopen is also more than adequately documented, as required by 10 C.F.R. §2.734(b). It contains specific references to, among other things, the Board's decision, earlier filings, the parties' briefs, and other materials generated and provided by Board Notification during the pendency of the appeals.<sup>191</sup> It also specifically incorporates the affidavits attached to the staff's brief and on which the State and the City rely heavily to establish the staff's changes in position.<sup>192</sup> Finally, as has been shown, the affidavits attached to the State's and the City's reply briefs to the NRC staff brief supplement their motion to reopen.<sup>193</sup>

Thus, had we not already determined that the Licensing Board's decision should be vacated in light of subsequent developments, there is ample ground for reopening the record to consider this new information. In ordinary cir-

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<sup>189</sup> As noted previously, *supra* note 173, in its motion for reconsideration of the PMP issue, the State called the Licensing Board's attention to the August 1989 version of the STP. Observing that it was entitled to "no regulatory force," the Board considered the draft STP anyway and concluded that it provided no basis for reconsidering its earlier decision. Feb. 13 Order at 5. The Board noted that the draft STP allowed vegetative covers to serve as the primary erosion barrier. *Id.* at 5-7. It also concluded "without further inquiry that the minimum design objective of Appendix A to assure isolation for 200 years is self evidently met by a wide margin under the PMP-B [i.e., less than a PMP magnitude event] design criterion." *Id.* at 8.

The Licensing Board's consideration of the draft STP does not affect our conclusion that the State's and the City's motion satisfies the third reopening criterion, i.e., likely materiality. In the first place, at the time the Board was presented with the draft STP, the staff had not yet applied the STP to this particular proceeding, as the staff has now done in its brief on appeal. Second, the Licensing Board's decision on reconsideration assumes that the vegetative cover is still the staff's preference, and that some maintenance thereof is acceptable under Appendix A — both of which have subsequently been eschewed by the staff. Finally, as we explain *infra* pp. 146-47, the Board erred in concluding that isolation for 200 years is the minimum design objective of Appendix A. In these circumstances, it cannot be reasonably argued that the Licensing Board has already considered and rejected the STP and thus that a materially different result would not be likely.

<sup>190</sup> See *infra* p. 144.

<sup>191</sup> As the Board Notifications themselves state, "[i]n conformance with the Commission's policy on notification of Licensing Boards, Appeal Boards, or [the] Commission," they provide "new, relevant, and material information." See, e.g., Board Notification 90-04.

<sup>192</sup> Motion to Vacate at 18 n.11. In the circumstances here, to require additional affidavits directly from the movants that would merely repeat information already contained in existing materials in the docket of this proceeding would burden the record unduly, elevate form over substance, and over-judicialize the agency's public hearing process.

<sup>193</sup> It cannot be argued that these affidavits are untimely because they were not filed with the motion to reopen. The staff recognized that the State and the City must be given a reasonable opportunity to respond to the new material in the staff's appellate brief, and it thus urged us not to rule on the motion to vacate/reopen until those responses were filed. NRC Staff Brief at 38; Staff Response to Motion to Vacate at 8. Hence, the Thiers and Levin Affidavits were timely filed with the State's and the City's reply briefs approximately five weeks after the motion to vacate/reopen, in accordance with a filing schedule set by order after soliciting input from all the parties. See Appeal Board Order of Sept. 19, 1990 (unpublished). Neither Kerr-McGee nor the staff sought leave to respond to the new Thiers and Levin affidavits.

cumstances, we would remand the matter to the Licensing Board for further evidentiary development.<sup>194</sup> But as is evident from Part II of this opinion, the circumstances of this proceeding are quite extraordinary. And, as also noted above, we address the future course of this matter later in this decision.<sup>195</sup>

#### IV. THE APPEALS

Obviously the events discussed in Part III of this opinion have overtaken, in large measure, many of the issues raised by the State and the City in their briefs on appeal from the Licensing Board's initial decision and related rulings. Review of several of the most significant of those issues, however, demonstrates that, even if the staff had not subsequently and substantially changed the position it presented to the Licensing Board, the Licensing Board's ultimate decision cannot stand. As discussed below, we conclude that the Board erred in several fundamental rulings, so as to warrant reversal of its decision authorizing the issuance of the license amendment to Kerr-McGee.

A. The State and the City initially challenge the Licensing Board's interpretation of the siting provisions of Appendix A Criterion 1. Before addressing the background and requirements of the Commission's mill tailings regulations and the Licensing Board's reading of them, it is helpful first to review the provisions of UMTRCA and its amendments, pursuant to which Appendix A was promulgated.

1. Congress enacted UMTRCA in 1978 to ameliorate the health and environmental hazards presented by uranium and thorium mill tailings. This action was based upon a finding that

mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.<sup>196</sup>

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<sup>194</sup> Although, as Kerr-McGee and the staff point out, we have the authority to hear evidence and decide matters in the first instance, the exercise of that authority has always been solely a matter of our discretion, dependent upon the particular circumstances of the case and available resources.

<sup>195</sup> See *supra* p. 117 & *infra* pp. 149-50.

<sup>196</sup> UMTRCA, Pub. L. No. 95-604, § 2(a), 92 Stat. 3021-22.

In explaining the need for UMTRCA, the House Report — the only report accompanying the legislation — relied upon the description of the public health hazard of mill tailings in the testimony of then NRC Chairman, Dr. Joseph M. Hendrie:

The NRC believes that long-term release from tailings piles may pose a radiation health hazard if the piles are not effectively stabilized to minimize radon releases and prevent unauthorized use of the tailings.

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Unlike high-level radioactive waste from the back end of the nuclear fuel cycle, which contains products of the fission reaction, mill tailings contain only naturally occurring radioactive elements, in

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The purposes of UMTRCA are twofold: first, to provide a remedial action program at inactive mill tailings sites;<sup>197</sup> and second, to provide a program for the regulation of "mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations."<sup>198</sup> Thus, Title I of UMTRCA provides a specific remedial program for a number of designated inactive and abandoned tailings sites under the primary direction of the Department of Energy.<sup>199</sup> Title II, on the other hand, establishes a comprehensive program for NRC regulation at active (licensed) mill tailings sites, by amending the AEA to include uranium and thorium mill tailings in the definition of byproduct material in section 11(e)(2), and by adding sections 83, 84, and 275 and amending sections 161 and 274 of the AEA so as to provide the Commission with broad authority to manage all aspects of mill tailings sites.<sup>200</sup> UMTRCA also directed EPA to promulgate "standards of general application" for both programs.<sup>201</sup> Title II charged the NRC, however, with implementing and enforcing the EPA standards, in addition to establishing its own specific requirements and standards for carrying out the purposes of UMTRCA and conforming its regulations to the EPA general standards.<sup>202</sup>

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small quantities. The radioactive decay of these elements leads to production of radon, a radioactive gas with a half-life of about four days, which can diffuse from a tailings pile into the atmosphere and subsequently expose persons to radiation far away from the pile. The increased exposure compared to exposure from radon already in the atmosphere from other sources is exceedingly slight, but this increase is in effect permanent. This is because radon production in mill tailings continues for times of the order of a hundred thousand years, so the tailings pile becomes a perpetual source injecting a small amount of radon into the atmosphere, unless some action is taken to keep the radon from escaping.

The health effects of this radon production are tiny as applied to any one generation, but the sum of these exposures can be made large by counting far into the future, large enough in fact to be the dominant radiation exposure from the nuclear fuel cycle. Whether it is meaningful to attach significance to radiation exposures thousands of years in the future, or conversely, whether it is justifiable to ignore them, are questions without easy answers. The most satisfactory approach is to require every reasonable effort to dispose of tailings in a way that minimizes radon diffusion into the atmosphere.

H.R. Rep. No. 1480, 95th Cong., 2d Sess., pt. 2, at 25 (1978) (ellipses in original).

<sup>197</sup> Pub. L. No. 95-604, § 2(b)(1), 92 Stat. 3022.

<sup>198</sup> *Id.* § 2(b)(2), 92 Stat. 3022.

<sup>199</sup> *Id.* §§ 101-115, 92 Stat. 3022-33.

<sup>200</sup> *Id.* §§ 201-206, 92 Stat. 3033-41.

<sup>201</sup> *Id.* § 206, 92 Stat. 3040.

<sup>202</sup> *Id.* §§ 203, 205, 92 Stat. 3036, 3039.

As described in the House Report, the dual EPA and NRC standard-setting regime contemplated that

[t]he EPA standards and criteria should be developed to limit the exposure (or potential exposure) of the public and to protect the general environment from either radiological or nonradiological substances to acceptable levels through such means as allowable concentrations in air or water, quantities of the substances released over a period of time, or by specifying maximum allowable doses or levels to individuals in the general population.

H.R. Rep. No. 1480, *supra* note 196, pt. 1, at 16-17. The NRC, on the other hand,

must set all standards and requirements relating to management concepts, specific technology, engineering methods, and procedures to be employed to achieve desired levels of control for limiting public exposure, and for protecting the general environment. The Commission's standards and requirements should be of such nature as to specify, for example, exclusion area restrictions on site boundaries, surveillance requirements, detailed engineering requirements, including lining for tailings ponds, depth, and types of tail-

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As originally enacted, UMTRCA directed EPA to issue general standards for inactive sites within 12 months, and for active sites within 18 months, after passage.<sup>203</sup> When EPA failed to promulgate its standards within the time set by Congress, the NRC published its "Uranium Mill Licensing Requirements," to meet its responsibilities under the Act.<sup>204</sup> The Commission's 1980 regulations were based upon the conclusions reached in the agency's generic environmental impact statement on uranium milling operations and management of mill tailings<sup>205</sup> and consisted of a general explanatory introduction and 12 technical criteria appearing as Appendix A to 10 C.F.R. Part 40. The regulations established a program to manage mill tailings by setting criteria for siting and disposing of mill tailings piles, controlling erosion and stabilizing tailings, limiting radioactive effluents from uranium and thorium mills and mill tailings, controlling seepage of toxic materials from tailings into groundwater, providing financial assurances for meeting disposal costs and long-term monitoring, and meeting the UMTRCA ownership requirements for tailings and disposal sites.<sup>206</sup>

After the Commission issued its 1980 mill tailings regulations, and primarily in response to the EPA's failure to meet the statutorily imposed deadlines of the Act for issuing general standards, Congress amended UMTRCA.<sup>207</sup> The amendments set new deadlines for EPA to issue general standards.<sup>208</sup> Congress also amended UMTRCA to clarify that EPA, in promulgating general standards, and the NRC, in issuing mill tailings regulations, should consider — in addition to the risk to the public health, safety, and environment — the economic

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ings covers, population limitations or institutional arrangements such as financial surety requirements or site security measures.

*Id.* at 16.

<sup>203</sup> Pub. L. No. 95-604, § 206, 92 Stat. 3040.

<sup>204</sup> See 45 Fed. Reg. 65,521 (1980).

<sup>205</sup> See NUREG-0706, "Final Generic Environmental Impact Statement on Uranium Milling" (Sept. 1980) [hereinafter Final GEIS].

<sup>206</sup> Kerr-McGee Nuclear Corporation challenged the Commission's 1980 regulations on several grounds, including whether the NRC had exceeded its statutory authority in issuing regulations prior to the promulgation of EPA's general standards. The court of appeals upheld the regulations. *Kerr-McGee Nuclear Corp. v. NRC*, 17 Env't Rep. Cas. (BNA) 1537 (10th Cir. 1982), *vacated and reh'g en banc granted* (Oct. 6, 1982). After the Commission issued amended mill tailings regulations in 1985, the court found that the 1980 regulations had been superseded and vacated the *en banc* setting.

<sup>207</sup> Act of Jan. 4, 1983, Pub. L. No. 97-415, §§ 18-22, 96 Stat. 2067, 2077-80 (1983) (codified in scattered sections of 42 U.S.C.). In large measure, Congress amended UMTRCA to resolve the confusion that arose when EPA failed to meet the legislative deadlines and the NRC nevertheless went ahead and issued its mill tailings regulations before EPA acted. See H.R. Conf. Rep. No. 884, 97th Cong., 2d Sess. 45-47 (1982).

<sup>208</sup> Pub. L. No. 97-415, § 18(a), 96 Stat. 2077.

In the event of a further EPA default in publishing standards for active sites, the amendments additionally provided that EPA's standards-setting authority would terminate and thereafter be exercised by the NRC. In order to give EPA time to meet the new statutory deadlines for promulgating general standards and, if necessary, to provide the NRC with the opportunity to conform its regulations to those of EPA or issue its own standards, the amendments suspended the Commission's 1980 mill tailings regulations until the beginning of 1983. The amendments also suspended certain additional provisions that likely would be affected by EPA's standards until early 1984. *Id.* § 18(a), 96 Stat. 2077-78.

costs of regulation, as well as such additional factors as the agencies consider appropriate.<sup>209</sup> Thus, Congress added the language emphasized below to the end of section 84(a)(1) of the AEA (which section had been added originally by UMTRCA):

The Commission shall insure that the management of any byproduct material, as defined in section [11(e)(2)], is carried out in such manner as —

(1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and non-radiological hazards associated with the processing and with the possession and transfer of such material, *taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate.*<sup>210</sup>

Finally, Congress added a provision to the AEA permitting licensees to propose alternatives to the Commission's mill tailings requirements. Thus, section 84(c) provides:

In the case of sites at which ores are processed primarily for their source material content or which are used for the disposal of byproduct material as defined in section [11(e)(2)], a licensee may propose alternatives to specific requirements adopted and enforced by the Commission under this [Act]. Such alternative proposals may take into account local or regional conditions, including geology, topography, hydrology and meteorology. The Commission may treat such alternatives as satisfying Commission requirements if the Commission determines that such alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose and any final standards promulgated by the Administrator of the Environmental Protection Agency in accordance with section [275].<sup>211</sup>

Immediately after Congress enacted the amendments to UMTRCA in 1983, EPA issued its general standards for inactive sites.<sup>212</sup> Later that year, EPA published its general standards for active sites, which, with the exception of those for groundwater, were essentially identical to its inactive site standards.<sup>213</sup>

<sup>209</sup> *Id.* § 22, 96 Stat. 2080.

<sup>210</sup> 42 U.S.C. § 2114(a)(1) (emphasis added).

<sup>211</sup> 42 U.S.C. § 2114(c).

<sup>212</sup> 48 Fed. Reg. 590 (1983) (codified at 40 C.F.R. §§ 192.00-23).

With one exception, EPA's inactive site standards were upheld against numerous challenges from industry and environmental petitioners (including Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation) in *American Mining Congress v. Thomas*, 772 F.2d 617 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986) [hereinafter *AMC I*]. That exception concerned groundwater, where, instead of setting specific contaminant levels as the court deemed necessary, the invalidated portion of the EPA standard directed that groundwater contamination should be dealt with on a site-specific basis. *Id.* at 638-39.

<sup>213</sup> See 48 Fed. Reg. 45,926 (1983) (codified at 40 C.F.R. §§ 192.30-43).

As in the case of the inactive site standards, EPA's active site standards also were upheld against numerous challenges by industry and environmental petitioners in a second case of the same name, *American Mining Congress* (Continued)

Among other things, the EPA standards established radon emission limits for disposal areas and provided that such areas must assure control of radiological hazards "for one thousand years, to the extent reasonably achievable, and, in any case, for at least 200 years."<sup>214</sup>

Subsequent to the issuance of EPA's general standards for active sites, the Commission undertook rulemaking proceedings to bring its 1980 mill tailings regulations into conformity with the EPA standards.<sup>215</sup> Those proceedings culminated in the promulgation of the Commission's 1985 regulations, amending the earlier 1980 requirements.<sup>216</sup> Many of the 1985 criteria, again appearing as Appendix A to 10 C.F.R. Part 40, were unchanged from the 1980 version. The Commission changed other criteria to conform to the EPA standards and essentially duplicated the EPA regulations. For example, Criterion 6 was amended to adopt both EPA's radon emission limits for disposal areas and its longevity standard, requiring waste areas to be designed to control radiological hazards "for 1,000 years, to the exten[t] reasonably achievable, and, in any case, for at least 200 years."<sup>217</sup>

As pertinent here, the first three paragraphs of the Introduction to Appendix A remained essentially unchanged from 1980. The Commission, however, added a new fourth paragraph in the 1985 regulations to implement one of the 1983 amendments to UMTRCA. As previously noted, that amendment added section 84c to the AEA in order to provide site-specific flexibility in licensing by permitting licensees to propose alternatives to Commission mill tailings requirements.<sup>218</sup> The new fourth paragraph of the Introduction is virtually identical to the statute and states:

Licenses or applicants may propose alternatives to the specific requirements in this Appendix. The alternative proposals may take into account local or regional conditions, including geology, topography, hydrology, and meteorology. The Commission may find that the proposed alternatives meet the Commission's requirements if the alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with the sites, which is equivalent to, to the extent practicable, or more stringent

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*v. Thomas*, 772 F.2d 640 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986). Many of the arguments in the first case were repeated in the second. For example, petitioners again argued that UMTRCA and its legislative history required EPA to find that mill tailings piles posed a significant risk before it could promulgate standards, and that EPA failed to consider costs in comparison with what petitioners perceived as the limited risk to public health. The court held, however, that in UMTRCA Congress itself had determined that radon emissions from mill tailings posed a significant enough health risk to warrant regulation, and that EPA had properly considered cost-benefit factors in promulgating standards. See *id.* at 646.

<sup>214</sup> 40 C.F.R. § 192.32(b)(1)(i).

<sup>215</sup> See 49 Fed. Reg. 46,418 (1984) (to be codified at 10 C.F.R. Part 40, App. A) (proposed Nov. 28, 1984).

<sup>216</sup> 50 Fed. Reg. 41,852 (1985). The Commission's groundwater criteria were further amended in 1987. See 52 Fed. Reg. 43,553 (1987).

<sup>217</sup> 10 C.F.R. Part 40, App. A, Criterion 6. See 50 Fed. Reg. at 41,857-58.

<sup>218</sup> See *supra* p. 126.

than the level which would be achieved by the requirements of this Appendix and the standards promulgated by the Environmental Protection Agency in 40 CFR Part 192, Subparts D and E.<sup>219</sup>

The 1985 regulations also added a fifth paragraph to the Introduction, reiterating the 1983 amendment to UMTRCA and the AEA that was intended to clarify the factors the NRC should consider in regulating mill tailings. As earlier indicated, the amendment to section 84(a)(1) of the AEA provided that, in addition to taking into account the risk to the public health, safety, and environment when regulating mill tailings, the Commission should also give "due consideration" to economic costs and any other appropriate factors.<sup>220</sup> Thus, the new fifth paragraph to the Appendix A Introduction paraphrases the UMTRCA amendment:

All site specific licensing decisions based on the criteria in this Appendix or alternatives proposed by licensees or applicants will take into account the risk to the public health and safety and the environment with due consideration to the economic costs involved and any other factors the Commission determines to be appropriate. In implementing this Appendix, the Commission will consider "practicable" and "reasonably achievable" as equivalent terms. Decisions involved [sic] these terms will take into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest.<sup>221</sup>

Upon issuance of the Commission's 1985 mill tailings regulations, industry petitioners, including Kerr-McGee, challenged them. The court of appeals upheld the validity of the Appendix A Criteria in *Quivira Mining Co. v. NRC*.<sup>222</sup> This case plays a prominent role in the assertions of the parties before us; indeed, several of their arguments are nearly identical to those made to the *Quivira* court. It is thus useful briefly to review that decision.

In *Quivira*, the petitioners initially argued that the 1985 criteria were not supported by the cost-benefit analysis required by UMTRCA. The court held, however, that the 1983 UMTRCA amendments only required the Commission to conduct "cost-benefit rationalization" in issuing regulations and managing mill tailings, and it concluded that the Commission had done so.<sup>223</sup> According to the court, that standard "requires the agency merely to consider and compare the costs and benefits of various approaches, and to choose an approach in which

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<sup>219</sup> 10 C.F.R. Part 40, App. A, Introduction. See 50 Fed. Reg. at 41,856.

<sup>220</sup> See *supra* p. 126.

<sup>221</sup> 10 C.F.R. Part 40, App. A, Introduction. See 50 Fed. Reg. at 41,855.

<sup>222</sup> 866 F.2d 1246 (10th Cir. 1989).

<sup>223</sup> *Id.* at 1251-58.

costs and benefits are reasonably related in light of Congress' intent."<sup>224</sup> It is significant that, in upholding the mill tailings regulations, the court determined that the 1983 amendment did not require the agency to perform "quantitative cost itemization in dollars and benefit itemization in unspecified units for every sentence in the Appendix A criteria that might impose some burden on the industry."<sup>225</sup> Further, the court noted that the agency's general endeavor to take into account the "economics of improvements in relation to benefits to the public health and safety," set forth in the new fifth paragraph of the Appendix A Introduction, was sufficient to ensure that in future licensing actions the costs of regulation bear a reasonable relationship to its benefits.<sup>226</sup>

Next, the petitioners argued that the Commission's Appendix A Criteria failed to provide for the kind of site-specific flexibility in individual licensing decisions that the 1983 addition of section 84(c) to the AEA requires. The petitioners also claimed that the new fourth paragraph of the Appendix A Introduction was insufficient to carry out this statutory command for flexibility. The court rejected these arguments, holding that the new fourth introductory paragraph, permitting licensees to propose equivalent alternatives to the Commission's criteria, fully met all of the statute's site-flexibility requirements.<sup>227</sup>

Finally, the *Quivira* petitioners argued that UMTRCA explicitly requires the Commission to make a positive distinction between new and existing mill tailings sites, and that the Appendix A Criteria do not adequately make that distinction. The court summarily dismissed this argument, noting that the statutory language of UMTRCA makes no such distinction and that the legislative history relied upon by the petitioners indicates only that the agency is to "consider possible differences in applicability of regulations to existing versus new tailings sites."<sup>228</sup> Moreover, the court stated that, even if it accepted petitioners' premise, the site-specific flexibility incorporated into the fourth paragraph of the Appendix A Introduction meets any such supposed requirement.<sup>229</sup>

2. With this background in mind, we now turn to the parties' arguments here regarding the Licensing Board's decision interpreting Criterion 1. That

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<sup>224</sup> *Id.* at 1250 (citing *AMC I*, 772 F.2d at 632). See *supra* note 212.

In *Quivira*, the court then reviewed the criteria that remained essentially identical to the Commission's 1980 regulations (i.e., Criteria 2, 3, 4, 7, 8A, and portions of each of the others) and found that the Commission's underlying generic environmental impact statement upon which the criteria were based established the necessary reasonable relationship between costs of controls and benefits. 866 F.2d at 1252-57. See *supra* p. 125 & note 205. It also reviewed the 1985 criteria that the Commission revised to conform to EPA's general standards (i.e., parts of the Introduction, Criteria 1, 5, 6, and 8) and found that the NRC's reliance on EPA's cost-benefit analysis for these requirements was sufficient. 866 F.2d at 1257-58.

<sup>225</sup> *Id.* at 1254.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Id.* at 1259-60.

<sup>228</sup> *Id.* at 1260 n.17.

<sup>229</sup> *Id.* at 1260.

Criterion sets forth the siting requirements of the Commission's mill tailings regulations.

In Contention 4(a) the State asserted that, in its SFES, the staff misinterpreted the Commission's siting requirements for mill tailings disposal by concluding that Kerr-McGee's proposal for leaving the wastes onsite satisfies the requirements of Criterion 1.<sup>230</sup> Among other things, Criterion 1 requires that the following three site features be considered in assessing the adequacy of a disposal site: (1) remoteness from populated areas; (2) hydrologic and other natural conditions that contribute to the isolation of tailings from groundwater; and (3) the potential for minimizing erosion over the long term.<sup>231</sup> In light of Kerr-McGee's plan to dispose permanently of 376,400 cubic meters of radioactive waste in the midst of the densely populated West Chicago area, just several meters above the water table,<sup>232</sup> the Licensing Board aptly characterized Contention 4(a) as going "to the heart of the ultimate issue to be decided: Is the West Chicago site acceptable for the disposal of the tailings?"<sup>233</sup>

The Licensing Board resolved Contention 4(a) in Kerr-McGee's favor, holding that the proposal for onsite disposal "satisfies the requirements of 10 C.F.R. Part 40, Appendix A, Criterion 1."<sup>234</sup> In reaching this conclusion, it interpreted the Commission's mill tailings regulations as focusing on primarily two considerations: economics and the difference between "new" and "existing" tailings sites. The Board's analysis is relatively brief and straightforward:

Kerr-McGee correctly points out that the 1983 NRC Authorization Act amended § 84(a)(1) to require the Commission to take into account risks to public health and safety and the environment while giving due consideration to economics. The Commission responded by inserting language in the Introduction to Appendix A which requires that all site-specific decisions take economics into account. This language goes on to state that in interpreting the terms "practicable" and "reasonably achievable" (which are to be considered equivalent), consideration must be given to, among other things, "the economics of improvements in relation to the benefits to the public health. . . ."

Illinois is correct in its observation that Criterion 1 requires consideration of remoteness from population and hydrologic factors in choosing among alternatives, as well as that it directs that the site-selection process should result in an optimization of these goals. Were this proceeding concerned with the siting of a new facility so that cost differences among potential sites were minor, Criterion 1 clearly would result in the disapproval of the West Chicago site because of its population density. But this proceeding concerns the disposal of an existing tailings pile located on the West Chicago site. Kerr-McGee correctly points out that, like it or not, we must deal with that site. We believe that the amendments to the Introduction to Appendix A, which require that consideration be given to economics in all

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<sup>230</sup> See LBP-90-9, 31 NRC at 155.

<sup>231</sup> 10 C.F.R. Part 40, App. A, Criterion 1.

<sup>232</sup> See *supra* p. 94.

<sup>233</sup> LBP-90-9, 31 NRC at 155.

<sup>234</sup> *Id.* at 184, 194.

siting decisions and permit applicants to propose alternatives, require that we approach this case with due regard for the fact that West Chicago is an existing site. If those provisions were not in place, Illinois'[s] position would be correct and it would be necessary to reject the West Chicago site at the outset. The requirement to consider economics as well as alternatives means that West Chicago may be rejected only after consideration is given to the costs and benefits that would be incurred by moving the tailings to another site. Criterion 1, when read in conjunction with the Introduction to Appendix A, clearly requires this result. Criterion 1 requires optimization of its enumerated goals "to the maximum extent reasonably achievable. . . ." The Introduction to Appendix A directs that we interpret "to the maximum extent reasonably achievable" in light of the costs and potential benefits that would be achieved by moving the tailings to another site which would optimize those goals.<sup>235</sup>

Before us, the State and the City each argue that the Licensing Board turned Criterion 1 on its head by shifting the proceeding into one large cost-benefit analysis and allowing short-term economics and design features to override the Criterion's siting features, which are intended to ensure the isolation of mill tailings for the very long term.<sup>236</sup> There is no dispute that the West Chicago site cannot be considered remote from populated areas. In fact, the City points out that the site is located across the street from numerous residences in the middle of the dense population center of West Chicago and is within 490 meters of five schools containing some 80 percent of the City's school children.<sup>237</sup> Similarly, the State and the City contend that it is undisputed that hydrologic and other conditions at the West Chicago site do not "contribute to continued immobilization and isolation of contaminants from ground-water sources."<sup>238</sup> Indeed, they claim that all parties agree that the West Chicago site has leached and will continue to leach into the groundwater, and that it is the only site of those studied that will not isolate the tailings from groundwater. In these circumstances, where the Commission's siting requirements call for the selection of a disposal site that isolates contaminants from groundwater, the appellants argue that it is totally incongruous to rely, as the Licensing Board did, upon the great flow of groundwater under the site to dilute the contaminants to regulatory limits at the site boundary. They further argue that the features of the West Chicago site do not contribute to minimizing erosion, so the site is not an optimization of the three siting features as required by Criterion 1. Thus, the State asserts that "West Chicago was selected as a disposal site for one reason — *the tailings are already there* — and was approved as a disposal site for one

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<sup>235</sup> *Id.* at 163-64 (footnotes omitted; ellipses in original).

<sup>236</sup> *See* Brief of the People of the State of Illinois (Apr. 19, 1990) [hereinafter Illinois Brief] at 1, 6-9, 14-18; West Chicago's Memorandum in Support of its Appeal of the ASLB's Decision Granting License Amendment (Apr. 19, 1990) [hereinafter West Chicago Brief] at 5-19.

<sup>237</sup> West Chicago Brief at 1 (citing SFES at 4-32).

<sup>238</sup> 10 C.F.R. Part 40, App. A, Criterion 1.

reason — it will cost Kerr-McGee at least \$40 million to move the tailings to another site.”<sup>239</sup>

Kerr-McGee, along with the staff, argues that the Licensing Board correctly concluded that the onsite disposal proposal satisfies Criterion 1.<sup>240</sup> In this connection, they both emphasize that the Licensing Board did not treat onsite disposal at the West Chicago site as a licensee-proposed alternative to the requirements of Criterion 1 pursuant to section 84(c) of the AEA and the fourth paragraph of the Appendix A Introduction. Rather, Kerr-McGee and the staff assert that the Board found only that onsite disposal met the siting provisions of Criterion 1.<sup>241</sup>

In support of the Licensing Board’s decision, Kerr-McGee argues, as it did below, that three guiding principles must be used in the interpretation of the Commission’s mill tailings criteria. First, Kerr-McGee claims that the history of UMTRCA and the Commission’s regulations “shows that the NRC has a fundamental obligation to construe the criteria so as to achieve a reasonable relationship between costs and benefits.”<sup>242</sup> Second, it recasts an argument that the court of appeals rejected in *Quivira* and asserts that, in applying the criteria, the NRC must recognize the difference between new and existing sites. Finally, it attempts to revive yet another argument cast aside in *Quivira* by claiming that the criteria must be applied flexibly on a site-specific basis to comport with the commands of UMTRCA. After reciting these “over-arching principles,” Kerr-McGee argues that Criterion 1 does not set out rigid siting requirements; rather, it merely articulates a general goal of permanent isolation of mill tailings and requires only that the various siting factors “‘be considered’ — as they demonstrably were.”<sup>243</sup> Thus, it argues that, in determining that only Kerr-McGee’s onsite disposal provides a reasonable relationship between costs and benefits, the Licensing Board interpreted Criterion 1 in a fashion fully consistent with its language and the enumerated guiding principles.

3. Contrary to the assertions of Kerr-McGee and the staff, however, the Licensing Board’s interpretation of Criterion 1 cannot be squared with the plain language of the regulation. The starting point in interpreting any regulation is not, as Kerr-McGee would have it, the consideration of “over-arching,” albeit unwritten, principles. Rather, we must begin with the language and structure of the provision itself.<sup>244</sup> In undertaking this task, we must bear in mind the

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<sup>239</sup> Illinois Brief at 8 (emphasis in original).

<sup>240</sup> See Brief of Kerr-McGee Chemical Corporation (May 21, 1990) [hereinafter Kerr-McGee Brief] at 14-33; NRC Staff Brief at 10-14.

<sup>241</sup> Kerr-McGee Brief at 31-32; NRC Staff Brief at 13-14.

<sup>242</sup> Kerr-McGee Brief at 19.

<sup>243</sup> *Id.* at 25.

<sup>244</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review declined*, CLI-88-11, 28 NRC 603 (1988); 1A Sutherland, *Statutory Construction* § 31.06 (4th ed. 1984).

elementary canon of construction that the regulation should be interpreted so as not to render any part inoperative; the whole of the regulation must be given effect.<sup>245</sup> Further, “[a]lthough administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.”<sup>246</sup>

Here, Criterion 1 must be read in concert with the appropriate portions of the Introduction to Appendix A, which we have already set out.<sup>247</sup> Because Criterion 1 is central to our interpretative task, we also set it forth in full:

### *I. Technical Criteria*

*Criterion 1* — The general goal or broad objective in siting and design decisions is permanent isolation of tailings and associated contaminants by minimizing disturbance and dispersion by natural forces, and to do so without ongoing maintenance. For practical reasons, specific siting decisions and design standards must involve finite times (e.g., the longevity design standard in Criterion 6). The following site features which will contribute to such a goal or objective must be considered in selecting among alternative tailings disposal sites or judging the adequacy of existing tailings sites:

Remoteness from populated areas;

Hydrologic and other natural conditions as they contribute to continued immobilization and isolation of contaminants from ground-water sources; and

Potential for minimizing erosion, disturbance, and dispersion by natural forces over the long term.

The site selection process must be an optimization to the maximum extent reasonably achievable in terms of these features.

In the selection of disposal sites, primary emphasis must be given to isolation of tailings or wastes, a matter having long-term impacts, as opposed to consideration only of short-term convenience or benefits, such as minimization of transportation or land acquisition costs. While isolation of tailings will be a function of both site and engineering design, overriding consideration must be given to siting features given the long-term nature of the tailings hazards.

Tailings should be disposed of in a manner that no active maintenance is required to preserve conditions of the site.

As is evident from a comparison of the language of Criterion 1 and the Licensing Board’s decision interpreting it, the Board in effect penciled out not only key words but entire provisions, including the penultimate paragraph of the regulation. While disregarding portions of Criterion 1 undoubtedly simplifies it, such an approach is a wholly unacceptable method of construing the Commission’s regulations. Rather, the regulation must be read as it is written

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<sup>245</sup> See *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985); 2A Sutherland, *supra* note 244, § 46.06.

<sup>246</sup> *Shoreham*, ALAB-900, 28 NRC at 288.

<sup>247</sup> See *supra* pp. 127-28.

and in its entirety.<sup>248</sup> We therefore reject staff counsel's untenable suggestion at oral argument that, in interpreting Criterion 1, we simply "ignore" certain key words.<sup>249</sup> When effect is given to all the words and provisions of Criterion 1 and the Introduction to Appendix A, the regulations clearly require the nondiscretionary consideration of a number of explicit factors. As we explain below, the Licensing Board's interpretation not only overlooks several of those factors, it blinks at the Commission's commands regarding the weight to be assigned to those factors in assessing a mill tailings disposal site.

Initially, we note our agreement with Kerr-McGee and the staff that the Licensing Board did not judge permanent disposal at the West Chicago site as a licensee-proposed alternative to the requirements of Criterion 1 under section 84(c) of the AEA and the fourth paragraph of the Appendix A Introduction. Rather, as they correctly assert, the Board held simply that disposal at the West Chicago facility satisfies the siting requirements of Criterion 1.<sup>250</sup> In its analysis of the mill tailings regulations, the Licensing Board several times observed that the regulations permit licensees to propose alternatives to the requirements of the various Criteria. Yet the Board made no mention of the statutory standard under which such alternatives must be judged. Nor did the Board analyze onsite disposal under that standard, as would be required if it were treating onsite disposal as a licensee-proposed alternative. Accordingly, we need not consider disposal at the West Chicago site as a licensee-proposed alternative to the requirements of Criterion 1 in reviewing the Licensing Board's interpretation of the mill tailings regulations.

The Licensing Board made several errors in construing the first paragraph of Criterion 1. First, it characterized, as mere general "goals," the three siting features — remoteness, hydrology, and erosion minimization — that the regulation mandates be considered in all tailings disposal siting decisions. As a consequence, these siting features played only a subsidiary role in the Board's analysis.<sup>251</sup> Before us, Kerr-McGee echoes this theme, arguing that the siting features are only general goals or broad objectives and, therefore, they are not mandatory requirements.<sup>252</sup> But this interpretation is contrary to the plain language of Criterion 1 because it confuses the goal set forth in that Criterion with the requirements specified to effectuate the goal. The first sentence sets out the *only* goal identified in Criterion 1 — the "permanent isolation of tailings . . . by minimizing disturbance and dispersion by natural forces, and to do

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<sup>248</sup> See *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987). See also *supra* note 245.

<sup>249</sup> App. Tr. 184.

<sup>250</sup> Indeed, in light of its argument in this regard, we assume Kerr-McGee would have presented us with an alternative argument in support of the Licensing Board's decision, if below it had intended to proffer permanent onsite disposal as a licensee-proposed alternative to the requirements of Criterion 1.

<sup>251</sup> See LBP-90-9, 31 NRC at 163-64.

<sup>252</sup> Kerr-McGee Brief at 25.

so without ongoing maintenance.” The three siting features that the Licensing Board and Kerr-McGee so readily dismiss as mere goals are instead requirements that the regulation states “must be considered in selecting” a disposal site.<sup>253</sup> In the words of the Criterion, when the three siting features are properly considered they “will contribute to such a goal or objective,” i.e., the permanent isolation of tailings without active maintenance. This reading is precisely the interpretation the court of appeals gave Criterion 1 in *Quivira*, and it is the only construction that is consistent with the wording and context of the regulation.<sup>254</sup>

Second, the Licensing Board read out of the first paragraph of Criterion 1 the Commission’s directive that the three siting features “must be considered in selecting among alternative tailings disposal sites or *judging the adequacy of existing tailings sites.*”<sup>255</sup> Rather than heed this clear instruction, it construed Criterion 1 to differentiate between *new* sites and *existing* sites and to require the consideration of the three site features only vis-a-vis the former. Thus, in its analysis of the regulation, the Licensing Board acknowledges that the State is correct that “Criterion 1 requires consideration of remoteness from population and hydrologic factors *in choosing among alternatives.*”<sup>256</sup> But in the next breath, the Board states:

[w]ere this proceeding concerned with the siting of a new facility so that cost differences among potential sites were minor, Criterion 1 clearly would result in the disapproval of the West Chicago site because of its population density. But this proceeding concerns the disposal of an existing tailings pile located on the West Chicago site. Kerr-McGee correctly points out that, like it or not, we must deal with that site.<sup>257</sup>

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<sup>253</sup> As originally promulgated in 1980, Criterion 1 did not articulate this “goal” as clearly as it does now. Instead, reference was made simply to “the broad objective of isolating the tailings and associated contaminants from man and the environment during operations and for thousands of years thereafter without ongoing active maintenance.” 45 Fed. Reg. at 65,533 (codified at 10 C.F.R. Part 40, App. A, Criterion 1 (1981)). When the Commission amended Appendix A in 1985, it clarified the first paragraph of Criterion 1 “to emphasize that it states a goal and not a standard, and to delete any specific time frame.” 50 Fed. Reg. at 41,856. It also changed “shall” in the fourth paragraph to “should.” *Ibid.* Criterion 1 now states affirmatively and at the outset what the “general goal or broad objective” of the Commission’s mill tailings siting and design decisions will be.

Kerr-McGee seizes on the Commission’s brief explanation of this clarification to support its view that the *entirety* of Criterion 1 now reflects simply a regulatory goal, not a standard. Kerr-McGee Brief at 25 n.33. That strained reading of the regulatory history of the provision, however, is at odds with both the language of Criterion 1 itself and logic. Quite simply, had the Commission intended in 1985 to relegate the three specified siting features to a lesser role than they had served up to that time, it would not have directed that these features “must be considered.” That the regulation means exactly what it says and commands that the three siting features be considered in selecting a disposal site is confirmed by the Statement of Considerations accompanying the final mill tailings regulations. There, the Commission notes that it is adopting “the standard convention on imposing an obligation” in the regulations, and that “‘must’ is used as the mandatory form when the subject is an inanimate object.” 50 Fed. Reg. at 41,860.

<sup>254</sup> 866 F.2d at 1252 n.8.

<sup>255</sup> 10 C.F.R. Part 40, App. A, Criterion 1 (emphasis added).

<sup>256</sup> LBP-90-9, 31 NRC at 163 (emphasis added).

<sup>257</sup> *Ibid.*

Not only is this interpretation contrary to the manifest language of the first paragraph of Criterion 1, the Licensing Board's construction reads into the regulation Kerr-McGee's assertion that UMTRCA explicitly requires the Commission's regulations to make a positive distinction between new and existing mill tailings sites. But in upholding the validity of the NRC's mill tailings regulations in *Quivira*, the court rejected that same argument by Kerr-McGee and it has no more currency before us.<sup>258</sup>

Moreover, as the *Quivira* court indicated, even if Kerr-McGee's view of UMTRCA is accepted, the provisions of the fourth paragraph of the Introduction to the Appendix A Criteria, providing that licensees may propose alternatives to the Commission's requirements, fully meet any supposed UMTRCA requirement that the mill tailings regulations distinguish between new and existing sites.<sup>259</sup> Here, of course, Kerr-McGee has not pursued that option and that situation was not before the Licensing Board.<sup>260</sup> More important, however, the Commission already considered any possible differences between new and existing tailings sites in promulgating Criterion 1. As is evident from the language of the regulation, the Commission determined that, regardless of any such differences, the three siting features — remoteness from populated areas, hydrologic conditions, and erosion resistance — are so important that they "must be considered in selecting among alternative tailings disposal sites *or* judging the adequacy of existing tailings sites."<sup>261</sup> In light of this explicit instruction, the Licensing Board could not properly interject into Criterion 1 any other differentiation between new and existing sites.<sup>262</sup>

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<sup>258</sup> 866 F.2d at 1260 & n.17. See *supra* p. 129.

As the Tenth Circuit noted, no UMTRCA provision explicitly requires a distinction between new and existing sites, and the legislative history suggests only that the NRC consider possible differences in the applicability of requirements to existing versus new tailings sites. 866 F.2d at 1260 n.17. See H.R. Rep. No. 1480, *supra* note 196, pt. 1, at 16.

<sup>259</sup> 866 F.2d at 1260.

<sup>260</sup> See *supra* p. 134.

<sup>261</sup> 10 C.F.R. Part 40, App. A, Criterion 1 (emphasis added).

<sup>262</sup> Obviously, in judging the adequacy of an existing tailings site against the three siting features of Criterion 1 and then comparing that site to alternative sites measured against the same siting requirements, the differences between sites become matters of degree; they are nonetheless to be measured by the same yardstick. In ignoring the requirement of Criterion 1 that existing sites, like new sites, must be judged against the three site features, the Licensing Board erroneously shortened the yardstick for existing sites. When the Commission originally promulgated its mill tailings regulations in 1980, it rejected suggestions that less strict criteria be developed for existing sites. It explained that the

[r]egulations were developed recognizing that it may not be practicable to provide the same measures of conservation at existing sites as can be done at new sites where alternatives are not limited. Certain requirements in the regulations represent minimum levels of protection of public health, safety, and the environment. These requirements can and must be met in all cases. For example, requirements for minimum tailings cover, erosion protection, financial surety provisions, and the broad requirement that no ongoing active maintenance be needed to preserve the tailings isolation are mandatory in all cases. It would not be possible, on the other hand, to line the bottom of an existing tailings impoundment. Also, objectives

(Continued)

The Licensing Board's treatment of the second and third paragraphs of Criterion 1 is similarly flawed and does not comport with the plain language of the regulation. The second paragraph provides that the process of selecting a tailings disposal site "must be an optimization to the maximum extent reasonably achievable" of the three siting features. The third paragraph then explains the ground rules for achieving the optimization of those siting features. First, the Criterion requires that in selecting a disposal site "primary emphasis must be given to isolation of tailings" because this radioactive waste presents "a matter having long-term impacts, as opposed to consideration only of short-term convenience or benefits, such as minimization of transportation or land-acquisition costs." Second, although the Criterion explains that "isolation of tailings will be a function of both site and engineering design," it then commands that "*overriding* consideration must be given to siting features given the long-term nature of the tailings hazards."<sup>263</sup>

In reading the Criterion, the Licensing Board noted that the second paragraph directs that the site selection process must optimize "to the maximum extent reasonably achievable" the siting features. As previously indicated, however, the Board erroneously labeled and treated the siting features as mere goals that can be disregarded for existing sites.<sup>264</sup> The Board also recognized that the use of the term "reasonably achievable" in the second paragraph of the criterion brings into play the fifth paragraph of the Introduction, which provides, *inter alia*, that specific licensing decisions involving this term "will take into account . . . the economics of improvements in relation to benefits to the public health and safety." But, as is evident from the following portion of its analysis, the Licensing Board read that provision in isolation from the third paragraph of Criterion 1:

We believe that the amendments to the Introduction to Appendix A, which require that consideration be given to economics in all siting decisions . . . require that we approach this case with due regard for the fact that West Chicago is an existing site. If those provisions were not in place, Illinois'[s] position would be correct and it would be necessary to reject the West Chicago site at the outset. The requirement to consider economics . . . means that West Chicago may be rejected only after consideration is given to the costs and benefits that would be incurred by moving the tailings to another site.<sup>265</sup>

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concerning remoteness from people, providing below-grade burial, and transferring ownership of sites, may not be met to the same degree at an existing site as at a new site.

At some point, a determination, based on how a site measures up against all of the criteria, must be made as to whether the tailings should be relocated from an existing to a new site . . . .

<sup>45</sup> Fed. Reg. at 65,523 (emphasis added).

<sup>263</sup> 10 C.F.R. Part 40, App. A, Criterion 1 (emphasis added).

<sup>264</sup> See *supra* pp. 134-35.

<sup>265</sup> LBP-90-9, 31 NRC at 163-64 (footnotes omitted).

The Board thus totally ignored the Criterion's provisions specifying how siting and design factors, including short-term economic costs, are to be weighed in judging the adequacy of a disposal site. Indeed, nowhere in the Licensing Board's analysis does it even mention the significant provisions of the third paragraph of Criterion 1, in particular, dictating that "overriding consideration must be given to siting features." Instead of putting its thumb on the long-term siting features side of the scale, as the second and third paragraphs of Criterion 1 require, the Board tipped the balance in favor of short-term economic considerations.

Contrary to the Licensing Board's approach, the provisions of the Criterion's third paragraph must be read in conjunction with the fifth paragraph of the Introduction. In promulgating that introductory paragraph, the Commission incorporated the mandate of new section 84(a)(1) of the AEA into the regulations so that all licensing decisions "will take into account the risk to the public health and safety and the environment with *due* consideration to the economic costs involved and any other factors the Commission determines to be appropriate."<sup>266</sup> As the court held in *Quivira*, section 84(a)(1) requires the NRC to abide by the cost-benefit rationalization standard in issuing regulations and managing mill tailings.<sup>267</sup> According to the court, that standard "requires the agency merely to consider and compare the costs and benefits of various approaches, and to choose an approach in which costs and benefits are reasonably related in light of Congress' intent."<sup>268</sup> Given the Licensing Board's reading of the regulations, it bears repeating that the application of that standard does not require a precise quantitative cost-benefit itemization in dollars or some other unit for every requirement in the Appendix A Criteria that imposes some burden on a licensee.<sup>269</sup> Rather, that standard allows a much more general relationship between costs and benefits. The *Quivira* court held that the Commission met the cost-benefit rationalization standard in promulgating the mill tailings regulations;<sup>270</sup> thus, when the commands of the second and third paragraph of Criterion 1 are followed in assessing the adequacy of a mill tailings site, that standard is necessarily met in implementing Criterion 1.

Criterion 1 directs that, due to the long-term impacts of mill tailings, "primary emphasis" must be given to the isolation of the tailings and less importance is to be attributed to "short-term convenience or benefits, such as minimization

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<sup>266</sup> 10 C.F.R. Part 40, App. A, Introduction (emphasis added). In the Statement of Considerations accompanying the final mill tailings rules, the Commission stated that it "views the mandate in section 84a(1) as applying to all aspects of its uranium recovery program. . . . The insert to the Introduction to Appendix A that paraphrases section 84a(1) will explicitly emphasize this point." 50 Fed. Reg. at 41,855.

<sup>267</sup> 866 F.2d at 1251-52.

<sup>268</sup> *Id.* at 1250.

<sup>269</sup> *Id.* at 1254.

<sup>270</sup> *Id.* at 1253-58.

of transportation or land acquisition costs.” This crucial weighing is necessary because mill tailings disposal is an exceedingly long-term waste management problem. As the Statement of Considerations accompanying the original 1980 mill tailings regulations states, “[t]he NRC has evaluated this problem and developed regulations considering the inescapable fact that the tailings will, in fact, remain hazardous for extremely long periods of time, *hundreds of thousands of years.*”<sup>271</sup> Here, for example, the half-life of the major thorium element in the West Chicago tailings is on the order of 14 billion years.<sup>272</sup> Or, as the House Report on UMTRCA states, the hazard will persist “until long after our existing institutions can be expected to last in their present forms.”<sup>273</sup> Although Criterion 1 recognizes that for “practical reasons” siting decisions and design standards must involve finite time periods, the tailings hazard does not disappear with the expiration of the 1000-year longevity design standard of Criterion 6. That being so, the third paragraph of Criterion 1 directs that, in judging the adequacy of a disposal site, isolation of mill tailings (through an optimization of the three siting features of remoteness from populated areas, hydrologic conditions, and resistance to erosion) is paramount, and short-term impacts like the costs of transporting tailings to another site are to be accorded lesser weight.<sup>274</sup>

Furthermore, and again because of the long-term nature of the mill tailings hazard, the Criterion commands that “overriding consideration must be given to siting features” relative to “engineering design” in order to ensure the isolation

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<sup>271</sup> 45 Fed. Reg. at 65,525 (emphasis added). See *supra* note 196.

<sup>272</sup> SFES at 2-12, 5-45. In terms of common human experience, time periods of this magnitude are unfathomable. Even the relatively short 1000-year longevity design standard of Criterion 6 has much more meaning when it is recognized, for example, that Columbus sailed to America only 500 years ago and the United States became a nation just over 200 years ago.

<sup>273</sup> H.R. Rep. No. 1480, *supra* note 196, pt. 1, at 17.

<sup>274</sup> This weighting of factors in assessing the sufficiency of a mill tailings disposal site in Criterion 1 is also driven by the difficulty and imprecision inherent in predicting health effects over the very long term. In the Statement of Considerations of the 1980 mill tailings regulations, the Commission explained this problem in rejecting, as unreasonable and likely misleading, a strictly quantitative, incremental cost-benefit methodology in favor of a less rigorous cost-benefit rationalization approach for establishing tailings cover requirements:

Given the long term nature of the mill tailings hazards, and the complexity and uncertainty associated with predicting actual levels of radon emissions and impacts over the long term, it is concluded that the problem of determining tailings containment requirements cannot be reduced to the purely mathematical formulations required for the quantitative cost-benefit optimization methodology. The mathematical process grossly oversimplifies the problem and, thus, while it appears to offer a “rational approach” to decisionmaking, it can be misleading and quite arbitrary.

One of the obvious problems with this methodology is that arguments can easily be made for virtually opposite positions (little or no control, versus absolute control of [f] radon releases) merely by measuring potential health impacts over short or long time periods. In fact, commenters did this. The monetary worth of averting a health effect (“life loss” or “life shortening” due to cancer) is another highly subjective factor which can vary widely and, thus, make more uncertain the level of control which should be required. While arbitrary decisions might be made concerning these factors, there is no practicable way to correlate long term containment performance uniquely with costs.

45 Fed. Reg. at 65,524-25.

of tailings. "Overriding" is defined as "subordinating all others to itself."<sup>275</sup> While care must always be taken not to apply dictionary definitions mechanically in unintended contexts,<sup>276</sup> here the purpose of the Commission's word choice seems evident. Once again, because of the exceedingly long-term nature of the tailings hazard and the potential for failure of engineered features over the very long term, the Criterion directs that the three siting features are to be given preeminence over engineered design features in assessing the adequacy of a tailings disposal site. As the Commission itself put it: "siting is of paramount importance in developing optimum tailings disposal programs. The problem of tailings disposal cannot be approached with the attitude that inadequate siting features can be compensated for by design."<sup>277</sup>

As detailed above, the Licensing Board's construction of Criterion 1 completely ignores the Criterion's third paragraph, and its interpretation of the first and second paragraphs cannot be squared with the plain language of the regulations. Accordingly, we reverse the Board's determination that the West Chicago site satisfies the provisions of Appendix A, Criterion 1. The current state of the record, as well as our determination in the next section that the Licensing Board erred in granting summary disposition on a number of the State's contentions, precludes us from applying the provisions of Criterion 1, properly interpreted, to the West Chicago site and the alternative sites. Hence, we reach no conclusion on the adequacy of any site under Criterion 1.

B. The State also challenges the Licensing Board's grant of Kerr-McGee's cross-motion for summary disposition on the State's admitted contentions concerning the ability of the proposed disposal cell to isolate mill tailings and to resist human intrusion over the long term without active maintenance, as required by the Commission's regulations.<sup>278</sup> Because the Licensing Board based its grant of summary disposition of these contentions upon an erroneous definition of "active maintenance" and upon an incorrect application of the standard for granting summary disposition, we reverse. In its resolution of these contentions, the Licensing Board combined Contentions 4(c) and 4(d) and similarly addressed Contentions 4(e) and 4(g) together. It then disposed of each grouping without further differentiation. For ease of reference, we discuss the contentions in the same manner.

1. As previously indicated, Criterion 12 requires that the final disposition of mill tailings must be such that ongoing active maintenance is not necessary to preserve isolation.<sup>279</sup> Additionally, a portion of the siting and design goal

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<sup>275</sup> *Webster's Third New International Dictionary* 1609 (1971).

<sup>276</sup> *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949).

<sup>277</sup> 45 Fed. Reg. at 65,524. *See also* Final GEIS at 15 ("good siting is of overriding importance in isolating the tailings and associated hazards; inadequate siting cannot be overcome by design").

<sup>278</sup> *See* LBP-89-35, 30 NRC at 686-90.

<sup>279</sup> *See supra* p. 106.

set forth in the first sentence of Criterion 1 provides that tailings should be permanently isolated “without ongoing maintenance.” The last paragraph of that criterion further amplifies that provision, stating that “[t]ailings should be disposed of in a manner that no active maintenance is required to preserve conditions of the site.” The State’s Contention 4(c) alleged that Kerr-McGee failed to demonstrate that, without active maintenance, its proposed above-grade disposal cell provides isolation of the tailings from natural erosional forces reasonably equivalent to below-grade disposal, as Criterion 3 requires.<sup>280</sup> Related Contention 4(d) alleged that the embankment and cover slopes of the proposed cell are not relatively flat after stabilization so as to minimize the potential for erosion and provide conservative factors for safely assuring long-term stability, as Criterion 4 requires.<sup>281</sup> Further, the contention asserts that the final slopes will not be contoured to grades that are as close as possible to those that would exist for below-grade disposal. The Licensing Board characterized Contentions 4(c) and 4(d) as alleging that, “because the 20% slope proposed for the disposal cell’s sides, while not prohibited, will require active maintenance over the long term in order to resist erosion, the cell will not provide isolation equivalent to that provided by below-grade disposal.”<sup>282</sup>

In its resolution of these joined contentions, the Licensing Board determined that the kinds of maintenance necessary to repair the damage to the disposal cell that the State claimed would be caused by erosion — namely, burning or mowing the top vegetative cover and making other minor-repairs — did not constitute “active maintenance” within the meaning of Appendix A. It concluded, therefore, that such anticipated maintenance activities could be performed in the future without running afoul of the mill tailings regulations. At the urging of Kerr-McGee, the Licensing Board adopted the definition of the types of activities that do and do not constitute “active maintenance” found in the Commission’s regulations governing the land disposal of radioactive waste.<sup>283</sup> Section 61.2 of 10 C.F.R. defines “active maintenance” as

any significant remedial activity needed during the period of institutional control to maintain a reasonable assurance that the performance objectives [of Part 61] are met. Such active maintenance includes ongoing activities such as the pumping and treatment of water from a disposal unit or one-time measures such as replacement of a disposal unit cover. *Active maintenance does not include custodial activities such as repair of fencing, repair or replacement of monitoring equipment, revegetation, minor additions to soil cover, minor repair of disposal unit covers, and general disposal site upkeep such as mowing grass.*<sup>284</sup>

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<sup>280</sup> See *supra* p. 105.

<sup>281</sup> *Ibid.*

<sup>282</sup> LBP-89-35, 30 NRC at 683.

<sup>283</sup> See Kerr-McGee Cross-Motion at 43-44.

<sup>284</sup> 10 C.F.R. § 61.2 (emphasis added).

According to the Board, "Illinois and Staff pose[d] no objections to this definition in their responses to [Kerr-McGee's] cross-motion" for summary disposition.<sup>285</sup> Thus, the Board incorporated this definition into Part 40, Appendix A, "because the goal stated in 10 C.F.R. § 61.44, elimination to the extent practicable of the need for active site maintenance following closure, is very similar to the goal of Criterion 12."<sup>286</sup>

But in its cross-motion for summary disposition urging adoption of the section 61.2 definition of active maintenance for use in Part 40, Kerr-McGee did not inform the Board,<sup>287</sup> nor apparently did the Board independently discover, that the immediately preceding section of the regulations, section 61.1(b), explicitly provides that the Part 61 "regulations . . . do not apply to . . . disposal of uranium or thorium tailings or wastes (byproduct material as defined in § 40.4(a-1)) as provided for in Part 40 of this chapter in quantities greater than 10,000 kilograms and containing more than five (5) millicuries of radium-226."<sup>288</sup> Moreover, section 61.2 itself defines "[w]aste" for purposes of Part 61 as "low-level waste[,] . . . that is, radioactive waste *not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act (uranium or thorium tailings and waste).*"<sup>289</sup> It is thus clear from the Part 61 regulations themselves that the Commission did not intend for any part thereof to be applied to mill tailings disposal.

The Board was also seriously mistaken in its expressed belief that the State did not oppose the use of the Part 61 definition.<sup>290</sup> Contrary to the Licensing

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<sup>285</sup> LBP-89-35, 30 NRC at 683.

<sup>286</sup> *Ibid.* Section 61.44 provides that "[t]he disposal facility must be sited, designed, used, operated, and closed to achieve long-term stability of the disposal site and to eliminate to the extent practicable the need for ongoing active maintenance of the disposal site following closure so that only surveillance, monitoring, or minor custodial care [is] required." In relying on this section, however, the Board apparently was unaware that 10 C.F.R. § 61.59(b) prohibits reliance on such surveillance or "minor custodial care" for "more than 100 years," a period an order of magnitude shorter than the 1000-year longevity design standard for mill tailings.

<sup>287</sup> See Kerr-McGee Cross-Motion at 43-44.

<sup>288</sup> 10 C.F.R. § 61.1(b)(2).

<sup>289</sup> *Id.* § 61.2 (emphases added).

As we have already noted (*supra* note 147), the staff was, at a minimum, seriously remiss in not calling to the Licensing Board's attention its view of the meaning of active maintenance contained in the draft STP that was made available for public comment weeks before the staff filed its responses to the State's and Kerr-McGee's motions for summary disposition. The staff's silence on the inapplicability of the Commission's Part 61 low-level waste regulations to mill tailings governed by Part 40 is even more puzzling in light of several of its answers to comments on the draft SFES in which the staff specifically acknowledges this very point. Consider, for example, the following comment on the draft SFES and question posed to the staff:

[T]he Code of Federal Regulations set by the NRC — Code 10 CFR, Vol. 10, Part 61 . . . in general, states that the licensing of any new low level nuclear dump site should not be carried out in a densely populated area due to the inherent risk of possible adverse effects on the populous and the environment. Why, then, is the West Chicago site not covered under your agencies [*sic*] own set of federal safety regulations, and why the inconsistency of the NRC?

SFES at H-58. In response, the staff stated that "[t]he West Chicago site does not fall under the regulations contained in 10 CFR Part 61 because of the type of material involved." *Id.* at H-60. See also *id.* at H-78, H-79.

<sup>290</sup> See LBP-89-35, 30 NRC at 683.

Board's statement, the State disputed explicitly the use of the Part 61 definition in its response to Kerr-McGee's cross-motion for summary disposition and the accompanying affidavit of its expert witness, Dr. Thiers. He explained why Part 61 does not assist in discerning the meaning of active maintenance as used in Part 40, by contrasting Part 61 low-level waste with Part 40 mill tailings. In this regard, Dr. Thiers stated that, pursuant to Part 61, low-level wastes generally will be placed below grade or sealed in concrete vaults with a 500-year design life. He further explained that the Part 61 regulations provide for only a 100-year period of institutional control because Class A and Class B low-level wastes have a relatively short half-life and will decay during that period, while thorium tailings include radioactive materials with half-lives of many thousands of years. Next, Dr. Thiers stated that EPA's regulations for inactive mill tailings sites, 40 C.F.R. Part 192, and the basis for those regulations set forth in the Statement of Considerations accompanying them, provide the correct guidance for dealing with the disposal of mill tailings. He then explained that, because of the long-term impacts of mill tailings, those regulations distinguish between active and passive controls and that passive maintenance, unlike active maintenance, includes no planned maintenance by people. Consequently, Dr. Thiers stated that a passive maintenance structure is self-maintaining and designed against the probable maximum flood (PMF), the PMP, the maximum credible earthquake (MCE), and other conceivable destructive events, with no planned human maintenance.<sup>291</sup>

In light of the explicit statements in 10 C.F.R. §§ 61.1(b) and 61.2 of the inapplicability of Part 61 to mill tailings regulated under Part 40, we hold that the Licensing Board erred in its use of the Part 61 definition in this proceeding. If regulations are to have any meaning, express exclusions and prohibitions must be obeyed. In some circumstances, if a regulation does not define a particular term, it may be acceptable to borrow the definition of a like term from another part of an agency's regulations. But this can never be the case where, as here, there are specific prohibitions against such application.<sup>292</sup>

Furthermore, the definition adopted by the Licensing Board is inappropriate for the very reasons stated by the State's expert, Dr. Thiers. By virtue of the extremely long half-lives of the elements found in mill tailings and the correspondingly long times the tailings will remain hazardous and need to be isolated, the Licensing Board should have crafted a definition for the active maintenance prohibited by Part 40 that would preclude any maintenance, even minor in nature, that is needed to ensure compliance with the design longevity

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<sup>291</sup> Affidavit of G.R. Thiers [hereinafter Thiers Sept. 11, 1989, Affidavit] at 13-14, attached as Exhibit A to People's Opposition to Kerr-McGee's Cross Motion for Summary Disposition (Sept. 21, 1989) [hereinafter State's Opposition]. See also State's Opposition at 45-46, 48; 48 Fed. Reg. at 597.

<sup>292</sup> Kerr-McGee's counsel conceded as much at oral argument. App. Tr. 83.

standards of *Part 40*. Accordingly, insofar as the Licensing Board relied upon the Part 61 definition of active maintenance in granting Kerr-McGee's motion for summary disposition of Contentions 4(c) and 4(d), we reverse.

2. In addition, we reverse the Board's treatment of these contentions for the independent reason that it misapplied the standard for granting summary disposition. Section 2.749 of the Commission's Rules of Practice governs motions for summary disposition. Only if there are no genuine issues of material fact and the moving party is entitled to a decision as a matter of law, may the presiding officer grant the motion.<sup>293</sup> Conversely, if a disputed issue of material fact exists, the motion must fail.<sup>294</sup> In weighing the evidence, it is well-settled that all inferences must be drawn in favor of the party opposing summary disposition.<sup>295</sup> Here, due to the existence of several disputed issues of material fact, the Licensing Board erred in granting Kerr-McGee's cross-motion for summary disposition on Contentions 4(c) and 4(d).

First, the Licensing Board erred in dismissing, on summary disposition, the State's challenges to the intrusion barrier. As the Board saw it, the purpose of the clay-cobble intrusion barrier underlying the vegetative cover is "to prevent human and animal intrusion and to provide added assurance of cell stability in the event that the topsoil layer is lost for some unspecified reason during the design life of the cell."<sup>296</sup> The State, in opposing Kerr-McGee's cross-motion for summary disposition, challenged the adequacy of the disposal cell design because it failed to provide certain information on the particle size and distribution of the clay-cobble layer, thereby preventing the State from being able to determine the effectiveness of the intrusion barrier. Despite its acknowledgment that the intrusion barrier served some purpose, the Board nonetheless held that the missing information was immaterial because the barrier was not required by Appendix A.<sup>297</sup>

Contrary to the Board's determination, however, the missing information regarding the particle size and distribution of the clay-cobble layer was material. As the State's expert, Dr. Thiers, explained in his affidavit in support of the State's position, without the specification of the percentage of such particle size

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<sup>293</sup> 10 C.F.R. § 2.749(d). See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units Nos. 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981) (citing *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980)).

A material fact is one that affects the outcome of the litigation or tends to resolve any of the issues raised by the parties. See generally 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, at 93-95 (1983).

<sup>294</sup> See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 345-47 (1989).

<sup>295</sup> See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

<sup>296</sup> LBP-89-35, 30 NRC at 687. As discussed *supra* p. 111, at the time of the Board's ruling on the summary disposition motions, neither Kerr-McGee nor the staff considered the intrusion barrier as the primary means to assure that the disposal cell met the erosion protection and longevity design standards.

<sup>297</sup> LBP-89-35, 30 NRC at 687-88.

and the percentage of soil fines to be employed in the intrusion barrier, the ability of the material to resist the design storm cannot be reliably evaluated.<sup>298</sup> The Licensing Board examined the intrusion barrier “[b]ecause [it] is part of the design,” and for that reason the Board sought “to determine whether it is likely to perform its intended function under conditions likely to prevail during the design life of the cell.”<sup>299</sup> In addition, the Board stated that one of the intended functions of the barrier was to assure “cell stability in the event that the topsoil layer is lost.”<sup>300</sup> In such a circumstance — i.e., the absence of a “full self-sustaining vegetative cover” — however, Appendix A Criterion 4 requires a “rock cover” like the intrusion barrier in order to reduce erosion to negligible levels.<sup>301</sup> Thus, under the terms of its own analysis for examining the barrier, the Board could not dismiss as immaterial the particle size and distribution of the clay-cobble layer on the ground that it was not required by the regulations.<sup>302</sup> Accordingly, the Board erred in rejecting the State’s challenge by determining that the intrusion barrier was not required by the regulations.

Second, the Licensing Board also erred in summarily disposing of the State’s challenge to the flooding event used by Kerr-McGee in its erosion analyses. The State, through the affidavit of Dr. Thiers, pointed out that the erosion estimates of both Kerr-McGee and the staff relied on flooding events of less intensity than that generally accepted by the NRC. As Dr. Thiers explained:

[i]f the topsoil is not designed to resist the PMP a gully will form, concentrating runoff and tending to erode the underlying intrusion layer. Unless the intrusion layer is designed to withstand this condition, erosion will continue downwards and back into the tailings, spreading those materials into the environment. This is major damage, and would require active maintenance or major reconstruction to correct the spill. Unless erosion protection sufficient to resist runoff from the PMP is provided the design does not meet the practice generally accepted by the NRC.<sup>303</sup>

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<sup>298</sup>Thiers Sept. 11, 1989, affidavit at 5-6, 16-17. See *infra* pp. 145-46, concerning the design storm.

No party challenges Dr. Thiers’s credentials. He is the Principal Geotechnical Engineer at M-K Environmental Services, San Francisco, California, and he holds B.S., M.S., and Ph.D degrees in civil engineering from the University of California, Berkeley, where the primary emphasis of his graduate studies was on geotechnical engineering. He has substantial experience with the reclamation of radioactive mill tailings sites, including supervising the consolidation, seepage, and seismic analyses for a major tailings deposit near Uravan, Colorado. He also has developed criteria, as well as design and analysis procedures, for the design of 24 uranium repositories in 10 states under Title I of UMTRCA. In addition, Dr. Thiers has supervised the preparation of construction drawings and specifications for three tailings reclamation sites and managed engineering during construction at three sites. See Affidavit of G.R. Thiers [hereinafter Thiers July 21, 1989, Affidavit] at 1, attached as Exhibit C to People’s Motion for Summary Disposition (July 31, 1989) [hereinafter State Summary Disposition Motion].

<sup>299</sup>LBP-89-35, 30 NRC at 687.

<sup>300</sup>*Ibid*.

<sup>301</sup>10 C.F.R. Part 40, App. A, Criterion 4(d).

<sup>302</sup>The Board’s ruling in this regard is also inconsistent with its earlier rejection of the State’s challenge to the sufficiency of the vegetative cover. See LBP-89-35, 30 NRC at 686-87. As we have already seen, however, in finding the vegetative cover adequate, the Board erroneously relied upon the definition of active maintenance in section 61.2.

<sup>303</sup>Thiers Sept. 11, 1989, Affidavit at 5. See also *id.* at 7.

He also noted that the Department of Energy (DOE) designs its mill tailings disposal cells to withstand erosion from a PMP event.<sup>304</sup>

The Board, however, dismissed Dr. Thiers's opinion as a "bare allegation" with "no technical basis for his conclusion."<sup>305</sup> It also described the erosion damage that Dr. Thiers alleged would occur as "the sort that could be corrected by minor repairs."<sup>306</sup> Thereafter, in denying the State's motion for reconsideration, the Board determined that the flooding event employed by Kerr-McGee "has a return frequency of far less than once every 200 years," so "the minimum design objective of Appendix A to assure isolation for 200 years is self evidently met by a wide margin under [Kerr-McGee's reduced flooding event design]."<sup>307</sup>

The Licensing Board improperly disregarded, as a "bare allegation," Dr. Thiers's expert opinion concerning the appropriate flooding event.<sup>308</sup> Dr. Thiers's affidavit unquestionably raises a disputed issue of material fact and provides an adequate technical foundation — i.e., the generally accepted positions of both the NRC and DOE, as well as his own expert opinion — which the Board was not free to disregard. Further, the Board fails to explain how the "major reconstruction" alleged by Dr. Thiers can be characterized as "minor repairs." And, as previously shown, even "minor repairs" fall within the bounds of prohibited active maintenance. Finally, the Board was mistaken concerning the acceptability of a design longevity standard of 200 years. In promulgating the final rule for its Part 40 regulations, the Commission recognized that "EPA's primary design standard is 1,000 years. Accordingly, the Commission has no discretion to promulgate a different design standard for a shorter period."<sup>309</sup> The Commission also stated that "[t]he 200-year minimum longevity requirement provides relief in those unique reclamation situations where the 1,000-year criterion can be shown to impose too much of a cost hardship. The Commission views the EPA longevity standard to be 1,000 years unless site specific circumstances preclude meeting 1,000 years."<sup>310</sup> Kerr-McGee did not contend, let alone show, that circumstances at West Chicago preclude compliance with the 1000-year standard. Hence, the Licensing Board mistakenly

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<sup>304</sup> *Id.* at 4.

<sup>305</sup> LBP-89-35, 30 NRC at 689.

<sup>306</sup> *Ibid.*

<sup>307</sup> Feb. 13 Order at 8.

<sup>308</sup> As has been observed, "[e]xpert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985). See also Fed. R. Evid. 703, 705.

<sup>309</sup> 50 Fed. Reg. at 41,856.

<sup>310</sup> *Id.* at 41,858.

used 200 years as the minimum design objective in granting summary disposition of Contentions 4(c) and 4(d).<sup>311</sup>

3. The Licensing Board similarly erred in its disposition of the State's Contentions 4(e) and 4(g). The principal focus of the Licensing Board's discussion of these contentions was the State's argument that "the location of the disposal cell within a densely populated area almost guarantees human intrusion absent a rigorous security program," and that such a program is inconsistent with the 1000-year longevity and "no active maintenance" criteria of Appendix A.<sup>312</sup> The Board granted Kerr-McGee's cross-motion for summary disposition of these two contentions, concluding that, while "some human intrusion onto the site is likely[,] . . . we do not believe that the site would constitute an attractive nuisance, so as to make such intrusion probable."<sup>313</sup> Further, the Board determined that, "given the design of the cell so as to resist erosion, we do not believe that Dr. Thiers has made a case that human intrusion could create damage so extensive that active maintenance would be required to correct it as that term is defined in section 61.2."<sup>314</sup>

In opposing the cross-motion for summary disposition on these contentions, the State took issue with, among other things, Kerr-McGee's position that the design of the cell was sufficient to resist human intrusion. The State asserted that, since its deactivation, the West Chicago site has had a history of unauthorized human intrusion "despite fences, 'radioactive' warning signs, and security guards."<sup>315</sup> Further, the State claimed that, not only would such intrusion continue, the cell itself would be invaded and require periodic active maintenance to repair it.<sup>316</sup> In support of its position, the State offered excerpts from the prior testimony of a Kerr-McGee official concerning the numerous intrusions at the West Chicago site notwithstanding Kerr-McGee's efforts to prevent such activities.<sup>317</sup> The State also offered the expert testimony, by way of affidavit, of Dr. Thiers. He contrasted underground disposal of mill tailings, "which

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<sup>311</sup> Additionally, the Licensing Board granted Kerr-McGee's motion for summary disposition on Contentions 2(k), 2(p), 2(s), and 2(u) by relying upon its findings and reasoning in disposing of Contentions 4(c) and 4(d), or by finding them duplicative of those contentions. LBP-89-35, 30 NRC at 701-02. In light of our reversal of the Board's grant of summary disposition of Contentions 4(c) and 4(d), its ruling on Contentions 2(k), 2(p), 2(s), and 2(u) must also be reversed.

<sup>312</sup> *Id.* at 689. See also Criterion 4(d), which requires that final rock covers be designed "to avoid displacement of rock particles by human and animal traffic"; Criterion 1, which specifies remoteness from populated areas as a siting feature; and Criterion 3, which identifies below-grade disposal as the preferred option. 10 C.F.R. Part 40, App. A, Criteria 4(d), 1, and 3.

The concern of the Commission's regulations that the design of tailings disposal sites effectively resist human intrusion can be traced, in part, to the EPA mill tailings regulations that are intended to inhibit the "misuse" of tailings. See 40 C.F.R. § 192.20(a)(1); *AMC I*, 772 F.2d at 632-33.

<sup>313</sup> LBP-89-35, 30 NRC at 689-90.

<sup>314</sup> *Id.* at 690.

<sup>315</sup> State's Opposition at 48.

<sup>316</sup> *Ibid.*

<sup>317</sup> See State's Summary Disposition Motion, Exhibit F.

would reduce the temptation for unauthorized post construction excavation to essentially zero,” with Kerr-McGee’s above ground design for the disposal cell at West Chicago. In the latter regard, he stated that “an unguarded 35-foot high, 27-acre mound in a partly residential area has a nearly 100% probability of being dug into, either out of curiosity, or for ‘free fill’ or both.”<sup>318</sup> As a result of such human intrusion, Dr. Thiers further concluded that “[e]ach excavation episode would require at least maintenance level repair.”<sup>319</sup>

Once again, in granting Kerr-McGee’s cross-motion for summary disposition, the Licensing Board was not free to disregard the State’s evidence concerning past intrusions onto the West Chicago site and the obvious inference from that evidence that such intrusions would continue in the future. This evidence raised a disputed issue of material fact not amenable to summary disposition. Indeed, the Licensing Board’s unexplained, unsubstantiated, and contradictory conclusions that, on the one hand, such intrusion is “likely,” but, on the other hand, not “probable” because the site is not an “attractive nuisance,” only serve to highlight the Board’s error. For one thing, in the context of the comprehensive scheme of multi-agency federal regulation of mill tailings, the tort law concept of attractive nuisance is entirely irrelevant. The Licensing Board also wrongly slighted Dr. Thiers’s expert opinion on the probability of intrusion into the disposal cell and the need for periodic maintenance to repair the damage. This expert opinion and the accompanying documentation were sufficient to raise a disputed issue of material fact concerning the likelihood of purposeful entry into the cell and the inadequacy of the cell design to resist it without active maintenance, so as to preclude the grant of summary disposition.<sup>320</sup> Further, as already shown, the Board relied upon an improper definition of active maintenance to “define away” this disputed issue. Accordingly, we reverse the Licensing Board’s grant of summary disposition on the State’s Contentions 4(e) and 4(g).<sup>321</sup>

4. Although the State and the City have raised a number of additional issues in their appeal from the Licensing Board’s decision, we emphasize that we have reviewed only those matters addressed in this decision. The absence of

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<sup>318</sup> Thiers July 21, 1989, Affidavit at 7.

<sup>319</sup> *Ibid.*

<sup>320</sup> The SFES itself casts even more doubt on the Board’s ruling:

Although it is not possible to calculate precisely the probability of human intrusion into any of the sites, the two most important factors that are believed to increase this probability are population density (in particular whether there are schools and parks nearby) and degree of isolation. The precise trade-offs of population density vs. isolation cannot be determined; however, because it is generally believed that intrusion is more likely under conditions of higher population density, the potential for human intrusion into the site area is considered higher for the West Chicago alternative in comparison to any of the alternative sites.

SFES at 5-7. *See also id.* at 5-9.

<sup>321</sup> In a subsequent ruling, the Licensing Board granted, on the basis of its ruling on Contentions 4(e) and (g), Kerr-McGee’s motion for summary disposition of the State’s Contention 2(h), which also dealt with human intrusion. LBP-90-9, 31 NRC at 190. In light of our holding, that ruling on Contention 2(h) must also be reversed.

discussion concerning these other issues should not be taken as our endorsement or approval of how the Licensing Board disposed of them. Indeed, we have considerable reservations about the Board's treatment of several areas, e.g., groundwater<sup>322</sup> and radiological impact. But the rulings set forth in this opinion, as well as time constraints and other circumstances, obviate consideration of any other issues, and we see no purpose in thus lengthening further either this proceeding or our decision.

## V. LICENSE REVOCATION AND TERMINATION OF THE PROCEEDING

The Licensing Board's decision authorizing the staff to issue the requested license amendment for Kerr-McGee's proposal was premised on that Board's resolution of all issues in Kerr-McGee's favor.<sup>323</sup> Parts III and IV of this opinion, however, establish that that is no longer the case. A significant portion of the Licensing Board's rulings must be vacated and/or reversed, and, in the alternative, the record warrants reopening for the consideration of new evidence on several critical issues. There no longer being a record and decision to support authorization of the license amendment, it necessarily must be revoked as well.<sup>324</sup> Indeed, this action arguably should have been taken by the staff itself when it determined, several months after issuing the license amendment, that "it is not clear that the designs of the top and side slopes, the diversion channels, or the sedimentation basin are adequate to resist erosion to the extent that the requirements of 10 CFR 40 Appendix A are met."<sup>325</sup> In any event, the staff's later requirement that Kerr-McGee obtain a new license amendment to incorporate the additional design specifications requested by the staff, in effect, amounts to an acknowledgment that the outstanding license amendment no longer provides sufficient legal authority from the NRC for Kerr-McGee's proposal.

As noted earlier, in normal circumstances, we would remand this proceeding to the Licensing Board, both to consider the new information developed since the rendering of its initial decision, and to reconsider specified rulings in light

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<sup>322</sup> See Board Notification 90-08, where the staff acknowledges that its environmental review of the impacts of Kerr-McGee's proposal on groundwater was inadequate.

<sup>323</sup> LBP-90-9, 31 NRC at 194-95.

<sup>324</sup> See *Long Island Lighting Co.* (Shorcham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 434, review declined, CLI-88-11, 28 NRC 603 (1988).

Rendering the instant decision before the date on which the State has indicated it intends to terminate Kerr-McGee's license (*see supra* p. 100) makes it unnecessary for us to rule on Kerr-McGee's motion for a protective order. We therefore deny the motion, without prejudice, of course, to the pursuit of other appropriate relief from the Commission.

<sup>325</sup> Swift Letter, Enclosure 3 at 1.

of the conclusions we have reached herein. Several facts militate against this action, however.

First, the Commission has transferred its jurisdiction over mill tailings located within Illinois to the State. And, in doing so, the Commission contemplated that there would be some future, site-specific proceeding conducted by the State involving the West Chicago facility.<sup>326</sup> Second, the staff has determined that a new license amendment is necessary to incorporate the design specifications supplied by Kerr-McGee during the staff's reevaluation of the proposal.<sup>327</sup> As the State and the City correctly point out, the need for a new license amendment triggers their right to a hearing under section 189(a) of the Atomic Energy Act.<sup>328</sup> Third, consideration of the developments since the issuance of the Licensing Board's decisions and correction of the other errors identified in those decisions would require substantial further effort. In large part, the proceeding must begin anew.

The appropriate remedy in these unusual circumstances, therefore, is to *terminate* this NRC proceeding,<sup>329</sup> thereby allowing consideration of Kerr-McGee's plan to begin under the auspices of the State regulatory body now responsible for overseeing the disposal of mill tailings.<sup>330</sup> We note in this regard that, in any licensing proceeding conducted by the State with regard to Kerr-McGee's disposal plan, section 274(o)(3) of the AEA requires the State to provide procedures that include

- (i) an opportunity, after public notice, for written comments and a public hearing, with a transcript,
- (ii) an opportunity for cross examination, and
- (iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review[.]<sup>331</sup>

<sup>326</sup> See *Illinois*, CLI-90-9, 32 NRC at 216-17; *id.*, CLI-90-11, 32 NRC at 334.

<sup>327</sup> NRC Staff Brief at 36, 38; Bernero Affidavit at 4; Swift Affidavit at 9.

<sup>328</sup> 42 U.S.C. § 2239(a)(1). See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 n.163 (1984); *id.*, ALAB-778, 20 NRC 42, 48 (1984), *aff'd sub nom. Anthony v. NRC*, 770 F.2d 1066 (3d Cir. 1985).

<sup>329</sup> This, of course, does not foreclose requests for Commission review of our decision.

<sup>330</sup> Cf. *Farmers Union Cent. Exch. v. FERC*, 584 F.2d 408, 410, 416-17, 421-22, 424 (D.C. Cir.) (in rare oil pipeline ratemaking proceeding — where there was an absence of established administrative precedents in that area of ratemaking, the record was found to be incomplete, and regulatory jurisdiction over oil pipelines was transferred to another agency while the case was pending on appeal — court grants request for remand made by agency now having jurisdiction, so that it can begin its regulatory duties on a clean slate; court also concludes that any examination of issue on which record was found incomplete would be premature), *cert. denied*, 439 U.S. 995 (1978).

<sup>331</sup> 42 U.S.C. § 2021(o)(3). See State Agreement Policy, 46 Fed. Reg. at 7544; 10 C.F.R. § 150.31(b)(3)(i). It is interesting to note that these statutory requirements for byproduct material licensing proceedings conducted by an agreement state seem to be more formal than those held to be required for byproduct material licensing proceedings conducted by the NRC. See *West Chicago*, CLI-82-2, 15 NRC at 247-56, *aff'd*, 701 F.2d at 645.

## VI. CONCLUSION

The Licensing Board's disposition of Contentions 4(c), 4(d), 4(e), 4(g), 2(k), 2(p), 2(s), 2(u), and 2(h), found in LBP-89-35, 30 NRC 677, and LBP-90-9, 31 NRC 150, is *vacated*. In the alternative, the record on these contentions is *reopened*. In addition, the Licensing Board's disposition of these same contentions, as well as Contention 4(a), in LBP-89-35 and LBP-90-9 is *reversed*. The Director of NMSS is directed to *revoke* the materials license amendment authorized by LBP-90-9. This proceeding is *terminated*.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins  
Secretary to the  
Appeal Board



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Walter H. Jordan  
Dr. Jerry R. Kline

In the Matter of

Docket Nos. 50-528-OLA-2  
50-529-OLA-2  
50-530-OLA-2  
(ASLBP No. 91-633-05-OLA-2)  
(Allowable Setpoint Tolerance)

ARIZONA PUBLIC SERVICE  
COMPANY, *et al.*  
(Palo Verde Nuclear Generating  
Station, Units 1, 2, and 3)

February 19, 1991

MEMORANDUM AND ORDER  
(Ruling upon Petitions for Leave to Intervene)

I. BACKGROUND

On December 27, 1990, the Commission published in the *Federal Register* notice that the NRC is considering issuing amendments to the operating licenses of the Palo Verde Nuclear Generating Station, Units 1, 2, and 3, held by the Licensees, Arizona Public Service Co., *et al.*, 55 Fed. Reg. 53,220-21. The notice explained that the proposed changes:

would increase the allowable setpoint tolerance for the pressurizer safety valves from 2500 psia plus or minus 1% to 2500 psia plus 3% or minus 1%; increase the allowable setpoint tolerance for the main steam safety valves from 1250 psig and 1315 psig plus or minus 1%

to the same settings plus or minus 3%; reduce the minimum required feedwater flow from 750 gpm to 650 gpm; and reduce the response time for the high pressurizer pressure reactor trip from 1.15 seconds to 0.5 seconds.

*Id.* at 53,220.

The notice also explained the opportunity for any person whose interest may be affected by the amendments to request a hearing and to file a petition for leave to intervene. The general provisions of the Commission's intervention regulation, 10 C.F.R. § 2.714, were set out in the notice. Two timely petitions for leave to intervene and requests for hearing were filed. This Atomic Safety and Licensing Board was established to rule on such petitions and requests and to preside over any resulting proceeding by order of the Acting Chief Administrative Judge on January 29, 1991.

## II. PETITIONERS

A petition dated January 22, 1991, was filed by Myron L. Scott and Barbara S. Bush, husband and wife, who own a home and reside in Tempe, Arizona. We refer to Mr. Scott and Ms. Bush hereinafter as the "Scott/Bush Petitioners," recognizing that they also are petitioning in behalf of the Coalition for Responsible Energy Education (CREE), which, in turn, is a project of Arizonans for a Better Environment (ABE).

Attorneys for Allan L. Mitchell and Linda E. Mitchell (hereinafter "Mitchell Petitioners") filed a petition dated January 28, 1991. The Mitchells reside within 5 miles of the Palo Verde Station and Mrs. Mitchell is an employee of Arizona Public Service Company at the Palo Verde Station.

Both petitions seek leave to intervene and request a hearing pursuant to the provisions of 10 C.F.R. § 2.714. Licensees<sup>1</sup> and the NRC Staff<sup>2</sup> oppose the petitions.

## III. THE INTERVENTION RULE

The NRC intervention rule, 10 C.F.R. § 2.714, as pertinent to the initial petition stage of an NRC proceeding provides:

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<sup>1</sup> Licensees' Answer in Opposition to Petitions for Leave to Intervene and Requests for Hearing, February 6, 1991.

<sup>2</sup> NRC Staff Response to Petitions for Leave to Intervene Filed by Allan L. Mitchell, Linda E. Mitchell, Myron L. Scott, Barbara S. Bush and the Coalition for Responsible Energy Education (Staff Response), February 11, 1991. It would be helpful to the Board and parties, who must cite to the pleadings, if the parties would use succinct titles for their filings. Titles need only identify the pleadings, not summarize them.

(a)(2). The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

\* \* \*

(d)(1). [The presiding officer shall, in ruling on a] petition for leave to intervene or a request for a hearing, consider the following factors, among other things:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

Other provisions of the rule provide for the filing of amended petitions and supplements listing contentions as we discuss below.

#### IV. STANDING TO INTERVENE

Contemporaneous judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in an NRC proceeding to be entitled to intervene. It has been generally recognized that these judicial concepts involve a showing that "(a) the action will cause 'injury in fact' and (b) the injury is arguably within the 'zone of interests' protected by the statutes governing that proceeding." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332-33 (1983).

Most often in NRC proceedings, but not always, whether a petitioner would sustain an "injury-in-fact" as a result of an action covered by a proceeding has been determined by whether the petitioner lives or engages in activities near the nuclear plant in question. Thus a petitioner may demonstrate the potential for injury if the petitioner, or its members, live, work, or play, for example, in an area that might be affected by the release of nuclear radiation from the plant. A leading case on this point is *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979), where the proceeding involved a proposed operating license amendment that would authorize the expansion of the spent fuel pool capacity. There the Appeal Board would not rule out as a matter of law derivative standing where a member of the petitioning organization lived about 35 miles from the facility, and where another member lived 45 miles away but engaged in canoeing in close proximity to the plant. *Id.* at 57.

Also, in *North Anna*, the Appeal Board noted that it had *never required* a petitioner in close proximity to a facility in question to specify the:

causal relationship between injury to an interest of petitioner and possible results of the proceeding. [Footnote omitted.] Rather, close proximity has always been deemed to be enough, standing alone, to establish the requisite interest.

*Id.* at 56, citing, e.g., *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974), and cases there cited. See also *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982).

It is especially noteworthy that the Scott/Bush Petitioners, living in Tempe, Arizona, are said by the Licensees to live some 52 miles from the station. The Staff notes that portions of Tempe are more than 50 miles from the station. These are estimates from map measurements. The Scott/Bush Petitioners have not specified the distance.

Coincidentally, proximity of "approximately 50 miles" from a nuclear facility is the greatest distance, as far as we can find in NRC case law, that might support standing to intervene on proximity alone. Even that precedence is a rather weak finding by the Appeal Board that approximately 50 miles "is not so great as necessarily to have precluded a finding of standing . . . ." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

Since the *Watts Bar* decision, *supra*, licensing boards have routinely cited the 50-mile distance involved there as the outer limit for proximity-based standing to intervene. E.g., *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1433 (1982).

The NRC Staff would have us distinguish between a situation where the proceeding is for the construction or operation of a nuclear plant compared to an *amendment* of an existing operating license. Staff Response at 8. In support of its argument the Staff (and Licensees) cite to the Commission decision in *St. Lucie*, CLI-89-21, *supra*, 30 NRC at 329-30:

It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. See, e.g., *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. See, e.g., *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 AEC 222, 226 (1974). Absent situations involving such obvious potential for

offsite consequences, a petitioner must allege some specific "injury in fact" that will result from the action taken . . . .

#### Staff Response at 8.

The Staff is correct; *St. Lucie* is instructive. But, unfortunately for the Staff's argument, that decision instructs us that, even in a narrow-issue operating licensing amendment proceeding, as in *North Anna* (cited in *St. Lucie* and *supra*), proximity alone in the case of an operating license amendment proceeding can support standing to intervene.

As the Commission noted in *St. Lucie, supra*, the proposed amendment involved plant-worker protection — air-purifying respirators in particular. The petitioner there was a member of the general public, not a worker. The proposed amendment had no potential for offsite consequences, thus no injury-in-fact to the petitioner. *Id.*, 30 NRC at 329-30.

As we are about to address whether the proposed changes at Palo Verde can support proximity-based standing to intervene, it should be noted that the only information we have about the proposed amendments is set out in the *Federal Register* notice and is cited above. *Supra* pp. 153-54. For the purpose of establishing injury-in-fact to a petitioner's interest, we need not find that the petitioner's concerns are well founded. *North Anna*, ALAB-522, *supra*, 9 NRC at 55-56. His responsibility to explain his concerns and to provide the bases for them will arise later at the contention-filing phase.

For now it is sufficient to observe that the proposed amendments involve changes to at least four systems that are important to safety: pressurizer safety valves, main steam safety valves, reactor-heat removal via steam-generator feedwater flow, and reactor trip. The quantity of change seems to us at this time to be significant in each case. Whether the changes increase, or decrease, the potential for offsite consequences, they most assuredly *involve* such potential. See *St. Lucie*, CLI-89-21, *supra*, 30 NRC at 329-30. Accordingly, we rule that standing in this proceeding can be established by proximity to the Palo Verde Station alone.

#### Mitchell Standing

The Mitchell Petitioners have easily established their standing by virtue of their residence within 5 miles of the station. In addition, the fact that Mrs. Mitchell is an onsite worker at the station is an even stronger factor involving injury-in-fact to her personal safety interests if the proposed amendments increase the risk of an accidental release. We need not address the other claims of standing set out in their petition.

## Scott/Bush Standing

It would seem that the Scott/Bush Petitioners live about 50 miles from the Palo Verde Station. As noted above, in the *Watts Bar* decision, the Appeal Board explained that “approximately 50 miles” is not so far as to rule out standing based upon proximity — nor do we rule it out. On the other hand we do not find from the petition that residing somewhere in Tempe in itself establishes standing. The 50-mile ruling was already very liberal and we are not inclined to extend it. We will hold the question of proximity-based standing in abeyance until the Scott/Bush Petitioners provide further information in an amended petition, if they so choose.

The Scott/Bush Petitioners also assert standing by virtue of their status as members and officers of CREE and ABE. They state that a majority of CREE’s members and directors reside in Maricopa County “at varying distances” from the Palo Verde Station.

Organizations can intervene in NRC proceedings in their own right or derive standing as the representative of their members. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979). But, the petitioning organization must explain why it or its members have standing. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1977). The Scott/Bush Petitioners do not explain any better than they explained for themselves how the interests of the CREE members are affected by the proceeding as a matter of proximity to the Palo Verde Station. We cannot discern how close to the station the CREE members live or whether any engage in activities near the station. Moreover, as a matter of proximity, the Petitioners do not explain how the CREE and ABE organizations might have standing in their own right. At minimum, if Mr. Scott and Ms. Bush, on behalf of CREE, claim standing because one or more of CREE’s members live or engage in activities in close proximity to the Palo Verde Station, those members should be identified by name and exact location of the members’ residence or activities with respect to the station.

The Scott/Bush Petitioners also claim standing for themselves and for CREE members as customers of the Palo Verde owners. This claim, however, will not establish standing to intervene. It has been long established that economic interests as rate payers do not fall within the “zone of interests” protected by the Atomic Energy Act. *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614. See also *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332 n.4.

The Scott/Bush Petitioners also assert that as citizens of the State of Arizona and of the United States they have an interest in the proposed amendments. There is, however, no causal connection between their political status as citizens and the proposed changes involved in this proceeding.

Accordingly, the Board rules that the Scott/Bush Petitioners, either for themselves or for CREE and ABE, have so far failed to establish standing to intervene in this proceeding. We will hold any ruling as to their final status to participate in the proceeding until they file their amended and supplemental petitions, if they choose to do so. The Board cautions Mr. Scott and Ms. Bush that any additional arguments in support of their claim of standing to intervene must be specific and sufficient to carry the burden of establishing the right to participate in the proceeding. They will not be given a third chance to establish standing without meeting much more difficult pleading requirements relating to nontimely petitions. See 10 C.F.R. § 2.714(a)(3).

## V. THE "ASPECT" REQUIREMENT

The intervention rule requires petitioners to state the "specific aspect or aspects of the subject matter for the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). Licensees and the NRC Staff would have us deny both petitions on the grounds that neither meets the "aspect" requirements. Licensees' Answer at 11-13; Staff Response at 9. As the Licensees acknowledge, they have little guidance from NRC case law for their position. Licensees' Answer at 11-12.

The Board believes that the objection is misdirected in this case. Section 2.714 is the general intervention rule controlling intervention in all proceedings under Subpart G. Thus, in a full-scope operating license proceeding, for example, petitioners might be expected to explain that they wish to intervene in, say, the ingestion-pathway emergency planning aspects, or perhaps financial qualifications, or management competence, or whatever broad category of interest concerns them.

In this proceeding the aspects of the operating license proposed for amendment are already clearly set out in the *Federal Register* notice. Simply by petitioning to intervene, a person whose interest may be affected by the proceeding has indicated the aspects as to which that person wishes to intervene. Petitioners need not be more particular until they file their list of contentions. Most important, the Licensees and the NRC Staff are well informed by early notice what any proceeding on the proposed amendments would be about. The Board believes that the "aspect" objections tended to be hypertechnical, unnecessary, and inconsistent with Licensees' stated interest in "expediting the resolution of this proceeding . . . ." Licensees' Answer at 4-5 n.4.

### Amended and Supplemental Petitions

The intervention rule provides that any person who has filed a petition for leave to intervene pursuant to the rule may amend his or her petition without

prior approval of the presiding officer (i.e., Licensing Board). The rule also states, as pertinent, that the amendment may be made at any time up to 15 days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(3).

In addition, section 2.714(b)(1) provides, as pertinent here, that not later than fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions that petitioner seeks to have litigated in the hearing.

As is often the case, the sequence and timing for the filing of amended and supplemental petitions under the rule must be changed by order of a presiding officer to provide for the efficient and rational management of the proceeding. In this case the Board sees no purpose to be served in calling a prehearing conference unless and until it has been established by the filing of at least one facially acceptable contention by a petitioner that a hearing might be required. Moreover, if the Petitioners wait until 15 days before the first prehearing conference to file amended and supplemental petitions, the answers to those petitions would not be in the hands of the Board and parties until the very day of the prehearing conference at the earliest, and possibly several days later than the prehearing conference depending upon the mode of service. In short, the Board and parties would not be prepared to attend to the very business for which the prehearing conference is convened if the schedule set out in the rule is followed. Therefore the Board suspends that provision and sets its own schedule below.

The Mitchell Petitioners, having already established standing to intervene, need only file a supplement to their petition with at least one acceptable contention to be admitted as parties to the proceeding.

The Scott/Bush Petitioners, having failed to establish standing to intervene, need to amend their petition if they wish to establish standing. They also need to supplement their petitions with at least one acceptable contention in order to be admitted as parties to the proceeding.

The *Federal Register* notice explained in detail the requirements for filing contentions in NRC proceedings.<sup>3</sup> The Board recommends that the Petitioners

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<sup>3</sup> As pertinent, section 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact.

(Continued)

study the contention requirements of the rule carefully since the rule provides that a petitioner who fails to satisfy the requirements will not be admitted as a party. 10 C.F.R. §2.714(b)(1).

## VI. ORDER

Pleadings shall be filed in accordance with the following schedule:

Each petitioner may file no later than March 11 an amended petition and a supplement to petitions that include a list of contentions that petitioner seeks to have litigated in a hearing.

Licenses may file answers to amended petitions and supplements to petition within 10 days after service of the amended petitions or supplements.

The NRC Staff shall file answers to amended petitions and supplements within 15 days following their service.

The pleadings are to be in the hands of the Board and other parties on the date due. The Board anticipates that the participants will use overnight express mail or facsimile service to accomplish timely service.<sup>4</sup>

The Board intends to schedule a prehearing conference to take place approximately 10 to 20 days following the NRC Staff's answers. If necessary,

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This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

<sup>4</sup> Petitioners and participants should note that Board member Dr. Walter H. Jordan should be served at 881 W. Outer Drive, Oak Ridge, Tennessee 37830. FAX Number for the Licensing Board is (301) 492-7285.

Petitioners may respond to answers orally at the prehearing conference or as otherwise provided by Board order.

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Walter H. Jordan (by I.W.S.)  
ADMINISTRATIVE JUDGE**

**Jerry R. Kline  
ADMINISTRATIVE JUDGE**

**Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
February 19, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08027-MLA  
(ASLBP No. 91-623-01-MLA)  
(Source Material License  
No. SUB-1010)

SEQUOYAH FUELS CORPORATION

January 24, 1991

MEMORANDUM AND ORDER  
(Requests for Hearing and Petitions for Leave to Intervene)

I. REQUESTS FOR HEARING

A. Background

An application by the Sequoyah Fuels Corporation (hereinafter SFC) for renewal of a source material license, and filed on August 29, 1990 (License No. SUB-1010), is pending before the U.S. Nuclear Regulatory Commission. Requests for an adjudicatory hearing on the matter, pursuant to 10 C.F.R. § 2.1205, were received by the Commission: Native Americans for a Clean Environment (hereinafter NACE) on September 28, 1990 (its request was supplemented on December 20, 1990); Earth Concerns of Oklahoma, Inc. (hereinafter ECO) on October 1, 1990; and The Native Toxics Campaign (hereinafter TNTC) on October 8, 1990.<sup>1</sup> A communication of September 28, 1990, was also received from the Carlile Area Residents Association (CARA)

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<sup>1</sup>In a notice of December 13, 1990, ECO's request for a hearing was withdrawn.

expressing an intent to file as an intervenor at a subsequent date. This memorandum and order considers the remaining petitions of NACE and TNTC. In a November 20, 1990 filing, the Staff opposed the requests but advised that pursuant to the provisions of 10 C.F.R. § 2.1213 it would participate in any hearing granted. Subsequently, after reviewing NACE's supplemental petition filing, the Staff withdrew its opposition to NACE's request.<sup>2</sup>

Under the Commission's regulations, this member of the Atomic Safety and Licensing Board Panel has been designated to rule on the requests for hearing and any petitions for leave to intervene and to serve as the Presiding Officer in a hearing if granted. *See* 55 Fed. Reg. 46,744 (Nov. 6, 1990).

## B. NRC Regulations

The U.S. Nuclear Regulatory Commission has provided informal procedures for adjudicatory hearings in material licensing proceedings. *See* 10 C.F.R. Part 2, Subpart L. Requests for a hearing in such a proceeding must describe in detail:

- (1) The requestor's interest in the proceeding;
- (2) How the requestor's interest may be affected by the results of the proceeding, including reasons why the requestor should be permitted a hearing with particular reference to factors set forth in 10 C.F.R. § 2.1205(g);
- (3) The requestor's area of concern about the licensing activity that is the subject matter of the proceeding; and
- (4) The circumstances establishing that the request is timely filed in accordance with 10 C.F.R. § 2.1205(c).

It is the Presiding Officer's responsibility to determine that petitioners' areas of concern are germane to the subject matter of the proceeding, the petition has been timely submitted, and judicial standards for standing have been met. The standards for informal adjudications are similar to those for formal hearing procedures and include among other factors:

- (1) The nature of the requestor's right under the Act to be made a party to the proceeding;
- (2) The nature and extent of requestor's property, financing, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest. *See* 10 C.F.R. § 2.1205(g).

Judicial concepts of standing, in addition to being codified in section 2.1205(g), are enumerated in a number of NRC decisions. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18

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<sup>2</sup>Staff Response to Supplemental Request, January 7, 1991.

NRC 327, 332 (1983). These concepts require a showing that (a) the action complained of will cause an injury-in-fact, and (b) the injury is arguably within the zone of interests protected by statutes covering the proceeding. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983).

In the event an organization files a petition for hearing, in order to meet standing requirements that entity must show injury-in-fact to its organizational interests or the relevant interest of members who authorize it to act for them. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987)).

### C. Petitions

1. NACE is an organization with at least several members residing within 10 miles of the SFC nuclear licensed operation at Gore, Oklahoma. Affidavits furnished by two members of NACE, authorizing NACE to represent them in the proceeding, cite, *inter alia*, previous contamination incidents at the plant and allege threats to their families' health and environment through continued operations.<sup>3</sup> The affiants cite specific threats to water supplies, fishing, hunting, recreational activities, and travel habits near the facility.

The NACE organization also alleges, *inter alia*, prior safety violations and accidents at the SFC facility including soil and groundwater contamination, the extent of which is currently being reviewed by the NRC Staff. Citing a November 5, 1990 NRC Demand for Information served on the Applicant concerning seepage of uranium-contaminated water, NACE questions whether NRC safety and health standards are being met. The organization also claims that the health and economic well-being of some of its members are threatened by possible contamination of the Arkansas River through the discharge of effluents from the SFC plant. The petition also raises a question whether, in light of alleged past and present safety violations, the best interests of public health and safety require the facility's decommissioning in lieu of a license renewal.

2. The TNTC request for a hearing is brief and submits no specific basis for its opposition. Although expressing a disapproval of SFC's license renewal, the petition merely states an intention to file a supplement to its request at a later date.

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<sup>3</sup> Applicant Ballard resides within 2 miles of the SFC plant and Deerwater "approximately" 10. Although the Commission has rejected strict distance requirements for standing in informal adjudicatory materials licensing cases, it may still be a material factor. The petition is to be judged by all the "circumstances" in the case. See 54 Fed. Reg. 8272 (Feb. 28, 1989) (Statement of Consideration).

## D. Decision

In applying NRC procedural requirements to the pending requests for a hearing, it is clear that NACE's petition complies with regulatory requirements and TNTC's does not.

### *Standing*

NACE purports to be an Indian-controlled and -staffed organization which aims to raise the consciousness of the public to environmental and nuclear-related issues. The organization meets NRC's standards for standing. Allegations that soil and water contamination at the facility present violations of NRC health and safety standards is certainly an issue alleging some injury in fact and is within the zone of interests protected by statute. NACE obtains standing through affidavits submitted by several of its members who allege specific threats of contamination as injurious to their lives and property. Not only do these members, who have authorized NACE to represent them live in close proximity to the facility at Gore, Oklahoma, but NACE has other members allegedly living in the general area of the plant, and members who are citizens of the Cherokee Nation of Oklahoma which owns the riverbed of a river flowing within a half-mile of the facility. The river may receive effluents from the SFC plant and the health and the environmental interests of these individuals allegedly will be affected by contaminating materials in the river.<sup>4</sup>

It is clear that NACE has a right through its members' interest to be made a party to the proceeding, that property, and safety and health interests of its members are involved, and that any order involving the application could have an adverse effect on these members' interests.

In regard to the TNTC petition, no additional supporting supplementary material has been received, and the organization's request is deficient in other respects in meeting NRC standing requirements. Accordingly, TNTC's request for a hearing must be denied.

### *Areas of Concern*

The rules of practice for informal materials licensing adjudications also call for a determination that requests for hearings be timely and that petitioners' specified areas of concern be germane to the subject matter of the proceeding. 10 C.F.R. § 2.1205(g).

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<sup>4</sup>A Staff objection that NACE has not been authorized to act on behalf of the Cherokee Nation appears to be misdirected, since NACE seeks merely to represent the environmental interests of those particular citizens of the Cherokee Nation who are also members of NACE.

NACE's petition was submitted within 30 days of the filing of the license renewal application and therefore qualifies on the timeliness requirement. See 10 C.F.R. §2.1205(c)(2). The matter is moot on the petition filed by TNTC since NRC's standing requirements have not been met, *supra*.

NACE's petition sets forth a number of areas of concern found to be germane to the proceeding and others that are not. Summarized, the relevant allegations are that (1) prior accidents, and incidents of soil and water contamination under current review by NRC, raise serious question whether health and safety standards can be met; (2) present contamination should be evaluated and removed prior to any license renewal; (3) the causes of SFC's "poor" safety and environmental record must be addressed and resolved to prevent a repetition of these matters; (4) SFC's proposed changes in its management structure may not provide assurance that adequate compliance with safety and environmental requirements will be provided; (5) the cumulative impact of permitted discharges to the air, water, and land during ten (10) more years of operation may pose an unacceptable risk to the public health and environment; and (6) the environmental and safety impacts of the saffinate fertilizer program require review.

The Petitioner also incorporates, among its areas of concern, matters raised by the Staff in its October 5, 1990 Order for Modification of License and a Demand for Information dated November 5, 1990. Since the Staff has indicated that the information sought by the Staff bears directly on license renewal, the relevancy of this nonspecific concern must be presumed at this point.

Not relevant or germane to the proceeding is NACE's request that the Staff look at decommissioning rather than operation of the facility.

## II. PETITIONS FOR LEAVE TO INTERVENE

The regulations provide that if a hearing request is granted, petitions for leave to intervene in the proceeding must be filed within thirty (30) days of the notice of hearing being published in the *Federal Register*. Petitions to intervene must comply with the same interest and standing obligations of petitioners for a hearing. See 10 C.F.R. §2.1205(j). Representatives of interested state, county, municipal governments, or agencies thereof also may request during the same 30-day period an opportunity to participate in these informal proceedings. These requesters must state their areas of concern with reasonable specificity. An opportunity will also be provided in this proceeding for persons not parties to it to make limited appearance statements for the purpose of stating their views on the issues.

### III. ORDER

For the reasons stated, it is, this 24th day of January 1991, ORDERED:

1. The request for a hearing by the Native Americans for a Clean Environment is granted; the request by The Native Toxics Campaign is denied.
2. A hearing on the Application of the Sequoyah Fuels Corporation for renewal of its Source Material License will be held and the time and other details concerning the hearing will be published at a future date.
3. Petitions to intervene in this proceeding must be filed within 30 days of this Order's appearance in the *Federal Register*. The Applicant and Staff will have ten (10) days to respond after service of any petition.
4. An appeal from this Order may be filed with the Atomic Safety and Licensing Board pursuant to the terms of 10 C.F.R. § 2.1205(n). Any appeal must be filed within ten (10) days of service of this Memorandum and Order and may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of service of the appeal brief.

James P. Gleason, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman  
Dr. James H. Carpenter  
Dr. Emmeth A. Luebke

In the Matter of

Docket Nos. 50-424-OLA  
50-425-OLA  
(ASLBP No. 90-617-03-OLA)  
(Facility Operating Licenses  
NPF-68 and NPF-81)

GEORGIA POWER COMPANY, *et al.*  
(Vogtle Electric Generating Plant,  
Units 1 and 2)

February 28, 1991

The Licensing Board denies an NRC Staff motion for reconsideration of an order posing certain safety questions to the parties prior to the Board's ruling on contentions and the institution of a formal hearing. The Board rules that, contrary to the position of the Staff, the Board is authorized to ask questions of that sort, in an effort to resolve issues informally.

**LICENSING BOARDS: JURISDICTION**

Prior to authorizing a hearing, licensing boards have authority to ask questions in order to clarify whether seeming areas of concern may be resolved informally, without resort to a formal hearing.

## **RULES OF PRACTICE: DISCOVERY**

Although discovery may not take place prior to the grant of a hearing, questions posed by a licensing board prior to the grant of a hearing in order to clarify areas of concern do not amount to discovery.

## **RULES OF PRACTICE: INFORMAL PROCEDURES**

Licensing boards are encouraged to utilize informal procedures to resolve issues before them. 10 C.F.R. § 2.756.

## **MEMORANDUM AND ORDER** **(Staff Motion for Reconsideration)**

By Memorandum and Order dated January 22, 1991 (unpublished), which confirmed a telephone conference call earlier that same day, the Licensing Board posed several clarifying questions to Georgia Power Company (Applicants) and the NRC Staff concerning previous filings of those parties. On February 4, 1991, the NRC Staff filed a motion for reconsideration of those questions, claiming in essence that we lack jurisdiction to ask them.

In response to our invitation, the Applicants and Georgians Against Nuclear Energy (GANE) each filed responses. The Applicants took the position that the Staff's motion was misplaced, that the Board's limited questions to clarify the record were reasonable, and they expressed their intent to answer the questions posed to them. For its part, GANE reiterated the importance of the safety issues raised by the proposed license amendment.

The questions arose as a result of the Board's attempt to understand and resolve several potentially serious safety issues informally — in order to preclude the necessity of a full hearing, with all the additional expense that would entail for all the parties, including the Staff. *See* 10 C.F.R. § 2.756. The Applicants early had suggested that we attempt to resolve issues in this manner. For reasons set forth below, we are not withdrawing the questions that we asked. Because we believe that the Applicants can furnish sufficient information to lead to an informal resolution of issues, however, we will permit the Staff to decline to answer any of the questions propounded to it.

1. The Applicants are seeking to amend the technical specifications of the Vogtle Electric Generating Plant, Units 1 and 2, to permit the bypass, in emergency start conditions, of the jacket-water high-temperature trip of the emergency diesel generators (EDGs). The change, which was sought to minimize the potential for spurious EDG trips in the emergency start mode, was favored by the NRC Staff but opposed by GANE.

The amendment application was filed on May 25, 1990. By letter of the same date (which confirmed a telephone call earlier that same day), the Staff, without any apparent review of most of the safety questions involved in the amendment, including those underlying the Board's questions, granted a temporary waiver of the technical specification in question (in effect, granting the requested amendment pending its completion of the paperwork involved, including the requisite Safety Evaluation Report (SER)).<sup>1</sup> Thereafter, the notice of opportunity for hearing and opportunity to file comments on a proposed "no significant hazards condition" finding was published on June 22, 1990 (55 Fed. Reg. 25,756), and the SER (and formal license amendment) were issued on July 10, 1990 (55 Fed. Reg. 32,337, Aug. 8, 1990).

The Board has not yet completed its review of GANE's request for a hearing. Although finding that GANE has standing, we have not yet ruled upon any of their proposed contentions.

2. The questions posed by the Board relate to whether, if the trip were bypassed (as proposed), an operator would have sufficient time to react to a startup of the EDGs. They become relevant as a result of the regulatory guide under which the Applicants are purporting to act in seeking the license amendment. Thus, in pertinent part, Regulatory Guide 1.9, Rev. 2 (December 1979), Position 7, states that "a trip may be bypassed under accident conditions, provided the operator has sufficient time to react appropriately to an abnormal diesel generator unit condition."

The sufficiency of operator response time was not one of the explicit contentions filed by GANE. But through the Board's review of the general safety issues espoused by GANE, as evidenced by the six proposed contentions on which we have not yet ruled, and the authority cited by GANE, it became apparent that operator response time was a key unanswered question. Technical information subsequently furnished by GANE, together with the documentation referenced by them in their initial filings, creates the issue in question and demonstrates a serious unresolved safety question as to whether sufficient operator response time (as required by Regulatory Guide 1.9) would exist.

3. The Staff's motion treats the Board questions as a form of discovery and not permissible until a formal hearing has been authorized. On the other hand, the Applicants perceive our questions as permissible inquiry by a Board to clarify whether seeming areas of concern may be resolved informally, without resort to a formal hearing.

The Applicants are correct. Indeed, our review of the record to date reflects a paucity of information on operator response time, notwithstanding its importance

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<sup>1</sup> Letter dated May 25, 1990, from the Assistant Director, Region II Reactors, NRR, NRC to the Senior Vice President-Nuclear Operations, Georgia Power Company, subject: Temporary Waiver of Compliance — Vogtle Electric Generating Plant (VEGP), Units 1 and 2.

to the regulatory-guide criteria under which the Applicants are seeking their amendment. Thus, the application for amendment, dated May 25, 1990, states only that "[f]rom the time of the high jacket water temperature alarm, the operator will have sufficient time to react appropriately to abnormal diesel generator condition."<sup>2</sup> No further data on this matter are set forth. In granting the temporary waiver on the same day, the NRC Staff states that "[y]our request *includes your analysis and justification* as to why this proposed change does not involve a significant hazards consideration" and "[w]e have reviewed your request *and the supporting analysis* and find them acceptable [emphasis added]." No additional analysis of operator response time appears in the SER, issued on July 10, 1990. Only in its January 11, 1991 comments on supplemental information provided by the Applicants does the Staff address this question, and it is to these comments that our questions to the Staff were directed.

4. The legal authority cited by the Staff in support of our asserted lack of jurisdiction is not persuasive. Although discovery may not take place prior to the grant of a hearing, we do not regard our questions to be discovery. Rather, they are designed to assist us in determining whether sufficient information is available to determine whether there is warrant for holding a hearing on any of the matters raised or suggested by GANE or on serious issues that may be raised by us *sua sponte*, or alternatively whether any or all of those matters may be resolved informally.

The two decisions relied on by the Staff do not govern the situation presented here. Both *Perry*<sup>3</sup> and *Waterford*<sup>4</sup> involved motions to reopen the record, where the standards are quite different from those applicable here and where a party has an extremely heavy burden of demonstrating that a hearing that has been completed should be reopened to receive further issues or information. 10 C.F.R. § 2.734. In those situations, the Appeal Board had improperly authorized a hearing to determine whether sufficient information was available to warrant reopening the record.

Here, however, the matter of the sufficiency of operator response time is a clear, unresolved safety issue. NRC rules encourage the settlement or compromise of safety issues, where possible. 10 C.F.R. § 2.759. Moreover, licensing boards are also encouraged to utilize informal procedures to resolve issues before them. 10 C.F.R. § 2.756. Here, we are attempting to resolve informally, at the behest of the Applicants in particular, a matter that is inherent in the safety questions raised by GANE and which in any event may be of sufficient seriousness to warrant adoption of an issue *sua sponte*. The apparent failure of the Staff initially to have addressed an issue as central as this to the

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<sup>2</sup> Letter from Georgia Power Company to NRC, dated May 25, 1990, Enclosure 2, at E2-2.

<sup>3</sup> *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986).

<sup>4</sup> *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986).

approval of the proposed amendment, together with ambiguities in its subsequent review that we are attempting to clarify, are also factors leading to our attempt to resolve the issue informally. In that connection, we are not attempting to control the manner or schedule of the Staff's carrying on its assigned functions but, instead, are attempting to correct what appears to have been an obvious Staff oversight — a matter clearly within our authority. *Cf. Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980), *aff'd*, ALAB-612, 12 NRC 317 (1980).

## Order

For these reasons, the Staff's motion for reconsideration is *denied*. However, consistent with its lack of adequate participation on this issue, we will permit the Staff to decline to answer the questions posed to it.<sup>5</sup>

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
February 28, 1991

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<sup>5</sup>The Staff should advise the Board in writing, by no later than the date on which its responses to questions would be due, if it should elect not to answer the questions.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Alan S. Rosenthal  
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL  
50-444-OL  
(Offsite Emergency  
Planning Issues)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

March 20, 1991

The Appeal Board accepts a certified question from the Licensing Board as to whether the Licensing Board may consider certain posthearing changes to the New Hampshire Radiological Emergency Response Plan and other posthearing developments as resolving sheltering issues raised in the hearing record, as identified by the Appeal Board in ALAB-939, 32 NRC 165 (1990). The Appeal Board concludes that while the posthearing information, if accepted, would resolve the matters identified in ALAB-939, ensuring that the record, as developed through summary disposition or other appropriate procedural avenues, properly reflects that information is, in the first instance, the responsibility of the Licensing Board.

## MEMORANDUM REGARDING CERTIFIED QUESTION

In ALAB-939,<sup>1</sup> we responded to questions certified to us by the Licensing Board in this operating license proceeding involving the Seabrook nuclear facility. In doing so, we identified several concerns arising from the evidence of record on the New Hampshire Radiological Emergency Response Plan (NHRERP) as it relates to the intended use of the so-called "shelter-in-place" protective action option for the general population visiting the Atlantic Ocean beaches near the Seabrook plant.<sup>2</sup> We also directed the Licensing Board to ensure that the record is clear with respect to those matters.<sup>3</sup>

In a memorandum dated March 12, 1991, the Licensing Board has certified to us an additional question regarding sheltering as a protective action for the New Hampshire beach population.<sup>4</sup> Specifically, the Board requests guidance on whether the concerns we identified in ALAB-939 are resolved by posthearing amendments to the NHRERP and representations in a January 10, 1991 memorandum, attested to by New Hampshire Emergency Management Director George L. Iverson, to the effect that evacuation is the only planned protective action for the general beach population. As this question relates directly to our response in ALAB-939 to the several questions previously put before us by the Licensing Board, we accept the certification.<sup>5</sup>

As the Licensing Board describes in some detail in its March 12 memorandum, the role of sheltering as a protective action for the general beach population (i.e., the transient beach population with transportation) has been an "evolving" matter. Testimony before the Board during its original hearing on the NHRERP established that, while they considered it of extremely limited utility, applicable perhaps to only the so-called "puff release" scenario, planners nonetheless viewed sheltering in one form or another as a viable emergency response for portions, if not all, of the general beach population.<sup>6</sup> In their most recent submissions to the Licensing Board in the wake of ALAB-939, however, several of the parties have indicated that this is no longer the case.

As the State of New Hampshire explained in its comments to the Board regarding the matters discussed in ALAB-939, under the NHRERP evacuation

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<sup>1</sup> 32 NRC 165 (1990).

<sup>2</sup> *Id.* at 178-80.

<sup>3</sup> *Ibid.*

<sup>4</sup> LBP-91-8, 33 NRC 197 (1991).

<sup>5</sup> After careful consideration of the parties' filings before the Licensing Board, *see* LBP-91-8, 33 NRC at 200 nn.6-10, 207 nn.37-38, and the transcript of the January 23, 1991 telephone conference with the parties, *see* Tr. 28,462-99, we have concluded that we have a sufficient understanding of the parties' positions regarding ALAB-939 and the issues identified therein so that we can provide guidance regarding the certified question without seeking further responses.

<sup>6</sup> *E.g.*, Applicants' Direct Testimony No. 6 (Sheltering), fol. Tr. 10,022, at 19-20; Tr. 10,714-15, 10,719-20. *See also* LBP-88-32, 28 NRC 667, 751, 758-59, 763 (1988).

— not sheltering — is the “planned” response for the general beach population (and, indeed, for the entire population in the area within approximately two miles of the Seabrook facility) in all circumstances it can now “foresee.”<sup>7</sup> For its part, the Federal Emergency Management Agency (FEMA) now proclaims that the circumstances in which sheltering for the general beach population would be of any use are “entirely theoretical and will never come about at a General Emergency.”<sup>8</sup> The NRC staff similarly maintains that the scenario under which sheltering might be useful as a protective option for the general beach population “is so unlikely as to be, for emergency planning purposes, a null set.”<sup>9</sup>

These filings make clear that the entities most directly responsible for the administration and evaluation of the NHRERP now insist that sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance.<sup>10</sup> If accepted, this assertion would negate the premise upon which our record clarification directive in ALAB-939 (and, in large part, our initial remand of the beach sheltering issue)<sup>11</sup> was anchored. This acceptance hinges, of course, upon whether the record itself reflects that the “evolution” of the consideration of sheltering as a protective action for the general beach population has reached the point where it effectively has been discarded as such an option. If that is the case, the issues we identified in ALAB-939 relating to the use of a sheltering option for the general beach population would in essence have become moot and so would be resolved.

The Licensing Board apparently is prepared to accept the position of these entities, based in substantial part on posthearing amendments to the NHRERP and the State’s recent comments on ALAB-939, as attested to by its Emergency Planning Director during a telephone conference.<sup>12</sup> The Board’s certified question essentially asks that we do the same. As with our directive in ALAB-939, however, we leave it to the Board to ensure, in the first instance, that the admin-

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<sup>7</sup> Memorandum of the State of New Hampshire on ALAB-939 (Jan. 10, 1991) at 1-2; Tr. 28,468.

<sup>8</sup> Advice of [FEMA] Regarding Issues Raised by ALAB-939 (Jan. 11, 1991) at 3.

<sup>9</sup> NRC Staff Views on Matters Referred in ALAB-939 (Jan. 11, 1991) at 2.

<sup>10</sup> For their part, applicants accept the State’s position with respect to sheltering the beach population. See Licensees’ Response to the Memorandum and Order of November 14, 1990 of the Atomic Safety and Licensing Board re ALAB-939 (Jan. 10, 1991) at 3-4. Intervenor Massachusetts Attorney General and the New England Coalition on Nuclear Pollution, on the other hand, have raised both substantive and procedural challenges to that position. Among other things, these intervenors assert that the State in fact is retaining sheltering as a planned protective action option for the beach population, albeit with only ad hoc implementation. Response of the MassAG and NECNP to the Licensing Board’s Order of January 24, 1991 (Feb. 14, 1991) at 5. They further contend that, assuming evacuation now is the only protective action for the emergency response planning area near the Seabrook facility, an even larger number of people risk receiving no dose reduction because full-time residents as well as beachgoers are included in the population that will not be sheltered. *Id.* at 4. In addition, they question the propriety of reliance by the Licensing Board on posthearing information (such as the State’s recent filings) as “evidence” of New Hampshire’s position on sheltering the beach population. They maintain that to do so permits a limited reopening of the record without affording them the opportunity to examine the foundation of that evidence or to present countervailing evidence. *Id.* at 4-5.

<sup>11</sup> See ALAB-924, 30 NRC 331, 370-73 (1989), *petitions for review pending*.

<sup>12</sup> See LBP-91-8, 33 NRC at 207.

istrative record, as developed through summary disposition or other appropriate procedural avenues, reflects any information necessary to its resolution of the matters identified in ALAB-939.

**FOR THE APPEAL BOARD**

**Barbara A. Tompkins  
Secretary to the  
Appeal Board**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman  
Dr. George G. Ferguson  
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-322-OLA  
(ASLBP No. 91-621-01-OLA)  
(Possession-Only License)

LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

March 6, 1991

MEMORANDUM AND ORDER  
(Ruling on Requests for Intervention)

I. INTRODUCTION

The Commission, in CLI-91-1, 33 NRC 1 (1991) (Carr, Chairman, dissenting), assigned for disposition by the Licensing Board two nearly identical pleadings styled as "Comment on Proposed No Significant Hazards Consideration and Petition for Leave to Intervene and Request for Prior Hearing." They were filed September 20, 1990, by the Scientists and Engineers for Secure Energy (SE2) and the Shoreham-Wading River Central School District (School District).<sup>1</sup>

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<sup>1</sup>The petitions were forwarded to this Licensing Board with their related supplements and answers in addition to *amicus* pleadings filed by the Long Island Power Authority (LIPA), the Department of Energy (DOE), the Council on Environmental Quality (CEQ), and the State of New York (State).

The petitions relate to a January 5, 1990 application by Long Island Lighting Company (LILCO) to amend its full-power operating license for the Shoreham Nuclear Power Station, Unit 1, to one to "possess, use, but not operate Shoreham." Licensee proposed that its full-power operating license be amended to become "a defueled operating license" which may be treated as a "possession-only license."

Additionally, the amendment would prohibit the placement of fuel in the reactor and delete provisions that Licensee considers are not pertinent to a situation where fuel may not be put into the reactor vessel and the reactor will not be operated. Generally, the license conditions regarding the Flux Monitor, Instrumentation and Control Systems Required for Safe Shutdown, Steam Condensing Mode of RHR, Emergency Diesel Generator, Fission Gas Release and Ballooning and Rupture, Strike Shutdown, Hurricane Shutdown, County Liaison, Brentwood Staffing, and Quarterly Drills would be deleted. The Licensee would not be allowed to operate the facility at any core power level.

Notice of the application to amend the license was published in the *Federal Register*. The notice listed the twenty-two proposed changes to the Technical Specifications of the Shoreham operating license. Also, it advised that the Licensee had determined, on the basis of its own analysis, that the proposed changes do not involve a significant hazards consideration. The notice further stated, following a restatement of the Licensee's analysis, that the Commission had made a proposed determination that the amendment request involves no significant hazards consideration and that the Commission may decide to issue license amendments authorizing various portions of the application, while it continues to review the remaining portions of the application. 55 Fed. Reg. 34,098-101 (Aug. 21, 1990).<sup>2</sup>

The Commission sought public comment on the proposed determination and offered any person whose interest may be affected by the application the opportunity to file a request to intervene in a hearing on the proposed amendments to the operating license. *Id.* at 34,100-101.

In response, SE2 and School District, on September 10, 1990, filed their petitions in which they argued, *inter alia*, that a final determination by the Commission that the proposed amendment poses no significant hazard is "fatally" premature, that Petitioners be permitted to intervene, and that a hearing be held on the issues presented by the proposed amendment to the full-power license.<sup>3</sup>

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<sup>2</sup>A *Federal Register* Notice of September 5, 1990, described the amendment request as removing LILCO's authority to operate Shoreham and would result in the issuance of a "possession only" license.

<sup>3</sup>Petitioners on October 10, 1990, filed supplements to their September 10, 1990 petitions citing further reasons for the relief sought.

By order of October 3, 1990, the Commission requested LILCO and the NRC Staff (Staff) to address Petitioners' arguments on the subject matter (1) that a proposed "defueled operating license" actually constitutes a "possession-only license" (POL) and (2) that under 10 C.F.R. § 50.82, LILCO must submit and Staff must approve a decommissioning plan prior to the submission of an application for a POL.

LILCO, on October 12, 1990, responded to Petitioners' petitions filed September 20, 1990, and the Commission's order of October 3, 1990. Licensee requested that the petitions for leave to intervene and requests for hearing be denied.

Staff on October 24, 1990, responded to the petitions and the Commission's order of October 3, 1990. In addition to answering the Commission's October 3 request, it opposed the petitions to intervene on the grounds that Petitioners have not shown that they would suffer an injury in fact by the granting of LILCO's application for a POL or that they have raised issues entitling them to a hearing.

In a separate matter, on October 17, 1990, the Commission had issued a Memorandum and Order involving three separate proposed changes to the Shoreham full-power operating license stemming from Licensee's agreement with State not to operate Shoreham and the plant's defueled status. The changes to the Shoreham license involved a Confirmatory Order that prohibits LILCO from placing any nuclear fuel in the Shoreham reactor vessel without prior NRC approval; an amendment that would allow changes in the physical security plan and a reduction in the security forces; and an amendment that would remove certain license conditions regarding offsite emergency preparedness activities. CLI-90-8, 32 NRC 201 (1990), *aff'd on reconsideration*, CLI-91-2, 33 NRC 61 (1991).

The Commission, in ruling on certain aspects of the petitions filed by SE2 and School District in those matters, determined, in part, that the National Environmental Policy Act (NEPA) and the Atomic Energy Act (AEA) do not require the NRC to consider resumed operation of Shoreham as an alternative to decommissioning under the facts of the proceeding. SE2's and School District's petitions to intervene and to hold a hearing were forwarded by the Commission for handling by a Licensing Board that is composed of the same members as this Licensing Board. The Licensing Board was directed to review the three matters and resolve all other aspects of the hearing requests in a manner consistent with the opinion.<sup>4</sup>

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<sup>4</sup> On January 8, 1991, the Licensing Board issued a Memorandum and Order, LBP-91-1, 33 NRC 15 (1991), in which it found that Petitioners had failed to meet the requirements of 10 C.F.R. § 2.714(a)(2) to permit intervention. Petitioners were permitted to file amended petitions, which they did on February 4, 1991. On January 23, 1991, Petitioners had appealed the Memorandum and Order, LBP-91-1, to the Commission.

In the subject proceeding, the Commission has accepted comments filed by LIPA, DOE, CEQ, and State. CLI-91-1, 33 NRC at 5 n.3.

In its January 24, 1991 Memorandum and Order, CLI-91-1, the Commission determined (1) that the requested amendment would transform the Shoreham operating license into a POL; (2) that such a POL may be issued without any preliminary or final decommissioning information; and (3) that the petitions should be forwarded to the Licensing Board for consideration under 10 C.F.R. § 2.714 and in accordance with the opinions expressed in CLI-91-1 and CLI-90-8.

In this Memorandum and Order, the Licensing Board rules on the petitions requesting intervention and hearing. We find, based on the filings before us, that Petitioners have failed to meet the requirements of 10 C.F.R. § 2.714(a)(2) to permit intervention. In accordance with Commission practice, Petitioners are given the opportunity to file amended petitions that may cure the defects that the Licensing Board has found.

## II. SCOPE OF PROCEEDING

### A. The Hearing Notice and Commission Guidance Define the Scope of the Proceeding

In licensing matters, the Commission has followed the rule that the hearing notice, published by the agency for the proceeding, defines the scope of the proceeding and its issues. The hearing notice limits the Licensing Board's jurisdiction. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

Furthermore, the Commission has inherent supervisory authority over adjudicatory proceedings and can step in to decide any matter itself. In so doing, the Licensing Board is bound by the guidance or direction given in determining the scope of the proceeding. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991).

The Commission, in forwarding the matter for handling by the Licensing Board, advised that the petitions should be decided in accordance with the opinions in CLI-91-1 and CLI-90-8. Our jurisdiction on the scope of the issues is limited accordingly.

### B. The Hearing Notice

The hearing notice was published in the *Federal Register* as one part of a notice titled "Consideration of Issuance of Amendment to Facility Operating

License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing; Long Island Lighting Co.” 55 Fed. Reg. 34,098-101 (Aug. 21, 1990).

As previously described, the proposed amendment would remove the Licensee’s authority to operate the facility as an operating reactor. There would be twenty-two changes to the Shoreham full-power operating license. The changes would for the most part eliminate Technical Specifications that LILCO has to comply with as the holder of a full-power license.

The notice recited that the Commission had made a proposed determination based on the Licensee’s analysis, that the request for amendment involves no significant hazards consideration and that the Commission may decide to grant portions of the request, in whole or part. The Commission sought public comment on the proposed determination and gave notice of opportunity for hearing on the amendment.

A determination of no significant hazards consideration is not a substantive determination of public health and safety issues for the hearing on the proposed amendment. The only effect of such a determination on the hearing is to establish whether the amendment may be approved before a hearing is held or, if there is a finding of significant hazards consideration, a final decision must await the conclusion of the hearing.

Commission regulation is very clear that a Licensing Board is without authority to review Staff’s significant hazards consideration determination. 10 C.F.R. § 50.58(b)(6). The Licensing Board will abide by the regulation and not consider any challenge to a significant hazards consideration determination by Staff. That part of the Commission’s notice of Aug. 21, 1990, relating to Staff’s significant hazards consideration determination, is beyond the scope of the hearing on the proposed amendment.

As to that part of the Commission’s notice offering the opportunity for intervention to a person whose interest may be affected by the issuance of the amendment, the scope of the hearing is whether the proposed amendment should be granted under the applicable law and regulation.

## **C. Commission Guidance**

### **1. CLI-90-8**

Petitioners submitted comments on three license changes to the Shoreham operating license, and each requested a hearing. The Commission delayed forwarding the petitions for handling by a licensing board in order to address at the threshold some significant policy questions about the operation of the decommissioning regulations that had been raised by Petitioners.

The Commission has ruled that LILCO is entitled to make an irrevocable decision not to operate Shoreham without NRC approval. The alternatives of resumed operation, or other methods of generating electricity, are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration in any NEPA review of decommissioning. The Commission has concluded that it has no legal authority, except under special circumstances not applicable here, to order the operation of a nuclear power plant.<sup>5</sup> The Staff therefore need not consider resumed operation of Shoreham as an alternative course of action in any environmental review of decommissioning it performs.

The Commission found that the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how decommissioning will be accomplished, not whether to decommission. With respect to three licensing actions then under consideration, it concluded that NRC's only concern under NEPA was whether the actions would prejudice decisions concerning the means of decommissioning.<sup>6</sup>

## 2. *CLI-91-1*

In a policy review of LILCO's application for amendment of the Shoreham license, the Commission determined that the requested "defueled operating license," if granted, would convert the Shoreham operating license into a POL. It also ruled that the request for POL need not be preceded or accompanied by either a decommissioning plan, or particular environmental information, or a NEPA review related to decommissioning. However, a NEPA review for a POL may be warranted despite the categorical exclusion, for example, if the POL clearly could be shown actually to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact. The Commission found that neither NEPA nor 10 C.F.R. Part 51 serves as a basis for linking a POL with the filing or review of any preliminary decommissioning plan.<sup>7</sup>

## 3. *Licensing Board Conclusion*

Upon review of CLI-90-8 and CLI-91-1, the Licensing Board concludes that it is without authority to issue an order for the purpose of causing or preserving

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<sup>5</sup> See sections 108, 186(c), and 188 of the Atomic Energy Act of 1954, as amended.

<sup>6</sup> The Commission affirmed on reconsideration its ruling on decommissioning policy in CLI-90-8. CLI-91-2, *supra*.

<sup>7</sup> In making its policy determinations, the Commission considered comments from LIPA, DOE, CEQ, and State. These commenters addressed broad policy issues related to NRC's decommissioning regulations but did not comment specifically on the proposed amendment or any of its subparts, or on either of the petitioner's particular bases for standing in this proceeding.

the option of resumed operation of Shoreham. The Licensing Board will not entertain any issue in the POL proceeding for which the relief sought is an order leading directly or indirectly to resumed operation of Shoreham as an alternative under NEPA.

The Licensing Board also concludes that, except in special circumstances which have not been asserted here, it lacks authority to order an environmental review in the request for a POL, or the prior filing of a decommissioning plan as a condition for approval of LILCO's request for a POL. The Licensing Board will therefore not entertain any issue for which that relief is sought in this proceeding.

### III. LEGAL REQUIREMENTS FOR INTERVENTION

Section 189(a)(1) of the Atomic Energy Act, which provides for a hearing to any person whose interest may be affected by the amending of a license, is implemented in 10 C.F.R. §2.714. Section 2.714(a)(1) states that "any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition to intervene."

Requirements for such petitions are contained in section 2.714(a)(2), which provides:

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

To determine whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has held that a licensing board may apply judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause injury in fact and (b) the injury is arguably within the zone of interests protected by statutes covering the proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). A petitioner should allege, in an NRC proceeding, an injury in fact that is within the zone of interests protected by the AEA or NEPA. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983).

In addition, the petitioner must establish (1) that it personally has suffered, or will suffer, a distinct and palpable harm that constitutes an injury in fact; (2) that the injury can be traced to the challenged action; and (3) that the injury is

likely to be remedied by a favorable decision granting the relief sought. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); see also *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

For an organization to have standing, it must show injury in fact to its organizational interests or to the interest of members who have authorized it to act for them. If the organization is depending upon injury to the interests of its members to establish standing, the organization must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).

A petitioner may base its standing upon a showing that an organization or its members are within the geographic zone that might be affected by an accidental release of fission products. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). Close proximity under those circumstances has been deemed standing, alone, to establish the requisite interest for intervention. In such a case, the petitioner need not show that the concerns are well founded in fact. Distances of as much as 50 miles have been held to fall within the zone. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984).

The Commission does not allow the presumption to be applied to all license amendments. It only does so in those instances involving an obvious potential for offsite consequences. Those include applications for construction permits, operating licenses or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. Those cases involve the operation of the reactor itself, or major alterations to the facility with a clear potential for offsite consequences. Absent situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332 n.4. Those economic concerns are more properly raised before state economic regulatory agencies. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984).

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individ-

ual or group in the nuclear regulatory adjudicatory process. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332.

#### IV. REQUESTS FOR INTERVENTION AND TO HOLD A HEARING

##### A. SE2's Position

SE2 claims that it meets all criteria for standing. It describes itself as an organization dedicated to correcting misunderstandings on fundamental scientific and technological issues permeating the "national energy debate." Petitioner offers its views, based on the expertise of its members, to the public and to governmental agencies with responsibility for the resolution of energy issues.

Many of its members are said to live, work, and have property interests in the vicinity of the nuclear plant. SE2 claims that the organization and its members have a special interest in the radiologically safe and environmentally benign operation of Shoreham to provide them with reliable electricity and to avoid the substitution of fossil fuel plants and their adverse effects, i.e., relying on imported gas and oil which have adverse effects on the physical environment, the trade deficit, and national energy security.

Petitioner overall views LILCO's application for a POL as another effort toward *de facto* decommissioning of the Shoreham plant without an approved decommissioning plan. SE2 claims that it's a *per se* violation of the AEA and a health and safety violation.

It believes that with the relaxation of the Technical Specifications, as requested, LILCO would be free to allow the facility to deteriorate and to actively dismantle systems that are vital to an operating system.

SE2's key point is that Shoreham's decommissioning is not a foregone conclusion and that the NRC must complete an Environmental Impact Statement (EIS) before any such approval for decommissioning may be given. It argues that the EIS must include as an alternative the operation of Shoreham.

SE2 further asserts that granting the POL with drastically relaxed Technical Specifications, which were considered necessary for safe operation, would increase the health and safety risk posed by the plant should the resumed-operation alternative ultimately be pursued.

In summary, Petitioner concludes that a Staff-approved decommissioning plan is required prior to the issuance of a POL; that prior to the issuance of a POL, the Staff must issue an EIS; and the EIS must consider resumed operation as an alternative decision to decommissioning the facility prior to the issuance of the POL.

Petitioner also claims that LILCO has failed to maintain the reactor at a full operational level and that Licensee by not abiding by its full-power operating license had increased Petitioner's radiological health and safety risks. SE2 stated

that the proposed amendment would only further compound the risks. Petitioner views the granting of the amendment as an endangerment to the radiological health, safety, and other interests of its members under the AEA and NEPA.<sup>8</sup>

SE2 seeks organizational standing asserting, *inter alia*, that the Commission interferes with its informational purposes by its refusal to conduct a NEPA study, which deprives the organization of its ability to carry out its organizational purposes. Its Executive Director is a signer of the petition.

SE2 asserted that it is injured by Staff's refusal to prepare an EIS on the decommissioning of Shoreham because that deprives Petitioner of the ability to: (1) comment directly on the environmental report prepared by LILCO and the Draft EIS prepared by the Staff;<sup>9</sup> (2) advise its members of the environmental risks involved with each alternative explored by the environmental studies; and (3) report the findings and recommendations based upon the environmental evaluations to the public and political leadership as set forth in SE2's charter.

Petitioner cites in support of its position *Competitive Enterprise Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107 (D.C. Cir. 1990), for the proposition that organizational standing is established whenever the agency's action interferes with the organization's informational purposes to the extent that it interferes with the organization's activities.

Representational standing is sought on the basis of five named individuals with mailing addresses in Shoreham, Port Jefferson, and Westbury, New York. They are said to live and/or work and have property interests within a 50-mile radius of Shoreham and have an interest in whether the proposed amendment provides reasonable assurance of their radiological health and safety under AEA and whether the decision on the proposed amendment and the larger decommissioning proposal, of which it is a part, is made in accordance with NEPA.

Members have an interest in obtaining sufficient amounts of electricity at reasonable rates. They are concerned that dismantling Shoreham and building substitute oil- or gas-burning plants will delay any increase in energy production capacity and increase costs which will be passed on to the ratepayers. SE2 seeks to protect its members from adverse health consequences that would result from the substitute oil-burning plants.

The specific aspects that SE2 states that it wishes to intervene on include: the adequacy of the evidence to support a grant of the proposed amendment;

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<sup>8</sup> On October 10, 1990, each Petitioner filed a document titled "Supplement to Comments on Proposed No Significant Hazards Determination, Petition to Intervene, and Request for Hearing." Petitioners assert that LILCO, on August 21, 1990, sought to change the Technical Specifications by removing an independent engineering group previously determined by NRC to be essential to licensed activities. They allege that by this request "LILCO seeks removal of this important mechanism which is required to assure the safe conduct of all licensed activities, regardless of whether electricity is produced."

<sup>9</sup> No Draft EIS was prepared by the Staff. Petitioner's assertion is a repeat of that made in its prior petitions to intervene on other changes to the Shoreham license.

resumed plant operation; decommissioning; the need for a decommissioning plan; the no significant hazard consideration standards and determination; whether the proposed changes would endanger the public health and safety or be inimical to the common defense and security, now or in the event of full-power operation; and whether the amendment will serve a useful purpose proportional to the quantities of special nuclear material or source material to be possessed.

Further, Petitioner seeks to have a full and fair NEPA consideration of what it terms the decommissioning proposal and considers the instant application to be an interdependent part. It lists eight aspects under NEPA on which it seeks to intervene.

Petitioner seeks ten remedies in the proceeding. The first two involve requesting an order permitting Petitioner's intervention and directing a hearing on the issues presented. The others are far ranging. They extend from requesting an order to bar Staff, *pendente lite*, from issuing the proposed amendment in order to allow for Licensing Board review of the issues, to requesting the Commission to stay the effectiveness of any final decision of a no significant hazards determination, until 10 days after publication of that final decision in the *Federal Register*, in order to allow Petitioner to seek a court determination.

## **B. Staff's Response to SE2's Petition on the POL**

Staff contends that SE2 has failed to show that the proposed amendment may reasonably be found to have some adverse impact upon any interest Petitioner may have identified; and that SE2 has failed to show that such injury can fairly be traced to the challenged action, or that such injury could be redressed by a favorable decision in this proceeding.

Staff looks upon Petitioner as having an academic and an economic interest, neither of which contributes to standing. Staff asserts that the petition fails to identify how the proposed amendment would have a direct and adverse impact on SE2's cognizable interests. It states that Petitioner's interests do not relate to the proposed POL, but to the abandonment of Shoreham which SE2 claims may be returned to operation at some future date. Staff states that Petitioner does not contend that the public health would be endangered by granting the instant amendment but that the amendment would cause undue deterioration of the facility and increased costs, if the Licensee should seek to commence full-power operation, a matter not at issue. Staff further states that Petitioner's bare allegation of adverse impacts is insufficient to demonstrate a potential adverse effect upon its interest and does not confer standing.

Additionally, Staff argued that (a) a POL may issue before a final decommissioning plan is finalized or approved and (b) the proposed no significant hazards consideration does not permit a hearing on that matter.

### **C. LILCO's Response to SE2's Petition on the POL**

LILCO opposes SE2's petition for intervention and a hearing.

Licensee asserts that Petitioner must specifically allege that granting the amendment presents a radiological health and safety threat cognizable under the AEA. It is not enough to advance vague, unparticularized allegations that the proposed amendment would violate the AEA, as Petitioner has done. LILCO alleges that SE2 never explained how the license amendment that is directed toward the shutdown of Shoreham increases their radiological risk.

Licensee disputes Petitioner's claim that NRC approval of a full decommissioning plan is a prerequisite for issuance of a POL and that granting the license amendment might present a radiological health and safety threat should some future decision be made to operate Shoreham. Licensee states that the latter claim is not relevant because it concerns the hypothetical future operation of Shoreham.

LILCO contends that even if Petitioner's speculation proves true regarding the need for building fossil fuel plants, because of the shutdown of Shoreham, NEPA does not require either an assessment of the alleged indirect effects of the plant's abandonment or a discussion of the alternative of plant operation. LILCO argues that the decision not to operate Shoreham is its own private decision and not a major federal action that is governed by NEPA. Licensee states that it will not operate the plant irrespective of whether the amendment is granted.

### **D. School District Position**

School District's petition differs from that of SE2 only insofar as the description of the Petitioner, its organizational purpose, those whom it seeks to represent, and the nature of their interests. Its petition differs from that of SE2 as follows.

School District alleges that it seeks intervention in order to protect the interests of School District, its students, and employees.

The School District is reported to be about 12 square miles in size with the Shoreham facility located within its boundaries. Petitioner asserts that it is located within the 50-mile limitation used by the Commission to determine whether an intervenor, expressing contentions under the health and safety provisions of the AEA, has an interest sufficient to allow intervention.

Petitioner depends on LILCO to meet the energy needs of its physical plant which includes five schools. School District's stated interest is to ensure an adequate supply of electricity at reasonable rates. In its view, any actions to dismantle the facility, and to build substitute oil-burning plants, will harm the region's electric energy production capacity and increase rates. Another

economic interest of the School District is that the property taxes paid by LILCO for Shoreham constitute approximately 90% of School District's tax base.

School District also claims that it has an interest in protecting the health and environment of almost 2000 students and 500 employees, who live and/or work in close proximity to the Shoreham facility, from the radiological impacts of the proposed amendment and the adverse health and other environmental consequences of non-operation of Shoreham. These are said to be air pollution produced by substitute oil and gas plants. The harm is said to be cognizable under NEPA. It seeks representational status for the President of the Board of Education, a resident of Wading River, New York. He was a signer of School District's petition.

#### **E. Staff's and LILCO's Responses to School District's Petition**

Staff and LILCO each filed a single response to both petitions. Their responses did not identify any significant differences between the petitions. In effect, they responded to both petitions in the same way.

#### **F. Licensing Board's Ruling on SE2's Petition on POL**

The Licensing Board finds that SE2 has failed to satisfy the requirements of 10 C.F.R. § 2.714(a)(2).

Petitioner, as an organization, has not established that it will suffer a distinct and palpable harm that constitutes an injury in fact. Its organizational interest is educational and informational in nature on the subject of the "national energy debate."

SE2's principal claim of injury is based on Staff's refusal to prepare an EIS on the decommissioning of Shoreham. Petitioner states that this deprives it of its right to comment directly on the EIS, to advise its members on its meaning and to make recommendations to the public and political leadership on Petitioner's evaluation of the EIS.

The Commission ruled in CLI-91-1 that the POL may be issued without any environmental review. Petitioner does not have a cognizable claim of injury where Staff did not prepare an EIS, an action the Commission found that Staff is not required to perform. Staff's failure to prepare an EIS is a nonissue. Petitioner's claim of organizational standing based on Staff's refusal to conduct a NEPA review, which SE2 states interferes with its organizational purposes and activities, was rendered moot by the Commission's action denying the need for the NEPA review.

The Commission was very clear in CLI-91-1 in denying SE2's claim that a Staff-approved decommissioning plan is required prior to the issuance of a POL;

that prior to the issuance of a POL, the Staff must issue an EIS; and the EIS must consider resumed operation as an alternative decision to decommissioning. The Commission's action deprived Petitioner of the most important bases of its claim for intervention.

Furthermore, Petitioner's broad public educational and informational interest, under Commission decision, does not establish the particularized interest necessary for participation in the adjudicatory process. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332.

SE2's petition is additionally defective in that it has failed to identify any particular injury that can be traced to the challenged action. *Dellums v. NRC*, 863 F.2d at 971.

The matter at issue in the POL amendment is whether the changes requested in the Technical Specifications can be accomplished without endangering public health and safety. SE2 did not identify within the scope of the proceeding any particularized injury that would stem from this proposed action.

SE2 claims that injury would result from the relaxation of the Technical Specifications because it would cause plant deterioration and be incompatible with maintaining the plant in an operational mode, which is necessary should resumed operation ultimately be pursued. This alleged injury is also a matter beyond the scope of this proceeding. The Commission, in CLI-90-8 and CLI-91-1, ruled out consideration of any alleged injury relating to resumed operation.

SE2 also makes a bare allegation that Licensee, by not abiding by its full-power operating license and by reducing the Technical Specifications requirements, increases radiological health and safety risks. The proposed amendment is directed at shutting down a defueled, non-operating plant. To make such an assertion without identifying a particularized injury that may be caused by the proposed amendment results in failure by Petitioner to establish the necessary elements for standing. *Dellums v. NRC*, *supra*. Also, no nexus was shown between the proposed amendment and the alleged harm from the future construction of substitute fossil fuel plants.

As to representational standing, SE2 has not stated that its organizational purpose provides authority to represent members in adjudicatory proceedings such as this one. Even if this can be inferred from the fact that its Executive Director is a signer of the Petition, SE2 has not satisfied the requirements for representational standing.

Petitioner states that the five members whom it seeks to represent have authorized it to do so. Their interests were not broken down individually but were stated collectively by Petitioner.

For an organization to rely upon injury to the interests of its members, it must provide, with its petition, identification of at least one of the persons it seeks to represent and a description of the nature of injury to the person, and it must demonstrate that the person to be represented has in fact authorized such

representation. *Limerick*, LBP-82-43A, *supra*, 15 NRC at 1437. No supporting statement containing that information was submitted from any member sought to be represented, as is required.

Although the members are said to live and/or work and have property interests within a 50-mile radius of Shoreham, these facts do not create a presumption of standing because it is not a proceeding for a construction permit, an operating license, or a significant amendment that would involve an obvious potential for offsite consequences. *St. Lucie*, CLI-89-21, *supra*.

Shoreham is a defueled nuclear power plant that has not been used commercially. To satisfy standing requirements, it would have to be shown by SE2 that a member's particularized injury in fact results from the proposed relaxed Technical Specifications that were for a full-power operating license. Under the proposed amendment, Licensee could not operate the Shoreham plant. Petitioner has failed to make this necessary showing for itself, or its members. Merely making bare allegations of radiological harm, as previously discussed, is legally insufficient to establish standing.

As to SE2 wanting to protect its members from alleged adverse health consequences that would result from substitute oil-burning plants, there was no nexus shown between the proposed amendment and the alleged resultant construction of substitute oil-burning plants and the harm that would be created.

Member interest, in part, is described as obtaining sufficient amounts of electricity at reasonable rates. It is very well settled in Commission practice that a ratepayer's interest does not confer standing in NRC licensing proceedings.

SE2 has not established the requisite interest for standing, organizationally or representationally.

A petition to intervene must contain the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2).

Petitioner submitted three groupings of aspects. One grouping is general in nature and overlaps a second grouping that relates to AEA issues. The third grouping pertains to NEPA issues. NEPA is not at issue; therefore, those aspects are inappropriate for this proceeding and will not be discussed further.

As to the remaining aspects, there were a sufficient number to satisfy the aspect requirements of section 2.714(a)(2). There were others that are beyond the scope of the proceeding.

Those aspects that relate to the subject matter of the proceeding include: whether the proposed changes involve a significant increase in the probability of an accident previously evaluated; whether the proposed changes create the possibility of a new or different kind of an accident previously evaluated; and whether the proposed changes involve a significant reduction in a margin of safety. Also included as acceptable aspects are those involving the adequacy

of the evidence to support a grant of the application and whether the proposed changes would endanger public health and safety.

At this stage it is premature to determine whether questions involving common defense and security and whether the proposed activities serve a useful purpose proportional to the quantities of special nuclear material or source material to be possessed will be at issue in the proceeding.

Those aspects set forth by the Petitioner that deal with decommissioning, resumed operations, and the Staff's no significant hazards consideration determination are not relevant to the issues in the proceeding and will not be considered.

As to the remaining issue of Petitioner's ten requests for relief, no ruling will be made at this time because it has not established standing in this proceeding.

#### **G. Licensing Board's Ruling on School District's Petition on POL**

The School District's petition is identical to that of SE2 in many areas. To the extent that the two petitions are the same, we make the same rulings we did on the SE2 petition. We will discuss those areas where the petitions differ and rule accordingly.

The Board finds that School District has failed to satisfy the requirements of section 2.714(a)(2) to establish standing.

School District's organizational interest is that of a ratepayer and a tax recipient. These are economic concerns that are outside the Commission's jurisdiction. The Commission has no regulatory responsibility for rates and tax distribution. They do not confer standing in NRC licensing proceedings and, therefore, School District has no basis for organizational standing.

As to its representational standing, School District wishes to protect the health and environment of its employees, one of whom has been identified as the President of the Board of Education. He is a signer of the petition and his address is Shoreham, New York.

Again, the fact that the individual may reside or work in close proximity to the nuclear facility does not create a presumption of standing. There is no obvious potential for offsite consequences where the action complained of requires that the Licensee not operate the plant.

The School District's petition, like that of SE2, fails to particularize any injury, within the scope of the proceeding, that it can trace to granting of the POL. Any alleged harm relating to abandonment of Shoreham, failure to maintain the facility so that it can resume full-power operation, the need for a NEPA review, and restart of Shoreham as a NEPA alternative are all beyond the scope of this proceeding.

The bare allegation of employee adverse health and safety effects stemming from the proposed amendment does not establish necessary elements for stand-

ing. *Dellums v. NRC, supra*. School District has not particularized a distinct and palpable harm that constitutes an injury in fact nor does it trace such injury back to the challenged action, under which Licensee could not operate the Shoreham plant. The mere allegation, without specifics, does not meet the regulatory requirements.

School District has failed to establish the requisite interest for standing, organizationally or representationally.

## V. CONCLUSION

The Board having reviewed each "Petition to Intervene and Request for Hearing" has determined that Petitioners have failed to establish standing, as required by section 2.714(a)(2). The deficiencies that have been found to exist have been discussed in detail in this Memorandum.

Petitioners have, for the most part, based their cases on the claims that the POL is part of the *de facto* decommissioning of Shoreham; that the POL application should be preceded by a decommissioning plan; that prior to the issuance of a POL Staff must issue an EIS; and that the EIS must consider resumed operation as an alternative to decommissioning because it is a viable alternative. The Commission's policy decisions in CLI-90-8 and CLI-91-1 stripped away Petitioners' main arguments for standing.

Petitioners did not have the benefit of the Commission's two precedential policy decisions at the time they filed their petitions to intervene. Their petitions focused on matters that the Commission subsequently determined to be beyond the scope of consideration in this proceeding. The Licensing Board concludes that because of these circumstances Petitioners should be afforded the opportunity to amend their petitions to intervene to take into account the recent Commission decisions and the deficiencies in their petitions that are specified in this Memorandum.

This conclusion is predicated, in part, on the Commission being rather liberal in permitting petitioners the opportunity to cure defective petitions to intervene. It has done so on the bases that, "the participation of intervenors in licensing proceedings can furnish valuable assistance to the adjudicatory process." *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973).

## Order

Based upon all of the foregoing, Petitioners are afforded the opportunity to amend their petitions to cure the defects found by the Licensing Board.

Amended petitions are required to be filed within twenty-five (25) days after service of this Order. LILCO shall file its response within ten (10) days of service of the amended petitions, and Staff shall have an additional five (5) days within which to respond.

**FOR THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Morton B. Margulies, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
March 6, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Richard F. Cole  
Dr. Kenneth A. McCollom

In the Matter of

Docket Nos. 50-443-OLR-4  
50-444-OLR-4  
(ASLBP No. 90-620-04-OLR-4)  
(Offsite Emergency Planning)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

March 12, 1991

MEMORANDUM  
(Certifying ALAB-939 Question)

I. BACKGROUND

ALAB-924

In ALAB-924, 30 NRC 331 (1989), the Appeal Board remanded to this Board an issue concerning implementation of the sheltering option for the general summer beach population near the Seabrook Station.<sup>1</sup> The Appeal Board explained that, notwithstanding the low probability of employing sheltering as a protective action for the transient summer beach population, so long as sheltering

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<sup>1</sup>The remanded issues were on review from the Partial Initial Decision on the New Hampshire Radiological Emergency Response Plan, LBP-88-32, 28 NRC 667 (1988).

remains an option under the NHRERP, respective implementing measures are required. 30 NRC at 368.

## LBP-90-12

In obedience to ALAB-924, and in disposing of related motions to reopen the record, this Board reported that the New Hampshire Radiological Emergency Response Plan (NHRERP) does not provide for actually sheltering the general beach population. Rather, the plan employs a "shelter-in-place" concept.<sup>2</sup> We noted that Richard Strome, then Director of the New Hampshire Office of Emergency Management, had explained how the "shelter-in-place" concept would be implemented:

New Hampshire employs the "Shelter-in-Place" concept. This provides for sheltering at the location in which the sheltering instruction is received. Those at home are to shelter at home; those at work or school are to be sheltered in the workplace or school building. Transients located indoors or in private homes will be asked to shelter at the locations they are visiting if this is feasible. Transients without access to an indoor location will be advised to evacuate as quickly as possible in their own vehicles (i.e., the vehicles in which they arrived). Departing transients will be advised to close the windows of their vehicles and use recirculating air until they have cleared the area subject to radiation. If necessary, transients without transportation may seek directions to a nearby public building from local emergency workers. (NHRERP Vol. 1, p. 2.6-6.)

LBP-90-12, 31 NRC at 444, *citing* Applicants' Direct Testimony No. 6, ff. Tr. 10,020, Appendix 1, at 4-5.

We also reviewed the rare circumstances that must prevail before the "shelter-in-place" option would be the most effective in achieving maximum dose reduction under a "condition (1)" scenario.<sup>3</sup>

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<sup>2</sup> Memorandum and Order (Ruling on Certain Remanded and Referred Issues), LBP-90-12, 31 NRC 427 (1990).

<sup>3</sup> Those circumstances are:

(1) The release must be nonparticulate (gaseous) and of short duration. This is most often referred to as a "puff" release.

(2) The release must be predicted to arrive at the beach within a relatively short time period, when, because of a large beach population, the evacuation time would be significantly longer than the exposure duration. The purpose is to avoid a situation in which a sheltered population would be exposed or reexposed to radioactive particulates deposited on the ground (groundshine) during their subsequent, postrelease evacuation.

(3) There cannot have been an earlier order for beach closing or evacuation.

(4) And most important of all, emergency decisionmakers *must believe in advance with strong confidence* that all of the several elements calling for actual sheltering are and will remain present throughout the emergency.

31 NRC at 440-41.

We also noted an important aspect of item (4) above. Shelter-in-place will not be an option whenever the potential remains that a later evacuation of the beach area would be required. *Id.* at 451-52; Tr. 28,361-64.

After reviewing the evidentiary record and posthearing information, the Licensing Board sought further guidance from the Appeal Board. We reported that “actual sheltering of the general beach population is a vanishingly improbable protective action choice under the NHRERP” and stated that there was no need to amend the NHRERP to include implementing detail for sheltering that population. LBP-90-12, 31 NRC at 453-54.

We also noted that a review of the record following the remand in ALAB-924 disclosed uncertainty about some details of the NHRERP. Although there was no significant safety issue remaining, we suggested that the Appeal Board might consider supplementing ALAB-924 by providing greater discretion to the Licensing Board to resolve any remaining uncertainties. *Id.*

Subsequently, after considering further information and discussing with the parties aspects relating to “condition (2)” (impediments to evacuation), the Licensing Board recommended that the referrals to the Appeal Board in LBP-90-12 be vacated and ruled that the issues remanded in ALAB-924 had been resolved.<sup>4</sup>

#### ALAB-939

In ALAB-939, the Appeal Board declined to accept our ruling that the sheltering issue remanded in ALAB-924 had been resolved, although it recognized that the need for implementing detail for sheltering “has for all practical purposes been vitiated.” 32 NRC at 178-79. Instead, the Appeal Board adopted our earlier suggestion that we be afforded greater discretion to resolve uncertainties in the record.<sup>5</sup> However, the Appeal Board identified its own set of uncertainties in New Hampshire’s planning for the general beach population:

[W]e find it incumbent upon the Licensing Board to ensure that, as a consequence of evidence previously submitted by applicants in the course of the hearing, several related matters are clarified. First, because the evidence presented by applicants indicates that automobiles are assigned no cloudshine sheltering value by planners, the Board should ensure that the record contains an adequately supported explanation for distinguishing between those nontransportation-dependent beachgoers already within a building, who will be directed to shelter, and all other beachgoers, who will be directed to go to their cars and evacuate, in terms of condition (1)’s purpose of utilizing sheltering for “achieving maximum dose reduction.” In addition, given the testimony by New Hampshire emergency planning officials suggesting the need to distinguish between suitable and unsuitable shelter, the Licensing Board should ensure that the record is clear as to whether such measures are necessary relative to the “shelter-in-place” option as now described by the State. Finally, given applicants’ evidence acknowledging the central importance of quality emergency notification messages, the Licensing Board should ensure that any EBS/beach public address message proposed for

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<sup>4</sup>LBP-90-20, 31 NRC 581, 585, 588 (1990).

<sup>5</sup>32 NRC at 179.

use relative to condition (1) makes clear the steps that all members of the beach population are to take in the event that a "shelter-in-place," as now described by the State, is recommended.

32 NRC at 179-80 (citations and footnotes omitted).

This Board sought the advice of the parties on how to proceed with the clarification required in ALAB-939. Responses were filed by the State of New Hampshire,<sup>6</sup> the Federal Emergency Management Agency,<sup>7</sup> NRC Staff,<sup>8</sup> Licensees,<sup>9</sup> Intervenor New England Coalition on Nuclear Pollution and the Massachusetts Attorney General,<sup>10</sup> and Seacoast Anti-Pollution League.<sup>11</sup> The parties joined the Board in a telephoned prehearing conference to discuss the responses.<sup>12</sup>

## II. PARTIES' POSITIONS ON ALAB-939 AND ANALYSIS

The State of New Hampshire, FEMA, and the NRC Staff now state that there is no "shelter-in-place" provision in the NHRERP for ERPA-A, the area within 2 miles of the Seabrook Station including the beaches. Thus, according to the government parties, the premise of ALAB-939 is incorrect. Licensees adopt the same position, and argue further that the clarification of the first two items required in ALAB-939, while irrelevant, can be found in the evidentiary record.

The Board initially perceived a change of position on the part of New Hampshire and FEMA, and as we explain below, there has been, at minimum, a change in focus. Intervenor would ignore any such change and seek to litigate the three areas seen by the Appeal Board as needing clarification.

### New Hampshire's Evolving Position

Early in 1990, in attempting to comply with the remand in ALAB-924, the Board considered the comments of the State of New Hampshire and the affidavits of New Hampshire's leading emergency planning officers.<sup>13</sup> We regarded some portions of New Hampshire's comments to be "enigmatic," including the following identical portions of the affidavits of the Emergency Management

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<sup>6</sup> Memorandum of the State of New Hampshire on ALAB-939, January 10, 1991.

<sup>7</sup> Advice of the Federal Emergency Management Agency Regarding Issues Raised by ALAB-939, January 11, 1991.

<sup>8</sup> NRC Staff Views on Matters Referred to in ALAB-939, January 11, 1991.

<sup>9</sup> Licensees' Response to the Memorandum and Order of November 14, 1990 of the Atomic Safety and Licensing Board Re ALAB-939, January 10, 1991.

<sup>10</sup> Memorandum of the Intervenor on the Remanded Sheltering Issues, January 10, 1991.

<sup>11</sup> SAPL Response to Memorandum and Order of November 19, 1990 Re: ALAB-939. SAPL is not authorized to participate in proceedings before this Board and its response was not considered.

<sup>12</sup> Tr. 28,453-99, January 23, 1991.

<sup>13</sup> State of New Hampshire's Comments Regarding Applicant's Response to Licensing Board Order of January 11, 1990, February 16, 1990, with Iverson and Wallace Affidavits attached.

Director, Mr. George L. Iverson, and the Public Health Director, Dr. William Wallace:

4. Where implementation of protective action is deemed appropriate (i.e. — a prognosis of decreasing ability to mitigate the emergency at the plant) evacuation is *preferred* and *generally* will be the selected protective action option. See NHRERP Rev. 3, 2/90, Vol. 1, p. 2.6-11.

5. The October 1988 amendments to the NHRERP confirmed the procedures underlying this protective action option by eliminating a shelter-in-place recommendation for ERPA-A whenever the potential remains for a later evacuation of the beach area.

6. The *planned* protective action for ERPA-A in the event of declaration of a General Emergency is evacuation. However, the option of recommending shelter-in-place for ERPA-A was *not precluded* by the amendments to the NHRERP in October 1988 or in any subsequent amendments or revisions. The shelter-in-place option remains for the so-called “puff release” scenario, and may also be exercised when physical impediments make evacuation impossible.

7. The shelter-in-place option is affirmed by the provisions of the NHRERP which: (a) permit consideration of a recommendation of shelter-in-place of ERPA-A in the event of a release of radioactive material at the Site Area Emergency (NHRERP Rev. 3, Vol. 8, Sec. 7, p. 6.1-7); and (b) allow for recommending shelter-in-place of ERPAs other than ERPA-A at the General Emergency (NHRERP Rev. 3, Vol. 8, p. 6.1-8).

31 NRC at 451-52 (emphases added).

Also at that time, counsel for the State affirmed that the “NHRERP provides for sheltering the general beach population in two very limited circumstances: [Condition (1), and Condition (2)].”<sup>14</sup> Again, on May 28, 1990, counsel for New Hampshire informed the Appeal Board that the shelter-in-place option has not been precluded for the Condition (1) (puff release) scenario providing that several appropriate preconditions “cannot be categorically ruled out.”<sup>15</sup>

Following ALAB-939, in response to our request for advice, the State of New Hampshire stated that it “reaffirms that with respect to Condition (1), the short duration nonparticulate gaseous puff release, evacuation — not shelter-in-place — is the *planned* protective action.”<sup>16</sup> In support of this reaffirmation, New Hampshire refers us to its two 1990 pleadings, *supra*. Thus, according to the State, it is not necessary to be concerned with the dose reduction factor of automobiles. Nor is there any need for an EBS message addressing a non-existent shelter-in-place option for the beach population.<sup>17</sup>

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<sup>14</sup> New Hampshire’s February 16, 1990 Comments at 2.

<sup>15</sup> Comments of the State of New Hampshire Regarding NHRERP Sheltering and LBP-90-12, at 2-3, May 28, 1990. This pleading, filed with the Appeal Board, was refiled with the Licensing Board with New Hampshire’s Memorandum of May 31, 1990. This information was provided to us in anticipation of the Board’s prehearing conference of June 5, 1990, and in part, persuaded the Board that the sheltering issue remanded in ALAB-924 had been resolved. LBP-90-20, 31 NRC at 585, 588.

<sup>16</sup> Memorandum of the State of New Hampshire on ALAB-939, January 10, 1991, at 1-2 (emphasis added).

<sup>17</sup> Note 16, *supra*.

As to whether New Hampshire has changed its position from the ALAB-924 remand to the ALAB-939 remand, we note that Mr. Iverson and Dr. Wallace did in fact state in their February 1990 affidavits that “[t]he planned protective action for ERPA-A in the event of declaration of a General Emergency is evacuation.” However, the balance of the same paragraph states that “shelter-in-place for ERPA-A was not precluded” by relevant amendments to the NHRERP, and that the “shelter-in-place option remains for the so-called ‘puff release’ scenario . . . .” P. 201, *supra*, ¶ 6. Moreover, New Hampshire’s counsel then viewed “[e]vacuation as the *preferred* [not planned] protective action for the beach population.”<sup>18</sup>

As noted, in examining the matter pursuant to ALAB-939, the Board perceived an evolution in the positions of New Hampshire and FEMA on the beach shelter-in-place issue. Tr. 28,462. Queried by the Board, counsel for New Hampshire explained that any difference between the State’s position following ALAB-924 and its present position on ALAB-939 is one of focus. Tr. 28,466-67. Counsel reemphasized that since October 1988, evacuation is the only planned protective action for ERPA-A and that the references to “shelter-in-place” for that area are simply an indication that shelter-in-place is not precluded if “circumstances that we can’t foresee arise.” Tr. 28,467-68, 28,487-88.

### FEMA’s Evolving Position

On February 16, 1990, FEMA explained to the Appeal Board that “the ‘shelter-in-place’ concept of NHRERP has since at least February 11, 1988 called for the transient beach population to evacuate and for the people indoors to remain indoors.”<sup>19</sup>

Again, on May 30, 1990, FEMA informed this Board that we correctly understand (in LBP-90-12), that the shelter-in-place concept in the NHRERP would call for “immediate evacuation of all the summer beach day trippers with their own transportation and without access to shelter.” FEMA explained again that people in buildings or those who may enter buildings immediately without direction from officials would utilize those buildings as shelter.<sup>20</sup>

But in its pleading of January 11, 1991, in response to our request for advice on ALAB-939, FEMA stated that “it is impossible to have the combination of events to constitute ‘Condition 1’ because the requisite certainty will never exist that a given accident will not get worse.” Therefore, FEMA states that it has

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<sup>18</sup> May 28, 1990 Comments at 2.

<sup>19</sup> Response of the Federal Emergency Management Agency to Emergency Motion of the Intervenor to Reopen the Record as to the Need for Sheltering in Certain Circumstances, February 11, 1990, at 2. See also *id.* at 3, 4, 6.

<sup>20</sup> Memorandum of the Federal Emergency Management Agency Regarding Resolution of ALAB-924 Issues, May 30, 1990, at 3.

approved the NHRERP with the interpretation that evacuation, not shelter-in-place, is the protective action for ERPA-A at a general emergency. Therefore, according to FEMA, it is unnecessary to address the first two issues sent down in ALAB-939, and is not necessary to have additional EBS messages for a Condition (1) scenario. Condition (1), FEMA repeats, is “entirely theoretical and will never come about at a General Emergency for ERPA-A.”<sup>21</sup>

While FEMA disavows any substantive change of position on the beach sheltering issue, FEMA’s counsel acknowledged that its earlier position “wasn’t as clear as it needed to be.” Tr. 28,466-67. FEMA now focuses more sharply on aspects of the issue that came to light in connection with our inquiry in response to ALAB-924. First, FEMA cites to our findings that “so long as the potential remains for a later evacuation the State of New Hampshire states that it will not ever recommend shelter-in-place.”<sup>22</sup> New in FEMA’s position is the realization that a Condition (1) scenario is categorically ruled out (as compared to extremely improbable) at a general emergency in ERPA-A since a later evacuation can never be ruled out. Tr. 28,466-67.

### NRC Staff’s Position

The NRC Staff, responding to the Board’s request for advice on the ALAB-939 issues, states that “[t]he NHRERP, approved by FEMA, provides for evacuation, and not shelter-in-place, as a protective action for ERPA-A in a General Emergency.” Moreover, according to the Staff, “[a]t the very most, the shelter-in-place concept for the beach population is merely an unplanned *ad hoc* option available to the State of New Hampshire.”<sup>23</sup> By way of analysis, the Staff reviews the unlikely set of circumstances needed to establish a Condition (1) event and concludes:

The occurrence of the combination of circumstances in the Condition 1 scenario (including strong confidence in the fact that the elements that call for shelter will remain constant) is so unlikely as to be, for emergency planning purposes, a null set.

*See supra* note 23.

### Licenseses’ Position

Licenseses have acceded to New Hampshire’s interpretation of its own radiological emergency response plan since the State challenged Licenseses’ interpre-

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<sup>21</sup> FEMA Advice, January 11, 1991, at 2-3.

<sup>22</sup> *Id.* at 2, citing LBP-90-12, 31 NRC at 452.

<sup>23</sup> NRC Staff Views on Matters Referred in ALAB-939, January 11, 1991, at 1-2, citing, *inter alia*, Tr. 14,241 (Keller).

tation of the October 1988 amendments to the plan.<sup>24</sup> Licensees now adopt New Hampshire's position that there is no need for an EBS/beach public address message about sheltering.<sup>25</sup> However, Licensees offer advice respecting the first two items sent down in ALAB-939, as we discuss below under Section III.

### Intervenors' Position

Intervenors argue that the present record does not address any of the issues sent down in ALAB-939 and that a full-blown hearing with discovery is required.<sup>26</sup> The Board discusses the merits of that position below. For now, our attention remains directed to the current provisions of the NHRERP with respect to shelter-in-place in ERPA-A. In general, Intervenors attribute to the NHRERP not only its express provisions, but impute to it inferences to be drawn from what State officials and FEMA have said about the plan as we have discussed above.<sup>27</sup> However, as we note in the next section, Intervenors have joined in a stipulation concerning which portions of the NHRERP are relevant to resolving the issues before us.

### III. FURTHER ANALYSIS

Following the prehearing conference of the parties, the Licensing Board noted the need for a common, clear understanding and identification of the relevant express provisions of the NHRERP as it has evolved since August 1986 — the version received into evidence as Applicants' Exhibit 5. We noted that there are important distinctions to be made among, for example, (1) the express provisions of the NHRERP, (2) State and FEMA interpretations of the express provisions, and (3) protective actions, possibly reserved as *ad hoc* options, that are not precluded by the NHRERP. We directed the Licensee to prepare a common reference document containing the relevant protective actions for ERPA-A showing changes from the August 1986 versions of the plan.<sup>28</sup> Licensees submitted such a document (hereinafter "Reference Document") on January 28,

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<sup>24</sup> Applicants' Advice to Licensing Board Re Erroneous Statements in Applicants' Response to Licensing Board Order of January 11, 1990, February 16, 1990.

<sup>25</sup> Licensees' January 11, 1991 Response at 3.

<sup>26</sup> Memorandum of the Intervenors on the Remanded Sheltering Issues, January 10, 1991.

<sup>27</sup> Response of the Mass AG and NECNP to the Licensing Board's Order of January 24, 1991, February 14, 1991.

<sup>28</sup> Memorandum and Order, January 24, 1991.

1991.<sup>29</sup> For the purposes of resolving the ALAB-939 issues, the Reference Document is as important for what it doesn't say as it is for what it does say.

The Reference Document reveals that in the August 1986 version of the NHRERP, sheltering is recommended for portions of ERPA-A in a general emergency. Reference Document at 11. As late as the February 1988 version of the plan, sheltering remained a protective option for the seasonal beach population in ERPA-A during a general emergency. *Id.* at 35. Thereafter, beginning in October 1988, evacuation is always the protective action for ERPA-A in general emergencies. No aspect of sheltering is provided for ERPA-A in a general emergency. *Id.*, *e.g.*, at 64, 79, 84, 85.

It should also be noted that the so-called "Condition (1)" and "puff release" and their various dimensions are not a part of the NHRERP. *Id.*, *passim*. In the one place where "shelter-in-place" is an option for the balance of the plume exposure EPZ because of evacuation constraints, the NHRERP cautions that at a general emergency, evacuation is nevertheless the preferred protective action for ERPA-A. *Id.* at 85-86.

We conclude, therefore, that New Hampshire Emergency Planning officials have not changed their position on the "shelter-in-place" option as it relates to ERPA-A in a general emergency. Mr. Iverson and Dr. Wallace selected their words carefully in their affidavits of February 16, 1990, quoted at p. 201, *supra*. The shelter-in-place concept has not existed in the NHRERP in a general emergency for ERPA-A since October 1988. Whatever force the concept has for ERPA-A exists only in the minds of the New Hampshire radiological emergency decisionmakers as an *ad hoc* possibility for unforeseen events.

Our discussion in LBP-90-12 of what the *parties said* about the shelter-in-place concept in the NHRERP rather than the provisions of the plan itself invited the inference that a shelter-in-place concept in the NHRERP still pertained to ERPA-A in general emergencies.<sup>30</sup> The focus of the response by this Board and the parties in addressing the issues remanded in ALAB-924 was whether NHRERP included an option to actually shelter the general (nontransportation-dependent) transient beach population as compared to the *evacuation* element of the shelter-in-place option as it was litigated during the NHRERP phase of the proceeding.

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<sup>29</sup> The Reference Document has its own numbering system superimposed upon the numbering of its constituent documents. Our references are to the Reference Document page numbers. All parties stipulated that the Reference Document is sufficiently complete and accurate for the purposes stated in our January 24, 1991 memorandum. We are informed that references to Attachments A and C in the October 1988, Rev. 2 version (at 64) are to Attachments A and C to the February 1988 Rev. 2 version (at 55-59, 61-62). Letter, Dignan to Board, February 12, 1991.

<sup>30</sup> See generally 31 NRC at 439-55.

Regardless of the reason, because of the changes in the NHRERP, this Board cannot ensure that the three items sent down in ALAB-939 are clarified by evidence previously submitted by Licensees in the course of the hearing.

Nevertheless, if one were to assume, for whatever unforeseen reason, that the shelter-in-place concept still obtained in ERPA-A in a general emergency, Licensees have addressed items sent down in ALAB-939. With respect to the first item, Licensees cite to the evidentiary record to explain that those in the beach population who are directed to go to their cars and evacuate at a general emergency are so directed because of the transportation value of automobiles, not for any dose reduction factor afforded by automobiles.<sup>31</sup>

Similarly, New Hampshire observes that "[t]he NHRERP does not consider the automobile as a location for sheltering."<sup>32</sup>

Again assuming for argument that shelter-in-place would be considered as an *ad hoc* protective action in ERPA-A in a general emergency, there is better record support than the terse comments by Licensees and New Hampshire available to clarify the Appeal Board's first area of concern. In LBP-90-12, we quoted at length the explanation of New Hampshire's Mr. Strome of why evacuation is the dominant aspect of the shelter-in-place concept. Mr. Strome's explanation is directly relevant to the Appeal Board's first area of concern. In simple terms, the distinction between sheltering those already at shelters and evacuating those who are not, is that *time*, thus *doses*, would be saved by not first moving the unsheltered population to sheltering.<sup>33</sup>

With respect to the second concern of ALAB-939, i.e., the suggested need to distinguish between suitable and unsuitable shelter, Licensees cite to Tr. 10,147-51 and Tr. 10,578 to the effect that suitable shelter is the equivalent of "indoor locations."<sup>34</sup> Licensees are correct. The Appeal Board itself identified similar testimony; i.e., suitable shelter means accessible shelter. Tr. 10,206-07. The Appeal Board's query was founded on the testimony of New Hampshire's Mr. Bond (Tr. 10,757) to the effect that there may be a need to distinguish

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<sup>31</sup> Licensees' Response to the Memorandum and Order of November 14, 1990 of the Atomic Safety and Licensing Board Re ALAB-939, January 10, 1991, at 2-3, citing Appl. Dir. No. 6, ff. Tr. 10,222, Appendix 1 at 4, 8; Tr. 10,181-82, 10,464-66, and 10,551-52.

<sup>32</sup> New Hampshire's January 10, 1991 Memorandum at 2.

<sup>33</sup> As stated in LBP-90-12,

[T]he State feels that if a release of radiation warranted movement of the public, they are much more likely to be afforded meaningful dose reductions by moving out of the EPZ than by moving to a shelter within the EPZ. This is the case since the members of the public would be, in effect, "evacuating" to a shelter. This action would require forming family groups or social units prior to moving, deciding whether to seek shelter or evacuate spontaneously, choosing a mode of transportation (i.e., walk or ride), seeking a destination (i.e., home or shelter), and undertaking the physical movement. Furthermore, since sheltering is a temporary protective action, those that sought public shelter would be faced with the prospect of assuming some dose while seeking shelter, more while sheltering, and even more during a subsequent evacuation.

<sup>31</sup> NRC at 445.

<sup>34</sup> Licensees' January 10, 1991 Response at 3.

between suitable and unsuitable shelter.<sup>35</sup> Mr. Bond's testimony on this point is an aberration and was not given weight by the Licensing Board in LBP-88-32, *supra*.

#### IV. CERTIFIED QUESTION

For the reasons stated above, the Licensing Board cannot comply with the directive in ALAB-939 to ensure that the stated matters be clarified based upon evidence adduced during the course of the hearing because there have been material changes in the NHRERP since the close of the evidentiary record. No party disputes that there have been changes relating to protective actions planned for ERPA-A. Nor is the nature of the changes in dispute. The changes have been established by reliable, albeit non-evidentiary, information.<sup>36</sup>

The Licensees and the NRC Staff urge this Board to certify to the Appeal Board a question, an affirmative answer to which would permit considering the posthearing information as a basis for resolving the ALAB-939 issues.<sup>37</sup>

Intervenors correctly sense that such a course would lead to a resolution of the remanded issues without reopening the evidentiary record. They oppose the question proposed by Licensees and stand by their position that this Board should reopen the record, permit discovery, and conduct a hearing on the beach sheltering issues. In the alternative, Intervenors propose a question to be certified which hypothesizes that the shelter-in-place option as understood in ALAB-939 remains a protective action for ERPA-A under the NHRERP. They would require a litigation of the protection afforded to those in the beach population who would evacuate under a shelter-in-place option.<sup>38</sup>

We cannot accept Intervenors' advice to reopen the evidentiary record, in part, because we lack jurisdiction to do so. Our jurisdiction, as we understand ALAB-939, is limited to examining the evidentiary record as it existed at the close of the hearing.

Even assuming jurisdiction, we would not reopen the evidentiary record for the litigation sought by Intervenors. For one thing, Intervenors wish to amend a record that "does not reflect any calculation as to the level of dose that will be received by the evacuating portion of the beach population under the present 'shelter-in-place' option."<sup>39</sup> Apparently the Intervenors have forgotten the

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<sup>35</sup> 32 NRC at 174 nn.40, 41.

<sup>36</sup> Stipulation and Reference Document; Memorandum of the State of New Hampshire on ALAB-939; and the attestation under oath by George Iverson, Director of the New Hampshire Office of Emergency Management.

<sup>37</sup> Licensees' Suggestion for Certified Question, January 28, 1991; NRC Staff Comments on Licensees' Proposed Certification Question Regarding Sheltering, February 15, 1991.

<sup>38</sup> Response of the Mass AG and NECNP to the Licensing Board's Order of January 24, 1991, February 14, 1991.

<sup>39</sup> Intervenors' Memorandum, January 10, 1991.

Commission's rejection of their measured-doses concept of emergency planning. CLI-90-2, 31 NRC 197, *aff'd*, *Commonwealth of Massachusetts v. NRC*, Nos. 89-1309, 90-132, 90-1218, \_\_\_ F.2d \_\_\_, slip op. at 33 (D.C. Cir. January 25, 1991) (exclusion of Sholly/Beyea testimony not improper).

In addition, the Intervenors do not explain how a reopened litigation on sheltering versus evacuation of the beach population will bring a better understanding of how to avoid doses to that population. There has already been extensive litigation of that very issue. LBP-88-32, 28 NRC at 750-76.

The general tenor of Intervenors' pleadings before us on ALAB-939 issues is that they wish to resurrect a defeated litigation strategy that, under NRC regulations, sheltering is an essential protective action option for the general beach population.<sup>40</sup> However, in sending this matter down to us, the Appeal Board expressly stated that it does not attempt to impose upon New Hampshire officials a requirement that they adopt sheltering for that population. ALAB-939, 32 NRC at 174, 178.

## V. CONCLUSION

The Board certifies the following question to the Appeal Board:

May the Licensing Board treat the posthearing amendments to the New Hampshire Radiological Emergency Response Plan (NHRERP) and the January 10, 1991 Memorandum of the State of New Hampshire, attested to by Mr. Iverson (Tr. 28,493), to the effect that evacuation is the only planned protective action for the general beach population in ERPA-A

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<sup>40</sup> *E.g.*, Intervenors' Memorandum at 2-5; Response at 4, 7.

at the General Emergency Level under the NHRERP as resolving the matters posed in ALAB-939?

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Richard F. Cole  
ADMINISTRATIVE JUDGE**

**Kenneth A. McCollom (by I.W.S.)  
ADMINISTRATIVE JUDGE**

**Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
March 12, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman  
George C. Anderson  
Peter S. Lam

In the Matter of

Docket Nos. 72-10  
50-282-RS  
50-306-RS  
(ASLBP No. 91-627-01-RS)  
(Independent Spent Fuel  
Storage Installation)

NORTHERN STATES POWER  
COMPANY  
(Prairie Island Nuclear Generating  
Plant, Units 1 and 2)

March 14, 1991

MEMORANDUM AND ORDER  
(Dismissing Proceeding)

Petitioners for leave to intervene in the above-identified proceeding, Minnesota Department of Public Service, Minnesota Environmental Quality Board, and the Prairie Island Mdewakanton Sioux Indian Community, each represented by counsel, have filed a Notice of Withdrawal in this proceeding following the reaching of a Settlement Agreement dated March 8, 1991, between the applicant, Northern States Power Company, the NRC Staff, and the three petitioners.

There being no other matters outstanding, this licensing proceeding is hereby *dismissed* without prejudice.

**IT IS SO ORDERED.**

**FOR THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Robert M. Lazo, Chairman  
ADMINISTRATIVE JUDGE**

**Issued at Bethesda, Maryland,  
this 14th day of March 1991.**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman  
Harry Foreman  
Ernest E. Hill

In the Matter of

Docket No. 30-16055-CivP  
(ASLBP No. 89-592-02-CivP)  
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.

(One Factory Row,  
Geneva, Ohio 44041)

March 19, 1991

**SUMMARY DISPOSITION**

A party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided by regulation must set forth specific facts showing that there is a genuine issue of fact. 10 C.F.R. § 2.749(b); *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 NRC 593, 595-96 (1982).

**SUMMARY DISPOSITION**

When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. Where the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Federal Rule of Civil Procedure 56(e) and (f) and Advisory Committee Note; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983).

## SUMMARY DISPOSITION

If there is no material factual dispute and the case can be decided as a matter of law, no due process has been denied. Federal Rule of Civil Procedure 56(c) and Advisory Committee Note; *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

## DISCOVERY: MATERIALS LICENSE PROCEEDINGS

The Commission's regulations do not prohibit licensing boards from ordering informal or formal discovery upon the request of licensees or intervenors prior to a prehearing conference in a materials license proceeding. The regulatory prohibition against discovery prior to a prehearing conference found in 10 C.F.R. § 2.740(b)(1) is limited to "an application for a construction permit or an operating license for a production or utilization facility."

## MEMORANDUM AND ORDER (Granting NRC Staff Motion for Summary Disposition and Terminating Proceeding)

### I.

In this enforcement action proceeding, the NRC Staff comes before the Atomic Safety and Licensing Board seeking a summary end to litigation concerning a civil penalty imposed on Advanced Medical Systems, Inc. ("AMS"), of Geneva, Ohio, for alleged license violations occurring in late 1984. As a result of investigations conducted by the Staff of the Nuclear Regulatory Commission, the Director of the Office of Inspection and Enforcement issued a Notice<sup>1</sup> in June of 1985 which concluded that four regulatory and license condition violations had occurred, together constituting a single Severity Level III violation under Commission policy considerations.<sup>2</sup> As a result of further investigations, the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operational Support issued an Order Imposing Civil Penalties in the amount of \$6250 against AMS in May of 1989.<sup>3</sup>

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<sup>1</sup> Advanced Medical Systems, Inc., Notice of Violation and Proposed Imposition of Civil Penalties, June 23, 1985.

<sup>2</sup> General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, Appendix C.

<sup>3</sup> Advanced Medical Systems, Inc., Order Imposing Civil Monetary Penalties, May 30, 1989 (54 Fed. Reg. 24,433, June 7, 1989).

The Staff now comes before us seeking three independent determinations: (1) that there are no factual disputes remaining for hearing; (2) that there were violations of either Commission regulations or AMS license conditions; and (3) that the Director correctly interpreted Commission policy in his decision to impose the Severity Level III fine.

The four alleged violations are as follows:

- (1) An AMS employee received a whole-body dose of 2.9 rems in the fourth calendar quarter of 1984. This dose exceeded the 10 C.F.R. § 20.101(a) limit of 1.25 rem per calendar quarter because conditions provided in 10 C.F.R. § 20.101(b), which would permit a greater occupational dose, were not applicable;
- (2) On November 6 and 21, 1984, inadequate radiation surveys of the Licensee's hot cell were conducted prior to entry of the cell by AMS employees. The Licensee's method of surveying the hot cell violated 10 C.F.R. § 20.201(b);
- (3) On the afternoon of November 21, 1984, two AMS employees failed to read their dosimeters at intervals consistent with the anticipated dose rate they would receive while working in the hot cell. This failure violates Condition 16 of the AMS license which references the AMS "Radiation Safety Procedures Manual, ISP-1," dated July 1983, § 7.2.c; and
- (4) The dosimeters used by the two individuals who worked in the hot cell on November 6 and 21, 1984, had not been calibrated for more than 180 days. The failure to calibrate dosimeters violates the AMS License Condition 16 which references Section E of the AMS application, which requires dosimeters to be calibrated at intervals of 180 days or less or before first use, if longer than 180 days since last calibration.

## II.

In order for the Staff to prevail, it must first demonstrate that there are no material factual issues remaining in the case. The Commission's Rules of Practice provide for summary disposition of a case where the statements of the parties in affidavits and other filings show that there are no genuine issues of material fact.<sup>4</sup> If there are no material facts in dispute, the Board may rule for the moving party as a matter of law.

The party moving for summary disposition is required by Commission regulations to annex to the motion a separate, short, and concise statement

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<sup>4</sup> 10 C.F.R. § 2.749(d).

of the material facts as to which the moving party contends that there is no genuine issue to be heard.<sup>5</sup> The party opposing the motion is required by the same regulations to annex to any answer a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard.<sup>6</sup> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.<sup>7</sup> A party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided by regulation must set forth specific facts showing that there is a genuine issue of fact.<sup>8</sup>

The burden of proof with respect to summary disposition is upon the movant who must demonstrate the absence of any genuine issue of material fact.<sup>9</sup> The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion.<sup>10</sup> The opposing party need not show that it would prevail on the issues but only that there are genuine issues to be tried.<sup>11</sup> When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. Where the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so.<sup>12</sup>

A. The Staff's Motion sets forth five statements of material fact about which, the Staff claims, no genuine issue exists:

- (1) An AMS employee received a whole-body dose of 2.9 rems in the fourth quarter of 1984;
- (2) On November 6 and 21, 1984, surveys of radiation levels at the door of the hot cell at the AMS facility were the only surveys made to

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<sup>5</sup> 10 C.F.R. § 2.749(a); *Dairyland Power Cooperative (La Crosse Boiling Water Reactor)*, LBP-82-58, 16 NRC 512, 520 (1982).

<sup>6</sup> See *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; *Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, LBP-82-17, 15 NRC 593, 595-96 (1982).

<sup>9</sup> *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, ALAB-182, 7 AEC 210, 217 (1974).

<sup>10</sup> See *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, LBP-74-36, 7 AEC 877 (1974), and cases cited therein.

<sup>11</sup> *Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-12, 23 NRC 414, 418 (1986).

<sup>12</sup> *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983). We note at this juncture that AMS has neither attached affidavits to its Answer nor offered explanation as to why it chose not to do so. Instead, AMS has mounted its defense by relying on statements made in the transcribed interviews the Staff has attached to its Motion. Counsel for AMS is not unfamiliar with summary disposition procedures and the use of affidavits. See LBP-90-17, 31 NRC 540 (1990). While this tactic is not in itself fatal to the AMS cause (see *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-443, 6 NRC 741, 752-54 (1977)), it provided AMS with little in the way of direct, contradictory evidence to aid its effort to establish the existence of genuine issues of material fact.

assess the possible exposure of AMS employees who worked in the hot cell;

- (3) The surveys made at the door of the AMS hot cell on November 6 and 24, 1984, were not adequate to detect the radiation level within the hot cell;
- (4) On November 21, 1984, two AMS employees failed to read their dosimeters between entries to the hot cell;
- (5) Dosimeters used by two AMS employees on November 6 and 21, 1984, had not been calibrated for more than 180 days.

We will address these factual contentions first, *seriatim*; then we will turn to the other issues in this proceeding.

B. *Contention 1.* An AMS employee received a whole-body dose of 2.9 rems in the fourth calendar quarter of 1984.

The Staff meets its initial burden by offering in support of its contention a signed letter from Harold Irwin of Advanced Medical Systems, Inc., dated March 8, 1985, sent to the U.S. Nuclear Regulatory Commission in which he states that an AMS employee received a 2900-millirem exposure during the month of November 1984.<sup>13</sup> This fact is further supported by a Radiation Detection Company (Sunnyvale, California) Dosimetry Report for the month of November 1984 which shows the AMS employee named in the Irwin letter to have received 2900 millirems of radiation during that time period.<sup>14</sup>

AMS does not dispute this statement of material fact in its Answer. The statement is deemed admitted.<sup>15</sup>

*Contention 2.* On November 6 and 21, 1984, surveys of radiation levels at the door of the hot cell at the AMS facility were the only surveys made to assess the possible exposure of AMS employees who worked in the hot cell.

The Staff offers the sworn and transcribed statements of two individuals present at the cell entries on November 6 and 21, "Individual A" and Glenn Sibert, respectively, one of the AMS employees who entered the hot cell and his supervisor, and a third individual, Howard Irwin, who is a self-described "manager" in the AMS corporate hierarchy. The three individuals describe the preentry procedures conducted on the two dates in question. As described, one air sample reading was taken by remote sensor on each day to detect airborne contamination in the cell.<sup>16</sup> Also, one radiation survey was taken at the cell door each day using a hand-held radiation monitor to detect nonairborne radiation levels within the cell.<sup>17</sup> AMS documents referred to as "ISP-18" also show that

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<sup>13</sup> Staff Motion, Attach. 1, Attach. D at 1.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. 10 C.F.R. §2.749(a).

<sup>16</sup> Staff Motion, Attach. 7 at 13-14, Attach. 8 at 26-28, Attach. 6 at 24.

<sup>17</sup> *Id.*, Attach. 6 at 14, Attach. 8 at 27-28, 47-48, Attach. 7 at 24-27.

“stay time” estimates for individuals entering the cell were based on radiation levels detected at the cell door.<sup>18</sup>

The AMS Answer counters by stating that preparation for the cell entries “began several days in advance.”<sup>19</sup> AMS offers statements by Glenn Sibert to support this assertion:<sup>20</sup>

Prior to going into the cell we always picked and checked the cell for stray pellets, because the way they were buying the cobalt it comes in a canister and when you cut it open it flies in every direction. We had to spend at least two or three days scanning for pellets every time we went in. . . . With the probe, a Victoreen 500 meter . . . [we would scan [the cell] using manipulators. . . . We get it as low as we could get it with that meter. Then the next procedure was to get ready to go in.”

Howard Irwin also agrees that remote-probe radiation detection is performed prior to cell entry as part of the cell decontamination procedures.<sup>21</sup>

The AMS Answer misses the mark. Neither Mr. Sibert nor Mr. Irwin states that the remote sensor was used to assess possible exposure of AMS employees who worked in the hot cell on November 6 and 21. They say only that the remote sensor was used as part of the preentry decontamination procedures.<sup>22</sup> Although decontamination would have lowered the potential radiation risks in the hot cell, it is, in itself, immaterial to the Staff’s assertion that the cell-door surveys were the only surveys made to assess potential radiation exposure levels.

By not disputing the Staff’s factual statement in its Answer the Licensee has failed to carry its burden. The statement is deemed to be admitted.

*Contention 3.* The surveys made at the door of the AMS hot cell on November 6 and 21, 1984, were not adequate to detect the radiation level within the hot cell.

As the foundation for this assertion, the Staff provides the results of the actual dosimeter readings taken from the hot-cell entries conducted on November 6 and 21. The results demonstrate that the actual exposure readings were nearly 50% higher on both dates than the anticipated exposures calculated on the basis of the door surveys taken on those dates.<sup>23</sup>

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<sup>18</sup> *Id.*, Attach. 1 at Attach. B.

<sup>19</sup> AMS Answer at 6.

<sup>20</sup> Staff Motion, Attach. 8 at 24-25.

<sup>21</sup> *Id.*, Attach. 7 at 25-27.

<sup>22</sup> Two other points are tangentially significant. First, Glenn Sibert admitted that the remote probe “could only survey to a certain point, and then it got to the point where you had to open up the cell door and stick a meter in.” *Id.*, Attach. 8 at 59. Second, Howard Irwin admitted that the remote probe was not calibrated. *Id.*, Attach. 7 at 26. It appears that the remote probe would have been incapable of providing accurate measurements of potential radiation exposure even if it had been used. Therefore, whether or not the remote probe was used becomes immaterial to whether or not a regulatory violation occurred, as will be discussed, *infra*.

<sup>23</sup> Staff Motion, Attach. 1 at 4, 6.

There is little, if any, merit to the AMS rebuttal. The AMS Answer makes a series of assertions that skirt but do not confront the issue presented by the Staff. AMS points to Mr. Sibert's unsupported opinion that the cell door would always have the greatest potential for radiation exposure, to Mr. Sibert's opinion that adequate surveys were performed, and the assertion that most of the required work leading to exposure would be conducted at the door to the cell.<sup>24</sup> In addition, AMS argues that "no evidence was ever presented to demonstrate that Mr. Sibert's results would have been different had he done his surveys any differently."<sup>25</sup>

These statements do little to either rebut the Staff's claim or to establish the existence of a material fact in dispute. As AMS admits, on both days that the hot-cell entries were made, the only *calibrated* radiation readings were ones conducted at the door of the hot cell by slightly opening the door and extending a hand-held radiation detector into the cell. The Staff has presented direct evidence, in the form of signed AMS reports, that the cell-door survey technique underestimated actual radiation exposure by 50% on both dates in question. AMS has neither challenged those readings nor offered an explanation for the underestimation. The Staff has presented unrefuted evidence that the radiation surveys conducted on November 6 and 21, 1984, were inadequate for the purposes of assessing radiation levels in the hot cell, and AMS is remiss by not countering that factual assertion in its Answer. The fact is deemed to be admitted.

*Contention 4.* On November 21, 1984, two AMS employees failed to read their dosimeters between entries to the hot cell.

On November 21, the hot-cell door was opened twice — once in the morning and once in the afternoon. In the morning, Individuals A and B pushed the cask containing cobalt-60 into the cell. There is no dispute that there occurred only one cell entry by each individual during the morning. After the cell door was closed that morning, Individual A checked his dosimeter but did not record the results.<sup>26</sup> Individual B believes he read his dosimeter after leaving the decontamination room and says he "probably" told someone the reading "out of habit."<sup>27</sup> There is no evidence that either of the dosimeter readings taken in the morning were ever recorded.<sup>28</sup>

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<sup>24</sup> AMS argues that since the cask containing the cobalt shipment is of such a substantial size, the employees do not actually enter the room when they wheel the cask in the hot cell. Therefore AMS asserts that the door survey is adequate. However, the November 6 entry entailed replacing light bulbs and a wall bracket, and the November 21 entry entailed replacing the frame, table top, and trashbag, and the installation of the sink after the cask had been removed. *Id.*, Attach. 1 at 5, Attach. 9 at 25.

<sup>25</sup> AMS Answer at 7 and cites therein.

<sup>26</sup> Staff Motion, Attach. 6 at 35-36.

<sup>27</sup> Staff Motion at 26-27.

<sup>28</sup> While the morning entry plays no part in the dispute at hand, it is instructive in defining the AMS rebuttal argument.

In the afternoon, the cell door was again opened. After Individuals A and B entered the cell to move the cask out, they had trouble with the device that aids the movement of the cask. They stepped out of the cell into the decontamination room and moved behind the cell door to receive further instructions from Glen Sibert. After learning how to correct the problem, Individuals A and B again entered the cell, made the necessary adjustments, and moved the cask out of the cell. Next, Individual B reentered the cell to replace the frame and table top. Individual A then reentered the cell to install the sink and to replace the trash bag on the cell wall. Both Individuals A and B state that at least three cell entries were made in the afternoon.<sup>29</sup> Both Individuals A and B state that each read his dosimeter only after they exited the decontamination room when the work was completed.<sup>30</sup>

AMS counters with three arguments — that only one cell entry was made in the afternoon; that Josephine Powell, whose job it was to monitor how long each individual remained in the cell, requested Individuals A and B to read their dosimeters through the PA system; and that Mr. Sibert remembered Individuals A and B checking their dosimeters and calling out an interim reading.<sup>31</sup>

The first argument would directly counter the Staff's assertion if in fact only two cell *entries* had taken place. Since both Individuals read their dosimeters after they left the decontamination room in the morning, and if there was only one cell entry in the afternoon, technically, an interim reading would have been taken prior to cell entry. However, the evidence upon which AMS relies to support this semantic argument is less than solid.

AMS points to statements made by Glen Sibert to argue that only two cell entries were made on November 21. In Mr. Sibert's opinion, a "typical cell procedure" amounted to "[p]ush[ing] the container in, unload[ing] it and pull[ing] it out of the cell. Just really two [entries]."<sup>32</sup> He repeatedly states that only two entries were made on November 21. However, this assertion becomes clearer when he admits that in his opinion, when the hot-cell door is open, the hot cell and the decontamination room became one in the same for the purposes of a "cell entry," i.e., if the door is open, stepping out of the hot cell into the decontamination room does not mean that you had to "reenter" the hot cell.<sup>33</sup>

On the other hand, Mr. Sibert admits that the two AMS employees working in the hot cell had to come out and stand behind the cell door in the decontamination room to receive instructions when they started to have trouble removing the container.<sup>34</sup> He also admitted that if a person is in the decontamination room,

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<sup>29</sup> Staff Motion, Attach. 6 at 20, Attach. 8 at 25.

<sup>30</sup> *Id.*, Attach. 6 at 20-21, 36, Attach. 8 at 26.

<sup>31</sup> AMS Answer at corrected page 8.

<sup>32</sup> Staff Motion, Attach. 8 at 52-53, 70.

<sup>33</sup> *Id.* at 54.

<sup>34</sup> *Id.* at 53-54.

that person cannot be in the hot cell.<sup>35</sup> More on point, earlier in his interview he directly contradicts his later statements concerning hot-cell entries:<sup>36</sup>

- Q. I would like to have your definition of what constitutes an entry into the cell as far as time in the cell. While you're in the decontamination room, is it after you go into the cell itself?
- A. Into the cell itself. Decontamination room is one thing and the cell is different. Between the decon room and the cell you got 5½ feet high density concrete and in the lab you got regular double doors with vents.

Mr. Sibert's inconsistent statements simply lack credibility.

The AMS arguments alleging that "one minute dosimeter checks were requested by Josephine Powell through the PA system" and that "she let them know when to check their dosimeters"<sup>37</sup> do little to establish whether or not the dosimeters were actually read prior to cell entry or at appropriate intervals during the procedure. AMS has not offered any affidavit by Ms. Powell stating either that she made the requests or that she saw the dosimeters being read.

The closest AMS comes to directly challenging the Staff's statement is an assertion that Mr. Sibert recalled one of the individuals calling out an interim dosimeter reading of 160 millirems during the procedures.<sup>38</sup> However, this statement by Mr. Sibert also proves different than it appears on first blush:<sup>39</sup>

- Q. Do you know if on either event, the 6th or the 21st, they checked their dosimeters at the one-minute interval?
- A. I recall asking them what they picked up, and —
- Q. That would be —
- A. I asked [Individual A] and [Individual B] and it seems to me, like they told me, that they picked up 160MR.
- Q. Okay, that doesn't jive with the — doesn't coincide with the information that they recorded. They got about 845MR dosimeter reading.
- A. Yes. Is that for the 21st?
- Q. Yes, we're on the 21st. That's the date.
- A. Well, 845 is their final dosimeter reading.
- Q. Okay, that was at the — at the end of how many entries was that?

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<sup>35</sup> *Id.* at 55.

<sup>36</sup> *Id.* at 38.

<sup>37</sup> AMS Answer at 8 (corrected page).

<sup>38</sup> *Id.*

<sup>39</sup> Staff Motion, Attach. 8 at 51-52, 70-71.

- A. That would be — their final dosimeter reading would be at the end of that work time. Now see, what had to be done that day, the container had to be put into the cell. I have to go out of the cell, or out of the lab, take a shower, get dressed, come back out to the cell window to get ready to unload this container.

While I'm getting it unloaded, these two are in the lab out of the high radiation area. They are out of the — over by the view window where you can look into the lab, and they have to wait until I get that container unloaded before we make preparations to take the container out of the cell.

- Q. Okay, so you remember them making how many dosimeter checks during those intervals?

- A. I know one, 160, is what they told me they picked up, and that's about all I can remember.

. . . .

- Q. Did these individuals that were working there read their dosimeters at the times indicated prior to entry and at times within the work period?

- A. The dosimeters were read.

- Q. Earlier you indicated that you don't recall seeing them read these dosimeters during the work period. Are you assuming they did?

- A. They did read them. You got to read them through a plastic bag.

- Q. Earlier in the interview you indicated that you don't recall having seen them do this. You just —

- A. No, I didn't see them. Like I said, I am not aware — I can't be a mother hen to them. Otherwise — I can't watch every move they make, because during the course of cobalt being put away I'm in and out, in and out.

On the basis of the statements made during the investigatory interviews, the 160-millirem reading was one taken after the two AMS employees left the decontamination room in the morning, prior to suiting up again for the afternoon entries. Both individuals remember reading their dosimeters at that time. Individual B stated that he probably called out his dosimeter reading. Both individuals have stated that they did not read their dosimeters during the afternoon procedures until they left the decontamination room for the final time.<sup>40</sup> AMS has offered no credible evidence to raise a doubt as to the veracity of those statements.

*Contention 5.* Dosimeters used by two AMS employees on November 6 and 21, 1984, had not been calibrated for more than 180 days.

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<sup>40</sup>The only other potential eyewitnesses to the hot-cell entries would have been Josephine Powell and whoever was stationed at the monitoring window timing the entries. Mr. Sibert never saw the dosimeters being read and AMS failed to offer any affidavits by those persons who would have been at the monitoring window instructing that the dosimeters be read. Indeed, we find it peculiar that Counsel for AMS did not attach an affidavit from Ms. Powell.

The AMS Answer states:<sup>41</sup>

[T]he standard practice for calibration of dosimeters was to compare the dosimeter readings with film badge readings. . . . This practice modified a 1979 procedure which was found to be unworkable because it yielded a 25% discrepancy. . . . The NRC has never been able to produce any evidence that the dosimeters were not in calibration or that the method of calibration used in November, 1984 was not adequate.

Once again, while the NRC Staff may dispute whether the calibrations were acceptable, there is testimony that calibrations were performed.

Unfortunately, both the Staff and AMS have either misstated or misinterpreted the material fact to be argued. The question is not whether the dosimeters were calibrated, because that is immaterial to the issue of whether the dosimeters were calibrated in the manner set forth in the AMS license agreement.<sup>42</sup> It is that fact that is germane to the issue of a license violation. Regardless, the pleadings and accompanying documents demonstrate that AMS has admitted deviating from license conditions with regard to the calibration of the dosimeters used in November 1984.<sup>43</sup> The issue is moot.

C. We next address whether or not AMS has violated Commission regulations or conditions that are part of its own license agreement in order to determine the larger issue of whether the Director's actions were correct with respect to the imposition of the monetary penalty against AMS. To do so, we once again revisit the four violations as they are set forth in the Notice of Violation of June 28, 1985, and the Staff Summary Disposition Motion.

*Violation 1.* An AMS employee received a whole-body dose of 2.9 rems in the fourth calendar quarter of 1984. This dose exceeds the 10 C.F.R. § 20.101(a) limit of 1.25 rem per calendar quarter. Conditions provided in 10 C.F.R. § 20.101(b) which permit a greater occupational dose are not applicable in this situation.

On May 24, 1988, Dr. Seymour Stein, President of AMS, wrote to the Director, Office of Inspection, stating, without qualification, that "AMS wishes to concede that technically a violation of 10 CFR 20.101(a) did occur."<sup>44</sup> The Board finds no reason to disagree.

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<sup>41</sup> AMS Answer at 8-9.

<sup>42</sup> The statement of material fact argued by the Staff should have more appropriately read: Dosimeters used by two AMS employees on November 6 and 21, 1984, had not been calibrated for more than 180 days according to the calibration techniques set forth in the AMS license agreement.

<sup>43</sup> Staff Motion, Attach. 3 at 3-4, Attach. 7 at 35-37.

<sup>44</sup> *Id.*, Attach. 4. Section 20.101(a) limits the whole-body dose of an individual in a restricted area to 1.25 rems per calendar quarter, except as provided by 10 C.F.R. § 20.101(b). The technical violation involved AMS's failure to document Individual B's past exposure levels under section 20.101(b)(1) prior to his entry into the hot cell in November. The only written record of Individual B's exposure history extant was signed in January 1985 — after Individual B had received a 2.9-rem dose of radioactivity — and postdated to September 1984 to make it appear that regulations had been complied with. See AMS Answer at 4.

*Violation 2.* On November 6 and 21, 1984, inadequate surveys at the door of the hot cell at the AMS facility were made. This failure to adequately survey a high-radiation area, prior to potential exposure to humans, violates 10 C.F.R. § 20.201(b).

Section 20.201(a) requires that each licensee make such surveys as may be necessary to comply with all sections of 10 C.F.R. Part 20. As defined in section 20.201(a), "survey" means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. Mr. Sibert stated that the only survey of the radiation level in the hot cell was the one taken at the door to the cell and the air sample to determine airborne contamination.<sup>45</sup> Howard Irwin also stated that the in-cell monitor was only used for decontamination and not to assess the amount of time workers could stay in the hot cell.<sup>46</sup> Moreover, the in-cell monitor was not calibrated during the November entries.<sup>47</sup> When a comparison is made between the exposure estimate based on the cell-door survey and the actual dose received by the two employees, the calculation from the cell-door survey underestimates the actual exposure by 50%.<sup>48</sup> As we have already noted, a radiation survey with a margin of error of 50% is not a reliable survey capable of protecting health or promoting safety in any stretch of the imagination. We can find no fault with the Director's decision pertaining to this violation of 10 C.F.R. § 20.201(a) and (b).

*Violation 3.* On November 21, 1984, two AMS employees failed to read their dosimeters at intervals consistent with the anticipated dose rate. This failure violates Condition 16 of the AMS license which references the AMS "Radiation Safety Procedures Manual, ISP-1," dated July 1983, § 7.2.c.

License Condition No. 16 requires that licensed material be possessed and used in accordance with statements, representations, and procedures contained in "Radiation Safety Procedures Manual, ISP-1" dated July 1983. Section 7.2.c, "Personnel Monitoring," of ISP-1 states,

Work in high dose areas will be preceded by a survey with appropriate monitoring equipment and an estimated total accumulated exposure determined. . . . The pencil type dosimeters will be read at intervals consistent with the anticipated dose rate to determine that the actual exposure is not greater than the anticipated exposure.<sup>49</sup>

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<sup>45</sup> Staff Motion, Attach. 8 at 25, Attach. 6 at 13-15, 19.

<sup>46</sup> *Id.*, Attach. 7 at 25-27.

<sup>47</sup> *Id.* at 26.

<sup>48</sup> *Id.*, Attach. 1 at 4-6. AMS personnel should have become aware of the discrepancy between the estimated and actual exposure after the November 6 entry. However, no corrections were made, based on the information gathered on November 6, prior to the November 21 entry.

<sup>49</sup> The Staff's reliance upon supporting documents as the basis for license requirements is consistent with the Atomic Energy Act, Commission regulations, and past Commission practice. See Atomic Energy Act of 1954, § 182(a), 42 U.S.C. § 2232 (Commission authority to require supplemental information from license applicant and

(Continued)

There is no dispute that on November 21, 1984, two individuals worked in the Licensee's hot cell, an area where high radiation levels exist.<sup>50</sup> The Licensee estimated a work exposure for the day to be approximately 750 millirems and established 1 minute as the "maximum allowable exposure time before checking dosimeters."<sup>51</sup> When the two individuals who entered the hot cell read their dosimeters for the first time that afternoon (upon exiting the decontamination room), both 1-rem dosimeters were off scale. Individual A had received a 1625-millirem dose and Individual B had received a 1600-millirem dose for that day, more than twice the estimated dose for each person. Had the dosimeters been read consistent with anticipated dose rates, at approximately 1 minute, the overexposures should not have occurred.

AMS has produced no evidence to support a claim that dosimeters were read consistent with anticipated dose rates. The two individuals who entered the cell have both stated that they did not read their dosimeters until the end of the procedure. There is sufficient, un rebutted evidence to find a violation of License Condition 16.

*Violation 4.* On November 6 and 21, 1984, the Licensee allowed two individuals to enter a high-radiation area equipped with dosimeters that had not been calibrated within a 180-day time period prior to their use.

License Condition No. 16 requires that licensed material be possessed and used in accordance with statements, representations, and procedures contained in the application received July 16, 1979, and in certain referenced documents. Schedule E of the application states that dosimeters will be calibrated at intervals of 180 days or less or before first use if longer than 180 days since last calibration. The Licensee is required, in accordance with the provisions of License Condition No. 16, to calibrate dosimeters by using a calibrated (cobalt) radiation source.<sup>52</sup> Both Dr. Stein and Howard Irwin acknowledged that dosimeter calibration procedures at AMS involved calibrating dosimeters by comparison with film-badge readings instead of the procedure found in the AMS license agreement.<sup>53</sup>

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to incorporate such into license); 10 C.F.R. §30.34; 10 C.F.R. §35.26(b); Preamble to NRC Form 374 (5-84). Also, in late 1986, the Commission published notice in the *Federal Register* of its revision to 10 C.F.R. Parts 30-35. Final Rule, 51 Fed. Reg. 36,932 (1986). In that notice, the Commission gives a clear account of its regulatory program and licensing practices regarding byproduct material licenses of the type issued to AMS. See *id.* at 36,933.

<sup>50</sup> On April 25, 1985, the licensee made a survey of the interior of the hot cell utilizing a Victoreen 500 Electrometer with a model 550-6A high-energy probe. The survey showed radiation levels inside the cell as high as 81 rems per hour. This amount was approximately four times higher than the radiation level used by the Licensee when calculating cell stay times during November.

<sup>51</sup> Staff Motion, Attach. 1, Attach. C at 1.

<sup>52</sup> *Id.*, Attach. 5, Appendix at 4.

<sup>53</sup> *Id.*, Attach. 3 at 3-4, Attach. 7 at 35-37.

AMS is bound by its license agreement to follow the conditions of that agreement which clearly called for calibration by radiation source. Calibration by radiation source is the method used throughout the nuclear industry and is the only calibration method currently approved by the Commission.<sup>54</sup> By its own admission, AMS failed to follow license conditions in the calibration of its dosimeters. We therefore have no alternative than to find AMS in violation of License Condition No. 16.

### III.

The Staff Motion requests the Board's concurrence that the imposition of a civil penalty of \$6250 is "consistent with Commission policy."<sup>55</sup> The Staff has attached to its Motion an affidavit of James Lieberman, Director of the Office of Enforcement, which explains that the Staff's calculation of the amount of the civil penalty is in accordance with the Commission's "General Statement of Policy and Procedure for NRC Enforcement Actions."<sup>56</sup> In his affidavit, Mr. Lieberman states that the four violations are considered collectively as a Severity Level III violation as defined in the Policy Statement in § C.4 of Supplement IV and § C.1 of Supplement VI. Under Table 1B (Base Civil Penalties for Severity Levels) the base civil penalty amount for a Severity Level III violation is 50% of the amount listed in Table 1A, or in this case, \$5,000. Mr. Lieberman goes on to state:<sup>57</sup>

As provided in the Policy [Statement] under Section IV.B.3., the base civil penalty was increased by 25% in the June 28, 1985 Proposed Civil Penalties Notice because of the failure of AMS to implement previous corrective action for prior similar problems. Specifically, a March 1983 inspection resulted in a July 13, 1983 order Imposing Civil Monetary Penalties of \$4,000 because of circumstances surrounding an overexposure . . . . in or near the licensee's hot cell. . . . Those circumstances were similar to circumstances described in the June 28, 1985 Notice . . . . and included failure to follow procedures for checking dosimeters while working in a high dose rate area.

The AMS answer does not follow the usual procedural pleading the Board has seen most often in enforcement proceedings involving the imposition of civil penalties. It is the case, more often than not, that licensee's counsel seeks mitigation of the civil penalty.<sup>58</sup> Instead, AMS argues that the NRC Staff "erred

<sup>54</sup> *Id.*, Attach. 5 at 4.

<sup>55</sup> Staff Motion at 11.

<sup>56</sup> 10 C.F.R. Part 2, Appendix C.

<sup>57</sup> Staff Motion, Affidavit of James Lieberman (attached) at 2.

<sup>58</sup> AMS does cite portions of the Commission's Policy Statement regarding the imposition of civil penalties that have bearing on the mitigation of those penalties. However, no argument is made that these considerations were improperly overlooked in the Director's decision to impose the penalties.

in considering the alleged four violations to be collectively at a Severity Level III . . . due to the fact that they do not meet any of the conditions of Severity Level III either collectively or singularly . . . . [and] would be, at most, Level IV, not Level III [violations].”<sup>59</sup>

We have chosen to set out those portions of 10 C.F.R. Part 2, Appendix C — General Statement of Policy and Procedure for NRC Enforcement Actions — in this text because the language of that Statement leaves no room for doubt that the Director’s decision to levy a Severity Level III violation finds its foundation in those guidelines:

The following statement of general policy and procedure explains the enforcement policy and procedures of the U.S. Nuclear Regulatory Commission and its staff in initiating enforcement actions, and of presiding officers . . . in reviewing these actions. . . .

The purpose of the NRC enforcement program is to promote and protect the radiological health and safety of the public, including employees’ health and safety . . . by:

- Ensuring compliance with NRC regulations and license conditions;
- Deterring future violations and occurrences of conditions adverse to quality;
- Encouraging improvement of licensee and vendor performance . . . .

. . . Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures. In no case, however, will licensees who cannot achieve and maintain adequate levels of protection be permitted to conduct licensed activities.

. . . Severity Level III violations are cause for significant concern. Severity Level IV violations are less serious but are of more than minor concern; i.e., if left uncorrected, they could lead to a more serious concern. . . .

. . . While examples are provided in Supplements I through VIII for determining the appropriate severity level for violations in each of the eight activity areas, the examples are neither exhaustive nor controlling.

. . . Each of the examples in the supplements is predicated on a violation of a regulatory requirement.

. . . In some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations.

. . . Civil penalties are designed to emphasize the need for lasting remedial action and to deter future violations.

Civil penalties are proposed absent mitigating circumstances for Severity Level I and II violations, are considered for Severity Level III violations, and may be imposed for Severity

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<sup>59</sup> AMS Answer at 25. Counsel for AMS mounts this challenge in a portion of the AMS Answer entitled “V. Statement of Material Facts Which Are in Dispute. *Id.* Counsel goes on to state:

The basis of Mr. Lieberman’s judgement certainly raises a question of material fact. . . . [E]ven if the violations were properly Level III violations, James Lieberman’s statement that the imposition of the fine as being in accordance with 10 CFR Part 2, Appendix C . . . . is a material fact in dispute.”

*Id.* at 25-26. If the basis for the Director’s judgment is to be upheld in accordance with Commission regulations, it is clearly a question of law that will determine the outcome.

Level IV violations that are similar<sup>3</sup> to previous violations for which the licensee did not take effective corrective action.

. . . .

NRC reviews each proposed civil penalty case on its own merits and adjusts the base civil penalty values upward or downward appropriately. . . .

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<sup>3</sup>The word "similar," as used in this policy, refers to those violations which could have been reasonably expected to have been prevented by the licensee's corrective action for the previous violation.

Under Appendix C, Supplement IV, the Director identified an example of a Severity Level III violation with significantly similar, if not identical, circumstances surrounding the AMS violations of 10 C.F.R. §§ 20.101 and 20.102 regarding adequate radiation surveys and worker safety:

Substantial potential for an exposure or release in excess of 10 C.F.R. 20 whether or not such exposure or release occurs (e.g., entry into high radiation areas, such as under reactor vessels or in the vicinity of exposed radiographic sources, without having performed an adequate survey, operation of a radiation facility with a nonfunctioning interlock system);<sup>[60]</sup>

Under Appendix C, Supplement VI, the Director identified another example of a Severity Level III violation that, while broader in scope than the previous example, is representative of the Licensee's obligation to follow the express conditions of its materials license agreement under 10 C.F.R. Parts 30 through 35 regarding materials operations:<sup>61</sup>

Failure to control access to licensed materials for radiation purposes as specified by NRC requirements;<sup>[62]</sup>

We see no reason to disturb that portion of the Director's analysis. Moreover, even if we were to consider the AMS violations to be Severity Level IV violations, the policy guidelines clearly allow the Director the discretion to impose fines for Level IV, especially in the case of repeated violations, as is the case here.<sup>63</sup> The AMS argument that its violations amount to "Level IV,

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<sup>60</sup> 10 C.F.R. Part 2, Appendix C, Supplement IV — Severity Categories, *Health Physics 10 C.F.R. Part 20*, § C.4.

<sup>61</sup> In this context, 10 C.F.R. § 30.34(e) states:

The Commission may incorporate, in any license issued pursuant to the regulations in this part and Parts 31 through 35 and 39, at the time of the issuance, or thereafter by appropriate rule, regulation or order, such additional requirements and conditions with respect to the licensee's receipt, possession, use and transfer or byproduct material as it deems appropriate or necessary in order to:

- . . . .
- (2) Protect health or to minimize danger to life or property.

<sup>62</sup> 10 C.F.R. Part 2, Appendix C, Supplement VI — Severity Categories, *Fuel Cycle and Materials Operations*, § C.1.

<sup>63</sup> As stated earlier, AMS was fined \$4000 in 1983 for an overexposure with circumstances similar to the circumstances occurring in November 1985.

not Level III" violations carries no weight. Accordingly, we find the Director's decision to impose the civil penalty in the amount of \$6250 to be fully in accordance with Commission policy and see no reason to overturn the decision or to mitigate the penalty.

#### IV.

There remains one matter the Board has decided on its own to address. Counsel for AMS has argued that "Summary Disposition is not the appropriate administrative action to take . . . ." <sup>64</sup> Counsel opines that "all interrogatories [sic] were conducted in the absence of AMS's Counsel. As such, AMS has had no opportunity for cross-examination." <sup>65</sup> Counsel borrows language from *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), to support an argument that can be interpreted no other way than to imply that AMS has been denied due process if summary disposition is granted. A succinct statement from *Poller* has been used in the AMS Answer to illustrate this point: <sup>66</sup>

Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

We do not share the same view of summary disposition in the matter before us, for two reasons. First, from the time AMS petitioned for a hearing on this matter (June 20, 1989), or even from the time of the filing of the Staff's Motion (August 29, 1990) to the time the AMS Answer was submitted (October 4, 1990), there was significant passage of time to engage in voluntary discovery and to solicit interrogatories and affidavits from the people who would have been most informed on the circumstances taking place on the dates in question. There are many indications that AMS had direct access to the facts, as it appears that several of the individuals that AMS relies upon to make its case are either AMS employees or ex-employees located within close proximity to the AMS facilities. Moreover, even if adversarial posturing could have inhibited the effectiveness of voluntary discovery, we find nothing in the Commission's regulations that would have prohibited Counsel for AMS from petitioning the Board for formal discovery even prior to a prehearing conference. <sup>67</sup>

Second, our reading of *Poller* shows that case to be concerned with issues not present in the case before us — foremost among them, conspiracy. AMS

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<sup>64</sup> AMS Answer at 30.

<sup>65</sup> *Id.* at 11.

<sup>66</sup> *Poller, supra*, 368 U.S. at 473.

<sup>67</sup> The regulatory prohibition against discovery prior to a prehearing conference found in 10 C.F.R. § 2.740(b)(1) is limited to "an application for a construction permit or an operating license for a production or utilization facility."

misquotes from *Poller* the exact language that should have alerted Counsel that the case is inapposite:<sup>68</sup>

We look at the record on summary judgement in the light most favorable to . . . the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex *antitrust* litigation where *motive and intent play leading roles*, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot [emphases supplied]. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

There is no motive or intent at issue here, just facts. If there is no material factual dispute and the case can be decided as a matter of law, no due process has been denied.

## V.

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 19th day of March 1991, ORDERED:

1. The NRC Staff Motion for Summary Disposition (August 29, 1990) is granted;

2. Advanced Medical Systems, Inc., of Geneva, Ohio, is found to have violated Commission regulations and license conditions as those violations have been set forth in the Notice of Violation and Proposed Imposition of Civil Penalties (June 28, 1985);

3. The Order Imposing Civil Monetary Penalties (May 30, 1989) in the amount of \$6250 issued by the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operational Support is sustained; and

4. There being no additional issues pending in the matter, this Civil Penalty proceeding is terminated.<sup>69</sup>

Pursuant to 10 C.F.R. § 2.762, within 10 days after its service, any party may appeal this Memorandum and Order by filing a Notice of Appeal with the Commission. Each appellant shall file a brief supporting its position on appeal

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<sup>68</sup> AMS Answer at 11, quoting *Poller*, *supra*, 368 U.S. at 473. We note with disapproval that Counsel for AMS omitted the Justices' reference to "antitrust" litigation in the cited paragraph in its Answer.

<sup>69</sup> One companion case remains pending: *In the Matter of Advanced Medical Systems, Inc.* (Decontamination Order), Docket No. 30-16055-OM, ASLBP No. 87-555-01-OM.

within thirty (30) days, (or within forty (40) days if the Commission Staff is the appellant) after the filing of the Notice of Appeal.<sup>70</sup>

THE ATOMIC SAFETY AND  
LICENSING BOARD

Robert M. Lazo, Chairman  
ADMINISTRATIVE JUDGE

Harry Foreman (by R.M.L.)  
ADMINISTRATIVE JUDGE

Ernest E. Hill (by R.M.L.)  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
March 19, 1991

[Administrative Judges Harry Foreman and Ernest E. Hill concur with this Memorandum and Order but were unavailable to sign this final draft of the decision.]

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<sup>70</sup> See 10 C.F.R. § 2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944, Oct. 24, 1990).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair  
James H. Carpenter  
Charles N. Kelber

In the Matter of

Docket Nos. 50-327-OLA  
50-328-OLA  
(ASLBP No. 90-635-07-OLA)  
(Technical Specifications,  
Work Schedules)  
(Facility Operating Licenses  
Nos. DPR-77, DPR-79)

TENNESSEE VALLEY AUTHORITY  
(Sequoyah Nuclear Plant, Units 1  
and 2)

March 18, 1991\*

The Board dismissed this case on March 18, 1991, after a voluntary withdrawal of the petition based on an agreement of the parties that was encouraged by the Board.\*

MEMORANDUM AND ORDER  
(Dismissal of Petition)

Memorandum

On March 15, 1991, we received a telephone call from counsel for the Tennessee Valley Authority informing us that a settlement had been achieved

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\*Re-served April 1, 1991.

and that we should expect to receive by facsimile transmission a letter from James T. Springfield, Business Manager, IBEW Local 721 (Petitioner) to the Secretary of the Commission formally withdrawing the petition in this case. The withdrawal request, which we received on the 15th, stated in part:

TVA and the International Brotherhood Electrical (IBEW) Workers met on March 11 and 12, 1991, to discuss concerns and worked out an equitable resolution. TVA and the IBEW have come to a joint understanding which resolves safety concerns. The IBEW appreciates the Atomic Safety and Licensing Boards' efforts in helping both parties resolve this issue.

Accordingly, after having verified by telephone that the Staff of the Commission has no objection to dismissing this case (to which no party has officially been admitted), we have decided to dismiss the proceeding pending before us.<sup>1</sup>

### Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 18th day of March, 1991, ORDERED, that:

This case is *dismissed*.

THE ATOMIC SAFETY AND  
LICENSING BOARD

James H. Carpenter  
ADMINISTRATIVE JUDGE

Charles N. Kelber  
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

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<sup>1</sup>Since the letter of withdrawal, which was acceptable to the parties, does not discuss whether the petition is withdrawn with or without prejudice (an issue that would be important only in the unlikely event that Petitioner sought to refile its petition), we reach no decision on that issue.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtiss  
Forrest J. Remick

In the Matter of

Docket No. 50-322-OLA

LONG ISLAND LIGHTING  
COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

April 3, 1991

The Commission reviews Petitioners' appeal of three actions at the Shoreham facility. Because the Licensing Board ruling on which the appeal is based was preliminary and did not deny the petitions in their entirety, the Commission dismisses the appeal as interlocutory. Furthermore, the Commission finds that the Petitioners do not meet the standards for discretionary review of their petitions.

**RULES OF PRACTICE: INTERLOCUTORY APPEALS**

The [Commission's] Rules do not permit a person to take an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76 (1991).

**RULES OF PRACTICE: INTERLOCUTORY APPEALS**

A licensing board order that determines that petitioners lack standing, but which provides petitioners with additional time to correct defects in their original

petitions, is a preliminary ruling and does not constitute the denial of the petitions in their entirety.

**RULES OF PRACTICE: INTERLOCUTORY APPEALS  
(DISCRETIONARY REVIEW)**

To meet the standards provided for discretionary review of their submissions, petitioners must show that the Licensing Board ruling on their petitions would, "absent immediate appellate review, threaten [the petitioners] with serious irreparable harm or pervasively affect the basic structure of the proceeding." *See Shoreham, CLI-91-3, citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983).*

**RULES OF PRACTICE: INTERLOCUTORY APPEALS**

Where the Licensing Board provides petitioners an opportunity to correct the defects it perceived in their initial filings, petitioners retain the right to appeal the denial of those petitions if they should fail to satisfy the Licensing Board in their supplemental submissions.

**NEPA: ENVIRONMENTAL IMPACT STATEMENT  
(SEGMENTATION)**

As a general proposition, it is within the scope of NEPA and a proceeding on any license amendment to claim that the amendment requires an Environmental Impact Statement ("EIS") because it is an inseparable segment of a larger major federal action with a significant environmental impact.

**NEPA: ENVIRONMENTAL IMPACT STATEMENT  
(SEGMENTATION)**

A contention that alleges the need for an EIS for allegedly segmented actions that are wholly separate from and independent of a larger action, to be properly pled, will, at a minimum, need to offer some plausible explanation why an EIS might be required for an NRC decision approving the larger action *and* how the actions in question could, by foreclosing alternative methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

# MEMORANDUM AND ORDER

## I. INTRODUCTION

This matter is before the Commission on an appeal by the Shoreham-Wading River Central School District ("School District") and the Scientists and Engineers for Secure Energy ("SE2") (collectively "Petitioners") from an order entered by the Atomic Safety and Licensing Board ("Licensing Board"). See LBP-91-1, 33 NRC 15 (1991). Upon review, we have decided to deny the appeal because it is interlocutory.

## II. BACKGROUND

On October 17, 1990, the Commission forwarded six petitions for intervention and requests for hearings (three by each of the Petitioners) to the Licensing Board for proceedings under the Commission's Rules of Practice. See CLI-90-8, 32 NRC 201, 209 (1990) ("CLI-90-8"), *aff'd*, CLI-91-2, 33 NRC 61 (1991) ("CLI-91-2"). These petitions sought administrative hearings regarding three actions or proposed actions at the Shoreham facility and requested intervention status for Petitioners in those hearings. The three actions were (1) a confirmatory order modifying the Shoreham license, (2) an amendment to the license regarding physical security, and (3) an amendment to the license regarding offsite emergency planning. In LBP-91-1, the Licensing Board found that the Petitioners had failed to establish standing under 10 C.F.R. § 2.714(a)(2). However, the Licensing Board provided the Petitioners with 20 additional days in which to correct the defects identified by the Licensing Board. See LBP-91-1, 33 NRC at 40-41.

On January 23, 1991, Petitioners filed this appeal with the Commission from the Licensing Board's Order. On February 4, 1991, Petitioners filed amended petitions with the Licensing Board.

## III. ANALYSIS

The Licensing Board Order before us is interlocutory. "The [Commission's] Rules do not permit a person to take an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991) ("CLI-91-3"), and cases cited therein. In this case, while the Licensing Board found that the Petitioners lacked standing, it provided Petitioners with additional time to correct their initial

petitions' defects. Accordingly, the Licensing Board's ruling was preliminary and the petitions were not "den[ie]d in their entirety." See *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).

Moreover, Petitioners have not shown that they meet the standards provided for discretionary review, i.e., that the Licensing Board ruling would, "absent immediate appellate review, threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding." See *Shoreham*, CLI-91-3, *supra*, citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983). In this case, the Licensing Board provided Petitioners an opportunity to correct the defects it perceived in their initial petitions. Should Petitioners fail to satisfy the Licensing Board in their supplemental submissions, they will still be able to appeal the denial of both petitions. Thus, the Petitioners have not yet suffered any irreparable harm. Moreover, given the preliminary nature of the Licensing Board's ruling, it cannot be said to affect the proceeding in any "basic" or "pervasive" way.

As a separate matter, we note that the Licensing Board held that the Petitioners' claims regarding the alleged "illegal segmentation" of the Shoreham decommissioning process were outside the scope of the Notice of Hearing, based upon our observation in CLI-90-8 that the three actions before the Licensing Board "have no prejudicial effect on *how* decommissioning will be accomplished." LBP-91-1, 33 NRC at 21, citing 32 NRC at 208 (emphasis in original). However, the Commission's rules provide that with respect to the license amendment actions "any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of Part 2 of this chapter applicable to that proceeding . . . ." 10 C.F.R. § 51.104(b). See also 10 C.F.R. § 51.34(b).<sup>1</sup> Therefore, as a general proposition, it is within the scope of NEPA and a proceeding on any license amendment to claim that the amendment requires an Environmental Impact Statement ("EIS") because it is an inseparable segment of a larger major federal action with a significant environmental impact.

In this case, the Staff has determined in each of the two amendments before the Licensing Board that there was no need to issue an EIS. Thus, a claim that the amendments at issue are an inseparable segment of an NRC action on something else — such as the approval of a decommissioning plan — and that approval of such a decommissioning plan requires an EIS, would normally be within the scope of the proceeding. Our comments in CLI-90-8 were not intended to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining properly supported contentions that such an EIS must be prepared

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<sup>1</sup> Under 10 C.F.R. § 51.10(d), orders issued pursuant to 10 C.F.R. Part 2, Subpart B, such as the Confirmatory Order (Immediately Effective) which is the third NRC action at issue here, are not subject to these requirements.

at this time. Instead, our comments were part of our discussion of the narrowness of the decision to decommission Shoreham and were intended to emphasize that the focus of any NEPA alternative review that may be required would be on alternative ways to decommission rather than the alternative of operation.

As the Licensing Board correctly noted, we view the actions in question as being wholly separate from, and independent of, decommissioning. In addition, we harbor substantial doubts that the Petitioners can make a credible showing that these actions are a part of the decommissioning process. However, we did not intend to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining properly supported contentions that allege that an EIS must be prepared for the license amendment actions.<sup>2</sup> Accordingly, if Petitioners satisfy the NRC's standing requirements in their amended petitions, the Licensing Board is free to consider a properly pled contention on the need for an EIS for these three actions. A properly pled contention will at a minimum need to offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan *and* how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

#### IV. CONCLUSION

For the foregoing reasons, the Petitioners' appeal is denied as interlocutory. It is so ORDERED.

For the Commission<sup>3</sup>

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of April 1991.

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<sup>2</sup> Moreover, while we have ruled that "resumed operation" as an alternative to decommissioning is not an issue within the scope of an EIS, *see* CLI-90-8, *supra*, *aff'd*, CLI-91-2, *supra*, we have not ruled that an EIS discussing matters other than resumed operation may *never* be required for approval of a decommissioning plan, either in this case or in any other proceeding.

<sup>3</sup> Chairman Carr was not present for the affirmation of this Order. If he had been present he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtiss  
Forrest J. Remick

In the Matter of

Docket Nos. 50-250-OLA-6  
50-251-OLA-6

FLORIDA POWER & LIGHT  
COMPANY  
(Turkey Point Nuclear Generating  
Plant, Units 3 and 4)

April 3, 1991

The Commission considers petitioner Thomas J. Saporito, Jr.'s appeal from a Licensing Board decision denying his petition to intervene in an operating license amendment proceeding. The Commission dismisses the appeal because Mr. Saporito has not filed a timely brief supporting his notice of appeal.

**RULES OF PRACTICE: APPELLATE REVIEW**

Under the NRC's Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42,944 (Oct. 24, 1990), the Commission, rather than an Appeal Board, will provide agency appellate review for new appellate matters. 10 C.F.R. § 2.785(b).

**RULES OF PRACTICE: APPELLATE REVIEW**

The NRC Appeal Panel lacks jurisdiction to hear appeals on new appellate matters. NRC Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42,944 (Oct. 24, 1990).

## RULES OF PRACTICE: APPELLATE REVIEW

Filings beyond the 10-day period prescribed for appeals in 10 C.F.R. § 2.714a are justifiable only if there is a showing of good cause for the failure to have filed on time.

## RULES OF PRACTICE: APPELLATE REVIEW

That a petitioner is a layman and thus possibly may be unfamiliar with NRC's Rules of Practice is not sufficient excuse for late or incomplete filings, particularly where the order that is being challenged expressly advised the petitioner of his appellate rights, of the time within which those rights have to be exercised, and of the manner in which an appeal is to be taken.

## MEMORANDUM AND ORDER

On September 26, 1990, the NRC published a notice indicating that it had under consideration an application for amendments to the operating licenses for Units 3 and 4 of the Florida Power & Light Company's Turkey Point station.<sup>1</sup> The notice provided an opportunity for interested members of the public to request a hearing. *See* 55 Fed. Reg. 39,331. The Nuclear Energy Accountability Project (NEAP) and Thomas J. Saporito, Jr., filed a "Request for Hearing and Petition for Leave to Intervene," but NEAP subsequently filed a motion to withdraw from the proceeding, which was granted by the Licensing Board.<sup>2</sup> This left Mr. Saporito as the sole petitioner in the proceeding. On January 23, 1991, the Licensing Board denied Mr. Saporito's petition to intervene on the ground that he had not satisfactorily demonstrated that he had the requisite standing to intervene. LBP-91-2, 33 NRC 42.

The Licensing Board's decision focused on the standing requirements of NRC's Rules of Practice (10 C.F.R. Part 2). Section 2.714 of the regulations provides, in subsection (a)(2), that the "petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . [and] why petitioner should be permitted to intervene . . . ." This means that the Petitioner must demonstrate that he satisfies the requirements of subsection (a)(2).<sup>3</sup>

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<sup>1</sup>The amendments relate to the Emergency Power System for these units.

<sup>2</sup>NEAP withdrew on the ground that it would be dissolved effective December 31, 1990.

<sup>3</sup>*See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989); *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

Mr. Saporito attempted to show that he met the standing requirements by reciting in his petition for leave to intervene that he "lives and works" in and about the City of Miami, Florida. However, other filings he had submitted in the proceeding (as well as statements he made in an unrelated Department of Labor proceeding) cast doubt on this assertion. To ensure that he had adequate opportunity to explain his position, the Board invited Mr. Saporito to amplify his statements, but his response was unclear. As a result, the Board found that it could not conclude that he resides or works at an address that would confer standing, and it denied his petition to intervene in the proceeding.

At the end of its order, the Licensing Board stated: "Pursuant to 10 C.F.R. § 2.714a(a), within 10 days after its service, Mr. Saporito may appeal this Memorandum and Order by filing a Notice of Appeal and accompanying brief with the Commission. See 10 C.F.R. § 2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944, Oct. 24, 1990)." LBP-91-2, 33 NRC at 47-48. The latter citation is to the NRC Interim Procedures for Agency Appellate Review, which provide that (with exceptions not relevant here) the Commission, rather than an appeal board, will henceforth provide agency appellate review for appellate matters. The Interim Procedures also provide that, until a final appellate review rule is issued, Commission review will follow existing procedures.

But, rather than going directly to the Commission, as directed by the Licensing Board Order, Mr. Saporito filed an "Appeal Request," dated February 4, 1991, with the Appeal Panel. Because it correctly concluded that it did not have jurisdiction to hear the appeal under NRC's Interim Procedures for Agency Appellate Review, the Appeal Board, on February 11, 1991, issued an Order referring the Appeal Request to the Commission.

The Commission must, at the outset, determine whether it is appropriate for it to consider Mr. Saporito's appeal. Section 2.714a of NRC's Rules of Practice allows an interlocutory appeal from a licensing board order on a petition for leave to intervene. Subsection (a) of that section requires a licensing board ruling on a petition for leave to intervene to be appealed by the filing of a notice of appeal and accompanying supporting brief within 10 days after service of the Board's order. Mr. Saporito's two-sentence Appeal Request can in no way be considered to be a supporting brief.

It may well be that the appeal period provided in section 2.714a is not jurisdictional in the sense that an appeal absolutely may not be entertained if it is not filed within 10 days after service of the order in question, but filings beyond the prescribed period are only justifiable if there is a showing of good cause for the failure to have filed on time. Moreover, the fact that the Petitioner is a layman and thus possibly may be unfamiliar with NRC's Rules of Practice is not sufficient excuse for late or incomplete filings, particularly where the order that is being challenged expressly advised the Petitioner of his appellate rights, of the time within which those rights had to be exercised, and of the manner in

which an appeal is to be taken. See *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

A petitioner's failure to file a supporting brief when filing a timely notice of appeal from the denial of an intervention petition was addressed by the Appeal Board in *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973). In that proceeding, the Appeal Board took into account the possibility that the failure to file a brief was occasioned by the petitioner's unfamiliarity with the requirements of section 2.714a, and *sua sponte* entered an order that extended the time for doing so by 2 working days. When the petitioner still failed to file a brief, the appeal was dismissed.<sup>4</sup> The Board stated that, while it may make some allowance for the fact that a party before it is proceeding *pro se*, "considerations of fairness to other litigants, as well as of the orderly administration of the adjudicatory process, preclude the granting to any appellant of a waiver of as fundamental a requirement of the Rules as that relating to the submission of a brief detailing the basis for his appeal."<sup>5</sup> We are of the same view.

Accordingly, Mr. Saporito's appeal from the Licensing Board decision denying his petition to intervene is dismissed.

IT IS SO ORDERED.

For the Commission,<sup>6</sup>

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of April 1991.

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<sup>4</sup> Similarly, an appeal on an issue that is not addressed in an appellate brief is considered to be waived. *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981).

<sup>5</sup> In any event, while Mr. Saporito is a layman acting *pro se*, it cannot be assumed that he is unfamiliar with NRC's Rules of Practice since he has been active in representing himself and other outside parties in NRC proceedings in recent years. See, for example, *St. Lucie*, CLI-89-21, *supra* note 3; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73 (1990), and *Turkey Point*, LBP-90-16, 31 NRC 509 (1990).

<sup>6</sup> Chairman Carr was absent for the formal affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kenneth M. Carr, Chairman**  
**Kenneth C. Rogers**  
**James R. Curtliss**  
**Forrest J. Remick**

**In the Matter of**

**GOVERNOR OF IDAHO**  
**(Request to Return to the**  
**United States the Idaho**  
**Program for the Licensing**  
**and Regulation of Byproduct**  
**Material as Defined in**  
**Section 11e(1) of the Atomic**  
**Energy Act of 1954, as Amended,**  
**Source Material and Special**  
**Nuclear Material in Quantities**  
**Not Sufficient to Form a**  
**Critical Mass)**

**April 11, 1991**

The Commission grants the Governor of Idaho's request to return to NRC jurisdiction Idaho's entire Agreement State Program governing the licensing and regulation of section 11e(1) byproduct material, source material, and special nuclear material in quantities not sufficient to form a critical mass. Idaho had returned previously to the NRC its authority to regulate section 11e(2) byproduct material under its Agreement State Program. The NRC finds that this action is required to protect the public health and safety. Therefore, the NRC accepts the return of the Idaho State agreement program, and effective April 26, 1991, at 12:01 a.m., MDST, terminates the Idaho Agreement in its entirety; and orders all affected licenses and/or other documents to remain in effect as currently issued.

## ORDER

Pursuant to section 274j(1) of the Atomic Energy Act of 1954, as amended, the Commission grants the request of the Governor of Idaho for the Nuclear Regulatory Commission to accept the return of authority over the licensing and regulation in Idaho of byproduct material as defined by section 11e(1) of the Atomic Energy Act of 1954, as amended, source material and special nuclear material in quantities not sufficient to form a critical mass. The Commission finds that this action is required to protect the public health and safety.

Idaho is an Agreement State. Under the provisions of the Agreement, which became effective October 1, 1968, Idaho assumed and NRC relinquished authority for the licensing and regulation of byproduct material, source material, and special nuclear material in quantities not sufficient to form a critical mass. On November 9, 1982, Idaho returned to the NRC authority to regulate byproduct material as defined by section 11e(2) of the Atomic Energy Act of 1954, as amended.

By letter dated March 25, 1991, Governor Cecil Andrus advised the Commission of his decision to return Idaho's Agreement program to the NRC. In his letter, the Governor indicated that he made this decision following a decision by the State Legislature not to fund the program for regulating radioactive materials subject to the Agreement at a level sufficient to meet NRC guidelines for adequacy to protect the public health and safety and compatibility with the NRC program. In view of the State of Idaho's decision to return its Agreement program to the NRC, the Commission finds it necessary to accept return of the Idaho program, and effective April 26, 1991, at 12:01 a.m., Mountain Daylight Savings Time, terminates the section 274b Agreement between the NRC and the State of Idaho in its entirety and reasserts NRC authority over the licensing and regulation in Idaho of byproduct material, as defined in section 11e(1) of the Atomic Energy Act of 1954, as amended, source material, and special nuclear material in quantities not sufficient to form a critical mass.

The Commission staff will review the files of the Idaho Department of Health and Welfare and will identify all relevant licensing documents for transfer to the NRC. In order to aid in a smooth transition, the Commission deems it essential to maintain continuity in the licensing and regulatory obligations of the Idaho licensees whose dockets are being transferred to the NRC. This continuity may be ensured by keeping in effect on an interim basis all Idaho licenses as currently issued, until such time as the licenses may be modified, if necessary, to meet NRC standards, or such time as the licenses are renewed or reissued.

Therefore, the Commission hereby terminates, effective April 26, 1991, at 12:01 a.m. Mountain Daylight Savings Time, the Idaho Agreement and orders that, as of that date, all Idaho-issued licenses, license amendments, outstanding

orders (if any), or other documents establishing obligations for specific licensees shall be deemed licenses issued or actions taken by the Commission, and such licenses or actions shall remain in effect by their existing terms as if initially issued by the Commission. The Commission staff will review all transferred licensing documents and may provide for their revision in accordance with Commission regulations if necessary for such licenses to meet applicable NRC requirements.

For the Commission,

**SAMUEL J. CHILK**  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 11th day of April 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman  
Thomas S. Moore  
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL-1  
50-444-OL-1  
(Onsite Emergency Planning)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

April 11, 1991

After remand of ALAB-918, 29 NRC 473 (1989), from the Court of Appeals in *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), the Appeal Board finds that the issue originally appealed in ALAB-918 is now moot. Accordingly, the Board dismisses the intervenors' appeal from the Licensing Board's decision in LBP-89-4, 29 NRC 62 (1989), denying the intervenors' motion to admit a late-filed onsite emergency planning contention.

APPEARANCES

Leslie Greer, Boston, Massachusetts, Diane Curran, Washington, D.C., and Robert Backus, Manchester, New Hampshire, for the intervenors, Attorney General of Massachusetts, New England Coalition on Nuclear Pollution, and Seacoast Anti-Pollution League, respectively.

Thomas G. Dignan, Jr., George H. Lewald, and Kathryn Selleck Shea, Boston, Massachusetts, for the applicants Public Service Company of New Hampshire, *et al.*

Mitzi A. Young and Lisa B. Clark for the Nuclear Regulatory Commission staff.

## MEMORANDUM AND ORDER

In *Massachusetts v. NRC*,<sup>1</sup> the court of appeals reviewed, *inter alia*, our affirmance in ALAB-918<sup>2</sup> of the Licensing Board's denial of the joint motion to admit a late-filed onsite emergency exercise contention filed by the intervenors, Massachusetts Attorney General, New England Coalition on Nuclear Pollution, Seacoast Anti-Pollution League, and the Town of Hampton, New Hampshire. The late-filed contention arose from a then-recently concluded, June 1988 graded emergency preparedness exercise for the Seabrook station. The court granted the intervenors' petition for review of ALAB-918 and remanded our decision "for further consideration of the materiality of petitioners' exercise contention" in the application of the third of the five factors set forth in 10 C.F.R. § 2.714(a)(1) for the admission of a late-filed contention under the Commission's Rules of Practice.<sup>3</sup> In taking that action, the court noted, however, "that Seabrook was scheduled for a second full participation exercise in December 1990" and "[a] clean record in that exercise will likely moot this issue."<sup>4</sup>

After the court's remand, we requested the parties to respond to a number of questions, including the question whether the remanded issue is now moot.<sup>5</sup> The responses of the applicants, the NRC staff, and the intervenors all confirmed that a full participation exercise was held in December 1990 and all three responses attached a copy of the staff's inspection report covering the exercise. The report states that "[n]o exercise weaknesses or plan deficiencies were identified."<sup>6</sup> Further, it concludes that "[t]he licensee[s] demonstrated the ability to implement their emergency plan in a manner which would protect the health and safety of the public."<sup>7</sup> In light of the results of the 1990 full participation exercise, we find, as the court presaged, that the intervenors' appeal is now moot.

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<sup>1</sup> 924 F.2d 311 (D.C. Cir. 1991).

<sup>2</sup> 29 NRC 473 (1989).

<sup>3</sup> *Massachusetts v. NRC*, 924 F.2d at 336.

<sup>4</sup> *Id.*

<sup>5</sup> Appeal Board Order of February 22, 1991 (unpublished).

<sup>6</sup> Inspection Report No. 50-443/90-85 (Jan. 30, 1991) at 1.

<sup>7</sup> *Id.*

As fully detailed in ALAB-918, the applicants held a full participation emergency exercise to test the emergency plans for the Seabrook station in June 1988.<sup>8</sup> A staff inspection team observed and graded the onsite portion of the exercise and subsequently issued an inspection report finding that, overall, the applicants' actions during the exercise were sufficient to protect the public health and safety.<sup>9</sup> The inspection report also noted, however, the strengths and weaknesses of the applicants' response.<sup>10</sup> With respect to the latter, the 1988 report stated:

The Technical Support Center (TSC) and Emergency Operations Facility (EOF) staff displayed questionable engineering judgment and/or did not recognize or address technical concerns (50-443/88-08-01). For example:

- Neither the EOF nor TSC staff questioned a release of greater than 7000 curies per second with only clad damage and no core uncovering [sic];
- Efforts continued to restore the Emergency Feedwater Pump after a large break LOCA;
- A questionable fix for the Containment Building Spray system;
- A lack of effort to locate and isolate the release path; and
- No effort was noted to blowdown Steam Generators to lessen the heat load in containment.<sup>11</sup>

These five examples of purported exercise weaknesses formed the bases of the intervenors' late-filed onsite emergency preparedness exercise contention. In essence, the contention alleged that the exercise demonstrated that the applicants' emergency plan did not comply with the Commission's regulations, 10 C.F.R. 50.47(b)(15), requiring that the persons assisting in an emergency be provided radiological emergency response training.<sup>12</sup> To support their contention, the intervenors relied upon the affidavit of Robert D. Pollard, a nuclear safety engineer with the Union of Concerned Scientists. Mr. Pollard concluded that each of the five examples of purported weaknesses in the applicants' 1988 exercise response evidenced fundamental deficiencies in the applicants' emergency plan by showing that the applicants' TSC and EOF staffs were inadequately trained to perform the tasks assigned to them in the exercise.<sup>13</sup>

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<sup>8</sup> 29 NRC at 476-79.

<sup>9</sup> Inspection Report No. 50-443/88-09 (July 6, 1988) at 1.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> Motion to Admit Exercise Contention or, in the Alternative, to Reopen the Record (Sept. 16, 1988) [hereinafter, "Intervenors' Motion"], Exhibit 1, Joint Intervenors On-Site Exercise Contention.

<sup>13</sup> Intervenors' Motion, Affidavit of Robert D. Pollard at 8-13.

In contrast to the staff's inspection report of the 1988 exercise, the staff report covering the onsite portion of the December 1990 emergency exercise found no exercise weaknesses concerning the applicants' TSC and EOF staffs. With respect to the former, the latest inspection report states:

*Technical Support Center (TSC)*

The following exercise strengths were identified:

1. Excellent command and control was demonstrated and frequent staff briefings were conducted.
2. Data were trended and extrapolated. Problems were anticipated. As a result, the time to reach conditions justifying a Site Area Emergency declaration were accurately predicted.
3. The need to identify plant vulnerabilities as early as possible led to a request to use probabilistic risk assessment.
4. Support resources from Yankee Nuclear Service Division engineers were appropriately requested and utilized.

No exercise weaknesses or areas for improvement were identified.<sup>14</sup>

In addressing the EOF, the 1990 staff inspection report states:

*Emergency Operations Facility (EOF)*

The following exercise strengths were identified:

1. There was excellent support of and interaction with representatives of the New Hampshire State government and the New Hampshire Yankee Massachusetts Off-Site Response Organization.
2. There was prompt and correct response to a simulated loss of the main electrical supply to the EOF.
3. Dose assessment personnel anticipated possible release pathways and performed a "what if" calculation based on possible containment breach in anticipation of a possible release.
4. There was good command and control, frequent staff briefings and EOF manager's meetings, which included government representatives and the NHY Massachusetts Off-Site Response Organization.
5. Environmental monitoring teams were repositioned to minimize mission dose.
6. Feedback was obtained regarding implementation of off site protective actions. This information was announced to EOF staff and relayed to other Emergency Response Facilities and Seabrook Station staff.

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<sup>14</sup> Inspection Report No. 50-443/90-85 (Jan. 30, 1991) at 6.

No exercises [sic] weaknesses were identified. The following areas for improvement were identified:

1. The responsibilities of the NHY staff member processing inhalation pathway samples should be reviewed to ensure that activities which might impede his performance are assigned to other response personnel.
2. The procedure for processing of inhalation pathway samples could be streamlined by restricting concerns to iodine and noble gas concentrations.<sup>15</sup>

As is evident from the staff inspection report of the 1990 full participation exercise, the staff found no exercise weaknesses concerning the adequacy of the training of the TSC and EOF staffs. Although the staff report notes two areas for improvement in the EOF, these areas were not found to be weaknesses and they do not involve the sufficiency of the training of the EOF staff. Thus, whatever circumstances existed in 1988 with respect to the training of the applicants' TSC and EOF personnel, the 1990 staff inspection report reveals the adequacy of those organizations today. Nor is there any merit to the intervenors' suggestion that the issue of the adequacy of the training of the TSC and EOF staffs may not be moot because the 1990 exercise was not identical to the 1988 test.<sup>16</sup> The adequacy of the training of applicants' TSC and EOF staffs — the focus of the intervenors' exercise contention — is as well tested by one scenario as another, so long as the exercise, as here, provides a fair test of the skills of the targeted personnel. The 1990 exercise produced the "clean record" that the court of appeals predicted would moot the issue appealed in ALAB-918, and we now find that that issue is moot. Accordingly, we *dismiss* the intervenors' appeal from the Licensing Board's decision in LBP-89-4, 29 NRC 62 (1989), denying their motion to admit a late-filed onsite emergency planning contention.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins  
Secretary to the  
Appeal Board

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<sup>15</sup> *Id.* at 7.

<sup>16</sup> Intervenors' Reply to Appeal Board Order of February 22, 1991 (Mar. 11, 1991) at 2.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Peter B. Bloch  
Peter Lam, Technical Advisor

In the Matter of

Docket Nos. 70-00270  
30-02278-MLA  
(ASLBP No. 90-613-02-MLA)  
(RE: TRUMP-S Project)  
(Byproduct License No. 24-00513-32;  
Special Nuclear Materials  
License No. SNM-247)

CURATORS OF THE  
UNIVERSITY OF MISSOURI

April 9, 1991

The Presiding Officer uses his authority, for the purpose of deciding a motion of Intervenors, to ask questions to ascertain whether the Staff of the Nuclear Regulatory Commission has exercised its authority (in a recent letter to Licensee) to hold the Licensee to a higher standard with respect to emergency planning and decommissioning than might otherwise be required by the regulations.

MEMORANDUM AND ORDER  
(Question About Staff Questions)

Memorandum

The purpose of this memorandum is to obtain information with which to evaluate the significance for this proceeding of a letter to the Licensee from

John D. Jones, Materials Licensing Section of the U.S. Nuclear Regulatory Commission, dated March 13, 1991.<sup>1</sup> That letter states:

We have reviewed your application for renewal of Type A Broad Scope Material License No. 24-00513-32 dated April 28, 1988. *Due to changes in regulations, licensing policy, and volume of material submitted over many years we are requesting that you resubmit your application in its entirety.* . . . Enclosed find Draft Regulatory Guide 10.5 (Rev. 2) which further describes the information you need to provide in your application. [Emphasis added.]

The Staff letter, which covers many areas, including decommissioning and radiological emergency planning, appears to anticipate requiring compliance with regulation revisions that became effective April 7, 1990, and that I have ruled are not applicable in this case. Memorandum and Order (Pending Motions, Including Those Related to Possession of <sup>241</sup>Pu), LBP-90-45, 32 NRC 449, 455-56 (1990); Memorandum and Order (Admitting Parties and Deferring Action on a Stay) (unpublished, August 28, 1990) at 5.

I request the Staff to tell me as soon as reasonably practicable, but no later than April 19, 1991, whether it intends to apply the decommissioning and radiological emergency planning provisions to the underlying byproduct materials license. If so, I am likely to consider that its request for information changes the complexion of this proceeding. If an emergency plan must be filed for the broad-scope license, then it seems to follow that a subsequent amendment to that license must comply with that emergency planning requirement, with respect to the activities covered by the amendment.

Should the Staff confirm that I am correct in interpreting its letter as a determination — pursuant to 10 C.F.R. § 30.34(e) or some other authority (and I request that the Staff provide citation to appropriate authority for its action) — then the regulatory revisions are now applicable to the application that will be resubmitted in its entirety. In that event, I plan to resolve expeditiously all other issues in the case but to leave these affected areas open for later resolution, prior to taking final action on the license amendment.

Respectfully ORDERED,

Peter B. Bloch, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

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<sup>1</sup>The letter was transmitted to me on March 27, 1991, by Licensee, apparently pursuant to its continuing obligation to keep me informed of arguably relevant events. Subsequently, I received "Intervenors' Motion for Reconsideration of Memorandum and Order LBP-90-45, December 19, 1990, etc." April 1, 1991, and "Licensee's Response to 'Intervenors' Motion for Reconsideration . . ." Filed on April 1, 1991," April 8, 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Peter B. Bloch  
Peter Lam, Technical Advisor

In the Matter of

Docket Nos. 70-00270  
30-02278-MLA  
(ASLBP No. 90-613-02-MLA)  
(RE: TRUMP-S Project)  
(Byproduct License No. 24-00513-32;  
Special Nuclear Materials  
License No. SNM-247)

CURATORS OF THE  
UNIVERSITY OF MISSOURI

April 15, 1991

The Presiding Officer determines that Licensee should install a fire sprinkler system in its Alpha Laboratory during the use of plutonium or americium in powdered form. He asks questions of Staff's and Intervenors' witnesses concerning his tentative conclusion that a fire in the Alpha Laboratory would be so limited in size and extent that it would not breach the gypsum wallboard fire barrier. He also imposes several conditions voluntarily suggested by Licensee.

**TECHNICAL ISSUES DISCUSSED**

The following technical issues are discussed:

National Fire Protection Association (NFPA) Recommendations  
Fire Sprinklers  
Fire Propagation  
Physical arrangement of fuel (fire)

Continuity of fuel components (fire)  
Fire loading  
Fire barrier.

## MEMORANDUM AND ORDER (First Initial Decision)

### Memorandum

The purposes of this decision are: (1) to grant relief with respect to Intervenor<sup>1</sup>'s request (voluntarily agreed to, in part, by Licensee<sup>2</sup>) for a sprinkler system; (2) to declare a tentative conclusion that a fire in the Alpha Laboratory that involves the wooden joists is not credible and permitting Mr. Amarendranath Datta, of the Staff, and Mr. Donald W. Wallace, Intervenor's witness, to answer my questions about this tentative conclusion; and (3) to impose license conditions voluntarily agreed to by Licensee.

#### I. USE OF SPRINKLERS

The National Fire Protection Association (NFPA) recommends automatic sprinkler systems in former section 2-2.2 of NFPA 801 and in Appendix B, § B-2.2 of the 1991 version. The former section stated:

The use of fire resistive building components and equipment is highly desirable in those areas where radioactive materials are to be stored or used. Some form of automatic protection, such as automatic sprinklers, would be highly advantageous wherever combustibles are encountered. The installation of automatic extinguishing systems will make it less necessary for personnel to expose themselves to possible danger, will start the fire process automatically, will sound an alarm and will make efficient use of the water supply.

Additionally, as Intervenor's point out, Licensee's witness, Mr. Robert G. Purington,<sup>3</sup> wrote:

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<sup>1</sup> Intervenor's are the Missouri Coalition for the Environment, the Mid-Missouri Nuclear Weapons Freeze, Inc., the Physicians for Social Responsibility/Mid-Missouri Chapter, Jeff Stack, Richard Smith, Amy Smith, Steve Jacobs, Marion Mace, Therese Folsom, Betty Aulabaugh, Diana Nomad, Clyde Wilson, and Kathleen Morrison.

<sup>2</sup> Licensee is the Curators of the University of Missouri. Licensee asks a 90-day grace period before installation of a sprinkler system is required.

<sup>3</sup> Mr. Purington was Fire Chief for the Lawrence Livermore National Laboratory for 23 years. He is highly qualified as a consultant on the subjects on which he has testified and I find his testimony to be well organized, carefully expressed, and highly persuasive.

In most cases, water — especially from automatic sprinklers — is the best way to control fire, including fires involving radioactive materials. Nevertheless, the use of sprinkler systems in radioactive areas is often debated, even though experience has shown that one of the best fire protection techniques for these facilities is automatic sprinklers. The arguments against sprinklers are usually unfounded, even when fissile materials are present. . . . Opponents of sprinkler systems cite the possibility of the spread of contamination by means of the water used to control the fire. Even if this is possible, the threat of airborne contamination resulting from uncontrolled fire is greater. Consequently, some contaminated water is a small price for quick and effective fire suppression by means of automatic sprinklers. If the threat of the spread of contaminated water is serious, sumps, drains, berms, and other means of water containment should be provided. . . .<sup>4</sup>

Furthermore, in his affidavit filed in this case, Mr. Purington wrote:

Sprinklers are like motherhood to we fire protection people. We'd like to see the whole world equipped with sprinklers, including all dwellings. Consequently, even though in view of the limited fire loading discussed above, sprinklers are not mandated in the Alpha Laboratory, I would recommend to the University the installation of sprinklers in the Alpha Laboratory. I have been informed that it plans to do so.<sup>5</sup>

I have concluded that Mr. Purington's conclusions should be adopted as my own, and I shall require both the installation of a sprinkler system in the Alpha Laboratory and a report to the Staff concerning whether any supplemental water collection systems may be required because of the risk of spreading contaminated water, either in false activations of the sprinkler system or in actual fires.<sup>6</sup>

On the other hand, I have decided to limit the amendment of the license to requiring a sprinkler system in the Alpha Laboratory itself. I find that the fire loading in the basement outside the laboratory is very low, being less than 40% of the loading inside the laboratory,<sup>7</sup> and I accept Mr. Purington's testimony that a fire from the other parts of the basement will not spread to the laboratory.<sup>8</sup> Consequently, I conclude that sprinkling of other portions of the basement is not related to the safety of the licensed activity, and I will not require sprinkling in other portions of the basement — even though such sprinkling may be required

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<sup>4</sup> Intervenor's Exhibit 6, March 26, 1991 filing, "Radioactive Materials," Robert G. Purington, in *Industrial Fire Hazards Handbook* 689-90 (1st ed. 1979).

<sup>5</sup> Licensee's Exhibit 19, Affidavit of Robert G. Purington, January 28, 1991, at 19.

<sup>6</sup> The MURR basement already has a drain collecting system. *Id.* at 22.

<sup>7</sup> Licensee's Exhibit 20, Affidavit of Walter A. Meyer, Jr., Responding to Portions of Intervenor's Rebuttal," January 28, 1991, at 12-15, ¶¶ 33-35.

<sup>8</sup> Licensee's Exhibit 19, "Affidavit of Robert G. Purington Regarding Fire Protection at the Alpha Laboratory," January 28, 1991, at 13-15, ¶ 6.

by the local fire code or, in fact, within the additional margin of safety that Licensee is planning to implement.<sup>9</sup>

## II. CREDIBILITY OF A MAJOR FIRE

I have tentatively concluded that the Type B fire scenario described by Amarendranath Datta<sup>10</sup> as less likely than  $1 \times 10^{-5}$ /facility-year, is not credible because the location of the limited burnable materials within the Alpha Laboratory would not permit an untended fire to breach the 30-minute fire-rated wallboards to involve the wood structure. This scenario is also similar to that on which Intervenors' witness, Donald W. Wallace, has relied.

My principal reason for reaching this tentative view is my acceptance of the testimony of Walter A. Meyer, Jr., Reactor Manager for the University of Missouri Research Reactor, and of Robert G. Purington, former Fire Chief of Lawrence Livermore National Laboratory. I am particularly persuaded by the following passage from Mr. Purington's testimony:<sup>11</sup>

[T]he fire load in the Alpha Laboratory and the MURR Basement is extremely low, as compared for example to typical fire loadings reported in the NFPA Fire Protection Handbook.<sup>12</sup> Materials encased in metal do not fully contribute their energy to a fire. Consequently these materials are "derated" and the fire loading is reduced appropriately.

Some typical values of fire loading compared to the Alpha Laboratory and the MURR Basement are:

Dwelling Bedroom .....	4.30 lb/ft <sup>2</sup>
Clerical Office .....	5.00 lb/ft <sup>2</sup>
Alpha Laboratory <sup>13</sup> .....	1.39 lb/ft <sup>2</sup>
MURR Basement <sup>14</sup> .....	0.50 lb/ft <sup>2</sup>

My personal observation of the Alpha Laboratory and the MURR Basement indicated that the individual fuel sources (e.g. glovebox windows, computers, paper) are relatively far apart. *Moreover the physical arrangement of the fuel would result in a generally low burning rate*

<sup>9</sup> See BOCA National Building Code, 1987, §1002.15, which is in effect in the City of Columbia and prohibits even a nonhazardous use in a basement unless the basement is fully sprinklered. Intervenors' Exhibit 2 (filing of March 26, 1991).

I do not consider it relevant to my determination that the Licensee has requested state funding for a sprinkler system for the entire MURR Facility. Licensee's Exhibit 25, Affidavit of Chester B. Edwards, Jr., ¶¶ 8 and 9. See "Intervenors' Supplemental Motion for Order Imposing Conditions on Licenses," April 1, 1991, at 1.

<sup>10</sup> Staff of the Nuclear Regulatory Commission.

<sup>11</sup> Licensee's Exhibit 19, "Affidavit of Robert G. Purington Regarding Fire Protection at the Alpha Laboratory," January 28, 1991, at 13-14.

<sup>12</sup> [Footnote in original.] Fire Protection Handbook, 16th Edition, National Fire Protection Association, Quincy, MA, p. 7-112. (Attachment 2.)

<sup>13</sup> [Footnote in original.] See Licensee's Fire Load Calculation, Attachment A to Licensee Exhibit 20.

<sup>14</sup> *Id.*

*should the fuel become ignited. In addition, the amount of each fuel source is relatively low.* [Emphasis added.]

*Accordingly, in my opinion, if a fire were to start, even assuming there is no intervention in the form of fire suppression activities, such a fire would not spread significantly beyond the initial fuel.* [Emphasis added.]

Moreover, even if a fire occurred in either the Alpha Laboratory or the MURR Basement and spread to some extent, it would not reach the flashover point (even assuming there is no intervention in the form of fire suppression activities). The continuity of each fuel component is such that fire would not spread from one item to the next. Further, the rate of heat release would be so low that heat losses to entrained air and surrounding building components would prevent the gases at the ceiling from reaching the required 1100-1200°F needed for flashover.

The conclusion that I reach would not be affected if the Alpha Laboratory and MURR Basement were considered a single fire area. The fire load of the combined area is only 0.61 lb/ft<sup>2</sup> which is very low, the continuity of fuel sources would still be low and the potential for flashover would remain negligible.

Because of my tentative conclusions, I direct the following two questions only to Mr. Wallace and Mr. Datta:

1. Is it credible that the gypsum wallboard fire barrier ("fire barrier") will be penetrated by a fire starting within the Alpha Laboratory? In particular, is the fire loading and continuity of fuel sources that are permitted to be present within the Alpha Laboratory sufficient to produce a fire of enough intensity and duration to penetrate the fire barrier? (If your answer is yes to either question, please explain whether or not such a fire should be treated as a credible event.)
2. Would your answers to Question 1 be affected by the installation of a fire sprinkler system in the Alpha Laboratory? How?

The witnesses may need access to data or photographs or to the site itself to answer these questions. I urge the parties to provide informally whatever seems necessary for an informed answer.

### III. LICENSE CONDITIONS

In addition to the one condition that I have decided to impose on Licensee, there are several to which it has voluntarily agreed and that I now impose pursuant to its suggestion.<sup>15</sup> These conditions include: (1) installation of an additional HEPA filter that will be tested in place within 90 days of the effective date of this Order; (2) replacing the window in the Alpha Laboratory with a

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<sup>15</sup>"Licensee's Response to Intervenors' Motion for Order Imposing Conditions on Licenses and Limiting Issues to Be Litigated," February 21, 1991.

wire glass window; and (3) limitation of the authorized possession and use of americium-241 to 10 curies.<sup>16</sup>

## Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 15th day of April 1991, ORDERED that:

1. Licensee shall install a fire sprinkler system in the Alpha Laboratory as a condition for conducting any experiments with plutonium or americium. This condition shall become effective as of the date of issuance of this Order.

2. The Staff and Intervenors may respond to the questions I have posed in the accompanying memorandum within three calendar weeks of the issuance of this Order, subject to extension for good cause shown.

3. By no later than 90 days from the date of issuance of this Order, Licensee shall fulfill the following conditions which it has voluntarily suggested:

(i) it shall replace the window of the Alpha Laboratory with a wire glass window; and

(ii) it shall install an additional HEPA filter, DOP tested in place, in the location originally suggested by its consultant, Mr. Steppen.

4. Pursuant to its own suggestion, Licensee shall limit its possession of americium to 10 curies, effective with the issuance of this Order.

5. The Staff shall promptly issue a license amendment effectuating §§ 1, 3, and 4 of this Order by making the requirements into license conditions.

6. Within 90 days, Licensee shall report to the Staff concerning whether the sprinkler system in the Alpha Laboratory will require additional provisions for drainage or collection.

Respectfully ORDERED,

Peter B. Bloch, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

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<sup>16</sup>Two of these conditions were proposed by Licensee at pages 75-76 of "Licensee's Response to Intervenors' Rebuttal," January 28, 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Walter H. Jordan  
Dr. Jerry R. Kline

In the Matter of

Docket Nos. 50-528-OLA-2  
50-529-OLA-2  
50-530-OLA-2  
(ASLBP No. 91-633-05-OLA-2)  
(Allowable Setpoint Tolerance)

ARIZONA PUBLIC SERVICE  
COMPANY, *et al.*  
(Palo Verde Nuclear Generating  
Station, Units 1, 2, and 3)

April 24, 1991

**MEMORANDUM AND ORDER**  
(Dismissing Scott/Bush/CREE Petitions to Intervene)

**I. BACKGROUND**

On March 13, 1991, the Atomic Safety and Licensing Board issued a Notice of Prehearing Conference directing Petitioners for leave to intervene or their respective counsel to attend a prehearing conference on April 10, 1991, in Phoenix, Arizona. The purpose of the prehearing conference, as announced in the notice, was to hear oral arguments on amended and supplemented petitions for leave to intervene and answers thereto, and to conduct any further business appropriate to make a determination as to the parties and key issues

in the proceeding, if any.<sup>1</sup> None of the joint petitioners, Myron L. Scott, Barbara S. Bush, the Coalition for Responsible Energy Education (hereinafter "Scott/Bush/CREE Petitioners") nor counsel for them appeared at the prehearing conference. They have not provided any explanation for their failure to appear.

Counsel for Licensees moved orally to dismiss the Scott/Bush/CREE petition "on the grounds that they've defaulted and failed to comply with the Board's order to attend the prehearing conference." Tr. 5. The Board deems Licensees' motion as one seeking dismissal on the dual grounds of default and as a sanction for failure to comply with a Board order. In the order below we grant the motion on both grounds.

## II. DISCUSSION

### A. Default

In our Memorandum and Order of February 19, 1991,<sup>2</sup> we ruled that the Scott/Bush/CREE Petitioners had not established standing to intervene. 33 NRC at 158-59. As the Board explained:

It would seem that the Scott/Bush Petitioners live about 50 miles from the Palo Verde Station. As noted above, in the *Watts Bar* decision, the Appeal Board explained that "approximately 50 miles" is not so far as to rule out standing based upon proximity — nor do we rule it out. On the other hand we do not find from the petition that residing somewhere in Tempe in itself establishes standing. The 50-mile ruling was already very liberal and we are not inclined to extend it.

*Id.* at 158.

We also noted that the Petitioners did not explain how the interests of the CREE members are affected by the proceeding as a matter of proximity to the Palo Verde Station, in that we could not discern how close to the station the CREE members live or whether any engage in activities near the station. *Id.* A final ruling on their status to participate on the basis of proximity to the Palo Verde station was held in abeyance until after the filing of amended and supplemental petitions, if any. *Id.* at 159.

A supplemental and amended petition was received from the Scott/Bush/CREE Petitioners purporting to set forth additional information concerning their standing to intervene. Mr. Scott states simply that his permanent home "is

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<sup>1</sup> The notice was served again on March 15, 1991, with a correction to the address of the U.S. District Courthouse in Phoenix, Arizona, and the corrected notice was published at 56 Fed. Reg. 12,045 (Mar. 21, 1991).

<sup>2</sup> LBP-91-4, 33 NRC 153 (1991).

approximately 50 miles” from the Palo Verde Station,<sup>3</sup> thus ignoring Licensees’ statement<sup>4</sup> that the map-measured distance of the Scott/Bush mailing address is approximately 52 miles from the station. The petition also failed to address the Board’s observation that it is not, in this case, inclined to extend the 50-mile proximity-based limit for standing.

Mr. Scott also states that he engages in recreational activities “within close proximity to PVGNS” without specifying how close and how frequently he engages in those activities. Mr. Scott also alludes to members of CREE who “live and/or own property well within fifty miles” of Palo Verde and provides affidavits of two such members.<sup>5</sup>

Licensees responded to the Scott/Bush/CREE supplemental and amended petition with well-reasoned legal and analytical challenges to the standing claims set out in the supplemental and amended petition. Licensees also questioned some of the Scott/Bush/CREE factual assertions relating to their standing-to-intervene claims.<sup>6</sup>

It is not our purpose now to evaluate the merits of the Petitioners’ claim of standing or to rule on the merits of Licensees’ challenge to those claims. Clearly the Scott/Bush/CREE Petitioners failed to address Licensees’ challenge when given that opportunity and when the need was very apparent. They are therefore in default in failing to meet Licensees’ challenge to their claims of standing to intervene in this proceeding.

In our Order of February 19 we reviewed again the requirements for filing contentions in NRC proceedings.<sup>7</sup> We recommended that “the Petitioners study the contention requirements of the rule carefully since the rule provides that a petitioner who fails to satisfy the requirements will not be admitted as a party.” LBP-91-4, *supra*, 33 NRC at 160-61 & n.3, *citing* 10 C.F.R. § 2.714(b)(1). The Scott/Bush/CREE supplemental and amended petition simply moved the Board

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<sup>3</sup> Supplemental and Amended Petition to Intervene of Myron L. Scott, Barbara S. Bush, and the Coalition for Responsible Energy Education, served March 11, 1991.

<sup>4</sup> Licensees’ Answer in Opposition to Petition for Leave to Intervene and Request for Hearing, February 6, 1991, at 6.

<sup>5</sup> On March 25, 1991, the Board received from Mr. Scott a letter dated March 18, forwarding the affidavits of Mrs. Bush and Claire Estes. According to Mr. Scott the submittal was “pursuant to the provision of ten days to submit supplemental affidavits.” The Board’s order of February 19, 1991, LBP-91-4, 33 NRC at 161, set March 11 as the date for amended and supplemented petitions and did not provide for “ten days to submit supplemental affidavits” as suggested by Mr. Scott. The Board ruled orally that it would not consider the affidavits. Tr. 7.

<sup>6</sup> Licensees’ Response to Scott/Bush/CREE Supplemental and Amended Petition, March 21, 1991, at 5-18.

<sup>7</sup> As pertinent, 10 C.F.R. § 2.714(b)(iii) requires that each petitioner shall provide the following information with respect to each contention:

- (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief

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to accept contentions raised by the Mitchell Petitioners and apparently attempted to summarize the Mitchell contentions.<sup>8</sup> Scott/Bush/CREE Supplemental and Amended Petition at 5.

As the NRC Staff points out, the Scott/Bush/CREE Petitioners have "failed to make even a minimal showing that they have read the relevant information and have a genuine dispute with the Licensees over a material issue."<sup>9</sup> Some of the Mitchell contentions, particularly their Contention 1, presented highly technical engineering discussions which the Board itself had difficulty evaluating. Had the Scott/Bush/CREE Petitioners appeared at the prehearing conference as directed, the Board would have probed their understanding of the Mitchell contentions to determine whether they, independently of the Mitchells, have a genuine dispute with the Licensees over a material issue. Having failed to plead or argue that they have in fact a material issue, and having failed to be available for discussion of the matter, or to counter the Staff's objections on that account, the Scott/Bush/CREE Petitioners are in default with respect to the contention-filing requirement of the intervention rule, namely 10 C.F.R. § 2.714(b)(iii). See note 7, *supra*.

## B. Sanction

In severe cases, licensing boards may dismiss parties from proceedings for a failure to meet that party's obligations. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). The Petitioners' failure to appear presents a severe case. There can be no more vital responsibility of a petitioner than to appear at the lawful direction of the presiding officer to participate in the fundamental genesis of the litigation proposed by that very petitioner. Moreover, the Licensees, NRC Staff, and the Licensing Board accepted the Scott/Bush/CREE petitions in good faith and have expended considerable effort in evaluating those petitions, as is apparent from the respective papers. Mr. Scott stated in the initial petition that he and other members of CREE are "trained lawyers" who would "not adversely affect orderly proceedings."<sup>10</sup> Contrary to this promise, the Petitioners lacked the fundamental courtesy to formally withdraw from the proceeding, seek a continuance or, to this date, otherwise explain to the judges of this Board and to the other parties their failure to appear. This we believe is not only default, but contemptuous

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<sup>8</sup> See Supplemental Petition of Mitchell Petitioners for Leave to Intervene, March 9, 1991.

<sup>9</sup> NRC Staff Response to Supplemental Petitions to Intervene Filed by Myron L. Scott, Barbara S. Bush, and the Coalition for Responsible Energy Education and Allan L. and Linda E. Mitchell, March 26, 1991, at 10. The Board again requests counsel for the NRC Staff to label her pleadings with succinct titles.

<sup>10</sup> Petition for Leave to Intervene and Request for Hearing, January 22, 1991, at 2.

conduct, proscribed by the Commission's regulations, 10 C.F.R. § 2.713(c), and is conduct disdained throughout American jurisprudence.

### **III. ORDER**

The Petition for Leave to Intervene and Request for Hearing by the Petitioners Myron L. Scott, Barbara S. Bush, and the Coalition for Responsible Energy Education, and their supplemental and amended petitions are dismissed on each of the following independently sufficient grounds in accordance with the foregoing discussion:

1. Petitioners are in default of their responsibility to meet challenges to their claims of standing to intervene in this proceeding,
2. Petitioners are in default of the requirement to show that a genuine dispute exists between them and the Licensees on a material issue of fact or law, and
3. Petitioners failed to obey the directive of the Licensing Board to appear at a prehearing conference on April 10, 1991, at Phoenix, Arizona, thereby severely failing to fulfill their obligations with respect to an essential step in the proceeding.

### **IV. APPEAL RIGHTS**

This Order wholly denies a petition for leave to intervene and a request for a hearing. Therefore, in accordance with the provision of 10 C.F.R. § 2.714a(a)

and (b), this Order may be appealed to the Commission within 10 days after service of this Order.

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Jerry R. Kline  
ADMINISTRATIVE JUDGE**

**Walter H. Jordan (by I.W.S.)  
ADMINISTRATIVE JUDGE**

**Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE**

**Bethesda, Maryland  
April 24, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Peter B. Bloch  
Peter Lam, Technical Advisor

In the Matter of

Docket Nos. 70-00270  
30-02278-MLA  
(ASLBP No. 90-613-02-MLA)  
(RE: TRUMP-S Project)  
(Byproduct License No. 24-00513-32;  
Special Nuclear Materials  
License No. SNM-247)

CURATORS OF THE  
UNIVERSITY OF MISSOURI

April 25, 1991

The Presiding Officer denies Intervenor's request for a right to reply to the Staff's filing because they have not shown with any specificity how they could contribute to the record by responding. He also provides for a motion for reconsideration, which would include an opportunity to make an offer of proof concerning how denial of a right to respond or to cross-examine improperly prejudiced their case.

**RULES OF PROCEDURE: SUBPART L; RIGHT TO RESPOND**

A party must show with specificity how it can contribute to the record before it will be permitted to respond.

## **RULES OF PROCEDURE: SUBPART L; MOTION FOR RECONSIDERATION**

The Presiding Officer permits a party to make an offer of proof at the conclusion of the case showing how denial of a right to respond or to cross-examine improperly prejudiced its case.

### **MEMORANDUM AND ORDER (Leave to Respond to NRC Staff Response)**

*"Intervenors' Motion for Leave to File Response to NRC Staff Response to Memorandum and Order,"* April 10, 1991, seeks to respond to two affidavits and seven pages of argument filed by the Staff of the Nuclear Regulatory Commission in response to questions that I addressed to all the parties. Intervenors believe that they have a right to respond pursuant to demands of due process of law. They also argue that there may be misunderstandings of fact and law which they should have an opportunity to correct.

*"Licensee's Response to Intervenors' Motion for Leave to Respond to the NRC Staff,"* April 22, 1991, opposes the Motion. Licensee argues that there is no due process right to respond to facts or arguments presented by the Staff and that the procedural regulations in 10 C.F.R. § 2.1233(a) and (d) grant the presiding officer the discretion to determine the sequence and timing for the submission of written evidence. It further argues that there have been opportunities galore for commenting and presenting evidence and that I am fully capable of reaching my own conclusions and determining whether I need any further information. See the Commission's expressed intent in Final Rule, 55 Fed. Reg. 8269, 8275 (Feb. 28, 1989).

I have determined that the intervenor's showing is not specific enough to persuade me that my decision will be substantially improved by permitting a further response. While stating that there are "misunderstandings" in the Staff's filing, they have not suggested anything about the nature of the misunderstandings or shown with any specificity that I could be persuaded that I would agree with their statement of what a mistake is.

I have solicited a further response by Intervenors to one area of Staff testimony, dealing with a more-than-30-minute fire. LBP-91-12, 33 NRC 257 (1991). Another area of some controversy involved in Staff's filing is its estimate of the probability of different fires. This was, however, directly responsive to the question I asked all the parties, and Intervenors therefore also had an opportunity to respond. That they did not do so was a matter of choice on their part.

On the other hand, I anticipate that my decision in this case will be subject to a motion for reconsideration. In such a motion, the traditional ground for reconsideration requires a party to spell out what matters of record were not properly considered by the presiding officer. In addition, I invite the parties to include a separate section in which they show precisely what evidence they are prepared to present (in the nature of an offer of proof) to show that they have been prejudiced by the denial of cross-examination or rebuttal.

Except to the extent indicated, the Motion of the Intervenors is *denied*.

Respectfully ORDERED,

Peter B. Bloch, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman  
Dr. Richard F. Cole  
Dr. Charles N. Kelber

In the Matter of

Docket No. 30-29086-SC  
(ASLBP No. 91-628-01-SC)  
(Byproduct Material  
License 24-18959-02)

RHODES-SAYRE & ASSOCIATES, INC.

April 25, 1991

In a proceeding involving an Order to Show Cause why a license should not be revoked for nonpayment of a license fee, the Licensing Board grants the NRC Staff's motion for summary disposition and authorizes the Staff to invoke the sanctions set forth in the Order to Show Cause.

**RULES OF PRACTICE: STANDARD FOR REVIEW OF  
SHOW-CAUSE DETERMINATION**

In evaluating the actions of the NRC Staff in issuing an Order to Show Cause, as well as in determining whether a requested waiver should be granted, a licensing board should base its review on whether, in each instance, the Staff abused its discretion. *See Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978); *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, 3), CLI-75-8, 2 NRC 173, 176 (1975).

## MEMORANDUM AND ORDER

### (Granting Staff Motion for Summary Disposition)

This proceeding involves an Order to Show Cause why the Byproduct Material License of Rhodes-Sayre & Associates, Inc. (License 24-18959-02) should not be revoked, together with related remedies involving disposal of the material and equipment and decontamination of the facility, for nonpayment of an inspection fee. The Licensee, located in Brookfield, Missouri, utilizes its license to permit certain byproduct material to be used in gauges for moisture/density measurements of soils and construction materials, at locations throughout the State of Missouri.

For reasons set forth below, we are granting the NRC Staff's March 20, 1991 motion for summary disposition and authorizing the NRC Staff to impose the sanctions set forth in the Order to Show Cause. This terminates this proceeding.

#### A. Procedural Background

According to the NRC Staff,<sup>1</sup> on April 15, 1987, the Staff conducted a routine safety inspection of the Licensee's activities at Brookfield, Missouri. On August 14, 1987, the Commission billed the Licensee an inspection fee of \$530, as authorized by 10 C.F.R. §§ 170.12(g) and 170.31(3)(P), requiring payment within 30 days.<sup>2</sup> Having not received payment, the Staff on September 25, 1987, sent the Licensee a second notice of payment due and, on October 14, 1987, a third (and final) notice.<sup>3</sup>

Absent receipt of any payment, the Staff on September 19, 1990, issued the Order to Show Cause. The Order provided the Licensee an opportunity to request a hearing and, on October 11, 1990, it filed a timely request. This Licensing Board was constituted to consider that request.<sup>4</sup> In that request, the Licensee admitted nonpayment of the fee in question but requested a waiver of that fee, on the ground that the Licensee's use of the licensed equipment was exclusively on projects for governmental units. (Under 10 C.F.R. § 170.11, in effect both in 1987 and at this time, certain governmental units are exempt from the license fees, were they licensed to use the equipment on their own behalf.)<sup>5</sup>

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<sup>1</sup> NRC Staff Response to Memorandum and Order, dated January 7, 1991.

<sup>2</sup> Invoice 1719A.

<sup>3</sup> A copy of the invoice is attached to the NRC Staff Response to Memorandum and Order, dated January 7, 1991.

<sup>4</sup> Establishment of Atomic Safety and Licensing Board, dated December 7, 1990, published at 55 Fed. Reg. 51,516 (Dec. 14, 1990).

<sup>5</sup> The Commission is currently proposing to end this exemption. See NRC letter to all licensees, dated April 5, 1991, "Proposed Revisions to 10 CFR 170 and 171 on License, Inspection and Annual Fees."

In our Memorandum and Order (Schedule for Further Filings), dated December 13, 1990 (unpublished), we granted the Licensee's Request for a hearing<sup>6</sup> and also asked the Staff to consider the requested waiver. Along with its response to our December 13, 1990 Memorandum and Order, the Staff filed the affidavit of Mr. Ronald M. Scroggins, NRC Controller, who has authority to grant exemptions from and waivers of fees where appropriate.<sup>7</sup>

Mr. Scroggins found insufficient basis to grant the requested waiver. He stated, in effect, that private commercial firms subject to NRC licensing are expected to pay, to the fullest extent possible, the agency's cost of performing regulatory services, that many private firms perform activities for governmental entities and that, in the past, all of these licensees have paid fees, some substantial in amount. Mr. Scroggins could find no public interest to be served in waiving the fee, including interest and penalties.

On January 30, 1991, we conducted a prehearing conference by telephone conference call. Because it appeared that, to some extent, the Licensee might have acquired its particular license based on a misunderstanding of the rules governing payment of fees, we encouraged the parties to seek settlement and to report the results to us. We deferred the proceeding pending the outcome of the settlement negotiations. See Memorandum and Order (Telephone Conference Call, 1/30/91), dated January 31, 1991 (unpublished). On February 19, 1991, the Staff reported that it had been unable to reach settlement and that further negotiations would not appear to be fruitful.<sup>8</sup> It indicated that it would shortly file a motion for summary disposition. The Licensee filed no report of its own.

## B. Motion for Summary Disposition

On March 20, 1991, the NRC Staff filed its Motion for Summary Disposition. The motion reiterated the facts described earlier in this opinion, including the consideration of waiver set forth in the affidavit of Mr. Scroggins referenced above. The motion also set forth the legal standards used to grant such motions — in particular, the requirements of 10 C.F.R. § 2.749.

In a timely response dated April 12, 1991, the Licensee did not contest any of the facts relied on by the Staff in its motion but merely reiterated its request for a waiver. The Licensee also stated that ownership of the equipment in question had been transferred to a governmental agency, which has applied for an NRC license.

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<sup>6</sup> See Notice of Hearing, dated December 13, 1990, published at 55 Fed. Reg. 52,113 (Dec. 19, 1990).

<sup>7</sup> NRC Staff Response to Memorandum and Order, dated January 7, 1991.

<sup>8</sup> NRC Staff Response to Licensing Board's Memorandum and Order dated January 31, 1991, dated February 19, 1991.

### C. Discussion

Under 10 C.F.R. § 2.749, authorizing motions for summary disposition, a moving party — here, the NRC Staff — is required to annex to its motion a “separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” Under the motion before us, the Staff has listed the following facts as to which it claims there is no genuine issue to be heard:

1. On April 15, 1987, Rhodes-Sayre & Associates, Inc. was inspected by a representative of NRC Region III pursuant to 10 C.F.R. § 30.52.
2. On August 14, 1987, the NRC Office of the Controller sent to Rhodes-Sayre & Associates, Inc., Invoice 1719A, for payment within 30 days of an inspection fee of \$530.
3. The inspection fee of \$530 assessed by the Office of the Controller for the April 15, 1987 inspection of Rhodes-Sayre & Associates, Inc., is the correct fee for an inspection of licensees such as Rhodes-Sayre & Associates, Inc., as set out in 10 C.F.R. § 170.31(3)(P).
4. Rhodes-Sayre & Associates, Inc. has failed and declined to pay the assessed fee of \$530 despite repeated written requests for payment thereof made by the NRC Office of the Controller.
5. The sole basis for Rhodes-Sayre & Associates, Inc. refusal to pay the assessed fee of \$530 is its request for a waiver of such fee on the grounds that it has utilized its licensed material solely in performing work on behalf of various governmental units.
6. Rhodes-Sayre & Associates, Inc. is a private for-profit corporation and is not organized or operated as a governmental entity.

Section 2.749 further provides that an answer to a motion for summary disposition include a “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard.” The Licensee neither filed such a statement nor set forth any facts that would challenge the facts set forth by the Staff.

In that situation, all “material facts set forth in the statement required to be served by the moving party will be deemed to be admitted.” Moreover, we are required to render the decision sought by the movant if the various filings in the proceeding “show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.749(d). In the situation before us, not only must the facts set forth by the Staff be deemed to be admitted but, in addition, based on the various filings of the parties, we are satisfied that they are accurate.

In that connection, we have evaluated the Staff’s actions in this proceeding, both in its issuance of the Order to Show Cause and in its determination of the

waiver request, on the basis of whether they constitute an abuse of discretion. See *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978); *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975). We are satisfied that there has been no abuse of discretion by the Staff.

We have also evaluated the Staff's determination to impose the most severe of the available sanctions, rather than some lesser sanction such as suspension pending receipt of payment. Although a wide range of sanctions is available, the Staff has indicated (in response to our inquiry dated March 27, 1991) that revocation is consistent both with enforcement action taken in similar cases and with the Commission's regulations in 10 C.F.R. Part 2, Appendix C, § V.C(3)(d).<sup>9</sup> See also *Michael F. Dimun, M.D.*, LBP-87-9, 25 NRC 175 (1987). In those circumstances, the sanctions sought do not appear to represent an abuse of discretion.

Based on all of these considerations, we conclude that there is no genuine issue of material fact to be heard and that the Staff is entitled to a decision as a matter of law. We are therefore granting the Staff's motion for summary disposition and terminating the proceeding on the basis thereof.

#### D. Order

Based on the foregoing, and the entire record in this proceeding, it is, this 25th day of April 1991, ORDERED:

1. The NRC Staff's Motion for Summary Disposition, dated March 20, 1991, is hereby *granted*.
2. The NRC Staff is hereby *authorized* to invoke the sanctions set forth in the Order to Show Cause, dated September 19, 1990.
3. This proceeding is hereby *terminated*.
4. This Order is effective immediately.
5. Pursuant to 10 C.F.R. § 2.760 of the Commission's Rules of Practice, this Memorandum and Order will constitute the final decision of the Commission thirty (30) days from the date of its issuance, unless an appeal is taken in accordance with 10 C.F.R. § 2.762 or the Commission directs otherwise. See also 10 C.F.R. § 2.786.

5. Any party may take an appeal from this Memorandum and Order to the Commission by filing a Notice of Appeal within ten (10) days after service of this Memorandum and Order. See 10 C.F.R. § 2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944 (Oct. 24, 1990)). Each appellant must file a brief supporting its position on appeal within thirty (30) days after filing its Notice

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<sup>9</sup>NRC Staff Response to Board Questions, dated April 15, 1991.

of Appeal, (forty (40) days if the Staff is the appellant). An appellant's brief must be confined to issues that the appellant placed in controversy or sought to place in controversy. Within thirty (30) days after the period has expired for the filing and service of the briefs of all appellants (forty (40) days in the case of the Staff), a party who is not an appellant may file a brief in support of or in opposition to the appeal of any other party. Briefs shall conform to the length and format specified in 10 C.F.R. § 2.762.

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE**

**Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE**

**Dr. Charles N. Kelber  
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland  
April 25, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Charles Bechhoefer, Chairman  
Dr. George C. Anderson  
Lester S. Rubenstein**

**In the Matter of**

**Docket No. 30-30691-CivP  
(ASLBP No. 91-636-03-CivP)  
(EA 90-102)  
(Materials License No. 35-26953-01)**

**BARNETT INDUSTRIAL X-RAY**

**April 30, 1991**

The Licensing Board in a civil penalty proceeding approves a settlement agreement and terminates the proceeding.

**MEMORANDUM AND ORDER  
(Approving Settlement Agreement and  
Terminating Proceeding)**

This proceeding involves a proposed civil penalty against Barnett Industrial X-Ray (Licensee) in the amount of \$7,500. In an issuance dated April 5, 1991 (unpublished), we noted that we had received telephone advice from the NRC Staff (later confirmed by letter, also dated April 5, 1991) that the Staff had reached agreement in principle with the Licensee for the settlement of this proceeding. As a result, we cancelled the prehearing conference scheduled for April 9, 1991.

On April 16, 1991, the Licensee and Staff submitted a joint motion for approval of a settlement agreement. Under the settlement, the Licensee has

agreed to pay, in semiannual payments extending for a period of 6 years, the full civil penalty of \$7,500, plus interest at 7.125% on the unpaid principal balance. A payment schedule of essentially equal semiannual payments is included. The payment obligation extends for so long as the Licensee or its owner holds an NRC materials license, with the owner responsible for a pro rata payment if the Licensee terminates its license prior to a semiannual payment date. The agreement is to become effective upon approval by this Board.

In a civil-penalty proceeding of this sort, where a Notice of Hearing has been issued (*see* Notice dated March 8, 1991, 56 Fed. Reg. 11,297, Mar. 15, 1991), we may approve a settlement agreement that is in the public interest, after according "due weight" to the interest of the Staff. 10 C.F.R. § 2.203. We have reviewed the proposed settlement agreement under those standards and are satisfied that approval of the agreement and termination of the proceeding based thereon is in the public interest.

Accordingly, it is, this 30th day of April 1991, ORDERED:

1. The settlement agreement attached hereto and incorporated by reference into this Order is *approved*.

2. Pursuant to §§ 81, 161(b), 161(c), 161(i) and 161(o) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2111 and 2201(b), (c), (i), and (o), and 10 C.F.R. § 2.203 of the Commission's regulations, this proceeding is hereby *terminated*.

3. Pursuant to 10 C.F.R. § 2.760, this Order, and the accompanying settlement agreement, shall become effective immediately and shall become the final order of the Commission thirty (30) days after issuance, absent further review by the Commission.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Dr. George C. Anderson (by C.B.)  
ADMINISTRATIVE JUDGE

Lester S. Rubenstein (by C.B.)  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
April 30, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 30-30691-CivP  
(EA 90-102)

**BARNETT INDUSTRIAL X-RAY**  
(Materials License No. 35-26953-01)

**SETTLEMENT AGREEMENT**

On December 31, 1990, an Order Imposing Civil Monetary Penalty in the amount of \$7500.00 was issued to Barnett Industrial X-Ray (Licensee). On January 28, 1991, the Licensee requested a hearing on the Order imposing the civil penalty, and the matter was referred to the Atomic Safety and Licensing Board. The NRC Staff and Mr. Loyd Barnett, individually and as owner and president of the Licensee, hereby agree as follows:

1. In response to the Order Imposing Civil Monetary Penalty — \$7500.00, the Licensee withdraws its request for a hearing dated January 28, 1991, and agrees to the payment of the civil penalty in the amount of \$7500.00 plus interest at 7.125 percent per annum over a period of six (6) years. Twelve semi-annual payments in the amount of \$756.66 will be made, with the first payment to be made May 8, 1991. Subsequent payments will be made by Mr. Loyd Barnett at six-month intervals, with the final payment due on November 8, 1996. Mr. Loyd Barnett will remain responsible for making semi-annual payments during any period that either Barnett Industrial X-Ray or Mr. Loyd Barnett holds an NRC materials license. If the Licensee terminates its NRC materials license prior to a semi-annual payment date, Mr. Loyd Barnett will be responsible for pro rata payment.
2. Mr. Loyd Barnett will notify the Director, Division of Accounting and Finance, Office of Administration and Resource Management, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 immediately after the termination or surrender of Barnett Industrial X-Ray's NRC materials license.
3. The payment terms and procedures are set forth in the attached

Promissory Note, which is incorporated by reference into this Settlement Agreement.

4. The NRC Staff and the Licensee jointly move the Atomic Safety and Licensing Board for an order approving this settlement agreement and terminating this proceeding. The agreement shall become effective upon Board approval.

FOR THE U.S. NUCLEAR  
REGULATORY COMMISSION,

FOR BARNETT INDUSTRIAL  
X-RAY,

Patricia Jehle  
Counsel for NRC Staff  
Dated at Rockville, Maryland  
this 25th day of April, 1991.

Loyd Barnett, President  
Barnett Industrial X-Ray  
Dated at Stillwater, Oklahoma  
this \_\_\_ day of April, 1991.

[The Promissory Note has been omitted from this publication but can be found in the NRC Public Document Room, 2120 L Street, NW, Washington, DC.]



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-220

NIAGARA MOHAWK POWER  
CORPORATION  
(Nine Mile Point Nuclear Station,  
Unit 1)

April 2, 1991

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Ms. Rosemary S. Pooler of the Atlantic States Legal Foundation, Inc., on behalf of Retire Nine Mile 1. Petitioner requested the Nuclear Regulatory Commission (NRC or Commission) to institute a proceeding to modify, suspend, or revoke Niagara Mohawk Power Corporation's (NMPC) license to operate Nine Mile Point Nuclear Station, Unit 1 (NMP-1), until such time as NMPC demonstrated that it had the requisite management capability to operate a nuclear power plant, until such time as the torus was repaired, and until such time as NMPC implemented every outstanding generic letter and bulletin relating to safety. As bases for this request, Petitioner alleged that (1) the most recent Systematic Assessment of Licensee Performance (SALP) report showed evidence of managerial incompetence at NMP-1; (2) there is continuing evidence of thinning of the torus walls, and therefore the plant should not be allowed to restart before the torus is repaired; and (3) the history of NMPC's management, together with the specific questions relating to restart, call for a different standard at NMP-1 from that applied to other plants with regard to implementation of all safety issues raised by generic letters and bulletins.

**SALP: PURPOSE**

The Systematic Assessment of Licensee Performance (SALP) program is an integrated agency effort to collect and evaluate available agency insights, data,

and other information on a plant/site basis in a structured manner in order to assess and better understand the reasons for a licensee's performance. The program is intended to be sufficiently diagnostic to provide a rational basis for allocating NRC resources and to provide meaningful feedback to the licensee's management regarding the NRC's assessment of the licensee's performance in each of the assessed areas.

#### **SALP: RELATION TO ENFORCEMENT**

The NRC Staff may take enforcement action independent of the SALP program. The Staff does not delay taking such action because of an ongoing SALP process.

#### **TECHNICAL ISSUES DISCUSSED: MANAGEMENT COMPETENCE**

The NRC Staff reviewed NMPC's Restart Action Plan (RAP), in which NMPC identified the underlying root causes of why its management had not been effective in recognizing and remedying problems and identified corrective action objectives and specific corrective action to address the underlying root causes. The Staff agreed with NMPC's identification of the underlying root causes in the RAP as the source of NMPC's management problems. The Staff identified no other root causes. The Staff concluded that, as of May 1990, NMPC had corrected the underlying root causes identified in the RAP, and that NMPC management was competent to operate NMP-1.

#### **RULES OF PRACTICE: SHOW-CAUSE PROCEEDING**

Where petitioner supplies no new information and available information shows that the licensee satisfies the Commission's regulations, there is no basis for instituting a proceeding pursuant to 10 C.F.R. § 2.206.

#### **TECHNICAL ISSUES DISCUSSED: TORUS WALL THICKNESS**

Data on torus wall thickness at NMP-1 demonstrate that the torus wall thickness is adequate to meet the ASME Code design-basis allowable stresses, in accordance with the Commission's regulations. Accordingly, the torus meets the required acceptance criteria for continued operation, and NMP-1 can be safely operated for one more fuel cycle.

## **GENERIC COMMUNICATION: IMPLEMENTATION**

Where petitioner has not presented a basis for applying a standard to one licensee to implement actions requested in generic communication different from the standard applied to all other licensees, no different standard will be applied, and the licensee's alleged failure to satisfy the different standard, even if true, would not be a basis to institute a proceeding pursuant to 10 C.F.R. § 2.206.

## **DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**

### **INTRODUCTION**

On July 26, 1990, Ms. Rosemary S. Pooler (Petitioner) of the Atlantic States Legal Foundation, Inc., on behalf of Retire Nine Mile 1, filed a Petition in accordance with 10 C.F.R. § 2.206 with the Nuclear Regulatory Commission (NRC or Commission). The Petition was referred to the Director, Office of Nuclear Reactor Regulation (NRR), for consideration.

The Petition asked the NRC to institute a proceeding to modify, suspend, or revoke Niagara Mohawk Power Corporation's (NMPC's or Licensee's) license to operate Nine Mile Point Nuclear Station, Unit 1 (NMP-1), until such time as NMPC demonstrates that it has the requisite management capability to operate a nuclear power plant, until such time as the torus is repaired, and until such time as NMPC implements every outstanding generic letter and bulletin relating to safety. As bases for this request, the Petition alleges (1) the most recent Systematic Assessment of Licensee Performance (SALP) report shows evidence of managerial incompetence at NMP-1; (2) there is continuing evidence of thinning of the torus walls, and therefore the plant should not be allowed to restart before the torus is repaired; and (3) the history of NMPC's management, together with the specific questions relating to restart, call for a different standard at NMP-1 from that applied to other plants with regard to implementation of all safety issues raised by generic letters and bulletins.

In letters of May 14, 1990, and July 26, 1990, to the Commissioners, further questions are specified relating to the bases stated for the Petition.

By letter dated August 31, 1990, I acknowledged receipt of the Petition and informed the Petitioner that appropriate action would be taken on the Petition within a reasonable time.

The Petition was placed in the Public Document Room and a copy of the Petition was sent to NMPC which provided the NRC with comments by letter dated October 25, 1990.

I have now completed my evaluation of the Petition. For the reasons given in the discussion below, the Petitioner's request for action is denied.

## BACKGROUND

NMP-1 was shut down in December 1987 when a manual scram was initiated in response to a feedwater transient. The unit initially remained shut down because of extensive problems in NMPC's inservice inspection (ISI) program for NMP-1. NMP-1 was operating at the end of a 417-day run when it was shut down. As a result of a March 1988 inspection, Confirmatory Action Letter (CAL) 88-13 was issued to formalize the Licensee's commitments to correct documentation deficiencies in NMPC's licensed operator requalification program. To address a broader spectrum of performance deficiencies that were identified before and subsequent to the December 1987 shutdown, CAL 88-17 was issued on July 24, 1988, superseding CAL 88-13 and documenting NMPC's commitment not to restart the unit until corrective actions for these broader issues were completed and restart was authorized by the NRC Regional Administrator for Region I. In addition to the ISI and requalification program concerns, the broader spectrum of performance deficiencies included inoperable fire-barrier penetrations that had been repeatedly inspected by the Licensee without uncovering the deficiencies (Inspection Report Nos. 50-220/88-15 and 50-410/88-15, dated June 7, 1988) and significant weaknesses in the implementation of emergency operating procedures (Inspection Report Nos. 50-220/88-22 and 50-410/88-23, dated July 8, 1988).

NMP-1 was placed on the NRC's list of plants warranting close monitoring in June 1988. This action was the result of NRC senior managers' evaluation of the plant's performance on the above issues as well as findings contained in the then-most-recent Systematic Assessment of Licensee Performance (SALP) Final Report (Report Nos. 50-220/86-99 and 50-410/87-99, dated July 1, 1988) regarding NMPC's management weaknesses, NMPC's failure to seek out problems and correct them before they became regulatory concerns, and the limited success of previous Licensee efforts to bring about long-term changes in performance at NMP-1. This close monitoring has included a major increase in inspection activity and the establishment of a Restart Assessment Panel to evaluate (1) the adequacy of the Licensee's Restart Action Plan (RAP) and (2) the effectiveness of the Licensee's implementation of the RAP.

CAL 88-17 documented the Licensee's agreement not to restart NMP-1 until the Licensee had taken certain corrective actions, which were to include (1) an assessment of the root causes of why NMPC's line management had not been effective in recognizing and remedying problems; (2) preparation of a RAP identifying all actions to be completed before startup and a schedule for completion of all other actions to be completed after startup that were needed to address the root causes identified in the item (1) effort; and (3) a written report identifying (a) NMPC's basis for concluding that NMP-1 was ready for restart, (b) a self-assessment of the implementation of the RAP, and

(c) NMPC's conclusions regarding whether line management possessed the appropriate leadership skills to prevent or to detect and correct future problems.

## DISCUSSION

The Petitioner requested the NRC to institute a proceeding to modify, suspend, or revoke NMPC's license to operate NMP-1 until such time as NMPC demonstrates that it possesses the requisite management capability to operate a nuclear power plant, until such time as the torus is repaired, and until such time as NMPC implements every outstanding generic letter and bulletin relating to safety. I also note that by letter dated May 14, 1990, from the Petitioner to the Commission, the Petitioner expressed a number of concerns regarding NMP-1. The concerns expressed in the May 14, 1990 letter were similar to those again raised in the July 26, 1990 letter. The NRC Staff's detailed comments addressing specific questions and concerns raised in the May 14, 1990 letter were provided in an enclosure to a letter dated June 21, 1990, from Chairman Carr to the Petitioner. The following discussion addresses the bases asserted by the Petitioner as supporting its request for action.

1. *There is continuing evidence of a lack of management technical competence and integrity to operate Nine Mile Point Nuclear Station, Unit 1. Specifically, can the Commission be sure that the health and safety of the public can be assured given the most recent SALP report which continues to document operator failure?*

The NRC's SALP program is an integrated agency effort to collect and evaluate available agency insights, data, and other information on a plant/site basis in a structured manner in order to assess and better understand the reasons for a licensee's performance. The manner in which a licensee meets regulatory requirements and the degree to which a licensee seeks to improve performance are both measures of a licensee's commitment to nuclear safety and plant reliability. The program is supplemental to normal regulatory processes used to ensure compliance with NRC rules and regulations. The program is intended to be sufficiently diagnostic to provide a rational basis for allocating NRC resources and to provide meaningful feedback to the licensee's management regarding the NRC's assessment of the licensee's performance in each of the assessed areas. It should be noted that the SALP program assesses a licensee's performance during the entire assessment period and, therefore, poor performance in part of the period may adversely affect the licensee's overall rating.

Independent of the SALP program, whenever the NRC Staff detects violations of NRC requirements, the NRC Staff takes enforcement action, as appropriate, in accordance with its "General Statement of Policy and Procedure for NRC

Enforcement Actions," 10 C.F.R. Part 2, Appendix C. The Staff does not delay taking such action because of an ongoing SALP process.

The most recently published Final SALP Report for NMP-1 assessed Licensee performance for the period March 1, 1989–February 28, 1990. The final report for this assessment period was issued on August 1, 1990, as Report Nos. 50-220/89-99 and 50-410/89-99. At the time the SALP was performed, NMP-1 was shut down and NMPC was taking action to respond to the issues set forth in CAL 88-17. Although this SALP report identified several areas of concern regarding management issues that were acknowledged by NMPC in its response dated July 2, 1990, to the May 7, 1990 SALP Board report, the SALP program and the resulting SALP report were not, and were not intended to be, used by the NRC Staff to evaluate the readiness of NMP-1 for restart. Rather, the specific actions that NMPC was required to implement before restart, and which were identified in CAL 88-17, were evaluated by an NRC Restart Assessment Panel. This evaluation, in turn, served as the basis for the NRC's restart decision.

CAL 88-17 confirmed that the Licensee would:

1. determine and document its assessment of the root causes of why NMPC's management had not been effective in recognizing and remedying problems;
2. prepare a proposed restart action plan and submit it to the NRC, Region I Regional Administrator, for review and approval; and
3. provide a written report regarding the readiness of NMP-1 for restart.

In response to items 1 and 2 of CAL 88-17, the Licensee prepared a RAP which was submitted to the NRC by letter dated December 21, 1988. Revision 1 to the RAP was submitted by letter dated March 2, 1989, and Revision 2 was submitted by letter dated July 11, 1989, to accommodate NMPC initiatives and in response to Staff comments during the NRC Staff's review of the RAP. In brief, the RAP described the process used to develop the RAP, identified five underlying root causes (URCs) responsible for management's ineffectiveness in recognizing and remedying problems, identified corrective action objectives and specific corrective actions to address the URCs, and also identified corrective action plans for eighteen specific issues that are listed in Table 1 of the RAP.

The five URCs identified in the RAP were as follows:

1. The management tasks of planning and goal setting have not kept pace with the changing needs of the Nuclear Division and with changes within the nuclear industry.
2. The process for identifying and resolving issues before they become regulatory concerns was less than adequate in that no integrated or consistent process was used to identify, analyze, correct, and assess problems in a timely way.
3. Management's technical focus has created an organizational culture

that diverts attention away from the needs of employees and effective use of employees.

4. Standards of performance have not been defined or described sufficiently for effective assessment, and self-assessments have not been consistent or effective.
5. Lack of effective teamwork within the Nuclear Division and with support organizations is evidenced by lack of coordination, cooperation, and communication in carrying out responsibilities.

In September 1988, the NRC Staff convened a Restart Assessment Panel comprised of senior representatives from NRC Headquarters and Region I for the review of NMP-1 restart-related issues, including the RAP. The Restart Assessment Panel evaluated the adequacy of the RAP. In addition, an NRR Special Team Inspection (STI) was conducted from January 31, 1989, to March 3, 1989, to independently determine the root causes of NMPC performance deficiencies (Inspection Report Nos. 50-220/89-200 and 50-410/89-200, dated May 10, 1989). The STI agreed with NMPC's identification of the five URCs as the source of NMPC's management problems. Furthermore, the STI identified no new root causes, but noted additional examples of previously identified problems. On the basis of the Staff's review of the RAP, which included consideration of comments on the RAP received from the public at a meeting held in Oswego, New York, on August 23, 1989, and the results of the STI, the Restart Assessment Panel concluded that the Licensee had thoroughly researched, evaluated, and documented in the RAP the root causes of its previous inability to effectively manage the operation of NMP-1, as well as the eighteen specific issues listed in Table 1 of the RAP. The panel also concluded that the RAP identified the essential corrective actions necessary to effect overall performance improvements at NMP-1. Therefore, by letter dated September 29, 1989, the NRC Staff approved the RAP and considered action items 1 and 2 of CAL 88-17 to be complete.

By letter dated September 8, 1989, the Licensee submitted a Restart Readiness Report (RRR) in response to the third action required by CAL 88-17. The RRR provided NMPC's evaluation of the effectiveness of the corrective actions contained in the RAP. The RRR concluded that NMP-1 was physically ready to operate and that NMPC had the management and leadership skills necessary to safely operate NMP-1 subject to the completion of certain items clearly identified in the RRR.

In October 1989, the NRC Staff conducted a 2-week Integrated Assessment Team Inspection (IATI) to review the Licensee's implementation of the RAP in resolving the five URCs of past management effectiveness issues (Inspection Report 50-220/89-81, dated November 8, 1989). In summary, the IATI team concluded that the RAP was well disseminated within the Licensee's organization and generally understood. However, the degree to which the plan had

been effectively implemented varied. The team noted clear improvement in performance related to the areas of planning and goal setting, organization culture, and teamwork (URCs 1, 3, and 5). The IATI team findings in these areas are summarized as follows:

In regard to URC No. 1, the IATI team noted that upper management levels had instituted a management-by-objectives (MBO) system and had implemented it to varying degrees down to the first-line supervision level (non-union representation). Below this first-line supervision level, the majority of working-level personnel had been given a pamphlet on vision, mission, goals, and standards of performance, which was developed by the Nuclear Division in 1989. Employees understood that its contents represented the objective for performance that they should strive to achieve. Working-level personnel were generally achieving this objective. Overall, the team concluded that NMPC had clearly improved its performance in the area of planning and goal setting.

With regard to URC No. 3, the IATI team found that most individuals in NMPC's staff accepted the bases for and actions associated with the plan to improve performance. However, one example to the contrary existed in that management was not properly controlling overtime according to technical specification guidelines. Notwithstanding this example, the team concluded that NMPC had clearly improved its overall performance in the area of organizational culture.

With respect to URC No. 5, the IATI team noted good overall cooperation among departments, and especially observed how well the operations and training departments worked together. From interviews, the team learned that the plant staff felt free to seek clarification regarding supervisory decisions. Overall, the team concluded that NMPC had clearly improved its performance in the area of teamwork.

Although it noted some signs of improvement, overall, the IATI team considered performance in the areas of problem solving and standards of performance and self-assessment to be weak (URCs 2 and 4). However, the team identified no fundamental flaws during the inspection to indicate that the RAP was inadequate.

Following the IATI, the Licensee continued with its implementation of the RAP. During the period April 30–May 11, 1990, the NRC Staff conducted a Readiness Assessment Team Inspection (RATI) (Inspection Report No. 50-220/90-80, dated June 1, 1990). This inspection made performance-based assessments of NMPC activities to determine whether sufficient progress had been made in resolving the previously identified URCs of management deficiencies to support the restart of the unit. The RATI team assessed the effectiveness of NMPC's performance in five functional areas: (1) plant operations, (2) radiological controls, (3) maintenance and surveillance, (4) engineering and technical support, and (5) safety assessment and quality verification. The team also eval-

uated the material condition of the plant and overall management readiness to support restart and operation of the unit.

The RATI team determined that the Licensee had made adequate progress in resolving the two URC areas that the IATI formerly judged to be weak. Specifically, these URC areas were URC No. 2, "Problem Solving," and URC No. 4, "Standards of Performance and Self-Assessment." The RATI team findings in these areas are summarized as follows: With regard to URC No. 2, effective use of engineering support for problem solving was noted by the team. A notable area of improvement had been the integration of the system engineering function into daily plant activities. The use of contract engineering support was noted to be effective. Root cause analyses developed by both NMPC and contract engineering personnel were generally good. With regard to URC No. 4, the team noted an overall attitude change in line with the standards of performance that had been developed by NMPC. Positive acceptance of these standards of performance was noted in all the functional areas evaluated by the team. Specifically, improvement in the standards of performance was noted in the areas of procedural adherence, procedure quality, work control package quality, plant housekeeping, attention to industrial and radiation safety practices, communications and teamwork. The readiness assessment team also determined that NMPC had sustained its level of performance in the other three URC areas, namely, "Planning and Goal Setting" (URC No. 1), "Organizational Culture" (URC No. 3), and "Teamwork" (URC No. 5). The RATI team also concluded that NMPC had continued to improve its performance in each of the functional areas evaluated in the inspection and particularly in the functional areas that were rated Category 3 (Plant Operations, Maintenance/Surveillance, and Safety Assessment/Quality Verification) in the most recent SALP period, which ended February 28, 1990.

Overall, the RATI team found the material condition of the plant to be acceptable and the plant organization capable of managing activities associated with plant startup and operation. The RATI team concluded that corrective actions taken by NMPC had effected appropriate changes in the control and performance of plant activities and in the analysis and assessment of plant events to resolve the URCs. The team also concluded from the observation of plant activities performed by NMPC during the inspection that the implementation of these changes had been sufficiently effective to support the restart of the unit. Subject to the completion of then-scheduled testing and startup preparation activities, the RATI team found no impediments to the restart of NMP-1.

Commission status briefings on the readiness for restart of NMP-1 were conducted on August 2, 1989, and May 14, 1990.

By letter dated July 13, 1990, in accordance with CAL 88-17, the Licensee requested approval to restart NMP-1. In this letter, the Licensee reviewed its progress in meeting the conditions of CAL 88-17 and its progress in

implementing its RAP. On the bases summarized in its letter of July 13, 1990, including the completion of the remaining open items it identified in its RRR, the Licensee concluded that it was ready to resume operation of NMP-1 upon receipt of approval from the NRC's Regional Administrator for Region I.

The NRC Staff reviewed the Licensee's justification for resumption of operation of NMP-1. By letter dated July 27, 1990, the NRC Regional Administrator for Region I issued Supplement No. 1 to CAL 88-17 authorizing the restart of NMP-1. The detailed supporting bases for authorizing restart were included as an attachment to CAL 88-17, Supplement No. 1. In summary, the Staff concluded that the Licensee had satisfactorily completed the three actions described in CAL 88-17. In addition, the Staff's evaluation of the following areas was found acceptable for plant restart: (1) NMPC's root-cause identification and corrective action process, (2) NMPC's management organization and oversight, (3) NMPC's plant and corporate staff readiness for restart, and (4) the physical readiness of NMP-1 for restart.

The NRC Staff's approval of the restart of NMP-1 was subject to NMPC's (1) self-assessment of its operations throughout the power ascension program and specific conduct of a detailed assessment at each of the designated plateaus (i.e., 25, 75, and 100% power); (2) discussion of the results of each self-assessment with the NRC Restart Assessment Panel at each of the designated plateaus and before commencing routine full-power operation; and (3) documentation of the results of the Licensee's overall self-assessment of the power ascension program after its completion and discussion of those results in a management meeting with the NRC Restart Assessment Panel. NMPC complied with the first two of these conditions by performing the self-assessments and discussing the results with the NRC Restart Assessment Panel before moving beyond each of the plateaus. NMPC complied with the third condition by documenting the results of its overall self-assessment of the power ascension program in a letter to the NRC, dated December 11, 1990, and by discussing those results with the NRC Restart Assessment Panel in a management meeting held at the Licensee's training facility on December 18, 1990.

The NRC Staff has concluded that NMPC successfully completed the NMP-1 power ascension test program in accordance with its program plan and in accordance with Supplement 1 to CAL 88-17. Therefore, by letter dated February 11, 1991, the NRC Regional Administrator for Region I agreed that NMPC had satisfied the provisions of CAL 88-17, Supplement 1. A summary of the Staff's basis for concluding that NMPC had satisfied the commitments specified in Supplement 1 to CAL 88-17 was included as an attachment to the February 11, 1991 letter.

NMPC's performance during the power ascension program and NMPC's self-assessment of the power ascension program were assessed as follows by the NRC Staff, in the attachment to the February 11, 1991 letter. The Staff

found that NMPC's overall performance during the power ascension program was satisfactory. Problems encountered by the plant staff were appropriately handled and their self-assessment process and abilities clearly improved during the power ascension program. However, because performance problems were noted during power ascension with respect to new standards of performance and procedural compliance, particular emphasis was subsequently placed by NMPC in these areas. As discussed below, NMPC adequately improved its performance in these areas. Licensed-operator response to events during the power ascension program had been good. NMP-1 licensed-operator requalification program evaluations had been performed in July 1990 and December 1990. All licensed operators successfully passed both the written and operating portions of the examinations. The Staff concluded that the general performance trend in the previous months was one of improvement and the problems identified had been promptly addressed with thorough corrective actions. The Staff found that NMPC's self-assessment of the power ascension program was comprehensive and critical. NMPC had performed its self-assessment of the power ascension program through an integration of assessments done by four separate groups. These four groups agreed on a common set of criteria for evaluating the performance of the physical plant and personnel during the power ascension program, with particular focus on the effectiveness of Licensee programs and personnel conformance with established standards of performance. Management was not driven by schedule or capacity factor in ensuring that the standards of performance were being adhered to. The Staff concluded that NMPC appeared to have become more effective in the implementation of the self-assessment process as the power ascension program progressed and made appropriate modifications to improve the process. The Staff reached the final conclusion that the results of NRC inspections and assessments since the restart of NMP-1 had been favorable and that NMPC had demonstrated sufficient capability to safely operate and to prevent or to detect and correct problems. This conclusion, coupled with NMPC's satisfactory completion of the commitments specified in Supplement 1 of CAL 88-17, supported continuation of routine full-power operation and the closing of CAL 88-17, Supplement 1.

I note that the stated objective of the Petitioner's request, to ensure that the Licensee "demonstrates that it has the requisite management capability to [safely] operate a nuclear power plant," is consistent with the performance that the NRC Staff expected from the Licensee in satisfying the conditions of CAL 88-17, Supplement 1, and as discussed above, this has been satisfactorily demonstrated by the Licensee.

The Petition does not raise any new issues regarding the technical competence and integrity of the Licensee's management to safely operate NMP-1. The information contained in the Petition was already known to and considered by the NRC Staff during its evaluation of NMPC's capability to restart and operate

NMP-1. Accordingly, with respect to the Licensee's management, I find that the Petition contains no basis to institute such a proceeding as requested by the Petitioner.

2. *There is continuing evidence of thinning of the torus walls, and therefore, the plant should not be allowed to restart before the torus is repaired.*

During power operation, the primary containment for NMP-1 is a pressure suppression containment system consisting of a drywell, suppression chamber (torus), and interconnecting vent piping. The torus contains a reserve of water, the primary purpose of which is to serve as a heat sink during loss-of-coolant accidents. The torus walls are fabricated from carbon steel plates. The inner surfaces of the torus walls are not protected from corrosion. The wall thinning results from corrosion of the inner surfaces of the wall material. NRC regulations (10 C.F.R. § 50.55a) require that the torus be designed in accordance with the requirements of the American Society of Mechanical Engineers Boiler and Pressure Vessel (ASME) Code. The design requirements of the ASME Code ensure an adequate margin of safety, provided the minimum design requirements (e.g., minimum wall thickness) are maintained.

Thinning of the torus walls has been evident to the Licensee since the beginning of the Licensee's measurement of wall thickness in 1975 and to the NRC Staff at least since its inspection in March–April 1988 (Inspection Report Nos. 50-220/88-09 and 50-410/88-08, dated June 10, 1988). The Licensee has been monitoring the wall thickness. The Licensee's practice is to measure the thickness every 6 months for trending purposes and for comparison to the minimum allowable values required by the ASME Code. The NRC Staff has reviewed the Licensee's data measurement program and the associated analyses and has concluded, on the basis set forth below, that the Licensee may operate NMP-1 in its current condition for the remainder of the current fuel cycle, provided surveillance of the torus continues at 6-month intervals (Inspection Report Nos. 50-220/89-28 and 50-410/89-24, dated January 29, 1990).

One of the specific technical issues included in the RAP was the issue of the torus wall thinning. As noted in the RAP, the NRC conducted an inspection in March–April 1988 wherein it performed independent measurements of the torus wall thickness (Inspection Report Nos. 50-220/88-09 and 50-410/88-08, dated June 10, 1988). The inspection identified deficiencies in trending of the torus wall thickness data taken by the Licensee up to that time and also identified a concern regarding procedures for identifying grid patterns for thickness measurements. These concerns were also discussed in a meeting held in the NRC Region I offices with the Licensee on April 26, 1988. During this meeting, the Licensee was requested to provide a justification for a return to operation, considering the condition of the torus. The Licensee responded to these concerns by letter dated May 27, 1988. By letter dated January 12, 1989,

the Licensee revised previous commitments and indicated that it would perform torus shell thickness measurements every 6 months.

By letter dated November 22, 1989, the Licensee submitted a report prepared by MPR Associates, Inc., assessing the sufficiency of the torus wall thickness for the next operating cycle. Given the measurements of torus wall thickness at NMP-1 (available in Table 1 of Enclosure 3 to the Staff's letter to Petitioner dated April 2, 1991) and because the minimum code-allowable torus wall thickness is 0.447 inch, the uncertainty in the wall thickness measurement is  $\pm 0.003$  inch, and the maximum corrosion rate is 0.002 inch per year, MPR Associates, Inc., and NMPC concluded that the NMP-1 torus wall thickness satisfies the ASME Code and 10 C.F.R. § 50.55a for the current fuel cycle of operation. The NRC Staff issued Inspection Report Nos. 50-220/89-28 and 50-410/89-24, dated January 29, 1990, covering its recent inspections on this issue and its review of the Licensee's November 22, 1989 submittal. On the basis of its inspections and review, the Staff concluded that NMP-1 could be safely operated for one more fuel cycle, provided that surveillance of the torus continues at intervals of every 6 months as previously committed to by the Licensee in its letter dated November 22, 1989, and that the torus wall thickness is not reduced to less than 0.447 inch.

The NRC Staff's conclusion that the NMP-1 plant is acceptable for operation in this regard continues to be based on a demonstration of adequate torus wall thickness to meet the ASME Code design-basis allowable stresses. As noted above, the torus has been evaluated by the Licensee and the NRC Staff and found to meet the required acceptance criteria for continued operation. Furthermore, the Licensee has committed to measure the torus wall thickness every 6 months and is performing engineering evaluations to determine what repairs, if any, may be required during the next refueling outage. The status of the torus wall thickness is well known to the NRC Staff. The thickness of the torus wall material still meets its acceptance requirements for continued operation. The Petitioner has submitted no new information relating to this concern nor given any reason for imposing on NMP-1 requirements stricter than those set forth in 10 C.F.R. § 50.55a. Therefore, the Petitioner has not presented the NRC with any new facts on which to reevaluate this concern. Accordingly, I find that torus wall thinning does not provide a basis for instituting a proceeding as requested by the Petitioner.

3. *Nine Mile Point Nuclear Station, Unit 1, should be held to a different standard than other plants and should not be allowed to restart without implementing all applicable NRC generic letters and bulletins relating to safety.*

Generic letters and bulletins are written notifications to groups of licensees identifying specific problems and which may recommend specific actions. Generic letters and bulletins each provide time for implementation of proposed actions, if any. These generic letters and bulletins normally are directed to

all commercial nuclear power plants, including NMP-1, as appropriate to the circumstances indicated by the information communicated in each generic letter or bulletin.

The management and technical issues relating to the recent 2½-year shutdown of NMP-1 have been extensively set forth, documented, and evaluated, as previously indicated. The status of implementation of actions requested by generic letters and bulletins was not a factor that led to the shutdown. In addition, the adequacy of NMPC's corrective actions for the issues that led to the plant's shutdown does not depend on whether NMPC's actions associated with each of the NRC generic letters and bulletins have been fully implemented.

In the Licensee's development of the five URCs responsible for management ineffectiveness or during the development of corrective actions required to address the eighteen specific issues listed in Table 1 of the RAP, the Licensee did not find that the lack of effective implementation of generic letters and bulletins was a factor related to these issues. Nor, during its review, did the NRC make any such discoveries. On the contrary, since the generic letters and bulletins were not directly linked to the RAP and its implementation, a requirement to fully implement all generic letters and bulletins before startup would add very little to ensure that the Licensee had sufficiently resolved the root cause of past performance problems to be able to safely operate the plant. The Petitioner has not presented a basis for a standard for NMP-1 implementing actions requested in generic communications different from other licensees. As described above, the Petitioner does not set forth any valid rationale for why a different standard in this regard should apply. Accordingly, I find that this issue does not form a basis on which to institute a proceeding as requested by the Petitioner.

## CONCLUSION

Our review of these three concerns contained in the Petition has identified no information that was not already available to the NRC Staff. The bases provided for the first two concerns reiterate previously known information. The third concern constitutes a generalized assertion without a supporting basis. Considering that the Petition does not offer any new information or new insights into these issues, I find no basis for instituting a proceeding as requested by the Petitioner.

The institution of proceedings pursuant to 10 C.F.R. §2.202 is appropriate only where substantial health and safety issues have been raised (*see Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984)). This is the standard

that I have applied to the concerns raised by the Petitioner in this decision to determine whether enforcement action is warranted.

For the reasons discussed above, I conclude that the Petitioner has not raised any substantial health and safety issues. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied as described in this Decision. As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission twenty-five (25) days after issuance unless the Commission on its own motion institutes review of the Decision within that time.

**FOR THE NUCLEAR  
REGULATORY COMMISSION**

**Thomas E. Murley, Director  
Office of Nuclear Reactor  
Regulation**

**Dated at Rockville, Maryland,  
this 2d day of April 1991.**



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtliss  
Forrest J. Remick

In the Matter of

Docket Nos. 70-00270  
30-02278-MLA  
(ASLBP No. 90-613-02-MLA)  
(RE: TRUMP-S Project)  
(Byproduct License No. 24-00513-32;  
Special Nuclear Materials  
License No. SNM-247)

CURATORS OF THE  
UNIVERSITY OF MISSOURI

May 31, 1991

The Commission finds that its Atomic Safety and Licensing Board, in an initial decision relating to fire protection for the Alpha Laboratory, fails to satisfy the requirements in 10 C.F.R. § 2.1251(c). Thus, the Commission provides guidance to the Board regarding implementation of section 2.1251(c) in initial decisions relating to Subpart L proceedings. However, the Commission does not vacate the instant decision since no appeals were taken.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.1251(c))**

The requirements of 10 C.F.R. § 2.1251(c) must be met in all initial decisions, even if it seems unlikely that any party would wish to appeal any part of the decision.

## RULES OF PRACTICE: ADMINISTRATIVE FAIRNESS

It is not intended that licensing board decisions become unnecessarily prolix, but fairness to the parties in a proceeding and a proper justification for the actions taken in the proceeding require that the parties be able to understand exactly what a decision requires them to do (or prevents them from doing), how the decision has been reached, and the time constraints surrounding any appeal from the decision.

### MEMORANDUM AND ORDER

The Atomic Safety and Licensing Board has issued a first initial decision<sup>1</sup> relating to fire protection for a University of Missouri laboratory (the Alpha Laboratory) that is conducting a portion of a research project designed to demonstrate part of a new spent fuel reprocessing technology. The decision ordered the Licensee to install a fire sprinkler system in the laboratory as a condition for conducting any experiments with plutonium or americium, and to take certain other actions to which the Licensee has voluntarily agreed. The NRC Staff was ordered to amend the License accordingly. The decision also declared a tentative conclusion that a fire in the laboratory that involves the wooden joists (i.e., a major fire) is not credible.

The Licensee suggested that it would install a sprinkler system in the Alpha Laboratory and neither the Licensee nor the Intervenor has taken an appeal from the Licensing Board decision. Accordingly, this order is not intended to disturb the outcome of the decision. However, the Licensing Board's Memorandum and Order indicates that there is a need for the Commission to provide guidance regarding implementation of 10 C.F.R. § 2.1251(c) in initial decisions relating to Subpart L proceedings.<sup>2</sup>

Section 2.1251(c) provides that initial decisions in Subpart L proceedings *must* include the following:

- (1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;
- (2) The appropriate ruling, order, or denial of relief with its effective date; and
- (3) The time within which appeals to the decision and a brief in support of those appeals may be filed, the time within which briefs in support of or in opposition to appeals filed by another party may be filed, and the date when the decision becomes final in the absence of an appeal.

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<sup>1</sup>LBP-91-12, 33 NRC 253 (1991).

<sup>2</sup>Subpart L of 10 C.F.R. Part 2 provides for informal hearing procedures for adjudications in materials licensing proceedings.

These requirements must be met in all initial decisions, even if it seems unlikely that any party would wish to appeal any part of the decision. It is not intended that licensing board decisions become unnecessarily prolix, but fairness to the parties in a proceeding and a proper justification for the actions taken in the proceeding require that the parties be able to understand exactly what a decision requires them to do (or prevents them from doing), how the decision has been reached, and the time constraints surrounding any appeal from the decision. In this case, the decision does not explain why a fire sprinkler system in the Alpha Laboratory is *required* for safety, as opposed to being merely desirable. The initial decision is especially puzzling in view of the Administrative Judge's adoption of Mr. Purington's testimony that while he recommended a sprinkler system "in view of the limited fire loading discussed [in his affidavit], sprinklers are not mandated in the Alpha Laboratory. . . ." The initial decision thus fails to satisfy section 2.1251(c)(1). It also fails to comply with section 2.1251(c)(3) by not specifying the time for appeals, briefs, and finality. Since no appeals have been filed, we do not vacate the decision. But in the future, we expect more rigorous adherence to the requirements of these regulations.

It is so ORDERED.

For the Commission<sup>3</sup>

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 31st day of May 1991.

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<sup>3</sup> Commissioner Remick was not present for the affirmation of this order; if he had been present he would have approved it.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Alan S. Rosenthal\*  
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL  
50-444-OL  
(Offsite Emergency  
Planning Issues)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

May 10, 1991

In reviewing LBP-89-32, 30 NRC 375 (1989), and related rulings as they encompass the Licensing Board's merits disposition of intervenor challenges to the adequacy of the Seabrook Plan for Massachusetts Communities and the June 1988 full participation emergency response exercise, the Appeal Board affirms those Licensing Board rulings and findings that were the subject of properly briefed intervenor appeals. In addition, the Appeal Board dismisses as moot intervenor appeals from the Licensing Board's decision in LBP-89-33, 30 NRC 656 (1989), explaining its conclusion that certain matters remanded in ALAB-924, 30 NRC 331 (1989), did not forestall the Board's authorization of staff issuance of a full-power operating license for the Seabrook facility.

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\*Mr. Rosenthal resigned from the Appeal Panel effective April 13, 1991. Although therefore unavailable to review any final editorial revisions, he fully participated in the preparation of this opinion and wishes to be recorded as concurring in all of the determinations reached therein.

## **EMERGENCY PLANNING: FEMA REVIEW**

### **EMERGENCY PLAN(S): UTILITY PLAN AS SUBSTITUTE**

The Federal Emergency Management Agency (FEMA) has the authority to review a utility-sponsored emergency response plan in instances when, because of governmental nonparticipation, no state or local government emergency plans have been prepared. See CLI-89-8, 29 NRC 399, 417-18 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 507 (1988). See also CLI-90-3, 31 NRC 219, 249 n.47 (1990) (Commission "immediate effectiveness" review decision).

### **RULES OF PRACTICE: CONTENTIONS; DISCOVERY**

A formal discovery request for documents relative to an emergency response exercise for use in litigation concerning the exercise would not lie in the absence of admitted contentions regarding the exercise. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 630 & n.10 (1988). See also 10 C.F.R. § 2.740(b)(1).

### **EMERGENCY PLANNING: EVACUATION TIME ESTIMATES**

In conformity with the applicable NUREG-0654 guidance and as part of the planning process, both evacuation time estimates (ETEs) and a study supporting those estimates should be prepared covering all jurisdictions within a multi-state plume exposure pathway emergency planning zone (EPZ). See NUREG-0654 (Rev. 1) Criterion IIJ.8; *id.* (Rev. 1, Supp. 1) Criterion IIJ.10.I.

### **EMERGENCY PLANNING: EVACUATION TIME ESTIMATES**

Evacuation time estimates (ETEs) are one of the primary tools utilized by decisionmakers in choosing the appropriate protective action recommendation (PAR) for the general public in the event of a radiological emergency. They supply information cardinal to a decision whether, for example, sheltering or evacuation is the appropriate protective action in a given instance.

### **EMERGENCY PLANNING: REGULATORY GUIDANCE (NUREG-0654)**

Given the status of NUREG-0654 criteria as "guidance," a failure by applicants to comply with its provisions would not necessarily compel a finding

that their planning efforts lacked the requisite reasonable assurance. See ALAB-935, 32 NRC 57, 70 & n.49 (1990).

### **LICENSING BOARD(S): RESPONSIBILITIES (RESOLUTION OF ISSUES)**

Licensing Board-assigned tasks of ensuring preparation of a revised ETE study prior to full-power licensing and of monitoring the study's accuracy and readability were no more than ministerial undertakings, and thus were properly left to the NRC staff (and FEMA) without further Board supervision. See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 835 n.58 (1984); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-06 (1983). See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 263 n.97 (1989).

### **EMERGENCY PLANNING: EVACUATION TIME ESTIMATES; REGULATORY GUIDANCE (NUREG-0654)**

In stating that "[e]ach special facility shall be treated on an individual basis" in preparing ETes for the special facility population, NUREG-0654 (Rev. 1), App. 4, at 4-10, NUREG-0654 seeks to ensure that, given the potential diversity of that population, each facility has been reviewed so that all factors that may affect significantly the evacuation time from a particular facility have been incorporated in the ETes for the special facility population generally.

### **RULES OF PRACTICE: DISMISSAL OF APPEAL (FAILURE TO BRIEF ISSUES PROPERLY)**

By failing to specify what errors were made by the Licensing Board or to explain why the Board was wrong, argument in appellant's brief is wholly inadequate to merit further Appeal Board consideration of issue appellant seeks to raise. See ALAB-942, 32 NRC 395, 413 n.46 (1990). See also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-51 (1981), *aff'd sub nom. Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732 (3d Cir. 1982).

## **EMERGENCY PLAN(S): CONTENT (DEFICIENCIES IN)**

Any assertion of error regarding Licensing Board findings concerning the sufficiency of facility, equipment, or personnel resources must be supported by a precise identification of *both* (1) the additional resources that are purportedly necessary; and (2) the record support for the claim that those resources are *in fact* necessary in order to ensure the fulfillment of the "reasonable assurance" standard embodied in the emergency planning regulations.

## **EMERGENCY PLAN(S): UTILITY PLAN AS SUBSTITUTE**

### **EMERGENCY PLANNING: ABSENCE OF STATE AND LOCAL GOVERNMENT PARTICIPATION**

The essence of the realism rule, as set forth in 10 C.F.R. § 50.47(c)(1)(iii), is that in the evaluation of the adequacy of a utility-sponsored emergency response plan, the NRC will recognize "the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." The rule, however, was intended to have application only to "those persons in leadership positions (such as governors, mayors, civil defense directors, and state police superintendents) whose regular duties include the initiation of measures to protect the public health and safety in the event of an emergency that puts the populace at risk." ALAB-937, 32 NRC 135, 148-49 (1990).

### **EMERGENCY PLANNING: RESPONSE PERSONNEL**

Apart from the realism rule as promulgated in section 50.47(c)(1)(iii), there is reason to assume that "because of the nature of their regular duties, most individuals in certain occupations will respond in emergency situations," for example, "police officers, professional firefighters, and civil defense workers, all of whom routinely confront emergencies in the discharge of their assigned functions." ALAB-937, 32 NRC at 149 n.44.

### **EMERGENCY PLANNING: REGULATORY GUIDANCE (NUREG-0654)**

NUREG-0654 (Rev. 1, Supp. 1) Criterion II.A.4, which declares that "[t]he offsite response organization [(ORO)] shall be capable of continuous (24-hour) operations for a protracted period," cannot be read to mean that each response function performed by ORO personnel must be continuously sustained. Rather,

the temporal adequacy of the ORO's response capability for any of the myriad of activities undertaken under its auspices will depend on the function being performed.

## **EMERGENCY PLANNING: TRAINING**

### **EMERGENCY PLAN(S): TRAINING**

There is no regulatory requirement that training of first- and second-shift emergency response personnel must be identical. Accordingly, irrespective of what training is provided first-shift personnel, the question of the sufficiency of the training accorded second-shift personnel turns on whether they have received enough training to discharge their responsibilities properly.

### **EMERGENCY PLAN(S): CONTENT (PROTECTIVE MEASURES)**

Within any reactor facility's EPZ a diversity of potential shelter structures with different dose reduction factors is likely to be encountered (e.g., office buildings, frame houses with or without basements, brick houses with or without basements). To address this diversity, planners view the population within the EPZ as a whole and use the reduction value applicable to the most vulnerable portion of the population, i.e., those who in appreciable numbers would have to rely upon structures with the least effective shielding factor.

### **EMERGENCY PLAN(S): CONTENT (SUFFICIENCY)**

As the Commission made plain in the Statement of Consideration accompanying its 1987 rulemaking concerning plan evaluation in the face of state or local government nonparticipation, any consideration of plans such as the Seabrook Plan for Massachusetts Communities (SPMC) is to be done "without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to specific dose reductions which might be accomplished under the plan or the capabilities of any other plan." 52 Fed. Reg. 42,078, 42,085 (1987).

### **EMERGENCY PLAN(S): CONTENT (DEFICIENCIES IN)**

When challenging a plan based upon the results of an exercise (as opposed to a challenge to the plan itself), under the applicable "fundamental flaw" standard the focus of intervenor efforts must be on identifying imperfections in a pivotal

element of the plan so pronounced that those shortcomings can be corrected only through substantial redesign of the plan.

**EMERGENCY PLAN(S): EMERGENCY PLANNING ZONES  
(SPECIAL POPULATION)**

In the absence of some concrete information establishing that an allegedly unreported special needs population has more than a de minimis presence in the EPZ, no cause exists for invalidating the entire survey intended to identify such a population. Rather, the appropriate response is to ensure that additional efforts are made to eliminate any uncertainty about the identification of the special needs population.

**LICENSING BOARD(S): RESPONSIBILITIES (RESOLUTION OF  
ISSUES)**

In requiring as condition of licensure that applicants ensure that all special facilities will be contacted within a period of ninety minutes from the time the emergency notification process begins, the Licensing Board acted appropriately in leaving verification of this corrective measure to the staff. The Board's specific direction in defining the notification time frame clearly makes this a matter of objective analysis appropriate for staff verification.

**LICENSING BOARD(S): RESPONSIBILITIES (RESOLUTION OF  
ISSUES)**

In directing that applicants create procedures to schedule returning evacuation vehicles for use in reuniting parents and children and to transport reunited transit-dependent families to their assigned SPMC congregate care facilities, the Licensing Board set forth a clearly defined responsibility that is well within the bounds of those remedial activities that properly can be referred to the staff for verification.

**EMERGENCY PLAN(S): CONTENT (DEFICIENCIES IN)**

Existence of unresolved legal dispute over applicants' planned use of facility as staging area is not sufficient to require Licensing Board to reserve judgment on the adequacy of the facility, particularly given adverse judicial determination already visited upon the purported zoning dispute. *See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 519 (1988).*

## **EMERGENCY PLANNING: MEDICAL SERVICES ARRANGEMENTS**

### **EMERGENCY PLAN(S): CONTENT (ARRANGEMENTS FOR MEDICAL SERVICE TO THE PUBLIC)**

Unlike transportation planning, host hospital capacity planning is not fueled by the concern that there be assurance that *every* patient EPZ hospitals can possibly hold can be moved from the most potentially hazardous area. Instead, its focus is on the availability of hospital beds in sufficient numbers to ensure that, once outside the area of immediate danger, EPZ hospital patients can be reestablished in a clinical environment in a relatively expeditious manner.

## **EMERGENCY PLANNING: MEDICAL SERVICES ARRANGEMENTS**

### **EMERGENCY PLAN(S): CONTENT (ARRANGEMENTS FOR MEDICAL SERVICE TO THE PUBLIC)**

Disputed testimony in the nature of a dissertation on what ideal planning and resource allocation would be for the long-term handling of radiologically injured persons that does not discuss (or even reference) the requirements of applicable NRC regulations and guidance regarding assistance to contaminated injured individuals, or provide any insight on how the SPMC fails to fulfill those requirements, was properly rejected as failing to provide information relevant to the central issue of the adequacy of the SPMC's provisions on care for the radiologically injured.

### **EMERGENCY PLAN(S): CONTENT (DEFICIENCIES IN)**

In advance of judicial determination (so far apparently lacking) upholding validity of Massachusetts agency's interpretation and application of state statute as requiring out-of-state ambulance companies to retract their commitments to provide services to applicants until licensed, Licensing Board did not err in rejecting agency "cease and desist" letters for lack of relevance. *See Shoreham, ALAB-905, 28 NRC at 519.*

## **APPEAL BOARD(S): STANDARD OF REVIEW**

In reviewing Licensing Board factual findings, Appeal Board will not overturn findings unless persuaded that the record evidence as a whole compels a different result. *See, e.g., General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 473 (1987).*

## **EMERGENCY PLAN(S): MONITORING CAPACITY**

In the absence of contrary evidence, the Licensing Board is entitled to treat as presumptively correct the FEMA conclusion that for planning purposes it can be assumed that a minimum of twenty percent of the total EPZ permanent and transient population would require or seek monitoring in the event of a radiological emergency. See ALAB-924, 30 NRC 331, 360 (1989), *petitions for review pending*.

## **RULES OF PRACTICE: CONTENTIONS (PURPOSE; SCOPE)**

"The reach of a contention necessarily hinges upon its terms coupled with its stated bases. We have long held that one purpose of the requirement in 10 C.F.R. 2.714(b) that the bases of a contention be set forth with reasonable specificity is to put the other parties on notice as to what issues they will have to defend against or oppose. Thus, where a question arises as to the admissibility of a contention, we look to both the contention and its stated bases. Similarly, where, as here, the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise." See ALAB-899, 28 NRC 93, 97 (1988) (footnotes omitted), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3755 (U.S. Apr. 25, 1991) (No. 90-1657).

## **EMERGENCY PLANNING: STATE AND LOCAL GOVERNMENT (PARTICIPATION)**

The so-called "realism rule" embodied in 10 C.F.R. § 50.47(c)(1)(iii) does not come into play when the emergency plan at issue is a state-sponsored plan.

## **EMERGENCY PLANNING: RESPONSE PERSONNEL**

Assumption that a firefighter will respond to a particular emergency situation does not hinge upon whether the emergency happens to have its inception within the borders of the community within which that individual is located.

## **EMERGENCY PLANNING: RESPONSE PERSONNEL**

Assumption that firefighters and others who routinely confront emergencies in the discharge of their assigned functions will respond in emergency situations

does not rest upon the application of principles governing legal obligations but, rather, is rooted in a recognition of the fundamental nature of the regular duties of, e.g., police officers and professional firefighters. Confronting emergencies (especially in the case of firefighters) is the *raison d'être* for their employment, so it is scarcely likely they would walk away from a genuine emergency calling for assistance to persons at risk simply because of a perceived lack of any enforceable obligation to provide such assistance.

#### **EMERGENCY PLAN(S): CONTENT (DEFICIENCIES IN)**

With respect to the first of the two principal components of a fundamental flaw as revealed in an exercise — the exercise “reflects a failure of an essential element of the plan” — it is not enough that “minor or isolated problems” come to the fore on the day of the exercise. *Shoreham*, ALAB-903, 28 NRC at 505. As to the second component — the flaw “can be remedied only through a significant revision of the plan” — the pivotal question is whether “the problem can be readily corrected”; if so, “the flaw cannot reasonably be characterized as fundamental. *Id.* at 505-06.

#### **TECHNICAL ISSUE DISCUSSED**

Emergency plans.

#### **APPEARANCES**

**John Traficonte**, Boston, Massachusetts (with whom **Allan R. Fierce**, **Leslie B. Greer**, **Matthew T. Brock**, and **Pamela Talbot**, Boston, Massachusetts, were on the brief), for the intervenor **James M. Shannon**, Attorney General of Massachusetts.\*\*

**Paul McEachern**, Portsmouth, New Hampshire (with whom **Diane Curran**, Washington, D.C., was on the joint brief), for the intervenors **Town of Hampton** and **New England Coalition on Nuclear Pollution**, respectively.

**Robert A. Backus**, Manchester, New Hampshire, on the brief for the intervenor **Seacoast Anti-Pollution League**.

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\*\*Subsequent to the filing of the brief and the presentation of oral argument, Mr. Shannon was succeeded as Attorney General of Massachusetts by Scott Harshbarger, who has been substituted as a party.

**R. Scott Hill-Whilton**, Newburyport, Massachusetts, on the brief for the intervenor Town of Newbury.

**Barbara J. Saint Andre**, Boston, Massachusetts, on the brief for the intervenors Town of Salisbury and Town of Amesbury.

**Judith H. Mizner**, Newburyport, Massachusetts, on the brief for the intervenor Town of West Newbury.

**Suzanne P. Egan**, Newburyport, Massachusetts, on the brief for the intervenor City of Newburyport.

**Thomas G. Dignan, Jr.**, Boston, Massachusetts (with whom **George H. Lewald**, **Kathryn A. Selleck**, **Jeffrey P. Trout**, **Jay Bradford Smith**, **Geoffrey C. Cook**, **William Parker**, and **Barbara Moulton**, Boston, Massachusetts, were on the brief), for the applicants Public Service Company of New Hampshire, *et al.*

**Mitzi A. Young** (with whom **Edwin J. Reis**, **Richard G. Bachmann**, **Elaine I. Chan**, **Sherwin E. Turk**, and **Lisa B. Clark** were on the brief) for the Nuclear Regulatory Commission staff.

## DECISION

In three prior decisions in this operating license proceeding involving the Seabrook nuclear power facility, we considered a variety of challenges to the Licensing Board's rejection at the threshold of certain contentions advanced by intervenors Massachusetts Attorney General (MassAG); Seacoast Anti-Pollution League (SAPL); New England Coalition on Nuclear Pollution (NECNP); the Town of Hampton, New Hampshire; and the Massachusetts Towns of Amesbury, Salisbury, Newbury, and West Newbury.<sup>1</sup> To a large extent, those contentions concerned the adequacy of the Seabrook Plan for Massachusetts Communities (SPMC),<sup>2</sup> the emergency response plan for the Massachusetts portions of the Seabrook plume exposure pathway emergency planning zone (EPZ) that had

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<sup>1</sup> See ALAB-937, 32 NRC 135 (1990); ALAB-941, 32 NRC 337 (1990); ALAB-942, 32 NRC 395 (1990). In ALAB-941, we additionally considered one contention that the Licensing Board had admitted and decided on the merits. See 32 NRC at 352-57.

<sup>2</sup> The SPMC, which was admitted into evidence as Applicants' Exhibit 42, consists of a single volume containing the emergency plan, several volumes of plan appendices, and a volume of implementing procedures (IPs). Unless otherwise noted, all SPMC citations herein are to Revision 0, Amendment 6.

been devised and implemented by the Seabrook owners in the face of the then-refusal of Massachusetts and various of its political subdivisions to participate in the emergency planning effort. The remainder of the contentions receiving threshold rejection were addressed to the scope or results of the June 1988 full participation exercise of both the SPMC and the New Hampshire Radiological Emergency Response Plan (NHRERP), the emergency response plan sponsored by that State for the segment of the EPZ within its borders.<sup>3</sup>

Insofar as *offsite* emergency planning is concerned, this leaves for our consideration such further aspects of the Licensing Board's action regarding the SPMC or the June 1988 exercise as has been brought into question by one or another of the previously noted intervenors or by intervenor City of Newburyport.<sup>4</sup> In substantial measure, their challenge is to the Board's findings and conclusions in LBP-89-32<sup>5</sup> respecting contentions pertaining to the SPMC and the exercise, which the Board accepted for disposition on the merits following an evidentiary hearing.<sup>6</sup>

## I. STATE AND LOCAL GOVERNMENT NONPARTICIPATION IN SEABROOK EMERGENCY PLANNING

A. A central element influencing radiological emergency response efforts for the Massachusetts portion of the Seabrook EPZ has been the nonparticipation of the Commonwealth and various local communities in the emergency planning process. As a utility-sponsored, rather than a governmental emergency response plan, the SPMC itself is the most obvious evidence of this factor. Not surprisingly, this lack of State and local government participation is at the core of many of the intervenors' challenges to the Licensing Board's findings concerning the adequacy of the SPMC.

Recently, while our examination of the various matters raised by intervenors was well along toward completion, the MassAG brought a significant new development to our attention. On March 6, 1991, Massachusetts Governor

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<sup>3</sup> See 10 C.F.R. Part 50, App. E, §IV.F.1.

<sup>4</sup> Certain issues pertaining to *onsite* emergency planning are still before a differently constituted Appeal Board.

<sup>5</sup> 30 NRC 375 (1989).

<sup>6</sup> As previously observed, *see supra* note 1, one such contention was ruled upon in ALAB-941. Also with regard to emergency planning for the Massachusetts EPZ, in ALAB-935, 32 NRC 57 (1990), we affirmed a separately-constituted Licensing Board's merits determination that the applicants' Vehicle Alert Notification System or VANS emergency warning system was in compliance with applicable regulatory requirements and guidance.

In extensive filings, both applicants and the NRC staff have opposed the intervenors' various assignments of error concerning the Licensing Board's merits rulings on the adequacy of the SPMC and the 1988 full participation exercise. See Applicants' Brief (Mar. 5, 1990) at 5-27, 48-112, 114; NRC Staff Brief in Response to Intervenor Appeals from LBP-89-32 and LBP-89-17 (Mar. 21, 1990) at 14-49, 69-71, 79-125. Although we have carefully considered the appellees' positions, in the interest of concision we will not set forth their arguments except as is necessary to provide a full explanation of our ruling on any particular issue.

William F. Weld signed Executive Order No. 303. In that document, of which we take official notice in accordance with 10 C.F.R. § 2.743(i), the Governor directed the Massachusetts Civil Defense Agency and Office of Emergency Preparedness (MCDA) to take the following measures:

1. To begin developing "the best possible emergency plans for response to a radiological emergency originating" at the Seabrook facility. In this planning effort, the MCDA Director is to work with the Secretary of the Executive Office of Public Safety, as well as with other officials of the Commonwealth and its political subdivisions, including the six Massachusetts communities within the Seabrook EPZ.

2. In conjunction with the Massachusetts State Police, to "begin working with and in cooperation with the operators of Seabrook Station to ensure adequate emergency planning and the establishment of effective warning and notification systems." (The six EPZ communities are "encouraged" to take similar steps.)

3. To "work with and remain in contact with the operators of Seabrook Station to ensure that an effective warning and notification system is established as expeditiously as possible, and that emergency planning efforts are coordinated and operational."

4. In conjunction with the Massachusetts Commissioner of Public Health, to "work with Seabrook Station to determine the feasibility of establishing a system to monitor off-site radiological emissions that may emanate from Seabrook Station." (The six EPZ communities are "encouraged" to participate in this endeavor. In addition, in its closing paragraph, the Executive Order requests that Seabrook facility officials work with the MCDA "on all aspects of public safety programming and planning and support those programs in a manner that will ensure the public's faith in the process.")

Needless to say, we must account for this dramatic change in the position of the Commonwealth of Massachusetts with respect to its participation in emergency response planning for the Massachusetts portion of the Seabrook EPZ.<sup>7</sup> At a minimum, it has an impact upon the portion of the MassAG's appeal, and that of some of the other intervenors as well, devoted to the Licensing Board's interpretation and application of certain provisions of 10 C.F.R. § 50.47, the basic Commission rule concerned with emergency response planning, which are intended to address the consequences of state and local government nonparticipation in emergency planning.

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<sup>7</sup> In an effort to do so, by unpublished order dated March 8, 1991, we requested that all the parties apprise us of their views about the effect of Executive Order No. 303 upon the issues remaining before us for determination. The MassAG, the City of Newburyport and the Towns of Newbury and West Newbury, the applicants, and the staff filed responses to our directive.

Paragraph (b) of section 50.47 sets forth the standards that must be met by onsite and offsite plans. In paragraph (c)(1), the rule states that, although the “[f]ailure to meet [those] standards . . . may result in the Commission declining to issue an operating license,” the applicant for such a license “will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operations.” Paragraph (c)(1) then goes on to address the situation when the applicant “asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning.” In such circumstances, an operating license may issue on a demonstration that (1) the inability to comply with the paragraph (b) requirements “is wholly or substantially the result of the non-participation of state and/or local governments”; (2) the applicant has made a sustained, good faith effort to obtain such participation; and (3) the applicant’s emergency plan provides reasonable assurance that facility operation will not endanger the public health and safety. On the last score, the rule provides that, in making its determination on the adequacy of a utility plan, “the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public.” Moreover, the rule establishes a rebuttable presumption that, in the event of such an emergency, state and local officials generally will follow the utility plan.<sup>8</sup>

In short, the resort to the so-called utility rule embodied in section 50.47(c)(1) rested on the premise — valid at the time the rule was invoked by the Licensing Board — that there would be no participation on the part of either the Commonwealth or its political subdivisions in the emergency planning endeavor. Given the Executive Order, however, it is no longer important whether, as the MassAG has maintained, correct effect was given below to the utility rule and its presumptions regarding governmental action in the event of an emergency.<sup>9</sup>

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<sup>8</sup>The validity of this rule and its presumptions was upheld by the United States Court of Appeals for the First Circuit in *Massachusetts v. United States*, 856 F.2d 378 (1st Cir. 1988).

<sup>9</sup>As we have indicated previously, see ALAB-942, 32 NRC at 431 n.130, in appealing the Licensing Board’s rejection of certain of his contentions, the MassAG (with the support of intervenor West Newbury) has sought to raise various issues concerning the Board’s application of 10 C.F.R. § 50.47(c)(1). See Brief of the [MassAG] in Support of His Appeal of LBP-89-32 (Jan. 24, 1990) at 2-23 [hereinafter MassAG Brief]; Town of West Newbury’s Brief on Appeal of the Partial Initial Decision on the SPMC LBP-89-32 (Jan. 24, 1990) at 11 [hereinafter West Newbury Brief]. Among other things, he asserts that the Board invoked the rule’s presumptions and allowed license issuance without having sufficient record evidence to support a finding that applicants complied with certain threshold requirements; erred in concluding that the findings of the Federal Emergency Management Agency regarding the SPMC were sufficient to establish the plan’s adequacy (but for governmental nonparticipation) so as to support the presumption that the nonparticipating governments will follow that plan; improperly precluded the MassAG from presenting evidence concerning the adequacy of an ad hoc response by  
(Continued)

For, as matters now stand, there is no room for doubt that Commonwealth emergency response officials will be active participants in emergency planning; in the event of an actual emergency “will exercise their best efforts to protect the health and safety of the public”; and, as part of the decreed cooperation with the Seabrook operators, they will generally follow the SPMC unless and until its provisions are superseded by plans devised and put into effect by the Commonwealth itself.<sup>10</sup>

We are satisfied that these considerations obviate, with the limited exception discussed in Part I.B below, any further exploration of the Licensing Board’s application of the utility rule. This is so despite the MassAG’s observation that the Executive Order does not mandate, but merely encourages, the involvement of the Massachusetts EPZ communities.<sup>11</sup> While it may not be certain that those communities will respond affirmatively to the Governor’s desires, the fact remains that the achievement of the SPMC’s objectives necessitates very little action on the part of the municipalities and, manifestly, if necessary the Commonwealth will be able to provide any support that the municipalities might otherwise be expected to furnish.<sup>12</sup>

Insofar as the other issues presented by the appeals are concerned, we need not pause to consider at this juncture whether, and if so to what extent, they may have been affected by the Executive Order. It is reasonable to assume that any alterations brought about because of the Commonwealth’s involvement will represent an improvement in emergency planning. This being so, it would become necessary to examine the implications of that involvement only were we to find, upon scrutiny of the intervenors’ attack upon it, that the SPMC is flawed in some material respect. For the reasons set forth in the balance of this opinion, we find no such flaws. Thus, the result below can be affirmed irrespective of the changes that might be wrought as a consequence of the Executive Order.

B. In addition to his concerns about the Licensing Board’s general application of 10 C.F.R. § 50.47(c)(1), the MassAG, along with SAPL, has expressed concerns about the role played by the Federal Emergency Management Agency (FEMA) in assessing the adequacy of the SPMC as a utility plan under this and the other provisions of section 50.47.<sup>13</sup> We find no merit to these challenges.

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the nonparticipating governments; concluded incorrectly that the Governor of Massachusetts is legally empowered to delegate emergency response authority to applicants to carry out the utility plan; and determined without record support that the response of nonparticipating governments in following the utility plan would be adequate.

<sup>10</sup> See [MassAG’s] Response to the Appeal Board Order of March 8, 1991 (Mar. 21, 1991) at 4-5.

<sup>11</sup> See *id.* at 4.

<sup>12</sup> Under the SPMC, the municipalities’ main contribution to emergency response efforts is providing local police to support and relieve utility-supplied traffic guides, a task for which, as we find in Part IV.A below, there already are adequate Massachusetts State Police resources.

<sup>13</sup> See MassAG Brief at 21-23; [SAPL] Brief on Appeal of the Partial Initial Decision on the [SPMC] and 1988 FEMA Graded Exercise (LBP-89-32) (Jan. 24, 1990) at 36-40 [hereinafter SAPL Brief].

1. Initially, the MassAG asserts that, at the time it conducted its review of the SPMC, under both NRC and its own regulations FEMA lacked the legal authority to evaluate a utility (as opposed to a government-sponsored) emergency plan. As the Licensing Board recognized,<sup>14</sup> in this very proceeding the Commission previously took note of FEMA's review of the SPMC and declared that favorable FEMA findings on that plan, in accordance with 10 C.F.R. § 50.47(a)(2), have the status of a rebuttable presumption.<sup>15</sup> The Commission's determination in this regard obviously is premised upon its judgment that FEMA has the legal authority to review the utility plan. Although espousing a different view, the MassAG has failed to present us with any argument that convinces us we should not consider this Commission conclusion binding.

2. The MassAG also maintains that FEMA utilized an improper "best efforts" standard in judging the SPMC by failing to make any appropriate judgment about the plan's effectiveness. He asserts that at the root of this deficiency is the Licensing Board's earlier ruling in the New Hampshire emergency response plan portion of this proceeding rejecting the so-called Sholly/Beyea/Thompson/Leaning testimony as based upon an inappropriate analysis of the purported dose savings achieved in emergency planning. The MassAG contends that determination had the effect of changing FEMA's views on the appropriate standards for assessing emergency plans. He concludes that, consistent with that ruling, FEMA's findings concerning the SPMC's adequacy simply reflect the Board's own improper "best efforts" standard and so do not constitute an independent assessment of the SPMC that warrants the presumptive status otherwise afforded by section 50.47(a)(1). In addition, the MassAG protests the Board's refusal to accept into evidence certain statements of FEMA counsel made during a deposition in which counsel declared that FEMA's review of a plan's adequacy was not based upon any particular quantitative level of dose savings achieved. The MassAG asserts that this "stipulation" reflected FEMA's adherence to the "best efforts" approach and thus should have been admitted.

Although labeled as a challenge to FEMA's role in reviewing the SPMC, it is apparent that both of these arguments are merely a variation of the MassAG's oft-repeated theme that a judgment about an emergency plan's efficacy requires a quantitative assessment of the dose savings achieved under the plan. In CLI-

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<sup>14</sup> See LBP-89-32, 30 NRC at 388.

<sup>15</sup> See CLI-89-8, 29 NRC 399, 417-18 (1989). See also CLI-90-3, 31 NRC 219, 249 n.47 (1990) (in context of the Seabrook "immediate effectiveness" review, Commission notes that FEMA has reviewed the SPMC and declares that agency's conclusions concerning plan adequacy are presumed to be correct unless rebutted). We made a similar finding earlier with respect to the utility plan at issue in the *Shoreham* proceeding. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 507 (1988) (discussing weight to be accorded FEMA findings as rebuttable presumptions on appeal of Licensing Board's conclusions regarding sufficiency of utility plan).

90-2,<sup>16</sup> the Commission determined that the Sholly/Beyea/Thompson/Leaning testimony on the purported dose consequences/dose savings resulting under the New Hampshire emergency plan for a range of accident scenarios should be excluded from consideration in that portion of this proceeding. The United States Court of Appeals for the District of Columbia Circuit recently upheld the Commission's determination.<sup>17</sup> The court concluded that the dismissal of this dose consequence evidence was consistent with the Commission's recognition, through its appropriate adoption of generic emergency planning standards set forth in 10 C.F.R. § 50.47(b), that hypothetical dose savings need not be examined in deciding under section 50.47(a)(1) whether the provisions of a particular emergency plan provide "reasonable assurance" of adequate protective measures.<sup>18</sup> As the Licensing Board found in ruling initially upon the MassAG's concerns regarding FEMA review, in assessing the SPMC's adequacy FEMA has reached its judgments based upon the standards set forth in the Commission's emergency planning regulations and guidance.<sup>19</sup> As this approach clearly is consistent with Commission and judicial conclusions regarding the appropriate framework for emergency planning analysis, the MassAG's assignments of error are without basis.<sup>20</sup>

3. Before us, the MassAG and SAPL also assert that the Licensing Board erred in rejecting an intervenor request that, because of the actions of FEMA representative Richard Donovan in destroying the written comments of NRC and FEMA evaluators regarding the June 1988 full participation exercise, neither the NRC nor FEMA should be given the benefit of the rebuttable presumption accorded to FEMA findings under 10 C.F.R. § 50.47(a)(2). The documents at issue, which one intervenor counsel asked to have retained in a written request to FEMA counsel just prior to the June 1988 exercise, were destroyed by Mr. Donovan in September 1988. At the time of their destruction, they were not the subject of a formal discovery request before the Board, which earlier apparently refused to entertain such a request until after intervenor contentions regarding the exercise were admitted.<sup>21</sup> In refusing to impose any sanctions or draw any negative evidentiary inferences on the basis of the document destruction, the Board stated that it accepted Mr. Donovan's explanation under oath that his

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<sup>16</sup>31 NRC 197 (1990).

<sup>17</sup> See *Massachusetts v. NRC*, 924 F.2d 311, 322-30 (D.C. Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3755 (U.S. Apr. 25, 1991) (No. 90-1657).

<sup>18</sup> See *id.* at 330.

<sup>19</sup> See LBP-89-32, 30 NRC at 389-91.

<sup>20</sup> With respect to FEMA's analysis of the SPMC, the MassAG also asserts that "FEMA completely misunderstood 'realism' as that doctrine has developed in NRC law." MassAG Brief at 22. He provides no explanation as to why this is so, other than to cite us to one of his proposed findings before the Licensing Board, a portion of a pleading filed before the Board, and the basis of one of his exercise contentions. As we explain more fully below, *see infra* p. 322, this presentation is wholly inadequate to bring the matter before us.

<sup>21</sup> See Tr. 15,008-09.

actions had been in accordance with his normal practice and that he believed that the destruction of the documents was not inappropriate.<sup>22</sup>

Intervenors have provided no authority (and we are aware of none) establishing that, apart from any requirements that might emanate from this litigation, FEMA was under an obligation to preserve the documents in question.<sup>23</sup> It also seems apparent that, given the status of the litigation at the time the documents were destroyed, a formal discovery request for the documents would not lie because contentions regarding the exercise had not yet been admitted.<sup>24</sup> Therefore, the only question remaining, and the one directly addressed by the Licensing Board's findings, is whether, to any significant degree, Mr. Donovan's act of destroying the documents was founded upon improper motives or otherwise grounded in bad faith. On the basis of Mr. Donovan's testimony on this issue,<sup>25</sup> the Board concluded that he had not acted from any base motivation. Instead, the Board found that he simply had followed his usual practice, apparently after seeking and receiving the advice of counsel that such action would not run afoul of any legal restrictions. We see no justification on this record for disturbing what is essentially a credibility finding by the Board. In any event, as the Board noted, intervenors were afforded extensive discovery and cross-examination of Mr. Donovan himself to compensate for the loss of the documentation, a corrective action that would eliminate any prejudice that might be argued to arise from the destruction of the evaluation reports.<sup>26</sup>

## II. EVACUATION TIME ESTIMATES

The balance of intervenor challenges to the SPMC deal with issues involving specific planning elements. Initially, the MassAG contests the Licensing Board's findings regarding the adequacy of the evacuation time estimates (ETEs) utilized

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<sup>22</sup> See LBP-89-32, 30 NRC at 397.

<sup>23</sup> While a request for the documents under the Freedom of Information Act might well have had that effect at least for the period necessary to resolve the validity of the request, see generally *United States v. Kentucky Utility Co.*, 927 F.2d 252 (6th Cir. 1991), intervenors chose not to utilize that avenue.

<sup>24</sup> See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 630 & n.10 (1988). See also 10 C.F.R. § 2.740(b)(1).

<sup>25</sup> See Tr. 21,888-94.

<sup>26</sup> See LBP-89-32, 30 NRC at 397. Also with regard to FEMA, the MassAG makes the one sentence assertion that Mr. Donovan's review of the SPMC was "arbitrary and capricious" and provides as the only support for this declaration a citation to his proposed findings of fact and conclusions of law. As we note below, see *infra* p. 322, this explanation clearly is insufficient to maintain an appeal of this matter.

SAPL is somewhat more forthcoming in an additional assertion that revisions made to the FEMA draft exercise report provided to the intervenors reveal the possibility that the final evaluation report was improperly "cooked." Nonetheless, after reviewing the various examples of changes SAPL points out, along with Mr. Donovan's testimony concerning those revisions, see Tr. 22,112-13, 22,121-23, 22,134-36, 22,140-46, 22,150-52, we find that the revisions in question were entirely reasonable and do not evidence any attempt to adjust the final report improperly.

for the SPMC. He asserts that the Board's determinations encompassed several purported deficiencies, including: (1) failure to prepare an evacuation time study for the Massachusetts portion of the EPZ; (2) planners' utilization of a "regional" approach to ETE calculations that do not provide accurate ETEs for individual Massachusetts communities; (3) failure to calculate ETEs for special facilities on an individual basis; and (4) errors in the calculation of the impact of "returning commuters" on evacuation times.<sup>27</sup> We address each of these concerns in turn.

A. As noted previously in ALAB-932,<sup>28</sup> for emergency planning purposes the Seabrook EPZ has been divided into seven Emergency Response Planning Areas (ERPAs). Two of these areas cover the Massachusetts portion of the EPZ. In turn, regions consisting of one or more ERPAs have been established on the basis of direction (i.e., north, south, or west) and spatial extent (i.e., beach area, two miles, five miles, EPZ boundary) relative to the Seabrook station. In line with the regional approach to ETE calculations taken by planning officials, the validity of which we discuss below, the NHRERP for the New Hampshire portion of the Seabrook EPZ contains a report setting forth a series of ETEs intended to cover different evacuation scenarios (e.g., good or bad weather, summer or offseason) for regions encompassing both the New Hampshire and Massachusetts ERPAs. As the Licensing Board recognized, however, the SPMC itself contains no comprehensive report showing how the specific ETEs contained in the SPMC were calculated or what assumptions and inputs were used to arrive at those figures.<sup>29</sup>

In its Criteria II.J.8 and II.J.10.1, the NRC/FEMA joint emergency planning guidance issuance NUREG-0654 indicates that emergency plans are to include "time estimates for evacuation."<sup>30</sup> In addition, these criteria state that the time estimates are to be derived from a dynamic analysis that should be prepared in accordance with the guidelines set forth in NUREG-0654, Appendix 4.<sup>31</sup> Before the Licensing Board, the MassAG contended that the applicants' failure to prepare a separate ETE report to accompany the SPMC violated the NUREG-0654 guidance regarding evacuation time studies. In response, the Board directed that, prior to full-power operation of Seabrook, the NRC staff was to confirm that applicants had provided such a report setting forth the technical

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<sup>27</sup> See MassAG Brief at 52-57.

<sup>28</sup> 31 NRC 371, 408-09 (1990).

<sup>29</sup> See LBP-89-32, 30 NRC at 399.

<sup>30</sup> NUREG-0654/FEMA-REP-1 (Rev. 1), "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," Criterion II.J.8 (Nov. 1980) [hereinafter NUREG-0654 (Rev. 1)]; *id.* (Rev. 1, Supp. 1) Criterion II.J.10.1 (Sept. 1988) [hereinafter NUREG-0654 (Rev. 1, Supp. 1)]. The 1988 supplement was created specifically to provide additional guidance regarding utility-sponsored emergency plans such as the SPMC.

<sup>31</sup> See *id.* (Rev. 1), App. 4.

basis for the ETEs specified in the SPMC.<sup>32</sup> This was done in a separate study covering ETEs for both the New Hampshire and Massachusetts portions of the EPZ.<sup>33</sup> The MassAG now asserts that this was inadequate to cure the applicants' failure to comply with the NUREG guidance. He insists that, without an ETE report in the SPMC geared specifically to the Massachusetts portion of the EPZ, the Board could not make the requisite "reasonable assurance" finding relative to the SPMC. He also maintains that the Board's action directing the staff to ensure that this separate report was available for use by planning officials prior to full-power operation was not enough. According to the MassAG, the Board itself had to scrutinize the report to ensure it is "technically accurate" and "user-friendly," a task that could not be delegated to the staff.<sup>34</sup>

As the Licensing Board apparently recognized, in conformity with the applicable NUREG-0654 guidance and as part of the planning process, both ETEs and a study supporting those estimates that would cover the entire Seabrook EPZ should have been prepared. There admittedly was no document designated as an ETE study to accompany the SPMC. Nonetheless, in the circumstances, we conclude that this did not forestall a reasonable assurance finding. We also find no impropriety in the Board's action leaving to the staff the task of ensuring the preparation of an ETE study to accompany the SPMC.

Evacuation time estimates are one of the primary tools utilized by decision-makers in choosing the appropriate protective action recommendation (PAR) for the general public in the event of a radiological emergency. They supply information cardinal to a decision whether, for example, sheltering or evacuation is the appropriate protective action in a given instance. For the Seabrook EPZ, the methodology utilized for deriving the necessary ETEs, which included the use of the Interactive Dynamic Network Evacuation or IDYNEV computer model, was described in the study initially incorporated in the NHRERP.<sup>35</sup> Although appended to the New Hampshire plan, the study nonetheless sets forth ETEs that encompass both the New Hampshire and the Massachusetts ERPA's. Moreover, although the SPMC makes no mention of it, the parties were aware that the ETE calculations in the utility plan are derived from the ETE report contained in the

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<sup>32</sup> See LBP-89-32, 30 NRC at 400-01.

<sup>33</sup> See Seabrook Station Evacuation Time Study (Rev. 2, Dec. 1989); Evacuation Time Study Handbook for the Seabrook [EPZ] (Rev. 0, Dec. 1989) [hereinafter Evacuation Time Study Handbook]. See also Memorandum from R. Strome to G. Peterson (Dec. 7, 1989), Attach., Item No. 4 (NHRERP revision 3 removed ETE study from NHRERP, separate ETE Study and Handbook published December 1989). In accordance with 10 C.F.R. § 2.743(i), we take official notice of these documents found in the docket of this proceeding.

<sup>34</sup> MassAG Brief at 53.

<sup>35</sup> See NHRERP (Seabrook Station Evacuation Time Study), Vol. 6 (Rev. 2, Aug. 1986). The NHRERP was admitted into evidence as Applicants' Exhibit 5.

NHRERP, as modified by additional information presented during the course of the adjudicatory hearing concerning that study.<sup>36</sup>

With the exception of the "returning commuters" issue that we discuss below, as part of his appellate challenge to the SPMC, the MassAG has not contested any substantive aspect of the ETE study that accompanied the NHRERP, including the ETEs in the SPMC that are based upon the New Hampshire plan study. Given this lack of challenge to the substance of the ETEs encompassing the Massachusetts portion of the EPZ, we are unable to perceive any basis for his argument that they are so deficient as to preclude a reasonable assurance finding. Further, compliance with the NUREG-0654 guidance suggesting the need for an ETE study for the Massachusetts portion of the EPZ was achieved with the Licensing Board's order that the staff ensure that a study specifically for Massachusetts (or a study explicitly designating as covering both Massachusetts and New Hampshire) be prepared prior to full-power licensing.<sup>37</sup> Moreover, as far as we are aware, this is not an instance in which revision of the study will require the incorporation of significant new information or analyses beyond that contained in the initial NHRERP ETE study or that which came to light during the course of the proceedings before the Board.<sup>38</sup> As a consequence, the Board-assigned tasks of ensuring preparation of the revised study and of monitoring its accuracy and readability are no more than ministerial undertakings,<sup>39</sup> and thus were properly left to the staff (and FEMA) without further Board supervision.<sup>40</sup>

B. Besides challenging the lack of a specific ETE study for the Massachusetts portion of the EPZ, the MassAG also asserts that the ETE process was deficient because it did not yield evacuation times for individual Massachusetts communities in the EPZ. The MassAG contends that this is a result of the applicants' improper utilization of a "regional approach" to ETE calculation.

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<sup>36</sup> See Applicants' Rebuttal Testimony No. 16 (Evacuation Time Estimates), fol. Tr. 26,681, at 2-3. See also Tr. 26,686-87.

<sup>37</sup> Of course, given the status of NUREG-0654 criteria as "guidance," a failure by applicants to comply with its provisions regarding an ETE study would not necessarily compel a finding that their planning efforts lacked the requisite reasonable assurance. See ALAB-935, 32 NRC 57, 70 & n.49 (1990).

<sup>38</sup> Although the new study was issued in December 1989, see *supra* note 33, the MassAG has not made any assertion of deficiencies in that study.

<sup>39</sup> See Tr. 27,179-80. That study undoubtedly should be accurate and user-friendly so that it can be readily utilized by planners in making subsequent revisions to the already established ETEs. See Tr. 27,178.

<sup>40</sup> See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 835 n.58 (1984) (supervision of compliance with party's commitment or licensing board condition is properly left to the staff); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-06 (1983) (appropriate for Licensing Board to place reliance on staff verification of various matters, including letters of agreement covering vehicle availability and installation of siren and communications systems). See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 263 n.97 (1989) (ensuring that sufficient number of buses actually are available is matter left to oversight of staff in performance of its continuing regulatory responsibilities).

As described above, the ERPAs for the Seabrook EPZ, including the two ERPAs encompassing the Massachusetts communities, have been arranged into "regions." Each region consists of the New Hampshire ERPA surrounding the Seabrook facility, ERPA A, combined with other New Hampshire or Massachusetts ERPAs in a manner designed to afford different spatial and directional configurations radiating from the facility. Accordingly, as calculated for the Seabrook emergency plans, the ETEs for a particular region constitute the time necessary to evacuate individuals from all ERPAs within the region, including ERPA A surrounding the Seabrook plant, to a particular distance from the facility (i.e., two miles, five miles, ten miles, or the EPZ boundary). Put another way, each ETE quantifies the time it is anticipated it will take the last of the evacuees leaving ERPA A to evacuate to a prescribed distance following an order to evacuate that particular region. The Licensing Board affirmed this regional approach to ETE calculation. In doing so, it relied upon the provisions of NUREG-0654 calling for integrated emergency planning between contiguous political jurisdictions, the "reality" that traffic flowing through the New Hampshire and Massachusetts EPZ areas cannot be segregated temporally according to political boundaries, and the fact that the New Hampshire seacoast areas are closer to the plant than are the Massachusetts communities and will be generating sizable traffic flows before or as soon as an evacuation order is issued.<sup>41</sup> The MassAG acknowledges these points, but asserts they are irrelevant to the central issue of whether Massachusetts response officials can and should make appropriate PAR determinations for the Massachusetts communities using the existing ETEs.

Because it seems apparent that ETEs for the particular Massachusetts towns can be generated,<sup>42</sup> the MassAG's challenge to the relevance of at least the last two rationales given by the Licensing Board is not unfounded. Somewhat more to the point, however, is the Board's additional observation, not addressed by the MassAG, that it is unrealistic to postulate a circumstance in which Massachusetts communities would be evacuated and New Hampshire communities closer to the facility would not.<sup>43</sup> The regional approach to ETEs always assumes the evacuation of New Hampshire ERPA A around the facility, generally in combination with other outlying ERPAs in New Hampshire or Massachusetts. This is founded upon a pragmatic recognition that a key to the effectiveness of any protective action for the Seabrook EPZ population is the protection it will afford to those in locations most likely to bear the initial impact of any radiological releases. Moreover, as the Board noted, the MassAG's criticism

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<sup>41</sup> See LBP-89-32, 30 NRC at 402.

<sup>42</sup> See Tr. 26,717. See also Evacuation Time Study Handbook at QR-3 (setting forth "clearance times" for specific New Hampshire and Massachusetts communities but indicating they "should not be used for PAR decision making").

<sup>43</sup> See LBP-89-32, 30 NRC at 403. See also Tr. 28,230-41.

of the use of regional ETEs fails to recognize that, consonant with applicable NUREG-0654 guidance, the PAR decisionmaking process for the two states within the EPZ is intended to reflect a coordinated structure.<sup>44</sup> The regional approach to ETEs is entirely consistent with the overall Seabrook emergency planning strategy that, after receiving a PAR from the utility onsite response organization, New Hampshire State and Massachusetts offsite response officials are expected to act in concert in determining what protective action will be utilized in each jurisdiction.<sup>45</sup> We thus find the MassAG's complaint concerning the validity of the planners' specification of regional ETEs, rather than the provision of ETEs for each Massachusetts community, to be meritless.

C. The MassAG also argues that, contrary to the conclusion of the Licensing Board, the SPMC is deficient because it fails to provide an ETE for each special facility (e.g., hospital, nursing home, school) within the Massachusetts portion of the Seabrook EPZ. As the sole authority for this proposition, he relies upon a portion of our decision in ALAB-924.<sup>46</sup> There, we found the need for additional Licensing Board consideration of the time necessary to prepare seriously ill, advanced-life-support (ALS) patients for transport from their special facility as part of the ETE planning basis. The MassAG finds particularly significant a footnote in which we referenced a statement in NUREG-0654 that, in computing ETEs for special facilities, "[e]ach special facility shall be treated on an individual basis."<sup>47</sup> He now asserts that this was tantamount to a holding that "ETEs for special facilities on an individualized basis are required."<sup>48</sup>

NUREG-0654 recognizes that ETEs generally should reflect a judgment about the maximum time necessary to complete the evacuation for the various population groups expected to be found within the EPZ.<sup>49</sup> NUREG-0654 also specifies that there should be separate ETEs for the general population (i.e., members of the permanent and transient populations) and the population of the special facilities located in the EPZ.<sup>50</sup> Contrary to the MassAG's assertion, however, this guidance indicates that the ETEs should encompass the entire special facility population, not the population for each separate facility.<sup>51</sup> Moreover, when viewed in the context of the overall ETE assessment scheme set forth in NUREG-

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<sup>44</sup> See LBP-89-32, 30 NRC at 402.

<sup>45</sup> See Tr. 26,710-11.

<sup>46</sup> 30 NRC 331 (1989), *petitions for review pending*.

<sup>47</sup> *Id.* at 352 n.71 (quoting NUREG-0654 (Rev. 1), App. 4, at 4-10).

<sup>48</sup> MassAG Brief at 55.

<sup>49</sup> See NUREG-0654 (Rev. 1), App. 4, at 4-10.

<sup>50</sup> See *id.* at 4-3, 4-9 to -10, -16. For the Massachusetts portion of the EPZ, the special facility population ETE was provided as part of the overall ETE study contained in the NHRERP. See NHRERP (Seabrook Station Evacuation Time Study), Vol. 6, at 10-71 to -74.

<sup>51</sup> See NUREG-0654 (Rev. 1), App. 4, at 4-16.

0654, the previously quoted language indicating special facilities should be “treated on an individual basis” is consistent with this approach.

In describing the analysis that should be undertaken for preparing ETEs, NUREG-0654 recognizes that evacuation for special facilities is more likely to be discontinuous as compared to the process for the general population.<sup>52</sup> When notified of an emergency requiring evacuation, the general population commonly will begin formation of family or other evacuation groups followed by a progressive egression that produces a fairly smooth evacuation time function.<sup>53</sup> The evacuation process for special facilities, however, is more disjointed. Delays arise, for example, because of the need to bring vehicles and other equipment to a special facility for evacuation of the facility population or the need to afford staff the time necessary to close down the facility.<sup>54</sup> Because of the diversity of special facilities, which include hospitals, schools, and nursing homes,<sup>55</sup> in stating that “[e]ach special facility shall be treated on an individual basis,” NUREG-0654 seeks to ensure that the effect of this discontinuous process is properly accounted for in the ETEs for the special facility population.

Indeed, our remand in ALAB-924 was directed to the same point. The record there reflected that, in assessing the ETEs for the special facility population, planners apparently had not accounted for a potentially significant period of preparation time for ALS patients in such facilities. In order to ensure that any effect arising from ALS patient transportation preparation has been accounted for in the ETEs for the special facility population, the matter was returned to the Licensing Board for further consideration.

Our decision in ALAB-924 concerning ALS patients thus did *not* include a holding that the NUREG-0654 guidance mandates that an ETE must be prepared for each special facility. Nor do we so hold in this instance. All that this NUREG-0654 guidance indicates — and all that the quoted footnote from ALAB-924 means — is that, in preparing the ETEs for the special facility population, the potential diversity of that population merits review of each special facility, so as to confirm that all factors that may affect significantly the evacuation time from that facility have been incorporated in the ETEs for the special facility population generally.<sup>56</sup> Accordingly, we reject this MassAG challenge.

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<sup>52</sup> See *id.* at 4-8.

<sup>53</sup> See *ibid.*

<sup>54</sup> See *id.* at 4-9 to -10.

<sup>55</sup> See *id.* at 4-2, -8.

<sup>56</sup> Under the SPMC, the issue of ALS patient preparation might have a particular impact on ETEs because the utility plan includes a transportation prioritization scheme for the transit dependent/special facility population under which ALS patients (along with other hospital and nursing home patients) would be slated to receive evacuation transportation last. See Applicants' Rebuttal Testimony No. 16, at 62-63. The MassAG, however, has not asserted that the ETE for the Massachusetts special facility population fails to reflect this factor properly.

D. The MassAG's remaining ETE-related concern involves the adequacy of the Licensing Board's determinations about the effect upon ETEs of those members of the EPZ permanent population who commute to work and who, in the event of a radiological emergency, would return to their homes in the EPZ prior to evacuating. Previously, in ALAB-917,<sup>57</sup> we determined that, despite the Board's disposition of portions of the MassAG's challenge on this issue in LBP-88-32 (its December 1988 partial initial decision regarding the NHRERP),<sup>58</sup> the Board's action there in retaining jurisdiction over one part of the issue dictated that intervenor appeals relative to the "returning commuter" issue only would be appropriate following resolution of the entire matter. Subsequently, in LBP-89-32, the Board's November 1989 decision on the SPMC, all aspects of the issue were resolved.<sup>59</sup>

The MassAG now appeals from the Licensing Board's findings in LBP-88-32 regarding the effects upon ETEs of commuters returning home against the evacuation stream or moving across the general flow of evacuation traffic. He also contests its findings in LBP-89-32 concerning the ETE modeling efforts undertaken by applicants on those aspects of the returning commuter issue about which the Board previously deferred judgment.<sup>60</sup> In both instances, however, the totality of the argument in his brief consists of references to hearing testimony and to his proposed findings of fact and conclusions of law relative to these matters, along with the exhortation that a "careful reading" of all this material will "establish" the errors in the Board's determinations.<sup>61</sup> He has not made any attempt to specify what errors were made by the Board or explain why the Board was wrong. As we have done several times previously with respect to other aspects of the MassAG's appeal,<sup>62</sup> we find this discussion wholly inadequate to merit our further consideration of these issues.<sup>63</sup>

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<sup>57</sup> 29 NRC 465 (1989).

<sup>58</sup> 28 NRC 667, 783-89 (1988).

<sup>59</sup> See 30 NRC at 423-34.

<sup>60</sup> Although, as we made clear in ALAB-917, the Licensing Board's decision to segment its determination on the returning commuter issue had the effect of postponing the time for filing an appeal relative to that issue until the entire matter was resolved, the Board's action nonetheless was well within its discretion and did not, as the MassAG now asserts, constitute reversible error.

<sup>61</sup> MassAG Brief at 57.

<sup>62</sup> See ALAB-942, 32 NRC at 413 n.46. See also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-51 (1981), *aff'd sub nom. Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732 (3d Cir. 1982).

Although the MassAG has suggested in other instances that his failure to provide an additional explanation was a consequence of the page limitation imposed on his brief, see MassAG Brief at 17, this does not explain why, despite our affording him a 30-page extension of the 70-page limit specified in the Rules of Practice, see Appeal Board Order (Jan. 19, 1990) at 2-3 (unpublished), he utilized only 93 of the 100 pages allotted.

<sup>63</sup> As an additional part of his challenge on this ETE issue, the MassAG complains about the Licensing Board's admission of certain supplemental testimony proffered by applicants, asserting that its introduction late in the proceeding "left the MassAG with inadequate time and opportunity to respond fully." MassAG Brief at 56. Given the one week the Board afforded the MassAG and his expert witness to consider and respond to this testimony, see Tr. 26,605-06, we perceive no fundamental unfairness to the MassAG in the admission of the testimony.

### III. TRAFFIC MANAGEMENT

Moving from questions of evacuation timing to issues of evacuation resources, several of the intervenors assail findings of the Licensing Board directed to the adequacy of the provisions of the SPMC concerned with traffic management on evacuation routes. In good measure, these challenges are rooted in claims that, contrary to those findings, the SPMC does not provide adequate resources in terms of personnel and equipment. At the same time, however, we are often not told why additional resources would make a significant difference in the sufficiency of the response to a particular Seabrook emergency. Indeed, in some instances we are left in the dark even with respect to the extent of the additional resources that, according to the intervenors, are necessary to enable a judgment that the SPMC passes muster.

An illustrative example is found in the line of argument of intervenor Salisbury concerned with the provisions in the SPMC for the handling of evacuation traffic from the Salisbury Beach area as it passes through a traffic control point (TCP) located at Salisbury Square (identified as B-SA-06). In the brief it filed jointly with intervenor Amesbury, Salisbury notes that this TCP is located at the intersection of three routes (1, 1A, and 110). Our attention is directed to the uncontroverted testimony of Salisbury Acting Police Chief Frank A. Beevers addressed to the extreme traffic congestion that is experienced on summer weekend days on Route 1A, the access route to Salisbury Beach. According to Salisbury, although ignored by the Licensing Board, this testimony established that a "wholesale exodus" from the beach can produce "up to four hours of traffic gridlock, plus up to five hours of bumper to bumper traffic."<sup>64</sup> This being so, and given the asserted additional traffic impact of local residents also endeavoring to leave the area, Salisbury maintains that the SPMC does not provide an adequate number of traffic guides at the Salisbury Square TCP.<sup>65</sup>

Given this line of argument, one might have expected Salisbury to enlighten us regarding the total number of traffic guides that, according to its view of the evidence, should be provided at that TCP. Not only has it not done so, but also we are left to discover for ourselves the number of such guides that are now called for in the SPMC.<sup>66</sup> As it turns out, these are not inconsequential omissions on Salisbury's part. For the record reveals that the SPMC assigns a total of

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<sup>64</sup> Brief of Appellants-Intervenors Towns of Salisbury and Amesbury on Appeal of the Partial Initial Decision on the SPMC LBP-89-32 (Jan. 24, 1990) at 19.

<sup>65</sup> See *id.* at 17-20.

<sup>66</sup> Although, for illustrative purposes, we are confining our discussion to the Salisbury assertions regarding this one TCP, that intervenor was no more informative with respect to the broader claim in its brief, *see id.* at 19, that the number of TCPs provided in the SPMC for the beach evacuation route is not adequate.

six traffic guides to the Salisbury Square TCP.<sup>67</sup> And, on cross-examination, Chief Beevers acknowledged that his municipality has never had a plan for the management of traffic coming out from the beach.<sup>68</sup> He further observed that, although at one time as many as three police officers might be found directing traffic at the Salisbury Square intersection, "due to the lack of funding, we haven't been able to do that in the last few years."<sup>69</sup>

Against this evidentiary background, it assuredly was not enough for Salisbury simply to point in its appellate filing to testimony that, at certain times during the year, a beach evacuation would occasion congested traffic conditions at the Salisbury Square TCP. While we have no difficulty in crediting that testimony, standing alone it does not materially advance Salisbury's cause. The pivotal question remains whether the record mandates a finding that a particular increase in the number of traffic guides at that TCP might make such a significant difference in the flow of traffic through the square that, without the increase, the SPMC must be deemed deficient.

We are unaware of any evidence that might indicate that the total of six traffic guides designated in the SPMC will not suffice at the Salisbury Square intersection. (Indeed, the disclosure that Salisbury apparently has never seen fit to assign more than three police officers to deal with seasonal vehicular congestion at that location might well be taken as a refutation of such a suggestion.) That is not to say, of course, that, if available, additional guides would necessarily be unwelcome. Presumably, at least if they did not produce a situation akin to the proverbial excess of cooks hovering over the broth, their presence might facilitate to some degree the evacuation effort. But contrary to the seeming belief of Salisbury (and some of the other intervenors as well), considerations of that nature cannot carry the day.

Manifestly, no emergency response plan can claim perfection in the sense that it would not be possible, through the commitment of still additional personnel or resources, to improve upon the carrying out of such protective measures as might be dictated in the instance of a particular emergency. (No doubt, as one extreme example, provision for a large fleet of rescue helicopters or boats on constant ready alert during daylight hours in the summer would substantially increase the likelihood of a rapid evacuation of the Salisbury Beach area.) The sufficiency of an emergency plan does not turn, however, upon whether every conceivable

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<sup>67</sup> See Applicants' Rebuttal Testimony No. 9 (Traffic Management and Evacuation of Special Populations), fol. Tr. 17,333, Attach. A. Under the SPMC, traffic guides are to be drawn from the offsite response organization, which is comprised of emergency response personnel from the New Hampshire Yankee Division of applicant Public Service Company of New Hampshire, other utility organizations, and contractors. See SPMC (Plan) at 2.1-1 (Rev. 0, Amend. 3).

<sup>68</sup> See Tr. 17,231.

<sup>69</sup> *Ibid.*

resource has been invoked, irrespective of either its cost or the incremental contribution that it would make to the fulfillment of the plan's purpose.

The Commission's emergency planning regulations require that, as a precondition to the issuance of an operating license, there be a finding of "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency."<sup>70</sup> At no point in those regulations or in any implementation guidance that may have been issued by this agency or FEMA is there the slightest hint that, in order to satisfy the "reasonable assurance" standard, emergency response planning must be boundless insofar as resource commitment is concerned. That the Commission does not entertain any such belief is apparent from its 1983 decision in the *San Onofre* proceeding.<sup>71</sup> There, it addressed the question of the arrangements that need be made for medical services for individuals requiring such services in the event of a nuclear plant accident. It concluded with respect to persons "who have been subjected to dangerous levels of radiation and who need medical treatment" that it would suffice if emergency plans included a listing of those local and regional medical facilities having the capabilities to provide appropriate diagnosis and treatment for radiation exposure. The Commission added: "No contractual arrangements or special training programs are necessary and no additional hospitals or other facilities need be constructed. No extraordinary measures are required of state and local governments."<sup>72</sup> In short, whatever might have been the incremental contribution flowing from the construction of new facilities or the establishment of new training programs, the Commission did not see that the expense underlying such endeavors was warranted in light of the availability of existing medical facilities.

For these reasons, we are disinclined to consider further the insistence of Salisbury that the SPMC does not provide adequate staffing for the Salisbury Square intersection. Nor do we see the occasion to address specifically any other assertion of insufficient facility, equipment, or personnel resources (whether advanced by this intervenor or another) in the absence of a precise identification of *both* (1) the additional resources that are purportedly necessary; and (2) the record support for the claim that those resources are *in fact* necessary in order to ensure the fulfillment of the "reasonable assurance" standard embodied in the emergency planning regulations.<sup>73</sup>

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<sup>70</sup> 10 C.F.R. § 50.47(a)(1).

<sup>71</sup> *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, *rev'd on other grounds sub nom. GUARD v. NRC*, 753 F.2d 1144 (D.C. Cir. 1983).

<sup>72</sup> *Id.* at 535-36.

<sup>73</sup> We note in passing that this approach to emergency planning resource contentions was presaged by the treatment accorded claims of deficiencies in quality assurance during the construction of nuclear power facilities. Just as no emergency plan is beyond possible improvement, so too no quality assurance effort can be expected to be flawless. To the contrary, "[i]n any project even remotely approaching in magnitude and complexity the erection

(Continued)

We now turn to those assertions in the area of traffic management that either meet that standard or raise issues not involving resource sufficiency.

A. The Licensing Board found that the SPMC procedures allow for staffing of egress-facilitating TCPs and ingress-limiting access control points (ACPs) "prior to the onset of congestion (other than for beach closure) for all but very fast-breaking accidents."<sup>74</sup> This determination rested on earlier findings derived from the applicants' rebuttal on traffic management and evacuation of special populations.<sup>75</sup>

As reflected in that testimony, the traffic guides are notified to report to the staging area upon the declaration of a site area emergency.<sup>76</sup> On the basis of the experience during the 1988 exercise, the guides should begin to arrive at the staging area within forty-five minutes. The twenty-seven guides needed to staff those TCPs and ACPs with the greatest potential for affecting evacuation time should be on hand within one hour and the remaining seventy or so guides should report to the staging area within an additional hour. Upon reporting for traffic control duty, the guides are processed (which requires thirty minutes) and then are assigned to particular TCPs and ACPs in a priority order that calls for staffing the most important control points first. Because the transit time from the staging area to the TCPs and ACPs ranges from fifteen to seventy-five minutes (in the case of the "most important" ones, an average of forty minutes), the Licensing Board found that the first guides would be in place at the most important TCPs within ninety minutes of the declaration of a site area emergency, the remainder of the guides assigned to those TCPs would be in place within 165 minutes (2.75 hours) and all TCPs would be fully staffed within an additional hour.<sup>77</sup>

In the MassAG's view, these intervals are not short enough and do not support the Licensing Board's determination that the SPMC procedures respecting the staffing of TCPs are sufficient. As he sees it, in order to avoid a situation in which heavy congestion will precede the arrival of the traffic guides at the TCPs

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of a nuclear power plant, there inevitably will be some construction defects tied to quality assurance lapses." *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983). This being so, in an operating license proceeding it is not enough for an intervenor simply to assert that such lapses have occurred. Rather, the focus perforce is on the implications of the asserted deficiencies in terms of safe plant operation. Accordingly, as concluded in *Callaway*, the question is "whether all ascertained construction errors have been cured" and, if so, whether it nonetheless appears that "there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components." *Ibid.* In sum, in the quality assurance arena as in emergency planning, one must look beyond the mere averment of a shortcoming to determine the level of its potential significance in terms of the achievement of the ultimate objective at hand. See *Shoreham*, ALAB-903, 28 NRC at 507.

<sup>74</sup> LBP-89-32, 30 NRC at 453.

<sup>75</sup> See *id.* at 451 (citing Applicants' Rebuttal Testimony No. 9, at 24-26).

<sup>76</sup> As we explain more fully below, this is the third of the four emergency action levels specified in NUREG-0654.

<sup>77</sup> See LBP-89-32, 30 NRC at 451. As observed by both the Licensing Board and the applicants' testimony, all time estimates in the foregoing discussion are approximations.

because of an “evacuation scenario that proceeds from a site area emergency to a general emergency within two hours,” the guides should be mobilized at the earlier alert stage.<sup>78</sup>

Although not acknowledged by the MassAG, this line of argument flies in the teeth of the guidance provided in NUREG-0654 with respect to the steps that should be taken at each emergency action level. The two lowest classes, notification of unusual event and alert, are designed “to provide early and prompt notification of minor events which could lead to more serious consequences given operator error or equipment failure or which might be indicative of more serious conditions which are not yet fully realized.”<sup>79</sup> For its part, an alert is triggered by events that, although involving “an actual or potential substantial degradation of the level of safety of the plant,” are not expected to result in radioactive releases above “small fractions of the [Environmental Protection Agency (EPA)] Protective Action Guideline exposure levels.”<sup>80</sup> Thus, the required actions at that stage on the part of offsite authorities do not include the mobilization of individuals having a role in evacuation efforts.

The next higher action level is the site area emergency, which comes into play in the instance of events involving “actual or likely major failures of plant functions needed for protection of the public.”<sup>81</sup> Because any associated releases are “not expected to exceed EPA Protective Action Guideline exposure levels except near site boundary,”<sup>82</sup> consideration of the advisability of evacuation of the public within the EPZ is still not dictated. Nonetheless, given the possibility of an escalation to the fourth and most serious classification — a general emergency — which might prompt an evacuation determination, at the site area emergency stage the prescribed actions include the alert to standby status of emergency personnel needed for evacuation and the dispatch of such personnel to near-site duty stations.<sup>83</sup>

Thus, in calling for the mobilization and dispatch of traffic guides to all TCPs at the site area emergency stage, the SPMC actually goes beyond the dictates of the NUREG-0654 guidance. Of itself this consideration may not have foreclosed the MassAG from pressing his claim that such action should take place at the earlier alert stage. But it assuredly obliged him (1) to adduce evidence as to the potential consequences of having an evacuation commence and move forward through a designated TCP without the presence of traffic guides at that location; and (2) then to demonstrate that those consequences are of sufficient gravity to warrant taking close to 100 individuals away from their normal pursuits at a

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<sup>78</sup> See MassAG Brief at 57-58.

<sup>79</sup> NUREG-0654 (Rev. 1), App. 1, at 1-3.

<sup>80</sup> *Id.* at 1-8.

<sup>81</sup> *Id.* at 1-12.

<sup>82</sup> *Ibid.*

<sup>83</sup> See *ibid.*

point at which there is no expectation that there will be significant radioactive releases at any locale, let alone a substantial possibility that an evacuation of the public ultimately will be found necessary. The MassAG did not undertake this obligation, let alone fulfill it.

B. Several of the intervenor municipalities contest the adequacy of the provisions in the SPMC concerned with the evacuation by bus of transit dependent persons.<sup>84</sup> In significant measure, their challenges focus upon the possibility that certain of the bus routes will be impassable by reason of local flooding. On this issue, the Licensing Board found it “highly unlikely” that the roadways in question would be “rendered impassable by flooding concurrently with an emergency at Seabrook.”<sup>85</sup> The Board went on to conclude that, in the event that the level of flooding on an evacuation route segment precludes traversal by a bus with a fifteen to twenty inch clearance from tailpipe to road surface, the possibility of a rerouting to avoid that segment would be pursued.<sup>86</sup>

We need not consider here whether, as the intervenors maintain, the Licensing Board underestimated the likelihood of significant flooding on currently designated evacuation routes. Nor need we dwell upon intervenor Newbury’s observation that alternate routes cannot be provided for the evacuation of persons on Plum Island should the single road off the island (the Plum Island Turnpike) be flooded and impassable.<sup>87</sup> All of this may well be true. But it scarcely follows that the SPMC is necessarily flawed.

Recently in ALAB-942,<sup>88</sup> we confronted MassAG contentions that focused upon another possible impediment to evacuation brought about by the forces of nature, a snowstorm. In response to those contentions, we endorsed the Licensing Board’s observation that there was “‘no basis for assuming that an evacuation would be ordered if unremoved snow makes that protective action impractical.’”<sup>89</sup> The same may be said of the flooding potential. If, because of such a development, it should not be feasible to evacuate transit dependent persons either on the designated route or on an alternate route, sheltering — rather than evacuation — presumably will be the adopted protective action.

In this connection, the intervenors have not brought to our attention any evidence establishing that the sheltering option would not be available in the

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<sup>84</sup> See City of Newburyport’s Brief on Appeal of the Partial Initial Decision of the [SPMC] LBP-89-32 (Jan. 24, 1990) at 8-11 [hereinafter Newburyport Brief]; Town of Newbury’s Brief on Appeal of the Partial Initial Decision of the [SPMC] LBP-89-32 (Jan. 24, 1990) at 13-17 [hereinafter Newbury Brief]; West Newbury Brief at 21-25.

<sup>85</sup> LBP-89-32, 30 NRC at 469.

<sup>86</sup> See *id.* at 469-70.

<sup>87</sup> In addition to the Plum Island situation, it has been asserted there are not adequate available alternatives to portions of certain designated routes in West Newbury that are said to be subject to seasonal flooding.

<sup>88</sup> 32 NRC at 408-09.

<sup>89</sup> *Id.* at 408 (quoting Licensing Board Memorandum and Order (July 22, 1988) at 51, 98 (unpublished)).

event that resort to that option was dictated by flooding conditions.<sup>90</sup> More important, despite the claim of flaws in the SPMC with regard to the prospect of evacuation route flooding, there is a total lack of any explanation respecting how the plan might better take that prospect into account. Obviously, no emergency planning effort is capable of achieving the impossible. If, then, the SPMC contains all reasonable measures to cope with the contingency of flooding on the designated evacuation routes — and, once again, the intervenors do not point to any other such measures that might be provided in that plan — that is the most that can be expected.<sup>91</sup>

C. We find no greater merit in the further claims of SPMC shortcomings in the traffic management sphere. For reasons already developed, we need not explore at length the assertions of intervenors Newbury, West Newbury, and Newburyport that more TCPs should be provided within their borders.<sup>92</sup> It suffices to note that none of those assertions is buttressed by a reference to record evidence clearly establishing that the addition would provide a significant benefit that is necessary to ensure compliance with the “reasonable assurance” standard.<sup>93</sup>

In support of its position that a single traffic guide might not be sufficient to perform all of the necessary functions at a TCP, intervenor West Newbury hypothesizes extended conversations between the guide and particular motorists who either require specific directions as to acceptable evacuation routes or seek the answers to questions. The Licensing Board’s response to this concern pointed to the fact that the traffic guides are instructed not to engage in lengthy conversations with motorists but, rather, to have them tune their radios to emergency broadcast system stations.<sup>94</sup> Further, the Board observed, the established procedures for staffing TCPs address the handling of various kinds of inquiries from members of the public without the guides being distracted from the performance of their main tasks.<sup>95</sup> Although we can agree with West Newbury that these instructions and procedures do not eliminate all possibility of guide distraction, it does not appear to us that there is a sufficient likelihood

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<sup>90</sup>The record indicates that the storms that flood the Plum Island Turnpike generally occur in the winter, spring, or late fall. Such a storm in the summer is a “freak” occurrence. See Tr. 17,883-84. See also Tr. 16,530-31.

<sup>91</sup>Intervenors Newbury and West Newbury also complain of the failure of the SPMC to provide a sufficient means for notifying the transit dependent population of a route change necessitated by flooding or some other obstacle. The applicants tell us that this complaint was not voiced below and, thus, is not available on appeal. Beyond that, the municipalities do not suggest additional notification procedures that might be utilized. Moreover, as the applicants note, it appears likely that, inasmuch as the emergency broadcasting system messages are the source of the information respecting when the buses are to start on their routes and, hence, when evacuees should await them at an outdoor location, most evacuees would learn of route changes through those messages.

<sup>92</sup>See Newburyport Brief at 3-8; Newbury Brief at 13; West Newbury Brief at 13-21.

<sup>93</sup>The same can be said with respect to intervenor Newburyport’s concern about the location of evacuation bus pickup points.

<sup>94</sup>See LBP-89-32, 30 NRC at 454.

<sup>95</sup>See *ibid.*

of a serious impairment of a single guide's ability to carry out his or her responsibilities so as to mandate multiple guides at all TCPs.

#### IV. RESPONSE PERSONNEL STAFFING AND TRAINING

In addition to these claims of SPMC inadequacies footed in evacuation traffic management concerns, the MassAG alleges the plan is deficient because of insufficient staffing and training for certain evacuation roles. Among these are allegations that the Licensing Board incorrectly: (1) relied upon the availability of State and local police to relieve traffic guides and to identify road impediments; (2) found shift staffing for dosimetry record keepers, route guides, evacuation vehicle drivers, and road crews was adequate; (3) declared that route guides were not needed to accompany evacuation vehicles other than buses following prearranged circuits; (4) concluded that second shift traffic guides would receive adequate training; and (5) determined that the American Red Cross (ARC) would provide the personnel resources necessary to staff congregate care centers.<sup>96</sup> We find no merit in any of these assertions.

A. According to the MassAG, in its findings regarding the availability of State and local police to aid as relief replacements for traffic guides and to help identify evacuation road impediments for removal by road crews, the Licensing Board made the same error.<sup>97</sup> The purported flaw is the Board's reliance upon the "best efforts" presumption, which he contends was incorrectly utilized to avoid the lack of any record evidence to support a finding that, in fact, a sufficient number of police will respond to perform these emergency response duties.

The presumption that the Licensing Board had in mind is at the heart of the so-called "realism rule" embodied in 10 C.F.R. § 50.47(c)(1)(iii). The essence of the rule, as set forth in that regulation, is that, in the evaluation of the adequacy of a utility-sponsored emergency response plan, the NRC will recognize the "reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." Given

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<sup>96</sup> See MassAG Brief at 58-63, 86-87.

<sup>97</sup> See LBP-89-32, 30 NRC at 454-55. The basis for the MassAG's assertion that relief will be needed for traffic guides is testimony from his traffic management expert that traffic guides will have an attention span of "something in the neighborhood of four hours," Tr. 17,026, which the MassAG maintains establishes that traffic guides will be unable to complete the 12-hour shifts contemplated by the SPMC. Putting aside the fact that the MassAG's concern arises only in the event of a specific accident sequence (i.e., an EPZ-wide evacuation on a crowded summer weekend in which there will be no time between the traffic guide's arrival at the TCP, which occurs sometime after a site area emergency declaration, and the TCP setup when the evacuation finally is ordered at the general emergency stage, see LBP-89-32, 30 NRC at 455), we are unaware of any evidence presented by the MassAG that establishes any dire consequences for the evacuation if traffic guides take limited relief breaks. This is particularly so given that more than half of the control points with first or second setup priority are staffed by more than one person. See SPMC (Plan) App. J at J-13, -21, -42, -51, -63, -82, -102, -119, -124, -129, -136 (Rev. 0, Amend. 5). In any event, the viability of the MassAG's assertion is of little moment given our conclusion that sufficient police resources are available to provide this relief.

our conclusion in ALAB-937 that, in the case of a utility-sponsored plan, the realism rule was intended to have application only to "those persons in leadership positions (such as governors, mayors, civil defense directors, and state police superintendents) whose regular duties include the initiation of measures to protect the public health and safety in the event of an emergency that puts the populace at risk,"<sup>98</sup> its application in this instance is questionable. Nonetheless, this is of no assistance to the MassAG for, as we went on to point out in ALAB-937:

Quite apart from the realism rule as promulgated in section 50.47(c)(1)(iii), there may well be reason to assume that, because of the nature of their regular duties, most individuals in certain occupations will respond in emergency situations. We have in mind, for example, police officers, professional firefighters, and civil defense workers, all of whom routinely confront emergencies in the discharge of their assigned functions.<sup>99</sup>

This assumption applies fully with respect to the response of State and local police officials to fulfill traffic direction and road impediment identification duties, matters that fall well within the realm of their normal responsibilities.<sup>100</sup> Thus, we find no error in the Licensing Board's reliance upon these police resources as being available to fulfill these needs.

Nor do we attach any significance to the MassAG's assertion, otherwise unsupported, that there will not be a sufficient number of officers available to respond.<sup>101</sup> Applicants' testimony before the Licensing Board established that as many as 45 on-duty and 180 off-duty officers would be available from the Massachusetts State Police troop stationed in the locality of the EPZ to perform traffic guide relief and related duties, with another approximately 1100 officers available state-wide.<sup>102</sup> With this significant resource base from which to draw State Police to act as relief replacements for the approximately 100 traffic guides called for under the SPMC and to perform other evacuation support duties, we perceive no justification for the MassAG's concerns.<sup>103</sup>

B. The MassAG also maintains that the SPMC is inadequate in that it does not provide a second twelve-hour shift for dosimetry record keepers, route

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<sup>98</sup> 32 NRC at 148-49.

<sup>99</sup> *Id.* at 149 n.44.

<sup>100</sup> Even without this assumption, however, the terms of the recent Executive Order regarding Massachusetts participation in emergency planning leave no doubt that State Police will respond. *See supra* pp. 309-10.

<sup>101</sup> The SPMC does contain provisions regarding evacuation support response by law enforcement officials. *See* SPMC (Plan) App. J at J-3, -5 (Rev. 0, Amend. 5).

<sup>102</sup> *See* Applicants' Rebuttal Testimony No. 21 (Coordination of Governmental Resources and Responses), fol. Tr. 23,537, at 11-12.

<sup>103</sup> *Compare* ALAB-932, 31 NRC at 409-12 (availability of 185 uniformed New Hampshire State troopers sufficient to meet need for staffing of some 80 traffic control points). These Massachusetts State Police resources are, of course, in addition to the second shift resources provided for in the SPMC by means of a mutual assistance plan with Yankee Atomic Electric Company. *See* SPMC (Plan) at 2.1-1 (Rev. 0, Amend. 3). *See also infra* p. 332.

guides, evacuation vehicle drivers, and road crews. On this score, he asserts that the plan contravenes Criterion II.A.4 of NUREG-0654, which declares that "[t]he offsite response organization shall be capable of continuous (24-hour) operations for a protracted period."<sup>104</sup> We disagree.

The MassAG misreads the guidance of Criterion II.A.4 as it applies to the response staffing at issue here. While reflecting the fact that the applicants' offsite response organization (ORO) as an entity must be capable of sustained operations for whatever period is necessary to provide an appropriate response to a radiological emergency, this guidance cannot be read to mean that each response function performed by ORO personnel must be continuously sustained. Rather, the temporal adequacy of the ORO's response capability for any of the myriad of activities undertaken under its auspices will depend on the function being performed.<sup>105</sup>

In this instance, the SPMC plainly classifies dosimetry record keepers and route guides as "evacuation-specific" personnel for which a second shift is provided by the Yankee Atomic Mutual Assistance Plan.<sup>106</sup> The MassAG's purported concern about a second shift for these response personnel thus is misdirected. It is less clear whether, as the MassAG appears to believe, the road crew members and the evacuation vehicle drivers are similarly regarded under the SPMC.<sup>107</sup> We need not, however, pursue that question here, for it is apparent that the single shift staffing for these personnel is appropriate.

The record indicates that the maximum ETE for those evacuating from and through the Massachusetts EPZ is approximately nine hours, or some three hours less than the planned shift for evacuation vehicle drivers and road crews.<sup>108</sup> Although, as the Licensing Board noted, there may be some period between the time these response personnel are activated and the time an evacuation is ordered and their evacuation activities actually begin,<sup>109</sup> the MassAG has not directed us to any evidence indicating that if the combination of "waiting time" and evacuation time extends the service of evacuation vehicle drivers and road crews somewhat beyond the planned twelve-hour shift, their ability to complete their duties will be significantly impaired.<sup>110</sup> As a consequence, we see no cause

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<sup>104</sup> NUREG-0654 (Rev. 1, Supp. 1) Criterion II.A.4.

<sup>105</sup> See ALAB-924, 30 NRC at 362 n.125.

<sup>106</sup> See SPMC (Plan) at 2.1-1 & Fig. 2.1-1 (Rev. 0, Amendments. 3 & 6). See also Tr. 23,965-66.

<sup>107</sup> See SPMC (Plan) Fig. 2.1-1.

<sup>108</sup> See Applicants' Rebuttal Testimony No. 16, Attach. D.

<sup>109</sup> See LBP-89-32, 30 NRC at 473.

<sup>110</sup> In this regard, as the Licensing Board noted, *see ibid.*, it is to be expected that, once an evacuation is begun, the peak activity would occur initially and then fall off as the majority of evacuees have left the area, thereby placing those in evacuation-support positions in a less stressful situation toward the end of their shift when they are more likely to be fatigued. As the Board also found, in evacuation situations the stress level of activity generally would not begin immediately, *see ibid.*, a conclusion that is consistent with the MassAG's own acknowledgment

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for imposing a requirement that an additional relief shift be provided for these response positions.

C. The MassAG assails the Licensing Board's determination that route guides are not required to accompany vans, station wagons, wheelchair vans, or ambulances that are intended to evacuate certain special needs (e.g., hospitalized, nursing home) populations, despite the fact that the SPMC provides such escorts for evacuation buses. Because "navigation of designated routes is defined as [a route guide's] responsibility," the Board reasoned that it is not essential for guides to accompany special needs vehicles.<sup>111</sup> The Board based its conclusion upon the fact that, while the buses must follow a predetermined route, these special needs vehicles are not similarly constrained.<sup>112</sup> In attacking this result, the MassAG stresses that (1) all buses are assigned guides, yet only some have preassigned routes; and (2) as the drivers of both the buses and special needs vehicles are based outside of the EPZ, no one driver is more able than another to reach his or her assigned destination without the assistance of a guide. Because of these factors, he insists that, if guides are provided for all buses, they must be supplied to all special needs vehicles as well.

We cannot accept this line of reasoning. The fact that the applicants have elected to assign route guides to all buses does not mean perforce that their services in that precise capacity are deemed to be required in the instances when the bus driver is not being called upon to follow a predetermined route.<sup>113</sup> Nor is there any cause to believe that drivers based outside the EPZ must have route guides at their disposal in order to locate a particular destination in circumstances where no specific route is prescribed and the drivers' obligation will be simply to reach that destination by any route they should select. Whether at the wheel of a bus or, rather, a special needs vehicle, we do not think it untoward, in the absence of any evidence to the contrary, to assume that those otherwise employed as drivers are able to read a road map.<sup>114</sup>

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that "[i]n an accident scenario where there is a time delay of three or four hours between [personnel activation] and [the time an evacuation is ordered], the evacuation personnel would initially be sitting around with little to do for a number of hours." MassAG Brief at 61.

<sup>111</sup>LBP-89-32, 30 NRC at 478.

<sup>112</sup>See *ibid.* These special needs vehicles are not assigned specific routes but must merely arrive at specific locations; how they arrive there is of no import. See Applicants' Rebuttal Testimony No. 20 (ORO Prerequisites and Training), fol. Tr. 27,388, at 34. See also SPMC (Procedures) IP 2.10, at 10-11, 31 (Rev. 0, Amends. 5 & 6).

<sup>113</sup>As matters now stand, there are independent reasons for placing guides on buses that do not have assigned routes. For example, as is reflected by the parties' recent stipulation, guides are to perform certain child supervision functions. See Joint Stipulation Regarding Contentions Remanded in ALAB-937 and ALAB-942 (Jan. 18, 1991) at 1-2 [hereinafter Joint Stipulation]. In addition, the SPMC provides that guides are to assist in boarding evacuees at schools and special facilities if assigned to such buses. See SPMC (Procedures) IP 2.10, at 25-26 (Rev. 0, Amend. 5).

<sup>114</sup>Special needs vehicle drivers, who generally are already employed as drivers at bus/ambulance companies, see, e.g., Applicants' Rebuttal Testimony No. 20, at 34; Applicants' Exh. 41 (Agreements) at 11-20, 33-40; SPMC (Plan) at 2.1-29, -31, are supplied map books, see SPMC (Procedures) IP 2.10, at 31 (Rev. 0, Amend. 5).

D. While first-shift traffic guides attend six training modules for approximately ten hours and receive additional instructions, under the SPMC second-shift guides receive "on-site training" both at the staging area where they initially report and from the guides they are replacing.<sup>115</sup> The MassAG asserts that, contrary to the finding below, the second shift's training is insufficient, labeling it as "at best cursory instruction."<sup>116</sup> Apparently, he believes that the training received by the second shift must be equivalent to that obtained by the first. We conclude otherwise.

We know of no regulatory requirement that the training of first- and second-shift personnel must be identical. The question at hand is simply whether, irrespective of what is provided first-shift guides, the second-shift guides receive enough training to discharge their responsibilities properly. In this regard, the second-shift guides receive training and briefings at the staging area to which they first report.<sup>117</sup> In addition, the extensively trained first-shift guides must thoroughly brief their replacements concerning (1) traffic and access control, (2) reporting, (3) the status of the emergency, and (4) methods of setting up control point flow patterns, as well as provide other on-the-job training. Finally, the first-shift guides may not leave their posts until they are satisfied that their replacements are able to perform their duties.<sup>118</sup> We find these training procedures to be adequate.

E. Finally with respect to response personnel, the MassAG contends that there was no basis for the Licensing Board's findings that the Red Cross will be able to provide timely and adequate staffing for the more than two dozen congregate care centers (i.e., displacement shelters) the ARC is to operate under the SPMC. According to the MassAG, this follows from the ARC's nonparticipation in Seabrook emergency planning, as a result of which it has not identified any of the personnel resources needed for prompt, ample staffing of those centers.

In ALAB-941,<sup>119</sup> we addressed the general issue of ARC availability for Massachusetts EPZ relief duties. We there upheld the Licensing Board's rejection of a MassAG contention that the June 1988 emergency planning exercise was deficient in scope because, due to ARC nonparticipation, congregate care centers were not activated. In doing so, we observed that, given the Commission's previous recognition in the *Shoreham* proceeding that the ARC will respond in an emergency, radiological or otherwise,<sup>120</sup> in the absence of any showing that

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<sup>115</sup> See LBP-89-32, 30 NRC at 472, 477-78.

<sup>116</sup> MassAG Brief at 63.

<sup>117</sup> See SPMC (Procedures) IP 3.2, at 4, 7.

<sup>118</sup> See *id.* IP 2.17, at 6-7 (Rev. 0, Amend. 5); *id.* (Plan) App. J at J-3.

<sup>119</sup> 32 NRC at 349-50.

<sup>120</sup> See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 887-88 (1987).

the ARC somehow lacks the ability to discharge its conventional and oft-fulfilled role, the Board did not err in rejecting the contention. By the same token, as the Board's extensive findings make clear,<sup>121</sup> in challenging the SPMC the MassAG failed to present any evidence sufficient to counter the presumption concerning the ARC's willingness and ability to respond in the event of an emergency, including any showing that the state and local chapters lack the ability to fulfill the ARC's conventional role as a disaster relief organization in administering and staffing shelter facilities like the congregate care centers. The Board thus acted properly in rejecting the MassAG's challenges to the adequacy of the SPMC based upon the ARC's nonparticipation.<sup>122</sup>

## V. PROTECTIVE ACTION RECOMMENDATIONS

Protective action recommendations, or PARs, are those measures emergency response officials counsel members of the public to take to avoid or reduce a projected dose arising from a radiological accident.<sup>123</sup> In appealing the Licensing Board's rulings concerning the SPMC and the June 1988 full participation exercise, the MassAG has raised several PAR-related issues, including: (1) the propriety of the Licensing Board's mid-hearing determination limiting his challenge to the adequacy of the METPAC computer model to PAR generation by onsite response personnel during the exercise; (2) the adequacy of the Board's findings regarding the timing of protective action beach closings during the 1988 exercise; (3) the sufficiency of the PARs that are utilized under the SPMC for the Massachusetts EPZ beach population; (4) the adequacy of the SPMC planning assumptions relating to the dose reduction factor adopted for nonbeach area shelter structures; (5) the Board's purported failure to consider evidence rebutting any FEMA presumption regarding the adequacy of the PAR decision criteria for the SPMC; (6) the Board's exclusion of the MassAG's prefiled testimony by a panel of experts on the adequacy of PAR decisionmaking criteria in the SPMC; and (7) the Board's failure to address the substance of the MassAG's challenge to the METPAC computer model.<sup>124</sup> We find no merit to any of these assignments of error.

A. As part of his challenge to the June 1988 exercise, the MassAG sought admission of two PAR-related contentions, MassAG EX-11 and MassAG EX-19. With Contention EX-11, he asserts that the exercise revealed a fundamental

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<sup>121</sup> See LBP-89-32, 30 NRC at 584-90.

<sup>122</sup> Given the Commonwealth's apparent cooperation with the ARC in planning for radiological emergencies at other nuclear facilities located within or near its borders, *see id.* at 589-90, the Governor's recent announcement concerning Massachusetts participation in Seabrook emergency planning seems likely to end the ARC's nonparticipation as well as the MassAG's concerns about the ARC's role and the adequacy of its response.

<sup>123</sup> See ALAB-942, 32 NRC at 419 n.77; NUREG-0654 (Rev. 1), App. 5, at 5-5.

<sup>124</sup> See MassAG Brief at 36-37, 50-51, 63-64.

flaw in the SPMC because it demonstrated that the ORO did not have the ability to make appropriate protective action decisions. In Contention EX-19, he makes a similar claim with respect to the applicants' onsite emergency response plan, the Seabrook Station Radiological Emergency Response Plan (SSRERP), based upon the purported inability of the applicants' onsite Emergency Response Organization (ERO) personnel to provide appropriate PARs for ORO consideration. In addition, he asserts that the ERO's PAR generation inadequacies, in combination with the high degree of ORO reliance on the ERO PAR recommendations, precludes the requisite reasonable assurance finding under 10 C.F.R. § 50.47(a)(1). Although the Licensing Board initially admitted both contentions,<sup>125</sup> it accepted only three of the four bases put forth by the intervenors in support of Contention EX-19: Basis A, contending that the PAR deficiencies identified in Contention EX-11 arose from the ORO's unqualified reliance upon the ERO's PARs; Basis B, asserting that New Hampshire officials' over-reliance on inappropriate ERO PARs resulted in the State's adoption of several improper PARs; and Basis D, declaring that, "[i]n all the instances described" in both Bases A and B, the ERO's inappropriate PARs were derived from its METPAC computer model, which contained fundamental flaws.<sup>126</sup>

Thereafter, in response to a staff request for clarification of its ruling accepting Contention EX-19,<sup>127</sup> the Licensing Board reiterated that the contention was properly admitted.<sup>128</sup> As a consequence, the staff presented the testimony of two agency employees, Senior Emergency Preparedness Specialist Edwin F. Fox, Jr., and Effluents Radiation Protection Section Chief Dr. Robert J. Bores, which was intended to establish that the PARs generated by the ERO for consideration by the ORO and New Hampshire response officials were timely and appropriate.<sup>129</sup> During cross-examination of these witnesses, a question arose concerning the scope of Contention EX-19 as it challenged the provisions of the onsite plan.<sup>130</sup> This scope issue subsequently was explored in greater detail in response to the MassAG's attempt to have admitted into evidence a portion of the SSRERP containing guidance for ERO determinations relative to its development of PARs as an aid to offsite authorities.<sup>131</sup> After considerable discussion,<sup>132</sup> the

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<sup>125</sup> See Memorandum and Order (Dec. 15, 1988) at 33-34, 46-49 (unpublished) [hereinafter Exercise Contentions Order].

<sup>126</sup> Joint Intervenor (JI) Contentions on the [SPMC] and the June 1988 Graded Exercise (July 5, 1989) at 111-113 [hereinafter Joint Intervenor Contentions Compilation].

<sup>127</sup> See Tr. 15,823-37.

<sup>128</sup> See Tr. 15,874-75. A little over two months after this ruling, the Licensing Board dismissed Basis D of Contention EX-19 for want of jurisdiction, see Tr. 22,178-224, a ruling we subsequently reversed in ALAB-916, 29 NRC 434 (1989).

<sup>129</sup> See NRC Staff Testimony of Edwin F. Fox, Jr. and Dr. Robert J. Bores Concerning MAG Exercise Contention 19 (PARS), fol. Tr. 24,627 [hereinafter Staff PAR Testimony].

<sup>130</sup> See Tr. 24,865-79.

<sup>131</sup> See MassAG Exh. 112 (SSRERP Emergency Response Procedure ER 5.4 (Rev. 08)).

<sup>132</sup> See Tr. 25,040-64, 25,106-35.

Board found that Basis D challenging the utilization of the METPAC by the ERO during the exercise was the only basis with sufficient “specificity as to the onsite methodology” that would permit a challenge to any aspect of the onsite planning basis for PARs.<sup>133</sup> Acting on this ruling, the Board rejected the exhibit, holding that it “impermissibly goes to onsite methodology” other than the METPAC model that was the subject of Basis D.<sup>134</sup>

Before us, the MassAG contests the Licensing Board’s ruling concerning the scope of Contention EX-19, asserting that he was improperly precluded from litigating the flaws in the decision criteria in the onsite plan that were revealed by the June 1988 exercise. We find, however, no error in the Board’s ultimate ruling. The Board simply acknowledged what the wording of Basis D makes manifest. Although Bases A and B describe the purportedly improper PARs, the only specific cause assigned by the MassAG for the inadequate PARs (through the incorporation by reference of Bases A and B) is the METPAC model designated in Basis D. The Board’s specificity ruling recognized that the MassAG properly should be limited to litigating only the adequacy of the one feature of the onsite plan that he characterized as the source of a fundamental flaw. In the circumstances, the Board’s limitation on the scope of his contention was appropriate.<sup>135</sup>

B. With the unilluminating declaration that the Licensing Board “does not even accurately summarize the issue let alone address it” and a reference, without further explication, to several of his proposed findings of fact, the MassAG asserts that the Board erred in its findings regarding the New Hampshire and Massachusetts beach closings undertaken as protective actions during the June 1988 exercise.<sup>136</sup> We once again would be justified in rejecting this challenge for inadequate briefing; we observe, however, that the MassAG’s argument is lacking in merit as well.

The principal contention in the MassAG’s proposed findings before the Licensing Board was that a particular ERO-generated PAR suggesting that the Massachusetts beaches be closed was inconsistent with the provisions of the SSRERP. He asserted this was so because the technical conditions specified in the plan’s PAR analysis as warranting closing were not met. Yet, the applicable

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<sup>133</sup> Tr. 25,130. See also LBP-89-32, 30 NRC at 487.

<sup>134</sup> Tr. 25,130. Subsequently, after additional consideration, the Board admitted the SSRERP segment for the limited purpose of allowing the MassAG to challenge the testimony given by staff witnesses Fox and Bores, but not as affirmative support for any broader attack upon the adequacy of the onsite plan. See Tr. 25,288-331.

<sup>135</sup> See *infra* note 310. We also fail to see what harm may have accrued to the MassAG as a result of the Licensing Board’s ruling concerning the scope of Contention EX-19 in light of the opportunity afforded him to challenge the validity of the onsite PAR determinations through the testimony of Dr. Goble and in the course of his cross-examination of the staff witnesses who testified as to the adequacy of the ERO’s determinations. See Testimony of Dr. Robert L. Goble on Behalf of [the MassAG] Regarding Contentions MAG EX-11, MAG EX-19, SAPL EX-14, JI-13C, JI-18F, JI-20 and JI-23 (Exercise PARs, Training for PAR Decision-makers, METPAC, PAR Decision Criteria, and Coordination of Mass/NH PARs), fol. Tr. 24,125; Tr. 24,628-963.

<sup>136</sup> MassAG Brief at 63.

provision of the SSRERP indicates that, even if, in undertaking a PAR analysis, the technical evaluation affords a “no PAR” result, ERO officials are to undertake an additional review to consider whether precautionary protective actions are appropriate.<sup>137</sup> Because the ERO’s recommendation on Massachusetts beach closings was consistent with (and apparently within the contemplation of) this directive in the onsite plan,<sup>138</sup> we are unable to conclude that the ERO’s action consistent with that provision provides support for the requisite finding that there is a “fundamental flaw” in the onsite emergency plan.<sup>139</sup>

C. With Contention JI-17, intervenors alleged the failure of the SPMC to provide a range of protective actions for the Massachusetts portion of the EPZ in accordance with 10 C.F.R. § 50.47(b)(10). The only specific challenge made by the MassAG to the Licensing Board’s rulings on the merits of this contention is his assertion that the Board failed to harmonize its holding in its SPMC decision that there is no requirement for a beach shelter survey with statements in its decision on the NHRERP concerning a shelter survey conducted for the New Hampshire EPZ beach area.<sup>140</sup> In its New Hampshire plan decision, the Board did indeed recognize and refer to a shelter survey conducted by applicants for the New Hampshire beaches.<sup>141</sup> As we determined in our recent decision in ALAB-942, however, as a result of subsequent developments concerning the issue of sheltering the New Hampshire beach population, any assertion about the need for a shelter survey in Massachusetts is misdirected. Under the “shelter-in-place” protective action now utilized in both plans, “there is no need to determine the available shelter capacity for [the beach] population when the only instruction

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<sup>137</sup> See MassAG Exh. 112, Fig. 1, at 2, ¶ 8.

<sup>138</sup> The MassAG also contends that the length of time within which the ERO decision was made suggests that it was done without sufficient analysis. Our review of the support he provided for this proposition leads us to the conclusion that this assertion is based upon nothing more than his own speculation.

<sup>139</sup> The same failure to demonstrate a fundamental flaw in an emergency plan is evident in the MassAG’s other complaints regarding the beach closings during the June 1988 exercise. He contends that the NHRERP was deficient because it afforded New Hampshire officials the discretion to close that State’s beaches at the alert stage (as opposed to the later site area emergency stage, see *supra* p. 327) without receiving a recommendation from the ERO. In addition, he asserts that the beach closing notification process was inadequate because only the beachfront loudspeaker system was used and because the Massachusetts beach closure statement did not mention the fact that the New Hampshire beaches had earlier been closed. Even assuming these can be called deficiencies, which is not apparent to us, they are hardly failures in an “essential element of the plan” whose correction would require “significant revision of the plan” so as to fulfill the applicable criteria necessary to constitute a fundamental flaw. See *Shoreham*, ALAB-903, 28 NRC at 505.

<sup>140</sup> The MassAG also maintains more generally that “[t]he Board never even addressed the issue presented by JI-17 let alone rule on it,” MassAG Brief at 63, a pronouncement that is accompanied by citations only to portions of the Licensing Board’s decision and to one of his proposed findings of fact. Once again putting aside this clear failure to meet our directive to provide an adequate explanation concerning any alleged deficiencies, we find in reviewing the Board’s decision, see LBP-89-32, 30 NRC at 486, that it did indeed address (and ruled upon) the overarching issue whether, in accordance with section 50.47(b)(10), sufficient consideration was given to sheltering as a protective action for the beach population. See *Massachusetts v. NRC*, 924 F.2d at 329.

<sup>141</sup> See LBP-88-32, 28 NRC at 761-62.

is to remain indoors if you are already there and to evacuate by car if you are not."<sup>142</sup> We thus find no error in the Board's SPMC determination.

D. The MassAG also contests the Board's findings regarding the use of sheltering in nonbeach areas, asserting that this protective action is being underutilized. He maintains that whatever basis might exist for applying a 0.9 dose reduction factor for the beach areas, there is no record support for the adoption of this minimal shielding factor for the entire Massachusetts (and the New Hampshire) EPZ.

Undoubtedly, within any reactor facility's EPZ a diversity of potential shelter structures with different reduction factors is likely to be encountered (e.g., office buildings, frame houses with or without basements, brick houses with or without basements). As staff and FEMA witnesses explained, to address this diversity, planners view the population within the EPZ as a whole and use the reduction value applicable to the most vulnerable portion of the population, i.e., those who in appreciable numbers would have to rely upon structures with the least effective shielding factor.<sup>143</sup> In this instance, planners concluded that this would be individuals in wood frame houses without basements, structures they found are present in the EPZ in significant numbers in the beach areas.<sup>144</sup>

As the Licensing Board noted,<sup>145</sup> this was the basis for the adoption of the 0.9 reduction factor employed in the SPMC for making PAR determinations in the Massachusetts EPZ. The MassAG obviously disagrees with this conservative approach; nonetheless, he has failed to present any evidence that reveals it to be demonstrably in error.<sup>146</sup> The record before the Licensing Board thus fully supports its determination that planning officials made a reasonable choice in utilizing this approach and the resulting 0.9 reduction factor.

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<sup>142</sup> ALAB-942, 32 NRC at 430. Even more recent developments before the Licensing Board suggest that a sheltering survey may be unnecessary because sheltering seemingly has been abandoned as a protective action option for the general beach population. See ALAB-945, 33 NRC 175, 177 (1991).

<sup>143</sup> See Tr. 18,577-78, 24,918-20.

<sup>144</sup> See Tr. 18,590.

<sup>145</sup> See LBP-89-32, 30 NRC at 486.

<sup>146</sup> During his cross-examination, FEMA witness Richard Donovan indicated that while the number of wood frame houses without basements in the beach areas is substantial, see Tr. 18,582-90, he did not know what proportion of housing within the nonbeach area falls into this category, see Tr. 18,584. The MassAG asserts that this establishes there is no basis for the adoption of the 0.9 dose reduction factor for the nonbeach populations. We disagree.

As we have already noted, the approach taken by planners was a conservative one designed to encompass the most vulnerable population within the EPZ, which was found to be those who might inhabit the large number of frame beach houses without basements. The MassAG's only substantive attempt to counter this analysis was his reference to United States census information, which he never introduced into evidence, purporting to show that nearly 93% of homes in New England have a basement. See Tr. 18,583. Basement sheltering generally would provide a substantially greater cloudshine dose reduction factor. See ALAB-942, 32 NRC at 415 n.60. Even if we were to take official notice of such information, however, the MassAG failed to establish that these general statistical data have any relevance to the housing in either the beach or nonbeach areas within the Massachusetts EPZ so as to call into question the validity of planners' conclusions about the overall significance of the vulnerable population in the beach area.

E. The MassAG also declares that the Licensing Board ignored “key” evidence completely rebutting any FEMA finding of the adequacy of the PAR decision criteria in the SPMC. The evidence he singles out is a statement by FEMA witness Richard Donovan that, consistent with NUREG-0654, the agency’s review of the PAR decision criteria for the SPMC was intended to ensure that their primary focus was actual plant status and a prognosis of future plant status rather than maximization of dose savings.<sup>147</sup> According to the MassAG, because assessing a plan’s dose savings potential is the key to determining whether the plan is adequate, the failure of FEMA to take dose savings into account in assessing the adequacy of the PAR criteria establishes that its review was inadequate.

In CLI-90-2,<sup>148</sup> the Commission declared that intervenor evidence on the purported dose consequences arising from a range of accident scenarios should be excluded from consideration in that portion of this licensing proceeding concerned with the New Hampshire emergency response plan. In its recent decision in *Massachusetts v. NRC* upholding the Commission’s determination, the District of Columbia Circuit concluded that the dismissal of this dose consequence evidence was consistent with the Commission’s recognition, through its appropriate adoption of generic emergency planning standards under 10 C.F.R. § 50.47(b), that hypothetical dose savings need not be examined in reaching a determination under section 50.47(a)(1) about whether the provisions of a particular emergency plan provide reasonable assurance of adequate protective measures.<sup>149</sup> We perceive no limitation inherent in the Commission’s (or the court’s) rejection of dose savings as a consideration in determining the adequacy of emergency planning efforts. As a consequence, that ruling applies with equal force here, mandating rejection of this additional MassAG dose-savings-based challenge to the PAR decision criteria in the SPMC.

F. An additional question raised by the MassAG regarding the SPMC decision criteria for PARs is whether the Licensing Board acted properly in excluding certain direct testimony sponsored by MassAG witnesses Dr. Gordon Thompson, Dr. Robert Goble, and Dr. Jan Beyea. The testimony in question was proffered in support of several contentions, principally Contention JI-18,<sup>150</sup> challenging those criteria as they provide for the choice between sheltering and evacuation. In response to a motion by applicants, the Board excluded the testimony on a number of different grounds. The Board found it “extremely difficult to understand, full of uncertainties and speculations, and far short of

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<sup>147</sup> See Tr. 18,572-73.

<sup>148</sup> 31 NRC at 217.

<sup>149</sup> See 924 F.2d at 330.

<sup>150</sup> See Tr. 18,570-71.

expected scientific standards.”<sup>151</sup> It also observed that the testimony “postulated hypotheticals with no evidentiary basis and improperly sought to compare sites and emergency plans” and “revisited matters already decided with respect to the sheltering option for the transient beach population.”<sup>152</sup> The MassAG protests the Board’s “understandability” ruling, asserting that it was an impermissible reason for rejecting the evidence, and further insists that the testimony was sound and clear.

As a reading of the testimony makes apparent, it is at its heart a comparison of four evacuation strategies — unplanned evacuation; SPMC evacuation; evacuation at a “generic” plant site; and evacuation at a generic site with difficulties (e.g., the San Onofre facility) — and four sheltering strategies — ad hoc shelter; the SPMC sheltering equivalent based upon wood frame buildings without basements; a sheltering equivalent based on wood frame buildings with basements; and good shelter — of which one “represents” the strategy utilized under the SPMC.<sup>153</sup> These various planning strategies are contrasted in an effort to show their relative merits in terms of radiation exposures and the relative probabilities of early deaths or severe radiation sickness likely to occur under each planning scenario.<sup>154</sup> As the MassAG made clear to the Licensing Board,<sup>155</sup> this testimony was crafted to avoid the ban on “dose savings” evidence that resulted in the rejection of some of his earlier testimony.<sup>156</sup> It likewise was subject to dismissal, however, because it fails to abide by another relevance parameter established by the Commission for the consideration of emergency planning matters.

As the Commission made plain in the Statement of Consideration accompanying its 1987 rulemaking concerning plan evaluation in the face of state or local government nonparticipation, any consideration of plans such as the SPMC is to be done “without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to specific dose reductions which might be accomplished under the plan or the capabilities of any other plan.”<sup>157</sup> In addition to characterizing the evacuation/sheltering strategies utilized for the SPMC, the proposed testimony describes other emergency planning strategies, most of which are in fact based upon highly questionable

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<sup>151</sup> LBP-89-32, 30 NRC at 484.

<sup>152</sup> *Ibid.*

<sup>153</sup> See MassAG Exh. 72 (Testimony of Dr. Gordon Thompson, Dr. Robert L. Goble, and Dr. Jan Beyea on Behalf of the [MassAG] on Contentions Regarding the Adequacy of the SPMC) at 25-42 (marked for identification at Tr. 18,904).

<sup>154</sup> See *id.* at 42-52.

<sup>155</sup> See Tr. 18,537-38.

<sup>156</sup> See *supra* pp. 313-14.

<sup>157</sup> 52 Fed. Reg. 42,078, 42,085 (1987).

assumptions,<sup>158</sup> that might be employed as part of other emergency plans. It then seeks to relate them to the SPMC in an attempt to show the purported deficiencies in the utility plan's design. At its core, this testimony runs afoul of the Commission's directive not to engage in plan capability comparisons and, accordingly, was properly dismissed.

G. The MassAG's final PAR-related appeal centers upon the Licensing Board's consideration of his challenge in MassAG Contention EX-19, Basis D, to the adequacy of the METPAC computer model. He asserts that the Board never addressed the substance of the issues he raised regarding this model as it was employed in the June 1988 exercise. We find, however, that his concerns were given appropriate consideration and disposition.

By way of background, we note that the METPAC is intended to aid emergency response officials in making PAR determinations by providing a computer model of both atmospheric dispersion of radioactive substances resulting from a release and dose assessments relative to the dispersion.<sup>159</sup> It does not, by itself, generate PARs; instead, it indicates whether particular PARs, such as sheltering, evacuation, or a combination of the two, should be considered on the basis of calculated, projected integrated doses.<sup>160</sup> As used for Seabrook, it also highlights those towns in the EPZ that are most likely to be affected.<sup>161</sup>

The cornerstone of the MassAG's challenge to the METPAC program is the testimony of his witness, Dr. Robert Goble. As the Licensing Board observed, Dr. Goble's principal theme was that PAR analysis, either under the SPMC generally or as it occurred during the June 1988 exercise, should be driven primarily by the goal of mitigating the effects of a serious, fast-breaking and fast-ending accident in which plume exposure to any given area would be relatively short-lived.<sup>162</sup> According to Dr. Goble, in the absence of information indicating that such an accident scenario can be eliminated as a possibility, this approach will maximize dose savings to the affected populations.<sup>163</sup> As the Board also recognized, using this approach Dr. Goble's PAR analyses repeatedly led him to the conclusion that sheltering would be the preferred PAR over evacuation.<sup>164</sup>

Dr. Goble took up this theme in criticizing the METPAC and its use by planners in the June 1988 exercise. Following the declaration of a general emergency during the exercise, the first PAR for the City of Newburyport,

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<sup>158</sup> After reviewing the testimony, we doubt that, if admitted, it would have added anything significant to intervenor's case because it is, as the Licensing Board Chairman observed, a "very bad piece of work." Tr. 18,882.

<sup>159</sup> See Staff PAR Testimony at 22.

<sup>160</sup> See *id.* at 23.

<sup>161</sup> See *ibid.*

<sup>162</sup> See LBP-89-32, 30 NRC at 492.

<sup>163</sup> See Tr. 24,577-78.

<sup>164</sup> See LBP-89-32, 30 NRC at 492.

Massachusetts, was to shelter,<sup>165</sup> a recommendation made before any release had occurred and before any METPAC dose projection using "actual" exercise-generated radiation release data was available.<sup>166</sup> Subsequently, the METPAC program was utilized by response officials in generating a second PAR calling for the evacuation of Newburyport.<sup>167</sup> Dr. Goble questioned the METPAC program's validity with respect to this PAR, asserting that its use in the exercise established that the program was biased in favor of evacuation (as opposed to sheltering). He maintained that this was the case because, in the absence of information concerning the duration of the release involved, an eight-hour default value was used as the input for that element.<sup>168</sup>

Dr. Goble's condemnation of the METPAC model and the use of this release duration was not unqualified, however. When questioned about what value other than eight hours should be used in the METPAC when the release duration was unknown, he responded "I don't know what they should use," and offered only the general suggestion that any choice on a default value should involve a further evaluation of the characteristics of the plant and the site.<sup>169</sup> We find this exhortation unconvincing. As staff witness Bores indicated, the opportunity for further evaluation of relevant factual circumstances is already a part of the PAR generation process. According to Dr. Bores, because the METPAC program is only one tool utilized by the PAR decisionmakers, any concern about flaws resulting from the use of this eight-hour default value was wholly misplaced. Thus, in addition to the METPAC program's results, response officials have access to current dose assessment information and can consult with accident assessment personnel, thereby enabling them to put any METPAC results into the proper perspective.<sup>170</sup>

As we declared in ALAB-903 in the *Shoreham* proceeding, in order to establish the requisite "fundamental flaw" in an exercised emergency plan, an intervenor must demonstrate that a "failure of an essential element of the plan" is extant, and that it can be remedied only through a "significant" plan revision.<sup>171</sup> Putting aside the fact that, as the Licensing Board noted, the central premise for Dr. Goble's appraisal of the PAR process during the exercise is his inappropriate concentration upon responding to a single accident scenario (as opposed to planning for a broad spectrum of accidents),<sup>172</sup> his METPAC criticisms, which essentially are suggestions about how the existing program might be improved,

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<sup>165</sup> See *id.* at 488.

<sup>166</sup> See Staff PAR Testimony at 24.

<sup>167</sup> See *ibid.* See also LBP-89-32, 30 NRC at 488.

<sup>168</sup> See Tr. 24,296-98.

<sup>169</sup> Tr. 24,339.

<sup>170</sup> See Tr. 24,901.

<sup>171</sup> 28 NRC at 505.

<sup>172</sup> See LBP-89-32, 30 NRC at 492.

are not sufficient to meet this standard. When challenging a plan based upon the results of an exercise (as opposed to a challenge to the plan itself), under the applicable "fundamental flaw" standard the focus of intervenor efforts must be on identifying imperfections in a pivotal element of the plan so pronounced that those shortcomings can be corrected only through substantial redesign of the plan. Dr. Goble's ambivalent disapproval of the METPAC program falls far short in this regard.<sup>173</sup> We thus find no basis for disturbing the Board's conclusion that the MassAG failed to establish that the use of the METPAC model as part of the PAR generation process during the exercise revealed any emergency plan fundamental flaws.

## VI. SPECIAL POPULATIONS

Also a topic of the MassAG's appeal are purported flaws in the Licensing Board's disposition of several of the issues related to the identification, notification, and handling of the Massachusetts EPZ special populations (e.g., hospital patients, nursing home residents, homebound individuals, and school children). His assignments of error include the Board's: (1) rejection of the testimony of MassAG experts Dr. Don Dillman and Sharon Moriearty regarding the sufficiency of applicants' "special needs" survey; (2) alleged failure to give appropriate consideration to MassAG testimony concerning the size of the EPZ special populations; (3) findings concerning the adequacy of applicants' special facilities notification efforts; (4) determinations regarding the adequacy of response personnel designated to aid special populations in an evacuation; and (5) conclusions with respect to the suitability of several facilities intended to house special populations in an evacuation.<sup>174</sup> We conclude that the first of these issues has become moot and that the MassAG has failed to establish any Board error on the other issues.

A. The MassAG complains of the Licensing Board's exclusion of the testimony of Dr. Dillman and Ms. Moriearty that he offered to challenge the adequacy of a mail survey conducted by the applicants for the purpose of identifying those homebound, disabled individuals within the Massachusetts EPZ in need of assistance in the event of a radiological emergency. The basis of the

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<sup>173</sup> Dr. Goble declared that while the METPAC program needed "development," nonetheless he did not want to be "too harsh" on the program. Tr. 24,208. This apparently was the case because he could not identify any existing modeling program that was better. See Tr. 24,209. Further, while he described the METPAC program as "obsolete" and "cumbersome," he also agreed that it was "on the cutting edge" of the technology and "in line" with what is in existence in the field. Tr. 24,209, 24,338. This, in concert with the Licensing Board's findings concerning the validity of response officials' determination to issue the Newburyport evacuation PAR, see LBP-89-32, 30 NRC at 489-90, which have not been the subject before us of any specific challenge by the MassAG except with regard to the METPAC program, further bolsters our conclusion that the program and its utilization in the exercise did not reveal any fundamental flaws in planning efforts.

<sup>174</sup> See MassAG Brief at 46-47, 64-70.

exclusion was the Board's determination that the testimony was outside the scope of Contention JI-48, to which it assertedly pertained.

Our review of the record disclosed that, during the discussion of the applicants' motion to exclude the testimony, their counsel offered to allow Dr. Dillman to design a "proper survey," which would then be executed and utilized by the applicants.<sup>175</sup> Although the offer was not accepted by counsel for the MassAG,<sup>176</sup> it seemed to us that it would still serve as a reasonable compromise on the issue of admission of the testimony. We so stated in an unpublished March 11, 1991 order.

In response to that order, the applicants made the following proposal:

The next survey may be designed by any individual or organization (acceptable to FEMA) which the Commonwealth of Massachusetts selects (including Dr. Dillman), and the [applicants] will pay the reasonable costs and expenses of such an effort.<sup>177</sup>

For his part, the MassAG has accepted the proposal in settlement of the testimony exclusion issue and, accordingly, that issue is now moot.<sup>178</sup>

B.1. Also with respect to the sufficiency of applicants' survey, the MassAG argues that the Licensing Board failed to take proper account of the testimony of his expert witness, Guy Daines, when the Board endorsed the applicants' claim that EPZ special needs individuals were adequately identified by their mail survey. Specifically, he challenges the Board's purported failure to take into account Mr. Daines' testimony that the planning basis for Massachusetts EPZ special needs individuals should be between four and five percent of the general population, as opposed to the approximately one percent identified by applicants' survey.<sup>179</sup>

Mr. Daines' planning basis estimate was from a secondary source, the statistical validity of which was never established.<sup>180</sup> Beyond that, his suggested four to five percent planning basis did not coincide with his personal experience in attempting to identify the special needs individuals in the Florida county in which he is emergency services director. As the Licensing Board observed, a mail survey conducted by his office yielded a special needs individuals figure of about 0.4 of one percent of the total population, as compared to the one percent

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<sup>175</sup>Tr. 20,038.

<sup>176</sup>See Tr. 20,083-84.

<sup>177</sup>Licensces' Response to Appeal Board Order of March 11, 1991 (Mar. 15, 1991) at 2.

<sup>178</sup>See [MassAG's] Response to the Appeal Board's Order of March 11, 1991 (Mar. 25, 1991) at 2. The MassAG stressed that the acceptance of the proposal did not affect his challenge to the finding below that the litigated special needs survey was adequate. See *ibid*.

<sup>179</sup>This one percent encompassed approximately 500 individuals, of which approximately 475 would need assistance because they would not have anyone available to accompany them in the event of an evacuation. See LBP-89-32, 30 NRC at 515.

<sup>180</sup>See Tr. 19,569-74. For example, Mr. Daines had no knowledge of the size or nature of the sample used to arrive at the value of nearly five percent of the total population. See Tr. 19,571.

identified in applicants' survey.<sup>181</sup> In the circumstances, we perceive no error in the Board's determination to accept the figure on special needs individuals presented by the applicants.

2. The MassAG also complains that the Licensing Board acceded to the survey's validity, notwithstanding its failure to catalogue a single member of a recognized special needs group — noninstitutionalized emotionally or mentally disturbed individuals. The Board itself expressed concern over this lack of identification and requested that the applicants undertake an effort that would provide greater confidence that, if such persons exist within the EPZ, they have been accounted for.<sup>182</sup> The MassAG maintains that this is inadequate and typifies the Board's inconsistent treatment of this issue.

In the absence of some concrete information establishing that this allegedly unreported special needs population has more than a de minimis presence in the EPZ, we see no cause for invalidating the entire survey. Rather, as the Licensing Board suggested, the appropriate response is to ensure that additional efforts are made to eliminate any uncertainty about the identification of this special needs population. The MassAG has advised us that he does not consider his acceptance of applicants' offer to conduct a survey designed by a Commonwealth-selected expert as a settlement of his challenges to the overall sufficiency of the applicants' survey.<sup>183</sup> Nonetheless, we have no doubt that the Board's appropriate concern that further measures be taken to clarify the status within the EPZ of this potential special needs population will be fulfilled through that survey.<sup>184</sup> Further, in line with the Board's designation of other confirmatory actions, the adequacy of the survey in this regard should be verified by the staff.<sup>185</sup>

C.1. The MassAG also challenges the adequacy of the SPMC's provisions for contacting special facilities, such as nursing homes, to notify them about the existence and nature of a radiological emergency and to ascertain the facility's transportation and assistance needs in the event of an evacuation. He asserts that, as identified during the June 1988 exercise, many of the special facilities that were to have a contact point in fact had no means of being notified most of the time. To correct this situation, the Licensing Board accepted the applicants' commitment to reevaluate the notification procedures so as to improve the

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<sup>181</sup> See LBP-89-32, 30 NRC at 516.

<sup>182</sup> See *id.* at 516-17.

<sup>183</sup> See *supra* note 178.

<sup>184</sup> Additionally, the Massachusetts Governor's recent decision to begin Commonwealth participation in emergency planning may assist in resolving this identification matter by gaining the assistance of the Massachusetts Office of Handicapped Affairs, which earlier had expressed a reluctance to provide applicants with the names of special needs individuals or to solicit those individuals' authorization to provide identifying information to the applicants, see LBP-89-32, 30 NRC at 517 n.45.

<sup>185</sup> See, e.g., *supra* note 40 and accompanying text.

notification process.<sup>186</sup> The MassAG now claims, with little explanation, that the Board erred in approving the plan while permitting applicants to undertake this remedial action. We disagree.

As the Licensing Board correctly noted, the observed deficiency should not seriously impede the successful implementation of the plan. The principal means of emergency notification for the EPZ population, whether in special facilities or otherwise, is the siren alert system.<sup>187</sup> Moreover, in the event response officials are unable to make contact with a special facility when an evacuation is required, the plan calls for the dispatch of enough transportation equipment to accommodate 100% of the facility's predetermined capacity.<sup>188</sup> Accordingly, the Board was correct in its refusal to classify this deficiency as being of sufficient import to preclude approval of the SPMC.

2. The MassAG further insists that the Licensing Board erred in permitting plant operation without reviewing the measures it required to be taken to correct another SPMC deficiency, also revealed by the June 1988 exercise, involving notification of special facilities in a time frame comparable to the ninety minutes it took for school notification. Recognizing the apparent failure of SPMC planners to assign enough personnel to carry out this task, the Board required as a condition of licensure that applicants ensure that all special facilities will be contacted within a period of ninety minutes from the time the notification process begins.<sup>189</sup> The MassAG contends that the Board acted inappropriately in leaving verification of this corrective measure to the staff. Again, we do not agree. The Board's specific direction in defining the time frame within which special facilities notification should be completed, i.e., ninety minutes, clearly makes this a matter of objective analysis that is appropriate for staff verification.<sup>190</sup>

D.1. In addition to his assertions about special facility notification, the MassAG alleges that the Licensing Board was wrong in finding that, despite reduced night staffing at nursing homes, there would be adequate personnel resources to effectuate an evacuation. According to the MassAG, this inadequacy is established by the applicants' failure to demonstrate that the EPZ nursing homes have procedures to call in off-duty staff.

The MassAG's argument, of course, rests upon the premise that night staffing procedures at each of these facilities now are insufficient to respond to an

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<sup>186</sup> See LBP-89-32, 30 NRC at 518-19.

<sup>187</sup> See Tr. 21,636.

<sup>188</sup> See LBP-89-32, 30 NRC at 519.

<sup>189</sup> See *id.* at 519-20.

<sup>190</sup> See *supra* note 40. In this regard, in accordance with 10 C.F.R. § 2.743(i), we take notice of additional documentation in the public docket of this proceeding indicating that, at the request of the staff, FEMA has acted to verify that the Licensing Board's condition regarding the timing of special facility notification was fulfilled prior to full-power licensure. See Memorandum from R. Strome to G. Peterson (Dec. 8, 1989), Attach. at 2 (Item 12) [hereinafter Strome Memorandum Attachment].

emergency situation requiring an evacuation. This supposition, which appears to pose serious questions about the existing emergency response capabilities of Massachusetts EPZ nursing homes, is one in which we are not necessarily prepared to indulge.<sup>191</sup> Be that as it may, we agree with the Licensing Board that, whatever the staffing situation at each particular home, sufficient ORO personnel will be available to aid in any nighttime evacuation. In addition to the drivers and additional support personnel aboard the buses and other evacuation vehicles that will transport the special populations, as many as eighty additional ORO personnel can be made available to aid in evacuating the ten Massachusetts EPZ nursing home facilities.<sup>192</sup>

2. Seeking to draw upon our decision in ALAB-924 concerning the status of teachers as “service providers,”<sup>193</sup> the MassAG asks that we find the Licensing Board was mistaken when it concluded that the teachers would supervise students evacuated to the School Host Facility at Holy Cross College. Events, however, have overtaken this challenge. Responding to our ruling in ALAB-937 requiring further consideration of Basis R of MassAG Contention No. 47 regarding Massachusetts school teacher participation in a radiological evacuation,<sup>194</sup> the parties entered into a joint stipulation that assigns any role previously held by school teachers to route guides.<sup>195</sup> This agreement resolves this issue as well.

In a further attempt to draw upon ALAB-924, the MassAG also questions the Licensing Board’s ruling that the staffs of special facilities will continue to care for the residents of those facilities in the event of an evacuation. This is merely a reassertion of his position on the issue of “role abandonment” by special facility staff, a matter we disposed of in an earlier decision and have no reason to revisit here.<sup>196</sup>

3. In addition, the MassAG declares that the Licensing Board improperly assigned to the staff the responsibility for reviewing the applicants’ efforts to comply with its directive to develop procedures for reunification of students from transit-dependent families with their parents. According to the MassAG, such review calls for the exercise of a judgment about plan adequacy that should be subject to the adjudicatory process. It is again apparent, however, that, in directing that the applicants create procedures to “identify, assign, and schedule returning evacuation vehicles for use in reuniting parents and children *and* in transporting such reunited transit-dependent families to their assigned SPMC

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<sup>191</sup> Although the Licensing Board relied upon applicants’ testimony concerning nursing home call-in procedures and staff responses as sufficient to resolve this issue, *see* LBP-89-32, 30 NRC at 528 (citing Tr. 21,271, 21,317), the MassAG characterizes this testimony as generic and thus insufficient to address the situation in Massachusetts EPZ nursing homes.

<sup>192</sup> *See id.* at 527-29.

<sup>193</sup> *See* 30 NRC at 342-44.

<sup>194</sup> *See* 32 NRC at 145-52.

<sup>195</sup> *See* Joint Stipulation at 1-2. *See also* LBP-91-3, 33 NRC 49 (1991).

<sup>196</sup> *See* ALAB-942, 32 NRC at 411-12.

congregate care facilities,"<sup>197</sup> the Board set forth a clearly defined responsibility that is well within the bounds of those remedial activities that properly can be referred to the staff for verification.<sup>198</sup>

E. The Licensing Board's determinations regarding the suitability of two of the facilities assigned to the special needs and school populations also are contested by the MassAG. One of these, the New England Power Service Company headquarters office complex in Westborough, Massachusetts, has been selected by the applicants to serve as an overflow facility in the event that demand exceeds the capacity of the Wilmington, Massachusetts Shriners' Auditorium, the primary special needs population congregate care center. The MassAG argues that the Westborough facility is not suitable because FEMA did not review its use to house special needs persons and because there is no indication that there are handicapped-accessible bathrooms in the building. Although FEMA did not assess the facility's suitability for special needs persons, the agency did evaluate it as a congregate care facility.<sup>199</sup> This, in conjunction with additional testimony indicating that the Westborough facility is handicapped-accessible,<sup>200</sup> provides sufficient evidence of the facility's suitability as an overflow special needs population congregate care center. Further, while the testimony of applicants' witnesses leaves unanswered the question of exactly how many handicapped-accessible bathrooms are located on these handicapped-accessible premises, the MassAG has not provided us with any evidence suggesting that there is any basis for his concern that what is there will not be adequate for handicapped evacuees.<sup>201</sup>

The other special populations facility issue identified by the MassAG concerns three asserted deficiencies that he maintains should have been addressed in the evaluation of Holy Cross College as the School Host Facility: the lack of adequate personnel to care for the children, the failure to provide for material resources "such as food, diapers, cribs, etc.," and failure to assure that the

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<sup>197</sup> LBP-89-32, 30 NRC at 543 (emphasis in original).

<sup>198</sup> See *supra* note 40. Again, at the request of the staff, FEMA has acted to verify that the Licensing Board's condition regarding arrangements for reuniting families was fulfilled prior to full power licensure. See Strome Memorandum Attachment at 3 (Item 16).

In this regard, we see no telling distinction between the Licensing Board's delegation to the staff and the review responsibilities assigned the staff and FEMA under the joint stipulation recently accepted by the MassAG relative to care arrangements for school children. See Joint Stipulation at 2-3.

<sup>199</sup> See Tr. 18,733-34, 21,461-62. The agency's judgment in this regard was based in part on the evaluation of that facility against American Red Cross (ARC) certification standards by a New Hampshire Yankee employee trained and certified as an ARC shelter manager. See Tr. 18,724-25, 21,463-65.

<sup>200</sup> See Tr. 21,458.

<sup>201</sup> Although, as the Licensing Board noted, FEMA initially did not evaluate the Westborough facility as a congregate care center for special needs populations, the staff has now informed us that FEMA has conducted a survey of the Westborough facility for suitability for special needs persons and found it to be adequate. See NRC Staff Response to Appeal Board's February 4, 1991 Order (Feb. 20, 1991) at 2 [hereinafter Staff Response to February 4 Order].

facility will remain open for an adequate length of time.<sup>202</sup> With respect to the personnel and timing issues, those matters have been resolved by the joint stipulation discussed above.<sup>203</sup> Further, although the MassAG declares that resources such as food and diapers are necessary, it is not apparent to us why such readily available items must be included as part of Seabrook emergency planning in order to ensure that the reasonable assurance standard is met, particularly when the parties envision that the Host School Facility will operate only for a relatively short time.<sup>204</sup>

## VII. FACILITY AND TRANSPORTATION RESOURCES

Before the Licensing Board, intervenors contested a number of the SPMC's provisions regarding the facility and transportation resources that are to be employed in responding to a radiological emergency in the Massachusetts EPZ. Intervenors MassAG and SAPL now challenge the Board's rejection of several of these concerns, including: (1) whether applicants properly could rely upon a Haverhill, Massachusetts building as a staging area in light of purported zoning difficulties; (2) with respect to medical care for Massachusetts EPZ evacuees, whether enough "host" hospital capacity has been procured and whether proposed testimony concerning the hospital resources needed for radiologically injured individuals and surrebuttal testimony concerning reception center screening of individuals with internal radiological contamination was improperly rejected; (3) whether enough ambulances are available to meet the transportation evacuation needs of the Massachusetts EPZ population and whether the Board improperly dismissed evidence introduced to demonstrate that Massachusetts public health officials were refusing to issue operating permits to a number of out-of-state vehicles that would be utilized under the SPMC; (4) whether enough buses are available to transport school children evacuated from Massachusetts EPZ schools; and (5) whether enough bedbuses and reception center parking spaces are available to fulfill the needs specified in the SPMC.<sup>205</sup> We find these complaints lacking in merit.

A. In Contention JI-53, in contesting whether the SPMC complied with regulatory requirements and guidance governing the provision of adequate emergency facilities and equipment, intervenors alleged that a basic plan deficiency

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<sup>202</sup> MassAG Brief at 69-70.

<sup>203</sup> See Joint Stipulation at 2-4.

<sup>204</sup> See *id.* at 2 (support plan for Holy Cross facility is to provide for transfer to ARC congregate care center of all children not picked up by parents by 8:00 p.m. of day of school evacuation).

<sup>205</sup> See MassAG Brief at 47-50, 51-52, 70-74; SAPL Brief at 27-35. Although there arguably is some subject matter overlap between the issues we address in this section and those we considered in Part VI above, to simplify matters we have adopted the general organizational structure utilized by the MassAG in briefing his appeal.

was the unavailability of a proposed vehicle and personnel staging area located in Haverhill, Massachusetts. This staging area could not be used, they asserted, because of an outstanding City of Haverhill building inspector's cease and desist order alleging violations of the City's zoning code. Noting that the City's order was invalidated by the Massachusetts courts, the Licensing Board rejected the MassAG's argument that, because the City might issue another restraining order for use of the facility, sufficient support existed for finding that the Haverhill facility was "'unavailable.'"<sup>206</sup> The MassAG now argues that the Board erred in not finding a regulatory deficiency because there has been no showing that the legal dispute over the facility has been resolved.

In rejecting the MassAG's argument that the possibility of future legal controversy over the staging area established a deficiency in the SPMC, the Licensing Board relied upon our decision in ALAB-905 in the *Shoreham* proceeding.<sup>207</sup> In that instance, we found the existence of an unresolved legal dispute regarding the effect of local zoning ordinances on the applicant's use of one of its own facilities as a reception center was not sufficient to require that the Licensing Board reserve judgment on the adequacy of that reception center facility.<sup>208</sup> We thus sanctioned the Board's "refus[al] to speculate" about the outcome of that controversy,<sup>209</sup> an endorsement that applies with equal force here, particularly given the adverse judicial determination already visited upon the purported zoning dispute.<sup>210</sup>

B.1. In the event of a Massachusetts EPZ evacuation, under the SPMC patients in the two hospitals within the EPZ are to be moved to any of four "host" hospitals outside the EPZ with which applicants have letters of agreement. Applicants computed the capacity of these host hospitals to house EPZ patients by taking the difference between each hospital's maximum licensed capacity (i.e.,

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<sup>206</sup> LBP-89-32, 30 NRC at 553-54.

<sup>207</sup> See *id.* at 553 (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515 (1988)).

<sup>208</sup> See ALAB-905, 28 NRC at 519. We did conclude, however, that a state court judgment barring the utility's use of certain of its facilities as a reception center required a remand to the Licensing Board for consideration of the effect of that ruling upon its findings concerning reception center adequacy. See *ibid.* The MassAG has not made such a showing here.

<sup>209</sup> *Ibid.*

<sup>210</sup> In his brief, the MassAG also asserts that the Licensing Board's findings were erroneous because FEMA never evaluated the adequacy of the Haverhill facility through its use in an exercise or otherwise. Placing to one side the fact that Contention JI-53 makes not the slightest reference to the need for or adequacy of any FEMA finding in this regard, see Joint Intervenor Contentions Compilation at 75, we note that in recent filings both the applicants and the staff (in coordination with FEMA) have represented to us that the Haverhill facility was used as a staging area during a December 1990 full participation exercise and that the FEMA exercise evaluation (as yet unpublished) did not identify any deficiencies. See Licensees' Response to Appeal Board Order of February 4, 1991 (Feb. 8, 1991) at 4 [hereinafter Licensees' Response to February 4 Order]; Staff Response to February 4 Order at 2. While the MassAG acknowledges that this demonstrates that the Haverhill facility "can be used," he asserts that this does not resolve the issue of whether the underlying zoning issues have been resolved. Response of the Mass AG to the Appeal Board Order of February 22, 1991 (Feb. 28, 1991) at 8-9 (emphasis in original). As we have already observed, however, his speculation regarding the possibility of a zoning dispute is of no consequence in assessing the availability of that facility.

the maximum number of patients it is permitted by the Commonwealth to admit) and its average daily census figure (i.e., the average of daily hospital admissions over a calendar year). The MassAG asserts that this method of calculation was improper because it is inconsistent with the transportation planning basis utilized for EPZ hospital patients. As the Licensing Board acknowledged, transportation planning was based upon the premise that resources should be available to evacuate 100% of each EPZ hospital's maximum licensed capacity.<sup>211</sup> The MassAG asserts that each host hospital's extra bed capacity likewise should have been conservatively computed by taking the difference between its maximum licensed capacity and its maximum census figure (i.e., the most patients admitted at any time during the course of the year).

Any purported inconsistency with the transportation planning basis is explained by considering the differing aims involved. By using a conservative approach based upon the "worst case" premise that the EPZ hospitals will be full to their licensed capacity when an evacuation is ordered, transportation planning is intended to ensure that there are sufficient resources available to remove promptly from the potentially hazardous EPZ area every hospitalized individual. Host hospital capacity planning is not fueled by the concern that there be assurance that every patient the EPZ hospitals possibly can hold can be moved from the most potentially hazardous area.<sup>212</sup> Instead, its focus is on the availability of hospital beds in sufficient numbers to ensure that, once outside of the area of immediate danger, EPZ hospital patients can be re-established in a clinical environment in a relatively expeditious manner.

With the average daily capacity at the EPZ hospitals running at approximately sixty percent of their licensed capacity,<sup>213</sup> reasonable assurance in this regard requires that careful consideration be given to employing a planning basis that ensures host hospital capacity sufficient to cover a significant proportion of the EPZ hospitals' patient load, with the possibility of additional augmentation as necessary. In a worst case scenario such as that employed by transportation planners, 338 EPZ patients would need hospital beds.<sup>214</sup> Under the average

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<sup>211</sup> See LBP-89-32, 30 NRC at 520.

<sup>212</sup> In fact, to utilize a worse case scenario for host hospital capacity that would most closely parallel that used in transportation planning would be to assume that all host hospitals are filled to their licensed capacity, in which case there would be no room for any EPZ patients. The MassAG does not take his argument this to this length; nonetheless, as far as we are aware, he has made no factual showing about the extent to which his proposed maximum census figure exceeds the average daily census figures employed by applicants for SPMC planning purposes.

<sup>213</sup> Applicants' testimony before the Licensing Board established that, while the two EPZ hospitals have a combined average daily census of 129 patients, based on occupancy figures for 1987, their combined maximum licensed capacity was 219 patients. See Applicants' Rebuttal Testimony No. 6 (Protective Actions for Particular Populations), fol. Tr. 21,049, at 61.

<sup>214</sup> In addition to the EPZ hospitals' maximum licensed capacity of 219 patients, applicants estimated that, in the event of an emergency, approximately 119 nursing home patients would need to be removed to hospital facilities. See *ibid.*

(Continued)

daily capacity figures used by the SPMC planners, 305 host hospital beds would be available.<sup>215</sup> This count is somewhat short of that needed to cover the transportation planning basis figure; nonetheless, officials at one host hospital have indicated that, through the transfer of patients to an affiliated facility, sixty-five additional beds could be provided for EPZ patients, making some 370 beds available. The total figure covers the transportation basis, with capacity to spare.<sup>216</sup> We thus find no reason to fault the planning basis used by applicants for determining the necessary host hospital capacity for Massachusetts EPZ patients.

2.a. Also on the subject of health care facility resources, intervenors object to two evidentiary rulings by the Licensing Board. First, in conjunction with SAPL, the MassAG contests a Licensing Board ruling rejecting the prefiled direct testimony of Dr. Jennifer Leaning. This testimony was proffered in support of Contention JI-46 regarding the adequacy of medical resources provided under the SPMC for persons who are radiologically injured.<sup>217</sup> The MassAG asserts that the Board rejected it as not being "useful," which he contends is a legally impermissible reason.

As we have already observed, an attempt to establish that a particular emergency plan requires "improvement" mandates not only a showing of what addi-

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The MassAG questions the validity of the figure of 119 nursing home resident hospitalizations, challenging the SPMC planning premise that only those nursing home patients requiring "continuous medical care" need be hospitalized, with all others being accommodated at the Red Cross-staffed Shriners' Auditorium or at the Westborough, Massachusetts overflow facility, *see* Tr. 21,447-48. We find no basis for revising this classification so as to place more nursing home residents in a hospital setting. According to the MassAG, the designated congregate care facilities are inadequate because applicants are not providing any staffing other than Red Cross volunteers to care for the nursing home population and because applicants are not providing any material resources, such as bed rails and sanitary supplies, that would be required by the nursing home population. As to the first point, the MassAG provides no explanation or citation of authority to indicate why Red Cross staffing is inadequate for the care of the nursing home population. We thus see no need to consider this point further. Regarding the second concern, the MassAG is correct that the record indicates that applicants have not endeavored to outfit either congregate care facility designated to handle nursing home residents with all the equipment that might be available at a nursing home. *See* Tr. 18,953-54. By the same token, however, the need for applicants to provide such accommodations in an emergency evacuation situation is not apparent. *See* Tr. 21,273 (supporting plans indicate special facilities should bring whatever special equipment may be required); Tr. 21,274-75 (lack of bed rails not significant because nursing home residents needing such equipment can be accommodated by putting them on floor mats). *See also* Tr. 18,953-54 (provision of accommodations different from those residents have in nursing home reflects fact that they will be in a temporary, emergency shelter); *supra* p. 350.

<sup>215</sup> The four host hospitals with which applicants have entered into letters of agreement have a combined maximum licensed capacity of 1120 patients and a combined average daily census of 815 patients, leaving 305 beds, on average, available for EPZ evacuees. *See* Applicants' Rebuttal Testimony No. 6, at 62. Although the applicants' testimony and the Licensing Board's opinion give the number of available beds as 350, *see id.* at 63; LBP-89-32, 30 NRC at 543, the specifics in the testimony from which this total is derived seemingly do not support this figure, as applicants appear to concede in their proposed findings of fact, *see* Applicants' Proposed Findings of Fact, Rulings of Law, and Conclusions with Respect to the [SPMC] and the Exercise Contentions (July 19, 1989) at 172.

<sup>216</sup> As the Licensing Board also recognized, *see* LBP-89-32, 30 NRC at 543, in accordance with NUREG-0654 (Rev. 1, Supp. 1) Criterion ILL.3, applicants also were required to supply an additional list of 60 hospitals that would be capable of providing medical support for contaminated injured individuals, *see* Applicants' Rebuttal Testimony No. 6, at 63. These facilities also are a potential source of beds for EPZ patients.

<sup>217</sup> *See* MassAG Exh. 78 (Commonwealth of Massachusetts Testimony of Dr. Jennifer Leaning on the Resource Needs of the Radiologically Injured) (marked for identification at Tr. 19,800).

tional resources need be provided but also a demonstration of how the existing plan, without those resources, is so deficient as not to provide the requisite "reasonable assurance."<sup>218</sup> As applicants correctly point out, the disputed testimony is in the nature of a dissertation on what, in Dr. Leaning's opinion, ideal planning and resource allocation would be for the long-term handling of radiologically injured persons. Nowhere, however, does the testimony discuss (or even reference) the requirements of applicable NRC regulations and guidance regarding assistance to contaminated injured individuals, or provide any insight on how the SPMC fails to fulfill those requirements. Nor, as he made apparent to the Licensing Board, was the MassAG prepared to make such a showing other than through the assertion that anything less than what Dr. Leaning proposed was inadequate.<sup>219</sup> In the circumstances, Dr. Leaning's testimony, while perhaps grist for the rulemaking mill, failed to provide information that was relevant to the central issue of the adequacy of the SPMC's provisions on the radiologically injured and, therefore, was properly rejected.<sup>220</sup>

b. On its own, SAPL objects to the exclusion of the reply testimony of Dr. Belton Burrows. This testimony, which was submitted to the Board on June 26, 1989, just four days before the hearing concerning the SPMC and the 1988 emergency response exercise was scheduled to be completed and the adjudicatory record closed, was rejected after an extended oral argument.<sup>221</sup> The testimony dealt with three different subjects: the adequacy of FEMA guidance on medical services for contaminated injured individuals (Questions 3-6); the SPMC's provisions regarding reception center medical referrals for individuals with suspected contamination (Questions 7-11); and the impact of a determination by applicants to add additional monitoring stations to its monitoring and decontamination facilities (Question 12).<sup>222</sup> SAPL asserts that, in all respects this rebuttal testimony was timely submitted. We do not agree.

The FEMA guidance on medical services for contaminated injured individuals, the subject of the first portion of the disputed testimony, was issued in

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<sup>218</sup> See *supra* p. 325.

<sup>219</sup> See Tr. 19,871-75, 19,880. By the same token, even if the Leaning testimony had been admitted and was the basis for an argument by the MassAG that the SPMC is inadequate, we would have to reject that assertion because the testimony fails to establish why the plan's existing provisions are inadequate to meet the applicable requirements and guidance.

<sup>220</sup> Although the MassAG also asserts that the Licensing Board acknowledged the relevance of the Leaning testimony, a careful reading of the Board's bench ruling reveals that it did not agree that the testimony was relevant. See Tr. 19,883, 19,892. The Board found that even accepting his argument that portions of the testimony were "relevant," the MassAG nonetheless had failed to indicate where in the testimony the relevant information was located, a duty that the Board properly did not consider it had to undertake in order to ensure that only relevant testimony was admitted. See Tr. 19,887-89.

<sup>221</sup> See Tr. 27,647-725.

<sup>222</sup> See SAPL Exh. A (Surrebuttal Testimony of Belton A. Burrows, MD on Issues re: MS-1 Hospitals, Reception/Decontamination Centers and FEMA (GM) MS-1 Guidance) at 2-6 (marked for identification at Tr. 27,725). Questions 1 and 2 were directed at witness qualification. See *id.* at 2.

November 1986.<sup>223</sup> In rendering its conclusions on the adequacy of the SPMC, including the plan's provisions relating to medical services for contaminated injured individuals, FEMA made clear that its analysis was based upon NUREG-0654 and FEMA guidance memoranda.<sup>224</sup> Further, as the Licensing Board's initial scheduling order made apparent, applicants intended to rely upon this evaluation, and the presumption that arose from it, as a major element of their direct case for the adequacy of the SPMC.<sup>225</sup> We thus find no basis for SAPL's claim that this portion of the testimony challenging the FEMA guidance need not have been filed much earlier as direct testimony in response to the applicants' prima facie case.<sup>226</sup>

SAPL has attempted to justify the submission of the second part of Dr. Burrows' testimony concerning reception center medical referrals for the radiologically injured based on an asserted lack of clarity in the SPMC that was rectified by the testimony of applicants' witnesses. Intervenor asserts that only with the testimony of applicants' witnesses did it become aware that, under the SPMC, hospital referral would be automatic solely for contaminated or overexposed individuals who were also traumatically injured, with the radiological health advisor making a determination about whether hospitalization or entry into a screening program was appropriate for all others suffering radiological injuries. A review of *all* pertinent portions of the plan makes it apparent, however, that SAPL's lack of understanding was not a failure reasonably attributable to the SPMC's drafters.<sup>227</sup> Even more directly fatal to SAPL's claim is its failure to seek introduction of the testimony until some forty days after the admission of that applicants' testimony it is alleged to rebut. This portion of the reply testimony was properly rejected as untimely.

The same is true for the last portion of the testimony concerning the addition of monitoring stations. SAPL asserts before us that this testimony was appropriate as rebuttal to the applicants' April 13, 1989 announcement of

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<sup>223</sup> See Staff Exh. 7 (FEMA Guidance Memorandum MS-1 (Nov. 13, 1986)).

<sup>224</sup> See Applicants' Exh. 43C (FEMA Review and Evaluation of the [SPMC] (Dec. 1988)) at 19, 99-100.

<sup>225</sup> See Memorandum and Order (Jan. 24, 1989) at 2, 4 (unpublished).

<sup>226</sup> Of the four questions involving FEMA MS-1 guidance, only number five concerning the qualifications of board certified radiologists to supervise a hospital response to a radiological emergency even arguably was not addressed directly in the guidance memorandum; however, the failure to allow rebuttal on this point is at best harmless because the Licensing Board placed no direct reliance upon this matter in rendering its determination on the adequacy of medical services. See LBP-89-32, 30 NRC at 481-82.

<sup>227</sup> Before the Licensing Board, SAPL placed primary reliance upon SPMC section 3.8.1, which states in pertinent part that "[i]njured individuals who may be contaminated or overexposed, will be transported from Reception Centers to designated MS-1 hospitals." SPMC (Plan) at 3.8-1 (Rev. 0 Amend. 5). A review of the implementing procedures for the plan makes it apparent, however, that a clear distinction exists between contaminated or exposed individuals who have other traumatic injuries and those who do not, in terms of the medical care for which they would automatically be referred. Compare SPMC (Procedures) IP 2.9, at 6-7 (Rev. 0, Amends. 2 & 5) (contaminated individuals with injuries transfer directly to an MS-1 hospital) with *id.* at 7 (Rev. 0, Amend. 5) (notify Radiological Health Advisor concerning individuals with contamination that cannot be removed after three attempts or who are suspected of having internal contamination and obtain necessary information for entrance into radiological screening program).

the increase in the number of stations. Putting aside the fact that SAPL made no mention of this justification before the Licensing Board, a potentially fatal misstep given the requirement that new arguments are not to be raised for the first time on appeal,<sup>228</sup> we likewise cannot condone a delay of seventy-four days in preparing and filing what amounts to seven lines of rebuttal testimony. Again finding no good cause for the delay, we affirm the rejection of this testimony.

C.1. The MassAG also has chosen to pursue on appeal the issue of evacuation ambulance availability, which he raises in two different contexts. The first is a challenge to the Licensing Board's finding that sufficient ambulances are available under the SPMC to meet estimated transportation needs for a Massachusetts EPZ evacuation. Accepting that the applicants' testimony established that eighty-six ambulances are needed under the SPMC,<sup>229</sup> the MassAG contends that evidence he presented demonstrated that only sixty of these vehicles actually would be available in the event of an emergency. He protests that this number is insufficient to support a finding of reasonable assurance regarding ambulance availability.

If, as the MassAG asserts, the evidence before the Licensing Board had established that only sixty out of the eighty-six ambulances needed were available, a significant planning adequacy question would exist. The record indicates, however, that applicants have under written agreement ninety-seven ambulances from eleven different companies.<sup>230</sup> To discredit this showing, the MassAG had his investigators interview managers at nine of these ambulance services. The investigators' testimony cast doubt upon the availability of fifteen ambulances: managers from two companies declared that six ambulances were subject to pre-existing contractual commitments to provide service in local communities, which would be left without service if the ambulances were sent to a Seabrook emergency,<sup>231</sup> and an official from a third company stated that, because of changes in the company's business operations, he no longer could provide nine of the ambulances set forth in his agreement with applicants.<sup>232</sup>

This testimony does provide some basis for concluding that, of the ninety-seven ambulances under agreement, only eighty-two would in fact be available.

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<sup>228</sup> See ALAB-924, 30 NRC at 358 & n.110 (citing cases).

<sup>229</sup> See Applicants' Rebuttal Testimony No. 6, Attach. T.

<sup>230</sup> Letters of agreement found in Applicants' Exhibit 41 establish that 89 ambulances or ambulance equivalents (i.e., ambulances or critical care unit vans) are available. See LBP-89-32, 30 NRC at 554. In addition, Anthony Callendrello, applicants' Manager of Emergency Preparedness Licensing, testified before the Licensing Board that subsequent written agreements provide for the availability of an additional eight ambulances. See Tr. 21,587-90.

<sup>231</sup> See Testimony of Maureen Mangan and John Paolillo, on Behalf of [MassAG] Regarding the Actual Availability of the SPMC's Manned Vehicles and Drivers, fol. Tr. 19,429, at 12-13, 16 [hereinafter MassAG Investigator Testimony].

<sup>232</sup> See *id.* at 13-14.

Although the accuracy of this figure of eighty-two is not free from doubt,<sup>233</sup> even if we accept it as correct, it is not significant in assessing the adequacy of planning efforts that it is somewhat shy of the eighty-six ambulances applicants have maintained are necessary under the SPMC. In gross terms, it represents less than five percent of the total needed, not anywhere near the thirty percent discrepancy claimed by the MassAG. Additionally, we view this particular variance as essentially transitory. As is perhaps best evidenced by the MassAG's evidence regarding the change in one ambulance provider's business operation, ambulance resources are vulnerable to fluctuations that occur through no fault of applicants. Recognizing this, applicants have attempted to compensate by having emergency response officials undertake periodic reassessments of ambulance resources,<sup>234</sup> thereby ensuring that circumstances such as a change in ambulance availability due to revised business operations are identified and resolved. The MassAG has provided us with no cause to believe that this process will not function.<sup>235</sup> Thus, the minor resource shortage suggested by this intervenor testimony is not of the kind or magnitude that would lead us to conclude that the arrangements made by applicants in the SPMC for furnishing the necessary ambulance resources fail to provide the requisite reasonable assurance.

2. Also on the subject of ambulance availability, the MassAG complains of the Licensing Board's denial of his June 30, 1989 motion to accept an exhibit that he had sought to introduce into the record.<sup>236</sup> The exhibit consisted of June 27, 1989 letters sent by a Deputy General Counsel of the Massachusetts Department of Public Health (DPH) to four ambulance companies having their principal place of business in either New Hampshire or Maine. Those letters called the addressees' attention to a Massachusetts statute that, as interpreted in an implementing DPH regulation, treats out-of-state ambulance companies possessing a contractual agreement to provide such services in Massachusetts

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<sup>233</sup> While the investigators' testimony raises questions about the availability of several vehicles, it also indicates that some transportation service providers may have more vehicles available than are reflected in their agreement letters. The figures on vehicle availability given by two of the service providers in their interviews with the MassAG's investigators appear to exceed by four vehicles those set forth in their letters of agreement. Compare Applicants' Exh. 41, at 218 (ten ambulances and two critical care units from Marlboro-Hudson) and *id.* at 479 (six ambulances from B&L) with MassAG Investigator Testimony at 16 (11 ambulances and three critical care units from Marlboro-Hudson) and *id.* at 19 (eight ambulances from B&L). This would cover the minor shortfall identified in the investigators' testimony.

<sup>234</sup> See LBP-89-32, 30 NRC at 558.

<sup>235</sup> The ongoing nature of this process seems apparent from a recent filing by applicants indicating that the most recent SPMC update reflects a supply of 107 ambulances. See Licensees' Response to February 4 Order at 4. We nonetheless note that, in contrast to applicants' assertion, the NRC staff (in coordination with FEMA) has stated it accounts for only 93 available ambulances in the most recent SPMC update. See Staff Response to February 4 Order at 2. Although both these numbers are in excess of the 87 that applicants now assert are needed, see Licensees' Response to February 4 Order at 4, given the disparity in the totals, prudence would dictate that the staff and applicants arrive at a common understanding of a current ambulance availability figure prior to applicants' proceeding with their announced plan to reduce to 95 the number of ambulances under written agreement, see *id.* at 4 n.8.

<sup>236</sup> See Memorandum and Order (Aug. 7, 1989) (unpublished) [hereinafter August 7 Order].

as “regularly operating in Massachusetts” and, thus, as requiring a license from the DPH. Because that agency had discovered that the addressees had such an agreement with the Seabrook applicants but had not yet acquired licenses, the letter indicated that civil or criminal enforcement action would be taken against them unless they were to “cease and desist” from their commitments under the Seabrook agreements until such time as they obtained “a valid Massachusetts ambulance service license.”<sup>237</sup>

In essential agreement with the applicants and the staff, the Licensing Board gave three independent reasons why the letters were not admissible. First, the Board found the letters “irrelevant to this proceeding” because the licensing of out-of-state ambulances was not within the scope of the only applicable contention, Contention JI-55.<sup>238</sup> That contention did raise the issue whether the SPMC provides reasonable assurance that an adequate number of ambulances would respond to a Seabrook radiological emergency in a timely fashion. And the Board acknowledged that, in Basis C, the contention alleged that certain *ambulettes* subject to an agreement with the Seabrook applicants “are not licensed in Massachusetts and cannot be used here.”<sup>239</sup> The Board deemed dispositive, however, the fact that there was not a similar allegation with respect to the *ambulances* mentioned in Basis C: in the Board’s words, “[t]he reference to the licensing of ambulettes in Basis C is exclusive of ambulances.”<sup>240</sup>

Second, also on the matter of relevance, the Licensing Board concluded that, absent a court test following a decision by the MassAG to seek enforcement, it was mere speculation whether the DPH would prevail on its legal position that the ambulance companies in question must obtain Massachusetts licenses in order to continue their agreements with the applicants. The Board then pointed to one of our holdings in the *Shoreham* proceeding as support for the proposition that it need not “afford any weight to a pending, or in this case, threatened lawsuit.”<sup>241</sup>

Finally, the Licensing Board found the proffer of the exhibit inexcusably late. In this connection, the Board determined that the MassAG knew or should have known of the legal requirements for licensing out-of-state ambulances more than a year before he sought to introduce the letters into evidence.<sup>242</sup>

We have significant concerns about the propriety of the Licensing Board’s reading of Basis C of Contention JI-55. Neither the Board nor the applicants and staff offered the slightest reason to believe that, insofar as any legal requirement for licensing is concerned, a valid distinction might be drawn

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<sup>237</sup> Motion for the Board to Accept an Exhibit (June 30, 1989), Exhs. at 2.

<sup>238</sup> August 7 Order at 5.

<sup>239</sup> *Id.* at 3.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Id.* at 8 (citing *Shoreham*, ALAB-905, 28 NRC at 519).

<sup>242</sup> *See id.* at 9-12.

between ambulances on the one hand and ambulettes on the other.<sup>243</sup> Indeed, if anything, there would appear to be a greater likelihood that any such existing requirement would apply to ambulances.<sup>244</sup> In the circumstances, the Licensing Board's seizure upon the fact that the reference in Basis C to the absence of licenses was cast simply in terms of ambulettes appears somewhat hypertechnical.<sup>245</sup>

Nonetheless, that is not a question we must resolve, for the Licensing Board's result must be upheld on a different ground. As the applicants' filing below reflects, there is a genuine dispute between the parties respecting the correctness of the DPH thesis as reflected in the letters contained in the rejected exhibit. Among other things, we cannot dismiss as beyond the bounds of reason the applicants' assertion below that their agreements with the out-of-state ambulance companies do not mean (as the DPH would have it) that the companies are "regularly operating" in Massachusetts and, as such, are subject to a licensing requirement. Consequently, the Board properly concluded that ALAB-905 stood as a formidable barrier to the admission of the exhibit. As previously noted, that decision squarely holds that there is no occasion to speculate on how a particular legal dispute might be resolved once it were to be placed before the appropriate judicial tribunal.<sup>246</sup> In the context of the present situation, it follows that the DPH letters lacked any relevance in advance of a judicial determination (so far apparently lacking) that the agency's interpretation and application of the germane Massachusetts statute rested on a sound footing.<sup>247</sup>

D. As with ambulances, the MassAG also has challenged the availability of the buses relied upon by applicants as evacuation transportation for various other Massachusetts EPZ populations, most particularly schoolchildren. He bases his assertions on the testimony of his investigators, who also interviewed officials of various companies with which applicants have agreements to provide evacuation buses. He maintains that their testimony established that, because

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<sup>243</sup> For its part, the contention itself refers specifically to "ambulances" but does not mention "ambulettes." See Joint Intervenor Contentions Compilation at 77. Yet even the applicants do not seem to question that, despite this fact, Basis C serves to bring claims respecting ambulettes within the scope of the contention.

<sup>244</sup> In his prepared testimony, MassAG witness John Paolillo stated that he had been informed by an official of an ambulance company that, although similar to an ambulance, an ambulette is larger but does not have as much medical equipment stored within its cabin. See MassAG Investigator Testimony at 7. One might reasonably assume that any regulatory interest that Massachusetts might have in this sphere would focus primarily upon the vehicles that, because of the inclusion of more medical equipment, could be expected to transport the more seriously ill.

<sup>245</sup> The crux of the matter at hand, as the Licensing Board itself recognized after canvassing NRC jurisprudence on the subject of basis and specificity for contentions, was that Basis C had to put the applicants "on notice to know, at least generally, what [they] must defend or oppose." August 7 Order at 4 (emphasis supplied). In this instance, there arguably was ample notice that a question was being raised as to whether Massachusetts licenses are required for those out-of-state companies that have contracted to provide Massachusetts transportation of the ill and infirm in a Seabrook emergency.

<sup>246</sup> See *supra* p. 351.

<sup>247</sup> Given this conclusion, we need not and do not reach the more difficult question whether the Licensing Board was justified in finding the proffer of the exhibit to be untimely.

those companies already have existing daily responsibilities for the transportation of non-EPZ schoolchildren, a significant transportation deficiency will arise if those companies are called upon to evacuate EPZ schoolchildren during “school bus hours.” We do not agree.

Before the Licensing Board, applicants introduced evidence of letters of agreement or contractual arrangements with twelve bus companies that indicated an availability of some 530 buses for evacuation transportation.<sup>248</sup> Evidence before the Board also established that 367 buses were required to carry out that function in the Massachusetts EPZ, with 230 of those needed for transporting school, day-care, and nursery school children.<sup>249</sup> In their testimony, the MassAG’s investigators indicated that, citing their existing commitments to non-EPZ schools, officials at six of the bus companies had expressed reservations about their ability to supply buses promptly if an evacuation is necessary during “school bus hours.”<sup>250</sup> These companies are to provide 393 of the 530 buses.<sup>251</sup> The Licensing Board rejected this claim, declaring that when these buses are unavailable because they are already transporting schoolchildren, “the need for buses [is] less,”<sup>252</sup> an apparent recognition that during “school bus hours” those buses that normally provide transportation to the EPZ children, which are not now counted as SPMC resources, will serve as evacuation transportation.

The scenario posited by the MassAG to support this “deficiency” assumes an accident sequence so rapid and severe that response officials have no leeway to take measures (such as sheltering while awaiting the arrival of non-EPZ school buses) that would avoid any conflict over bus availability.<sup>253</sup> Even accepting this scenario as pertinent to the planning basis, if the evacuation recommendation comes during “school bus hours,” we cannot conceive that those buses that already provide daily transportation to and from school would not, at a minimum, fulfill their existing responsibility of delivering the children home, after which the children can evacuate with their families.<sup>254</sup> Further, it is not unreasonable to assume in these particular circumstances that the buses regularly furnishing transportation services to the EPZ schools would provide a significant supplemental resource for transporting the children out of the EPZ, an

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<sup>248</sup> See LBP-89-32, 30 NRC at 554.

<sup>249</sup> See Applicants’ Rebuttal Testimony No. 6, Attach. T.

<sup>250</sup> See Tr. 19,430-33.

<sup>251</sup> See Applicants’ Exh. 41, at 18, 32, 38, 84, 126, 171.

<sup>252</sup> LBP-89-32, 30 NRC at 559.

<sup>253</sup> Indeed, the MassAG’s scenario also assumes that, despite the provision in the transportation agreements for three-hours notice to bus providers, *see, e.g.*, Applicants’ Exh. 41, at 13, officials would be unable to contact them and the non-EPZ schools for which they work in time to reach some arrangement that would allow the bus companies to commit some significant portion of their resources in response to an emergency that could have a detrimental impact upon the health and safety of the children in the EPZ.

<sup>254</sup> See ALAB-932, 31 NRC at 405. With regular bus riders thus provided for, the excess bus resources available, *see supra* notes 248-51 and accompanying text, undoubtedly would be sufficient to provide evacuation transportation for any children who do not regularly ride the bus.

eventuality already contemplated in the SPMC in planning for school evacuation transportation resources generally.<sup>255</sup> The availability of these existing resources, in conjunction with the surplus of buses already available under the SPMC,<sup>256</sup> thus leads us to conclude that no significant safety consequences arise under the MassAG's "school bus hours" scenario.<sup>257</sup>

E. The MassAG questions the Licensing Board's disposition of his challenge regarding the availability of at least thirty-one bedbuses needed to provide evacuation transport for those not assigned to ambulances and the need to ensure that areas at the Andover and Beverly reception/monitoring centers that are now used as equipment storage areas by the owner, Massachusetts Electric Company, will be cleared quickly for use as parking lots. Recognizing the need for the bedbuses, the Board made its adequacy finding regarding the SPMC subject to the applicants' acquisition or execution of written agreements that would ensure the availability of thirty-five such vehicles, which would provide the necessary number plus an eleven percent margin.<sup>258</sup> Similarly, the Board directed that applicants identify or develop procedures that will assure timely clearance of parking space obstacles at the reception centers.<sup>259</sup> The MassAG now asserts that because the record before the Board did not establish that the buses were actually under contract or that the lot clearance procedures existed, there is no basis for an adequacy finding by the Board as to either matter.

As both applicants and the staff point out, the Licensing Board's findings were conditioned on the applicants' execution of the agreements and their identification or development of the necessary parking lot clearance procedures, with confirmation of those actions delegated to the staff.<sup>260</sup> Because these are

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<sup>255</sup> See SPMC (Procedures) IP 2.7, at 6 (in checking with each school to determine evacuation transportation needs, school liaison is to inquire whether school's current contracted bus company is assisting with transportation and ensure that its drivers know location and route to appropriate reception center).

<sup>256</sup> The MassAG launches a general attack upon the availability of 120 buses that are to be supplied by the McGregor-Smith Company, asserting that a company vice president's statements to his investigators that the firm would not sign a contract with applicants for the bus services, as did all other bus suppliers, vitiates an earlier letter of agreement. Assuming that the MassAG is correct in this regard, *but see* MassAG Exh. 73 (Memorandum from R. Donovan to R. Krimm (Mar. 21, 1988)) at 12, we nonetheless agree with the Licensing Board's conclusion that it is without significance, given the excess number of buses that are available under contract. See LBP-89-32, 30 NRC at 560.

<sup>257</sup> Of course, at the root of this "availability" issue is the fact that for SPMC transportation resources, applicants generally are relying upon school bus suppliers other than those that normally provide transportation services to the EPZ schools. To the degree this is a consequence of the nonparticipation of the various Massachusetts governmental entities, we would hope that the Commonwealth's new position on planning participation will aid in procuring the participation of local bus companies, thereby alleviating any concern over the availability of sufficient transportation resources for the EPZ schoolchildren.

<sup>258</sup> See LBP-89-32, 30 NRC at 561.

<sup>259</sup> See *id.* at 578.

<sup>260</sup> See *id.* at 594.

matters that could appropriately be left to the staff for verification, we find no error in the Board's ruling.<sup>261</sup>

## VIII. MONITORING FACILITIES

The MassAG makes a number of assertions centering on the adequacy of the SPMC's provisions for monitoring of EPZ evacuees to determine the extent, if any, to which they have received radioactive contamination as a consequence of an accident at Seabrook. In this regard, the question is whether, as called for by the guidance contained in NUREG-0654, there will be enough personnel and equipment available to monitor "within about a 12-hour period" all EPZ resident and transient evacuees arriving at relocation/reception centers.<sup>262</sup> In resolving this question, i.e., in deciding whether the number of monitoring stations contemplated by the SPMC is sufficient to satisfy the guideline, it is necessary to determine both the number of persons that can be monitored in a specified period of time (monitoring rate) and the number of evacuees who will seek monitoring (monitoring load). The MassAG insists that the Licensing Board erred in its conclusions on both scores.<sup>263</sup>

A. On the matter of monitoring rate, the Licensing Board found that each monitoring station, consisting of separate monitoring locations capable of processing two evacuees at a time, could accommodate 101 individuals per hour.<sup>264</sup> This finding rested on subsidiary determinations to the effect that (1) for the standard adult the average linear distance to be monitored will be 180 inches; (2) the radiation detection device (probe) can monitor the subject at the rate of three inches per second; (3) ten seconds should be added to the monitoring time to account for the period of time required to move within the monitoring trailer to and away from the monitoring location (in/out time); and (4) one minute per hour would be lost for each monitoring station to perform decontamination activities (downtime).<sup>265</sup> Although the MassAG contends that these Board findings are flawed, after reviewing the record foundation for each we are unable to discern any reason to set them aside.

1. *Monitored linear distance per evacuee.* Testimony of FEMA witness Richard Donovan established that FEMA accepted 180 inches as the linear distance covered in monitoring a standard adult and that this is the figure

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<sup>261</sup> See *supra* note 40. At the request of the staff, FEMA also has acted to verify that the Licensing Board's conditions regarding bedbuses and parking lot clearance procedures were fulfilled prior to full power licensure. See Strome Memorandum Attachment at 3-4 (Items 18-19).

<sup>262</sup> NUREG-0654 (Rev. 1, Supp. 1) Criterion II.J.12.

<sup>263</sup> See MassAG Brief at 74-86.

<sup>264</sup> See LBP-89-32, 30 NRC at 575.

<sup>265</sup> See *id.* at 568-75.

the agency utilizes for calculating monitoring rates.<sup>266</sup> The MassAG did not question this FEMA witness concerning the basis for the agency's coverage span assumption. Instead, he sought to challenge this value in a series of questions presented to a panel of applicants' witnesses by which he attempted to explore their knowledge of the various body dimensions of the average adult evacuee who would be surveyed. While the witnesses agreed that some of the dimensions offered by the MassAG were reasonable, they professed no knowledge of others, disagreed with other MassAG suggestions about the appropriate probe motions to be utilized in proper monitoring, and stated that they did not know what specific measurements were used by FEMA for calculating the standard dimensions for an adult.<sup>267</sup> Somewhat later, these same witnesses testified that the dimensions suggested by the MassAG during their previous cross-examination were not the same as the distances required for probe motion in monitoring an individual.<sup>268</sup> Although the MassAG now asserts that the results of his cross-examination establish a linear probe distance of 292 inches, our review of the testimony convinces us there is no basis for adopting his series of hypothetical estimates over the essentially unchallenged value presented by the FEMA witness.

2. *Probe rate.* In contrast to the standard civil defense instruments used for radiological monitoring, for the Seabrook EPZ populations applicants proposed using an Aptec FT-126B probe. The Licensing Board found that for the Aptec instrument a probe rate of three inches per second "is reasonable and well supported by uncontradicted expert opinion and technical assessments."<sup>269</sup> Use of this figure, in conjunction with the already established 180 linear inch distance per evacuee, yields a monitoring time of sixty seconds per person. MassAG claims, however, that there is no valid technical justification supporting a faster monitoring rate for this particular probe than that allowed by FEMA for standard detectors, i.e., ninety seconds per person.<sup>270</sup>

This clearly is not the case. Applicants provided FEMA with a technical justification indicating that, because of the larger area of its monitoring window, at a coverage rate of three inches per second the Aptec probe had a detection efficiency greater than or equal to the standard pancake probe that provides the footing for the existing FEMA standard.<sup>271</sup> Based on its review of this technical submission, FEMA determined that the faster frisk rate was an appropriate value

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<sup>266</sup> See Tr. 18,605, 18,609.

<sup>267</sup> See Tr. 25,651-70.

<sup>268</sup> See Tr. 26,020-21.

<sup>269</sup> LBP-89-32, 30 NRC at 571.

<sup>270</sup> See MassAG Exh. 63 (Selected Distribution Memorandum from R. Donovan (Feb. 18, 1988)) at 1.

<sup>271</sup> See MassAG Exh. 64 (Technical Justification). See also Applicants' Rebuttal Testimony No. 17 (Radiological Monitoring Process), fol. Tr. 25,423, at 19-20 & Attach. A.

to utilize for the Aptec probe.<sup>272</sup> In addition, evidence was placed before the Licensing Board indicating that the rate achieved during a demonstration run of the monitoring process as part of the June 1988 full participation exercise was consistent with applicants' planning basis probe rate.<sup>273</sup> The MassAG fails to point to anything that calls into serious question the validity of either the applicants' technical justification or the exercise demonstration.<sup>274</sup> As a consequence, we find no basis for overturning the Board's probe rate findings.

3. *In/out time.* The Licensing Board adopted applicants' addition of ten seconds to the sixty-second monitoring time to account for the period it takes an individual to move from the queue at the entrance of the monitoring trailer to one of the monitoring stations and to move away from the station after having been monitored. The MassAG argues before us that he "elicited convincing evidence that a 15-second in/out time is more realistic."<sup>275</sup> It seems, however, that the only time a fifteen-second value is mentioned in the "record" of this proceeding is in his proposed findings. Moreover, in suggesting this figure, the MassAG does not account for the testimony of applicants' witnesses that "out time" can overlap the "in time" for the next person to be monitored,<sup>276</sup> thereby providing a significant degree of conservatism in the time allotted to monitor each person.<sup>277</sup> Thus, we accept the Board's finding that the overall

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<sup>272</sup> See Tr. 18,606-09.

<sup>273</sup> See Applicants' Rebuttal Testimony No. 17, at 20 & Attachs. B-C; Tr. 18,627-28.

<sup>274</sup> As the centerpiece for his attack upon the technical validity of applicants' Aptec probe evaluation, the MassAG has latched onto a reference in applicants' probe testing report to the nuclear power station radiological protection guidelines promulgated by the industry-sponsored Institute for Nuclear Power Operations (INPO). According to the report, these INPO guidelines suggest that, in performing a standard personnel contamination frisk, the probe rate to be used with a standard pancake probe should be "less than two inches per second." Applicants' Rebuttal Testimony No. 17, Attach. A at 4. Contending that probe sensitivity may vary significantly depending upon probe rate, the MassAG asserts that applicants' technical justification was invalid because their comparative efficiency conclusions were based upon a standard pancake probe rate of two inches per second, rather than the "less than two inches per second" INPO guideline. This argument, however, fails to account for the fact that FEMA probe rate guidance, which is the benchmark for which applicants had to provide a comparative equivalent, is footed on a standard rate of two inches per second. See MassAG Exh. 63, at 1 (FEMA assumes individual monitoring will require 90 seconds); Tr. 18,605 (FEMA assessment of reasonable monitoring time based upon frisk rate using standard civil defense probe over linear monitoring distance of 180 inches).

In addition, in faulting the Licensing Board's reliance on the results of the monitoring drill performed during the June 1988 exercise, the MassAG supplies a citation to his proposed findings of fact without any further explanation regarding the basis for the Board's error. As indicated previously, we reject such unexplained assignments of error as inadequately briefed. See *supra* p. 322. Also regarding the drill, the MassAG asserts that the Board failed to explain why it concluded the MassAG's witness who challenged the drill's reliability was acting on misunderstood and incorrect assumptions so as to warrant the rejection of her testimony. See LBP-89-32, 30 NRC at 571-72. The witness' deficiencies in this regard are more than adequately demonstrated by the fact that she mischaracterized the drill as utilizing seven monitoring stations, rather than the five actually operated, so that her monitoring rate calculations were significantly less than the actual rate. Compare Corrected Testimony of Carol Sneider on Behalf of [the MassAG] Regarding Contention II-56 (Monitoring Rate), fol. Tr. 24,974, at 3-5 with Applicants' Rebuttal Testimony No. 17, at 20.

<sup>275</sup> MassAG Brief at 83.

<sup>276</sup> See Tr. 25,496.

<sup>277</sup> See Tr. 19,187 (FEMA witness Donovan characterizes ten second in/out assumption as "ultra-conservative"). In this regard, the Licensing Board also appears correct in its assumption that any time required to monitor

(Continued)

time to monitor an individual is seventy seconds (ten seconds in/out time and sixty seconds for actual monitoring).<sup>278</sup>

4. *Downtime.* The MassAG's appeal of the Licensing Board's finding that the planning basis should include one minute per hour of decontamination downtime at each monitoring station consists of the simple (albeit insufficient) statement that the Board should have adopted the MassAG's proposed findings on the issue. In this instance, it is not surprising that the MassAG offers nothing more. In his proposed finding, the MassAG asserts that the Board should reject the testimony of his own witness that one minute of every hour should be allocated to the cleanup of each monitoring station and instead hold, with no support in the record, that the allocated time should be seven minutes for each station.<sup>279</sup> The Board found no reason to reject the testimony of the MassAG's own witness and neither do we.

B. The Licensing Board having correctly concluded that each monitoring station, processing two evacuees at a time, can maintain an hourly monitoring rate of 101 persons per hour, the question then becomes whether the ten stations per reception center the Board directed applicants to provide are sufficient to accomplish monitoring of Massachusetts EPZ evacuees "within about a 12-hour period."<sup>280</sup> This, in turn, depends upon the size of the monitoring load. The MassAG insists that, even accepting the FEMA position that monitoring capacity need be provided only for a minimum of twenty percent of evacuees,<sup>281</sup> the monitoring capacity of the Massachusetts EPZ reception centers will prove inadequate.

To establish the monitoring load that must be processed within about twelve hours, the applicants employed a mathematical analysis that assigned a different weight to various segments of the EPZ population. They assumed that some elements of the population, such as schoolchildren, would be monitored in their entirety. On the other hand, the transient population that frequents the Atlantic Ocean beaches during the summer was incorporated in the monitoring load only

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personal belongings, as is called for in the plan, see SPMC (Procedures) IP 2.9, at 12 (Rev. 0, Amend. 5), can be accomplished during this overlap interval. See LBP-89-32, 30 NRC at 573.

<sup>278</sup> In reviewing this and other factual findings by the Licensing Board, we apply the well-established standard that we will not overturn such findings unless we are persuaded that the record evidence as a whole compels a different result. See, e.g., *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 473 (1987).

<sup>279</sup> See [MassAG]'s Proposed Findings of Fact, Rulings of Law, and Conclusions with Respect to the [SPMC] and the Exercise Contentions (Aug. 14, 1989) at 457-58 (Finding 9.1.78.Y).

<sup>280</sup> See *infra* note 284.

<sup>281</sup> FEMA's position concerning the appropriate monitoring planning basis was set forth in the Krimm memorandum, which was the subject of extensive consideration in the *Shoreham* proceeding. See *Shoreham*, ALAB-905, 28 NRC at 522-31. We previously have upheld the applicability of this planning basis for the Massachusetts EPZ. See ALAB-942, 32 NRC 404-07. The Krimm memorandum itself is found in the record of this proceeding as Attachment 1 to Applicants' Direct Testimony No. 4 (Decontamination and Reception Centers), fol. Tr. 4740, submitted in response to intervenor challenges to the NHRERP.

in part. Because of this selective weighting, as well as their incorporation of a factor to account for the distribution of the beach population between the New Hampshire and the Massachusetts oceanfront areas, the applicants arrived at the conclusion that the greatest monitoring load would exist if the evacuation were to occur on a weekday during the "offseason," i.e., when the beaches are essentially empty and schools and day-care centers are in session. Before the Licensing Board, the MassAG argued that the various segments of the EPZ population should be weighted differently than was proposed by applicants and that a different figure for distribution of the beach population should be used, with the result that the maximum monitoring load would occur on a summer weekend with the schools and day-care centers empty and the beach population at its peak. In his view, the maximum monitoring load under this summer scenario, occurring at the reception center at Beverly, Massachusetts, would be 2456 evacuees greater than the applicants' offseason maximum monitoring load of 10,712 persons.<sup>282</sup>

This variation of 2456 evacuees was the focal point of the Licensing Board's attempt to resolve the difference in the parties' monitoring load estimates. Applying the FEMA general presumption that twenty percent of evacuees will require monitoring,<sup>283</sup> the Board found that the 2456 monitored evacuees would be representative of a general evacuee population of 12,280. Treating these evacuees generally as part of the beach population, on the basis of its findings concerning double-counting for EPZ residents who are on the beach, the Board applied an initial fifteen percent reduction, leaving a total of 10,438 evacuees potentially in need of monitoring. To this figure, the Board applied the FEMA twenty percent monitoring planning basis presumption, with the result that it found 2088 of these evacuees normally would go to a reception center for monitoring. Finally, concluding that certain evacuees residing outside the EPZ would not go to a reception center for monitoring because they would not be seeking congregate care sheltering, a determination we discuss in more detail *infra*, the Board applied an additional twenty-five percent reduction. The Board then added this incremental quantity of 1566 persons to the applicants' maximum calculated monitoring load value of 10,712 persons and found that the monitoring load should be 12,278 evacuees at each of the two reception centers.<sup>284</sup>

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<sup>282</sup> See LBP-89-32, 30 NRC at 564. This load figure involves those evacuees, such as the general public and the school and day-care populations, who would be processed by going through a monitoring trailer rather than those, such as the special facility/special needs populations, who under the SPMC are to be monitored while remaining in their evacuation vehicles. See Applicants' Rebuttal Testimony No. 17, at 5. The dispute before us concerns only the trailer load figures.

<sup>283</sup> See *supra* note 281 and accompanying text.

<sup>284</sup> See LBP-89-32, 30 NRC at 567-68. Thereafter, taking account of the monitoring rate analysis we have upheld above, see *supra* p. 365, the Board found that to accommodate this monitoring load in accordance with the "within about a 12-hour period" guidance of NUREG-0654, applicants would need to maintain ten monitoring stations per reception center, an increase of one over what applicants had committed to provide. See LBP-89-32, 30 NRC at 575.

On appeal, the MassAG claims that the Licensing Board erred in two respects in arriving at its monitoring load figures. First, by accepting applicants' value of thirty-one percent rather than his proposed figure of forty percent, the Board failed to allocate to the Massachusetts beach area a proper proportion of the entire EPZ beach population. In addition, the MassAG argues that the Board, on the basis of its assumptions about reception center utilization by the non-EPZ beach day-tripper and business employee populations, incorrectly imposed an additional monitoring load reduction beyond the twenty percent limitation that was established by FEMA in its so-called Krimm memorandum. After reviewing the errors assigned by the MassAG, we have concluded that, in all events, they are essentially harmless.

The cross-examination of MassAG expert witness Dr. Colin J. High established that, based principally on vehicle counts from aerial photographs, at least four separate measurements of the population distribution between the New Hampshire and Massachusetts beaches were available for consideration: on Sunday, August 11, 1985, about forty percent of the beach area vehicles were at Massachusetts beaches; on Sunday, July 5, 1987, the Massachusetts portion of the beach traffic was forty-one percent; on Saturday, July 18, 1987, thirty-one percent of vehicles in the beach area were in Massachusetts; and on Sunday, July 19, 1987, the Massachusetts share of beach traffic was thirty-six percent.<sup>285</sup> Despite conceding that "it's reasonable to believe that people come and go in roughly the same proportions" during the day, Dr. High chose to consider only the two higher values in his analysis, excluding the other data on the grounds that the measurements were not made at the optimum time of day.<sup>286</sup> Applicants' position, apparently based solely upon consideration of the data supporting the lowest value, was that the appropriate figure was thirty-one percent.<sup>287</sup> Ultimately, the Licensing Board rejected the MassAG's analysis, citing his "selective use of available data," and adopted applicants' proposed figure because it was based upon the same aerial survey information the Board reviewed in establishing the New Hampshire evacuation time estimates.<sup>288</sup>

As Dr. High acknowledged during his testimony, the population distribution between the beaches in the two portions of the EPZ can vary from day-to-day and hour-to-hour.<sup>289</sup> With this potential vicissitude, we cannot say that the Board's adoption of the thirty-one percent Massachusetts beach traffic figure lacks substantial evidentiary support.<sup>290</sup> Nonetheless, even if we were to accept the proposition that the higher percentages relied upon by the MassAG should have

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<sup>285</sup> See Tr. 27,994-28,000.

<sup>286</sup> See Tr. 28,002-04

<sup>287</sup> See Tr. 25,892-94; 26,021-22; 26,029.

<sup>288</sup> See LBP-89-32, 30 NRC at 406, 564-65.

<sup>289</sup> See Tr. 28,004.

<sup>290</sup> See *supra* note 278.

been given more weight, in light of the variations in the existing measurements, the most we would provide would be a distribution ratio based upon an average of the four weekend measurements, i.e., thirty-seven percent. But, as we explain subsequently,<sup>291</sup> even this approach is of no help to the MassAG in his challenge to the sufficiency of the applicants' monitoring capacity.

The same is true with respect to the MassAG's claim that the Licensing Board improperly applied an additional twenty-five percent reduction to the difference between the applicants' and the MassAG's proposed monitoring loads to account for those nonresident EPZ evacuees who will not utilize the reception centers because they do not need the associated congregate care shelters. The Board declined to accept the applicants' proposed 100% reduction, but concluded that human behavioral factors underlying the use of a reception center support some further reduction in the monitoring planning basis.<sup>292</sup> The Board declared that the monitoring-load planning basis should reflect reception/congregate care center use by three evacuee subsets: those who go for only monitoring services, those who go for both monitoring and congregate care (i.e., shelter) services, and those who go for congregate care services. The Board stated further that, in contrast to those beach day-trippers and business employee evacuees who live within the EPZ, nonresident EPZ day-trippers and business employee evacuees can be assumed to have no need (and thus no motivation) to seek congregate care through a reception center. This supposition, in turn, led the Board to conclude (although without citation to any record authority) that these non-EPZ populations would have a reception center use rate lower than their EPZ counterparts, which merited an additional twenty-five percent reduction in the monitoring load rate.

As we have observed previously, in the absence of contrary evidence the Licensing Board is entitled to treat as presumptively correct the FEMA conclusion, as evidenced in the Krimm memorandum,<sup>293</sup> that for planning purposes it can be assumed that a minimum of twenty percent of the total EPZ permanent and transient populations would require or seek monitoring in the event of a radiological emergency.<sup>294</sup> In this instance, the Board nonetheless found that this twenty percent presumption is not applicable to several transient populations because their members were not EPZ residents. We have misgivings about the validity of this conclusion, however, because we find nothing in the Krimm memorandum — which provides the analytical basis for the twenty percent presumption — or in the record before the Board that supports an additional reduction in the

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<sup>291</sup> See *infra* pp. 369-70.

<sup>292</sup> See LBP-89-32, 30 NRC at 566-67.

<sup>293</sup> See *supra* note 281.

<sup>294</sup> See ALAB-924, 30 NRC at 360.

monitoring load rate based upon whether an evacuee dwells inside or outside of the EPZ.

On its face, the Krimm memorandum draws no distinction between EPZ residents and nonresidents. It is simply a blanket statement that provisions should be made "to monitor a minimum of 20 percent of the estimated population to be evacuated."<sup>295</sup> Further, as a technical foundation for the twenty percent monitoring load planning basis for all evacuees, FEMA relies on studies and previous Licensing Board findings regarding relocation/congregate care center use generally as well as the potential for additional, radiation-anxiety induced monitoring requests.<sup>296</sup> This analysis effectively parallels the reception center/congregate care use considerations cited by the Board as supporting an additional planning basis reduction in this instance. Thus, the FEMA Krimm memorandum planning basis, by looking to the effect that an evacuee's perceived need for different reception center services (i.e., monitoring v. sheltering) may have on his or her willingness to utilize a reception center, appears to reflect a judgment on the elements central to the Board's determination to apply an additional planning basis reduction.<sup>297</sup>

For the MassAG, however, our concerns in this regard again are of no aid in achieving his goal of having the Licensing Board's findings concerning the adequacy of monitoring capacity reversed. This is so because we are unable to discern that a rescission of the Board's twenty-five percent reduction, even in combination with a more generous Massachusetts beach population differential of thirty-seven percent, results in any significant change in the monitoring

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<sup>295</sup> Applicants' Direct Testimony No. 4, Attach. 1, at 2.

<sup>296</sup> In support of the 20% planning basis for monitoring, the Krimm memorandum refers to research indicating that in an emergency between 3% and 20% of evacuees arrive at a relocation center. *See id.*, Attach. 1, at 1. It also states that, in radiological emergencies, irrespective of actual exposures, additional evacuees can be expected to avail themselves of relocation services, including monitoring, in order to allay their fears about radiation so that the percentage of evacuees is likely to be at the upper end of the 20% range. *See ibid.* Finally, while acknowledging that the issue had never been formally litigated in a hearing, the memorandum notes that the percentage of congregate care facility capacity generally cited in Licensing Board hearings is between 5% and 15% percent of the estimated number of EPZ evacuees. *See ibid.*

<sup>297</sup> In explaining the additional 25% reduction, the Licensing Board also found significant the fact that applicants chose to provide monitoring services to some special populations, e.g., children evacuated from schools and nursing home residents, in percentages greater than the 20% provided for in the Krimm memorandum. *See LBP-89-32, 30 NRC at 565-66.* The relevance of this consideration is questionable as well. Nothing in FEMA's analysis, which declares that monitoring is to be provided for 20% of the projected evacuated population "at a minimum." Applicants' Direct Testimony No. 4, Attach. 1, at 2, suggests that because an applicant provides enhanced monitoring coverage for one evacuee group, it can discount the monitoring services that are to be provided to other evacuee populations.

Undoubtedly, in the interest of establishing the most reasonable and practical monitoring planning basis, it would be advisable if FEMA reviewed the Licensing Board's observations about the effect of EPZ residency on the use of reception center monitoring services, along with the applicants' conclusions about the advisability of fully counting schoolchildren and other special population groups as part of the monitoring load, to determine whether they reflect useful refinements of the policy established in the Krimm memorandum for the entire estimated evacuee population. In this regard, none of the parties has provided us with any indication of FEMA's position on the Board's conclusions regarding EPZ nonresidency as a justification for a further reduction in the monitoring load planning basis.

load that would place the applicants' existing monitoring program outside the limits of applicable regulatory guidance. Applying these figures, along with the fifteen percent double-counting value set out above,<sup>298</sup> to the various population values given in Dr. High's prepared testimony, establishes that the maximum monitoring load at Beverly, which would occur during a summer weekend evacuation, would be 12,312 persons.<sup>299</sup> This is hardly a significant increase over the figure of 12,278 monitored evacuees that the Board found applicants could handle adequately under their present monitoring planning basis. Moreover, even if the beach vehicle count is increased from 31,000 to 32,800 to reflect our earlier directive to include "hidden vehicles" in the beachfront areas,<sup>300</sup> the monitoring load would rise to only 12,584 persons. Given applicants' established monitoring rate planning basis of 1010 evacuees per hour at each reception center,<sup>301</sup> these evacuees could be serviced in somewhat less than twelve hours and thirty minutes. As a consequence, we see no basis for modifying the Board's conclusion regarding the ability of the SPMC monitoring process to meet the regulatory guidance that evacuee monitoring be completed "within about a 12-hour period."

## IX. ADDITIONAL EXERCISE ISSUES

Besides contesting various Licensing Board findings regarding the adequacy of emergency planning efforts for the Massachusetts EPZ as embodied in the SPMC, intervenor SAPL disputes the Board's resolution of several matters relating to one of its challenges to emergency response adequacy within the New Hampshire EPZ based upon the results of the June 1988 full participation emergency response exercise. Specifically, SAPL appeals several Board rulings regarding its Contention EX-12, which asserts that "[t]he adequacy of procedures, facilities, equipment and personnel for the registration, radiological monitoring and decontamination of evacuees was not demonstrated during the [1988] exercise" of the NHRERP.<sup>302</sup>

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<sup>298</sup> The 15% reduction of the beach population that the Licensing Board employed to account for double counting of the EPZ residents has not been challenged by the MassAG as part of his appeal. Accordingly, we use that value in our analysis. Cf. NUREG-0654 (Rev. 1), App. 4, at 4-2 (in calculating demand estimation for ETEs, care should be taken to avoid double counting).

<sup>299</sup> This result is reached by using the monitoring load equation set forth in Dr. High's direct testimony, along with the figures for the permanent population, beach population, nonbeach and non-EPZ employee population, special facilities population, and transient dependant population proffered in his testimony. See Revised Testimony of Dr. Colin J. High on Behalf of [the MassAG] Concerning Contention JI-56 (Monitoring Rate), fol. Tr. 27,974, at 4, Attach. A at 1-3.

<sup>300</sup> See ALAB-932, 31 NRC at 419.

<sup>301</sup> This reflects the sum of all 10 stations in a reception center each processing 101 persons per hour.

<sup>302</sup> Joint Intervenor Contentions Compilation at 120.

According to the contention, “[f]acilities were not well organized and not run in an adequately effective manner.”<sup>303</sup> In the assigned bases, SAPL notes that only two New Hampshire communities (Salem and Dover) had opened reception centers as part of the exercise. With respect to Salem, SAPL maintains that certain specified difficulties were encountered in setting up the facility and that the problem of insufficient personnel was exacerbated when firefighters assigned to fulfill roles at that reception center were called away to deal with “real life” situations, i.e., actual fires.<sup>304</sup>

The Licensing Board admitted Contention EX-12 insofar as it alleges in effect that (in the Board’s words), “the flaws in the execution of the plan were so pervasive and extreme that a redraft . . . for specificity and clarity is needed.”<sup>305</sup> Thereafter, SAPL filed in advance of the hearing on the contention the prepared written testimony of two Salem firefighters, Captain Daniel Breton and John Van Gelder.<sup>306</sup>

Before us now are (1) SAPL’s challenge to the threshold exclusion by the Licensing Board (on the applicants’ motion) of certain portions of the Breton/Van Gelder testimony; and (2) that intervenor’s insistence that the testimony of the firefighters established that, contrary to the findings below, the NHRERP is fundamentally flawed.<sup>307</sup> We turn first to the excluded testimony and then consider the fundamental flaw claim.

A.1. Based on its determination that Contention EX-12 does not allege that reception center personnel lacked adequate training, the Licensing Board declined to accept so much of the proffered Breton/Van Gelder testimony as claimed a lack of training on the part of the firefighters called upon to operate the Salem center.<sup>308</sup> We agree with both the Board’s reading of the contention and the consequences it attached to that reading.

There is not the slightest mention of training in the contention or its assigned bases and, contrary to SAPL’s apparent belief, there is no reason why it nonetheless should have been obvious to the reader that SAPL was attributing some or all of the alleged deficiencies to training shortcomings.<sup>309</sup> The short of the matter is that, if SAPL intended to raise a training issue, it should (as it

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<sup>303</sup> *Ibid.*

<sup>304</sup> As the Licensing Board noted, *see* LBP-89-32, 30 NRC at 627, the NHRERP makes the members of the Salem Fire Department responsible for setting up a reception and decontamination center in Salem and for the monitoring and decontamination of evacuees arriving at the center.

<sup>305</sup> Exercise Contentions Order at 61-62.

<sup>306</sup> *See* Testimony of Captain Daniel Breton and John Van Gelder, Firefighters for the Town of Salem, New Hampshire on Behalf of [SAPL] Regarding SAPL Contention EX-12 (Reception/Decontamination Centers), fol. Tr. 25,535 [hereinafter Breton/Van Gelder Testimony].

<sup>307</sup> *See* SAPL Brief at 7-20.

<sup>308</sup> *See* Tr. 25,251.

<sup>309</sup> There are a wide variety of possible causes of the failure of a reception center to function properly during an exercise.

readily could) have said so explicitly in the contention. Its attempt to cure that failure through the prepared testimony of witnesses simply came too late.<sup>310</sup>

2. We likewise find no fault in the Licensing Board's exclusion of the firefighters' testimony to the effect that they were not given precise information respecting the number of evacuees that they should expect at the Salem reception center. In common with the Board,<sup>311</sup> we are unable to see the relevance of that testimony insofar as the purposes to be served by the 1988 exercise are concerned. In this connection, it may well be that, as SAPL insists, one of the purposes of an emergency preparedness exercise is to ensure that emergency workers are familiar with their assigned duties. But it scarcely follows, as SAPL would have it, that in the case of reception center personnel such familiarity requires exact knowledge as to how many evacuees are likely to present themselves at the center. That number has a bearing only upon the quite different matter (not addressed in the excluded testimony now under scrutiny) regarding whether adequate personnel resources are allocated to the center by the NHRERP.<sup>312</sup> Insofar as an individual emergency worker assigned to the center is concerned, all that is required is a familiarity with the particular duties that he or she will be expected to carry out — duties that do not hinge upon the number of evacuees that might turn up at the center.

3. The testimony of the firefighters was presented in question and answer form. Question 24 sought Captain Breton's opinion on whether "the scope of the exercise was reasonable" and elicited the response that the scope "did not approach the number of people we're supposed to be capable of processing."<sup>313</sup>

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<sup>310</sup>Our conclusion that effect must be given to the express terms of Contention EX-12 (i.e., to what is said and what is *not* said in the contention and any supporting bases) derives direct support from ALAB-899, 28 NRC 93 (1988), which recently obtained the explicit approval of the District of Columbia Circuit in *Massachusetts v. NRC*, 924 F.2d at 332-33. We there confronted an attack upon the dismissal of an intervenor contention based upon the Licensing Board's interpretation of that contention as not embracing the issue of microbiologically-induced corrosion in the Seabrook facility's cooling systems. In rejecting that attack on the ground that the Board had correctly construed the contention as written, and that therefore the intervenor's post-submission endeavor to broaden its reach necessarily was unavailing, we had this to say:

The reach of a contention necessarily hinges upon its terms coupled with its stated bases. We have long held that one purpose of the requirement in 10 C.F.R. 2.714(b) that the bases of a contention be set forth with reasonable specificity is to put the other parties on notice as to what issues they will have to defend against or oppose. Thus, where a question arises as to the admissibility of a contention, we look to both the contention and its stated bases. Similarly, where, as here, the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise.

ALAB-899, 28 NRC at 97 (footnotes omitted).

<sup>311</sup>See Tr. 25,252-61.

<sup>312</sup>As the applicants note, the issue of the number of persons likely to go to the New Hampshire reception centers was fully litigated in the phase of the proceeding concerned with the adequacy of the NHRERP. See LBP-88-32, 28 NRC at 703-04, *aff'd*, ALAB-924, 30 NRC at 361-62. In the case of Salem, the Licensing Board found that number to be 6416. See *id.* at 704.

<sup>313</sup>Breton/Van Gelder Testimony at 7-8.

The Licensing Board excluded this question and answer on the ground that Contention EX-12 "did not fairly allege a flaw in the scope of the exercise."<sup>314</sup>

As we see it, there is a yet more compelling justification for precluding this testimony. Obviously, and for equally patent good reason, the exercise did not call for the participation as evacuees of the full number of individuals that the Salem response center is deemed capable of accommodating. The real question thus is whether, given the extent of the participation, the scope of the exercise at Salem was sufficient to satisfy the requirements of the pertinent NRC regulations.<sup>315</sup> This is essentially a question of law as to which Captain Breton was not shown to be qualified to respond. Although he may have been assigned a significant role in the functioning of the Salem reception center, our attention has been directed to nothing to suggest that he is versed in the concepts underlying the conduct of emergency planning exercises, let alone the regulatory standards respecting the necessary or desirable scope of such exercises.

4. Finally, SAPL asserts that the Licensing Board should have allowed testimony of the firefighters designed to establish that, for one reason or another, they or their colleagues would not respond in the event of a real emergency. The Board's exclusion of that testimony was grounded on its belief that it ran afoul of what the Board described as "the conclusive presumption of the emergency planning rule that local emergency officials will respond in an emergency."<sup>316</sup>

As we observed previously in a somewhat different context, the presumption referred to by the Licensing Board is the so-called "realism rule" embodied in 10 C.F.R. § 50.47(c)(1)(iii). Strictly speaking, however, the rule and its presumption do not come into play here for, in contrast to the SPMC, the NHRERP (which includes the arrangements for the Salem reception center) is a state-sponsored plan. Moreover, as we concluded in ALAB-937, even in the case of utility-sponsored plans, the realism rule would not apply because it was intended to cover only "those persons in leadership positions (such as governors, mayors, civil defense directors, and state police superintendents) whose regular duties include the initiation of measures to protect the public health and safety in the event of an emergency that puts the populace at risk."<sup>317</sup>

Nonetheless, these considerations are of no assistance to SAPL here. As we also recognized in ALAB-937, reason exists to presume that those who "routinely confront emergencies in the discharge of their assigned functions," including professional firefighters, "will respond in emergency situations," in-

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<sup>314</sup>Tr. 25,261. Indeed, in admitting a portion of Contention EX-12, the Licensing Board expressly rejected "the scope aspect" of the contention. See Exercise Contentions Order at 61.

<sup>315</sup>For its part, FEMA apparently saw no problem on that score. See LBP-89-32, 30 NRC at 628.

<sup>316</sup>Tr. 25,271.

<sup>317</sup>ALAB-937, 32 NRC at 148-49. That limitation would appear to explain why, in terms, the realism rule is confined to utility-sponsored plans. In the case of a government-sponsored plan, there likely would never be an issue respecting the response of persons in leadership positions should an emergency arise.

cluding radiological emergencies.<sup>318</sup> Upon reflection, we are satisfied that such an assumption is entirely appropriate with respect to the Salem firefighters assigned to staff the reception center in that township.

Our conclusion in this regard is not affected by the fact, stressed by SAPL, that Salem is not within the EPZ but, instead, is a host community (i.e., it is to provide services to evacuees who are not residents of that municipality). The validity of the assumption that, if called upon to do so, a firefighter will respond to a particular emergency situation should not hinge upon whether the emergency happens to have its inception within the borders of the community within which that individual is located. And it does an equal disservice to the professionalism of firefighters in general, and to that of the Salem firefighters specifically, to suggest that their willingness to provide a necessary service to persons put at risk because of an emergency might depend upon where those persons reside.

Nor is the assumption countered by SAPL's reliance upon a purported Memorandum of Agreement between Salem and its firefighters to the effect that the latter would not be required by the Town to participate in radiological/decontamination training exercises and operations.<sup>319</sup> Underlying that reliance is the unspoken premise that the State of New Hampshire lacks the authority in an emergency situation to direct emergency response employees of its political subdivisions to fulfill responsibilities placed upon them by an emergency response plan that was sponsored by the State and is to be carried out under its aegis. For present purposes, however, it is not necessary to inquire whether that premise finds support in New Hampshire law. That is because the assumption to which we referred in ALAB-937 does not rest upon the application of principles governing legal obligations but, rather, is rooted in a recognition of the fundamental nature of the regular duties of, e.g., police officers and professional firefighters. To repeat, those individuals "routinely confront emergencies in the discharge of their assigned function" — indeed (especially in the case of firefighters), such confrontation is the *raison d'être* for their employment. This being so, it is scarcely likely that a firefighter would walk away from a genuine emergency calling for his or her assistance to persons at risk simply because of a perceived lack of any enforceable obligation to provide such assistance.

In the circumstances, the Licensing Board was justified in declining to credit the Breton/Van Gelder predictions concerning Salem firefighter response in the event a Seabrook emergency should bring about the activation of the Salem

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<sup>318</sup> *Id.* at 149 n.44.

<sup>319</sup> The Memorandum was referred to in a portion of the Breton/Van Gelder Testimony that was excluded by the Licensing Board. See Breton/Van Gelder Testimony at 3.

reception center.<sup>320</sup> This does not perforce mean that the Board should have excluded that testimony at the threshold.<sup>321</sup> The better course might have been to have allowed the testimony for such worth as the Board deemed it to possess. But we need not pursue that essentially procedural question. For, given our agreement with the Board that the testimony was devoid of substantial probative value, any error associated with its exclusion was harmless.

B. SAPL recognizes that the Commission has decreed that hearings on the results of emergency planning exercises are to be confined to those issues concerned with whether an exercise revealed "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan."<sup>322</sup> In the wake of that mandate, we reached certain conclusions respecting the two principal components of a fundamental flaw as revealed in an exercise. With respect to the first — the exercise "reflects a failure of an essential element of the plan" — it is not enough that "minor or isolated problems" come to the fore on the day of the exercise.<sup>323</sup> As to the second component — the flaw "can be remedied only through a significant revision of the plan" — the pivotal question is whether "the problem can be readily corrected"; if so, "the flaw cannot reasonably be characterized as fundamental."<sup>324</sup>

SAPL maintains that the Breton/Van Gelder testimony establishes that the 1988 exercise revealed problems at the Salem reception center that are neither minor or isolated in character nor readily correctable. Accordingly, we are told, the Licensing Board erred in finding that the "problems identified during the exercise and related to the setting up and operation of [that] reception center are readily correctable and do not constitute a fundamental flaw in the emergency plan."<sup>325</sup>

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<sup>320</sup>The Licensing Board had especially good cause to reject Mr. Van Gelder's statement (in his answer to question 25 in the prepared testimony, *see id.* at 8) that, if he were on duty at the time of an actual radiological emergency at Seabrook, he would falsely claim he was ill, return to his home, and "get [his] family out of town." *See* Tr. 25,276-77. Mr. Van Gelder's statement notwithstanding, such a serious dereliction of duty on the part of his co-workers involving a deliberate misrepresentation of fact is not lightly to be presumed. Moreover, the Van Gelder statement did not explain why he might wish to return home for the purpose of removing his family from a community not within the Seabrook EPZ, subjecting himself in the process to possible severe disciplinary action for being absent from his duty station without authorization or warrant.

<sup>321</sup>*See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 153-54 (1986), *aff'd in part and rev'd in part on other grounds*, CLI-87-12, 26 NRC 383 (1987).

<sup>322</sup>*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

<sup>323</sup>*Shoreham*, ALAB-903, 28 NRC at 505.

<sup>324</sup>*Id.* at 505-06. Our ALAB-903 determinations were recently reiterated in ALAB-942 in this proceeding. *See* 32 NRC at 425-26.

<sup>325</sup>LBP-89-32, 30 NRC at 628. In this connection, the Licensing Board referred to FEMA's determination that the performance of the Salem reception center during the exercise was adequate and that the objective of demonstrating the sufficiency of procedures, equipment, and personnel for monitoring and decontamination was met. *See ibid.* The Board acknowledged that it was bound to accept that determination in passing upon the fundamental flaw question. It pointed, however, to our observation in ALAB-903, 28 NRC at 507-08, to the effect

(Continued)

We do not agree. To be sure, if credited, the testimony of the firefighters reflected that the exercise did not go as smoothly at the Salem reception center as might have been desired. Our review of the shortcomings to which the witnesses alluded does not suggest, however, the existence of problems that must be deemed beyond correction in the absence of significant revision of the NHRERP.

In Captain Breton's view, the exercise was marked by considerable confusion at the reception center, attributable in significant measure to what he deemed to be insufficient resources and lack of coordination.<sup>326</sup> Assuming that the Licensing Board was obliged to accept that judgment, rather than the diametrically opposed FEMA assessment,<sup>327</sup> we fail to see why those asserted deficiencies would not be readily remediable without the necessity to alter the emergency plan.

It is quite true that, as SAPL emphasizes, during the course of the exercise Salem firefighters were called away from the reception center to respond to actual emergencies. This fact is said to demonstrate that the NHRERP is fundamentally flawed in its reliance upon firefighters to perform monitoring and decontamination functions. In making this claim, SAPL acknowledges the existence of mutual aid agreements between Salem and neighboring communities in both New Hampshire and Massachusetts — agreements that led the Licensing Board to find that available firefighter manpower would be “unlimited” in the event of an emergency.<sup>328</sup> That finding rested upon firefighter Van Gelder's use of precisely that term in his response to a question on cross-examination designed to determine how many persons he “could count on from Massachusetts if (in case of a fire) you needed additional help.”<sup>329</sup> Nonetheless, SAPL attacks the finding. It points out that, for the most part, the fire departments in the New Hampshire towns with which Salem has mutual aid agreements are staffed largely by volunteer firemen; that, assuming their willingness to respond at all to a Seabrook emergency, the two Massachusetts towns that Salem normally relies upon for mutual aid would choose to assist towns within the Massachusetts EPZ; and that, according to Captain Breton, it is difficult to work with firefighters

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that, in circumstances where FEMA has not assigned a deficiency rating to problems revealed by an exercise, an intervenor has a more difficult task even in obtaining the admission of a contention alleging a fundamental flaw.  
<sup>326</sup> See Breton/Van Gelder Testimony at 5-9. As earlier noted, see *supra* p. 371, the additional claim of lack of adequate training was excluded by the Licensing Board.

<sup>327</sup> In his prepared testimony, Captain Breton stated his disagreement with the following excerpt from the final FEMA Exercise Report on the June 1988 exercise:

The Salem facility was activated in a timely and effective manner. The assigned personnel performed as a team and demonstrated their knowledge of Emergency Plan Procedures for the necessary stations to be established throughout the facility. All necessary equipment and supplies were available and adequately demonstrated by the staff. The staff was knowledgeable in the procedures to establish and operate each function of the facility.

*Id.* at 7 (quoting Applicants' Exh. 43F (FEMA Exercise Report (Sept. 1988)) at 192).

<sup>328</sup> See LBP-89-32, 30 NRC at 627.

<sup>329</sup> Tr. 25,561.

from other communities because of such factor as differences in training and approach.

Undoubtedly, the Salem reception center will function best if, during the period of its operation, there are no other local emergencies of a type customarily addressed by the firefighters staffing the center. In addition, the center might be better served were it feasible to staff it with individuals having no other possible duty to perform while a Seabrook emergency is in progress. It does not follow, however, that the considerations to which SAPL alludes compel the conclusion that the NHRERP is fundamentally flawed in calling upon firefighters to operate the center.

More specifically, we are unpersuaded that the mutual aid agreements could not be expected to bring about a sufficient supplementation of the Salem firefighters in the event of a fire or other local emergency. It might or might not be that the individuals supplied under the agreements would be able to substitute for the Salem firefighters in the relatively simple tasks associated with the registration, monitoring, and decontamination of evacuees arriving at the reception center. As trained firefighters, however, they should prove capable of taking over for the Salem personnel (if necessary) upon their arrival at the scene of a fire or like emergency. This would leave the latter free to return to their reception center duties without a hiatus of sufficient duration to put any of the evacuees at undue risk.

There is yet another reason why we are disinclined to act affirmatively upon SAPL's concerns respecting the availability of the Salem firefighters at the reception center. To this point, we have assumed that the 1988 exercise brought to light for the first time the possibility that, in the course of an actual emergency at Seabrook necessitating EPZ evacuation, those firefighters might be called away from reception center duties to respond to a fire call. But such an assumption is unwarranted. What transpired during the exercise in that regard was totally foreseeable;<sup>330</sup> it should have been obvious well before the exercise that, in the case of a Seabrook accident requiring the establishment of the reception center, the firefighters might be confronted with local fire calls to which they would give priority. In short, any perceived problems associated with the NHRERP-prescribed use of firefighters to staff the Salem reception center could and should

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<sup>330</sup>We nonetheless note parenthetically that the Licensing Board erred in adopting verbatim the applicants' proposed finding that "one of the ground rules for the exercise was that safety had priority over exercise events; therefore, personnel were to respond to actual emergencies if such occurred during the exercise." LBP-89-32, 30 NRC at 628. As support for this finding, we are referred to page 4.4-4 of Applicants' Exhibit 61, the document governing the conduct of the 1988 exercise. All that there appears, however, is an admonition that, because "personnel safety takes precedence over all other requirements," the participants in the exercise should "[f]ollow safety rules, take no unnecessary chances, use all safeguards and safety equipment provided, and make safety a part of your responsibility." *Ibid.* This admonition manifestly addressed solely safety precautions for the protection of the exercise participants and, as such, had nothing to do with the response of those participants to emergencies totally unrelated to the Seabrook exercise.

have been raised and resolved in connection with the litigation on the sufficiency of that emergency response plan.

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For the foregoing reasons, with respect to those rulings and findings discussed herein that were the subject of properly briefed appeals by intervenors MassAG, SAPL, Newburyport, Amesbury, Salisbury, Newbury, and West Newbury, the Licensing Board's final partial initial decision, LBP-89-32, 30 NRC 375, is *affirmed*. In addition, the appeals of intervenors MassAG, Hampton, Newbury, and West Newbury from the Licensing Board's decision in LBP-89-33, 30 NRC 656, are *dismissed* as moot.<sup>331</sup>

It is so ORDERED.

FOR THE APPEAL BOARD

Eleanor E. Hagins  
Secretary to the  
Appeal Board

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<sup>331</sup>Intervenors' appeals regarding LBP-89-33 challenged the Licensing Board's conclusion that our remand of certain issues in ALAB-924, 30 NRC at 373, did not forestall the Board's authorization of staff issuance of a full-power operating license for the Seabrook facility. These appeals have been rendered moot by the District of Columbia Circuit's decision in *Massachusetts v. NRC*, 924 F.2d at 330-32, upholding full-power license issuance for Seabrook. The same is true for that portion of the February 6, 1990 motion of intervenors MassAG, SAPL, and NECNP requesting clarification of the status of the appeals from LBP-89-33.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman  
Dr. Richard F. Cole  
Frederick J. Shon

In the Matter of

Docket No. 50-312-OLA  
(ASLBP No. 91-634-06-OLA)

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT  
(Rancho Seco Nuclear Generating  
Station)

May 1, 1991

The Licensing Board rules on petition to intervene filed in opposition to an application for a possession-only license for the Rancho Seco power reactor filed in advance of a decommissioning application. Licensing Board finds that there is no obligation on the part of the Commission to conduct a NEPA review of Licensee's decision to cease operations of the reactor, but that Petitioner may have identified a litigable aspect of the proceeding in its allegation that the possession-only license amounts to an illegal segmentation of a major federal action. Licensing Board withholds its final ruling to permit Licensee and Staff to respond to Petitioner's allegations of injury.

**STANDING TO INTERVENE: INJURY-IN-FACT TEST**

An allegation that a proposed license amendment might, if granted, permit a licensee to allow a plant to deteriorate to the point that future operation would be unsafe is too remote and speculative to support standing under the Atomic Energy Act.

### **DECOMMISSIONING: REQUIREMENT TO SUBMIT PLAN**

There is no requirement that a licensee submit a decommissioning plan contemporaneously with its application for a possession-only license.

### **DECOMMISSIONING: NEPA REQUIREMENTS**

NEPA does not require that the Commission review a licensee decision to cease operations of and decommission a power reactor.

### **STANDING TO INTERVENE: INJURY-IN-FACT TEST**

An allegation that a proposed license amendment has caused a loss of employment states an injury in fact.

### **STANDING TO INTERVENE: ZONE-OF-INTERESTS TEST**

An economic injury that does not result from damage to an interest protected by the Atomic Energy Act or NEPA does not meet the zone-of-interests test.

### **STANDING TO INTERVENE: INJURY-IN-FACT AND ZONE-OF-INTERESTS TESTS**

An allegation that a proposed license amendment deprives one of the legally protected right to comment on an EIS or to information essential to an organization's purposes contained in an EIS may state an injury in fact that falls within the zone of interests protected by NEPA.

## **MEMORANDUM AND ORDER** **(Ruling on Petition to Intervene)**

The Sacramento Municipal Utility District (SMUD) has decided to permanently cease operations at its Rancho Seco Nuclear Generating Station. This decision followed a public referendum, held in June 1988, in which SMUD's ratepayers decided that SMUD should cease operating the plant. SMUD has filed an application for a license amendment with the Commission that would authorize it to possess both the reactor and the nuclear fuel, but would remove authority to operate the reactor, a so-called "possession-only" license.

In response, Staff published in the *Federal Register*<sup>1</sup> a notice that it was considering issuing the license amendment and proposed to make a finding that operation under that amendment posed "no significant hazards" not previously considered, thus paving the way for the issuance of the amendment prior to the completion of any hearing on SMUD's application. In this notice, Staff noted that any interested person could file a petition to intervene and request a hearing with respect to the amendment application. It also invited comments on the proposed "no significant hazards" determination.

On November 8, the Environmental Conservation Organization (ECO) filed a petition to intervene and request for a hearing with respect to the license amendment and, in addition, commented on the proposed "no significant hazards" determination. This petition was opposed by SMUD and the Commission's Staff in filings dated November 30 and December 5, 1990, respectively, and in a letter of February 8, 1991, addressed to the Atomic Safety and Licensing Board by SMUD's counsel. Pursuant to the Commission's Order of January 30, 1991, this Board was appointed to rule on the petition.<sup>2</sup> Pursuant to *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979), we afforded ECO an opportunity to reply to the SMUD and Staff filings. ECO filed its reply on March 4, and on April 15 it filed certain supporting affidavits and what it called a "Further Amendment to Environmental and Resource Conservation Organization Request for Hearing and Petition to Intervene."<sup>3</sup>

## STANDING

ECO and Staff agree that, in order to demonstrate standing to cause a hearing to be held, ECO must show that the licensing action will cause it to suffer an actual injury, i.e., "injury in fact," and that that injury is arguably within the zone of interests protected by the statutes governing the proceeding. They also agree that ECO must show that (1) it has suffered a distinct and palpable harm (2) that can be traced to the challenged action and (3) that can be redressed by

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<sup>1</sup> 55 Fed. Reg. 41,280 (Oct. 10, 1990). This notice corrected errors in an earlier notice published at 55 Fed. Reg. 36,349 (Sept. 5, 1990).

<sup>2</sup> Boards do not become involved in proposed "no significant hazards" determinations under 10 C.F.R. §§ 50.91 and 50.92. See 10 C.F.R. § 50.58(b)(6). We do not believe that the Commission's January 30 Order was intended to involve us in that process, and hence do not consider the comments on that proposal filed by ECO.

<sup>3</sup> The affidavits were filed with the consent of the parties. However, Staff objects to the "Further Amendment" on the grounds that, rather than an amendment to the petition, it constitutes a further reply to the responses to the petition filed by SMUD and Staff which was not agreed to by the parties and is not authorized by the rules. Staff moves to strike the "Further Amendment." SMUD supports Staff's motion and urges that no further filings be accepted. Staff is correct; the "Further Amendment" is stricken.

a favorable decision. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).<sup>4</sup> ECO makes the following assertions with regard to its standing.

ECO began as an unincorporated association of individuals and subsequently sought incorporation as a nonprofit corporation under the laws of the State of California.<sup>5</sup> Its proposed articles of incorporation state that its purposes are the following:

- 1) To provide accurate technical and financial information about energy supply and demand in California in the years to come. . . .
- 2) To provide expert and objective information about the safety and environmental issues concerning nuclear energy in general and the Rancho Seco Nuclear Generating Station in particular. . . .
- 3) To provide factual information to specific parties or organizations to whom this information would be important and timely, and to petition the U.S. Nuclear Regulatory Commission (USNRC) to accept and consider information this organization can provide in its deliberations concerning licensing activities that relate to the Rancho Seco Nuclear Generating Station. Decisions concerning the possible decommissioning and dismantling of this generating station are under consideration by the USNRC, and it is our finding that a full Environmental Impact Statement must be prepared by the USNRC before they can make final licensing decisions relating to these possible actions. Therefore we have petitioned USNRC for the right to intervene in any proceedings on these subjects that come before it (Petition dated November 8, 1990). Some of its members are residents of California, and these actions are important to protect their interests with respect to these actions.

In its petition, ECO states that:

[O]rganizational standing is established whenever the agency's action interferes with the organization's informational purposes to an extent that it interferes with the organization's activities. This is precisely the situation in the instant case: the NRC has not yet agreed to conduct a NEPA study, which directly deprives ECO of its ability to (1) comment directly on an environmental report prepared by SMUD and the draft EIS prepared by the NRC Staff, (2) advise its members of the environmental risks involved with each alternative explored by the environmental studies, and (3) report the findings and recommendations based upon the environmental evaluations to the public.<sup>6</sup>

ECO relies on *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107 (D.C. Cir. 1990), for this argument.

In addition to asserting the above organizational interest in support of its standing, ECO also seeks to intervene as a representative of some of its members.

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<sup>4</sup> See Petition at 8-9; Staff's Response at 3-4. SMUD agrees that injury in fact must be shown but does not address the other points.

<sup>5</sup> See ECO's Reply of March 4 at 1, and the April 12, 1991 Affidavit of A. David Rossin, ECO's President, both of which attach ECO's proposed articles of incorporation. The name under which ECO seeks incorporation is Environmental and Resources Conservation Organization.

<sup>6</sup> Petition at 23-24.

Its petition recites that “[c]ertain members . . . live and/or work in [the SMUD], some buy their electric power from SMUD, and some live within 50 miles of the Rancho Seco Nuclear Generating Station.” The petition also recites that certain ECO members also live and/or work in the plume and ingestion exposure pathway emergency planning zones. In addition to interests that are allegedly protected by the Atomic Energy Act and the National Environmental Policy Act, ECO’s members assert an interest in an adequate and reliable supply of electricity.<sup>7</sup>

As required by 10 C.F.R. § 2.714(a)(2), ECO has identified the aspects of the proceeding as to which it wishes to intervene. The petition recites the following aspect with regard to the Atomic Energy Act:

May the Commission issue a possession only license for a utility full power reactor licensee before submittal by the licensee, and approval by the Commission, of the “decommissioning plan” required by 10 CFR § 50.82 (1990)?

The affiants assert an injury to health, safety, and property interests protected by the Atomic Energy Act because “neither the financial responsibility nor safety planning requirements of the regulations have been approved although they are prerequisites for the amendment.”<sup>8</sup> While we are left to speculate regarding the precise financial responsibility and safety requirements that these affiants maintain must be met before grant of the possession-only license, we presume that affiants have reference to this aspect of the proceeding.

ECO states the following aspect with regard to the National Environmental Policy Act (NEPA):

SMUD’s proposed license amendment is one segmented part in implementation of a proposed major Federal action which, if approved, will significantly affect the quality of the human environment. Because preparation of an EIS and a final decision is required before any part of the decommissioning proposal may be implemented, the proposed amendment is in direct violation of Section 102(2)(C) of NEPA and Petitioner’s right to such NEPA review. Therefore, it cannot be approved prior to NEPA review of the whole decommissioning proposal.<sup>9</sup>

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<sup>7</sup> *Id.* at 21-22; Reply at 2.

<sup>8</sup> Crespo, Conklin, and Conklin Affidavits, ¶¶ 6, 8, and 7, respectively.

<sup>9</sup> Petition at 31-33. At an earlier point, the petition recites that the aspects of interest are whether the grant of the amendment would:

1. be arbitrary, capricious, and/or an abuse of discretion;
2. significantly delay and increase the cost of returning Rancho Seco to operation in the future;
3. constitute an irreversible and irretrievable commitment of the Rancho Seco resource; and
4. allow deterioration and dismantling of the facility so as to undermine any conclusion that operation could be resumed with reasonable assurance that the public health and safety would be protected.

*Id.* at 24-25.

In its opposition to the petition, SMUD argues that ECO has not identified an aspect of the subject matter of this application cognizable in an adjudication. SMUD points out that the Atomic Energy Act neither requires nor permits the Commission to review a licensee's decision to cease operation of a nuclear power plant. According to SMUD, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 550 (1978), and *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 218-19 (1983), establish that the Commission has no authority to compel the development of a nuclear power plant. SMUD maintains that it follows that the Commission has no authority to review a licensee's decision to cease operation of a nuclear power plant, a proposition recognized by the Commission in *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-8, 32 NRC 201, 207 (1990), where it observed that the regulations do not contemplate NRC approval of a decision not to operate a plant.<sup>10</sup> The decision that, in ECO's view, requires an EIS is, in SMUD's view, not a federal decision at all, so that NEPA is not applicable to it.<sup>11</sup>

SMUD also points out that, following the filing of the petition, in another ruling in the *Shoreham* proceeding the Commission addressed the same argument raised here concerning the need to file a decommissioning plan prior to approval of the possession-only license application.<sup>12</sup> In that decision, the Commission determined that such a filing was not necessary. Thus SMUD maintains that both aspects of the subject matter of the application which ECO raised for litigation are not cognizable.

SMUD also attacks ECO's standing both in its own right and as a representative of its members. SMUD argues that ECO has not shown that it has standing as an organization in that it has not shown an informational interest sufficient to be recognized under *Competitive Enterprises, supra*, nor has it shown that it was formed to participate in proceedings such as this one. With regard to representational standing, SMUD argues that ECO has not furnished affidavits from its two identified members authorizing ECO to represent their interests and that the interests of those members that ECO has identified are not sufficient to support standing.<sup>13</sup>

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<sup>10</sup> SMUD's November 30 Opposition at 9-10.

<sup>11</sup> See SMUD's Opposition at 14-15. SMUD also spends considerable time addressing ECO's segmentation arguments. See *id.* at 15-22.

<sup>12</sup> See SMUD's February 8, 1991 letter addressed to the Atomic Safety and Licensing Board concerning CLI-91-1, 33 NRC 1 (1991). In its opposition to the petition, SMUD had argued that ECO's position that a decommissioning plan was required prior to the issuance of a possession-only license was incorrect. See Letter at 10-14.

<sup>13</sup> See SMUD's Opposition at 25-29. The identified interests of ECO's members and SMUD's responses are:

1. Proximity (within 50 miles) to the plant—where the licensing action involves no potential for offsite releases, more than mere proximity to the plant is required;

(Continued)

Staff also opposes the petition. Staff asserts that ECO has expressed a mere academic interest, as opposed to a concrete injury, which is insufficient to support standing, citing *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972), and *Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).<sup>14</sup> Further, Staff points out that the asserted interests of the members that ECO seeks to represent fall outside the scope of interests protected by the AEA and NEPA and amount to no more than an academic interest as opposed to a concrete injury that would result from the grant of the possession-only license, citing *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327 (1983).<sup>15</sup>

Moreover, Staff characterizes the petition as raising one central issue: should Rancho Seco be operated? Staff points out that the Commission has no authority to make such a decision or to require operation of the plant. Staff further points out that the aspects of the application that the petition seeks to litigate all concern the possibility of continued operation, not the direct impacts of the possession-only license application. These aspects are, in Staff's view, not cognizable in this proceeding.<sup>16</sup>

ECO begins its reply to SMUD and Staff by noting that it is in the process of incorporating and that its petition is germane to its purposes.<sup>17</sup> It then reiterates the distinction it sees between the instant situation and the situation presented in *Shoreham*, CLI-90-8, *supra*, i.e., that the decision that SMUD is not to operate Rancho Seco does not prevent its operation by another entity. Thus ECO sees no irrevocable decision not to operate Rancho Seco and asserts, without any citation of authority, that the Commission "must make the ultimate decision as to the need for power in its NEPA review. . . ."<sup>18</sup> ECO believes that both SMUD and Staff have failed to understand that the Commission's power to grant a license also includes the power to refuse a license. ECO believes that the possession-only license is a part of and subsidiary to a proposal to decommission Rancho Seco; ECO sees a refusal to grant the possession-only license as resulting in preservation of the option to operate the Rancho Seco plant in the future. ECO points out that SMUD's decision not to operate Rancho Seco is not equivalent

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2. Grant of a possession-only license could result in greater deterioration of the plant which would lead to ECO's members being exposed to greater risks if the plant is operated in the future—too remote and speculative;

3. An adequate supply of electricity at reasonable rates—neither interest is within the scope of interests protected by the AEA and NEPA; and

4. Adverse environmental impacts of substitute fossil fuels—no connection to a possession-only license, too remote and speculative.

<sup>14</sup> Staff's Opposition at 6-7.

<sup>15</sup> *Id.* at 7-9.

<sup>16</sup> *Id.* at 9-13.

<sup>17</sup> See note 3 and accompanying text, *supra*.

<sup>18</sup> See ECO's Reply at 3. ECO also notes that the Commission and DOE have authority under certain circumstances to order the operation of a nuclear power plant. ECO asserts that that issue should be considered. *Id.* at 3-4.

to the Commission's decision to approve a decommissioning proposal. It is the proposal to authorize the latter that ECO maintains demands an EIS.<sup>19</sup> With regard to the need to submit decommissioning information in conjunction with the application for the possession-only license, while ECO candidly recognizes that we may well be bound by *Shoreham*, CLI-91-1, it finds itself in agreement with the dissenting views of Chairman Carr.

In accord with an agreement of the parties, ECO filed affidavits in support of its petition on April 15. In addition to the affidavit of its President, ECO has submitted affidavits of three members in support of its representational standing.<sup>20</sup> In the first of these, David R. Crespo recites that his employment at the Rancho Seco plant as a Senior Construction Engineer, a position he held as a contract employee through Bechtel Corporation, was terminated in August 1989. Mr. Crespo states that

the fact that SMUD is being allowed to pursue its proposal to decommission Rancho Seco before review of that proposal pursuant to the National Environmental Policy Act . . . has been completed directly caused my layoff.<sup>21</sup>

Mr. Crespo further states that he was unemployed for a number of months following his layoff and now earns 30-40% less than his previous earnings. He believes that there is a substantial likelihood that he would be reemployed at Rancho Seco if that plant is operated in the future.

Mr. Crespo asserts that a grant of the possession-only license to SMUD would violate his rights under NEPA. He states:

I do not believe that any steps in furtherance of the Rancho Seco's decommissioning should be implemented until a FEIS evaluating, among other things, the impacts of, and alternatives to, the entire decommissioning proposal has been completed in compliance with the terms of NEPA and the NRC's own regulations in a single proceeding. If the NRC allows steps which are clearly in furtherance of decommissioning, and have no necessary independent utility, to be implemented at Rancho Seco prior to the necessary NEPA review, my rights, and the rights of those similarly situated, to have an opportunity for meaningful comment of the environmental consideration of the decommissioning proposal will be prejudiced, if not completely denied.<sup>22</sup>

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<sup>19</sup> *Id.* at 3-6. ECO argues that NUREG-0586, "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (August 1988), is distinguishable because, in contrast to the situation presented by the Rancho Seco plant, it considered only reactors that had reached "end-of-life" by virtue of age or accident.

<sup>20</sup> ECO was unable to submit the affidavit of Ray Ashley, one of its members identified in the petition as wishing ECO to represent his interests, because Mr. Ashley is travelling. See note 1 to ECO's April 1 amendment to its petition.

<sup>21</sup> Crespo Affidavit, ¶ 2.

<sup>22</sup> *Id.*, ¶ 5.

Additionally, Mr. Crespo asserts that his rights under the Atomic Energy Act would be violated by the granting of the amendment because "neither the financial responsibility nor safety planning requirements of the regulations have been approved although they are prerequisites for the amendment."<sup>23</sup> Finally, Mr. Crespo asserts that decommissioning Rancho Seco will adversely affect the environment in which he lives because of the need to substitute other generating stations for Rancho Seco. Mr. Crespo resides 43 miles from the Rancho Seco plant where he owns both real and personal property, is a member of ECO, and authorizes ECO to represent his interests.<sup>24</sup>

## DISCUSSION

ECO argues that:

Without the application of full-power license conditions, Technical Specifications, and NRC regulations and guidance, SMUD, and any future licensee, would be free both to allow the facility to deteriorate and to actively dismantle the systems which are vital to an operating facility. . . . [D]ecommissioning is not a foregone conclusion.<sup>25</sup>

ECO regards operation of Rancho Seco as a feasible alternative. Therefore, it regards any amendment that would permit its deterioration as a threat to the public health and safety. ECO maintains that "[u]ntil a properly informed decision on decommissioning has been reached, consideration of a 'possession-only' amendment is premature and a violation of the health and safety provisions of the AEA."<sup>26</sup> ECO states that:

The proposed amendment would nullify almost all of the presently applicable license conditions and Technical Specifications pertaining to operation and thereby opens the door

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<sup>23</sup> *Id.*, ¶ 6.

<sup>24</sup> The second affidavit is that of Linda Conklin, who, with the exception of the particular representations concerning her employment, makes the same allegations as Mr. Crespo. Ms. Conklin states that she was employed at Rancho Seco as an engineer in various capacities and as a senior reactor operator until she was laid off in December 1990 as a direct result of the proposal to decommission Rancho Seco. She was to assume a new position at a different employer in April 1991. The new position entails a significantly decreased level of responsibility. She believes that she would be reemployed at Rancho Seco if that plant is operated. Ms. Conklin resides 30 miles from the Rancho Seco plant where she owns both real and personal property, is a member of ECO, and authorizes ECO to represent her interests.

The last affidavit is that of Bill Conklin who, with the exception of the particular representations concerning his employment, also makes the same allegations as Mr. Crespo. Mr. Conklin states that he was employed at Rancho Seco as an engineer in various capacities until he was laid off in October 1990 as a direct result of the proposal to decommission Rancho Seco. He was to assume a new position at a different employer in April 1991. The new position entails a step backward in Mr. Conklin's career development. He believes that he would be reemployed at Rancho Seco if that plant is operated. Mr. Conklin resides 30 miles from the Rancho Seco plant where he owns both real and personal property, is a member of ECO, and authorizes ECO to represent his interests.

<sup>25</sup> Petition at 9.

<sup>26</sup> *Id.* at 11-12.

for further maintenance neglect and active decommissioning. *The NRC, however, has not yet issued a final decision on whether or not the facility should be rendered inoperative. In these circumstances, the Commission certainly has the power and the duty to prevent a particular licensee from taking steps which effectively undermine the safety and feasibility of operation.*

In deciding whether or not such steps should be allowed, the NRC is obligated to consider not only the immediate health and safety implications of proposed decommissioning actions, but also future such implications, the public interest in the plant as an operating entity, the national security and common defense interest in the operational plant, and finally, the environmental impacts of, and alternatives to, allowing a plant to be prematurely decommissioned. Until the NRC makes a final decision on the proposal to decommission Rancho Seco which includes a discussion of all of these issues and a fully articulated explanation of the reasons for the decision, an amendment deleting requirements previously found essential for safe operation are [*sic*] illegal.

The alternative of operation has not been foreclosed, and, therefore, amendments inconsistent with safe operation are per se threats to health and safety. Thus, allowing the Rancho Seco operating license to be degraded at this time unavoidably and significantly increases the direct and/or indirect endangerment of the radiological health and safety and other interests of ECO's members under both AEA and NEPA.<sup>27</sup>

The arguments advanced in the petition concerning interests asserted by ECO that are allegedly protected by NEPA go to the affiants' interest in a benign source of electricity. Affiants state that, if Rancho Seco is not operated, they will be injured in that oil-burning generating stations will be necessary replacements. These will injure the affiants in that they increase dependence on foreign oil and are a source of air pollution.

In its petition, ECO states:

Approval of [a decommissioning] plan is a major Federal action, certainly one of more impact and significance that [*sic*] many other actions which have been so categorized. Thus, before any such approval may issue, the NRC must complete an Environmental Impact Statement which includes consideration of the alternative of operating Rancho Seco and the alternative of "no action" (or denial of the application).<sup>28</sup>

ECO contends that economic and other conditions point to operation of Rancho Seco, and that the public airing of these considerations in an environmental impact statement (EIS) and hearing will provide a sound record for the Commission's decision on this application.<sup>29</sup>

ECO fears that the granting of a possession-only license would permit SMUD to take actions that could make it impossible to return Rancho Seco

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<sup>27</sup> *Id.* at 25-26 (emphasis supplied).

<sup>28</sup> *Id.* at 9-10.

<sup>29</sup> *Id.* at 10-11. With regard to the need for an EIS, ECO relies on a letter of November 9, 1990, to the Commission from the Chairman of the Council on Environmental Quality, filed in a similar proceeding concerning the Shoreham reactors.

to commercial operation as a nuclear station. ECO wants the Commission to examine SMUD's ability to meet projected demand without Rancho Seco in an EIS. ECO believes that the Commission must evaluate the environmental costs of not operating Rancho Seco.<sup>30</sup> ECO states that:

Countless nuclear power plants were delayed for long periods of time while NRC prepared environmental impact statements and held hearings on precisely these issues. For NRC at this time to risk letting a sorely needed source of clean energy be simply thrown away forever without thorough exploration of the issues is neither in the national interest nor consistent with its obligations under the AEA and NEPA.<sup>31</sup>

Moreover, ECO believes that the increased risk of radiological harm posed by the possession-only license also increases "the risk that the choice of reasonable alternatives would be limited." As a result, ECO maintains that 10 C.F.R. § 51.101(a) bars issuance of the proposed amendment until NEPA review is completed on the decommissioning proposal.<sup>32</sup>

The arguments concerning a possible threat to radiological health and safety if the possession-only amendment is granted and Rancho Seco is subsequently returned to operation assert a general interest of individuals residing within 50 miles of Rancho Seco to be protected from radiological injuries. However, the arguments are not founded upon any injury alleged in the affidavits supplied by ECO's members, nor do they appear to elaborate upon an organizational interest reflected in ECO's proposed charter. Even if they did elaborate on an asserted interest, they do not present a direct, palpable injury that would support standing. SMUD correctly points out that they are entirely too remote and speculative.<sup>33</sup> Moreover, they incorrectly assume that the Commission would permit the operation of Rancho Seco under circumstances in which there was not reasonable assurance that the public health and safety would be protected. For these reasons we reject these arguments as a basis for standing.

ECO also asserts that the Commission may not issue a possession-only license until SMUD submits a decommissioning plan, an interest apparently substantiated by the affiants, assertion of an injury to their health and safety as a result. SMUD correctly points out that this argument was put to rest by the Commission's decision in *Shoreham*<sup>34</sup> where it was determined that no such requirement existed. In its reply, ECO recognizes the impact of that decision

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<sup>30</sup> *Id.* at 12-16. ECO suggests that the environmental costs to be evaluated include such things as costs associated with: an inadequate supply of electricity; use of alternative fuels to generate electricity; and foregone alternatives, such as the use of electric cars. The affiants assert that they would be injured in these respects if Rancho Seco is not operated.

<sup>31</sup> *Id.* at 19-20.

<sup>32</sup> *Id.* at 28-29.

<sup>33</sup> See SMUD's Response at 27.

<sup>34</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1 (1991).

on its argument and notes its agreement with Chairman Carr's dissent. This argument does not raise a litigable aspect of the proceeding.

Turning to the asserted injuries within the scope of NEPA, we initially note that the scope of the action under consideration by the Commission is not nearly so broad as ECO would have it. The Commission has made it plain in several *Shoreham* rulings that it has no control over a licensee's decision whether to operate a plant or to seek permission to decommission it, and that as a result it has no obligation to consider alternatives to that decision.<sup>35</sup> Focussing on the Commission's statement in the introduction to *Shoreham*, CLI-90-8, *supra*, 32 NRC at 203, that

[a]fter due consideration, we have determined that [NEPA] and the [AEA] of 1954, as amended, do not require the NRC to consider "resumed operation" as an alternative, at least under the facts of this situation,

ECO distinguishes that case on the ground that the facts governing Rancho Seco are different in that the referendum that led to the decision not to operate the plant applies only to SMUD, thus leaving the option open for another entity to operate the plant. While true, this difference does not assist ECO. The Commission's *Shoreham* rulings amply demonstrate that the decision to cease operating a utility-owned nuclear power plant is not a decision that requires Commission approval. Hence, there is no obligation on the part of the Commission to consider the alternatives to that decision under NEPA. SMUD and Staff are correct in their position that ECO's argument does not raise an aspect of the proceeding that is litigable in this proceeding.

The fact that the affiants have alleged an injury in fact arising from the lack of an EIS does not assist ECO. All of the affiants assert a loss of employment resulting from SMUD's decision to close Rancho Seco and allege that this loss results directly from the fact that SMUD has been allowed to pursue its decision in advance of review under NEPA. This interest was not addressed in the petition. Unquestionably, these affiants have stated an injury in fact that, for purposes of this discussion, we assume to have resulted for the reasons alleged. However, they have not stated an injury arguably within the scope of interests protected by the Atomic Energy Act or NEPA.<sup>36</sup> While NEPA does protect economic interests, it reaches only those economic injuries that result from environmental damage. The loss of employment suffered by affiants was not "occasioned by the impact

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<sup>35</sup> *Shoreham*, CLI-90-8 and CLI-91-1, *supra*; *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61 (1991).

<sup>36</sup> It is well settled that the Atomic Energy Act does not protect economic interests. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Consumers Power Co.* (Pallisades Nuclear Power Facility), LBP-81-26, 14 NRC 247 (1981), *rev'd on other grounds*, ALAB-670, 15 NRC 493 (1982); *cf. Northern States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523 (1980).

that the [possession-only license] under consideration would or might have upon the environment.” *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

However, affiants also assert that the issuance of the possession-only license will deny them the opportunity to comment on an environmental impact statement on the decommissioning of Rancho Seco. They state that permitting steps that are clearly in furtherance of decommissioning, and that have no independent utility, to take place prior to NEPA review will have this effect. This allegation of injury supports ECO’s argument that it is entitled to a hearing on the NEPA aspects of the proceeding.

In general, an injury to such a legal interest may support standing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), *reconsideration denied*, LBP-90-25, 32 NRC 21 (1990). Moreover, in another *Shoreham* decision, the Commission recognized that “it is within the scope of NEPA and a proceeding on any license amendment to claim that the amendment requires an Environmental Impact Statement . . . because it is an inseparable segment of a larger major Federal action with a significant environmental impact.”<sup>37</sup> Thus, affiants may have alleged an injury that falls within the zone of interests protected by NEPA. Before reaching that conclusion, we must give SMUD and Staff an opportunity to address this asserted interest.<sup>38</sup>

We view ECO’s assertion of an organizational interest in the dissemination of information, an interest to which it claims injury resulting from the failure to prepare an EIS, in the same light. SMUD is correct in pointing out that *Competitive Enterprises Institute* held that

an informational interest is *not* sufficient to establish an organization’s standing under NEPA, absent concrete showings that an agency’s action withholds specific information related to the environmental interests that NEPA was intended to protect, that the information is essential to the organization’s activities, and that the lack of information will render those activities infeasible.”<sup>39</sup>

However, we are not convinced that ECO has not met this standard. First, it seems arguable that the challenged Commission action “withholds specific information related to the environmental interests that NEPA was intended to protect.” Second, that information may be essential to ECO’s purposes as reflected in its proposed charter. Third, the lack of that information may well render some of ECO’s purposes infeasible. As with the affiants’ asserted interest

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<sup>37</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991).

<sup>38</sup> We recognize that SMUD has addressed the segmentation issue at some length. (Response at 15-22.) However, SMUD’s position was based on its interpretation of CLI-90-8, an interpretation that, we suspect, may need to be revised in light of CLI-91-4. Moreover, neither SMUD nor Staff have had an opportunity to address the interest asserted by affiants in the opportunity to comment on an EIS.

<sup>39</sup> SMUD’s Response at 25 (emphasis in original).

in commenting on an EIS, we must withhold any final conclusion until SMUD and Staff have an opportunity to comment on ECO's purposes as reflected in its proposed charter, a document that was not available to them when their responses were filed.

To facilitate the resolution of this matter, we are scheduling a prehearing conference in Sacramento, California, for June 25, 1991, at a location and time to be announced. The purpose of the prehearing conference is to hear SMUD's and Staff's arguments on the above points, ECO's reply to those arguments, and the parties' positions with respect to ECO's contentions. ECO is to file its contentions by June 3. The filing of contentions will lend specificity to these issues and facilitate our deliberation on the question of whether a hearing is warranted. No further filings will be permitted absent specific leave of the Board.

In drafting its contentions, ECO is to pay particular heed to the Commission's statement that

A properly pled contention will at a minimum need to offer some plausible explanation why an EIS might be required for an NRC decision approving a [Rancho Seco] decommissioning plan *and* how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.<sup>40</sup>

Similarly, ECO is to keep in mind that, in accord with the Commission's *Shoreham* rulings, the scope of any EIS that might be ordered is limited to the

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<sup>40</sup> *Shoreham*, CLI-91-4, *supra*, 33 NRC at 237 (emphasis in original).

proposed decommissioning and alternatives to it. The alternative of operating Rancho Seco is not within that scope.

It is so ORDERED

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Frederick J. Shon  
ADMINISTRATIVE JUDGE**

**Richard F. Cole  
ADMINISTRATIVE JUDGE**

**John H Frye, III, Chairman  
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland,  
May 1, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Walter H. Jordan  
Dr. Jerry R. Kline

In the Matter of

Docket Nos. 50-528-OLA-2  
50-529-OLA-2  
50-530-OLA-2  
(ASLBP No. 91-633-05-OLA-2)  
(Allowable Setpoint Tolerance)

ARIZONA PUBLIC SERVICE  
COMPANY, *et al.*  
(Palo Verde Nuclear Generating  
Station, Units 1, 2, and 3)

May 3, 1991

MEMORANDUM AND ORDER  
(Denying Relief Sought by Licensees'  
May 1, 1991 Letter)

On May 1, 1991 counsel for Licensees, Arizona Public Service Company, *et al.* ("APS"), sent a letter to members of the Board enclosing a letter dated April 29, 1991, from William F. Conway, Executive Vice President, Nuclear, APS, to the Nuclear Regulatory Commission. Mr. Conway's letter provides supplemental information concerning the application for the license amendments that are the subject of this proceeding. Mr. Conway states that, under the requested amendment, APS will adjust Main Steam Safety Valves (MSSV) and Pressurizer Safety Valves (PSV) whose setpoints are outside  $\pm 1\%$ , even though within the proposed tolerances, to  $\pm 1\%$  of the required setpoint. APS will

test additional valves in accordance with the ASME Boiler and Pressure Vessel Code.

Counsel for Licensee states in his letter that Mr. Conway's commitments eliminate the first basis for Mitchell Contention 1 and that the commitment adds support to Licensees' previous argument that the second basis to Contention 1 is an impermissible challenge to 10 C.F.R. § 50.55a(g). Therefore, according to counsel, the only possible support for Contention 1 has been eliminated. Implicit in counsel's letter is a request to consider this information in connection with previously made arguments and then reject Contention 1.

Licensee's request is akin to a motion for summary judgment pursuant to 10 C.F.R. § 2.749, except that there is no issue before us and we have no jurisdiction to grant the relief sought.

The January 29, 1991 order of the Acting Chief Administrative Judge of the Atomic Safety and Licensing Board Panel established this Board to "rule on petitions for leave to intervene and/or requests for hearing and to preside over the proceeding in the event that a hearing is ordered." 56 Fed. Reg. 4652 (*published* Feb. 5, 1991). The dual assignment is a reflection of the separation of responsibilities between an "intervention board" and a "hearing board." We are now serving as an intervention board with jurisdiction only to rule on the petitions of Allan L. and Linda E. Mitchell seeking to intervene and seeking to have contentions litigated in this proceeding. This Board will soon issue an order ruling on the Mitchells' contentions. No contention has been accepted yet.

Until and unless at least one contention is found to meet the requirements of 10 C.F.R. § 2.714(b)(1) and (2), the Mitchells, the only surviving petitioners, may not be admitted as a party. Thus there would be neither parties nor issues to provide jurisdiction over the subject matter of the Notice of Opportunity for Hearing in this proceeding. *Id.*

In *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977), an Appeal Board explained that in cases where a hearing is not mandatory, "but rather is dependent upon a successful intervention petition being filed in response to the published notice of opportunity for hearing, an 'intervention' licensing board is established for the sole purpose of passing upon such petitions . . . ." If a petition is granted requiring adjudication, then a second, "discrete licensing board is then established to perform that function." *Id.* at 1177-78, *citing Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 n.2 (1973).

Thus, in *Stanislaus, supra*, the Appeal Board agreed with the "intervention" licensing board that the lower board had no jurisdiction to pass upon a motion for summary disposition; that jurisdiction would lodge with the second, or "hearing" board. 5 NRC at 1177-78.

In earlier NRC practice, "intervention" boards might not have the same composition as "hearing" boards depending upon caseload determinations by the Licensing Board Panel Chairman (now Chief Administrative Judge). *Id.*

Recent practice has been to establish both "intervention" boards and "hearing" boards with the same members in a single order because members of "intervention" boards now almost always constitute the associated "hearing" board. Nevertheless, until we, as members of the intervention board, metamorphose into a hearing board, we lack jurisdiction over any substantive issue encompassed by the Notice of Opportunity for Hearing in this proceeding. That notice reflected the scheme of first ruling on intervention petitions before a notice of hearing issues. 55 Fed. Reg. 53,221 (Dec. 27, 1991).

Therefore, the relief sought by Licensees' May 1, 1991 letter is denied for want of jurisdiction.

Jurisdiction aside, the request for relief would also fail because it is procedurally deficient. The letter would bring about a very important ruling by this Board, but it is not in the form of a motion. *See* 10 C.F.R. § 2.730. This places the Petitioners and the NRC Staff in an unfair dilemma. They have no duty to respond to letters, but they may not wish to risk a default. *See* 10 C.F.R. §§ 2.707, 2.730(c). Certainly the Mitchell Petitioners would not agree to having their intervention terminated by the informal and unilateral action of counsel for Licensees.

The Board has acted promptly in disposing of the matters raised by the letter to spare the other participants further uncertainty. We will not in the future look favorably upon pleading by letter, nor will we require parties opposing such letters to answer them.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
May 3, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Walter H. Jordan  
Dr. Jerry R. Kline

In the Matter of

Docket Nos. 50-528-OLA-2  
50-529-OLA-2  
50-530-OLA-2  
(ASLBP No. 91-633-05-OLA-2)  
(Allowable Setpoint Tolerance)

ARIZONA PUBLIC SERVICE  
COMPANY, *et al.*  
(Palo Verde Nuclear Generating  
Station, Units 1, 2, and 3)

May 9, 1991

MEMORANDUM AND ORDER  
(Granting Mitchell Petition for  
Leave to Intervene and Request for Hearing)

I. INTRODUCTION

On December 27, 1990, the Commission published in the *Federal Register* notice that the Licensees herein, Arizona Public Service Company, *et al.*, requested amendments to the operating licenses of the Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3. 55 Fed. Reg. 53,220-21. The proposed amendments:

[W]ould increase the allowable setpoint tolerance for the pressurizer safety valves from 2500 psia plus or minus 1% to 2500 psia plus 3% or minus 1%; increase the allowable setpoint tolerance for the main steam safety valves from 1250 psig and 1315 psig plus or minus 1% to the same settings plus or minus 3%; reduce the minimum required feedwater flow from 750 gpm to 650 gpm; and reduce the response time for the high pressurizer pressure reactor trip from 1.15 seconds to 0.5 seconds.

*Id.* at 53,220.

The notice provided an opportunity to request a hearing and to file a petition for leave to intervene. Allan L. Mitchell and Linda E. Mitchell (hereinafter "Mitchell Petitioners") filed a petition dated January 28, 1991, seeking leave to intervene and requesting a hearing pursuant to the provisions of 10 C.F.R. §2.714. The Mitchells reside near the Palo Verde Station and Mrs. Mitchell is an associate electrical engineer employed by Arizona Public Service Company at the Palo Verde Station.

In our order of February 19, 1991, we ruled that the Mitchells had demonstrated standing to intervene in the proceeding and we provided for the filing of a supplemental petition containing the contentions the Petitioners seek to have litigated.<sup>1</sup> On March 9, 1991, the Mitchells submitted their Supplemental Petition with five proposed contentions. In the order below, over the Licensees' objections, we accept the Mitchells' Contention No. 1 as derived from portions of the first and second bases (i.e., paragraphs) of that contention. All other contentions and bases are rejected.

## II. STANDARDS FOR CONTENTIONS IN NRC PROCEEDINGS

### A. Substantive Standards

The August 11, 1989, amendments to the NRC intervention rule raised the substantive threshold for the admission of contentions.

As pertinent here, 10 C.F.R. § 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together

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<sup>1</sup> Memorandum and Order (Ruling upon Petitions for Leave to Intervene), LBP-91-4, 33 NRC 153, 159-61. The order also noted that Myron L. Scott, Barbara S. Bush, and the Coalition for Responsible Energy Education (CREE) had filed a petition seeking leave to intervene. Subsequently the Board dismissed the Scott/Bush/CREE Petitioners from the proceeding. LBP-91-13, 33 NRC 259 (1991).

with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. . . .

In addition, pursuant to the provisions of the new subsection 2.714(d)(2)(ii), the Board must reject a proposed contention when, even if proven, it "would be of no consequence in the proceeding because it would not entitle petitioner to relief." This requirement is intended to parallel the standard for dismissing a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure to permit dismissal of a claim where the plaintiff would be entitled to no relief.<sup>2</sup>

As the NRC Staff notes in its brief on the admissibility of the Mitchell Contentions,<sup>3</sup> while the 1989 amendments change much about the threshold requirements for contentions, much remains unchanged. For example, as the Commission explained in the Supplementary Information for the 1989 amendment:

This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.

54 Fed. Reg. 33,170.

Consistent with the foregoing, the Commission specifically overturned long-standing NRC case law that the regulation did not require a petitioner to describe facts that would be offered in support of a proposed contention. *Id.*; See *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 (1980).

Licensees argue that:

In order for a contention to be admitted, the Petitioners must show that their concerns arise as a specific result of the changes in the technical specifications to be authorized by the proposed amendment — *i.e.*, the contentions must bear a clear nexus to the proposed increase in allowable setpoint tolerances, or reductions in auxiliary feedwater flow or High Pressurizer Pressure Trip response time. Such a nexus exists only where the issue raised

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<sup>2</sup> Supplementary Information, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process (Supplementary Information), 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

<sup>3</sup> NRC Staff Response to Supplemental Petitions to Intervene Filed by . . . Allan L. and Linda E. Mitchell (Staff Response), March 26, 1991.

by the contention is a "direct consequence" or a "necessary implication" of the proposed license amendment. *Vermont Yankee*, ALAB-245, 8 AEC at 875; ALAB-246, 8 AEC 933, 934, *reconsideration denied*, ALAB-250, 8 AEC 990 (1974); *Turkey Point*, LBP-81-14, 13 NRC at 697, *aff'd*, ALAB-660, 14 NRC 987; *Consumers Power Co.* (Big Rock Point Nuclear Plant), LBP-80-4, 11 NRC 117, 125 (1980).

#### Licenseses' Response at 10-11.<sup>4</sup>

While we agree with the general tenor of the foregoing argument, the actual world of litigation may not be so neat. The difference between an issue that is a "direct consequence" or "a necessary implication" compared to an evidentiary matter relevant to the amendment may have to be decided within an evidentiary context. In any event, the Notice of Opportunity for Hearing itself stated, "[c]ontentions shall be limited to matters within the scope of the amendment under consideration." 55 Fed. Reg. at 53,221. The amendment to the regulation has no effect upon the longstanding rule that proposed contentions must fall within the scope of the issues set forth in the notice of hearing. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

Still other principles of contention pleading remain unchanged by the amended rule. As the NRC Staff states:

[T]he new amendments are fully consistent with longstanding case law holding that the purposes of the basis requirements of 10 C.F.R. § 2.714(b)(2) are (1) to assure that the contention in question raises a matter appropriate for adjudication in a particular proceeding, (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion, and (3) to put the other parties sufficiently on notice of the issues so that they know generally what they will have to defend against or oppose. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1976).

#### Staff Response at 6.

We agree with the Staff, at least to the extent that the cited purposes of contention pleading remain relevant. However, the amended rule overrules, or at least supersedes, *Peach Bottom* by raising the threshold requirements. The Appeal Board in *Peach Bottom* held that "[a]nd the greater the particularity of the contentions to permit a conclusion that there is in fact a genuine issue, the better." ALAB-216, 8 AEC at 21. Now, of course, subsection 2.714(b)(2)(iii) requires absolutely that a proposed contention show that a genuine dispute with the applicant exists.

The Commission also discussed whether the familiar standard, "the information presented prompts reasonable minds to inquire further," should be one

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<sup>4</sup> Licenseses' Response to Supplemental Petition of Mitchell Petitioners (Licenseses' Response), March 21, 1991.

of the two standards proposed to be adopted. The Commission determined that it would be unnecessary and possibly confusing to have two different phrases describing the threshold for the admissibility of contentions. Therefore the Commission deleted the "reasonable minds" standard from the final rule and adopted only the other proposed standard: "existence of a genuine dispute . . . on a material issue . . ." Supplementary Information, 54 Fed. Reg. at 33,169. We do not, however, read the discussion as overruling the "reasonable minds" standard; rather it appears that the "genuine dispute" standard subsumes it.

## B. Standards for Construing Contentions

We address the matter of construing the language of contentions at some length because the language of the accepted Mitchell contention, as we explain in the discussion of it below, would not survive a strict construction. At the outset, we note that our task here is first, to construe appropriately the intent of the contention and its bases, then, once construed, to apply the high-threshold substantive requirements for pleading contentions.

In determining whether the fundamental purposes of contention pleading are satisfied, the *Peach Bottom* decision, *supra*, cited by the Staff, teaches that a reasonable construction of a proposed contention must be made. ALAB-216, 8 AEC at 21. Nothing in the amended rule overrules that longstanding concept.

In the case of a *pro se* petitioner whose effort to state a contention contained curable procedural defects, an Appeal Board permitted an opportunity to amend the petition and accepted an unartfully drafted contention. The fact that the petitioner was *pro se* was material. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973).

Another Appeal Board observed that a petitioner to intervene in NRC proceedings is called upon to express "technical matters beyond the ordinary grist for the legal mill" and empathized "with petitioners who must of necessity proceed . . . with counsel new to the field . . ." In such circumstances, licensing boards have "leeway in judging the sufficiency of intervention petitions." *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576-77 (1975). We too note that practice before NRC adjudicators is often difficult and unusual. We do no discredit to counsel for the Mitchell Petitioners in observing that he is new to NRC practice and should not be held to the same drafting standards as experienced counsel.

The Appeal Board in *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979), explained:

It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.

*Id.* at 649.

We also look to the new contention-pleading rule for guidance in construing imperfectly drafted contentions. The concept that a contention pleader must now confront factual material, in this case the application for an amendment, with a showing that a genuine dispute exists, is analogous to opposing a motion for summary disposition. The Commission discussed such a relationship in the Supplementary Information to the rule, and explained that the quality of the evidentiary showing at the summary disposition stage is expected to be of a higher level than at the contention filing stage. 54 Fed. Reg. at 33,171. It follows, then, that the contention pleader is entitled to at least the same benefit of construction as a party opposing a summary disposition motion. Thus, as is the case under Rule 56 of the Federal Rules of Civil Procedure, a pleading opposing summary judgment must be indulgently treated with inferences of fact drawn in the pleader's favor. 6 *Moore's Federal Practice*, ¶ 56.15[3] (2d ed. 1990). Therefore, the Mitchells' pleading must be viewed in the light most favorable to accepting it. See *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 464 (1962). See also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-74-36, 8 AEC 877, 878-79 (1974).

As we discuss below, implicit in one aspect of the Licensees' opposition to Mitchell Contention 1 is that, if proven, the contention would not entitle the Petitioners to relief. The relevant portion of the new rule, codified at subsection 2.714(d)(2)(ii), "was intended to parallel a standard for dismissing a claim under Rule 12(b)(6) of the Federal Rules of Procedure." Supplementary Information, 54 Fed. Reg. at 33,171. Here again the Board finds guidance under the Federal Rules. In that the Petitioners here are in a position akin to defending against a motion under Rule 12(b)(6), they are entitled to a liberal construction of their contention, and their allegation should be construed most favorably to them. Dismissal under this rule is generally disfavored. 2 *Moore's Federal Practice*, ¶ 12.07[2] (2d ed. 1990).

We are also mindful of the guidance of Rule 8(f) of the Federal Rules of Civil Procedure: "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

Finally, we note that the contention-pleading rule requires a "brief" explanation of the bases, and a "concise" statement of the allegations in support of the contention. Subsections 2.714(b)(2)(i) and (ii). Thus, if sufficient information is provided to demonstrate that a genuine dispute with the Licensees exists, we

would not penalize Petitioners for being briefer and more concise than others might have been.

### III. THE PROPOSED CONTENTIONS

#### A. Technical Background

The following analysis of the technical issues involved in the Mitchell contentions has been taken without further attribution from undisputed portions of the Licensees' Response to the Mitchells' Contentions.<sup>5</sup>

The Application for the amendment states that Licensees evaluated the effect of the proposed changes on the Updated Final Safety Analysis Report (UFSAR), Chapter 15, safety analyses; the relevant design-basis accidents in UFSAR, Chapter 6; and the natural circulation cooling for the Palo Verde Nuclear Generating Station ("PVNGS"); and concluded that the proposed license amendment fully preserves the results of the safety analyses.<sup>6</sup> The Application describes safety evaluations for those event scenarios that could be adversely impacted by the proposed amendment. Two of these evaluations are pertinent to the contentions proposed by the Mitchells — Loss of Condenser Vacuum (LOCV) and Steam Generator Tube Rupture (SGTR). However, since only Contention 2 deals with the SGTR scenario, and since that contention fails on grounds other than technical merit, we address only the LOCV scenario.

In a Pressurized Water Reactor (PWR) such as those at PVNGS, heat is normally removed from the primary or Reactor Coolant System through the steam generators. There, heat from the high-pressure and -temperature reactor coolant is transferred through the generator-tube walls to the lower-pressure and -temperature water on the "secondary" side of those tubes. Steam produced from heating the secondary-side water passes through the main steam lines, into the main turbine, and is then drawn through the condensers, cooling the steam into a liquid. Maintenance of a vacuum in the condensers improves thermodynamic efficiency and prevents overpressurization of the condenser and turbine shell. UFSAR, § 10.4.1.2.

Loss of condenser vacuum would result in a turbine trip and a main feedwater pump trip and consequent increase in the pressures and temperatures in both the primary and secondary systems. *See id.* § 15.2.3. The Main Steam Safety Valves (MSSV) are relief valves designed to open automatically when the pressure in

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<sup>5</sup> Licensees' Response at 4-7. We do not find the statements in this section to be facts. Our sole purpose is to provide a context for the evaluation of the Mitchells' contentions. We note that much of the data cited in Licensees' response, e.g., the UFSAR, is not even in our possession.

<sup>6</sup> Transmittal letter from Conway to NRC, November 13, 1990; Attachment 1, Safety Evaluation (hereinafter "Application"), at 2-3.

the secondary system reaches a preset level to prevent overpressurization of the secondary system. To evaluate the proposed amendment, Licensees assumed for its analysis that all twenty of the MSSVs open at 3% above their nominal pressure settings. For the analysis in the UFSAR, the MSSVs were assumed to open at 1% above the nominal settings. Application at 5, 21; UFSAR, § 15.2.3.2, Table 15.2.3-1.

The increase of reactor coolant system pressure would also result in an increase in the pressure in the pressurizer, and cause a High Pressurizer Pressure Trip (HPPT). The analysis calculates the time until the reactor is tripped assuming the HPPT response time of 0.5 second. The UFSAR analysis assumes 1.15 seconds. Application at 3, 21. The reactor trip reduces the rate of energy release by the reactor core. The analysis calculates the maximum temperatures and pressures in both the primary and secondary systems and finds that reactor pressure continues to increase after the reactor trip. UFSAR, § 15.2.3.2, Table 15.2.3-1. When the reactor pressure reaches the setpoint of the Pressurizer Safety Valves (PSVs), those valves open. *Id.* Again, the PSVs are modeled as all four opening at 3% above their nominal pressure setpoints, rather than the 1% assumed in the UFSAR analysis. *Id.*; Application at 5, 21. The setpoints on the PSVs are designed to ensure that the reactor trips before the PSVs open. An issue here is whether the PSVs open soon enough to ensure that the maximum pressure in the reactor coolant system does not exceed its design limits as stated by Licensees. *See* UFSAR, §§ 15.2.3.3.C, 15.2.3.4.

As shown in the Application, the evaluation of the Loss of Condenser Vacuum (LOCV) event scenario found that the plant response would continue to satisfy design limitations *with the proposed reduced HPPT response time assumption* (as well as two other assumptions not germane to this discussion) and the increased PSV and MSSV tolerances. Application at 21-23. Licensees state that the safety analysis supporting the proposed license amendment incorporates a number of conservative assumptions regarding the inoperability of control systems and was calculated in a manner similar to that described in Chapter 15 of the UFSAR and approved by the NRC. Application at 11, 21-22; *see* UFSAR, § 15.2.3.

### ***Contention 1***

***Contention No. 1:*** The request to amend the setpoint tolerances for the Main Steam Safety Valves (MSSVs) and the Pressurizer Safety Valves (PSVs) would cause a safety limit violation in the event of a loss of condenser vacuum (LOCV). Setpoint drift in the increasing direction of the pressurizer safeties setpoint with a setting high in the band would exceed the safety limits.

The technical bases for Contention 1 are contained in two paragraphs following the contention.<sup>7</sup> For convenience in referencing, we have supplied alphanumeric identification.

### *First Basis*

- (A) Based on the information provided in the application for amendment, the margin of error between the safety limit of 2750 psia and the peak pressure of 2740.9 psia is only approximately 9.1 psia. *See* November 13, 1990 letter from William F. Conway to U.S. Nuclear Regulatory Commission, Attachment 1 at 23-24 (hereinafter, "Application").
- (B) Even a drift of plus or minus 1% (approximately 50 psia) would exceed the limit of 2750 psia. *See* Tech. Spec. Bases 3/4.4.2, Reactor Coolant System — Safety Valves.
- (C) Given that APS concedes that the MSSVs and PSVs have exceeded the plus or minus 1% limit "several times, necessitating the issuance of Licensee Event Reports (LERs)," almost any drift in the setpoints would result in a safety limit violation. Application, Attachment 1 at 2.
- (D) The consequences of the strong possibility of exceeding the safety limits during a LOCV trip could result in a plant shutdown each time a safety limit violation occurs. *See* Tech. Spec. Section 6.

### *Second Basis*

- (A) Another concern regarding the requested amendment is the proven unreliability of the MSSVs and PSVs.
- (B) If the amendment is granted, APS would reduce the frequency of testing which would result in unacceptable setpoint drift. Application, Attachment 1 at 2, 5.
- (C) Currently, only about one-third of the MSSVs are found to be within the plus or minus 1% setpoint tolerance. *See* Exhibit 2, Recent Test Data.
- (D) These data are based on strict surveillance testing every cycle (approx. every 18 months) under the more stringent plus or minus 1% setpoint tolerance standard.
- (E) While the majority of the MSSVs fall within the plus or minus 3% setpoint tolerance, in recent tests several of the valves have been found to exceed the plus or minus 3% setpoint tolerance. *Id.*

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<sup>7</sup> Supplemental Petition at 2-3.

- (F) Indeed, some of the valves have been found to be in excess of minus 5% in recent tests. *Id.* If the setpoint tolerance is increased as requested it would result in greater setpoint drift than what is currently experienced at Palo Verde.
- (G) Setpoint drift in the range of plus or minus 10% to 20% could occur if the amendment is granted. Such setpoint drift is unacceptably high given the safety limits.

Without analysis, the NRC Staff states that it has no objections to the contention as founded on the first and second bases:

to the extent that it is premised upon the basis that the change in setpoint tolerances for the MSSVs and PSVs could result in an increase in set point due to reduced testing and a possible safety limit violation in the event of a LOCV.

#### Staff Response at 12.

Licensees object to this and all of the Mitchell contentions. With respect to the first basis, Licensees state that, because the current margin of safety is 8 psi (2750-2742 psi as stated in the USFAR), and, whereas the Application shows that with the proposed amendment the margin would be 9.1 psi, "the premise of the contention is in error; . . . the safety margin would be increased by the proposed amendment, not decreased." Licensees' Response at 13-14. In essence, Licensees seem to argue that the proposed amendment would actually achieve an increased margin of safety, and that the Petitioners incorrectly fail to accept that premise. Nowhere in Licensees' response to the first basis is it made clear that the LOCV safety evaluation depends upon a new analysis with new assumptions, and not upon any improvement in plant equipment or procedures. Licensees then argue that Petitioners have failed to comply with 10 C.F.R. § 2.714(b)(2)(ii) and (iii) for failing to provide information in support of their "unique theory." Licensees' Response at 13-14.

The Board had difficulty understanding the first basis. For one thing, statement (A) can be read to accept the analysis and conclusions of LOCV analysis at pages 21-24 of the Application. In fact, nowhere do the Petitioners expressly challenge any of the assumptions supporting the new analysis, even though it appears that all of the assumptions are required if the calculated pressures are not to exceed the safety limits. Application at 22. Without a challenge to the assumptions and the analysis based upon them, it is difficult to identify in the first basis a dispute between the Mitchells and Licensees.

The Board explained its puzzlement to the parties. *E.g.*, Tr. 45-48, 58-59. In response, counsel for Petitioners urged the Board to read the first basis as implying a challenge to the first assumption, i.e., the High Pressurizer Pressure Trip response time assumption is changed to 0.5 second from 1.15 seconds.

Petitioners do not challenge the other two assumptions underlying the analysis. Tr. 58-60. See Application at 22.

Construing the first basis indulgently, resolving uncertainties in Petitioners' favor, the Board infers that it constitutes in part a challenge to the assumed HPPT response time. True, the basis does not contain words to that effect, but it concludes that there is a strong possibility of exceeding the safety limits during a LOCV trip, a conclusion dependent upon a challenge to at least one of the three assumptions. The HPPT response assumption set out in the notice of opportunity for hearing is inferentially a logical target of the first basis. We attribute failure to plead that challenge to drafting oversight.<sup>8</sup>

On first impression the first basis seems to have another lapse. Statements (C) and (D), taken together, seem to say that since the MSSVs and PSVs have exceeded the 1% limit before, that same 1% should be added to the 3% setpoint tolerance assumed in the Safety Evaluation. See Application at 24. But the entire purpose of the LOCV safety evaluation is to bound the 1% by the 3% tolerance analysis based upon the new assumptions. Thus the 1%, drawn from PVNGS experience, should not be added to the 3% in the Safety Evaluation *analysis*; rather the 3% subsumes the 1% *if the Board were to read the first basis as standing alone*.

The better construction — the one favored by the NRC Staff (Tr. 55) — is to read the first two bases as a single allegation. Thus the historical drifts of 1% may logically be added to the proposed 3% drift tolerance if a valve approaching that tolerance is placed back into service after inspection and without recalibration.<sup>9</sup>

This construction is consistent with the statement by the Mitchell Petitioners that “[i]f the amendment is granted, APS would reduce the frequency of testing which would result in unacceptable setpoint drift.” Second basis, Statement (B). Stated another way, as do the Licensees, the concern appears to be “that the testing frequencies will not provide adequate assurance the PSVs and MSSVs will be maintained within the proposed revised tolerances.” Response at 14.

Licensees recognize that a concern also may be that “if the allowed tolerance is increased to  $\pm 3\%$ , the valves would be less likely to fail the surveillance tests,

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<sup>8</sup> Our colleague, Dr. Jordan, in his separate opinion makes a reasonable argument that we are reading too much into the contention. We recognize the uncertainty, but believe that the better course is to decide the matter on the merits.

<sup>9</sup> Licensees made an effort to resolve the excessive drift dispute. The effort failed. See Joint Report of Settlement Negotiations, April 22, 1991. Licensees then made a second, similar effort to resolve the matter. By letter of April 29, 1991, William F. Conway, Executive Vice President, Nuclear, committed that APS will adjust Main Steam Safety Valves and Pressurizer Safety Valves whose set points are outside  $\pm 1\%$ , even though within the proposed tolerances, to  $\pm 1\%$  of the required setpoint. APS will test additional valves in accordance with the ASME Boiler and Pressure Vessel Code. The Board ruled that as an “intervention board” it lacks jurisdiction at this time to reject Contention 1 on that basis. Memorandum and Order, LBP-91-18, 33 NRC 394 (1991). By today’s Order, we become a “hearing board” with jurisdiction to consider appropriate motions on the substantive merits of the contention.

and therefore . . . sample sizes will be increased less frequently.” Response at 15.

Licensees argue, however, that the issue raised by the second basis is not aimed at the change in acceptable tolerances, but constitutes a challenge to 10 C.F.R. § 50.55a(g)(4), which in turn incorporates the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code with respect to testing frequencies and sample sizes. Licensees note that the proposed amendment does not seek to change the regulatory and license requirement for valve surveillance testing frequency.<sup>10</sup> Response at 15-16.

It is not disputed that 10 C.F.R. § 2.758 prohibits challenges to NRC regulations in an adjudicatory proceeding. However, Licensees’ reliance on this prohibition is premature. It is predicated upon the premise that the:

[S]afety analysis described in the Application demonstrates that the tolerance range proposed ( $\pm 3\%$  for MSSVs and  $+3\%/-1\%$  for PSVs) is acceptable, the required methodology for assuring that the new tolerance is met should be the same as that applicable to the previous tolerance (i.e.,  $\pm 1\%$ ).

Licensees’ Response at 16.

Licensees have inaccurately cast Contention 1 as accepting the safety analysis and the proposed tolerance range, but, contrary to regulation, calling for more frequent testing and enlarged sample sizes.

We, however, construe the contention as having two legs:

- (1) It challenges the analysis in the safety evaluation by challenging the High Pressurizer Pressure Trip response-time assumption, but
- (2) Even accepting the LOCV analysis (and its HPPT response-time assumption) as correct, the magnitude of possible setpoint drift could cause the 9.1 psia safety margin calculated in the analysis to be exceeded.

In either case, it follows that the ASME/§ 55.a(g)(4) inspection procedures would be *properly applied* to the *wrong tolerance ranges*. Under either leg of the contention, safety valves with unacceptable tolerances could be placed back into service without recalibration.<sup>11</sup> Then, with predictable drift, undetected

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<sup>10</sup> Licensees explained that:

Subsection IWV requires surveillance testing of the PSV and MSSV setpoints to be done on a sample of the valves during each refueling outage, with samples selected such that each valve is tested at least once in five years. Thus, one third of the valves are tested each PVNGS refueling outage (18 month refueling cycle). If a valve fails to function properly during a regular test, additional valves in the system must be tested. If one of the additional valves fails to function properly, all such valves in the system must be tested. ASME Code Section XI, Subsection IWV 3500.

Response at 15 n.11.

<sup>11</sup> *But see supra* note 9.

because of reduced sample sizes and frequency of inspection, tolerances will exceed the safety limits.

Statement (G) of the second basis that valves could drift to 10-20% out of tolerance lacks any explanation. Licensees state that “there is no reason to expect that valves could drift so far from their setpoints, and Petitioners’ position in this regard is entirely speculative.” Response at 15. Perhaps so, but the statement is not essential to the contention, and the matter may be left to any evidentiary showing Petitioners may attempt on the issue.

The third basis for this contention is that “[t]here is no evidence that the current . . . setpoint tolerances have in fact adversely impacted the restart schedules.”

Licensees oppose the basis on two grounds: (1) the assertions raise no issue as to whether the amendment would comply with applicable NRC requirements, and (2) the argument has no factual support. The Application cites the potential for economic impact *if* the requirement to reset an expanded valve sample to within the current  $\pm 1\%$  tolerance could not be met within the time allotted to a refueling outage; it does not state that such a delay had been experienced. The petition does not cite any basis for rejecting the possibility that such a delay might occur. Licensees’ Response at 16-17. The Board rejects the basis on the first grounds argued by Licensees — that the averment does not address any NRC regulation. Although the Application referred to the possible economic impact associated with the proposed amendment, we see no need for Licensees to justify any such amendment on that basis. However, because they opposed the basis on that ground, Licensees are estopped from asserting an economic need for the proposed amendment.

The fourth basis for Contention 1 alleges that because the PSVs are packaged and shipped off site, “no man-rem exposure to testing personnel results.” Petition at 4. Licensees observe, however, that the PSV testing is done by a vendor, but plant personnel must remove and package the valves for shipment to the vendor. The petition cites no rationale for ignoring the radiological doses to these plant personnel or, for that matter to vendor personnel. The basis is rejected because it fails to identify any litigable dispute with Licensees.

As the fifth basis for Contention 1, the petition states that

[L]icensee has been cited by NRC Region V Staff for deficiencies in the Surveillance Test (ST) program procedures, for inadequate training of ST personnel, and for the assignment of unqualified personnel to perform tests on the MSSVs. *See* Contention No. 3.

Petition at 4.

This basis is duplicated by portions of Contention 3, and we discuss the entire issue under that contention, below. The fifth basis for Contention 1 is rejected.

## Contention 2

*Contention No. 2:* During a Steam Generator Tube Rupture (SGTR) event the offsite radiological releases would exceed acceptable limits if the proposed changes in Technical Specifications for auxiliary feedwater flow (AFW), High Pressurizer Pressure Trip (HPPT) response time, PSVs and MSSVs are permitted.

The first basis for this proposed contention is that “[t]he APS analysis is dependent upon the assumption that all steam generator tubes are in good condition (*i.e.*, that there are no leaks or ruptures).” Petitioners argue that APS has not justified nor can it justify such an assumption pending eddy current testing. Petition at 5.

The second basis for Contention 2 is a criticism that the analysis regarding tube recovery “in general is suspect given the lack of testing and the lack of data on heat exchange and iodine spike.” *Id.* at 5-6.

The third basis is an allegation that the radiological dose calculations “appear to be subjective and are suspect given the above-stated factors.” *Id.* at 6.

Both the Licensees and the NRC Staff challenge the first three bases of Contention 2 with the general argument that they lack factual support and that they incorrectly perceive the Application and associated papers. Licensees’ Response at 18-20; Staff Response at 13-14.

The fourth basis is that the Application’s projected thyroid dose increase to 260 rem “is alarming particularly in light of the fact that the Mitchells live only 2 to 3 air miles from Palo Verde.” And, according to the Mitchells, it is “even more alarming . . . that APS has not specified the geographical area upon which its radiological estimates are based.” Petition at 6, *citing* 10 C.F.R. § 100.11(a).

As the NRC Staff observes, the Application does in fact specify the geographical areas for the radiation estimates. *See* Application at 43-44. In addition, the accompanying No Significant Hazards Consideration shows that the 2-hour thyroid inhalation dose was calculated for the exclusion area boundary. Application, Attachment 2, at 5.

We read the fourth basis to state that 260 rem is excessive. The Commission’s acceptance standard is 300 rem from iodine exposure to the thyroid over 2 hours at the exclusion-area boundary. 10 C.F.R. § 100.11(a). Thus, this basis would constitute a challenge to a Commission regulation without compliance with 10 C.F.R. § 2.758.

At the prehearing conference, called especially to provide Petitioners an opportunity to respond to challenges to contentions, counsel for the Mitchells elected to stand on the pleadings on Contention 2. Tr. 74-75. The arguments opposing the first three bases were sound. The fourth basis is actually the heart of the contention, and it constitutes an attack on the regulation 10 C.F.R. § 100.11(a). Therefore, all bases fail and Contention 2 is rejected in its entirety.

### Contention 3

The Surveillance Test (ST) program procedures are deficient and some licensee engineers have not been adequately trained. In addition, qualified personnel have been replaced by personnel who are unqualified to perform and/or direct Section XI Testing on MSSVs and PSVs.

#### Petition at 6.

Petitioners allege that "APS has been cited by the NRC Region V Staff for deficiencies in its Surveillance Test (ST) program procedures." *Id.* (citing Region V Inspection Report Nos. 50-528/90-28, 50-529/90-28, and 50-530/90-28 at 5-6 (Sept. 24, 1990) ("Report No. 90-28")). Petitioners believe that the matter remains as an open concern.

Additionally, Petitioners allege that APS has been cited for "inadequate training of engineers assigned to perform STs for the MSSVs and for assigning unqualified personnel to perform and direct such tests." Petition at 6-7 (citing Report No. 90-28 at 15-16).

Both Licensees and the NRC Staff challenge the factual bases for the contention. Each characterizes the contention as having no bases, when in fact it does. Licensees and Staff simply believe that the bases are inaccurate, thus there are no bases at all. Licensees' Response at 22-23; Staff Response at 16. Such a challenge, however, is not grounds for rejecting a contention. Petitioners are not required to prove their case at this stage of the proceeding. The challenge to the accuracy of the bases demonstrates that some type of factual dispute exists with Licensees.

A larger problem for Petitioners is whether the dispute falls within the scope of the issues set out in the Notice of Opportunity for Hearing. Licensees argue, as they did with respect to the fifth basis for Contention 1, that, while this contention mentions the valves whose setpoints are the subject of the proposed amendment, the issue sought to be raised by the contention is not impacted by the amendment. While Licensees concede that deficiencies in the ST procedures or training of personnel may be relevant to safety:

ST procedures and personnel training are not impacted by the proposed changes in the Technical Specifications. No modification is requested which will change the Licensees' obligation to have adequate ST procedures and to adequately train personnel who conduct ST. There is therefore no requisite nexus between the issues raised in this contention and the proposed license amendment. The alleged deficiency in training and/or procedures is in no way a "direct consequence" or a "necessary implication" of the proposed amendment.

#### Response at 23-24.<sup>12</sup>

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<sup>12</sup> Citing *Vermont Yankee*, ALAB-245, 8 AEC at 875; see, e.g., *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1819-21 (1982), *aff'd on other grounds*, ALAB-719, 17 NRC (Continued)

We rule that Contention No. 3 does not allege facts sufficient to establish that it falls directly within the scope of the Notice of Opportunity for Hearing. It is therefore rejected. However we recognize that the nature of the allegation might be relevant to Contention 1 in that any decrease in the margin of safety attendant to the proposed increase in setpoint tolerances, if any, could be exacerbated by inadequately trained and unqualified personnel. Accordingly, we do not at this time rule that evidence of the nature set out in this contention may not be offered in any hearing on Contention 1.

#### ***Contention 4***

The licensee has failed to maintain a Quality Assurance program in accordance with 10 C.F.R. Part 50, Appendix B.

Petition at 7.

The basis for Contention 4 alleges a generalized breakdown in the Palo Verde quality assurance program without sufficient support for such a sweeping allegation. The only portion of the bases even arguably within the direct scope of the Notice of Opportunity for Hearing is the statement:

The Licensees' QA personnel are also unqualified to perform a QA function for the ST program, particularly with regard [to] the proposed Tech Spec changes.

*Id.* at 8.

There is not even color of support for the allegation. Contention 4 is rejected as a separate contention. We make no ruling as to the relevance of evidence in the nature of the cited allegation.

#### ***Contention 5***

The licensee has harassed and intimidated and otherwise retaliated against personnel for raising safety concerns related to the testing of MSSVs and PSVs.

*Id.* at 9.

Petitioners allege a general pattern of harassment and intimidation of "whistle-blower" employees, particularly of employees engaged in surveillance testing, such as testing the valves at issue in the proposed amendment. *Id.*

The Petitioners cite as the best support for the allegation a recommended decision by a Department of Labor administrative law judge In the Matter of *Sarah Thomas v. APS* (No. 89-ERA-19) (1989) finding that APS retaliated

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387 (1983) (conditions relating to existing deficiencies or deterioration in management/operator performance are not relevant to amendment permitting steam generator replacement).

against an employee for raising safety concerns in a so-called section XI valve testing program which was an activity (whistleblowing) protected by section 210 of the Energy Reorganization Act. Petition at 9, Exh. 7.

Licenseses and Staff argue that the issue raised by the contention relates to the resolution of allegations of harassment and intimidation which falls within the purview of the Department of Labor, not this Board. Staff Response at 19; Licenseses' Response at 26.

We disagree. The gist of the contention is not to seek a remedy for harassment allegations. Rather, Petitioners allege that somehow "the atmosphere of harassment and intimidation within the engineering organization at Palo Verde which includes [surveillance testing] personnel" presents a reason for denying the request for an amendment. Petition at 10. Petitioners do not explain how this atmosphere leads to an unacceptable margin of safety if the amendment is approved.

In our analysis of Contention 1, above, we supplied inferences reasonably drawn from the underlying bases to construe an acceptable contention. With respect to Contention 5, the predicted causal chain between acts of discrimination alleged to have occurred as far back as 1986 and to whether the proposed setpoint tolerances would preserve an acceptable margin of safety is too long, speculative, and remote to be overcome by favorable inferences. While we can imagine a nexus, the most liberal rule of construction would not permit us to use imagination to complete the connection needed to accept Contention 5. Contention 5 is rejected.

#### IV. ORDER

A. Contention 1 with the first and second bases are accepted for litigation in this proceeding. The factual issues presented by the contention are:

1. The safety evaluation fails to contain sufficient information to support the assumption regarding High Pressurizer Pressure Trip response time. Application at 22, item 1.
2. Therefore, the LOCV analysis would not be established. *Id.* at 22-24.
3. Even if the LOCV analysis were accepted as correct, the magnitude of possible setpoint drift could cause the 9.1 psia safety margin calculated in the analysis to be exceeded.
4. In either case, safety valves with unacceptable tolerances could be placed back into service without recalibration.
5. Then, with predictable drift, undetected because of reduced sample sizes and frequency of inspection, tolerances will exceed the safety limits.

B. All other contentions and bases are rejected.

C. Allan L. Mitchell and Linda E. Mitchell, jointly, are admitted as parties to this proceeding. Their request for a hearing is granted. A Notice of Hearing setting the time and place of such hearing will issue when the parties are prepared to go forward. The Board will conduct one or more prehearing conferences as needed to further identify issues and to provide a schedule for further actions in the proceeding.

D. Discovery within the scope of the issues accepted for litigation in accordance with the provisions of 10 C.F.R. §§2.740-2.742 is authorized to commence immediately.

## V. APPEALABILITY

This Order grants a petition for leave to intervene and a request for hearing. Therefore it may be appealed to the Commission by any party other than the Mitchell Petitioners within 10 days after the service of this Order.

### THE ATOMIC SAFETY AND LICENSING BOARD

Jerry R. Kline  
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
May 9, 1991

### PARTIAL DISSENT BY JUDGE JORDAN

I would not accept for litigation that aspect of the contention that has been construed to include a challenge to the High Pressurizer Pressure Trip response-time assumption, thus challenging the LOCV analysis. There is no language in the bases that implies or even comes close to implying a challenge to the HPPT response-time assumption. The dialogue between the Board and counsel for the Petitioners in which he argues that a challenge to the HPPT response time assumption should be inferred from the bases provides no grounds for such an inference. Rather it seems that he convinced the majority to infer the challenge

after he came to believe that such was a logical necessity in demonstrating a dispute with the Licensees. Tr. 58-60, 63-66.

I concur in all other aspects of the majority's opinion.

Walter H. Jordan (by I.W.S.)  
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman  
Frank F. Hooper  
Peter A. Morris

In the Matter of

Docket Nos. 50-528-OLA  
50-529-OLA  
50-530-OLA  
(ASLBP No. 91-632-04-OLA)  
(Shutdown Cooling Flowrate)

ARIZONA PUBLIC SERVICE  
COMPANY, *et al.*  
(Palo Verde Nuclear Generating  
Station, Units 1, 2, and 3)

May 14, 1991

In a proceeding involving an application to amend an operating license, the Licensing Board dismissed the petition to intervene on the basis that the Petitioners had failed to file any contentions during the prescribed period that had been ordered by the Licensing Board.

MEMORANDUM AND ORDER  
(Terminating Proceeding)

I.

On February 6, 1991, Arizona Public Service Company, *et al.* ("Licensees"), filed their "Answer in Opposition to Petitions for Leave to Intervene and

Requests for Hearing” (“Licensees’ Answer”). The Answer opposed both a “Petition for Leave to Intervene and Request for Hearing” submitted by Myron L. Scott, Barbara S. Bush, and the Coalition for Responsible Energy Education (“CREE”), dated January 22, 1991 (“Scott/Bush/CREE Petition”), and also a similarly entitled document submitted by Allan L. Mitchell and Linda E. Mitchell, dated January 21, 1991 (“Mitchell Petition”). Both petitions relate to a proposed amendment to each of the operating licenses for the three Palo Verde units which was noticed in the *Federal Register* on December 21, 1991. 55 Fed. Reg. 52,337. NRC Staff filed a Response on February 11, 1991, which concluded that the requests of both petitions should be denied.

This Atomic Safety and Licensing Board issued a “Notice of Prehearing Conference and Order Scheduling Filing of Pleadings” on March 18, 1991 (“Order”). In this Order we mandated that “each petitioner . . . shall file *no later than April 12, 1991* a Supplemental Petition which must include a list of contentions which petitioner seeks to have litigated in the hearing, and which satisfy the requirements of paragraph (b)(2) of § 2.714 of the Commission’s Rules of Practice.” Additionally, the pleadings were “to be in the hands of the Licensing Board and other parties on the due date.”

In a “Notice of Voluntary Withdrawal of Petition for Leave to Intervene and Request for Hearing,” dated April 11, 1991, the Mitchell Petitioners notified the Licensing Board and the parties that they had voluntarily withdrawn their January 21, 1991 Petition for Leave to Intervene and Request for Hearing.

Although the Board expressly ordered that supplemental petitions be filed and in the hands of parties by April 12, 1991, no Supplemental Petition from or on behalf of the Scott/Bush/CREE Petitioners has been received by the Board. We have also been advised that neither the Licensees nor the NRC Staff have received such a Supplemental Petition.

“Licensees’ Motion to Dismiss Petitioners and Terminate Proceeding” was filed on April 17, 1991. In it, Licensees request that the Licensing Board dismiss the Mitchell Petitioners and also dismiss the Scott/Bush/CREE Petition. The NRC Staff filed an answer on April 25, 1991, supporting Licensees’ motion to dismiss all petitioners and terminate this proceeding. No answer to the motion has been received from the Scott/Bush/CREE Petitioners.

## II.

The Scott/Bush/CREE Petition must be dismissed because those Petitioners have failed to set forth at least one litigable contention in accordance with paragraph (b)(2) of 10 C.F.R. § 2.714. Additionally, the Petition must be dismissed for the reasons noted in Licensees’ Answer and the NRC Staff Response to the Petition — Petitioners have failed to demonstrate their interest

in the proceeding, how the proceeding will affect that interest, and the specific aspect or aspects of the proceeding as to which they wish to intervene. Finally, the Board must dismiss the petition pursuant to 10 C.F.R. § 2.707, because the Petitioners have failed to comply with the Board's Order of March 18, 1991.

### III. ORDER

Based upon the foregoing, it is, this 14th day of May 1991, ORDERED:

1. The Mitchell Petitioners' "Notice of Voluntary Withdrawal of Petition for Leave to Intervene and Request for Hearing," dated April 11, 1991, is *accepted*;
2. The Scott/Bush/CREE Petition for Leave to Intervene and Request for Hearing, dated January 22, 1991, is hereby *denied*;
3. Licensees' Motion to Dismiss Petitioners and Terminate Proceeding, dated April 17, 1991, is *granted*; and
4. There being no other matters outstanding,<sup>1</sup> this licensing proceeding is hereby *dismissed*.

### IV. APPEAL RIGHTS

This Order wholly denies a petition for leave to intervene and a request for a hearing. Therefore, in accordance with the provisions of 10 C.F.R. § 2.714a(a) and (b), this Order may be appealed to the Commission within ten (10) days after service of this Order.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

Robert M. Lazo, Chairman  
ADMINISTRATIVE JUDGE

Issued at Bethesda, Maryland,  
this 14th day of May 1991.

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<sup>1</sup> If we were to have authorized a hearing, we would have set forth detailed rulings on the standing of the Petitioners. Given the results that we are here reaching, we need not do so.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman  
Dr. James H. Carpenter  
Dr. Emmeth A. Luebke

In the Matter of

Docket Nos. 50-424-OLA  
50-425-OLA  
(ASLBP No. 90-617-03-OLA)  
(Facility Operating Licenses  
NPF-68 and NPF-81)

GEORGIA POWER COMPANY, *et al.*  
(Vogtle Electric Generating Plant,  
Units 1 and 2)

May 15, 1991

In a proceeding involving an application to amend the technical specifications of an operating license, the Licensing Board dismisses all the contentions proffered by a petitioner for intervention and dismisses the proceeding.

**RULES OF PRACTICE: INTERVENTION**

To be admitted as a party, a petitioner for intervention must establish, *inter alia*, that it has standing and that it has offered at least one admissible contention.

**REGULATORY GUIDES: APPLICATION**

Although Regulatory Guides do not have the status of formal regulations, where a Regulatory Guide provides several options for complying with safety standards, and where no factual basis has been presented showing why a

particular permissible option should be denied, there is no legitimate ground for limiting an applicant's choice to one of the options.

## MEMORANDUM AND ORDER (Terminating Proceeding)

This proceeding involves the application of Georgia Power Co., *et al.* (hereinafter Applicants), to amend the technical specifications of the Vogtle Electric Generating Plant, Units 1 and 2, for authority to bypass, in emergency start conditions, the jacket-water high-temperature trip of the emergency diesel generators (EDGs). The change, which has already been put into effect by the NRC Staff under the authority of 10 C.F.R. §§ 50.91 and 50.92,<sup>1</sup> was sought to minimize the potential for spurious EDG trips in the emergency start mode. The change is being opposed by Georgians Against Nuclear Energy (GANE), Petitioners for Intervention. For further details, *see* Memorandum and Order (Intervention Petition), LBP-90-29, 32 NRC 89 (1990); Prehearing Conference Order (Filing Dates for Further Submissions), dated October 2, 1990 (unpublished).

For the reasons that follow, based on our review of the filings of all participants in the proceeding, we conclude that GANE has not submitted any admissible contentions and, accordingly, that its petition for intervention and request for a hearing must be denied and the proceeding terminated.

### I. INTRODUCTION

On March 20, 1990, the Vogtle Generating Plant, Unit 1, experienced a serious operational incident: a loss of all safety AC offsite power. The NRC Staff performed a comprehensive investigation, leading to a thorough report entitled "Loss of Vital AC Power and the Residual Heat Removal System During Mid-Loop Operations at Vogtle Unit 1 on March 20, 1990," NUREG-1410 (June 1990) (hereinafter NUREG-1410). As summarized in the Abstract to that report, at p. iii:

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<sup>1</sup>The change was applied for on May 25, 1990, and was formally approved by the NRC Staff on July 10, 1990. 55 Fed. Reg. 32,337 (Aug. 8, 1990). In fact, the change was approved in principle by the NRC Staff on May 25, 1990, the same day the formal application was filed. *See* Letter dated May 25, 1990, from G.B. Mathews (for Gus C. Lainas, Assistant Director for Region II Reactors), Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation, NRC, to W.G. Hairston, III, Senior Vice President—Nuclear Operations, Georgia Power Co., Re: "Temporary Waiver of Compliance — Vogtle Electric Generating Plant, (VEGP) Units 1 and 2." *See also* Tr. 33-35 and LBP-91-6, 33 NRC 169 (1991).

The plant was in cold shutdown with reactor coolant level lowered to "mid-loop" for various maintenance tasks. . . . One emergency diesel generator and one reserve auxiliary transformer were out of service for maintenance, with the remaining reserve auxiliary transformer supplying both Unit 1 safety buses. A truck in the low voltage switchyard backed into the support column for an offsite power feed to the reserve auxiliary transformer which was supplying safety power. The insulator broke, a phase-to-ground fault occurred, and the feeder circuit breakers for the safety buses opened. The operable emergency diesel generator started automatically because of the undervoltage condition on the safety bus, but tripped off after about 1 minute. About 20 minutes later the diesel generator load sequencer was reset, causing the diesel generator to start a second time. The diesel generator operated for about 1 minute and tripped off. The diesel generator was restarted in the manual emergency mode 36 minutes after the loss of power. The generator remained on line and provided power to its safety bus. During the 36 minutes without safety bus power, the reactor coolant system temperature rose from about 90°F to 136°F. . . .

Several months after this loss-of-power incident, the Applicants filed the instant application (*see* note 1, *supra*). The amendment is intended to preclude spurious trips such as were involved in the March 20, 1990 incident.

## II. PROCEDURAL HISTORY

Following GANE's timely intervention petition, we conducted a prehearing conference on September 19, 1990, to consider the organization's standing to intervene and the validity of its eight proffered contentions.<sup>2</sup> We determined that GANE had standing<sup>3</sup> and that two of its proposed contentions (numbers 7 and 8) should be summarily dismissed for lack of relevance. *See* Prehearing Conference Order, *supra*. We dismissed those two contentions at that time.

The other six contentions included structural flaws that raised questions concerning satisfaction of NRC requirements for admissible contentions (*see* further discussion below). The Licensing Board has never formally ruled on any of these contentions, inasmuch as the Applicants at the prehearing conference volunteered to attempt to resolve the issues informally. *See* 10 C.F.R. §2.756. The Applicants were responding to concerns expressed at the conference about the incident, as set forth in NUREG-1410, and the lack of data or analyses indicating how the amendment under consideration would meet those concerns.

The Applicants filed a supplemental statement on November 14, 1990, outlining in considerable detail the steps taken to respond to the incident and NUREG-1410 and technical analysis supporting the technical specification change. GANE filed a timely response on December 10, 1990 (corrected on January 22, 1991), and the Staff filed its response on January 11, 1991.

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<sup>2</sup>The contentions were filed on September 4, 1990.

<sup>3</sup>If we were to have authorized a formal hearing, we would have set forth details of our ruling on standing. Given the result that we are here reaching, we need not do so.

Additional comments were filed by GANE on January 25, 1991; by the NRC Staff on March 18, 1991; and the Applicants on March 20, 1991. GANE filed a timely reply to the Applicants' response on April 22, 1991.<sup>4</sup>

### III. REGULATORY REQUIREMENTS

The Applicants have sought the changes in question under the authority of Regulatory Guide 1.9, Revision 2 (December 1979), Position 7. In relevant part, that Position states that a trip of the type involved here "may be bypassed under accident conditions, provided the operator has sufficient time to react appropriately to an abnormal diesel-generator unit condition."

The Board recognizes that this position stems from a Regulatory Guide, not a formal regulation and, accordingly, that a party could advocate the application of a different standard. *Porter County Chapter of the Izaak Walton League of America v. AEC*, 533 F.2d 1011 (7th Cir. 1976), *cert. denied*, 429 U.S. 545 (1976). Because no participant has done so here, we are according great weight to the Regulatory Guide criteria in determining the acceptability of the proffered contentions. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974).

### IV. GANE'S CONTENTIONS

To be admitted as a party, a petitioner for intervention (such as GANE) must establish, *inter alia*, that it has standing and that it has offered at least one admissible contention. We here turn to the six remaining proposed GANE contentions (numbers 1 through 6) on which we have not yet ruled.

None of those contentions complies with all of the requirements of 10 C.F.R. § 2.714. For example, they make no reference whatsoever to the legal authority under which the application should be judged — either the criteria of the Regulatory Guide upon which the Applicants and Staff are relying or some other criteria that GANE might contend are applicable.

Nor does GANE include a "brief explanation of the bases of the contention" in any contention. Indeed, except for one subpart of one contention (Contention 2(d)), no basis is even identified.

Beyond that, none of the contentions set forth "a concise statement of the alleged facts or expert opinion which support the contention . . . , together with

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<sup>4</sup>GANE's April 22, 1991 reply was not signed by any representative of GANE. As a result, the NRC Staff on April 26, 1991, moved to strike GANE's reply for noncompliance with 10 C.F.R. § 2.708(c). Because GANE's reply clearly was unsigned, the Staff's motion was well-founded. GANE, however, on May 7, 1991, filed a signed statement. We have considered the arguments set forth therein.

references to those specific sources and documents . . . on which the petitioner intends to rely . . . .” Further, GANE fails to provide any “supporting reasons” for its dispute with the Applicants, other than its general complaint of lack of available data or analyses. GANE does not even explain how its reference to one appendix of NUREG-1410 supports the contention for which it is cited. After the prehearing conference, it was not clear what other portions of the more-than-500-page report (if any) it intended to rely on for its basis, and for which of the proposed contentions.

Under the current Rules of Practice (which in pertinent part are unchanged from those in effect when GANE filed its contentions), GANE’s contentions could have been summarily dismissed for these failures. However, during the prehearing conference, GANE repeatedly expressed concern about the lack of publicly available supporting data or analyses for the proposed amendment (*see, e.g.*, Tr. 136, 143, 150, 151, 152, proposed Contentions 4 and 6). Based on the concerns expressed at the prehearing conference, the Applicants took steps to alleviate these expressed concerns by offering to supplement the available data in an attempt to resolve the concerns informally. *See* 10 C.F.R. § 2.756. We are satisfied that the Applicants (together with supplemental Staff review and comments) have answered all outstanding legitimate concerns with the information provided.<sup>5</sup>

Given the various structural flaws in GANE’s proposed contentions, we need not devote an extended discussion to each individual one. We note only briefly the following additional reasons bearing upon the admissibility of the proposed contentions:

1. GANE’s expressed concern about operating procedures and training (Contention 2(c), which it discussed in conjunction with operator error (Contention 2(b)) becomes moot in light of the information on those subjects provided by the Applicants and Staff. *See* Supplemental Statement, Exhibit 10, Attachment at 3; Architzel 1/11/91 Affidavit at 5-6; Applicants’ Letter to NRC, dated January 10, 1991 (Attachment to Staff Comments dated January 11, 1991); Correia 1/11/91 Affidavit at 10. Contentions 2(b) and (c) are thus being dismissed for failing to set forth a genuine dispute with the Applicants, as required by 10 C.F.R. § 2.714(b)(2)(iii).
2. Contrary to Contention 1, as well as Contentions 2(e) and (f), the application documents clearly set forth “what will alert the operator to potential overheating.” *See also* note 5, *supra*. These contentions are likewise being dismissed for failure to set forth a genuine dispute

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<sup>5</sup>In particular, we note that the question of operator response time appears to be satisfactorily addressed by operating procedures that provide for a prompt dispatch of an operator to the EDG when it starts in an emergency situation.

with the Applicants, as required by section 2.714(b)(2)(iii), as well as for the structural deficiencies outlined earlier.<sup>6</sup>

3. The claim that the Applicants have not shown a "reasonable basis" for the proposed change (Contention 2(a)) ignores the reasons set forth by the Applicants for the change and fails to take issue with any of those reasons.
4. The lack of analysis complained about in Contentions 4 and 6 has now been remedied by the Applicants and Staff, through the supplementary information that they have furnished. These contentions are being dismissed for failure to set forth a genuine dispute with the Applicants, as required by section 2.714(b)(2)(iii).
5. Contentions 2(g) and 5 seek the installation of equipment not required by NRC regulations. Contention 4, to the extent it seeks the identity of the person who determined that the Applicants should seek the amendment under review, is either discovery (and hence not permissible at this stage of the proceeding) or irrelevant. In either case, the contentions must be denied as failing to state a claim upon which relief might be granted, within the meaning of 10 C.F.R. § 2.714(d)(2)(ii).
6. Finally, with respect to GANE's expressed preference for repairing the sensors rather than bypassing the trip (Contentions 2(d) and 3), we acknowledge that both methods might satisfactorily meet current NRC regulatory guidance since, under Regulatory Guide 1.9, each of these options might be considered as equally satisfactory, assuming conformance to certain conditions with respect to each. The electronic logic suggested by GANE in its April 22, 1991 filing might also be considered.

But where each option is legally permissible, and where (as here) there has been no factual basis presented by the Petitioners showing why a particular permissible option should be denied, we would have no legitimate ground for limiting the Applicants' choice to one. See *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, LBP-83-76, 18 NRC 1266, 1273 (1983). For this reason, we are dismissing Contentions 2(d) and 3 inasmuch as they are not based on allegations that, if proved, would entitle the petitioner to relief. See 10 C.F.R. § 2.714(d)(2)(ii).

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<sup>6</sup>We note that the scenario set forth in GANE's April 22, 1991 filing cannot be considered credible because it considers EDG operating temperature rather than startup temperature as the initial temperature.

## V. CONCLUSION

In conclusion, we find that GANE has not set forth any contentions that are adequate to satisfy the requirements of 10 C.F.R. §2.714. We are therefore denying its petition to intervene and request for a hearing and terminating the proceeding.

## VI. ORDER

Based on the foregoing, it is, this 15th day of May 1991, ORDERED:

1. The proposed contentions of GANE are *dismissed*.
2. GANE's petition for intervention is hereby *denied*.
3. This proceeding is hereby *terminated*.
4. Pursuant to 10 C.F.R. §§2.760 and 2.764 of the Commission's Rules of Practice, this Memorandum and Order shall become effective immediately. It will constitute the final action of the Commission forty-five (45) days from the date of issuance, unless an appeal is taken in accordance with 10 C.F.R. §2.762 or the Commission directs otherwise. *See also* 10 C.F.R. §2.786.

5. Any party or petitioner for intervention may take an appeal from this Memorandum and Order with the Commission by filing a Notice of Appeal within ten (10) days after service of the decision. *See* 10 C.F.R. §2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944 (Oct. 24, 1990)). Each appellant must file a brief supporting its position on appeal within thirty (30) days after filing its Notice of Appeal (forty (40) days if the Staff is the appellant). A petitioner-appellant's brief must be confined to issues that the petitioner-appellant placed in controversy or sought to place in controversy. Within thirty (30) days after the period has expired for the filing and service of the briefs of all appellants (forty (40) days in the case of the Staff), a party who is not an appellant may file a brief in support of or in opposition to the appeal of any other party or petitioner. A responding party or petitioner shall file a single,

responsive brief *only* regardless of the number of appellants' briefs filed. Briefs shall conform to the length and format specified in 10 C.F.R. § 2.762.

**THE ATOMIC SAFETY AND  
LICENSING BOARD**

**Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE**

**Dr. James H. Carpenter  
ADMINISTRATIVE JUDGE**

**Dr. Emmeth A. Luebke  
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland  
May 15, 1991**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Presiding Officer  
Charles N. Kelber, Special Assistant

In the Matter of

Docket No. 40-672-MLA  
(ASLBP No. 91-639-02-MLA)  
(License Renewal)  
(Source Material License  
No. SMB-179)

NUCLEAR METALS, INC.

May 16, 1991

The presiding officer describes in detail the procedures governing the appointment of a settlement judge at the request of both parties.

**RULES OF PRACTICE: SETTLEMENT JUDGE**

A settlement judge may be appointed at the request of the parties. Should the parties request the appointment of the presiding officer as settlement judge, he may request that the Chief Judge of the Atomic Safety and Licensing Board Panel appoint him as settlement judge and appoint a new presiding officer. (Although this is a Subpart L case, the principles seem applicable generally.)

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\*Re-served May 30, 1991.

## MEMORANDUM AND ORDER (Information Notice: Settlement Judge)

On May 14, 1991, Nuclear Metals, Inc., moved for the appointment of the presiding officer in this proceeding as a settlement judge. With respect to that motion, I want to bring to the attention of the parties an opinion of the Commission that appears to be controlling. The opinion is *Rockwell International Corp.* (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340-41 (1990):

Commission policy strongly favors settlement of adjudicatory proceedings. At the same time, we are aware of the potential for compromise of a presiding officer's role as an impartial adjudicator through involvement in the settlement process discussed in the Appeal Board's Memorandum and Order. [ALAB-925, 30 NRC 709 (1989)] . . . at 721 n.13. Where an administrative judge's involvement in the settlement process could be extensive (more than providing encouragement to parties or holding a conference in open session), we believe that utilization of a settlement judge should be considered. Use of settlement judges has been endorsed by the Administrative Conference of the United States:

The settlement judge can command a degree of deference similar to that of the presiding judge without the need to observe all the commands that establish and maintain impartiality. A separate settlement judge, once appointed, can engage in *ex parte* and off-the-record conversations, frank assessments of the merits, and other techniques to aid settlement that the presiding judge is less free to use.

1 C.F.R. § 305.88-5.

We believe that resort to a settlement judge may be accomplished under our present rules which encourage settlements (10 C.F.R. §§ 2.759, 2.1241), endow presiding officers with the authority to hold conferences before or during hearings for settlement (10 C.F.R. §§ 2.718(h), 2.1209(c)) and allow presiding officers to take any other action consistent with the Atomic Energy Act, the Administrative Procedure Act, and our rules of practice (10 C.F.R. §§ 2.718(m), 2.1209(i)). Accordingly, it is our view that the presiding officer could, at the request of the parties, ask that the Chairman of the Atomic Safety and Licensing Board Panel appoint a settlement judge if he considered it advantageous to do so. We are mindful, of course, that any party's participation in the settlement process is voluntary. Therefore, utilization of the settlement judge cannot be mandatory and cannot accrue to a party's detriment. In addition, in view of the fact that a settlement judge might engage in *ex parte* discussions and form a judgment on the merits of a party's position during the course of negotiations, the settlement judge's communications and dealings with the presiding officer on the merits of issues and the parties' positions will have to be circumscribed. With these caveats, however, we believe that the settlement judge concept could serve a useful purpose in our proceedings.

Consequently, both parties should be aware that if they agree I should be settlement judge, then I would request the Chief Judge of the Atomic Safety and Licensing Board Panel to appoint a settlement judge and I would communicate

their preference as to whom should be appointed. If he did appoint me as settlement judge, he would then appoint a new presiding officer.

The settlement process is entirely voluntary and therefore depends on the agreement of the parties. I can assist on strictly procedural aspects of reaching agreement, at the request of the parties, but I am restricted from off-the-record substantive discussions by the ruling of the Commission and by the ex parte rules of the Commission. I am available for a telephone conference call at (301)492-7479.

Respectfully,

Peter B. Bloch, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulles, Chairman  
Dr. George A. Ferguson  
Dr. Jerry R. Kiline

In the Matter of

Docket No. 50-322-OLA  
(ASLBP No. 91-621-01-OLA)  
(Confirmatory Order Modification,  
Security Plan Amendment, and  
Emergency Preparedness Amendment)

LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

May 23, 1991

MEMORANDUM AND ORDER  
(Ruling on Amended Petitions to Intervene  
and to Hold Hearings)

I. INTRODUCTION

The Licensing Board issued, on January 8, 1991, a Memorandum and Order, LBP-91-1, 33 NRC 15 (1991), which gave Petitioners, Scientists and Engineers for Secure Energy (SE2) and Shoreham-Wading River Central School District (School District), the opportunity to amend their previously filed petitions to intervene and to hold hearings on three changes to Long Island Lighting Company's (LILCO's) full-power operating license for the Shoreham Nuclear Power Station (Shoreham).

The Licensing Board had found that Petitioners failed to establish standing, as provided for by 10 C.F.R. § 2.714(a)(2), in each of the three matters, i.e., the Confirmatory Order Modification, the Security Plan Amendment, and the Emergency Plan Amendment. The deficiencies that resulted in Petitioners' failure to meet the standard for standing, in section 2.714(a)(2), were discussed in detail in LBP-91-1.

Each Petitioner, on February 4, 1991, filed an "Amendment to Its Request for Hearing and Petition to Intervene" in each of the matters. Petitioners claimed to have corrected deficiencies found by the Licensing Board in their initial request for intervention and to hold hearings.

On February 19, 1991, in response, Licensee filed "LILCO's Opposition to Petitioners' Amended Petitions to Intervene and Requests for Hearing." In it, LILCO asks that all six petitions to intervene and requests for hearing be denied.

On February 25, 1991, Staff filed its response entitled "NRC Staff Response to Petitioners' Six Amended Petitions to Intervene and Requests for Hearing." It too requests that the amended petitions be denied.

On April 3, 1991, the Commission issued a Memorandum and Order, CLI-91-4, 33 NRC 233, which denied an appeal of Petitioners of the Licensing Board's order in LBP-91-1, *supra*. The appeal was denied because it was interlocutory and not permitted under the Commission's Rules of Practice. The Commission did expound on the guidance it had previously provided in CLI-90-8, 32 NRC 201 (1990), *aff'd*, CLI-91-2, 33 NRC 61 (1991) on the three licensing changes.

In this Memorandum and Order, which supplements LBP-91-1, the Licensing Board reviews and rules on the amended requests for intervention and hearings.

## II. LICENSING BOARD'S RULINGS ON DEFICIENCIES IN ORIGINAL PETITIONS

### A. The SE2 Petitions

SE2's original petitions in the three matters duplicate one another except for the nature of the three changes to the full-power Shoreham license and aspects on which SE2 would participate at a hearing.

The Licensing Board, in each instance, found that SE2 failed to establish standing either organizationally or representationally.

SE2 asserted that injury to itself and its members was caused by the Commission permitting the *de facto* decommissioning of Shoreham and the agency's failure to require LILCO to maintain Shoreham at a full-power operational status under the Shoreham full-power operating license. SE2 claimed that a National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS), con-

sidering resumed operation as an option, was required prior to agency decision making on the alleged ongoing decommissioning of Shoreham.

The Confirmatory Order Modification, the Security Plan Amendment, and the Emergency Preparedness Amendment were considered by SE2 to be part of the decommissioning activity and the failure to maintain the facility at a full-power operational level was a violation of its license requirements. SE2 had alleged that LILCO, by not abiding by its full-power license, increased risk to the radiological health and safety of Petitioner's members.

The Licensing Board, relying on CLI-90-8, *supra*, denied as issues in the proceedings SE2's claim of injury that was said to result from the Commission permitting the *de facto* decommissioning of Shoreham, of which the three licensing actions were part, and the agency failing to require Shoreham to be kept in a full-power operational status.

The Licensing Board also found that Petitioner SE2 had not shown how, in a concrete way, the lack of an environmental assessment on any of the three specific license actions would injure Petitioner's ability to disseminate information that is essential to its programmatic status and is in the zone of interests protected by NEPA. It was decided that without this showing, no cognizable basis was provided to establish standing. *Competitive Enterprise Institute v. Natural Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990).

The Licensing Board further found that the petitions were deficient as to organizational and representational standing because they did not allege any other cognizable harm that would result from the three specific changes to the Shoreham license. SE2 made bare assertions and offered unsupported abstract arguments of radiological harm to the health of its members, none of which satisfied the regulatory requirements for standing. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

The Licensing Board did not permit SE2 to successfully invoke a presumption of injury for five of its members who live, work, or have property interests within 50 miles of Shoreham. It was found that the presumption could not be used because the license changes do not involve a construction permit, an operating license, or a significant amendment that would involve an obvious potential for offsite consequences. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

The SE2 petitions were also found deficient because they had not stated that Petitioner's organizational purpose provides authority to represent members in adjudicatory proceedings. Additionally, SE2 did not provide a necessary supporting statement, for each of its members it seeks to represent, identifying the person, describing the nature of injury to the person, and demonstrating that the person to be represented has, in fact, authorized such representation.

*Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).

Finally, the Licensing Board found that the SE2 petition on the Security Plan Amendment failed to identify an aspect of the subject matter on which Petitioner sought to intervene that was within the subject matter of the proceeding.

## **B. The School District's Petitions**

School District's petition, like those of SE2, are similar to one another and, for the most part, duplicated those of SE2. The petitions differed from those of SE2 only insofar as the description of the Petitioner, its organizational purpose, those whom it seeks to represent and the nature of the interests.

The focus of the Petitioners is the same. They both claim that the injury to the organizations and their members result from the *de facto* decommissioning of Shoreham in advance of the filing of a decommissioning plan and the failure of LILCO to maintain Shoreham at a full-power operational status.

The Licensing Board ruled that School District, like SE2, failed to satisfy the requirements of section 2.714(a)(2) to establish standing.

School District's petitions differed from SE2's in that the School District's organizational interest is that of a ratepayer and tax recipient. Both are economic concerns over which the Commission has no jurisdiction and do not provide an interest for standing.

Like SE2, School District did not submit a supporting statement for whom it seeks to act representationally. In School District's case, it lacked one from the President of the Board of Education.

## **III. COMMISSION GUIDANCE IN CLI-91-4**

The Commission, in denying Petitioners' interlocutory appeals of LBP-91-1, in Memorandum and Order, CLI-91-4, expounded on the guidance it previously offered on the license changes in CLI-90-8.

The Commission, having noted that the Licensing Board in LBP-91-1 held that the alleged illegal segmentation of the Shoreham decommissioning process was outside the scope of the Notices of Hearing, stated that the Commission's "comments in CLI-90-8 were not intended to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining properly supported contentions that such an EIS must be prepared at this time." 33 NRC at 236-37.

It pointed out that it is within the scope of NEPA and a proceeding on any license amendment to claim that the amendment requires an EIS because it is an inseparable segment of a larger federal action with a significant environmental

impact. Cited in support were 10 C.F.R. §§ 51.104(b) and 51.34(b).<sup>1</sup> 33 NRC at 236.

The Commission further stated that if the Petitioners satisfy the NRC's standing requirements in their amended petitions, the Licensing Board may consider a properly pled contention on the need for an EIS for the three actions. *Id.* at 6. The Commission's order permitted the petitioner the opportunity to challenge all three actions.

The Commission defined a properly pled contention as:

offer[ing] some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan *and* how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

*Id.* at 237.

#### IV. LICENSING BOARD'S RULINGS ON AMENDED PETITIONS

The Licensing Board, having reviewed and fully considered SE2's and School District's six amended petitions and LILCO's and Staff's answers, filed in response to LBP-91-1, makes the following determinations and rulings.

##### A. Procedural Issues in the Amended Petitions

Petitioners cured the procedural deficiencies found by the Licensing Board. SE2 and School District did provide a necessary supporting statement for each of their members that they sought to represent; identifying the person, describing the nature of the alleged injury to the person, and demonstrating that the person has, in fact, authorized such representation.

Sufficient information was provided in the affidavit of SE2's Executive Director for the Licensing Board to conclude that the Petitioner's organizational purpose provides authority to represent members in adjudicatory proceedings. Among the affidavits was one from the President of the Board of Education authorizing School District to represent his interest.

The foregoing puts to rest the matters of procedural deficiencies.

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<sup>1</sup>The Confirmatory Order, which is not a license amendment, is not subject to the proposition.

## B. SE2's Amended Petitions

### 1. *The NEPA Issues*

The Commission indicated in its most recent guidance, in CLI-91-4, that the Licensing Board was incorrect in holding that Petitioners' principal NEPA claim, the *de facto* decommissioning of Shoreham without an EIS, was outside the scope of the proceeding. The Commission in finding that "the Licensing Board is free to consider a properly pled contention on the need for an EIS for these three actions" (33 NRC at 237) identifies Petitioner's claim of injury as one being within the zone of interests protected by NEPA. Accordingly, the Licensing Board reconsiders its previous decision on the NEPA issue.

SE2 originally asserted that it established organizational standing because the NRC failed to prepare an EIS in the three proposed actions that interfered with Petitioner's informational purposes to the extent that it injured the organization's activities. Under *Competitive Enterprise Institute, supra*, Petitioner must show how the lack of an EIS has significantly harmed its ability to educate and inform the public about a zone of interests protected by NEPA whose purpose is to protect the environment. However, the court recognized that "NEPA's purpose of ensuring well-informed government decisions and stimulating public comment on agency actions effectively lowers the threshold for establishing injury to informational interests." 901 F.2d at 123.

The Licensing Board found that SE2 had not made the required showing because its focus had been on decommissioning and restart, two matters we ruled were not at issue in this proceeding. We further found that Petitioner had not shown how, in a concrete way, the lack of an environmental review of the Confirmatory Order Modification, the Security Plan Amendment, or the Emergency Preparedness Amendment would injure its ability to disseminate information that is essential to its programmatic status and is in the zone of interests protected by NEPA.

SE2's overall claim of injury is that because of the Commission's inaction in conducting an environmental review of the alleged *de facto* decommissioning of Shoreham, it is precluded from commenting on an EIS and advising its members of the environmental risks involved and reporting the findings and recommendations based upon environmental evaluations to the public and political leadership as provided for in SE2's charter.

There is sufficient information of record for the Licensing Board to find that the information SE2 seeks relates to environmental interests that NEPA was intended to protect. In the amended petitions, SE2's Executive Director and other members indicated a preference for a mothballing type of solution, as a choice among alternatives, in the process of decommissioning Shoreham. Petitioner expresses an interest within the scope of that found acceptable in CLI-90-8 and CLI-91-4.

SE2's charter mandates that its members and public bodies be informed of such matters. For purposes of standing, it can reasonably be said that SE2 may be significantly harmed in its ability to educate and inform the public on the effects of the alleged *de facto* decommissioning by not having an EIS prepared by the NRC. The Licensing Board finds that SE2 has posited a cognizable injury under NEPA. It further finds that Petitioner has established organizational standing on the NEPA issue.

Members of SE2 assert that their rights to have an opportunity for meaningful comment on the environmental consideration of the decommissioning proposal will be prejudiced or completely denied. The statements are so vague that they do not identify a palpable injury and therefore provide no basis for representational standing for SE2.

Another effect of CLI-91-4 is that the Licensing Board reverses its finding that the need for an EIS would not be a proper aspect of the subject matter of the proceedings, as required by section 2.714(a)(2). SE2 has identified a relevant aspect in the Security Plan Amendment on which to intervene.

SE2 having established standing organizationally on the NEPA issue, as provided for under section 2.714(a)(2), will be afforded the opportunity to file one or more contentions as prescribed in section 2.714(b)(2). Contentions filed will be required to meet Commission requirements specified in CLI-90-8 and CLI-91-4. Resumed operation or other methods of generating electricity are beyond the scope of the proceedings.

Because SE2 has already established standing under NEPA, only a brief comment will be made on additional grounds it offered for consideration under NEPA.

Petitioner claimed that the absence of a categorical exclusion from environmental review under 10 C.F.R. § 51.22(c) for the licensing actions indicates that such review is required. Commission regulations do not provide that all actions that are not categorically excluded require environmental review. Absent something additional, the absence of a categorical exclusion is not determinative of whether an environmental review is required.<sup>2</sup>

SE2 alleges in its amended petitions possible injury to members stemming from substitute oil-burning plants. A bare conclusory allegation is made of a connection between the license actions and the undefined injury to members. Such unsupported generalized claims do not support a claim for standing. Moreover, possible injury to SE2 members from substitute oil-burning plants is not a relevant NEPA consideration in these matters. The Commission found

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<sup>2</sup> LILCO renewed its request that the Licensing Board decide the issue whether there is a categorical exclusion for the Security Plan Amendment in 10 C.F.R. § 51.22(c)(2). It cannot be done at this time because the Licensing Board, like the Petitioner, is not privy to the contents of the security plan. We will consider the matter at the appropriate time.

that “the alternative of ‘resumed operation’ — or other methods of generating electricity — are alternatives to the decision not to operate Shoreham and thus beyond Commission consideration.” CLI-90-8, 32 NRC at 207 (footnote omitted). The Licensing Board finds no merit to this claim of injury.

## **2. *The Atomic Energy Act (AEA) Issues***

### **a. *The Confirmatory Order Modification***

SE2’s amended petition provides no new basis for the Licensing Board to change its ruling that SE2 has not shown that it or its members will suffer a distinct and palpable harm that constitutes an injury, in fact, within the zone of interests protected by the AEA that is caused by the Confirmatory Order Modification.

Members’ generalized unsupported claims that the “Confirmatory Order also represents a threat to my personal radiological health and safety and to my real and personal property” do not meet the regulatory standard.

Neither does the members’ continuing to base their requested participation on presumed injury stemming from living, working, or having property within a 50-mile radius of Shoreham. The presumption is inapplicable because the license change does not involve a construction permit, an operating license, or a significant amendment that would involve an obvious potential for offsite consequences.

Although SE2’s Executive Director claims that there is an obvious potential for offsite consequences because of the plant’s degraded safety condition, he never convincingly explains how the Confirmatory Order Modification, which requires NRC approval before LILCO returns fuel to the reactor vessel, would involve an obvious potential for offsite consequences. That is the matter at issue and not the plant’s alleged degraded safety condition.

Members’ claims of harm as ratepayers and electricity users do not fall within the zone of interests protected by the AEA.

SE2 has not met the requirements for standing as provided for in section 2.714(a)(2) on AEA issues involving the Confirmatory Order Modification.

### **b. *The Security Plan Amendment***

SE2’s petition in large measure repeats what is contained in its original petition and what it submitted for the Confirmatory Order Modification. To avoid repetition, we will discuss the amended petition to the extent that it differs from the others that we have ruled on.

Petitioner claims that the proposed reduction in physical security of vital plant systems would unacceptably increase the risk of radiological sabotage and

hence adversely affect the radiological health and safety of Petitioner and its members. SE2 further asserts that it has not yet been allowed access to the changes in the physical security plan for Shoreham and is therefore limited to the extent to which the harm can be specified.

SE2 identifies the sequences for harm that could result from the reduction of security for a plant having "slightly radioactive fuel" as: (a) the theft and offsite transportation of the fuel and placement in water supplies to cause radiological harm; (b) the changing of the configuration of the fuel in such a manner so as to create further fission activities; (c) the theft of the fuel and diversion to weapons or terrorist purposes; and (d) creating panic on Long Island with ensuing personal health and property damage. Petitioner claims that the risk to members is enhanced by the elimination of emergency preparedness requirements.

SE2 appears to seek to invoke a presumption of injury for its members who reside, work, or have property within a 50-mile radius of Shoreham. Petitioner asserts that because the expansion of a spent fuel pool, with all safety systems functioning, creates an obvious potential for offsite consequences, an unavoidable inference must be drawn that a reduction in the measures against radiological sabotage must also involve an obvious potential for offsite consequences.

In the amended petition, SE2 raised as an additional specific aspect, whether the reduction in vital areas, vital equipment, and plant security staff will offer adequate assurance of the public health and safety to meet the design-basis threat of radiological sabotage, described in 10 C.F.R. § 73.1(a)(1).

LILCO, in its response, claims SE2 has not demonstrated standing to intervene. Licensee asserts that SE2 merely states that the reductions in plant vital areas and personnel "obviously" reduce the barriers against radiological sabotage but Petitioner has not shown it to be so. SE2 is said not to confront the fact that even with the granting of the amendment, the Shoreham security plan remained in full compliance with applicable NRC regulations. In support, LILCO cited the Staff's no significant hazards consideration determination in this matter. 55 Fed. Reg. 10,540 (Mar. 21, 1990).

LILCO contends that it is incumbent on Petitioner to explain why it believes that the amended security plan, which continues to meet the generic standards under 10 C.F.R. Part 73, would not provide a sufficient level of protection against radiological sabotage. Licensee further contends that the amended petition is based on abstract arguments and fanciful scenarios that are insufficient to support standing.

Staff states, in its response, that SE2 assumes that the smaller security force authorized by the amendment increases the risk of radiological sabotage, and further assumes an increased risk that terrorists will be able to use Shoreham's "slightly radioactive fuel" to make weapons. Staff claims that the assumptions

ignore the findings of the Staff in its Safety Evaluation of the Security Plan and demonstrate that SE2 has again failed to confront such findings.

Staff further asserts that because SE2's argument is based on the assumption that a plan that meets the Commission's regulations does not provide reasonable assurance against the risks of radiological sabotage, it constitutes an impermissible attack on the Commission's regulation, 10 C.F.R. § 73.55, and, as a result, may not be considered in this proceeding.

The Licensing Board concludes that SE2 has only partially satisfied the requirements for standing: (1) that the petitioner identify a particularized injury and (2) that it can be traced to the Security Plan Amendment.

The particularized injuries so identified by SE2 are: the theft and offsite transportation of the fuel and placement in water supplies to cause radiological harm; the changing of the configuration of the fuel in such a manner so as to create further fission activities; and the theft of the fuel and diversion to weapons. At this state of the adjudicatory process, a petitioner need only identify a particularized injury that could be caused by the proposed action, which SE2 has done.

Petitioner's claim of other injury, the theft of the fuel and diversion to "terrorist purposes," is too indefinite and incomplete to be considered as an identified particularized injury. SE2's claim of injury of panic with resultant damage to health and property is too nebulous to be considered as an identified injury.<sup>3</sup>

Petitioner has not met the standing requirement of showing that the claimed injury will result from the Security Plan Amendment.

The Licensing Board finds that the injury cannot be presumed to result from the action because SE2's members reside, work, or have property within a 50-mile radius of Shoreham. The 50-mile presumption is applicable where there is an obvious potential for offsite consequences which is not shown to exist here.

Petitioner claims that because the expansion of a spent fuel pool, with all safety systems functioning, creates an obvious potential for offsite consequences, then the same inference must be drawn when there is a reduction in the measures against radiological sabotage. That is an impermissible inference because Petitioner does not account for the fact that Shoreham is a defueled plant and for any differences in the amount of radiation of the respective fuel involved. Because the differences in circumstances are ignored by SE2, its postulated inference does not follow. SE2 cannot rely on an invalid inference to claim a

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<sup>3</sup>The claim of panic of the populace is a psychological stress issue. The Commission has held, in the case of NEPA, which can equally be applied here, that "the Commission's resources should be devoted primarily to addressing the safety issues which are or might be the causes of psychological stress on the part of some members of the public rather than to addressing the nature and extent of the stress itself." *Consideration of Psychological Stress Issues; Policy Statement*, 47 Fed. Reg. 31,762-63 (July 22, 1981).

presumption of injury in fact to its members resulting from the changes in the security plan.

SE2 also relies on an assumption that the changes in the security plan increase the possibility of radiological sabotage. This unsupported assumption is insufficient to establish the cause of the injuries and normally the petition to intervene would fail on that ground. However, Petitioner does not have access to the security plan for Shoreham and there is substance to its excuse for lack of specificity.

Both LILCO and Staff assert that SE2 has not shown that the reduction in plant vital areas and security personnel reduce the barriers against radiological sabotage and have not confronted LILCO's and Staff's conclusions to the contrary.

Both LILCO and Staff are correct in their assertions. However, without access to the security plan, SE2 is hindered in its ability to be specific on the issue that the change in the security plan reduces the barriers against radiological sabotage.

Staff's argument, that SE2's unwillingness to accept Staff's finding that the changes in the security plan provide reasonable assurance against the risks of radiological sabotage constitutes an impermissible attack on Commission regulation, is without merit. Section 73.55 of 10 C.F.R. sets a performance standard for the physical protection of licensed activities in nuclear power reactors against radiological sabotage. SE2 does not attack those performance standards. It questions LILCO's and Staff's claims that the performance standards are met by the change in the security plan. It is within Petitioner's rights to contest Staff's findings and is not an improper attack on Commission regulation.

The Licensing Board is faced with the conflicting requirements of not unfairly precluding Petitioner from possibly establishing standing where it is handicapped because of a lack of access to the security plan and the need to safeguard the plan and ensure that its terms are not needlessly disclosed.

To meet these requirements, the Licensing Board will defer ruling on standing at this time. Instead, we will permit SE2 to file a contention or contentions on the Security Plan Amendment as specified in 10 C.F.R. § 2.714(b).

In reviewing the merits of the contention(s), the Licensing Board will take into account SE2's lack of access to the security plan. Although the lack of the security plan may adversely affect SE2's ability to demonstrate that the security plan is the cause of the matter complained of, it should in no way otherwise hinder SE2's ability to establish the other elements of an acceptable contention, as provided for in section 2.714(b).

If the contention submitted is meritorious (taking into account SE2's handicap on the causal issue), the Licensing Board will further pursue with the participants the resolution of the problems relating to standing. If the contention is not

otherwise meritorious, the Licensing Board will decide the standing issue against the Petitioner.

Petitioner's claim that the injury risk is enhanced by the elimination of emergency preparedness requirements is not determinative of the standing issue and need not be considered further at this time.

Unlike the initial petition, the amended petition identifies a specific aspect relevant to the Security Plan Amendment, under the AEA, as provided for in section 2.714(a)(2). The aspect is whether the reduction in vital areas, vital equipment, and plant security staff will offer adequate assurance of the public health and safety and meet the design-basis threat of radiological sabotage.

### *c. The Emergency Preparedness Amendment*

SE2's amended petition significantly duplicates its initial petition and repeats the same positions it took on the Confirmatory Order Modification, all of which the Licensing Board found wanting to establish standing. SE2 had not shown that it or its members will suffer a distinct and palpable harm that constitutes an injury in fact within the zone of interests protected by the AEA that is caused by the Emergency Preparedness Amendment.

SE2 has added several new claims for standing into its amended petition. It claims that the amendment deprives the LILCO Emergency Response Organization (LERO) of adequate effectiveness to meet the requirements of 10 C.F.R. §§ 50.34, 50.47, 50.54, and Appendix E to Part 50 for a full-power operating license. No further elaboration is provided.

This claim is inadequate for standing. LILCO's compliance with the regulations for a full-power operating license is not the issue. Shoreham is a defueled facility and the issue is whether, within that context, the Emergency Preparedness Amendment will ensure compliance with the regulatory requirements. Furthermore, it is a bare allegation without the necessary specificity required to show a particularized injury.

Petitioner also contends that the elimination of LERO destroys LILCO's ability to ensure "a smooth evacuation" of the emergency planning zone in the event of a radiological incident. That is said to occur when the increased risk of a radiological incident is combined with the increased risk of a radiological incident due to the changed physical security plan.

The claim is defective because it fails to allege a cognizable injury in fact to the organization or its members that can be remedied under the AEA. There is no requirement in the regulation or elsewhere for "a smooth evacuation" of the emergency planning zone.

Also, Petitioner never explains why or how LILCO's alleged inability to conduct "a smooth evacuation" would come about from the combination of the Security Plan Amendment and the Emergency Plan Amendment license changes.

These vague generalities do not show that a particularized injury would result from the license amendments.

Members, in their affidavits claim that an accidental release of fission products would be significantly greater in adverse health and safety impacts absent the presence of LERO. There is no explanation as to how this can occur from a defueled plant with low burnup fuel on site and why they would be so harmed. It is another unsupported generality incapable of supporting standing.

Petitioner, in the amended petition, raises as issues (a) whether the Licensee furnished the Commission with a reasoned analysis, in compliance with Commission standards on the no significant hazards consideration, and (b) whether the 10 C.F.R. § 50.91(b) procedures were followed. Section 50.91(b) relates to Commission public notice of proposed no significant hazards consideration determinations.

Both LILCO and Staff have responded that a Licensing Board has no authority to entertain such questions, citing 10 C.F.R. § 50.58(b)(6). They are correct that both issues are beyond the scope of this proceeding. Section 50.58(b)(6) bars a hearing on Staff's significant hazards consideration determination.

SE2 has not met the requirements for standing, as provided for in section 2.714(a)(2); therefore, its petition, as amended, to intervene and to hold a hearing on the Emergency Preparedness Amendment is denied.

## **C. School District's Amended Petitions**

### ***1. The Confirmatory Order Modification***

School District's amended petition provides no information that would cure any of the substantive deficiencies for standing found by the Licensing Board in the original petition under NEPA and the AEA.

New matters in the amended petition include a claim by School District that the lack of an environmental assessment or EIS deprives Petitioner and its employee of the information that NEPA requires to be developed by the Staff for the benefit of the general public and the decision makers.

The President of the Board of Education of the School Board provided an affidavit that authorizes Petitioner to represent his interest. He asserts that his right to have an opportunity for meaningful comment on the environmental consideration of the decommissioning proposal will be prejudiced if not completely denied.

The President claimed to rely on presumed injury resulting from living within 2 miles of the facility and having property within a 50-mile radius of Shoreham. The Licensing Board had previously found that the presumption of injury is inapplicable in this proceeding.

School District's organizational interests are those of a ratepayer and tax recipient. These economic interests do not qualify it for standing under NEPA or the AEA.

Petitioner's and its employees' claim of a deprivation of information mandated by NEPA is vague and does not identify a cognizable palpable injury that would provide a basis for organizational or representational standing.

School District's amended petition repeats the same positions we found wanting in its original petition in LBP-91-1 or are identical to those in SE2's petitions on the Confirmatory Order Modification that we discussed above and found deficient.

School District's amended petition provides no new basis for the Licensing Board to change its ruling that it has not been shown that Petitioner or its members will suffer a distinct and palpable harm caused by the Confirmatory Order Modification that constitutes an injury in fact within the zone of interests protected by NEPA or the AEA.

School District has not met the requirements for standing as provided for in section 2.714(a)(2); therefore, its petition, as amended, to intervene and to hold a hearing on the Confirmatory Order Modification is denied.

## ***2. The Security Plan Amendment***

The School District's amended petition is duplicative of SE2's amended petition, except for the affidavit of the President of the Board of Education.

Petitioner makes the same claim as SE2 that the reduction in physical security of vital plant systems would increase the risk of radiological sabotage which would adversely affect the radiological health and safety of its employee. The School District identifies alleged sequences for harm that could result from the reduction of security for a plant having "slightly radioactive fuel." It also claims a lack of specificity because of no access to the security plan.

The affidavit of the President of the Board of Education repeats that the School District's and his interests are economic. They want Shoreham to continue to operate. He views the proposed amendment as a step in the decommissioning process for which he claims entitlement to NEPA review. The President views the proposed amendment as a threat to his personal radiological health and safety. He resides, recreates, and works within a 50-mile radius of the plant. The official claims that the proposed amendment, which allows reduction in the security force, increases the probability of radiological sabotage and increases the radiological hazard to the School District's students and employees. The President is concerned that if Shoreham shuts down, oil-burning plants will have to be built which will cause pollution and global warming which is detrimental to his health.

The Licensing Board has heard all of these positions previously because of the duplicative nature of the School District's submittals. Petitioner has not established standing under NEPA. Like SE2, we will not finally decide School District's standing under the AEA on the licensing change at this time. School District will be permitted to submit a contention or contentions on alleged radiological harm to Petitioner's employee stemming from the Security Plan Amendment, in accordance with section 2.714(b). The same conditions permitting the SE2 filing are applicable to School District.

### **3. *Emergency Preparedness Amendment***

School District's amended petition provides no basis for the Licensing Board to change its ruling that it has not been shown that Petitioner or its members will suffer a distinct and palpable harm, caused by the *Emergency Preparedness Amendment*, that constitutes an injury in fact within the zone of interests protected by NEPA or the AEA.

The petition is duplicative of School District's initial petition, as well as the petition it filed on the Confirmatory Order Modification and SE2's filings on the same matters. We previously described in our Memorandum and Order of January 8, 1991, why School District's arguments for standing are inadequate.

In summary, School District has not established an organizational interest that is qualifying for standing. Its amended petition failed to identify any particularized injury to itself or its members that can be traced to the *Emergency Preparedness Amendment*. It repeats positions previously advanced which have been denied.

School District has not met the requirements for standing as provided for in section 2.714(a)(2); therefore, its petition, as amended, to intervene and to hold a hearing on the *Emergency Preparedness Amendment* is denied.

## **V. CONCLUSION**

SE2 may file contentions, as prescribed under section 2.714(b), in the Confirmatory Order Modification, Security Plan Amendment, and the *Emergency Preparedness Amendment* proceedings on the NEPA issue and in the Security Plan Amendment proceeding on the AEA issue, as detailed in this Memorandum. The petitions for standing are otherwise denied.

School District may file contentions, as prescribed under section 2.714(b) in the Security Plan Amendment proceeding on the AEA issue as detailed in this Memorandum. The petitions for standing are otherwise denied.

The contentions will be considered at a prehearing conference whose agenda will follow that prescribed in 10 C.F.R. 2.751(a).

Contentions and answers will be required to be filed sufficiently in advance to ensure adequate preparation for the prehearing conference.

## Order

Based upon all of the foregoing, it is hereby ordered:

That SE2 and School District may file contentions in the manner prescribed in the Memorandum.

That SE2's and School District's petitions for standing beyond that for which approval was granted for filing contentions, are hereby denied.

That contentions shall be filed, in hand, with the Licensing Board and the participants, on June 21, 1991. LILCO shall file an answer, in hand, with the Licensing Board and the participants, on July 5, 1991, and Staff shall file its answer on July 12, 1991.

That the prehearing conference be held on July 23, 1991, at Hauppauge, New York.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

Morton B. Margulies, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
May 23, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Richard F. Cole  
Dr. Kenneth A. McCollom

In the Matter of

Docket Nos. 50-443-OLR-4  
50-444-OLR-4  
(ASLBP No. 90-620-04-OLR-4)  
(Offsite Emergency Planning)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

May 30, 1991

MEMORANDUM AND ORDER  
(Granting Licensees' Motion for Summary Judgment)

I. BACKGROUND

In this order we grant Licensees' motion for summary judgment on the last vestige of the issues involving radiological protective actions for the summer population at the beaches near the Seabrook Station.<sup>1</sup> The issue presented by the motion pertains to whether the New Hampshire Radiological Emergency Response Plan (NHRERP) currently provides for any type of sheltering for that population in a general emergency at the Seabrook Station. The lengthy and

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<sup>1</sup> Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939, March 29, 1991.

complex history of this issue is summarized in our memorandum of March 12, 1991.<sup>2</sup>

It has previously been established that the State of New Hampshire does not plan to employ sheltering generally as a protective action in the event of a radiological emergency at Seabrook. Rather, the State employs a "shelter-in-place" concept which means simply that those already at shelter when a respective protective action recommendation is received remain there. All others evacuate. Special provisions are made to evacuate the few who have no transportation available to them. A "shelter-in-place" protective action would be selected only in extremely rare circumstances.<sup>3</sup>

In ALAB-939 the Appeal Board identified several concerns about the use of a shelter-in-place protective action for the summer beach population. The Appeal Board directed this board to ensure that the record was clear with respect to those concerns. ALAB-939, 32 NRC 165, 178-80 (1990).

In the course of complying with that directive, it became apparent that, as a consequence of October 1988 amendments to the NHRERP (after the close of the relevant evidentiary record), all provisions for any form of sheltering, including shelter-in-place, had been removed from the NHRERP for the summer population at the beaches near the Seabrook Station in a general emergency. Thus the concerns set out in ALAB-939 would be moot.

We reported as much to the Appeal Board in LBP-91-8. There we certified a question as to whether the respective amendments to the NHRERP and the reliable information demonstrating that those amendments could be treated as resolving the matters posed in ALAB-939. LBP-91-8, 33 NRC at 208-09.

The Appeal Board agreed that the concerns identified in ALAB-939 would be resolved as moot provided that the "record itself reflects that . . . sheltering as a protective action for the general beach population . . . effectively has been discarded as such an option." ALAB-945, 33 NRC 175, 177 (1991). The matter was again left to this Board:

[T]o ensure, in the first instance, that the administrative record, as developed through summary disposition or other appropriate procedural avenues, reflects any information necessary to its resolution of the matters identified in ALAB-939.

*Id.* at 177-78. Since the record certified to the Appeal Board in LBP-91-8 already reflected reliable information sufficient to resolve as moot the matters identified in ALAB-939, we infer that the Appeal Board in ALAB-945 would

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<sup>2</sup> Memorandum (Certifying ALAB-939 Question), LBP-91-8, 33 NRC 197 (1991).

<sup>3</sup> See generally Memorandum and Order (Ruling on Certain Remanded and Referred Issues), LBP-90-12, 31 NRC 427 (1990).

require a recognized and traditional "procedural avenue" specified in the Rules of Practice to establish the relevant facts.

## II. LICENSEES' MOTION

Licenseses have employed an established procedural avenue, a motion for summary disposition, pursuant to the provisions of 10 C.F.R. § 2.749, to resolve the ALAB-939 matters. They submit a statement as to which, they state, there is no genuine issue to be heard:

1. Sheltering is not a planned protective option under the NHRERP for the general beach population in ERPA-A in a general emergency or in any other foreseeable circumstance.

Motion at 3.<sup>4</sup>

In support of the statement, Licenseses offer the following:

### A. Common Reference Document

1. A "Common Reference Document" was produced by Licenseses in accordance with a January 24, 1991 Order of this Board. The document consists of selected provisions of the NHRERP.

### B. Stipulation

2. Licenseses offer a stipulation dated February 12, 1991, by all participating parties, the State of New Hampshire, and FEMA that the Common Reference Document is complete and accurate in that it contains all provisions in the NHRERP and associated documents for protective actions to be taken in ERPA-A in the event of a general emergency for the period since August 1986 through the date of the stipulation. The stipulation was a consequence of the Board's January 24 Order. Together with the General Reference Document, the stipulation settles any dispute as to the actual provisions of the NHRERP with regard to protective actions for the beach population and the concerns stated in ALAB-939.

We find as fact in this proceeding the following excerpt from our report to the Appeal Board in LBP-91-8:

The Reference Document reveals that in the August 1986 version of the NHRERP, sheltering is recommended for portions of ERPA-A in a general emergency. Reference

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<sup>4</sup>ERPA-A is the area within 2 miles of the Seabrook Station including the Atlantic Ocean Beaches.

Document at 11. As late as the February 1988 version of the plan, sheltering remained a protective option for the seasonal beach population in ERPA-A during a general emergency. *Id.* at 35. Thereafter, beginning in October 1988, evacuation is always the protective action for ERPA-A in general emergencies. No aspect of sheltering is provided for ERPA-A in a general emergency. *Id.*, e.g., at 64, 79, 84, 85.

It should also be noted that the so-called "Condition (1)" and "puff release" and their various dimensions are not a part of the NHRERP. *Id.*, *passim*. In the one place where "shelter-in-place" is an option for the balance of the plume exposure EPZ because of evacuation constraints, the NHRERP cautions that at a general emergency, evacuation is nevertheless the preferred protective action for ERPA-A. *Id.* at 85-86.

LBP-91-8, 33 NRC at 205.

### C. New Hampshire's Memorandum on ALAB-939

Licensees also offer a statement by the Deputy Attorney General of the State of New Hampshire on the issue. Following ALAB-939, in response to our request for advice, the State of New Hampshire stated that the planned protective action for ERPA-A in a general emergency is evacuation. In particular, New Hampshire "reaffirms . . . that with respect to Condition (1), the short duration nonparticulate gaseous puff release, evacuation — not shelter-in-place — is the planned protective action."<sup>5</sup>

### D. Mr. Iverson's Attestation

Mr. George L. Iverson is the Director of the New Hampshire Office of Emergency Management. On January 23, 1991, he attested to the accuracy of the State's January 10, 1991 memorandum, *supra*. Tr. 28,493. Licensees offer this attestation as additional support for the statement as to which there is no genuine dispute.

## III. INTERVENORS' OPPOSITION

Intervenors oppose Licensees' motion by asserting a statement as to which they believe there is a genuine issue to be heard.<sup>6</sup>

The statement consists of two subissues:

1. Whether sheltering is an anticipated and thus, planned, protective action option under the NHRERP.

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<sup>5</sup> Memorandum of the State of New Hampshire on ALAB-939, January 10, 1991, at 1-2.

<sup>6</sup> Opposition of the Mass AG and NECNP to the Licensees' Motion for Summary Disposition, April 22, 1991, at 9.

2. Whether sheltering as it is presently a protective action option under the NHRERP accomplishes the stated goal of maximizing dose savings for the beach population of ERPA-A under the current provisions of the plan which contain no implementing procedures for that option and which apparently distinguish between different classes of beach goers.

### Intervenors' Opposition at 9.

As to the first subissue, Intervenors apparently forgot to limit the statement to a general emergency at ERPA-A for the summer beach population. That is the issue sent down in ALAB-939. 32 NRC at 179-80. There has never been a question as to whether the NHRERP provides for a form of sheltering in other portions of the 10-mile radius plume exposure pathway for Seabrook.<sup>7</sup> Since it is appropriate to resolve uncertainties in favor of a party opposing summary disposition, the Board infers the thoughts missing from subissue 1.

It is not so simple, however, to repair Intervenors' subissue 2. Its meaning is not clear. It may be that Intervenors are attempting to restate the issue remanded in ALAB-939. 32 NRC at 179-80. To add to the confusion, nowhere in Intervenors' Opposition do they even allude to ALAB-945, where the Appeal Board qualified the issue remanded in ALAB-939.<sup>8</sup>

Again, construing Intervenors' pleading in a light most favorable to them, we read the subissues together to assert that "shelter-in-place" remains a planned protective action option in the NHRERP for ERPA-A summer beachgoers in a general emergency (subissue 1); therefore, the issues remanded in ALAB-939 are not moot; thus they remain as genuine issues to be heard (subissue 2).

Intervenors submit the affidavit of Jeffrey Hausner in support of their statement. Mr. Hausner is a self-employed emergency planning consultant. He served as the Commonwealth of Massachusetts' principal official in the area of radiological emergency response from January 1985 to April 1991. Mr. Hausner is offered as an expert on the sheltering procedures of the NHRERP. Affidavit at 1, ¶ 1.<sup>9</sup>

Mr. Hausner states that "[i]t appears that the State of New Hampshire does anticipate implementing shelter as a protective action recommendation for the population . . . of ERPA-A under certain conditions." Affidavit at 2, ¶ 7. The

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<sup>7</sup> See generally Reference Document and Stipulation. See also Partial Initial Decision on the NHRERP, LBP-88-32, 28 NRC 667, 750-76 (1988) (Section 8, Sheltering of Beach Population).

<sup>8</sup> ALAB-945, 33 NRC at 177-78.

<sup>9</sup> Contrary to the statement in his affidavit, Mr. Hausner's professional resume was not attached to the copies served upon the Licensing Board. However, his affidavit itself establishes threshold qualifications as an expert.

Mr. Hausner's service as the leading Massachusetts radiological emergency planning official spanned the litigation on Seabrook offsite emergency planning issues. But he played no role known to us in the resolution of those issues. The Massachusetts Attorney General represented to NRC adjudicators throughout the evidentiary hearing that Massachusetts emergency planning officials had no information, and would not accept information, about the Seabrook offsite radiological emergency plans. We found this representation to be incredible. Partial Initial Decision, LBP-89-32, 30 NRC 375, 595-96, 601-07 (1989).

statement is correct with respect to a *site area emergency*.<sup>10</sup> But the sheltering litigation on remand has been concerned with a *general emergency*. *E.g.*, ALAB-924, 30 NRC 331, 363-64 (1989); Tr. 28,467-69, 28,471-73, 28,485, 28,487-88, 28,494. The parties stipulated that the General Reference Document was accurate and complete for the purposes of the remanded issue, and as can be seen, the document deals throughout with protective actions at the general emergency level. Mr. Hausner's statement, taken at face value, shows no genuine issue to be heard.

Mr. Hausner may simply have overlooked the need to limit his opinion to the general emergency level, although we would have expected a radiological emergency planning expert with his credentials to be more careful in making the argument he undertakes in his affidavit. Assuming, for the purpose of analysis, that Mr. Hausner is addressing protective action options in a general emergency in ERPA-A, we need to understand his reasons for asserting that "New Hampshire does anticipate implementing sheltering" in that circumstance. He acknowledges that the NHRERP itself does not provide for sheltering in ERPA-A and that the respective NHRERP procedures provide only for evacuation. Affidavit at 2, ¶ 8.

The only reasoning we can infer for Mr. Hausner's opinion that "New Hampshire does anticipate implementing shelter as a protective action recommendation" is his reasoning that New Hampshire *should* do so because of the advantages of that option and because of the guidance in NUREG-0654/FEMA REP 1. Affidavit at 2-3, ¶¶ 3-10. But the Intervenor have lost that argument many times, and they lose again today. LBP-88-32, 28 NRC at 775-76 (New Hampshire need only carefully consider sheltering option); ALAB-924, 30 NRC at 368 (implementing measures required so long as sheltering is a protective action under the NHRERP); CLI-90-3, 31 NRC 219, 244 (1990) (pertinent regulatory guidance does not require sheltering), *aff'd*, *Commonwealth of Massachusetts v. NRC*, 924 F.2d 311, 329-30 (D.C. Cir. 1991); ALAB-939, 32 NRC at 178 (Appeal Board remands do not direct planning officials to adopt sheltering of the general beach population). Most recently the Appeal Board rejected virtually the identical argument by Intervenor in ALAB-945. 33 NRC at 177 n.10, 178; *see also* ALAB-747, 33 NRC 299, 337-38 (1991).

Licensees' statement as to which they assert there is no genuine issue to be heard is supported by the administrative record of this proceeding. Intervenor's opposition to Licensees' motion and Mr. Hausner's affidavit do not set forth specific facts showing that there is a genuine issue of fact to be heard within the scope of the remand in ALAB-939 and ALAB-945. *See* 10 C.F.R. § 2.749(b).

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<sup>10</sup> State of New Hampshire's Comments Regarding Applicants' Response to Licensing Board Order of January 11, 1990, February 16, 1990, with Iverson and Wallace Affidavits attached.

#### IV. ORDER

Licensees' motion for summary disposition is *granted*. The directive in ALAB-939 is *resolved as moot*.

#### THE ATOMIC SAFETY AND LICENSING BOARD

Richard F. Cole  
ADMINISTRATIVE JUDGE

Kenneth A. McCollom (by I.W.S.)  
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
May 30, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-322

LONG ISLAND LIGHTING  
COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

May 14, 1991

The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a petition filed by James P. McGranery, Jr., on behalf of the Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. (SE2), requesting action with regard to the Shoreham Nuclear Power Station, Unit 1. Specifically, the petition alleged that the storage by the Licensee of certain reactor components on the south separator/reheater roof raised questions as to whether the Licensee is violating NRC regulations and a Confirmatory Order and that granting the Licensee's application for a license amendment allowing shipment of these parts for burial would be contrary to NRC requirements. The petition requested that the Commission issue a Notice of Violation including a proposed civil penalty to the Licensee and order the Licensee to implement a remedial plan to bring the Licensee into compliance with the Confirmatory Order and other requirements and to ensure that these reactor parts are properly preserved. The Director grants the petition to the extent that it requests that the NRC take action to prevent the Licensee from shipping the components for burial, and denies the Petitioners' requests that the Commission issue a Notice of Violation and order the Licensee to implement a remedial plan.

## **RULES OF PRACTICE: SHOW-CAUSE PROCEEDING**

The institution of proceedings pursuant to 10 C.F.R. §2.202 is appropriate only where substantial health and safety issues have been raised.

### **DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**

#### **INTRODUCTION**

On July 14, 1989, James P. McGranery, Jr., filed a request with the Executive Director for Operations pursuant to 10 C.F.R. §2.206 on behalf of the Shoreham-Wading River Central School District requesting that action be taken with regard to the Shoreham Nuclear Power Station, Unit 1 (hereinafter School District Petition). The School District supplemented this Petition by a letter of July 19, 1989. By letter of July 20, 1989, I acknowledged receipt of the School District Petition. The School District responded to my letter by letter of July 21, 1989.

On July 26, 1989, Mr. McGranery filed a Petition on behalf of Scientists and Engineers for Secure Energy, Inc. (SE2) (hereinafter SE2 Petition). The Petition stated that SE2 adopted and incorporated the July 14 request made by the School District as supplemented on July 19 and July 21, 1989, and requested that its Petition be consolidated with that of the School District. By letter of August 21, 1989, I acknowledged receipt of the SE2 Petition. A notice was published in the *Federal Register* indicating that the Petitioners' requests were under consideration. 54 Fed. Reg. 36,077 (Aug. 31, 1989). On July 31, 1989, and January 23, April 5, May 4, November 14, and November 29, 1990, additional supplements to the Petitions filed by the School District and SE2 were submitted.

On December 20, 1990, I issued a Director's Decision under 10 C.F.R. § 2.206 (DD-90-8, 32 NRC 469) resolving all of the issues raised in the School District and SE2 Petitions<sup>1</sup> with the exception of those issues discussed in the Petitioners' November 29, 1990 supplement, and stated that the issues raised in that supplement would be addressed by a separate Director's Decision.

In their November 29 supplement, the Petitioners stated that the Long Island Lighting Company (LILCO) had "recently" informed the NRC that it was storing 137 fuel support castings and 12 peripheral pieces from the Shoreham reactor vessel on the south separator/reheater roof above the turbine deck,

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<sup>1</sup> On August 4, 1989, Leonard Bickwit, Jr., submitted a Petition on behalf of the Long Island Association requesting action regarding the Shoreham facility similar to that requested by Mr. McGranery and on similar bases. All of the issues raised in that Petition also were resolved in DD-90-8.

causing LILCO to post a "high radiation area." According to the Petitioners, those circumstances raised questions as to whether LILCO is violating NRC regulations and a Confirmatory Order issued on March 29, 1990, that required continued maintenance of structures, systems, and components necessary for full-power operation. The Petitioners also noted the pendency of a LILCO application for a license amendment that would allow LILCO to ship these parts for burial to the low-level waste storage facility at Barnwell, South Carolina. The Petitioners alleged that such a license amendment would be contrary to "the decision reached by the Commission on recommendations of SECY-89-247," other regulatory requirements of 10 C.F.R. Chapter I, the Low-Level Waste Policy Amendments Act of 1985, and the National Environmental Policy Act of 1969, as amended (NEPA), and that an attempt to bury these parts before issuance and judicial review of a possession-only license would violate section 236 of the Atomic Energy Act, 42 U.S.C. § 2284, which provides for criminal penalties for certain acts relating to sabotage of nuclear facilities or fuel. Consequently, the Petitioners requested that the Commission issue a Notice of Violation including a proposed civil penalty and a remedial action plan to bring LILCO into compliance with the Confirmatory Order and other requirements and to ensure that these reactor parts are properly preserved.

I have now completed my evaluation of the Petitioners' supplement of November 29, 1990. I have determined, for the reasons set forth below, that the Petition should be granted in part and denied in part.

## BACKGROUND

On February 28, 1989, LILCO entered into an agreement with the State of New York to transfer its Shoreham assets to an entity of the State of New York for decommissioning (Transfer Agreement). However, LILCO continued to seek from the NRC issuance of a full-power license to operate the Shoreham Station. On April 21, 1989, the NRC issued Facility Operating License No. NPF-82 to LILCO, which allows full-power operation of the Shoreham plant. On June 28, 1989, LILCO's shareowners ratified LILCO's Transfer Agreement with the State of New York.

Consistent with the Transfer Agreement, which prohibits LILCO from further operating the Shoreham facility, LILCO began to defuel the facility on June 30, 1989, completed defueling on August 9, 1989, and reduced its operating and support staff. On September 19, 1989, LILCO submitted a letter to the NRC committing to protect those systems not required for safety in the defueled mode but necessary for full-power operation consistent with NRC regulations and LILCO's license obligations. Further, LILCO is discontinuing customary maintenance for systems that LILCO considers unnecessary to support opera-

tion when all the fuel is placed in the spent fuel pool, by deenergizing and protecting these systems rather than maintaining them in a condition ready for operation. On January 12, 1990, LILCO submitted a letter to the NRC in which LILCO stated that it would not place nuclear fuel back into the reactor without first receiving the NRC's approval. On March 29, 1990, the NRC issued a Confirmatory Order. (55 Fed. Reg. 12,758 (Apr. 5, 1990)) that prohibits the Licensee from placing fuel back into the reactor vessel without first receiving approval from the NRC and that further states the following:

This Confirmatory Order in no way relieves the licensee of the terms and conditions of its operating license or of its commitments covering the continued maintenance of structures, systems, and components outlined in its letter of September 19, 1989.

On June 28, 1990, LILCO and the Long Island Power Authority (LIPA) submitted a joint application for an amendment to LILCO's license to authorize the transfer of the Shoreham facility to LIPA. That application is still pending before the Staff. A notice regarding this application was published in the *Federal Register* on March 20, 1991 (56 Fed. Reg. 11,781).

By letter of November 8, 1990, LILCO informed the Staff that it intended to ship 137 fuel support castings and 12 peripheral pieces to the low-level radioactive waste repository at Barnwell, South Carolina, before December 7, 1990. On November 14, 1990, the Staff responded to LILCO's letter of November 8, by informing LILCO that such an activity requires the NRC's authorization and that the Staff was processing its letter of November 8 as a request for an amendment to its license. After reviewing this request, the Commission determined to deny the request for amendment and published a Notice of Amendment Denial in the *Federal Register* on April 12, 1991. (56 Fed. Reg. 16,132).

## DISCUSSION

The Petitioners alleged that LILCO is storing 137 fuel support castings and 12 peripheral pieces from the Shoreham reactor vessel on the south separator/reheater roof above the turbine deck, causing the Licensee to post, in accordance with 10 C.F.R. Part 20, the only "high radiation area now in effect at the plant." The Petitioners alleged that this action raises questions as to whether LILCO is violating NRC regulations and the March 29, 1990 Confirmatory Order requiring continued maintenance of structures, systems, and components necessary for full-power operation.

The Staff has determined that LILCO's storage of the 137 fuel support castings and the 12 peripheral pieces on site does not violate the Shoreham license or any other NRC requirement. In particular, the onsite storage of

these components does not violate the Confirmatory Order of March 29, 1990, because the storage of the components was not prohibited by that Order. The March 29th Order prohibited only the placing of nuclear fuel into the Shoreham reactor vessel without prior NRC approval. Although the Order emphasized that it in no way relieved the Licensee of complying with its license or its commitments of September 19, 1989, regarding maintenance of structures, systems, and components, the storage of the components is not inconsistent with the Shoreham license or those commitments. LILCO's storage of these components is consistent with its commitment in its September 19, 1989 letter to protect systems not required for safety in the defueled mode but necessary for full-power operation on a cost-effective basis consistent with NRC regulations and LILCO's license obligations pending plant disposition.

The Petitioners further alleged that a license amendment allowing LILCO to ship these parts for burial would be contrary to "the decision reached by the Commission on recommendations of SECY-89-247," other regulatory requirements of 10 C.F.R. Chapter I, the Low-Level Waste Policy Amendments Act of 1985, and NEPA, and that an attempt to bury these parts while LILCO possesses a full-power license would violate section 236 of the Atomic Energy Act. Consequently, the Petitioners request that the Commission take prompt action to investigate LILCO's conduct, and correct and prevent alleged violations of the Atomic Energy Act and NEPA.

After a careful review of LILCO's request to ship the fuel support castings and peripheral pieces of the Shoreham reactor vessel for burial, the Staff concluded that the request cannot be approved. Specifically, the Staff concluded that LILCO's request was premature while LILCO still possesses a full-power operating license. Accordingly, on April 12, 1991, the NRC issued a Notice of Denial of Amendment to Facility Operating License and Opportunity for Hearing (56 Fed. Reg. 16,132) and an associated safety evaluation (dated April 12, 1991), which denied LILCO's request. Therefore, to the extent that the Petition requests that the Commission take action to prevent LILCO from shipping the 137 fuel support castings and 12 peripheral pieces off site for burial while still possessing a full-power license, that aspect of the Petition has been granted. In view of the denial of LILCO's request for the amendment to its license to allow the shipment of these components for disposal prior to issuance of a possession-only license, it is not necessary to address the Petitioners' specific assertions that such an amendment would be contrary to the Commission's decision on recommendations of SECY-89-247, the regulatory requirements of 10 C.F.R. Chapter I, the Low-Level Waste Policy Amendments Act of 1985, and NEPA, and that burial of these parts would violate the Atomic Energy Act.

The Petitioners also assert that the Commission should take prompt action to investigate LILCO's conduct and correct and/or prevent alleged violations of the Atomic Energy Act and NEPA, and issue a Notice of Violation, including a

proposed civil penalty, to LILCO. However, as explained above, the components are presently being preserved in onsite storage in compliance with LILCO's September 19, 1990 commitment letter, the March 29, 1990 Confirmatory Order, the Shoreham license, and all other NRC regulations. Because the Licensee is complying with the Confirmatory Order and other requirements, there is no basis to issue a Notice of Violation, including issuance of a proposed civil penalty. Therefore, to the extent that the Petition requests that the Commission take enforcement action including issuing a Notice of Violation and proposed civil penalty to LILCO, the Petition is denied.

Finally, the Petitioners assert that the NRC should issue a remedial action plan to bring LILCO into compliance with the Confirmatory Order and other requirements to ensure proper preservation of these reactor internal components. However, these components are presently being maintained and preserved in accordance with all regulatory requirements, the storage of these components has not violated any regulatory requirements, and no substantial health and safety issues have been raised. Consequently, to the extent that the Petition requests that the Commission issue a remedial action plan to LILCO, the Petition is denied.<sup>2</sup>

## CONCLUSION

For the reasons stated above, I find that, to the extent that the Petition requests that the Commission take action to prevent LILCO from shipping certain fuel support castings and peripheral pieces from the Shoreham reactor vessel to the Barnwell, South Carolina, low-level waste storage facility for burial, the Petition is granted.

With regard to the Petitioners' request that the Commission issue a Notice of Violation, including a proposed civil penalty, there are no violations of NRC requirements that would provide a basis for such action. With respect to the Petitioners' request that the Commission order LILCO to implement a remedial action plan, the institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised (see *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3),

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<sup>2</sup> Petitioners incorporate by reference a November 29, 1990 submission in connection with the Staff consideration of the Licensee's request to submit the reactor components for burial ("Comment on Proposed No Significant Hazards Consideration Determination, Request for Hearing, Notice of Intent to Intervene, and Opposition to Issuance of Amendment by and on Behalf of Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc.," as corrected and supplemented). The Staff has reviewed this document and determined that no additional information has been provided which was not considered in determining to deny the Licensee's request. Because the Licensee's request to ship these components at this time while in possession of a full-power license has been denied, it is not necessary to address in this decision, the arguments in the Petitioners' November 29, 1990 submission.

CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984)). This is the standard that I have applied to the concerns raised by the Petitioners in this decision to determine whether a remedial action plan should be ordered. For the reasons discussed above, I conclude that the Petitioners have not raised any substantial health and safety issues. Accordingly, this request is denied.

Accordingly, the Petition is granted in part and denied in part. A copy of this Decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR  
REGULATORY COMMISSION

Thomas E. Murley, Director  
Office of Nuclear Reactor  
Regulation

Dated at Rockville, Maryland,  
this 14th day of May 1991.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtliss  
Forrest J. Remick

In the Matter of

Docket No. 50-322

LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

June 12, 1991

The Commission considers Petitioners' "stay" motion as a motion to reconsider two earlier holdings; and to hold further Shoreham-related proceedings in abeyance. The Commission declines to reconsider its decisions in CLI-90-8 and CLI-91-2; it further denies Petitioners' requests for the NRC Staff to cease review of pending matters and to hold all future Shoreham proceedings in abeyance. The Commission thereby approves the Staff's recommendation to issue a "possession-only" license for Shoreham, subject to an administrative stay.

**RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)**

The NRC's "stay" criteria found at 10 C.F.R. §2.788(e) are designed for those situations in which parties before the Commission seek to "stay" the effectiveness of a decision that has already occurred, pending some additional event — generally, further appeal within the NRC's adjudicatory system.

**RULES OF PRACTICE: FORM OF MOTION**

In considering a petitioner's filing, the Commission will look at the nature of the pleading before it, not to the fashion in which it is styled.

**RULES OF PRACTICE: LIMITS ON PARTICIPATION**

A party that has not attempted to intervene under 10 C.F.R. § 2.714(a)(1), or to participate under 10 C.F.R. § 2.715(c), may only proceed under the *amicus* provisions of 10 C.F.R. § 2.715(d).

**RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)**

In circumstances where a petitioner's pleading, when viewed correctly, is not a "stay request" as that term is properly defined, reliance on 10 C.F.R. § 2.788(e) is inappropriate, and analysis of the traditional four "stay criteria" is unnecessary.

**RULES OF PRACTICE: REQUESTS TO HOLD COMMISSION ACTION IN ABEYANCE**

**RULES OF PRACTICE: STAY OF AGENCY ACTION (NATURE OF REQUEST)**

Where a pleading requests the Commission not to take action in the future, that request is properly considered as a "Motion to Hold in Abeyance," not as a "Motion for Stay."

**RULES OF PRACTICE: STAY OF AGENCY ACTION (LENGTH OF REQUEST)**

Where a petitioner's request is not properly filed under 10 C.F.R. § 2.788(e), the Commission will not reach the question of whether petitioner's entire original pleading should have been stricken as being in excess of the 10-page limit provided in 10 C.F.R. § 2.788(d).

**RULES OF PRACTICE: STANDING TO PARTICIPATE**

The party that will receive a nuclear plant in a sale is a party to the proceeding to transfer the license.

## **RULES OF PRACTICE: MOTIONS (REPLIES TO RESPONSES)**

Under the Commission's regulations at 10 C.F.R. §2.730, a party has no *right* to file a reply to the responses to their motions. Such a reply is permitted only at the discretion of the . . . Secretary or the Assistant Secretary.

## **RULES OF PRACTICE: MOTIONS (REPLIES TO RESPONSES)**

In exercising its discretion to permit a party to file a reply pleading, the Commission emphasizes that the number of pages filed by respondents is irrelevant to that decision. Movants are expected to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly.

## **NRC: SCOPE OF AUTHORITY**

In its earlier decisions in which it found that NEPA only requires the NRC to consider alternative *methods* of decommissioning, the Commission reiterates that that portion of the decision was based upon the *nature* of the action in question, not on the *likelihood* of the action occurring.

## **OFFICIAL NOTICE OF FACTS**

Lacking a basis to look behind a licensee's statement, the Commission must accept that licensee's declaration at face value.

## **DECOMMISSIONING: RIGHT TO DECOMMISSION FACILITY**

A licensee is capable of deciding to decommission a nuclear facility at any time in the operating life of the plant.

## **RULES OF PRACTICE: REQUESTS TO HOLD COMMISSION ACTION IN ABEYANCE**

If a decision on a pleading before a tribunal other than the NRC will have no impact on the NRC proceeding, there is no reason for the NRC to hold its proceeding in abeyance.

**OPERATING LICENSE AMENDMENTS: NO SIGNIFICANT HAZARDS CONSIDERATION**

A license amendment may be issued as immediately effective when the Staff makes a finding that the amendment involves “no significant hazards considerations.”

**OPERATING LICENSE: AMENDMENTS (IMMEDIATELY EFFECTIVE)**

An “immediately effective” amendment changing a license to a “possession-only” license may be issued without prejudice to Petitioners’ rights in the license amendment proceeding before the Licensing Board.

**NRC: SUPERVISORY AUTHORITY**

To permit the orderly processing by the Court of Appeals of an anticipated request to stay any NRC action, the Commission has the discretion to issue an administrative stay of the effectiveness of that action in order to allow orderly judicial review.

**MEMORANDUM AND ORDER**

**I. INTRODUCTION**

This matter is before the Commission on a pleading by the Shoreham–Wading River Central School District (“School District”) and the Scientists and Engineers for Secure Energy (“SE2”) (jointly “Petitioners”) styled as a “Joint Motion to Stay or Vacate License Issuance and Other Matters.” Briefly stated, the Joint Motion requests the Commission (1) to refrain from issuing a “possession-only” license or “POL” for the Shoreham facility; (2) stay further proceedings by the Atomic Safety and Licensing Board (“Licensing Board”); and (3) stay further NRC Staff review of other pending applications for related amendments to the Shoreham license, while awaiting the outcome of pending litigation before the New York Court of Appeals regarding the Shoreham facility.

We have received responses from the NRC Staff, the Long Island Lighting Company (“LILCO”), the Long Island Power Authority (“LIPA”), and Mario M. Cuomo, Governor of the State of New York (collectively “respondents”). We have entered an order granting Governor Cuomo’s unopposed motion to file his response as an *amicus* pleading under 10 C.F.R. § 2.715(d). LIPA, while

not officially a party to any adjudicatory proceeding currently pending before the Commission, has declined to file its response as an *amicus*, asserting that it has a right to file as a participant because it alleges that it "will be" a party to several of the proceedings that the Petitioners wish to have stayed. In reply to the four responses filed by the Staff, LILCO, LIPA, and Governor Cuomo, the Petitioners have filed a motion for leave to file a "reply" pleading, responding to various arguments raised by LILCO, LIPA, Governor Cuomo, and the Staff. The Staff and LILCO have responded in opposition to the motion for leave to file the "reply."

After due consideration, we have determined that the Petitioners' pleading does not properly constitute a "stay" motion as that term is defined in our regulations. Instead, Petitioners' pleading is more properly considered as (1) a motion for reconsideration of two earlier decisions, and (2) a motion to hold in abeyance current and possibly future proceedings dealing with Shoreham. We have then decided as a matter of discretion to consider LIPA's response as an *amicus* pleading in response to the first motion and as a party to the second motion. In addition, we have decided to consider the Petitioners' "reply." Turning finally to the main issue before us, we have denied the motion for reconsideration and we have also denied the motion to hold all other Shoreham-related proceedings in abeyance.

## II. PREVIOUS COMMISSION PROCEEDINGS

This Order is simply the latest in a long line of Commission orders dealing with the Petitioners' attempts to block the sale and possible decommissioning of the Shoreham facility. Petitioners' basic argument is that the National Environmental Policy Act ("NEPA") requires the NRC to publish an Environmental Impact Statement ("EIS") considering "resumed operation" of Shoreham as an alternative to decommissioning. Petitioners further allege that this NEPA duty must be discharged immediately because of preliminary activities by the NRC Staff.

We have disagreed with Petitioners' basic NEPA theory. *E.g.*, CLI-90-8, 32 NRC 201 (1990), *aff'd on reconsideration*, CLI-91-2, 33 NRC 61 (1991). Moreover, we issued further guidance regarding the relationship of the "possession-only" license and a decommissioning plan when forwarding Petitioners' requests to intervene in LILCO's request for a "possession-only" license to the Licensing Board. CLI-91-1, 33 NRC 1 (1991).

### III. NEW YORK JUDICIAL PROCEEDINGS

The proceedings before the New York Court of Appeals are three related challenges to a Settlement Agreement between the State of New York and LILCO. The Settlement Agreement resolved the opposition of the State of New York, the County of Suffolk, and the Town of Southampton to the licensing of Shoreham. The Agreement provided, *inter alia*, that LILCO would not operate Shoreham as a nuclear plant; instead, LILCO agreed to sell Shoreham for \$1.00 to LIPA, which was established to obtain and decommission Shoreham. In return, LILCO received numerous financial benefits, including various tax benefits from the New York state government and favorable rate increases from the New York Public Service Commission. *See generally* CLI-90-8, 32 NRC at 204-05. Petitioners and other parties attacked the Settlement Agreement in the New York courts on various grounds including violations of substantive New York law and the state's constitution.

Initially, the Settlement Agreement was upheld in unanimous opinions by the New York Supreme Court and the Appellate Division. *See Citizens for an Orderly Energy Policy v. Cuomo*, 144 Misc. 2d 281 (N.Y. Sup. Ct. 1989), *aff'd*, 159 A.D.2d 141, 559 N.Y.S.2d 381 (A.D. 3 Dept. 1990); *Dollard v. Long Island Power Authority*, 159 A.D.2d 141, 559 N.Y.S.2d 381 (A.D. 3 Dept. 1990); *Nassau Suffolk Contractor's Ass'n, Inc. v. Public Service Commission*, \_\_\_ A.D.2d \_\_\_, 559 N.Y.S.2d 393 (A.D. 3 Dept. 1990). Moreover, the Appellate Division denied permission to appeal in all three cases. *See, e.g., Nassau Suffolk, permission denied*, 76 N.Y.2d 982, 563 N.Y.S.2d 769 (1990). However, the New York Court of Appeals granted leave to appeal in all three cases. *See* \_\_\_ N.Y.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_ (Feb. 19, 1991). Oral argument in all three cases is scheduled for September 11, 1991.

### IV. ARGUMENTS OF THE PARTIES

Petitioners' argument centers on the action by the New York Court of Appeals. The Court of Appeals granted "leave" to appeal under standards that appear to mirror the *certiorari* provisions of the U.S. Supreme Court. In their "Stay Request," Petitioners provide statistics for the year 1989 as published in official court publications which indicate that in such situations, the Court of Appeals reverses approximately 40% of those decisions that it reviews and modifies approximately 4% more. Petitioners provide calculations to support their argument that the 40% rate of reversal, when combined with three separate cases being appealed, constitutes over a 70% chance that one of the three cases involving the Shoreham agreement may be reversed. Thus, argue the Petitioners,

they have demonstrated that they have a “probability of success on the merits” of their appeals justifying a stay of further Commission proceedings.

After asserting that they satisfy the remaining “stay” criteria found in 10 C.F.R. § 2.788, i.e., irreparable injury, lack of injury to others, and the public interest, the Petitioners argue that the Commission should “stay” all Shoreham-related actions pending the outcome of the New York proceedings. They assert that if the agreement is vacated, our decisions in CLI-90-8 and CLI-91-2, *supra*, will be undercut extensively, if not voided altogether. Thus, they argue, the NRC should defer action pending a decision by the New York Courts out of “comity,” citing *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968). Furthermore, Petitioners argue that the NRC is the only forum in which they can seek such a stay because the New York Rules of Court do not allow for stays pending appeal by the New York Court of Appeals.

The respondents appear not to disagree with the Petitioners’ central observation — that the Court of Appeals reverses a substantial portion of cases that it accepts under its *certiorari* standard — although they take issue with the calculation of the 70% figure.<sup>1</sup> Instead, they argue that the NRC expressed two separate holdings in CLI-90-8 and CLI-91-2: first, that the NRC has no control over the private decision to close Shoreham and thus NEPA does not require an analysis of “resumed operation” as an alternative to decommissioning; and second, that resumed operation is not a “reasonable alternative” to decommissioning because it is “speculative.” Respondents appear to concede that a decision by the New York Court of Appeals might impact the second alternative holding, but they contend that such a decision would not affect the first holding. Thus, they argue, a decision vacating the Settlement Agreement will not remove the legal underpinnings of the Commission’s position.

Moreover, LILCO states in its response that it will never operate the plant under *any* circumstances, i.e., that there is no chance that any action by the Court of Appeals vacating the Settlement Agreement will ever prompt LILCO to operate the plant. Accordingly, LILCO and the other respondents argue that resumed operation still is not a “reasonable alternative” to decommissioning. Therefore, argue the respondents, because a decision by the Court of Appeals will not force resumption of operations, there is no need to “stay,” or hold in abeyance, any other Shoreham-related proceedings.

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<sup>1</sup> Additionally, while respondents appear to argue that the New York Court of Appeals *should* have authority to issue stays on matters before it, and that Petitioners should attempt to exhaust such avenues, we find no citation to any authority that the Court of Appeals *does* have such authority.

## V. ANALYSIS

### A. Characterization of Petitioners' Request

Initially, we are not satisfied that Petitioners' pleading is actually a "stay" request as defined in our regulations. True, the Petitioners' pleading is styled as a "stay request" and asks for a "stay" of all current and future Commission, Staff, and Licensing Board actions. However, our "stay" criteria found at 10 C.F.R. § 2.788(e) are designed for those situations in which parties before the Commission seek to "stay" the effectiveness of a decision that has already occurred, pending some additional event — generally, further appeal within the NRC's adjudicatory system. Here, neither the Commission nor the NRC Staff has yet taken any action on any of the matters that the Petitioners wish to have delayed that have any "final" consequences.

Instead, Petitioners' request is more in the nature of (1) a "motion to reconsider" and (2) a "motion to hold in abeyance." The "motion to reconsider" aspect of the request asks us to reconsider — again — our holdings in CLI-90-8, as affirmed by CLI-91-2, on the basis of "newly discovered" information, i.e., the recent decision by the New York Court of Appeals to, in effect, grant *certiorari* to the Petitioners and others in their attempt to overturn the settlement agreement between LILCO and the State of New York on the basis of New York law. Meanwhile, the "motion to hold in abeyance" aspect asks us to order that all other Commission, Licensing Board, and Staff activities regarding Shoreham be held in abeyance pending the outcome of the New York judicial proceedings.<sup>2</sup> We will consider both motions separately in sections "D" and "E" below.

### B. LIPA's Pleading

LIPA filed its response to the Petitioners' "Joint Petition" without a request for leave to file as an "*amicus*" under 10 C.F.R. § 2.715(d) because it asserts that it has an interest in several of the actions that the Petitioners seek to have held in abeyance. However, LIPA has not formally intervened in *any* of the matters now pending before the Commission or the Licensing Board, i.e., either (1) the Petitioners' request for hearings regarding the three matters at issue in CLI-90-8 and CLI-91-2, or (2) the Petitioners' request for a hearing regarding the requested "possession-only" license. See CLI-91-1. By this time, the period for timely intervention in those proceedings has expired.

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<sup>2</sup>Because, viewed correctly, the original "Joint Petition" is not a "stay request" as that term is properly defined, reliance on section 2.788(e) is inappropriate and analysis of the traditional four "stay criteria" is unnecessary. Therefore, because the Petitioners' request is not properly filed under section 2.788(e), we will not reach the question — correctly raised — of whether Petitioners' entire original pleading should have been stricken as being in excess of the 10-page limit provided in 10 C.F.R. § 2.788(d).

In view of the above, LIPA can only proceed in these matters as an *amicus* under section 2.715(d) by satisfying the five criteria for late intervention under 10 C.F.R. § 2.714(a)(1)(i)-(v), or by seeking to participate as an interested government agency under 10 C.F.R. § 2.715(c). Because LIPA has not attempted to intervene under section 2.714(a)(1), or to participate under section 2.715(c), the only course left to it is to proceed in these matters under section 2.715(d). However, LILCO and LIPA have submitted a request to transfer Shoreham from LILCO to LIPA. The Staff has noticed this request in the *Federal Register*, see 56 Fed. Reg. 11,768 (Mar. 20, 1991), and both Petitioners have filed petitions for intervention and requests for hearings. See Petitions of April 19, 1991. LIPA is certainly a party to that proceeding. Thus, as a matter of Commission discretion, we have filed LIPA's response as an *amicus* pleading under section 2.715(d) to the motion for reconsideration and as a party's response to the motion to hold pending proceedings in abeyance.

### C. Petitioners' Reply

Petitioners seek to file an additional pleading as a "reply" to the responses of LILCO, LIPA, Governor Cuomo, and the Staff. The Petitioners argue that the respondents filed a "blizzard" of paper in response to the Petitioners' initial pleading and that the respondents raised arguments that were unanticipated. The Petitioners' initial pleading was hardly a model of brevity. In any event, the Petitioners have no *right* to file a reply to the responses to their motions. "The moving party shall have no right to reply [to a response or "answer" to a motion] except as permitted by the . . . Secretary or Assistant Secretary." 10 C.F.R. § 2.730. Nevertheless, after reviewing the Petitioners' reply, we find that it contributes to our understanding of Petitioners' arguments. In fact, it presents the Petitioners' arguments more cogently than the original pleading. Thus, while we do not wish to provide incentive to future movants to file additional and unnecessary pleadings, we have decided to accept Petitioners' "reply" pleading in this instance. We emphasize that the number of pages filed by respondents is irrelevant to our decision here. We expect future movants to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly.

### D. Petitioners' Motion for Reconsideration

Succinctly stated, Petitioners first argue that: (1) the New York Court of Appeals has granted leave to appeal in the three Shoreham-related cases filed in New York when the Appellate Division of the New York Supreme Court denied leave to appeal; (2) that in those instances in which the Court

of Appeals grants leave to appeal in this manner, it reverses the decision of the lower court in a substantial number of cases; and thus, (3) the status of the Settlement Agreement is open to serious question. Then, the Petitioners' argument continues, because the status of the Settlement Agreement is open to serious question, the Commission's decisions in CLI-90-8 and CLI-91-2 are in doubt because those decisions were based upon the validity of the Settlement Agreement. Specifically, Petitioners argue that the Commission's first holding in CLI-90-8 and CLI-91-2 — that the decision not to operate Shoreham is not a federal decision — is seriously undercut and the second holding — that "resumed operation" is not a "reasonable alternative" — is destroyed altogether.

While we find the Petitioners' statistical argument to be confusing and, to the extent that it is clear, incorrect, we acknowledge that there is certainly a "nontrivial" possibility that the Settlement Agreement may be either modified or vacated. Indeed, respondents do not challenge this rather obvious conclusion.

Nevertheless, such a decision modifying or vacating the Settlement Agreement would not have an adverse impact on our primary holding, i.e., that the decision not to operate Shoreham is a private decision and that NEPA only requires the NRC to consider alternative *methods* of decommissioning. See CLI-90-8, 32 NRC at 207-08; CLI-91-2, 33 NRC at 70-71. That portion of our decision was based upon the *nature* of the action in question, not on the *likelihood* of the action occurring. Any decision not to operate Shoreham will still be made by LILCO (or LIPA) and will still be a private decision, regardless of the probability of its occurrence. Thus, as a starting point for our analysis, this independent basis for our prior decision will be unaffected by any New York Court of Appeals' decision on the validity of the Settlement Agreement.<sup>3</sup>

As to our second holding, we note that LILCO has now stated that, *regardless* of the outcome of the New York litigation, it is committed *not* to operate Shoreham under *any* circumstances. See LILCO Response at 10. Petitioners characterize that response as merely "arm waving," and allege that LILCO is "contractually obligated" to make that assertion. See Joint Reply at 3 n.3. However, the Commission has no basis to look behind LILCO's statement, and, accordingly, we will accept LILCO's declaration at face value. Given this, we see no compelling reason to reconsider our view that resumed operation of Shoreham is remote and speculative.

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<sup>3</sup> Petitioners argue that the NRC has found that, "but for" a legally valid settlement agreement, LILCO "would not be able to seek permission to decommission the facility." See CLI-91-2, 33 NRC at 71. See Joint Petition at 19. Quite simply, the Commission did not intend to rule that a legally valid Settlement Agreement is a necessary prerequisite to an application to decommission Shoreham. Clearly, LILCO's ability to decide to decommission Shoreham does not rest on the effectiveness of the Settlement Agreement. LILCO — or any licensee, for that matter — is capable of deciding to decommission a nuclear facility at any time during the operating life of the facility. Our wording in CLI-91-2 should not be interpreted in a manner that is inconsistent with that position.

## E. Petitioners' Motion to Hold in Abeyance

Essentially, Petitioners argue that because the issues before the New York Court of Appeals are central to the decisions to be made in this case, and because there is no mechanism by which they can seek a stay before the New York Court of Appeals, the Commission should stay all further adjudicatory proceedings and Staff actions pending a decision by that court. We cannot agree. As we noted above, we find that there is no basis to change our ruling that NEPA does not require consideration of "resumed operation" as an alternative to decommissioning. Thus, there is nothing before the New York Court of Appeals that is central to our decisions.<sup>4</sup>

## VI. THE "POSSESSION-ONLY" LICENSE

LILCO has sought an amendment to the Shoreham license that changes the license from one that authorizes LILCO to "possess, use, and operate" Shoreham to one that authorizes LILCO to "possess, use, but not operate" Shoreham. See CLI-91-1, 33 NRC at 3. The Staff proposes to issue the license amendment as immediately effective, after making a finding that the amendment involves "no significant hazards considerations." See 55 Fed. Reg. 34,098 (Aug. 21, 1990). Petitioners have filed comments opposing the Staff's proposed finding and have requested a hearing and intervention. See CLI-91-1, *supra*. We have forwarded the requests to intervene to the Licensing Board for further action as appropriate. See *id.* at 7.

The NRC Staff has now recommended that it be allowed to issue such a license amendment. See SECY-91-129 (May 13, 1991). The Staff served a copy of that paper on all interested parties, including Petitioners. See 10 C.F.R. § 2.781(a)(2). The Petitioners have had an opportunity to file comments in response to the Staff's recommendation. After due consideration, we hereby approve the Staff's recommendation that it be allowed to issue the license amendment, without prejudice to Petitioners' rights in the license amendment proceeding before the Licensing Board. Cf. 10 C.F.R. § 2.764.

## VII. ADMINISTRATIVE STAY

We understand that Petitioners may seek judicial review of this action and, in the process, may seek a judicial stay of our action authorizing the issuance

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<sup>4</sup>We assume, for purposes of discussion, that Petitioners correctly state New York law regarding the availability of stays before the New York Court of Appeals. As we noted earlier, see note 1, *supra*, respondents argue that the Court of Appeals *should* have such authority, but they never affirmatively state — with citation — that the Court of Appeals *does* have such authority.

of a POL. To permit the orderly processing of such a stay request by the Court of Appeals, we will adopt a two-stage administrative stay of the effectiveness of the POL. Initially, we will stay the effectiveness of the POL until ten (10) working days after the date of publication of the amendment in the *Federal Register*. If Petitioners file a motion for stay with the appropriate U.S. Court of Appeals within that time, the administrative stay will be automatically extended for an additional ten (10) working days to provide the court with the time to review the matter.

## VIII. CONCLUSION

For all the foregoing reasons, we deny Petitioners' request to reconsider CLI-90-8 and CLI-91-2. We also deny Petitioners' request to hold further adjudicatory proceedings in abeyance, and we deny Petitioners' request that we direct the Staff to cease review of all other pending applications for related amendments to the Shoreham license. We hereby approve the Staff's recommendation that it be allowed to issue a "possession-only" amendment to the Shoreham operating license, subject to the administrative stay described above.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 12th day of June 1991.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtliss  
Forrest J. Remick

In the Matter of

Docket Nos. 50-445  
50-446

RICHARD E. DOW

June 20, 1991

The Commission denies Mr. Dow's motion to quash a subpoena that requires him to produce documents identifying individuals who allegedly informed him of safety-related deficiencies at Comanche Peak and containing information regarding the allegations. The subpoena remains in force with a return date of July 10, 1991.

**RULES OF PRACTICE: SUBPOENA**

It is inherently reasonable that notice of a motion to quash or modify a subpoena be provided to the person requesting the subpoena at the same time it is provided to the Commission.

**RULES OF PRACTICE: NONTIMELY MOTIONS**

In deciding whether to dismiss a motion on grounds of failure to file in a timely fashion, the Commission may consider all the circumstances surrounding the filing.

## **RULES OF PRACTICE: STAFF RESPONSIBILITIES**

It is the Staff's responsibility to review and resolve allegations regarding public health and safety. See, e.g., *United States v. Comley*, 890 F.2d 539, 542 (1st Cir. 1989). "To deny [the Staff] the opportunity to gather relevant information for [this] undeniably proper purpose[] would be to thwart its effort to better execute its responsibilities." *United States v. McGovern*, 87 F.R.D. 590, 593 (M.D. Pa. 1980).

## **RULES OF PRACTICE: STAFF AUTHORITY**

The NRC Staff not only has the right to investigate allegations regarding the public health and safety, it has the duty to do so.

## **RULES OF PRACTICE: SUBPOENA**

The Commission cannot allow the recipient of a subpoena to be able to avoid that subpoena by simply alleging that the records sought by the subpoena contain information of Staff misconduct.

## **RULES OF PRACTICE: SUBPOENA**

In a situation where Staff misconduct is alleged, the Staff should coordinate receipt and review of materials subpoenaed in support of the allegations with the Office of the Inspector General.

## **RULES OF PRACTICE: CONFIDENTIAL INFORMATION**

The NRC Staff must "carefully and conscientiously" explore any possible alternative methods of obtaining information from an allegor's sources in order to protect their confidentiality and to minimize any intrusion into the allegors' First Amendment association rights. See *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987).

## **RULES OF PRACTICE**

Under appropriate circumstances, an allegor's First Amendment rights must give way to the "compelling" interest in the public health and safety.

## MEMORANDUM AND ORDER

This matter is before the Commission on a motion by Richard E. "Mickey" Dow to quash a subpoena *duces tecum* issued to him by the NRC Staff. The NRC Staff has filed a response as we directed. For the reasons explained below, we deny the motion to quash.

### I. BACKGROUND

#### A. Mr. Dow's Initial Discussions with the NRC

Mr. Dow first communicated with the NRC Staff in January 1991. During subsequent discussions with both the technical staff and the NRC's Office of Investigations ("OI"), Mr. Dow apparently presented a number of allegations regarding the status of the Comanche Peak nuclear power plant. These allegations were based upon information provided to Mr. Dow by other persons. After reviewing his allegations, both OI and the technical staff informed Mr. Dow that they had not found any evidence of regulatory violations at Comanche Peak.

Among the items Mr. Dow discussed with the Staff and OI were sixteen audio tapes created by the TU Electric switchboard monitoring system. Mr. Dow informed the Staff and OI that he had obtained these tapes from a former plant employee. At that time, Mr. Dow did not allege that the tapes themselves contained any information regarding violations of NRC regulations.

#### B. Mr. Dow's April 9, 1991 Petition

On April 9, 1991, Mr. Dow filed a "Petition for Temporary Restraining Order and Preliminary Injunction" in the U.S. District Court for the Northern District of Texas. In this pleading, Mr. Dow sought to enjoin the refueling and operation of Comanche Peak, Unit 1, and the continuing construction of Unit 2. The District Court dismissed the petition for lack of jurisdiction. *See Dow v. Comanche Peak Steam Electric Station*, No. 4-91-0255-E (N.D. Tex. Apr. 11, 1991).<sup>1</sup>

In his petition, Mr. Dow alleged, *inter alia*, that he had raised various safety concerns with the NRC and that he did not believe that these concerns had been satisfactorily resolved. He also alleged — for the first time — that

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<sup>1</sup>Mr. Dow has filed an appeal from this decision. The U.S. Court of Appeals for the Fifth Circuit has denied his request for an injunction pending appeal. *See Dow v. Comanche Peak Steam Electric Station*, No. 91-1444 (5th Cir. May 9, 1991). The Fifth Circuit has also denied his Petition for Writ of Mandamus, directing the District Judge to grant the requested injunction. *See Dow v. McBryde*, No. 91-1451 (5th Cir. May 7, 1991).

a person who had listened to the tapes had informed him that the sixteen tapes contained conversations between NRC officials and TU Electric officials concerning hazardous conditions at the plant and that on at least one occasion, NRC officials had given TU Electric permission to ignore possible hazardous conditions at the facility.

On April 19, 1991, Region IV Staff members conducted a transcribed interview with Mr. Dow under oath. While he provided the names of some of his informants and some additional details, he refused to provide the names of individuals whom he stated did not wish to be identified because they feared harassment. He also refused to provide the name of another individual whom he said did not wish to be identified because that individual did not believe the NRC would take any action.

Mr. Dow also refused to provide the NRC with the tapes he alleged contained the information cited in his petition. He admitted that he himself had only listened to a portion of the sixteen tapes and that he personally had not heard any information that he considered relevant to NRC activities. However, he alleged that three of his "sources" had informed him that the tapes contained conversations between NRC officials and plant officials and that the person who had provided him with the tapes had refused to permit him to release the tapes.

On April 29, 1991, Mr. Dow reiterated his refusal to release the tape recordings in a telephone conversation with NRC Staff members. In response, on May 8, 1991, the NRC Staff informed Mr. Dow that it could not initiate any action based upon the concerns he had expressed because his information lacked sufficient detail and because he had refused to provide the names and telephone numbers of these individuals so that the NRC could interview them directly.

## II. THE NRC STAFF SUBPOENA

On May 10, 1991, the NRC Staff issued a subpoena to Mr. Dow. The subpoena was signed by Robert D. Martin, Regional Administrator, NRC Region IV, and was returnable on May 20, 1991, at the Region IV Headquarters in Arlington, Texas, approximately a 2-hour drive from Mr. Dow's residence. The subpoena sought two classes of records from Mr. Dow. First, the subpoena directed Mr. Dow to provide "for copying such reports, memoranda, letters, notes, and any other records or documents in your possession, or control, which you allege contain information concerning safety-related deficiencies at Comanche Peak . . . ."

## Second, the subpoena sought

for copying at the same time any reports, memoranda, letters, notes or any other records or documents in your custody, control, or possession, which identify the telephone numbers or addresses or both the telephone numbers and addresses of persons whom you identified during your interview . . . as allegedly having informed you of safety-related deficiencies at Comanche Peak . . . .

The subpoena informed Mr. Dow that any request to quash or modify the subpoena would have to be in "the hands of the Secretary of the Commission no later than 4:00 p.m., May 17, 1991." Furthermore, the subpoena itself contained the facsimile number for the Office of the Secretary. Finally, the subpoena informed Mr. Dow that if he filed such a motion, he should provide "notice to the party at whose instance the subpoena was issued . . . ."

### III. THE MOTION TO QUASH

The Commission has received a letter from Mr. Dow that essentially constitutes a motion to quash. The letter is dated May 17, 1991, but was not provided to the Commission until sometime later. A copy of Mr. Dow's motion was provided to the Region IV Regional Counsel in Arlington, Texas, on May 20, 1991. The Office of the General Counsel provided the motion to the Secretary on May 21, 1991; after receiving it from the Regional Counsel. The Secretary has received no other copy of the motion.

According to the Staff's response, a friend of Mr. Dow's provided a copy of the letter to the Region IV counsel and informed counsel that Mr. Dow had delivered the letter to the Commission's former address in downtown Washington, D.C. Mr. Dow did not inform the Office of the Secretary directly, either by mail, facsimile, telephone, or by leaving the motion at the Commission's Public Document Room.

### IV. ARGUMENTS

Mr. Dow claims that his material will indicate a situation of "duplicitous and compromise" between NRC Region IV, TU Electric, and a citizens' group. Moreover, he believes that the tapes contain conversations regarding violations of the Atomic Energy Act and that only the Office of Inspector General ["OIG"] should have jurisdiction of this matter. Mr. Dow does not otherwise challenge the scope, purpose, or service of the Staff subpoena.

The Staff responds that Mr. Dow has alleged the existence of safety concerns or violations of the Atomic Energy Act. Because it is charged with protecting

public health and safety, argues the Staff, it has a right to uncover information surrounding those allegations. Furthermore, this responsibility is a proper purpose for issuing a subpoena.

Moreover, the Staff argues that the OIG is well aware of the matter because the Regional Administrator himself notified the OIG of these allegations on April 18, 1991, and formally referred the matter to the OIG on May 21, 1991. In the Staff's view, upholding the subpoena will not prevent Mr. Dow from bringing his allegations to the attention of the OIG. Accordingly, Mr. Dow's unsupported allegations should not be allowed to defeat an otherwise valid subpoena.

## V. ANALYSIS

### A. The Timeliness of the Motion to Quash

Before we turn to the merits of Mr. Dow's motion, we address its timeliness. Clearly, Mr. Dow did not comply with terms of the subpoena in filing his motion to quash because he did not properly notify the Office of the Secretary within the time specified, despite the fact that the subpoena itself supplied the facsimile number for filing a motion with the Commission on short notice. Nor did he inform the Region IV Office of his motion, i.e., provide "notice to the party at whose instance the subpoena was issued," as the subpoena required, until May 20, 1991, the date the subpoena was returnable. We agree with the Staff that it is inherently reasonable that notice of a motion to quash or modify a subpoena be provided to the person requesting the subpoena at the same time it is provided to the Commission.

In its response, the Staff advised us that there are some indicia that Mr. Dow made a "good-faith attempt" to serve the motion on the Secretary personally, although at the incorrect address. Under all the circumstances, we decline to dismiss the motion on timeliness grounds and, instead, consider it on its merits.

### B. The Merits of the Motion to Quash

Quite simply, Mr. Dow has alleged that TU Electric has committed violations of the NRC's public health and safety regulations and of the Atomic Energy Act at Comanche Peak. It is the Staff's responsibility to review and resolve allegations regarding public health and safety. *See, e.g., United States v. Comley*, 890 F.2d 539, 542 (1st Cir. 1989). "To deny [the Staff] the opportunity to gather relevant information for [this] undeniably proper purpose[] would be to thwart its effort to better execute its responsibilities." *United States v. McGovern*, 87 F.R.D. 590, 593 (M.D. Pa. 1980).

In sum, the NRC Staff not only has the right to investigate these allegations, it has the duty to do so. Therefore, the Staff has the right to require Mr. Dow to substantiate his allegations. *Cf. Joseph J. Macktal*, CLI-89-12, 30 NRC 19 (1989); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6 (1987). The Staff is entitled to review the material upon which Mr. Dow relies to support his allegations, as identified in the subpoena. This material clearly includes the tapes.

Essentially, Mr. Dow argues that because he has alleged misconduct on the part of the NRC Staff, we should quash the Staff's subpoena and transfer jurisdiction of the case to the OIG. We disagree. We cannot allow the recipient of a subpoena to be able to avoid that subpoena by simply alleging that the records sought by the subpoena contain information of Staff misconduct.

As the Staff correctly notes, the OIG is well aware of this matter because the Staff itself has referred the matter to the OIG. The OIG is perfectly capable of issuing its own subpoena for the requested material if it believes such a course of action is appropriate. We have no reason to believe that enforcement of this subpoena will in any way prevent the OIG from reviewing the tapes or any other information, should the OIG decide to do so. In the interests of orderly process, however, the Staff should coordinate receipt and review of the tapes with the OIG, in the event that the OIG exercises its discretion to do so.

### C. The Confidentiality of Mr. Dow's Sources

We note that the second paragraph of the subpoena asks for information disclosing the identities of Mr. Dow's sources. The Staff believes that it needs to interview these individuals in order to substantiate their technical concerns. As we noted earlier, Mr. Dow states that he will not disclose the identities of some of his sources because those sources fear that disclosure of their names to the Staff would lead to the disclosure of their names to TU Electric, leaving those individuals open to harassment and intimidation by the utility.

In a recent similar situation, an individual who alleged the existence of safety violations at another nuclear plant argued that disclosure of the identities of the sources of that information to the Staff could result in those persons choosing not to bring forward information in the future. In that case, the court held that the NRC must explore any possible alternative methods of obtaining the requested information from those individuals in order to protect their confidentiality and to minimize any intrusion into the alleged First Amendment association rights. *See United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987). However, the *Garde* Court also pointed out that "it is clear that under appropriate circumstances . . . [the] First Amendment rights would give way to the compelling government interest in nuclear safety." *Id.* at 606.

In order to avoid any possible infringement on Mr. Dow's associational rights — and to provide the opportunity for Mr. Dow's sources to maintain their confidentiality — we direct the Staff to discuss with Mr. Dow various alternative means of interviewing the individuals whose allegations he has presented. For example, the Staff may offer formal protection to these individuals under the confidentiality provisions of NRC Manual Chapter 0517. We do not direct the Staff to choose any particular alternative; nor do we expect the staff necessarily to accede to all of Mr. Dow's requests. The *Garde* Court made clear that persons who present allegations cannot "dictate how the NRC conducts its affairs." 673 F. Supp. at 606. We only hold that the Staff must "carefully and conscientiously" explore all reasonable alternatives to obtain the identities of these individuals in order to protect their confidentiality. *U.S. v. Garde, supra*.

## VI. CONCLUSION

For the foregoing reasons, we have denied the motion to quash. The subpoena remains in force and the new return date is 10:00 a.m. on Wednesday, July 10, 1991, at Suite 1000, 611 Ryan Plaza Drive, Region IV, Arlington, Texas.

It is so ORDERED.

For the Commission<sup>2</sup>

SAMUEL J. CHILK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 20th day of June 1991.

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<sup>2</sup> Commissioner Rogers was not present for the affirmation of this order; if he had been present he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL PANEL

Christine N. Kohl, Chairman<sup>1</sup>

In the Matter of

CAROLINA POWER AND LIGHT  
COMPANY  
(H.B. Robinson, Unit 2)

Docket No. 50-261  
(Operating License Amendment)

VIRGINIA ELECTRIC AND  
POWER COMPANY  
(North Anna Power Station,  
Units 1 and 2)

Docket Nos. 50-338  
50-339  
(Operating License)

FLORIDA POWER & LIGHT  
COMPANY  
(St. Lucie Nuclear Power Plant,  
Unit 2)

Docket No. 50-389  
(Construction Permit)

CAROLINA POWER AND LIGHT  
COMPANY  
(Shearon Harris Nuclear  
Power Plant, Units 1, 2, 3,  
and 4)

Docket Nos. 50-400  
50-401  
50-402  
50-403  
(Construction Permit)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)<sup>1</sup>

Docket Nos. 50-443  
50-444  
(Construction Permit)

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<sup>1</sup> Issued pursuant to 10 C.F.R. § 2.787(b)(2).

**KANSAS GAS AND ELECTRIC  
COMPANY and KANSAS CITY  
POWER AND LIGHT COMPANY**  
(Wolf Creek Generating Station,  
Unit 1)

**Docket No. STN 50-482  
(Construction Permit)**

**June 11, 1991**

In order to clear the docket following abolition of the Atomic Safety and Licensing Appeal Panel, the Panel Chairman issues an order referring six proceedings to the Commission. The proceedings have been in abeyance pending final Commission action on one issue, the health effects of radon emissions.

## **ORDER**

The six proceedings listed in the above caption still remain pending before various Appeal Boards for consideration of one "generic" issue — i.e., the health effects of radon-222 emissions.<sup>2</sup> In 1982, several Appeal Boards resolved this issue in a consolidated "lead" proceeding involving three other facilities,<sup>3</sup> but a petition for review of the Boards' decision (ALAB-701) was filed with the Commission. The Commission stayed ALAB-701 and deferred action on the petition for review, pending further rulemaking activity in the area of mill tailings regulation.<sup>4</sup> Further action on the other proceedings that remained before various appeal boards (including the six proceedings identified above<sup>5</sup>) was therefore deferred as well.

The Commission has yet to take final action on the petition to review ALAB-701, and thus these six proceedings technically remain in abeyance before appeal boards. The Commission, however, has abolished the Atomic Safety

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<sup>2</sup> See *Carolina Power and Light Co.* (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 562 (1979); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-676, 15 NRC 1117, 1134 n.66 (1982); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-603, 12 NRC 30, 33 n.2, 65 n.132 (1980); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241-42 (1978); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-557, 10 NRC 153, 157 n.10 (1979); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 340 n.38 (1978). See also *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-480, 7 NRC 796 (1978); 43 Fed. Reg. 15,613, 15,615-16 (1978) (Commission directs radon issue to be addressed in all proceedings then pending before licensing or appeal boards, whether or not that issue had been placed in contest by a party).

<sup>3</sup> *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-701, 16 NRC 1517 (1982).

<sup>4</sup> *Id.*, CLI-83-14, 17 NRC 745 (1983).

<sup>5</sup> The radon issue originally remained open in a number of other proceedings as well. But due to the cancellation of the involved plants over the intervening years, only these six are left.

and Licensing Appeal Panel and it will soon cease to exist. In order to clear the Panel's docket, these proceedings are accordingly *referred* to the Commission for eventual disposition when the radon matter is finally resolved.

It is so ORDERED.

FOR THE APPEAL PANEL

Barbara A. Tompkins  
Secretary to the  
Appeal Panel

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman  
Howard A. Willber  
G. Paul Bollwerk, III

In the Matter of

Docket Nos. 50-443-OL-1  
50-444-OL-1  
(Emergency Planning Issues)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Units 1  
and 2)

June 21, 1991

The Appeal Board affirms the Licensing Board's order, LBP-89-38, 30 NRC 725 (1989), denying the intervenors' motions to admit late-filed contentions and reopen the record concerning the September 1989 Seabrook onsite emergency exercise.

**OPERATING LICENSE: EMERGENCY PREPAREDNESS (ONSITE EXERCISE)**

**REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX E, § IV.F.1)**

The "exercise" that is the subject of the third and fourth sentences of section IV.F.1 is plainly distinct from, and supplemental to, the "full participation" exercise that the first two sentences require. Consequently, the structure of the provision and the placement of footnote 4 are such that the footnote plays no part in defining the term "exercise" in the third sentence.

**OPERATING LICENSE: EMERGENCY PREPAREDNESS (ONSITE EXERCISE)**

**REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX E, § IV.F.1)**

The third and fourth sentences of section IV.F.1 do not require that the scope of a preclicensing onsite exercise be synonymous with that of a full participation exercise so as to include all major observable elements of the onsite plan.

**APPEARANCES**

**John Traficonte**, Boston, Massachusetts, **Diane Curran**, Washington, D.C., and **Robert Backus**, Manchester, New Hampshire, for the intervenors **Attorney General of Massachusetts**, **New England Coalition on Nuclear Pollution**, and **Seacoast Anti-Pollution League**, respectively.

**Thomas G. Dignan, Jr.**, **George H. Lewald**, and **Jeffrey P. Trout**, Boston, Massachusetts, for the applicants **Public Service Company of New Hampshire**, *et al.*

**Lisa B. Clark** for the Nuclear Regulatory Commission staff.

**MEMORANDUM AND ORDER**

Before us is the appeal of the intervenors, the Massachusetts Attorney General, the Seacoast Anti-Pollution League, and the New England Coalition on Nuclear Pollution, from the Licensing Board's memorandum and order in LBP-89-38.<sup>1</sup> That order denied the intervenors' motions to admit late-filed contentions and reopen the record relating to the September 1989 Seabrook onsite emergency exercise and their motion for summary disposition on those contentions. The applicants, the Public Service Company of New Hampshire, *et al.*, and the NRC staff oppose the intervenors' appeal. For the reasons that follow, we affirm the Board's denial of the intervenors' motions.

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<sup>1</sup> 30 NRC 725 (1989).

## I.

The Commission's emergency planning regulations, 10 C.F.R. Part 50, Appendix E, § IV.F.1, require that a full participation exercise testing both onsite and offsite emergency response plans must be conducted within two years before issuance of the initial full-power operating license for a power reactor. If the full participation exercise is conducted more than one year prior to issuance of a full-power operating license, then the regulations provide that an exercise testing only an applicant's onsite emergency plan must be conducted within one year before such licensure. Applicants did not receive a full-power operating license for the Seabrook facility by the first anniversary of the June 1988 Seabrook full participation exercise. They also failed in an attempt to obtain an exemption from the onsite exercise requirement.<sup>2</sup> As a consequence, to fulfill the regulatory requirements for a full-power operating license, the applicants conducted an onsite exercise on September 27, 1989.

Two days later, the intervenors filed a motion with the Licensing Board to admit a contention alleging that the applicants' preclicensing onsite exercise had not met the requirements of Appendix E, § IV.F.1, because it failed to test "all or even a significant number of the major observable portions of the Seabrook Station [Radiological Emergency Response Plan]."<sup>3</sup> Following the staff's issuance of a favorable inspection report covering the applicants' preclicensing onsite exercise, the intervenors filed a second motion to admit another contention on October 13, 1989.<sup>4</sup> The second contention listed a number of perceived shortcomings in the scope of the applicants' preclicensing onsite exercise and, like the first contention, alleged that the September 27 exercise had not met the requirements of Appendix E, § IV.F.1, because it failed to test the major observable portions of the onsite plan.<sup>5</sup> On October 16, 1989, the intervenors filed a third motion seeking to amend their earlier motions in order to address the pleading requirements of 10 C.F.R. § 2.734 for motions to reopen the record.<sup>6</sup> That motion was followed on October 18 by the intervenors' fourth motion that sought summary disposition of their two proffered preclicensing onsite exercise contentions.<sup>7</sup>

In its December 1989 decision denying the intervenors' motions to admit the preclicensing onsite exercise contentions, the Licensing Board first determined

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<sup>2</sup> See CLI-89-19, 30 NRC 171 (1989).

<sup>3</sup> Intervenors' Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (Sept. 29, 1989), Attach. A at 1 [hereinafter First Motion Contention].

<sup>4</sup> Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (Oct. 13, 1989).

<sup>5</sup> *Id.*, Attach. A at 2-3 [hereinafter Second Motion Contention].

<sup>6</sup> Intervenors' Motion to Amend Intervenors' Motions of September 29, 1989 and October 13, 1989 to Admit Contentions on the September 27, 1989 Onsite Emergency Plan Exercise (Oct. 16, 1989).

<sup>7</sup> Intervenors' Motion for Summary Disposition on Contentions JI-Onsite Ex-1 and JI-Onsite Ex-2 (Oct. 18, 1989).

that the contentions were deficient for failing to allege either that there was a fundamental flaw in the applicants' onsite emergency plan or that the scope of the preclicensing exercise was insufficient to reveal a fundamental flaw in the plan — essential prerequisites under agency case law for contentions challenging the adequacy of any emergency response exercise.<sup>8</sup> Next, the Board concluded that the intervenors' motions must meet the requirements of 10 C.F.R. § 2.734 for reopening the record, but determined that their motions failed to address a significant safety issue — a principal criterion for record reopening required by section 2.734(a)(3).<sup>9</sup> In this same vein, it decided that the intervenors' motions failed to comply with the express requirement of section 2.734(b) that reopening motions must be accompanied by affidavits setting forth the factual or technical bases for reopening the record.<sup>10</sup> The Board also found that a balancing of the five factors in 10 C.F.R. § 2.714(a)(1) governing the admission of late-filed contentions, weighed against admitting the intervenors' preclicensing onsite exercise contentions.<sup>11</sup> Finally, in denying the intervenors' motions, the Board rejected their interpretation of Appendix E, § IV.F.1, that provides the legal underpinning for both of their exercise contentions. Contrary to the construction of the regulations contained in the intervenors' contentions, the Licensing Board held that the agency's regulations do not require that the scope of a preclicensing onsite exercise be synonymous with that of a full participation exercise so as to include all major observable elements of the onsite plan.<sup>12</sup>

## II.

On appeal, the intervenors challenge each of the Licensing Board's five grounds for denying their motions to admit the preclicensing onsite exercise contentions. Because each of the Board's stated grounds is independently dispositive of the intervenors' motions, our affirmance on any one ground is sufficient to uphold the Board's denial of the motions. We need not, therefore, freight our decision with a discussion of all of the Board's alternative holdings. Rather, we will consider only the intervenors' attack upon the Board's interpretation of Appendix E, § IV.F.1 — the central legal issue before us. The Board rejected the intervenors' reading of the Commission's regulation that forms the legal premise of both contentions. Without the foundation of the intervenors' interpretation, it is undisputed that their preclicensing onsite exercise contentions cannot stand.

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<sup>8</sup> LBP-89-38, 30 NRC at 730-32, 740.

<sup>9</sup> *Id.* at 732-40.

<sup>10</sup> *Id.* at 733-34, 740.

<sup>11</sup> *Id.* at 740-41.

<sup>12</sup> *Id.* at 741-45.

The premise of the intervenors' onsite exercise contentions is that Appendix E, §IV.F.1, requires that, as with a full participation exercise, the prelicensing onsite exercise must test the major observable portions of the applicants' onsite emergency plan. According to the proffered contentions, the applicants' September 1989 exercise did not test certain specified portions of the onsite plan, thus making the exercise legally insufficient to support the issuance of a full-power operating license for Seabrook.<sup>13</sup> In its entirety, the pertinent regulation states that

A full participation<sup>4</sup> exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted for each site at which a power reactor is located for which the first operating license for that site is issued after July 13, 1982. This exercise shall be conducted within two years before the issuance of the first operating license for full power (one authorizing operation above 5% of rated power) of the first reactor and shall include participation by each State and local government within the plume exposure pathway EPZ and each State within the ingestion exposure pathway EPZ. If the full participation exercise is conducted more than one year prior to issuance of an operating license for full power, an exercise which tests the licensee's onsite emergency plans shall be conducted within one year before issuance of an operating license for full power. This exercise need not have State or local government participation.

<sup>4</sup> "Full participation" when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately assess and respond to an accident at a commercial nuclear power plant. "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

The intervenors' appellate brief on the issue of the interpretation of this regulation is woefully deficient. It merely incorporates by reference the legal analysis presented to the Licensing Board<sup>14</sup> — a practice we have held to be tantamount to the abandonment of the issue.<sup>15</sup> In any event, the intervenors' construction of the regulation cannot be squared with the language of the regulation.

<sup>13</sup> According to the bases proffered for intervenors' contentions, a comparison of the exercise objectives specified for the onsite portion of the June 1988 full participation exercise demonstrated that among the "major observable portions" not tested in September 1989 were development of offsite protective action recommendations (PARs), utilization of offsite medical personnel and treatment facilities, procedures for plume tracking or related monitoring needed to assess offsite radiological consequences, public notification system capabilities (e.g., siren alerting), second-shift staffing, and offsite monitoring and decontamination of onsite personnel. First Motion Contention at 1-3; Second Motion Contention at 1-5.

<sup>14</sup> Brief of Intervenors in Support of Their Appeal of LBP-89-38 (Jan. 22, 1990) at 32. See Memorandum of the Intervenors in Support of Their Motion for Summary Disposition of the Scope Contentions Filed in Response to the September 27, 1989 Onsite Exercise (Oct. 18, 1989) [hereinafter Intervenors' Summary Disposition Memorandum].

<sup>15</sup> See, e.g., *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). See also ALAB-947, 33 NRC 299, 322 (1991).

In brief, the intervenors argue that Appendix E, § IV.F.1, and footnote 4 of the regulation compel inclusion of the activities enumerated in their contentions in the preclicensing onsite exercise required by the third and fourth sentences of the provision. Thus, the intervenors assert that the language in footnote 4 of section IV.F.1 of Appendix E that provides for “testing the major observable portions of the onsite and offsite emergency plans” applies to the applicants’ September 1989 preclicensing onsite exercise. According to the intervenors, this is so because the term “full participation” in the regulation should be read as having two distinct meanings: one defines the “how” of the exercise, the other defines the “who.” Their argument continues that, when the regulation is read in this manner, the applicants’ September 1989 exercise did not require the participation of state and local governments because it was not a “full participation” exercise, but it still required the “full participation” of the applicants in the sense that the applicants’ personnel were required to test all “major observable portions” of the onsite plan.<sup>16</sup>

We think it is clear that the regulation cannot reasonably be read in the manner asserted by the intervenors. Rather, the “exercise” that is the subject of the third and fourth sentences of section IV.F.1 — and the type of exercise conducted by applicants in September 1989 — is plainly distinct from and supplemental to the “full participation” exercise that the first two sentences require. The term “full participation” is not used in conjunction with the term “exercise” appearing in the third and fourth sentences. Consequently, the structure of the provision and the placement of footnote 4 are such that the footnote — the linchpin of the intervenors’ argument — plays no part in defining the term “exercise” in the third sentence.

The intervenors’ interpretation is further refuted by the wording of footnote 4 itself. To be sure, the second sentence of that footnote contains the “major observable portions of the onsite and offsite emergency plans” language relied upon by the intervenors. But the preceding sentence emphasizes that “full participation” means that “appropriate offsite local and State authorities *and* licensee personnel physically and actively take part in testing their *integrated* capability to adequately assess and respond to an accident” (emphases added).<sup>17</sup>

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<sup>16</sup> See *Intervenors’ Summary Disposition Memorandum* at 10-15.

As we indicated in ALAB-946, 33 NRC 245, 246 (1991), a full participation exercise testing both the Seabrook onsite and offsite emergency plans was held in December 1990, more than six months after applicants received a full-power operating license. As also was noted in that decision, the staff found no deficiencies in the emergency plans as a consequence of the exercise. *Id.* Like the issue in ALAB-946, the matters before us on this appeal may well have been rendered moot by the December 1990 full participation exercise. Although the applicants moved in a February 12, 1991 motion to dismiss the intervenors’ appeal on other grounds, *see infra* note 19, they did not argue that the issues before us were rendered moot by the December 1990 full participation exercise. Nor did we raise the mootness issue *sua sponte*. Accordingly, because the parties have not had an opportunity to brief the question, we forgo deciding intervenors’ appeal on that basis.

<sup>17</sup> See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 289, 293, 297, *review declined*, CLI-88-11, 28 NRC 603 (1988).

The next sentence also refers, in the conjunctive, to mobilizing the capacity of "State, local *and* licensee personnel" (emphasis added). It thus is clear that the "full participation" exercise referred to in the regulations is the more comprehensive exercise required prior to initial licensing and has no bearing on the scope of the supplemental onsite exercise that is required only in certain circumstances due to timing exigencies.

Accordingly, as the Licensing Board determined, the clear import of the language of the regulation cannot be construed to reach the result urged by the intervenors relative to the scope of the September 1989 prelicensing onsite exercise.<sup>18</sup>

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For the foregoing reasons, the Licensing Board's denial in LBP-89-38, 30 NRC 725, of the intervenors' motions to admit their proffered onsite exercise contentions is *affirmed*.<sup>19</sup>

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<sup>18</sup>Although the intervenors have constructed an elaborate argument from the administrative history of the regulations in support of their thesis that a full participation exercise and a prelicensing onsite exercise must be essentially identical in scope, that history provides little support for their assertion. In fact, that history indicates that, in contrast to the full participation exercise that has as a principal objective the identification of planning deficiencies, the prelicensing onsite exercise is intended to focus upon the preparedness of applicant personnel to carry out their responsibilities under the previously tested onsite plan. For example, in response to a suggestion to delete the third and fourth sentences of Appendix E, § IV.F.1, the Commission explained:

The importance of annual onsite emergency planning exercises by the licensee's operational staff has already been recognized in the Commission's regulations, which now require that after a facility is licensed to operate there must be an annual onsite exercise. This annual emergency response function drill ensures that the licensee's new personnel are adequately and promptly trained and that existing licensee personnel maintain their emergency response capability. The existing requirement of a pre-operational onsite exercise within one year prior to full-power license issuance is consistent with this philosophy as well as the Commission's general desire to have pre-operational emergency planning exercises as close as practicable to the time of licensing.

52 Fed. Reg. 16,823, 16,824-25 (1987). See also *id.* at 16,825 (having onsite exercise within one year before licensing reflects fact that applicant makes a full-scale shift from facility construction to operation within the last 12 to 18 months and retains many new operational personnel who must be ready to carry out utility's existing onsite plan). Further, this interpretation is consistent with the reading of the United States Court of Appeals for the District of Columbia Circuit gave section IV.F.1 in its recent decision in *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3755 (U.S. May 7, 1991) (No. 90-1657). There, the court considered whether the issue of the admissibility of contentions raising onsite planning weaknesses purportedly evidenced in the June 1988 full participation exercise was mooted by the applicants' subsequent September 1989 onsite exercise. The court endorsed the Licensing Board's explanation that the purpose of the "more limited onsite drill" was "to ensure that emergency response personnel retain sufficient knowledge and expertise to actuate an emergency [plan] already determined through a reasonably current 'full participation' exercise to be adequate and without fundamental flaws." *Id.* at 336 (quoting LBP-89-38, 30 NRC at 744-45 (emphasis supplied by the court)). In the context of this proceeding, the Commission has expressed a corresponding, albeit nonbinding, view. See CLI-90-3, 31 NRC 219, 256 (1990) (in effectiveness decision discussion regarding Licensing Board's rejection of intervenors' prelicensing onsite exercise contentions, Commission notes that "principal goal" of similar annual onsite exercise is to avoid "readiness lapses").

<sup>19</sup>Because the Licensing Board correctly denied the intervenors' motions to admit the onsite exercise contentions, their motion for summary disposition should necessarily have been dismissed. Similarly, our affirmation of the Board's denial of the intervenors' motions to admit contentions makes it unnecessary for us to rule on the applicants' February 12, 1991 motion to dismiss intervenors' appeal on the grounds that the District of Columbia Circuit's ruling in *Massachusetts v. NRC* regarding the September 1989 onsite exercise, see *supra* note 18, rendered the Board's denial of a hearing correct as a matter of law.

**It is so ORDERED.**

**FOR THE APPEAL BOARD**

**Barbara A. Tompkins  
Secretary to the  
Appeal Board**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman  
Thomas S. Moore  
Howard A. Wilber

In the Matter of

Docket Nos. 50-250-OLA-4  
50-251-OLA-4  
(Pressure/Temperature Limits)

FLORIDA POWER & LIGHT  
COMPANY  
(Turkey Point Nuclear Generating  
Plant, Units 3 and 4)

June 24, 1991

The Appeal Board affirms two Licensing Board decisions in this operating license amendment proceeding concerning revisions to a facility's technical specifications. One decision denied a late-filed petition to intervene and the other granted applicant's motion for summary disposition and terminated the proceeding. The Appeal Board also dismisses an appellant for lack of participation.

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS**

A Licensing Board decision that reflects a careful weighing of each of the five factors set forth in 10 C.F.R. § 2.714(a)(1) governing late-filed petitions to intervene will not be overturned on appeal, absent a showing of an abuse of discretion. *See Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), *cert. denied*, — U.S. —, 111 S. Ct. 246 (1990); *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC

881 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C. Cir. 1982).

**RULES OF PRACTICE: BRIEFS**

Appellants are obliged to explain in their briefs on appeal how the Licensing Board erred in the decision on review. *See Georgia Power Co.* (Vogle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131-32 (1987).

**ADJUDICATORY BOARDS: ROLE**

Because it is an adjudicatory board's very function to review and make determinations as to the admissibility of evidence, presumably it can do so without compromising the outcome by consideration of inadmissible material.

**RULES OF PRACTICE: SUMMARY DISPOSITION**

Although 10 C.F.R. § 2.749(a) provides that no replies to the responses to a motion for summary disposition "may be entertained," it does not prohibit a Licensing Board in its discretion from ordering the filing of further pleadings in connection with summary disposition. Such authority is surely encompassed within a Board's general powers under 10 C.F.R. § 2.718, subject, of course, to its exercise in an evenhanded manner. *See also* 10 C.F.R. § 2.730(c).

**RULES OF PRACTICE: EVIDENCE (FEDERAL RULES); EXPERT WITNESS(ES)**

**EVIDENCE: EXPERT WITNESS**

The Commission has endorsed reliance on the standard of Rule 702 of the Federal Rules of Evidence for judging whether a prospective witness qualifies as an expert. *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

**RULES OF PRACTICE: SUMMARY DISPOSITION; MOTIONS FOR SUMMARY DISPOSITION**

Section 2.749(b) of 10 C.F.R. requires any affidavits submitted in connection with a motion for summary disposition to "set forth such facts as would be admissible in evidence" and to "show affirmatively that the affiant is competent to testify to the matters stated therein."

## **RULES OF PRACTICE: EVIDENCE**

### **EVIDENCE: ADMISSIBILITY (SPONSORSHIP BY EXPERT)**

The Commission's rules impose a general requirement on all evidentiary submissions that, in order for them to be admissible, they must be "relevant, material, and reliable." 10 C.F.R. §2.743(c). For evidence on highly technical subjects to be considered "reliable" and thus admissible, the proponent thereof must show her or his qualifications to sponsor and discuss such evidence.

### **TECHNICAL ISSUES DISCUSSED**

Pressure/temperature limits  
Neutron fluence  
Fracture Toughness Requirements, 10 C.F.R. Part 50, Appendix G  
Reactor Vessel Material Surveillance Program Requirements, 10 C.F.R. Part 50, Appendix H  
Material degradation  
Neutron irradiation  
Irradiation embrittlement.

### **APPEARANCES**

**Joette Lorion**, Miami, Florida, intervenor pro se and for intervenor Center for Nuclear Responsibility.

**Thomas J. Saporito, Jr.**, Jupiter, Florida, petitioner pro se and for petitioner Nuclear Energy Accountability Project.

**Harold F. Reis**, **Steven P. Frantz**, and **Kenneth C. Manne**, Washington, D.C., and **John T. Butler**, Miami, Florida, for applicant Florida Power & Light Company.

**Patricia A. Jehle** and **Janice E. Moore** for the Nuclear Regulatory Commission staff.

### **DECISION**

This proceeding involves an application by Florida Power & Light Company (FP&L) for amendments to the operating licenses for Units 3 and 4 of its

Turkey Point nuclear power facility. The amendments, which were issued by the NRC staff in January 1989,<sup>1</sup> revise the licenses' technical specifications by incorporating new pressure/temperature (P/T) limits for the reactor coolant system. These new limits are applicable for up to 20 "effective full-power years" (EFPY) of plant operation, and they replace the former P/T limits, which applied to only 10 EFPY.

Joint intervenors Joette Lorion and the Center for Nuclear Responsibility (Lorion/CNR, or intervenors) have appealed the Licensing Board's memorandum and order that granted FP&L's motion for summary disposition and terminated the proceeding. See LBP-90-4, 31 NRC 54 (1990). Petitioners Thomas J. Saporito, Jr., and the Nuclear Energy Accountability Project (NEAP) have appealed the Licensing Board's companion decision that denied their late-filed petition to intervene. See LBP-90-5, 31 NRC 73 (1990). Upon consideration of the parties' arguments on appeal and the record in this proceeding, we affirm both Licensing Board decisions, as explained below.

#### A. The Saporito/NEAP Appeal

1. Before turning to the merits of this appeal, we first address a procedural matter. Last December, applicant FP&L requested that we issue an order to NEAP directing it to show cause why it should not be dismissed from this proceeding. FP&L's motion was based on the fact that NEAP had moved to withdraw from another licensing proceeding due to its anticipated dissolution effective December 31, 1990. The NRC staff supported FP&L's motion. NEAP did not reply to the motion, nor did it reply to our January 11, 1991, show cause order. Accordingly, NEAP is *dismissed* from this proceeding, and the arguments raised on appeal insofar as they relate to NEAP's effort to intervene are necessarily disregarded.

2. The Saporito petition to intervene was 11 months late. See LBP-90-5, 31 NRC at 75-76. Thus, as required by the Commission's Rules of Practice, the Licensing Board balanced the five factors set forth in 10 C.F.R. § 2.714(a)(1) to determine if the late-filed petition should be granted. After devoting substantial attention to Mr. Saporito's arguments, the Board concluded that, on balance, the petition failed to satisfy the necessary criteria for intervention at such a late stage of the proceeding. LBP-90-5, 31 NRC at 83. In particular, the Board found that the petitioner fell far short of meeting the first and most important of the five factors — i.e., good cause for failing to file in a timely manner. *Id.* at 76-80.<sup>2</sup>

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<sup>1</sup>The amendments were issued following the staff's "no significant hazards" determination under 10 C.F.R. § 50.91(a)(4).

<sup>2</sup>The Board reached the same conclusion as to NEAP. LBP-90-5, 31 NRC at 80-81.

We have reviewed Mr. Saporito's arguments on the five factors, both on appeal and in his filings below, and find no basis on which to overturn the Licensing Board's decision. Indeed, the Board's decision reflects a careful weighing of each factor and an ultimate judgment well within the Board's discretion. See *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), cert. denied, — U.S. —, 111 S. Ct. 246 (1990); *South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1)*, ALAB-642, 13 NRC 881 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C. Cir. 1982). There is nothing on which we could elaborate.

Much of Mr. Saporito's argument on appeal also goes to the issue of his standing to intervene in this proceeding. The Commission's Rules of Practice, 10 C.F.R. § 2.714(d)(1), require every petitioner who seeks intervention — whether timely or not — to demonstrate sufficient interest in the proceeding so as to establish standing. Because the Licensing Board determined that Mr. Saporito's petition was "inexcusably late" and thus must be denied in any event, it saw no need in addressing the standing issue. The Board nonetheless noted that the standing of either the individual or organizational petitioner was "at best a close call." LBP-90-5, 31 NRC at 83 n.12.

The Licensing Board committed no error in premitting the question of petitioners' standing. Having found that Mr. Saporito failed to satisfy the criteria *required* for late intervention, no purpose would have been served by such an exercise. Even if the Board had concluded that Mr. Saporito or NEAP had standing, the balancing of the five factors of section 2.714(a)(1) compelled denial of the 11-months late petition.

## B. The Lorion/CNR Appeal

In LBP-90-4, the Licensing Board granted FP&L's motion for summary disposition of Lorion/CNR's Contention 2, the only remaining issue in this proceeding.<sup>3</sup> As admitted by the Board, the contention alleges that the conduct of FP&L's Integrated Surveillance Program (ISP) does not satisfy certain regulatory requirements insofar as Unit 4 of the Turkey Point plant is concerned. Particularly at issue are the requirements of 10 C.F.R. Part 50, Appendices G and H, which describe "Fracture Toughness Requirements" and "Reactor Vessel Material Surveillance Program Requirements," respectively. In addition to specifying the requirements for the ferritic materials used in the pressure containment boundary, Appendix G requires, among other things, testing of

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<sup>3</sup>Lorion/CNR originally submitted three contentions. The Licensing Board rejected Contention 1 for lack of jurisdiction. It also modified or rejected portions of Contention 2 as nonlitigable or beyond the scope of this proceeding. LBP-89-15, 29 NRC 493, 499-504 (1989). Intervenors have not appealed that decision. They ultimately withdrew Contention 3, following an exchange of information between the parties. LBP-90-4, 31 NRC at 56.

“beltline” materials as prescribed in Appendix H.<sup>4</sup> Appendix H establishes surveillance program criteria and permits the use of an integrated surveillance program “for a set of reactors that have similar design and operating features.” 10 C.F.R. Part 50, App. H, § II.C.

According to the Licensing Board, the gist of Lorion/CNR’s complaint is that FP&L’s testing program, which was based in part on data from surveillance capsules in Turkey Point Unit 3, does not provide “adequate assurance that the materials making up the beltline (roughly the midpoint) of the Unit 4 reactor vessel at Turkey Point will be tough enough over the life of the plant to function safely under the pressure, temperature, and irradiation to which those beltline materials will be subjected.” LBP-90-4, 31 NRC at 57. Intervenors’ primary concern stems from the different operating histories and capacity factors of Units 3 and 4. *See id.* at 62.

After providing the technical and regulatory background for Contention 2, the Board set forth the positions of the parties and the controlling law on motions for summary disposition. *Id.* at 58-67. As required for a grant of such a motion under 10 C.F.R. § 2.749, the Board found no salient facts in dispute. It also concluded that “the matters raised by Intervenors are either explained by [FP&L] or constitute an attack on the methodology of the Commission’s testing program for reactor vessel materials.” *Id.* at 67. It thus determined that FP&L had met its burden of proof and that the conduct of its ISP was in compliance with all regulatory requirements. Accordingly, the Board granted FP&L’s motion and terminated the proceeding.

The Licensing Board’s decision is thorough in its recitation of both the technical background of this matter as well as the positions of the parties. We therefore need not rehearse that material here. Nor have Lorion/CNR provided any persuasive reason for overturning the Board’s ultimate judgment. Nonetheless, we address briefly each of the eight arguments Lorion/CNR have raised on appeal.

1. Lorion/CNR first argue that the Licensing Board erred in not addressing the views provided by their expert, Dr. George Sih, set forth in a letter attached to intervenors’ reply to the motion for summary disposition. They contend that this letter, in which Dr. Sih states why he believes the difference in operating times of Units 3 and 4 is significant vis-a-vis the fracture toughness of the Unit 4 reactor vessel, was evidence from a competent expert on metallurgy; even

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<sup>4</sup>The “beltline” is the region of the reactor vessel (shell material including welds, heat affected zones, and plates or forgings) that directly surrounds the effective height of the active core and adjacent regions of the reactor vessel that are predicted to experience sufficient neutron radiation damage to be considered in the selection of the most limiting material with regard to radiation damage.

10 C.F.R. § 50.61(a)(3); Part 50, App. G, § IIF.

though it was not in affidavit form, the letter should not have been excluded from consideration by the Licensing Board.

Nowhere in its opinion, however, does the Board exclude or reject Dr. Sih's letter. Lorion/CNR concede as much later in their brief. *See* CNR/Lorion Brief (Mar. 5, 1990) at 22. To be sure, the Board found *Ms. Lorion* to be lacking in the technical expertise to qualify her to provide testimony on metallurgy or mechanical engineering matters, as required by 10 C.F.R. § 2.749(b). LBP-90-4, 31 NRC at 64. The Board also stated that it was "tempted to (and could well) decide this case in [FP&L's] favor on the basis of the absence of a sworn affidavit by a qualified affiant in support of Intervenor's opposition to [FP&L's] motion." *Id.* at 69. But the Board went on to refer to and discuss Dr. Sih's concerns and did not, in fact, exclude the letter in question. *See id.* at 65 & n.4, 69-70. *See also id.* at 63 n.3, where the Board explicitly states that its decision relies on, among other things, "Intervenor's Response [to FP&L's motion for summary disposition] and supporting documentation" (emphasis added). Lorion/CNR's objection is thus without merit.

2. Intervenor's contend that the Licensing Board erred by weighing the evidence and making factual determinations at the summary judgment stage. In particular, they object to the Licensing Board's conclusion that, "[b]ecause the difference in operating features between the two Turkey Point reactors was acceptable in 1985, . . . *a fortiori* . . . a smaller difference today remains acceptable." *Id.* at 70-71. In intervenor's view, Dr. Sih's claim — that the difference in operating experience between Units 3 and 4 is significant to the resolution of Contention 2 — establishes the existence of a genuine issue of material fact that cannot be resolved upon summary disposition.

An examination of the record makes clear that there is no genuine issue of material fact in dispute. There may be a misapprehension on Dr. Sih's part, however, as to the relevance of the *rate* at which neutron fluence is accumulated. Dr. Sih's letter contains his view that material degradation from neutron irradiation is a "time-history and rate dependent process." Intervenor's Response to Licensee's Motion for Summary Disposition (Oct. 19, 1989), Attachment A (Oct. 18, 1989, letter from Dr. Sih) at 2. He believes that FP&L's contrary position (i.e., the rate or duration of neutron fluence accumulation is not relevant in determining the effect of irradiation) conflicts "with one of the most important unit[s] . . . for measuring irradiation damage of material" — namely "nvt," where "n" is the density or number of neutrons per cubic centimeter (cm<sup>3</sup>), "v" is the velocity in centimeters per second (cm/sec), and "t" is the time. *Id.* at 2 n.\*.

As FP&L points out in its brief on appeal, the difference between its position and that of Dr. Sih is essentially a problem of semantics, "since the rate of neutron irradiation integrated over the time of irradiation is equivalent to fluence." Licensee's Brief (Apr. 3, 1990) at 30 n.57. *See* L.E. Steele & C.Z.

Serpan, Jr., *Analysis of Reactor Vessel Radiation Effects Surveillance Programs* 264 (American Society for Testing and Materials Special Technical Publication 481, 1970) (definition of "neutron fluence"). See also NRC Staff Brief (Apr. 19, 1990) at 15-17, 19. In other words, under the very formula for neutron fluence cited by Dr. Sih —  $nvt$  — the rate of neutron irradiation during a particular time frame "cancels out" and only the total accumulation of neutrons per unit area becomes significant:

$$(n/cm^3) \times (cm/sec) \times sec = n/cm^2$$

Thus, the difference in operating histories of Units 3 and 4 and thereby the different rates at which neutron fluence accumulated over the years are not the relevant data; the total accumulated fluence is. See LBP-90-4, 31 NRC at 70 (differences in annual operating periods of the two units is "subsumed in the calculation of total fluence"). Consequently, there was no actual dispute as to a material issue of fact and the Board did not err in granting summary disposition on this particular point.

3. Lorion/CNR next argue that the Licensing Board erred in not resolving any conflicts in the record evidence in a light favorable to them, as should be the case with the party opposing summary disposition. Specifically, they object to a footnote in the Board's decision in which it states that Dr. Sih's position on a certain point (as reflected in another letter submitted by intervenors) was "not clear." The Board went on to provide "[a] fair reading of this letter," explaining what it believed Dr. Sih meant. *Id.* at 65 n.4. But while intervenors object to the Board's characterization of Dr. Sih's statement as more favorable to the proponents of the summary disposition motion, they fail to *explain* either what Dr. Sih really meant in the statement in question, or how the Board's asserted misinterpretation led to an erroneous outcome. See CNR/Lorion Brief at 16-17. Their complaint is thus wholly lacking in merit. See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131-32 (1987).

4. According to Lorion/CNR, the Licensing Board erred in directing FP&L to file a reply to the intervenors' opposition to the motion for summary disposition, and this error "may have resulted in substantial prejudice to intervenors." CNR/Lorion Brief at 17. They acknowledge the Board's statement that, because the Rules of Practice do not provide for such a reply, it did not consider the FP&L reply and made its decision "solely" on the record prior to the motion, the FP&L motion itself and supporting documentation, intervenors' response and supporting documentation, and the NRC staff's response and supporting documentation. LBP-90-4, 31 NRC at 63 n.3. Nevertheless, Lorion/CNR believe that the Board members "may have read the Reply and been influenced by the arguments contained therein." CNR/Lorion Brief at 19. As evidence of this asserted influence, intervenors point to the Board's comment that "it appears

that Intervenor's concern with strain rate in fact relates to fracture toughness requirements for the danger of pressurized thermal shock, a matter that has been excluded from this proceeding." LBP-90-4, 31 NRC at 70 (citations omitted). They suggest that, because strain rate was first raised as an issue in intervenors' response to the FP&L motion for summary disposition and FP&L's reply thereto addressed the matter, the Board was likely influenced by the latter's arguments.

The one example of assertedly improper influence cited by Lorion/CNR provides no basis whatsoever for not taking the Board at its word that it did not consider the FP&L reply in reaching its decision. The Board's discussion of strain rate cites a Commission regulation (10 C.F.R. § 50.61) and the Board's own earlier decision concerning the proper scope of the proceeding (LBP-89-15, *supra* note 3, 29 NRC at 503-04). It is reasonable not only to assume, but also to expect, that Licensing Boards would be aware of and free to rely on both in rendering decisions. Further, as the staff points out, because it is an adjudicatory board's very function to review and make determinations as to the admissibility of evidence, presumably it can do so without compromising the outcome by consideration of inadmissible material. NRC Staff Brief at 24.

Lorion/CNR's argument in this regard fails for other reasons as well. For one, they do not identify the "substantial prejudice" they "may" have experienced. Moreover, it is by no means clear that the Board even erred in requesting FP&L's reply. Although the *rule* on summary disposition provides that no such replies "may be entertained," 10 C.F.R. § 2.749(a), it does not *prohibit* a Licensing Board in its discretion from ordering the filing of further pleadings in connection with summary disposition. Such authority is surely encompassed within the Board's general powers under 10 C.F.R. § 2.718, subject, of course, to its exercise in an evenhanded manner. *See also* 10 C.F.R. § 2.730(c). In this case, given that intervenors' Contention 2 does not specifically mention "strain rate" and that this discrete point was not raised until the filing of their response to FP&L's motion for summary disposition, the Board's original instinct in giving FP&L the opportunity to address the matter was the right one.

5. Intervenor's next maintain that the Licensing Board erred by allegedly adhering strictly to formal rules of evidence, and that this prejudiced their case. In this connection, they object to the Board's finding that, under 10 C.F.R. § 2.749(b), Ms. Lorion was not competent to provide testimony on the technical matters at issue. They also reiterate the complaint, addressed *supra* pp. 497-98, about the Board's treatment of Dr. Sih's letters.

Once again, Lorion/CNR's characterization of the Board's decision is at odds with reality. There is no suggestion anywhere in the Board's opinion that, in granting FP&L's motion for summary disposition, it applied the formal rules of evidence or, indeed, any rules other than the Commission's Rules of

Practice.<sup>5</sup> The Board also correctly determined that, because Ms. Lorion did “not claim any expertise in metallurgy, or in materials or mechanical engineering,” or “provide any indication of training or specific experience . . . that would qualify her to address the technical issues in this proceeding,” she was not “competent” for the purposes of 10 C.F.R. §2.749(b). LBP-90-4, 31 NRC at 64. That provision requires any affidavits submitted in connection with a motion for summary disposition to “set forth such facts as would be admissible in evidence” and to “show affirmatively that the affiant is competent to testify to the matters stated therein.” Even if this language could be considered somewhat ambiguous, the Commission’s rules impose a general requirement on all evidentiary submissions that, in order for them to be admissible, they must be “relevant, material, and *reliable*.” 10 C.F.R. §2.743(c) (emphasis added). For evidence on highly technical subjects (such as the response of reactor vessel materials to neutron irradiation and temperature variables) to be considered “reliable” and thus admissible, the proponent thereof must show her or his qualifications to sponsor and discuss such evidence. Ms. Lorion failed to do so.

That does not mean, however, that the Board could not consider the *argument* supplied by Ms. Lorion in her response to the summary disposition motion. In fact, the Board did just that, as is evident from the discussion of intervenors’ arguments throughout the decision before us on review. See LBP-90-4, 31 NRC at 65, 69-71.

6. Lorion/CNR see conflicts between the position of an NRC staff expert and that of FP&L’s witness concerning why a surveillance capsule removed from Unit 4 showed a higher rate of embrittlement than similar specimens from Unit 3. Specifically, intervenors contend that, in responding to their interrogatories, one NRC staffer stated that “flux lot is only of minor importance in determining the sensitivity [of certain welds used as surveillance material] to radiation embrittlement.” CNR/Lorion Brief at 24. But, according to intervenors, another staff witness, as well as FP&L’s expert, actually attributed the higher degree of embrittlement to alleged differences in “flux lot number.” *Ibid*. In intervenors’ view, this “conflict[] in the record” demonstrates a genuine issue of material fact that cannot properly be resolved on summary disposition. Lorion/CNR also believe that this asserted conflict raises a question as to whether FP&L has satisfied the Integrated Surveillance Program requirements and whether there is a danger to the public health and safety. *Ibid*.

Intervenors’ basic premise — that there is a conflict in the record — does not withstand scrutiny. FP&L’s expert witness stated that the impact of the

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<sup>5</sup>The Commission, however, has endorsed reliance on the standard of Rule 702 of the Federal Rules of Evidence for judging whether a prospective witness qualifies as an expert. See *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

difference in flux lot numbers is "unclear." Licensee's Motion for Summary Disposition (Sept. 11, 1989), Affidavit of Stephen A. Collard [hereinafter Collard Affidavit] at 27.<sup>6</sup> Although he offers the variation in flux lot numbers as one of four possible explanations for the discrepancy in test results, he describes this as "of secondary importance." *Id.* at 29. In response to intervenors' interrogatories, NRC staff witness Barry J. Elliot stated that "the flux lot is not considered important in determining the sensitivity of the weld to irradiation embrittlement." NRC Staff Response to [CNR/Lorion's] First Set of Discovery Requests (Aug. 28, 1989) at 7. We see no meaningful difference between these two positions.

Moreover, the staff and FP&L agree that there is no reason to exclude the results of any of the surveillance tests from the data used to determine the new pressure/temperature limits for Unit 4. The weld samples in both Units 3 and 4 were fabricated from the same heat number and thus have essentially the same copper and nickel content (the elements that are of importance in irradiation embrittlement). Response of NRC Staff in Support of Licensee's Motion for Summary Disposition (Oct. 19, 1989), Affidavit of Barry J. Elliot [hereinafter Elliot Affidavit] at 8-9; Collard Affidavit at 27. The staff also points out that the data provided by the Unit 4 specimen are within the expected range of values. Elliot Affidavit at 10-11. In this circumstance, we are unable to find any genuine dispute as to a material fact or any question as to FP&L's compliance with ISP requirements. Accordingly, Lorion/CNR's argument fails.

7. Intervenors strenuously object to the Licensing Board's finding that they were, in essence, seeking to modify the Commission's rule establishing ISP requirements, 10 C.F.R. Part 50, Appendix H. *See* LBP-90-4, 31 NRC at 71. They maintain that they were merely challenging whether FP&L met the requirements of the program, as specified in Appendix H, and that this was made clear to the Board throughout the proceeding. Lorion/CNR urge that Unit 4 data be used to set revised pressure/temperature limits, and they also contend, as they did before the Licensing Board, that FP&L should be required to have a written, detailed contingency plan to meet ISP requirements.

We are not persuaded by intervenors' arguments. Even if the Licensing Board mischaracterized their complaints (and we do not suggest that it did so), it would be harmless error at worst. The Board clearly addressed what Lorion/CNR claim was their point — i.e., that FP&L has not satisfied the requirements of the ISP. The Board specifically found "no evidence that [FP&L] has done anything other than satisfy the requirements of the integrated surveillance program approved for use at Turkey Point in 1985 pursuant to Appendix H." *Ibid.* It stressed that the ISP specifically authorizes reliance on data from Unit 3 in assessing fracture

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<sup>6</sup>Mr. Collard explains that "the flux lot number corresponds to all of the material included in the production of one batch of original flux mix. Flux is a material that is used to prevent, dissolve, or facilitate removal of undesirable oxide substances on the surfaces of welds." Collard Affidavit at 26 n.5.

toughness of both Units 3 and 4, and that “[t]he Appendix H requirement for a contingency plan is, on its face, satisfied by the existence of two similar units each with surveillance capsules installed”; no separate written statement is required. *Ibid.*

We also find that the Licensing Board’s conclusions are consistent with the language of the pertinent regulatory provisions. Appendix H to Part 50 requires a material surveillance program to monitor changes in the fracture toughness properties of ferritic materials in the reactor vessel bellline region resulting from neutron irradiation and temperature variations. An integrated surveillance program “for a set of reactors that have similar design and operating features” is explicitly authorized under Appendix H, and “[t]he representative materials chosen for surveillance from each reactor in the set may be irradiated in *one or more* of the reactors.” 10 C.F.R. Part 50, App. H, § I.I.C (emphasis added). Reliance on the Unit 3 data in setting pressure/temperature limits for both Units 3 and 4 is thus in keeping with Commission requirements. As for the contingency plan requirement, found in Appendix H, section I.I.C.3, the regulations do not prescribe what form that “plan” must take. It appears to be enough if there is assurance in the ISP itself that the “program for each reactor will not be jeopardized by operation at reduced power level or by an extended outage of another reactor from which data are expected.” *Id.* § I.I.C.3. As the staff points out, if there were an extended outage or period of low operation at one Turkey Point unit, FP&L “would rely on the surveillance capsules in the operating unit or place all the capsules in the operating unit.” NRC Staff Brief at 35.

8. Lorion/CNR’s concluding argument is that the Licensing Board’s “conduct throughout this proceeding has been prejudicial toward the citizen Intervenors and not in keeping with the spirit of the Atomic Energy Act.” CNR/Lorion Brief at 28. They also contend that “the Board’s actions may be part of what appears to be a growing and concerted effort by the Nuclear Regulatory Commission to severely restrict citizen participation on important nuclear safety issues.” *Ibid.* But other than their argument (already addressed *supra* pp. 500-01) that the Board erroneously applied the formal rules of evidence in this proceeding, intervenors supply no examples of the claimed prejudice. Moreover, our review of the record and the Board’s decision reveals that this proceeding was conducted wholly in accord with Commission rules and policies.

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Appellant Nuclear Energy Accountability Project is *dismissed* from this proceeding. The Licensing Board's decisions, LBP-90-4, 31 NRC 54, and LBP-90-5, 31 NRC 73, are *affirmed*.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins  
Secretary to the  
Appeal Board

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman  
Dr. W. Reed Johnson  
G. Paul Bollwerk, III

In the Matter of

Docket No. 9999004  
(General License Authority  
of 10 C.F.R. § 40.22)

WRANGLER LABORATORIES,  
LARSEN LABORATORIES,  
ORION CHEMICAL COMPANY,  
and JOHN P. LARSEN

June 25, 1991

The Appeal Board reverses and remands the Licensing Board's initial decision in this enforcement proceeding involving an NRC staff order that revoked the authority of Licensees to engage in the chemical processing of depleted uranium pursuant to a general license under 10 C.F.R. § 40.22. The Licensing Board had modified the staff order so as to permit Licensees to continue operating, subject to certain conditions. The Appeal Board, however, concludes that the Licensing Board erred in several rulings of law, warranting reconsideration of the staff's revocation order.

**SOURCE MATERIAL: LICENSES**

Section 62 of the Atomic Energy Act (AEA), 42 U.S.C. § 2092, authorizes the Commission to issue general or specific licenses for the transfer or receipt in interstate commerce, or the transfer, delivery, receipt of possession of or title to, or the import into or export from the United States of source material.

## **SOURCE MATERIAL: DEFINITION**

Acting pursuant to its authority under AEA sections 11z and 61, 42 U.S.C. §§ 2014(z), 2091, the Commission has defined source material to include, *inter alia*, “[u]ranium or thorium, or any combination thereof, in any physical or chemical form.” 10 C.F.R. § 40.4.

## **SOURCE MATERIAL: SPECIFIC LICENSES**

Under 10 C.F.R. § 40.20(a), the Commission issues “specific licenses” to named persons upon applications filed pursuant to the regulations in Part 40.

## **SOURCE MATERIAL: GENERAL LICENSES**

Under 10 C.F.R. § 40.20(a), a “general license” is effective without the filing of an application with the Commission or the issuance of licensing documents to a particular person — in effect, an authorization granted by operation of rule to anyone conducting activities pursuant to the parameters established by the regulation. *See id.* § 40.22.

## **RULES OF PRACTICE: CHALLENGE TO COMMISSION REGULATIONS**

Under 10 C.F.R. § 2.758, challenges to Commission regulations in initial licensing proceedings are generally foreclosed.

## **GENERAL LICENSE: STANDARDS**

Under 10 C.F.R. § 40.22(a), the Commission has authorized and issued a general license for the use and transfer of not more than fifteen pounds of source material at any one time for research, development, educational, commercial, or operational purposes. A general licensee may not receive more than a total of 150 pounds of source material in any one year.

## **REGULATIONS: INTERPRETATION**

“As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in the regulation.” *Long*

*Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (citations omitted), *review declined*, CLI-88-11, 28 NRC 603 (1988). *See also Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 132-33 (1991), *petition for review pending*.

#### **GENERAL LICENSE: STANDARDS**

In order to be in conformity with section 40.22(a), a general licensee cannot have on hand at any one time more than fifteen pounds of source material, whether in the form of unprocessed, processed, or waste matter. A general licensee's receipt of source material likewise is governed by this limitation to the extent that it cannot receive any amount of material that would cause it to exceed the limitation of fifteen pounds on hand. Further, while there is no limitation on the number of source material consignments a particular general licensee can receive, each licensee is limited to the receipt of a total of 150 pounds of source material in any calendar year.

#### **REGULATIONS: INTERPRETATION**

The publication in the *Federal Register* of the Commission's statement of considerations for a regulation essentially provides notice to all interested persons of the contents of, and thus the Commission's intent regarding, that regulatory language. *See Federal Register Act*, 44 U.S.C. § 1507.

#### **ATOMIC ENERGY ACT: COMMISSION AUTHORITY**

Section 161b of the AEA, 42 U.S.C. § 2201(b), authorizes the Commission to establish by rule, regulation, or order such standards and instructions to govern the possession and use of source material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. *See also id.* § 2201(i).

#### **REGULATIONS: SOURCE MATERIAL (10 C.F.R. PART 40)**

#### **SOURCE MATERIAL: REGULATION**

Sections 40.41 and 40.71 make clear that an order is an appropriate means for modifying the terms and conditions of any license issued under 10 C.F.R. Part 40.

## **SOURCE MATERIAL: LICENSES**

In accordance with section 62 of the AEA, 42 U.S.C. § 2092, the Commission can determine that quantities of source material utilized for certain specified purposes are so "unimportant" that no license is required. *See* 10 C.F.R. § 40.13.

## **AGENCY DISCRETION: RULEMAKING OR ADJUDICATION**

It is within an agency's discretion whether to use either rulemaking or adjudication (i.e., orders) for announcing new requirements of general applicability. *SEC v. Chenery*, 332 U.S. 194, 201-02 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

## **ENFORCEMENT ACTIONS: LICENSE REVOCATION ORDERS**

Under the Commission's enforcement policy, the issuance of a license revocation order is appropriate when, among other reasons, a licensee is unable or unwilling to comply with NRC requirements or refuses to correct a violation, or for any other reason for which revocation is authorized under section 186 of the AEA, 42 U.S.C. § 2236 (e.g., any condition which would warrant refusal of a licensee on an original application). 10 C.F.R. Part 2, App. C, § V.C(3)(a), (b), (e).

## **EQUAL ACCESS TO JUSTICE ACT: INTERPRETATION**

The Equal Access to Justice Act, 5 U.S.C. § 504, does not permit a licensee to obtain attorney's fees as recompense for its participation before the Commission in an enforcement proceeding. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271 (1990).

## **APPEARANCES**

**Ann P. Hodgdon** for the Nuclear Regulatory Commission staff.

**John P. Larsen**, Orem, Utah, for licensees Wrangler Laboratories, Larsen Laboratories, Orion Chemical Company, and John P. Larsen.

## DECISION

This appeal is before us on the NRC staff's request for review of the Licensing Board's initial decision, LBP-89-39,<sup>1</sup> modifying a staff enforcement order. That order revoked the authority of John P. Larsen, doing business as Wrangler Laboratories, Larsen Laboratories, and Orion Chemical Company (hereinafter referred to as Licensees), to engage in the chemical processing of depleted uranium (DU) under a general license authorized by 10 C.F.R. § 40.22.<sup>2</sup> Because we conclude that several of the focal legal premises underlying the Board's decision are in error, we reverse its determination and remand the matter for further consideration consistent with this opinion.

### I. BACKGROUND

As is pertinent here, section 62 of the Atomic Energy Act of 1954 (AEA), as amended, provides that

[u]nless authorized by a general or specific license issued by the Commission which the Commission is authorized to issue no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material . . . except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.<sup>3</sup>

To implement this legislative grant of licensing authority for source material such as DU,<sup>4</sup> the Commission in 10 C.F.R. § 40.20 has provided that “[s]pecific licenses are issued to named persons upon applications filed pursuant to the regulations in [Part 40].”<sup>5</sup> In contrast, a “general license” is one “effective without the filing of applications with the Commission or the issuance of licensing documents to particular persons”<sup>6</sup> — in effect, an authorization granted by operation of rule to anyone conducting activities pursuant to the parameters established by the regulation.

The distinction between general license authorization and specific license authorization has practical as well as legal significance. Notwithstanding the principal limitation of conducting operations subject to a cap on the amount of

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<sup>1</sup> 30 NRC 746 (1989).

<sup>2</sup> See 53 Fed. Reg. 32,125 (1988).

<sup>3</sup> 42 U.S.C. § 2092.

<sup>4</sup> Acting pursuant to its authority under AEA sections 11z and 61, 42 U.S.C. §§ 2014(z), 2091, the Commission has defined source material to include, *inter alia*, “[u]ranium or thorium, or any combination thereof, in any physical or chemical form.” 10 C.F.R. § 40.4.

<sup>5</sup> 10 C.F.R. § 40.20(a).

<sup>6</sup> *Id.*

source material involved, operation under a general license is usually very desirable for those firms that can conform to the pertinent regulatory requirements, particularly small businesses such as are involved in this proceeding. Besides avoiding the administrative burdens associated with a specific license, a firm conducting activities pursuant to a general license is exempt from a number of the regulatory restrictions imposed on specific licensees, which can involve significant expenditures to ensure compliance.<sup>7</sup> With this less structured regulatory scheme, however, comes the potential for a less structured licensee approach to the safe handling of the albeit limited amounts of source material general license holders are allowed to use. Indeed, it does not seem unwarranted to conclude that tensions between operational economies and operational safety played a significant role in shaping the events that have culminated in the proceeding now before us.

The factual circumstances surrounding the enforcement action at issue are described in some detail in the Licensing Board's decision.<sup>8</sup> We provide a somewhat briefer, summarized exposition. John Larsen is sole owner and proprietor of Orion Chemical Company and Larsen Laboratories, located in Provo, Utah, and Wrangler Laboratories, located in Evanston, Wyoming. These firms have engaged in the chemical processing of DU to produce uranyl acetyl acetate, a substance used in the production of Department of Defense munitions.

The revocation order at issue here is not the first enforcement action Licensees have faced in the ten or more years Mr. Larsen has been conducting his DU processing activities. Citing various regulatory violations identified during an inspection of the Orion Chemical Company facility (including exceeding source material possession limitations imposed by 10 C.F.R. § 40.22, failure to maintain and make records available, and unauthorized DU disposal), in September 1982 the NRC staff issued an immediately effective suspension of his general license authorization.<sup>9</sup> Subsequently, on the basis of Mr. Larsen's corrective actions, in October 1982 the staff issued an order rescinding the general license suspension.<sup>10</sup> The staff nonetheless determined that the violations at issue warranted the imposition of a civil penalty, which it proposed in December 1982 and which Mr. Larsen paid in March 1983.<sup>11</sup>

Also as a result of the 1982 inspection, the staff determined that Mr. Larsen's DU processing activities should be conducted pursuant to a specific, rather than a general, license. An NRC specific license was issued to Larsen Laboratories

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<sup>7</sup> Compare *id.* §§ 19.2, 20.2, 21.2 (all persons licensed under 10 C.F.R. Part 40 are subject to requirements of 10 C.F.R. Parts 19, 20, and 21) with *id.* § 40.22(b) (persons operating under a general license are exempt from the provisions of 10 C.F.R. Parts 19, 20, and 21).

<sup>8</sup> See LBP-89-39, 30 NRC at 751-53, 762-64.

<sup>9</sup> See 47 Fed. Reg. 40,953 (1982).

<sup>10</sup> See 47 Fed. Reg. 50,128 (1982).

<sup>11</sup> See LBP-89-39, 30 NRC at 751.

in December 1983, but the agency retained oversight responsibility for this license for only a little more than a year. As a consequence of the State of Utah's obtaining "Agreement State" status under AEA section 274b,<sup>12</sup> in May 1985 the State reissued a specific license to Larsen Laboratories. Mr. Larsen, however, soon ran afoul of State authorities. In November 1986, the Utah Department of Health issued an immediately effective order that suspended Larsen Laboratories' specific license and imposed a civil penalty. In its suspension order, Utah required that Mr. Larsen complete a number of specified actions. In a January 1987 settlement agreement, a portion of the proposed civil penalty was suspended and Mr. Larsen acceded to performing the activities required by the order. The reduced civil penalty was paid, but the license suspension remained in effect because Mr. Larsen failed to comply with his promises to move to a production facility approved by State officials through license amendment procedures and to hire a qualified radiation protection officer.<sup>13</sup>

Nor was the assumption of State control over the Larsen Laboratories' specific license the end of Mr. Larsen's dealings with the NRC. Acting on allegations presented by authorities in the nonagreement state of Wyoming, in November 1987 the NRC staff conducted an inspection of his Wrangler Laboratory chemical processing facility in Evanston. As a consequence of this inspection and a followup enforcement conference, in November and December 1987 Mr. Larsen and the staff entered into a series of agreements, embodied in Confirmatory Action Letters (CALs), by which he made a commitment to dispose of all DU remaining at the Evanston facility and to have employees wear lapel air samplers and submit urine samples for uranium analysis. The staff found his compliance with these agreements unsatisfactory, however, for in February 1988 it issued an immediately effective order suspending Licensees' use of source material under the general license authorization. As justification for the suspension, the staff cited failures to provide promised bioassay information, evidence of apparent internal contamination of employees, contradictory statements made by Mr. Larsen to NRC and State officials concerning DU processing activities, and inadequate processing controls resulting in facility contamination exceeding NRC guidelines. In addition, the staff ordered Mr. Larsen to decontaminate the Wrangler facility and to dispose of all licensed material.<sup>14</sup>

As is permitted by 10 C.F.R. § 2.202(b), in March 1988 Mr. Larsen submitted a written reply to the suspension order. From this response, the staff was able to identify what it concluded were additional deficiencies on the part of Licensees,

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<sup>12</sup> 42 U.S.C. § 2021(b).

<sup>13</sup> See LBP-89-39, 30 NRC at 770-71. The Utah specific license was allowed to expire on December 31, 1988, while still under suspension. See Board Notification No. 90-01 (Feb. 8, 1990), Encl. at 1.

<sup>14</sup> See 53 Fed. Reg. 7452 (1988).

including transfer and receipt of source material in amounts exceeding general licensing limitations and deviations from various CAL provisions regarding employee urine samples and bioassay results. Referencing these purported failings, as well as violations of the 1986 Utah suspension order, Licensees' failure to provide certain facility protective equipment, the contamination of the Wrangler facility, and Licensees' history of continuing violations as reflected in the various NRC and Utah enforcement actions described previously, the staff issued the revocation order that is the subject of this proceeding.<sup>15</sup>

Pursuant to section 2.202, Licensees requested a hearing. In June 1989 the Licensing Board conducted a three-day evidentiary proceeding during which it heard testimony from staff witnesses as well as from Mr. Larsen, his spouse, and one of his employees.<sup>16</sup> In response to the staff's testimony detailing his purported failings, Mr. Larsen generally ascribed these difficulties to the travails of a small businessman in a complex and demanding regulatory environment. While acknowledging that Mr. Larsen had many problems in this regard, in its initial decision the Board nonetheless refused to sustain the staff's revocation order in its entirety. It instead concluded that the most significant of the alleged violations did not constitute deviations from applicable general-license requirements and that the multiple violations that were demonstrated by the staff were insufficient to support license revocation.<sup>17</sup> While thus permitting the Licensees to retain their general licensing authorization, the Board found that the requirements of 10 C.F.R. Part 20 were applicable to Licensees and, accordingly, authorized the staff to impose "routine and systemic" employee urine-testing requirements upon Licensees as a condition for further operation.<sup>18</sup>

The staff challenges various aspects of the Licensing Board's legal and factual conclusions relative to the revocation order.<sup>19</sup> We find it unnecessary to reach

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<sup>15</sup> See 53 Fed. Reg. 32,125.

<sup>16</sup> Tr. 77-725.

<sup>17</sup> See LBP-89-39, 30 NRC at 761.

<sup>18</sup> *Id.*

<sup>19</sup> For his part, Mr. Larsen has submitted letters dated March 3 and April 11, 1990, in which he contests the validity of certain recent actions by Utah regarding his activities in that state and questions whether the radiological hazards associated with DU are sufficient to warrant NRC regulatory control. By letter dated April 17, 1990, we advised Mr. Larsen that we would treat these letters as his brief on appeal.

With regard to the substance of this correspondence, we have no jurisdiction to entertain his complaints concerning the Utah state authorities. As to Mr. Larsen's second argument, under the terms of 10 C.F.R. § 2.758, this challenge to the Commission's regulatory authority undoubtedly would be foreclosed in an initial licensing case as a challenge to the Commission's regulations that does not meet the requirements of that rule. By its terms, however, section 2.758 is not applicable here because this is not an "initial licensing" case. 10 C.F.R. § 2.758(e). See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 50-53 (1947). Nonetheless, the record before us fully supports a finding that the assertion of NRC regulatory authority over the source material involved in this instance is appropriate. See Tr. 256-70. Furthermore, any complaints concerning the scope of the NRC's authority in this regard should be addressed to the Congress, which has determined, through the AEA, that source material like DU is to be regulated.

all these issues,<sup>20</sup> however, because we conclude that the error extant in several of the Board's conclusions of law mandates a remand of this case for further consideration.

## II. ANALYSIS

A. A principal staff concern involves the Licensing Board's interpretation of the source material amount limitations specified in 10 C.F.R. § 40.22. Section 40.22, which is titled "Small quantities of source material," specifies in paragraph (a) that:

A general license is hereby issued authorizing commercial and industrial firms, research, educational and medical institutions and Federal, State and local government agencies to use and transfer not more than fifteen (15) pounds of source material at any one time for research, development, educational, commercial or operational purposes. A person authorized to use or transfer source material, pursuant to this general license, may not receive more than a total of 150 pounds of source material in any one calendar year.

According to the staff, this provision's weight limitation on the "use" of source material precludes any general licensee from having on hand at any one time more than fifteen pounds of source material, a limitation that it found Licensees had violated on several occasions. Under the staff's interpretation, this limitation applies without regard to whether the source material is stored awaiting processing or scientific evaluation, is actually being processed or analyzed, or is waste matter. In contrast, the Licensing Board interpreted this provision as not including material awaiting processing/evaluation or waste matter. By the Board's reckoning, as we understand it, a general licensee may stockpile and thus have on hand an unlimited amount of source material, so long as it does not actually engage in processing/evaluation operations involving more than fifteen pounds of that material at any one time. As a consequence, the Board refused to countenance any of the staff's charges of section 40.22 possession limitation violations by Licensees.<sup>21</sup>

In resolving this dispute, our previous guidance concerning the interpretation of a regulation is instructive:

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. . . . Further, the entirety of the provision must be given effect. . . . Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities

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<sup>20</sup> See, e.g., NRC Staff Brief on Appeal of LBP-89-39 (Mar. 5, 1990) at 8-9, 11-14.

<sup>21</sup> See LBP-89-39, 30 NRC at 753-57, 759, 769-70, 785, 787.

in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.<sup>22</sup>

In accord with these guidelines, we focus first on the language and structure of the regulation.

The first indication of trouble for the Licensing Board's interpretation is found in the title of the regulation, which refers to "small" quantities of source material. Under the Licensing Board's resolution of this construction dispute, there exists the possibility that firms such as Licensees can operate under the relaxed strictures of general license authority afforded by section 40.22, yet have unrestricted control over and immediate access to a potentially unlimited amount of source material, as well as unlimited amounts of waste material. This is hardly consistent with a provision intended to deal with "small" amounts of source material.

An even more crucial element, however, is the language of paragraph (a), which imposes the fifteen-pound limitation on the "use" of source material for those that desire to operate under general license authority. As the wording of that paragraph makes apparent, in order to fall within its terms, a licensee must "use" the source material for certain specified purposes, including performing research, development, educational, commercial, or operational functions. Unlike some other general license authorizations in Part 40, which involve essentially passive control over source material,<sup>23</sup> these specified functions embody ongoing analytical or operational processes. Consistent with the dynamic nature of these functions, source material "use" necessarily encompasses more than merely the act of physically handling the material as part of an operational or evaluative process. Rather, the "use" of this material in the process begins when it is received by the general licensee to be employed for one of the specified purposes and continues until such time as it is transferred.

The Licensing Board declined to accept such a reading of paragraph (a). The Board placed its reliance instead upon the canon of construction that the whole of a regulation must be given effect.<sup>24</sup> In this regard, it found significant the fact that the terms "possess" and "use" are both contained in paragraph (b) of section 40.22, which provides an exemption from certain regulatory requirements for those who "receive, possess, use, or transfer source material pursuant to the

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<sup>22</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (citations omitted), *review declined*, CLI-88-11, 28 NRC 603 (1988). See also *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 132-33 (1991), *petition for review pending*.

<sup>23</sup> See, e.g., 10 C.F.R. § 40.23 (general license authorized for possession of transient shipment of source material); *id.* § 40.28 (general license for the custody and long-term care of certain uranium and thorium mill tailings disposal sites).

<sup>24</sup> See *West Chicago*, 33 NRC at 132-33.

general license.”<sup>25</sup> According to the Board, this establishes that paragraph (a), which includes only the term “use,” is not intended to place any limitation on the amount of material that a licensee can “possess” (i.e., have on hand “at any one point in time”).<sup>26</sup>

The language of paragraph (b) undoubtedly creates some ambiguity regarding the scope of the term “use” in paragraph (a). As our previous guidance indicates, however, a primary tool for resolving such uncertainty is the regulatory history of the provision. On this score, the staff points to a 1960 notice of proposed rulemaking that advanced a complete revision of 10 C.F.R. Part 40, including section 40.22. In that notice, the Commission’s predecessor, the Atomic Energy Commission, declared:

The proposed amendment would generally license *possession and use of up to 15 pounds of contained uranium or thorium or any combination thereof at any one time* by certain classes of users . . . . This general license is subject to an annual possession limit of 150 pounds of contained uranium or thorium or any combination thereof. Under this provision many users of small quantities of uranium would be relieved of the necessity of obtaining a specific license. Such general licensees would also be exempted from compliance with the provision of Part 20 of this chapter.<sup>27</sup>

Subsequently, referencing the proposed rule’s “detailed statement of considerations explaining the provisions of the following amendments,” the Commission adopted the regulations as proposed (with one exception not pertinent here), including language in section 40.22 virtually identical to that now at issue.<sup>28</sup>

The Licensing Board denominated this explanation as “at best unclear.”<sup>29</sup> We, however, find it dispositive of the interpretative disagreement between the Board and the staff. As the Commission’s statement makes evident, in order to be in conformity with section 40.22(a), a general licensee cannot have on hand at any one time more than fifteen pounds of source material, whether in the form of unprocessed, processed, or waste matter.<sup>30</sup> A general licensee’s receipt of

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<sup>25</sup> Identical language is found in 10 C.F.R. §40.22(c), which prohibits persons who “receive, possess, use or transfer source material pursuant to the general license issued in paragraph (a)” from administering source material to human beings for medicinal or other purposes.

<sup>26</sup> LBP-89-39, 30 NRC at 755.

<sup>27</sup> 25 Fed. Reg. 8619, 8619 (1960) (emphasis added).

<sup>28</sup> 26 Fed. Reg. 284, 284 (1961). The original wording of section 40.22 was revised in 1980 to its current form. The change in language, however, is not pertinent to the issue before us here. Compare 25 Fed. Reg. at 8621 with 45 Fed. Reg. 55,419, 55,420 (1980).

<sup>29</sup> LBP-89-39, 30 NRC at 756.

<sup>30</sup> By the same token, we view this statement as dispositive of any attempt to excuse noncompliance with 10 C.F.R. §40.22(a) on the basis of a lack of ability to understand the extent of the limitations imposed by this regulation. The publication of this Commission exposition in the *Federal Register* essentially provides notice to all interested persons of the contents of, and thus the Commission’s intent regarding, this regulatory language. See Federal Register Act, 44 U.S.C. §1507. In any event, the Licensees here certainly were on notice of this staff interpretation at least as early as 1982, when the staff took enforcement action. See LBP-89-39, 30 NRC at 769-70.

source material likewise is governed by this limitation to the extent that it cannot receive any amount of material that would cause it to exceed the limitation of fifteen pounds on hand. Further, as the Commission's statement makes clear, while there is no limitation on the number of source material consignments a particular general licensee can receive, each licensee is limited to the receipt of a total of 150 pounds of source material in any calendar year.

The Licensing Board's interpretation of the possession limitations specified in section 40.22 thus is in error and so we reverse its determination in this regard. Further, given that its legal ruling constituted the basis for its rejection of a number of alleged violations put forth by the staff as justification for its revocation order,<sup>31</sup> we remand this matter for further consideration of those charges as grounds for the staff's enforcement action.

B. As a corollary to its ruling regarding section 40.22(a), the Licensing Board also concluded as a matter of law that, in the absence of an amendment of the regulation establishing the general license, the staff has no authority by means of an order (or other formal enforcement action) to impose additional requirements upon general licensees similar to those applicable to specific licensees.<sup>32</sup> As a consequence, the Board concluded that certain staff allegations regarding regulatory violations could not be considered as justification for its revocation order.<sup>33</sup> The staff contests the Board's conclusions in this regard, asserting that the Commission's bestowal of general licensing authority by rule does not limit its authority to utilize orders (and other enforcement mechanisms) to place appropriate conditions on individual general licensees as may be necessary to protect the public health and safety.

Several AEA provisions speak to the Commission's authority to impose requirements and conditions upon licensees. As is pertinent here, section 161b authorizes the Commission to "establish by rule, regulation, *or order*, such standards and instructions to govern the possession and use of . . . source material . . . as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property."<sup>34</sup> Similarly, paragraph (i) of AEA section 161 permits the Commission to

prescribe such regulations *or orders* as it may deem necessary . . . (3) to govern any activity authorized pursuant to [the AEA], including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.<sup>35</sup>

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<sup>31</sup> See *supra* note 21 and accompanying text.

<sup>32</sup> See LBP-89-39, 30 NRC at 750, 754, 788.

<sup>33</sup> See *id.* at 772, 782, 784.

<sup>34</sup> 42 U.S.C. § 2201(b) (emphasis added).

<sup>35</sup> *Id.* § 2201(i) (emphasis added).

Implementing these statutory provisions with regard to the regulation of source material are two especially pertinent Commission rules. The first of these is 10 C.F.R. § 40.41, which provides in pertinent part:

(a) Each license issued pursuant to the regulations in this part shall be subject to all the provisions of the [AEA], now or hereafter in effect, and to all rules, regulations and orders of the Commission.

\* \* \*

(e) The Commission may incorporate in any license at the time of issuance, or thereafter, by appropriate rule, regulation or order, such additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of source or byproduct material as it deems appropriate or necessary in order to:

- (1) Promote the common defense and security;
- (2) Protect health or to minimize danger of [*sic*: "to"] life or property;
- (3) Protect restricted data;

(4) Require such reports and the keeping of such records, and to provide for such inspections of activities under the license as may be necessary or appropriate to effectuate the purposes of the [AEA] and regulations thereunder.

In addition, there is 10 C.F.R. § 40.71, a provision not referenced by the Licensing Board in its decision, which declares in part:

(a) The terms and conditions of each license shall be subject to amendment, revision, or modification by reason of amendments to the [AEA], or by reason of rules, regulations, or orders issued in accordance with the [AEA].

(b) Any license may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application or any statement of fact required under section 182 of the [AEA], or because of conditions revealed by such application or statement of fact or 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 conditions of the [AEA], or the license, or of any rule, regulation or order of the Commission.

As is evident, in each instance, the regulation clearly states that an order is an appropriate means for modifying the terms and conditions of any license issued under 10 C.F.R. Part 40.<sup>36</sup>

In the Licensing Board's view, if the staff (or the Commission) finds that a particular firm's activities under a general license mandate additional limitations or requirements in order to protect public health and safety, it cannot act to impose those conditions by order (or other enforcement mechanism); instead, a time-consuming rulemaking amending section 40.22 itself or a "waiver" of the

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<sup>36</sup> Although 10 C.F.R. § 40.71 speaks in terms of "each license" rather than "[e]ach license issued pursuant to the regulations in this part," as is the reference in section 40.41, the definition of "license" in 10 C.F.R. § 40.4 makes it clear that the references have the same meaning.

rule is required.<sup>37</sup> The limitations and requirements specified in section 40.22 thus would constitute the regulatory upper boundary for any general licensee attempting to operate under that section's authorization.<sup>38</sup>

Undoubtedly, if the Commission wished to establish a licensing scheme limiting its authority (and that of the staff) in this manner, it could have done so. We can find no evidence that was its intention. Rather, as sections 40.41 and 40.71 make apparent, the general licensing authorization afforded by section 40.22 constitutes a regulatory foundation upon which, in the proper circumstances, the staff can impose additional constraints and conditions. Under the terms of those regulations any license authorization, including that provided under a general license, is subject to modification in any particular instance by, for example, an order issued pursuant to 10 C.F.R. §§ 2.202, 2.204. As with any other staff-initiated enforcement action under 10 C.F.R. Part 2, Subpart B, an order modifying a general licensee's authorization must have a sufficient factual and legal predicate to warrant imposing the particular conditions on the licensee. But contrary to the Licensing Board's conclusion, the fact that an order imposes requirements upon a general licensee in excess of those mandated by the regulation providing general license authorization does not disqualify it as a valid regulatory requirement.<sup>39</sup>

Having identified the fundamental legal error in the Licensing Board's justification for discounting certain purported Licensee violations as grounds for the revocation order, we nonetheless are unable to conclude that it necessarily follows that the result reached by the Board was incorrect. As described by the Board, the violations at issue were based upon the Licensees' (1) failure to comply with regulatory requirements regarding licensee technical competence, institutional capability, and equipment and facility adequacy, which requirements

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<sup>37</sup> See LBP-89-39, 30 NRC at 750, 788.

<sup>38</sup> As apparent support for this conclusion, the Licensing Board relied upon a

Commission finding that general source material license activities in the specified quantities "can be conducted without any unreasonable hazard to life or property." [25 Fed. Reg. at 8619.] In other words, the Commission has specified that authorized general license activities do not create an unreasonable hazard; that being so, the Staff cannot rely on public health and safety concerns to impose additional public health and safety conditions.

*Id.* at 755. See also *id.* at 788. The Commission finding referenced by the Board, however, has no relevance to the case at bar. The quoted statement pertains to quantities of source material utilized for certain specified purposes not involved here that, in accordance with AEA section 62, 42 U.S.C. § 2092, the Commission considers to be so "unimportant" that no license is required. 25 Fed. Reg. at 8619; see 10 C.F.R. § 40.13. See also *supra* p. 509.

<sup>39</sup> Certainly, given the Supreme Court's recognition in cases such as *SEC v. Chenery*, 332 U.S. 194, 201-02 (1947), and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), that it is within an agency's discretion whether to use either rulemaking or adjudication (i.e., orders) for announcing new requirements of general applicability, we perceive no reason for finding that the NRC has less procedural latitude in defining the specific requirements that may be necessary in a particular case to protect the public health and safety.

In this regard, the Licensing Board's conclusion about the need for rulemaking to impose additional conditions upon general licensees appears, in part, to have been fueled by its concern that the staff should not be permitted to turn a general licensee into a specific licensee by ordering the general licensee to comply with identical requirements. See LBP-89-39, 30 NRC at 750, 755. While the administrative efficiency of such an endeavor may be questionable, it is not apparent that it would violate any applicable procedural requirements.

are applicable by rule to only “specific licensees”; and (2) use of inadequate controls resulting in facility contamination in excess of NRC guidelines.<sup>40</sup> Although our reasons are different from those of the Board, we too harbor doubts about the ability of the staff to rely upon these purported violations as justification for a *revocation* order.

Under the Commission’s enforcement policy, the issuance of a license revocation order is appropriate when, among other reasons, a licensee “is unable or unwilling to comply with NRC requirements” or “refuses to correct a violation,” or “[f]or any other reason for which revocation is authorized under section 186 of the [AEA, 42 U.S.C. § 2236] (e.g., any condition which would warrant refusal of a licensee on an original application).”<sup>41</sup> The policy defines a “requirement” as “a legally binding requirement such as a statute, regulation, license condition, technical specification, or order,”<sup>42</sup> and a notice of violation sets forth “one or more violations of a legally binding requirement.”<sup>43</sup> Consistent with this enforcement policy, the Board correctly refused to consider the “violations” underlying the staff’s revocation order, *unless* the aforementioned “specific license” requirements and contamination “guidance”<sup>44</sup> have been imposed upon Licensees here as “requirements” (i.e., by prior order or some other legally binding requirement), or *unless* the failure of Licensees to follow those requirements and guidelines would warrant the refusal of a general license to Licensees under section 40.22.<sup>45</sup> It is not apparent to us, however, that either of these circumstances exists.

Nonetheless, the potentially expansive nature of the Board’s erroneous legal determination regarding the Commission’s authority to impose additional requirements on section 40.22 general licensees by order leads us to conclude that the staff should be given an additional opportunity on remand to address the issue of the validity of these purported violations as justification for the revocation of Licensees’ general license authority. In addition, in light of the Board’s extensive findings regarding the Licensees’ failure to comply with the terms of the CALs regarding urine sampling,<sup>46</sup> and its apparent lack of findings

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<sup>40</sup> See LBP-89-39, 30 NRC at 772, 782-84, 788.

<sup>41</sup> 10 C.F.R. Part 2, App. C, § V.C(3)(a), (b), (c). The enforcement policy also declares that issuance of a license revocation order is an appropriate sanction when a licensee “does not respond to a notice of violation where a response was required” or “refuses to pay a fee required by 10 CFR Part 170,” *id.* § V.C(3)(c), (d), circumstances not alleged in this instance.

<sup>42</sup> *Id.* § III n.2.

<sup>43</sup> *Id.* § V.A.

<sup>44</sup> See *supra* pp. 518-519 & note 40.

<sup>45</sup> Relative to the section V.C(3)(c) standard, see *supra* note 41 and accompanying text, the other reasons for which revocation is authorized by AEA section 186 either are not applicable here (i.e., making a false statement in an application or any statement of fact required under AEA section 182, 42 U.S.C. § 2232), or are subsumed within the policy statement’s revocation order criteria V.C(3)(a) or (b) (i.e., failure to construct or operate a facility in accordance with a construction permit, license, or application technical specifications, or violation of any AEA provision or Commission regulation).

<sup>46</sup> See LBP-89-39, 30 NRC at 774, 779, 781-82.

concerning the import of Licensees' noncompliance with the CAL provisions regarding lapel air sampling, upon remand the Board should give additional consideration to the extent to which this noncompliance, while evidently not violative of a legally binding requirement,<sup>47</sup> nonetheless justifies license revocation by demonstrating an unwillingness or inability to comply with NRC requirements. Finally, if the Board again finds that the staff's revocation order cannot be sustained,<sup>48</sup> it also should consider whether any legal basis remains for the imposition of the conditions requiring urine testing and reporting,<sup>49</sup> given that the linchpin of those requirements — Licensees' Utah specific license — no longer exists.<sup>50</sup>

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For the foregoing reasons, the Licensing Board's decision, LBP-89-39, 30 NRC 746, is *reversed* and this cause is *remanded* for further proceedings consistent with this decision.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins  
Secretary to the  
Appeal Board

Dr. Johnson did not participate in this decision.

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<sup>47</sup> See 10 C.F.R. Part 2, App. C, § V.II.

<sup>48</sup> In such a circumstance, contrary to the Licensing Board's earlier observation, see LBP-89-39, 30 NRC at 761 n.18, the Equal Access to Justice Act, 5 U.S.C. § 504, does not permit Licensees to obtain attorney's fees as recompense for their participation before the agency in this type of enforcement proceeding. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271 (1990).

<sup>49</sup> See *supra* note 18 and accompanying text.

<sup>50</sup> See *supra* note 13.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman  
Howard A. Wilber  
G. Paul Bollwerk, III

In the Matter of

Docket Nos. 50-250-OLA-5  
50-251-OLA-5  
(Technical Specifications  
Replacement)

FLORIDA POWER & LIGHT  
COMPANY  
(Turkey Point Nuclear Generating  
Plant, Units 3 and 4)

June 28, 1991

The Appeal Board affirms the Licensing Board's order, LBP-90-24, 32 NRC 12 (1990), dismissing the petitioner, Nuclear Energy Accountability Project, from the operating license amendment proceeding for lack of standing to intervene.

**RULES OF PRACTICE: STANDING TO INTERVENE**

The Commission long ago established that judicial concepts of standing are to be used in determining whether a petitioner has a sufficient "interest" to intervene in a proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325,

329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

#### **RULES OF PRACTICE: STANDING TO INTERVENE**

When an environmental organization seeks to intervene in its own right, independent of its status as a representative of one or more of its members, it must demonstrate an injury in fact to the organization within the zone of interests of the Atomic Energy Act and the National Environmental Policy Act. *See Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 740-41 (1978).

#### **RULES OF PRACTICE: STANDING TO INTERVENE**

An organization's asserted purposes and interests, whether national or local in scope, do not, without more, establish independent organizational standing.

#### **RULES OF PRACTICE: STANDING (REPRESENTATIONAL)**

An organization may acquire standing as the representative of one or more of its members if the member has standing in his or her own right and the member has authorized the organization to represent his or her interests. *See St. Lucie*, 30 NRC at 329; *TMI*, 18 NRC at 332; *Pebble Springs*, 4 NRC at 612-14. *See also Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

#### **RULES OF PRACTICE: STANDING (REPRESENTATIONAL)**

Representational standing hinges upon the organization having a *member* to represent. In other words, the organization's standing is essentially derivative of the member's standing.

#### **RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)**

In exercising its discretion on the question whether a petitioner should be granted discretionary intervention, the Commission indicated that a licensing board should consider, among other things, the factors set out in 10 C.F.R. § 2.714(a) and (d) governing late intervention and intervention generally. *Pebble Springs*, 4 NRC at 616.

## APPEARANCES

**Billie Pirner Garde**, Houston, Texas, for petitioner Nuclear Energy Accountability Project.

**Harold F. Reis**, **Michael A. Bauser**, and **James Vigil, Jr.**, Washington, D.C., and **John T. Butler**, Miami, Florida, for applicant Florida Power & Light Company.

**Patricia Jehle** for the Nuclear Regulatory Commission staff.

## DECISION

Petitioner Nuclear Energy Accountability Project (NEAP) appeals the Licensing Board's memorandum and order dismissing NEAP from this operating license amendment proceeding for a lack of standing to intervene.<sup>1</sup> For the reasons that follow, we affirm the Board's order.

### I.

On December 5, 1989, the Commission published a notice of opportunity for hearing on the application of Florida Power & Light Company for amendments to the operating licenses for Units 3 and 4 of its Turkey Point facility.<sup>2</sup> The applicant sought the amendments to replace the custom technical specifications for the two plants, which dated from initial licensure in the early 1970s, with technical specifications based upon the Westinghouse Standard Technical Specifications. In response to the Commission notice, Thomas J. Saporito, Jr., filed a request for a hearing and a petition for leave to intervene on his own behalf and on behalf of NEAP.

The petition asserted that NEAP, a corporation with its principal place of business in Jupiter, Florida, "is an environmental organization with specific and primary purposes to operate for the advancement of the environment and for other educational purposes."<sup>3</sup> It claimed that members of NEAP "live, work, and vacation in and otherwise use and enjoy" the area within fifty miles of the Turkey Point plants and that such members could suffer severe consequences in the event of a serious nuclear accident at the plant. The petition also stated

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<sup>1</sup> LBP-90-24, 32 NRC 12 (1990).

<sup>2</sup> See 54 Fed. Reg. 50,295 (1989).

<sup>3</sup> Request for Hearing and Petition for Leave to Intervene (Dec. 27, 1989) at 1-2.

that Mr. Saporito, the Executive Director of NEAP, works in and about the City of Miami, Florida, as a teacher in the field of digital electronics. In addition, the petition states that he regularly travels to Miami to conduct research in the nuclear field, thus placing him "within the NRC 'Zone of Interest' on a regular basis."<sup>4</sup> Both the applicant and the NRC staff opposed the intervention petition on the ground that neither NEAP nor Mr. Saporito had demonstrated that they met the Commission's requirements for standing to intervene in the license amendment proceeding.<sup>5</sup> In a February 5, 1990 memorandum and order, the Licensing Board noted that the petitioners were without legal counsel and that the applicant and the staff "have paid particularly careful attention to the law" in opposing the intervention petition.<sup>6</sup> Urging the petitioners to study these answers to their petition, the Board provided them an opportunity to cure any deficiencies.<sup>7</sup>

On March 5, 1990, the petitioners filed an amended intervention petition, accompanied by fifty-six contentions. With respect to the standing of Mr. Saporito, the amended petition, supported by his affidavit, stated that he resided with his family in Jupiter, Florida, some eighty-three miles from the Turkey Point plants and that he worked as an instructor at a technical school in Miami, Florida, a location he declared to be "well within the NRC's 'geographical zone of interest.'" <sup>8</sup> The amended petition further asserted that, in addition to being its Executive Director, Mr. Saporito was President, Treasurer, and a member of the Board of Directors of NEAP. The petition also stated that Mr. Saporito opposed the license amendments because the revised technical specifications will cause the plant to be operated unsafely, resulting in the release of radiation that will adversely affect his health and safety.<sup>9</sup>

With respect to NEAP, the amended petition asserted that, as a nonprofit environmental organization, its "primary purpose [is] focused on providing for public safety and for the protection of the environment as a whole regarding Nuclear Power Generation."<sup>10</sup> It further stated that NEAP derives standing through its Executive Director, Mr. Saporito, and that NEAP opposes the license amendments because it, along with its members, believes the technical specification revisions will cause the Turkey Point plants to be operated unsafely. According to the amended petition, such operation will adversely affect the

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> See Licensee's Answer in Opposition to Request for Hearing and Petition for Leave to Intervene (Jan. 10, 1990) at 2-18; NRC Staff Response to Request for Hearing and Petition for Leave to Intervene of [NEAP] and Thomas J. Saporito, Jr. (Jan. 16, 1990) at 3-9.

<sup>6</sup> Memorandum and Order (Feb. 5, 1990) at 3 (unpublished).

<sup>7</sup> *Id.*

<sup>8</sup> Petitioners Amended Petition for Intervention and Brief in Support Thereof (Mar. 5, 1990) at 10 [hereinafter Amended Petition].

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 15.

health and safety of its members, as well as NEAP's ability to carry out its mission to inform and educate the public.<sup>11</sup>

In their respective responses to the petitioners' amended intervention petition, the applicant and the staff conceded that Mr. Saporito had standing to intervene based upon his employment in the vicinity of the Turkey Point plants and that NEAP, through Mr. Saporito, also had established representational standing.<sup>12</sup> Nonetheless, a little over a week after a March 23, 1990 prehearing conference at which he represented NEAP as well as himself, Mr. Saporito filed a notice of withdrawal from the proceeding. The April 1 notice stated that the applicant's action in seeking to verify Mr. Saporito's employment by writing his employer "caused Mr. Saporito to feel intimidated by the Applicant's actions" so he was withdrawing from the proceeding, leaving NEAP as the sole remaining petitioner.<sup>13</sup>

In an April 24, 1990 memorandum and order, the Licensing Board indicated that it would treat Mr. Saporito's withdrawal notice as a motion to withdraw.<sup>14</sup> In its ruling, the Board first stated that, if the withdrawal motion were granted, the question of NEAP's standing, both as an organization and as a representative of its members, would be revived because at the prehearing conference the Board had not determined "whether NEAP had standing in this case without reliance on Mr. Saporito as the member whose interest is affected by the proposed amendment."<sup>15</sup> It then determined that, on the basis of Commission precedents, "NEAP does not have standing as an organization since it is merely claiming a generalized grievance — alleged danger from a nuclear power plant — that is shared by the general public."<sup>16</sup> Next, outlining the Commission's requirements for establishing representational standing, the Board found it had insufficient information to rule on the issue. It therefore ordered petitioner NEAP to provide

a statement signed by an authorized officer of NEAP that:

1. The organization has decided that it desires to continue to be represented in this proceeding.
2. Sets forth the name of the organization's authorized representative in this proceeding.
3. Explains the nature of and privileges of membership in NEAP and how the organization determines whether a particular person is a member.

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<sup>11</sup> *Id.* at 15-16.

<sup>12</sup> Applicant's Response to Amended Petition to Intervene (Mar. 16, 1990) at 6; NRC Staff Response to Petitioners' Amended Petition for Leave to Intervene (Mar. 19, 1990) at 7-9.

<sup>13</sup> Notice of Withdrawal from Proceeding (Apr. 1, 1990).

<sup>14</sup> Memorandum and Order (Apr. 24, 1990) at 1 [hereinafter April 24 Order].

<sup>15</sup> *Id.* at 5. See LBP-90-16, 31 NRC 509, 511-12 (1990).

<sup>16</sup> April 24 Order at 6 (emphasis in original).

4. States that each of the persons on whom NEAP relies for standing is a member of NEAP, including the date they became a member and that they have been a member since the beginning of this proceeding until the present date.<sup>17</sup>

The Licensing Board also directed that petitioner NEAP provide a statement from at least one of its members that:

1. They desire to be represented by NEAP in this proceeding.
2. Establishes that they have a personal interest in the proceeding (such as their place of residence or the other contacts that establish that they have a direct interest; and the nature of the interest they seek to protect).
3. Establishes the date they became a member of NEAP and that they are currently members of NEAP.
4. Communicates their understanding concerning their privileges as a member of NEAP and the nature of their participation in NEAP activities.<sup>18</sup>

In response to the Licensing Board's order for specific information, Mr. Saporito, on behalf of NEAP, stated that, even though he had withdrawn from the proceeding in his personal capacity, he was NEAP's authorized representative. NEAP's response also indicated that, pursuant to its bylaws, members are entitled to receive information and newsletters but they have no voting rights, unless specifically authorized by the Board. Finally, the response asserted that NEAP relied upon its member, Shirley Brezenoff, for standing, referring to her attached affidavit and membership application. In her affidavit, Ms. Brezenoff stated that she is a member of NEAP who is concerned about the Turkey Point license amendments, that she lives within 50 miles of the nuclear facility, and that she authorizes NEAP and Mr. Saporito to represent her interests. The attached copy of her membership application, however, was not signed by Ms. Brezenoff in her individual capacity; instead, it was executed by her on behalf of an organization called Quad City Citizens for Nuclear Arms Control.<sup>19</sup>

After receiving NEAP's response and replies from the applicant and the staff, the Licensing Board granted part of Mr. Saporito's still pending motion to withdraw, but only as it related to him in his capacity as an individual petitioner. The Board did not permit Mr. Saporito to withdraw from the proceeding in his capacity as a member and representative of NEAP, which it noted would have deprived NEAP of standing.<sup>20</sup> The Board thus left unchanged its previous determination that NEAP had standing as the representative of its member Mr.

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<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 8-9.

<sup>19</sup> NEAP's Response to the ASLB's Memorandum and Order (May 5, 1990) [hereinafter NEAP's Response].

<sup>20</sup> LBP-90-16, 31 NRC at 514.

Saporito, but it made its ruling contingent upon Mr. Saporito's filing "a pleading in which he personally states his willingness to be represented by NEAP."<sup>21</sup> In this regard, the Board noted that

([w]ere Mr. Saporito a lawyer, fully informed of the possible consequences of his motion to withdraw, we might grant his motion and rule that NEAP is no longer a party. However, given Mr. Saporito's lay status, our denial of [part of] his motion will give him a chance to consider the full consequences of his request.)

\* \* \*

If Mr. Saporito continues to withdraw himself as the basis for NEAP's standing, he may do so. However, he is the sole basis on which NEAP relies and NEAP has already had all the opportunity it needs to establish standing; it may not file any further documents alleging a new basis for standing. Hence, if Mr. Saporito fails to assure us of his willingness to have NEAP represent him . . . the entire basis for standing for NEAP fails and this case will be dismissed.<sup>22</sup>

In making this provisional ruling on standing, the Licensing Board also found that the information provided by NEAP in its response was insufficient to support NEAP's standing as a representative of Ms. Brezenoff because she did not have the requisite indicia of membership due to her lack of control over NEAP and the absence of her individual membership in that organization.<sup>23</sup> Finally, the Board admitted five of petitioners' contentions.<sup>24</sup> Therefore, the Board's ruling effectively granted NEAP's intervention petition contingent upon Mr. Saporito's filing the required pleading indicating whether he wished to be represented by NEAP.

By letter dated June 20, 1990, NEAP's newly retained counsel advised the Licensing Board that Mr. Saporito was no longer employed in the Miami area and that he had been dismissed from his teaching position on May 10, 1990.<sup>25</sup> Counsel's letter also enclosed a copy of Mr. Saporito's June 19, 1990 statement declaring that he desired to be represented by NEAP in the license amendment proceeding. On June 22, 1990, the applicant, asserting a material change in circumstances, moved for reconsideration of the Licensing Board's ruling on NEAP's standing. The applicant argued that the intervention petition should now be denied and the proceeding dismissed because NEAP failed to meet the standing requirements of 10 C.F.R. § 2.714.<sup>26</sup> The staff supported the applicant's motion and NEAP opposed it.<sup>27</sup>

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<sup>21</sup> *Id.* at 538.

<sup>22</sup> *Id.* at 514.

<sup>23</sup> *Id.* at 513 n.5.

<sup>24</sup> *Id.* at 538.

<sup>25</sup> Letter from B. Garde to Licensing Board (June 20, 1990) at 2.

<sup>26</sup> Applicant's Motion for Reconsideration and Dismissal of Petition to Intervene (June 22, 1990).

<sup>27</sup> See NRC Staff Response to Applicant's Motion for Reconsideration (July 12, 1990); Response of [NEAP] and Thomas J. Saporito to Florida Power and Light's Motion for Reconsideration and Dismissal of Petition to Intervene (July 10, 1990).

In the order that is now before us on appeal, the Licensing Board granted the applicant's motion and dismissed NEAP from the proceeding for lack of standing.<sup>28</sup> The Board emphasized in its ruling that the sole ground for NEAP's standing was the standing of its representative and member, Mr. Saporito, who was employed in Miami in the immediate geographical vicinity of Turkey Point — a critical fact that was no longer true. The Board also reiterated a NEAP concession in its response to the applicant's dismissal motion to the effect that the changed circumstances eliminated the basis for NEAP's standing. Further, the Board denied NEAP's requests to submit additional facts and argument to establish NEAP's standing and to hold the matter in abeyance pending a determination by the Department of Labor whether the applicant caused Mr. Saporito's discharge by his employer. In this regard, the Licensing Board found that NEAP already had ample opportunity to establish NEAP's standing:

We note that until this time Mr. Thomas J. Saporito, who is not a lawyer, has appeared on behalf of NEAP, as is his right under the procedural regulations. . . . As the representative of NEAP, Mr. Saporito had the full authority and responsibility to represent it, on both technical and procedural matters. He could win or lose the case on complex issues of science, engineering, and law. He also could make arguments that impose the costs of response on opposing parties and the costs of decision on the Nuclear Regulatory Commission. While we have been patient and protective of his needs as a nonlawyer, he has now had all the protection he can properly be afforded.

NEAP has had ample opportunity to demonstrate that it has standing independent of Mr. Saporito, and it has not done so.<sup>29</sup>

Finally, the Board denied NEAP's request for discretionary intervention, finding that such intervention was inappropriate under the standards laid down by the Commission.<sup>30</sup>

## II.

A. Before us, NEAP first argues that the Licensing Board erred in denying it organizational standing in its own right to intervene in the license amendment proceeding.<sup>31</sup> The crux of its argument is simply that NEAP's status as a small

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<sup>28</sup> LBP-90-24, 32 NRC 12.

<sup>29</sup> *Id.* at 15 (citation omitted).

<sup>30</sup> *Id.* at 15-17.

<sup>31</sup> Although NEAP's appellate brief is styled "Brief for Appellants Nuclear Energy Accountability Project (NEAP) and Thomas J. Saporito," NEAP is the only proper appellant before us. Mr. Saporito voluntarily sought to withdraw from the proceeding and the Licensing Board granted his request. See LBP-90-16, 31 NRC at 514. Not surprisingly, he did not file a notice of appeal, nor did he have a right to. *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, ALAB-851, 24 NRC 529 (1986).

organization with locally focused interests and purposes is sufficient to provide it the foundation for organizational standing.<sup>32</sup> NEAP's argument is without merit.

Pursuant to 10 C.F.R. § 2.714(a) of the Commission's Rules of Practice, "[a]ny person whose interest may be affected by a proceeding" may seek to intervene by, *inter alia*, filing a petition "set[ting] forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene." The Commission long ago established that judicial concepts of standing are to be used in determining whether a petitioner has a sufficient "interest" to intervene in a proceeding.<sup>33</sup>

Those well-known standing principles require a petitioner to establish that the Commission's action will cause an "injury in fact" and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding.<sup>34</sup> Regardless of whether the petitioner seeking to intervene is an individual or an organization, the same showing is required.<sup>35</sup> Thus, when an environmental organization seeks to intervene in its own right, independent of its status as a representative of one or more of its members, as NEAP does here, it must demonstrate an injury in fact to the organization within the zone of interests of the Atomic Energy Act and the National Environmental Policy Act.<sup>36</sup> To meet the injury in fact test, the petitioner must show a real or threatened harm, not merely an academic interest in a matter.<sup>37</sup> Similarly, the standard is not met if the asserted harm is only a generalized grievance shared by all or a large class of citizens that does not result in a palpable injury.<sup>38</sup>

Although NEAP claims that the Licensing Board should have found it had standing to intervene as an organization in its own right, it has failed to demonstrate any injury in fact to its organizational interests from the Turkey Point license amendments. Indeed, NEAP simply ignores this essential prerequisite. Rather, in its brief, NEAP points to the local nature of its organizational interests and purposes, asserting, in effect, that these alone are sufficient to establish its organizational standing. Thus, it argues that the assertions in its amended inter-

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<sup>32</sup> Brief for Appellants [NEAP and Saporito] (Sept. 5, 1990) at 41-43 [hereinafter NEAP Brief].

<sup>33</sup> *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

<sup>34</sup> *St. Lucie*, 30 NRC at 329; *TMI*, 18 NRC at 332. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

<sup>35</sup> See *TMI*, 18 NRC at 332.

<sup>36</sup> 42 U.S.C. §§ 2011 *et seq.*; 42 U.S.C. §§ 4321 *et seq.* See *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 740-41 (1978).

<sup>37</sup> *Pebble Springs*, 4 NRC at 613.

<sup>38</sup> *TMI*, 18 NRC at 333; *Transnuclear, Inc.* (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 531 (1977).

vention petition — i.e., that NEAP “‘distributes information about the Turkey Point nuclear plant in Homestead, Florida . . . [which] provides for public education of nuclear energy issues and meets a requirement of NEAP’s mission’ ” and “‘has obtained authorization from the Superintendent of the Dade County School Board to conduct educational seminars at all of the public schools in the School Board’s jurisdiction’ ” — are sufficient to establish its organizational standing.<sup>39</sup> But these assertions, as well as others from the amended petition to the effect that NEAP’s “primary purpose [is] focused on providing for public safety and for the protection of the environment as a whole regarding Nuclear Power Generation,”<sup>40</sup> simply do not demonstrate an injury in fact to an organizational interest of NEAP that is within the zone of interests of the applicable statutes. An organization’s asserted purposes and interests, whether national or local in scope, do not, without more, establish independent organizational standing. As the Supreme Court stated in *Sierra Club v. Morton*,<sup>41</sup> “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the [Administrative Procedure Act].” Similarly, the purposes recited by NEAP are insufficient to establish its “interest” in the proceeding under the Commission’s regulations.<sup>42</sup> Accordingly, the Licensing Board did not err in determining that NEAP lacked organizational standing.

B. NEAP next asserts that the Licensing Board erred in denying it standing as the representative of Ms. Brezenoff. Like the proverbial short horse soon curried, this argument need not detain us long.

An organization may acquire standing as the representative of one or more of its members if the member has standing in his or her own right and the member has authorized the organization to represent his or her interests.<sup>43</sup>

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<sup>39</sup> NEAP Brief at 42. See Amended Petition at 15-16.

<sup>40</sup> Amended Petition at 15.

In its brief (at 42), NEAP also quotes, without attribution, several additional statements of the purposes and interests of NEAP. The language quoted by NEAP comes from a NEAP promotional flyer that was attached to the applicant’s answer to NEAP’s intervention petition. Because this material does not appear in NEAP’s amended intervention petition, we are hard pressed to see how NEAP can now use it on appeal to establish its organizational standing. In any event, this material does nothing to establish standing for NEAP as an organization in its own right.

<sup>41</sup> 405 U.S. 727, 739 (1972).

<sup>42</sup> Indeed, NEAP’s asserted interests here are closely akin to those identified in *Sheffield*, 7 NRC at 740, as patently insufficient to establish the organizational standing of an Illinois not-for-profit corporation in the license renewal and amendment proceeding for a low-level radioactive waste burial site. In *Sheffield*, the intervention petition stated, *inter alia*, that “Mid-America, as a public interest foundation, is concerned with both the benefits accruing to the general public from the use of radioactive materials and with the disposal of waste products in a safe manner with respect to persons and the environment.” *Id.*

<sup>43</sup> See *St. Lucie*, 30 NRC at 329; *TMI*, 18 NRC at 332; *Pebble Springs*, 4 NRC at 612-14; *Sheffield*, 7 NRC at 741. See also *Hunt v. Washington Apple Advertising Comm’n*, 432 U.S. 333, 342-43 (1977); *Warth v. Seldin*, 422 U.S. at 511.

Such representational standing, however, hinges upon the organization having a *member* to represent. In other words, the organization's standing is essentially derivative of the member's standing.

After Mr. Saporito filed his April 1, 1990 notice of withdrawal, the Licensing Board found it had insufficient information to determine whether NEAP had standing as the representative of any of its members. Thus, the Board ordered NEAP to provide the necessary information including a statement from NEAP naming each person upon whom it relied for standing and the date he or she became a member.<sup>44</sup> The Board also required NEAP to file a similar statement from each member it identified.<sup>45</sup> In response to the order, NEAP named only one supposed member, stating "NEAP relies on its member Ms. Shirley Brezenoff . . . for standing in this proceeding."<sup>46</sup> NEAP then attached the affidavit of Ms. Brezenoff and a membership application signed by her "For Quad City Citizens for Nuclear Arms Control." As part of its June 15, 1990 ruling on Mr. Saporito's withdrawal motion, the Licensing Board found that NEAP did not have standing as a representative of Ms. Brezenoff because, *inter alia*, she "became a member 'For Quad City Citizens for Nuclear Arms Control' and not for herself."<sup>47</sup>

That ruling is manifestly correct. Indeed, in its brief, NEAP does not even address this Licensing Board determination. As the Board found, NEAP's standing cannot rest upon Ms. Brezenoff because she is not an individual member of NEAP and hence NEAP cannot act in a representational capacity for her. Moreover, NEAP made no showing establishing the standing of the Quad City organization, an asserted member of NEAP. Nor can NEAP be heard to complain that it did not have ample opportunity to establish its standing as the representative of its members.<sup>48</sup> Under the Licensing Board's order, it was free to provide information on any or all of its members. Instead, it chose to rely solely on Ms. Brezenoff, who was herself not a NEAP member, but a representative of yet another organization. Thus, NEAP ran the risk that, if its response was found inadequate, it had no other member on which to base its standing.<sup>49</sup> Accordingly, the Licensing Board correctly found that NEAP did not have standing as the representative of Ms. Brezenoff.

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<sup>44</sup> April 24 Order at 8.

<sup>45</sup> *Id.* at 9.

<sup>46</sup> NEAP's Response at 3.

<sup>47</sup> LBP-90-16, 31 NRC at 513 n.5.

<sup>48</sup> Nothing in the Commission's Rules of Practice mandates that NEAP (or Mr. Saporito) be given multiple opportunities to cure intervention petition deficiencies. Indeed, if the Licensing Board is to be faulted in this regard, it would be for bending over backwards to aid NEAP in its intervention quest.

<sup>49</sup> In its brief (at 43-44), NEAP also alleges without any elaboration, that it established representational standing by naming in its amended intervention petition a number of other individuals. Not only is this claim inadequately briefed, and hence abandoned, *see Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant)*, ALAB-837, 23 NRC 525, 533-34 (1986), but none of the statements supplied by these individuals indicated they were

(Continued)

C. NEAP also challenges the Licensing Board's ruling denying its additional request for discretionary intervention. In *Pebble Springs*, the Commission held that when a petitioner is not entitled to intervene in a proceeding as a matter of right, the Licensing Board nevertheless may permit a petitioner to participate in the proceeding as a matter of discretion.<sup>50</sup> In exercising its discretion, the Commission indicated that a board should consider, among other things, the factors set out in 10 C.F.R. § 2.714(a) and (d) governing late intervention and intervention generally.<sup>51</sup> We will reverse a licensing board's determination on discretionary intervention only when we find the board abused its discretion. Under that review standard, the petitioner

has a substantial burden on this appeal. It is not enough for it to establish simply that the Licensing Board might justifiably have concluded that the totality of the circumstances bearing upon the [10 C.F.R. § 2.714] factors tipped the scales in favor of [the grant] of the petition. In order to decree that outcome, we must be persuaded that a reasonable mind could reach no other result.<sup>52</sup>

Here, the Licensing Board considered the factors prescribed by the Commission and determined that "on balance it is not appropriate to use our discretion to admit NEAP as a party."<sup>53</sup> We have reviewed NEAP's arguments on appeal and find no basis upon which to overturn the Licensing Board's ruling. The Board's decision reflects a considered balancing of the prescribed factors and a judgment well within its discretion. Accordingly, we are unable to conclude that the Board abused its discretion in denying discretionary intervention to NEAP.

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For the foregoing reasons, the Licensing Board's order dismissing NEAP as a party for lack of standing, LBP-90-24, 32 NRC 12, is *affirmed*.<sup>54</sup>

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members of NEAP or described the purported injury they suffered. Moreover, NEAP cannot now rely upon the individuals named in its March 5, 1990 amended petition given its subsequent admission in its response to the Licensing Board's April 24, 1990 order that it relied solely upon Ms. Brezenoff to establish its standing.

<sup>50</sup> *Pebble Springs*, 4 NRC at 614-17.

<sup>51</sup> *Id.* at 616.

<sup>52</sup> *Washington Public Power Supply System (WPPSS Nuclear Project No. 3)*, ALAB-747, 18 NRC 1167, 1171 (1983).

<sup>53</sup> LBP-90-24, 32 NRC at 17.

<sup>54</sup> Our affirmation of the Licensing Board's dismissal of NEAP for lack of standing, makes it unnecessary for us to rule on the applicant's contested December 19, 1990 motion for a show cause order why the proceeding should not be terminated and its subsequent February 8, 1991 motion to strike the petitioner's reply.

**It is so ORDERED.**

**FOR THE APPEAL BOARD**

**Barbara A. Tompkins  
Secretary to the  
Appeal Board**



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman  
Dr. A. Dixon Callihan  
Dr. Jerry R. Kilne

In the Matter of

Docket No. 30-12319-CivP  
(ASLBP No. 90-618-03-CivP)  
(EA 89-223)  
(Material License No. 35-17178-01)

TULSA GAMMA RAY, INC.

June 13, 1991

The Licensing Board determines that the Licensee in a civil-penalty proceeding is not required to present its case through prepared testimony.

**RULES OF PRACTICE: PREPARED TESTIMONY**

Any requirement to file prepared testimony in a civil-penalty proceeding would be contrary to NRC rules, which exempt enforcement proceedings from the general requirement for filing prepared testimony. 10 C.F.R. § 2.743(b)(3).

**MEMORANDUM**  
**(Filing of Direct Testimony)**

By letter dated June 11, 1991, copies of which were provided to the Licensing Board, the NRC Staff advised the Licensee that the Staff (which had filed prepared testimony) would object to any testimony of the Licensee that was not similarly prefiled in prepared form. (The Licensee has filed no prepared

testimony.) As a basis for its position, the Staff cited the Licensing Board's Order of November 15, 1990, LBP-90-43, 32 NRC 390.

The Board had considerable doubt as to the legal authority for such a position and, in addition, was aware that in discovery the Licensee had indicated that it planned to call several named witnesses. Accordingly, the Board attempted to convene a telephone conference to discuss this matter but was unable to establish a time in the near future when all parties could participate (so that the Licensee would not be put to the burden and expense of preparing direct testimony, if it did not wish to do so).

As a result, the Board on June 12, 1991, separately advised the parties by telephone that (1) the November 15 Order did not require the filing of prepared testimony but only established a date by which parties were permitted to file such testimony, and (2) in any event, any requirement to file prepared testimony in this civil-penalty proceeding would have been contrary to NRC rules, which exempt enforcement proceedings of the type involved here from the general requirement for filing prepared testimony. 10 C.F.R. § 2.743(b)(3). *See also* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d); *Attorney General's Manual on the Administrative Procedure Act*, U.S. Department of Justice, 1947, at 77-78.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
June 13, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman  
Dr. George A. Ferguson  
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-322-OLA-2  
(ASLBP No. 91-631-03-OLA-2)  
(Possession-Only License)

LONG ISLAND LIGHTING  
COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

June 13, 1991

MEMORANDUM AND ORDER  
(Ruling on Amended Petitions to Intervene  
and to Hold Hearings)

I. INTRODUCTION

On March 6, 1991, the Licensing Board issued Memorandum and Order, LBP-91-7, 33 NRC 179 (1991), which afforded Petitioners, Scientists and Engineers for Secure Energy (SE2) and Shoreham-Wading River School District (School District), the opportunity to amend their previously filed petitions to intervene and to hold hearings on Long Island Lighting Company's (LILCO's) application for what the Commission has determined is a possession-only license (POL) for the Shoreham Nuclear Power Station, Unit 1 (Shoreham).<sup>1</sup>

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<sup>1</sup>CLI-91-1, 33 NRC 1, 3 (1991).

The Licensing Board, in LBP-91-7, had found that Petitioners failed to establish standing, as provided for by 10 C.F.R. § 2.714(a)(2), in the subject proceeding. On April 8, 1991, each Petitioner filed an "Amendment to Its Request for Hearing and Petition to Intervene" to correct deficiencies found by the Licensing Board in the original petitions.

On April 23, 1991, in response, Licensee filed "LILCO's Opposition to Petitioners' Amended Petitions to Intervene and Requests for Hearing on Proposed 'Possession Only' License for Shoreham." LILCO asserts that the amended petitions have nothing worthwhile to contribute to the proceeding and should be dismissed.

On April 29, 1991, NRC Staff (Staff) filed its response titled "NRC Staff Response to Petitioners' Amended Petitions to Intervene and Requests for Hearing." It requests that the amended petitions be denied.

In this Memorandum and Order, which supplements LBP-91-7, the Licensing Board reviews and rules on the amended requests for intervention and hearing.

## II. LICENSING BOARD'S RULINGS ON DEFICIENCIES IN ORIGINAL PETITIONS

### A. The Petitions

Petitioners principally based their cases on the claims that the POL is part of the *de facto* decommissioning of Shoreham; that the POL application should be preceded by a decommissioning plan; that prior to the issuance of a POL, Staff must issue an Environmental Impact Statement (EIS); and that an EIS must consider resumed operation as an alternative to decommissioning because it is a viable alternative.

Pursuant to the Commission's instructions in CLI-91-1, that the Licensing Board act in accordance with that decision and the opinions expressed in CLI-90-8, 32 NRC 201 (1990), *aff'd*, CLI-91-2, 33 NRC 61 (1991), the Licensing Board found that the Commission's policy decisions stripped away Petitioners' main arguments for standing.

The Commission had found in CLI-90-8 that the Staff need not consider resumed operation of Shoreham as an alternative course of action in any environmental review of decommissioning it performs.

Contrary to Petitioners' claim, the Commission found in CLI-91-1 that a request for a POL need not be preceded or accompanied by either a decommission-

ing plan or particular environmental information, or a National Environmental Policy Act (NEPA) review related to decommissioning.<sup>2</sup>

### **1. The SE2 Petition**

SE2 claimed in its original petition that it was injured because of Staff's refusal to prepare an EIS on the alleged decommissioning of Shoreham of which the POL application was part. It stated that the failure to act by Staff deprived Petitioner of its right to comment directly on the EIS, to advise its members on its meaning, and to make recommendations to the public and political leadership. SE2 asserted that the Commission inaction interferes with its informational purposes and deprives the organization of its ability to carry out its organizational purposes. The Licensing Board ruled that, based on the Commission's holding in CLI-91-1, a POL may be issued without any environmental review, and Petitioner's claim of injury was invalid.

The Licensing Board also found that SE2's petition was defective because it failed to identify any particular injury to itself or its members that can be traced to the challenged action. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). Petitioner only presented bare conclusory allegations that the proposed reduction in technical specification requirements would increase radiological health and safety risks without identifying a particularized injury. This was found by the Licensing Board to be legally insufficient to establish standing.

The Licensing Board did not permit SE2 to successfully invoke a presumption of injury for five of its members who live, work, or have property interests within 50 miles of Shoreham. It was found that the presumption could not be employed because the POL does not involve a construction permit, an operating license, or a significant amendment that would involve an obvious potential for offsite consequences. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

The Licensing Board further found that member interest was that of ratepayers and that it was well settled that such an interest does not confer standing in a NRC licensing proceeding.

For an organization to rely upon injury to the interests of its members, it must provide, with its petition, identification of at least one of the persons it seeks to represent, a description of the nature of the injury to the person, and demonstration that the person to be represented has in fact authorized such representation. *Philadelphia Electric Co.* (Limerick Generating Station, Units

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<sup>2</sup>However, the Commission further found that despite this categorical exclusion, a NEPA review for a POL may be warranted, for example, if the POL clearly could be shown to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact. Petitioners had made no such claim in the original petitions.

1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982). The Licensing Board found that Petitioner had not submitted a supporting statement containing such information for any members claimed to be represented, as is required. Neither did SE2 state that its organizational purposes provide authority to represent members in adjudicatory proceedings.

A petition to intervene must contain the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2). Based on the Commission's decision in CLI-91-1, that the request for a POL need not be preceded or accompanied by particular environmental information or a NEPA review related to decommissioning, the Licensing Board ruled that NEPA requirements are not at issue in the proceeding and aspects relating to NEPA were not relevant to the proceeding.

Also, it was found that those aspects proposed by the Petitioner dealing with decommissioning, resumed operations, and the Staff's no significant hazards consideration determination are not relevant issues in the proceeding.

## **2. *The School District's Petition***

The School District's original petition extensively duplicated that of SE2's. To the extent that the two petitions were identical, the Licensing Board made the same ruling on identical matters. To the extent they differed, the following rulings were made on the deficiencies in the School District's petition.

School District was found not to have the organizational interest for standing. Its interests were those of a ratepayer and a tax recipient. These economic concerns are outside of the Commission's jurisdiction.

As to representational standing for the President of the Board of Education, the Licensing Board found that although the individual might reside or work in close proximity to the nuclear facility, it did not create a presumption of injury for standing because there was no obvious potential for offsite consequences. The POL requires that LILCO not operate the plant.

The Licensing Board further found that School District had not particularized a distinct and palpable harm that constitutes an injury in fact to itself or to its employee, nor did it trace any such injury back to the challenged action. The Licensing Board ruled that these allegations, proffered by the School District without specifics, did not meet the regulatory requirements for standing.

## **III. LICENSING BOARD'S RULINGS ON AMENDED PETITIONS**

The Licensing Board, having reviewed and fully considered SE2's and School District's amended petitions and LILCO's and Staff's answers, all filed in response to LBP-91-7, makes the following determinations and rulings.

## A. Procedural Issues in the Amended Petitions

Petitioners cured the procedural deficiencies found by the Licensing Board in the original petitions. They did provide a necessary supporting statement for each of the persons they sought to represent, identifying the individual, describing the nature of the alleged injury to the person, and demonstrating that the person, in fact, authorized such representation. The Licensing Board concludes from the affidavit of SE2's Executive Director that Petitioner's organizational purpose provides authority to represent members in adjudicatory proceedings.

## B. SE2's Amended Petition

In its amended petition, SE2 requests that the Licensing Board reconsider its prior finding that NEPA requirements are not at issue in the POL proceeding, on the basis of the Commission's most recent guidance in CLI-91-4, 33 NRC 233 (1991), which modifies Commission holdings in CLI-90-8.

The referenced proceedings relate to three licensing changes to the Shoreham full-power operating license, the Confirmatory Order Modification, the Security Plan Amendment and the Emergency Preparedness Amendment. In these proceedings, Petitioners contended that the three actions were part of an unauthorized *de facto* decommissioning of Shoreham without a required agency NEPA review. The Licensing Board, relying on CLI-90-8, in LBP-91-1, denied the foregoing as issues in the three proceedings.

The Commission more recently in CLI-91-4 stated that its "comments in CLI-90-8 were not intended to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining properly supported contentions that such an EIS must be prepared at this time." 33 NRC at 236-37.

It further stated that "it is within the scope of NEPA and a proceeding on any license amendment to claim that the amendment requires an EIS because it is an inseparable segment of a larger federal action with a significant environmental impact." *Id.* at 236. The Commission gave the Petitioners the opportunity to challenge the three actions.

As a result of the Commission's further guidance in CLI-91-4 and additional information SE2 submitted in an amended petition of February 4, 1991, the Licensing Board in LBP-91-23, 33 NRC 430 (1991), found SE2 had established standing under NEPA, as provided for in 10 C.F.R. § 2.714(a)(2).

The Licensing Board, in regard to the three licensing actions, found that the alleged *de facto* decommissioning of Shoreham without a required agency environmental review was an issue relevant to the proceedings. It further determined that SE2 had posited a cognizable injury under NEPA to establish standing.

The injury was alleged to result from the Commission's inaction in conducting an environmental review of the alleged decommissioning which precluded SE2 from commenting on an EIS and advising its members on the environmental risks and reporting its findings and recommendations to the public and political leadership as provided for in its charter. SE2 made a sufficient case for standing based on its claim that its programmatic informational activities and organizational purpose were significantly harmed by the failure to conduct an environmental review. An environmental interest identified by Petitioner was a preference for a mothballing type of solution, as a choice among alternatives, in the process of decommissioning Shoreham.

In its original petition on the POL, SE2 made the argument that LILCO's application for a POL is but another effort toward the decommissioning of the Shoreham plant without a required EIS.

SE2, in its amended petition, requests that the Licensing Board follow the Commission's guidance in CLI-91-4 and consider as a relevant issue the allegation that the POL is part of an impermissible segmentation of the decommissioning of Shoreham and that an EIS is required for all of the actions.

LILCO and Staff oppose such consideration. LILCO claims that in CLI-91-4, the Commission was only discussing the applicability of NEPA to the three licensing actions at issue in Petitioners' other sets of petitions and has no applicability to the POL.

Staff asserts that Petitioners have not shown that the proposed issuance of a POL is an inseparable segment of a larger NRC action or that such an action would require an EIS. It further asserts that there was no showing that a POL would not have a separate utility of its own. Staff claims that the adverse environmental impacts complained of all stem from the Licensee's decision not to operate Shoreham and not from decommissioning the facility.

The Licensing Board finds that the Commission's guidance in CLI-91-4 does apply to the POL proceeding. The Commission, in assigning the POL to the Licensing Board, stated that the matter should be handled in accordance with CLI-90-8. The guidance in CLI-91-4 is but a modification of CLI-90-8 and to the extent CLI-90-8 is applicable to the POL so is its modification.

The Licensing Board further concludes that based on the Commission's guidance in CLI-91-4 and additional information provided in the amended petition. SE2 has established standing on the NEPA issue in the POL application proceeding.

SE2 makes the same case for standing on the POL as it did on the three licensing actions. Its position is that the POL is part of the continuum in the alleged unauthorized decommissioning of Shoreham without a required EIS. The Commission has recognized this position to be relevant to license amendment proceedings and upon which litigable contentions may be based.

Petitioner in the POL proceeding identified the same kind of injury to its programmatic informational activities and organization that the Licensing Board found to be a cognizable injury under NEPA and was sufficiently qualifying to establish standing for the three licensing actions.

As evidenced by Staff's criticism, SE2 has not made a particularly strong showing for standing. However, it has been recognized that "NEPA's purpose of ensuring well-informed government decisions and stimulating public comment on agency actions effectively lowers the threshold for establishing injury to informational interests." *Competitive Enterprise Institute v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 123 (D.C. Cir. 1990). Petitioner indicated a preference for a mothballing type of solution, as a choice among alternatives, in the decommissioning of Shoreham, thereby providing an environmental interest that NEPA is intended to protect.

The Licensing Board's determination that SE2 may file a contention alleging that a NEPA review is required in the POL proceeding is not contrary to the Commission's determination in CLI-91-1 that the "decommissioning rules do not contemplate that a POL would, in normal circumstances, need to be preceded by submission of any particular environmental information or accompanied by any NEPA review related to decommissioning." CLI-91-1, 33 NRC at 6-7.

The Commission did not make the proscription absolute. It went on to state that "[o]f course there may be special circumstances where some NEPA review for a POL may be warranted despite the categorical exclusion, for example if the POL clearly could be shown actually to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact." *Id.* at 7.

SE2's allegation of injury transcends ordinary circumstances involving a separate, independent POL licensing action. It claims that the POL is but another step in the impermissible segmentation of a major federal action (decommissioning) that requires an EIS.

The Licensing Board believes that the "special circumstances" referred to by the Commission have been successfully pleaded here and permits SE2 to file a contention or contentions on the NEPA issue as prescribed by the Commission's requirements enunciated in CLI-90-8, CLI-91-1, CLI-91-4, and 10 C.F.R. § 2.714(b).

As to standing on Atomic Energy Act (AEA) issues, Petitioner claims that with the removal of the technical specifications, which were previously found necessary whether the reactor was in any operating or non-operating mode, would significantly increase the radiological risk to persons and property.

Petitioner presents an abstract argument that when a power plant with a full-power operating license undergoes outages, it is not relieved of its license conditions. Therefore, Shoreham, when in a non-operating mode should not be relieved of its license conditions as the POL and other license changes would

permit. Petitioner then concludes that to limit Shoreham's license conditions would result in an obvious potential for offsite consequences and increased risk to persons and property.

The argument fails for standing purposes because Petitioner has not presented anything convincing for one to conclude that a temporary outage in an operating plant is the equivalent, for safety purposes, of a defueled plant that is shut down and that Licensee will not be permitted to operate. It also fails because SE2 does not offer more than its bare conclusory assertion that to relieve the Licensee of the license conditions as proposed will result in a potential injury to persons and their property. Additionally, the potential injuries are not identified. As the Licensing Board has previously ruled, such pleadings are legally insufficient to establish standing.

Similarly, SE2 fails to identify a particularized injury stemming from the POL and other license changes when it stated that the proposed action "destroys LILCO's ability to assure a safe evacuation of the emergency planning zone in the event of a radiological incident, including an incident of radiological sabotage." The claim of injury is all too vague.

The affidavits of Petitioner's Executive Director and six of its members did nothing further to cure the deficiencies described by the Licensing Board in LBP-91-7 regarding SE2's organizational and representational standing.

Members' claims, that their rights to have an opportunity for meaningful comment on environmental considerations of decommissioning will be prejudiced or completely denied if there is no environmental review, are vague and do not identify a palpable injury to establish standing.

Affiants appeared to continue to rely upon a presumption of injury because members live, work, or have property interests within 50 miles of Shoreham. Nothing meritorious was presented to overcome the Licensing Board's prior ruling that the presumption was inapplicable.

Claims of members that "the amendment also represents a threat to my personal radiological health and safety and to my real and personal property" do nothing to overcome the Licensing Board's prior finding that members failed to identify any injury that can be traced to the challenged actions.

Members' economic interests such as that of a ratepayer continue to be nonqualifying for standing. As to claims of injury from replacement fossil fuel plants, they relate to other methods of generating electricity, a subject that the Commission has repeatedly stated is not a NEPA issue.

Except for the NEPA issue, Petitioner has not satisfied the standing requirements of 10 C.F.R. § 2.714(a)(2). Aspects relating to NEPA are relevant and will be considered in the POL proceeding.

SE2's amended petition is wide ranging. It seeks adoption of the Council on Environmental Quality regulations on the scope of an EIS. SE2 asserts that in so doing it would encompass the indirect effects of construction of fossil

plant and transmission lines to replace Shoreham. Such indirect effects would be outside the scope of any required NEPA review in this proceeding. It is clear beyond cavil that the Commission has held that restart will not be considered nor will other methods of generating electricity, which include fossil fuel plants. Likewise, the effects of fossil fuel plants are beyond the scope of the proceeding.

Petitioner also requests that, should the Licensing Board decide that SE2 has a right to an EIS, it adhere to 10 C.F.R. § 51.100 which prohibits a decision on a license amendment from being issued where an EIS is required, unless prescribed *Federal Register* notices are followed. SE2 raised this matter prematurely but can again raise it at the appropriate time.

Petitioner raises as issues (a) whether the Licensee furnished the Commission with a reasoned analysis about the no significant hazards consideration complying with Commission standards and (b) whether the 10 C.F.R. § 50.91(b) procedures for notifying states of the considerations were followed and, if not, whether the amendments should be barred. Evidentially the issues raised are directed at the adequacy of Staff's proposed no significant hazards consideration determination.

The Licensing Board must consider the request to be frivolous.<sup>3</sup> The issue had already been ruled on earlier. In LBP-91-7, 33 NRC at 183, the Licensing Board stated:

Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards consideration determination. 10 C.F.R. § 50.58(b)(6). The Licensing Board will abide by the regulation and not consider any challenge to a significant hazards consideration determination by Staff. That part of the Commission's notice of Aug. 21, 1990, relating to Staff's significant hazards determination, is beyond the scope of the hearing on the proposed amendment.

Again at 194, it stated that "[t]hose aspects set forth by the Petitioner that deal with . . . Staff's no significant hazards consideration determination are not relevant to the issues in the proceeding and will not be considered."

### C. School District's Amended Petition

School District does not provide anything in its amended petition that would warrant the Licensing Board changing its ruling that School District has failed to establish standing in the POL proceeding.

School District's amended petition is a repeat of that of SE2. Like SE2, it requests that the Licensing Board reconsider its prior finding that NEPA requirements are not at issue in the POL proceeding, based on the Commission's

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<sup>3</sup> Counsel appears to have a penchant for repeating arguments that have been ruled upon and were dismissed. The Licensing Board does not favor such practices and expects that it will not continue.

guidance in CLI-91-4. It claims that the POL is part of the unauthorized *de facto* decommissioning of Shoreham which requires the preparation of an EIS under NEPA.

The injury that the School District asserts is that, without an environmental review, Petitioner's right to comment and the Commission's duty to have available considered detailed information concerning significant environmental impacts before decisions are made would be violated.

Although the purpose of NEPA is to ensure well-informed government decisions and stimulating public comment on agency actions, the failure of an agency to prepare an EIS does not *ipso facto* result in a cognizable injury that affords standing under NEPA. A petitioner must show that it has suffered, or will suffer, a distinct and palpable harm that constitutes an injury in fact.

SE2 made its case for standing on the claim that the failure to prepare an EIS caused its programmatic informational activities and organizational purpose significant harm. School District made no such showing of a distinct and palpable harm; therefore its claim for organizational standing and that issue must be denied.

As to representational standing on the NEPA issue, School District's President of the Board of Education makes the same argument as SE2's members did on injury. He claims that his rights for meaningful comment on environmental considerations of decommissioning will be prejudiced or completely denied if there is no environmental review. The claim is too vague to identify a palpable injury and does not provide a basis for establishing representational standing for the School District.

As to the remainder of School District's amended petition, it repeats the same positions that the Licensing Board found inadequate for standing in its original petition and in SE2's amended petition which it duplicates.

School District's interest continues to be that of a ratepayer and tax recipient. Its President also expresses concerns over the costs of electricity. These economic concerns fall outside of the Commission's jurisdiction and do not provide a basis for standing.

School District, like SE2, and for the same reasons, failed to establish the applicability of a presumption of injury for itself, its president, employees, or students because of a presence within a 50-mile radius of Shoreham.

Neither did School District particularize, under the AEA, a distinct and palpable harm that constitutes an injury in fact to itself or those it seeks to represent, nor did it trace any such injury back to the challenged action. As the Licensing Board has repeatedly stated, those that the School District proffers are conclusory generalizations that do not meet the regulatory requirements for standing as provided for in 10 C.F.R. § 2.714(a)(2).

#### IV. CONCLUSION

SE2 may file contentions as prescribed under 10 C.F.R. §2.714(b) and in this Memorandum on the NEPA issue. Its petition for standing, as amended, is otherwise denied.

School District, having failed to establish standing, should have its petition for intervention and to hold a hearing on the POL denied.

SE2's contentions will be considered at a prehearing conference whose agenda will follow that prescribed in 10 C.F.R. §2.751(a).

#### ORDER

Based upon all of the foregoing, it is hereby Ordered:

That SE2 may file contentions in the manner prescribed in this Memorandum. Its petition for standing, as amended, beyond that for which approval was granted for filing contentions, is hereby denied.

That School District's petition for intervention and to hold a hearing on the POL is denied and it is dismissed from participation in the proceeding.

That SE2 shall file contentions, in hand with the Licensing Board and the participants, on July 1, 1991. LILCO shall file an answer, in hand with the Licensing Board and the participants, on July 15, 1991, and Staff shall file its answer on July 22, 1991.

That the prehearing conference will be held on July 30, 1991, at Hauppauge, New York.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

Morton B. Margulies, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
June 13, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Presiding Officer  
Charles N. Kelber, Special Assistant

In the Matter of

Docket No. 40-672-MLA  
(ASLBP No. 91-639-02-MLA)  
(License Renewal)  
(Source Material License  
No. SMB-179)

NUCLEAR METALS, INC.

June 18, 1991

The Presiding Officer dismissed the petition for a hearing because it had not been filed within 30 days of receiving actual knowledge of the application and had not demonstrated an adequate excuse for untimeliness under 10 C.F.R. § 2.1205. He found that Petitioners had failed to contradict Licensee's assertions that they had actual notice of the application for license renewal 8 months prior to filing their request for a hearing, and that they had further notice both of the right to file a "letter" of opposition to the notice 2 months prior to filing their petition.

**RULES OF PRACTICE: SUBPART L; TIMELINESS (IGNORANCE OF THE LAW IS NO EXCUSE)**

Actual notice under the timeliness requirements of 10 C.F.R. § 2.1205 was held to include notice of an application but not to require notice of the right to oppose the application; the principle that "[i]gnorance of the law is no excuse" was said to apply to the need for Petitioners to comply with the timeliness

provision of the regulations, particularly where they had enough knowledge to inquire further.

## MEMORANDUM AND ORDER (Dismissal)

After reviewing the reply filing of Citizens Concerned About Nuclear Metals, the National Toxic Campaign Fund, and the National Toxics Campaign (Petitioners), filed June 6, 1991, I have concluded that the petition should be dismissed. Petitioners have not addressed facts clearly set forth by Nuclear Metals, Inc. (Licensee) that demonstrate that Petitioners have not set forth circumstances that demonstrate the timeliness of their petition or that the untimeliness was excusable.<sup>1</sup>

The governing law relating to the timeliness of a petition, which is a necessary condition for the admission of a party, is the following portion of 10 C.F.R. § 2.1205:

(c) A person other than an applicant shall file a request for a hearing within—

\* \* \*

(2) If a *Federal Register* notice is not published . . . , the earlier of—

(i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; . . . .

\* \* \*

(g) In ruling on a request for a hearing filed under paragraph (c) of this section, the presiding officer shall determine . . . that the petition is timely.

\* \* \*

(k)(1) A request for a hearing or a petition for leave to intervene found by the presiding officer to be untimely under paragraph (c) . . . will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that—

(i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; . . . .

### I. UNTIMELINESS

Licensee's answer attached an affidavit that stated that Petitioners, who filed their petition on January 24, 1991: (1) provided public information about their license renewal information in March 1990 and that CCNM "regularly and

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<sup>1</sup> The principal filings are: Letter from Sanford J. Lewis to John Kinneman, USNRC Region I, January 24, 1991 (petition); Answer to Petition of Citizens Concerned About Nuclear Metals [CCNM], National Toxic Campaign Fund and National Toxics Campaign, May 10, 1991 (Answer); Reply to Answer of Nuclear Metals, Inc., Regarding Petition to Intervene, June 6, 1991 (Reply). On May 16, 1991, I issued a Memorandum and Order (unpublished) authorizing a reply, and providing Petitioners with a courtesy copy of *Curators of the University of Missouri*, LBP-90-18, 31 NRC 559 (1990).

meticulously” inspected those files;<sup>2</sup> and (2) in public forums during September and November 1990, the Applicant and the NRC told the Petitioners of the pending application.<sup>3</sup>

Licensee’s affidavit thus set forth important facts that Petitioners would have to respond to if they were to demonstrate to me either that they filed their petition within 30 days of receiving actual notice or that their delay was excusable. Petitioner’s reply failed entirely to address the question of when Petitioners first received actual notice of the pendency of the renewal application. This leads me to believe that CCNM had actual notice of the pending application in March or April of 1990. I presume that the other Petitioners, who failed to state when they received actual notice, were equally tardy: over 8 months late when a 30-day delay period is specified by the regulations.

Although the regulations are silent as to whether “actual notice” must include both notice of the application *and* of the legal right to challenge that application, it is a general principle of law (with a few narrow exceptions related to specific statutes) — even of *criminal* law — that ignorance of the law is no excuse;<sup>4</sup> this is particularly so when a person has knowledge of circumstances that would lead to further inquiry.

I conclude that actual notice does not require notice of the legal right to challenge the application or of the period of time within which a challenge must be filed. However, Petitioners were informed in November 1990 not only that license renewal was being considered but that “comments on the license renewal” could be sent to the NRC.<sup>5</sup> Thus, Petitioners learned of a way to begin their challenge — plus an opportunity to question an NRC official about the requirements for “comments” — and they have not offered any persuasive explanation of why they did not assert their rights in a timely fashion.<sup>6</sup>

The “excuse” for untimeliness offered by Petitioners is that they did not file a “letter” as suggested to them by the NRC official because they were negotiating

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<sup>2</sup> Affidavit of Frank J. Vumbaco, attached to the Answer, at 1-2, ¶¶ 5-6.

<sup>3</sup> *Id.* at 2-3, ¶¶ 7-12.

<sup>4</sup> *United States v. Hiland*, 909 F.2d 1114 (1990) (no excuse of ignorance of U.S. law for sending to Saudi Arabia a certification of not doing business with Israel); *United States v. Monteleone*, 804 F.2d 1004, *cert. denied*, 480 U.S. 931, 107 S. Ct. 1567 (1986) (no excuse of ignorance of criminal consequences when defendant was informed only of civil consequences for contempt and later was also sentenced for criminal contempt); *Harford Life Insurance Co. v. Title Guarantee Co.*, 520 F.2d 1170 (1975) (ignorance that underlying fraud invalidates the questioned note is no defense in a civil action on the note); *Pope v. Illinois*, 481 U.S. 497, 517, 107 S. Ct. 1918; 95 L. Ed. 2d 439 at 455 (1987) (Dissent, certainty is less necessary in civil than in criminal cases).

<sup>5</sup> Affidavit of Frank J. Vumbaco, attached to the Answer, at 3, ¶ 12; *see also* Exhibit E, Kyle Nitzsche, “Public input in NMI cleanup process sought,” *Concord Journal*, November 22, 1990, page 18, cols. 2-3.

<sup>6</sup> The Reply states, at 2-3, that an agency employee informed Petitioners that if a “letter” was written to the agency there could be an adjudicatory hearing on the license. Apparently nothing was said about the regulatory requirement that the “letter” be written within 30 days. However, Petitioners should have inquired further about the requirements for such a letter if they sought to file one. In addition, they have a lawyer who should have been sufficiently curious to inquire of the agency (or of the official who discussed the filing of a “letter”) as to any timeliness requirements. *See* Affidavit of Mary Jane Williams (attached to Petitioners’ Reply) at 27, ¶¶ 4, 7.

with Nuclear Metals, Inc., in an attempt to resolve the issues involved in this case.<sup>7</sup> However, the existence of negotiations does not create any excuse for a party to sleep on its obligation to file a petition in a timely fashion, any more than negotiating about a tort (a civil suit) would permit a party to overstay the statute of limitations.

Furthermore, because of Petitioner's failure to respond to Licensee's allegations concerning the date on which Petitioners obtained actual notice, I conclude that Petitioners knew of the application for *months*, without ascertaining their procedural rights. Petitioners do not offer any explanation of why they did not inquire about legal rights to challenge the application during that extended period of time.

Consequently, I conclude that the petition was inexcusably untimely and shall deny the petition for a hearing.<sup>8</sup>

## II. CONSIDERATION OF THE SERIOUSNESS OF THE ISSUES RAISED

Since 1958, Nuclear Metals, Inc., has operated a plant in West Concord, Massachusetts, where depleted uranium (uranium from which most of the fissile isotope, U<sup>235</sup>, has been removed) is treated by electrochemical and machining processes to form a variety of products, primarily armor-piercing cores for antitank weapons. The company also manufactures metal powders for medical applications and photocopiers and specialty metal products, such as beryllium tubing used in the aerospace industry.

Petitioners have raised a variety of allegations concerning Licensee and have supported them by an affidavit of Dr. Marvin Resnikoff, Ph.D.<sup>9</sup> In this portion of my memorandum, I will examine Dr. Resnikoff's affidavit to determine whether he has raised any issues that ought to be referred to the Staff of the Nuclear Regulatory Commission (Staff) for its consideration.

Dr. Resnikoff is a graduate (1965) of the University of Michigan with the degree of Doctor of Philosophy in Theoretical Physics. He is Senior Associate at Radioactive Waste Management Associates and has performed numerous studies on nuclear waste management.<sup>10</sup> I have determined, based on the limited record

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<sup>7</sup> Reply at 3.

<sup>8</sup> The Motion of Nuclear Metals, Inc., for Leave to Supplement Its Answer, June 13, 1991, is *denied*. This decision was prepared in draft form prior to receiving the Motion, and I do not find that the motion contains anything necessary to the decision of this case.

<sup>9</sup> Affidavit of Marvin Resnikoff, Ph.D., attached to Supplement to Petition to Intervene and for a Public Hearing, June 6, 1991.

<sup>10</sup> Radioactive Waste Campaign, *Living Without Landfills* [unspecified date of publication]; co-author, *Deadly Defense, A Citizen Guide to Military Landfills* [unspecified date of publication]; author, *The Next Nuclear Gamble*, (Continued)

before me, that he is a competent expert with respect to the subject he covers in his testimony. Indeed, his testimony is very thorough and professional. Having already determined that the petition shall be denied for lack of timeliness, the review I make of it in this memorandum can only be for a narrow purpose: to determine whether to make a referral to the Staff. If Petitioners would like to file a petition to the Staff under 10 C.F.R. § 2.206 with respect to some or all of their allegations, they may do so. None of the analysis in this memorandum is intended to prejudice the result they might achieve through a filing with the Staff.<sup>11</sup>

Dr. Resnikoff has reviewed operations at Licensee's plant from May 15, 1958 to the present (Affidavit at 2, ¶ 9); he points out (*id.* at 1, ¶ 5) that he had extensive but limited information about Licensee and has had to fill in "some information gaps . . . from my knowledge of the federal government's uranium processing facility in Fernald . . ." I have accepted Dr. Resnikoff's assumptions, making my conclusions insensitive to his use of collateral information.

My analysis follows.

#### A. Airborne Releases During Normal Operation

Dr. Resnikoff states (Affidavit at 3, ¶ 11) that Licensee's Concord plant conducts operations that could release uranium particulates to the external environment through forty of its fifty-eight stacks. But, as Dr. Resnikoff reports (*id.* at 4, ¶ 16), the stacks in question had been fitted with cyclone separators and HEPA filters. Such particulate collection and filtration is highly efficient: commercially available cyclone separators remove at least 96.5% of particulates<sup>12</sup> while High-Efficiency Particulate (HEPA) filters typically transmit less than 1 part in 10,000 of the fine particles impinging on them.<sup>13</sup> Cyclone separators typically are used to separate and collect larger particles, while the HEPA filters subsequently remove the finer particulates.

Dr. Resnikoff then performed a calculation based on wind patterns from another site (Knolls Atomic Power Laboratory, Schenectady, New York) to estimate a land dose to a hypothetical adult standing motionless 300 meters from the plant for an entire year. Dr. Resnikoff estimated Licensee's hourly release rate for depleted uranium and derived a yearly dose estimate of about

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*Transportation and Storage of Nuclear Waste* [unspecified date of publication]. See Exhibit A to the Affidavit of Marvin Resnikoff, Ph.D.

<sup>11</sup> Citations to regulations and staff guidance might enhance the petition.

<sup>12</sup> Since I am evaluating the importance of allegations that have not been admitted to this proceeding, I have used trustworthy sources of information, with the aid of my technical advisor, who has been most helpful to me. See P. Stallard, et al., "The Development of a multi-tube Axial Flow Cyclone Separator System for Use in Nuclear GAs Cleaning Systems," Proc. 20th DOE/NRC Nuclear Air Cleaning Conference, 259-77 (1988).

<sup>13</sup> M. Ammerich et al., "Contamination Releases from HEPA Filters Under High Temperature Operating Conditions," Proc. 20th DOE/NRC Nuclear Air Cleaning Conference, 349-64 (1988).

10 millirem per year for the hypothetical person. While Dr. Resnikoff does not cite an applicable regulation, 10 C.F.R. 20.1301<sup>14</sup> appears to be applicable. That section states, in relevant part:

(a) Each Licensee shall conduct operations so that—

(1) The total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contribution from the Licensee's disposal of radioactive material into sanitary sewerage in accordance with § 20.2003. . . .

Thus, the dose estimated by Dr. Resnikoff for the hypothetical individual fixed at a point 300 meters from the plant for a year is less than the recently enacted regulatory limit by a factor of ten.<sup>15</sup> For more normal patterns of individual movement, the estimate would be still lower.<sup>16</sup>

Dr. Resnikoff also is concerned about the failure to measure releases appropriately (Affidavit at 5, ¶ 19). He says that “the best method to show that uranium air concentrations are within regulatory limits is to have high volume air particulate samplers at the fence post.” However, he also states that “[t]he company now has such samplers,” thus curing the problem he raises.

## B. Liquid Discharges

Plant operations produce liquid waste. This waste usually contains some depleted uranium. As pointed out by Dr. Resnikoff (*id.* at 3, ¶¶ 12-14), the waste is either solidified or recycled, with some solid precipitates of uranium oxide being separated in the recycling. The solid wastes are then sent to licensed radioactive landfills, as is any scrap material. I conclude that Dr. Resnikoff does not specify any issue with respect to this procedure that I might present to the Staff.

Dr. Resnikoff describes some other sources of concern that I will deal with individually.

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<sup>14</sup> 56 Fed. Reg. 23,398 (May 21, 1991), effective May 20, 1991, with deferral for existing licensees until January 1, 1993. *Id.* at 23,360. I use this section, which is not applicable to this license application, as a standard for comparison because it has been adopted by the Commission.

<sup>15</sup> Dr. Resnikoff states (Affidavit at 4-5, ¶ 18) that higher uranium concentrations would occur during accidents, but he does not provide any information from which I could conclude that accident frequency or intensity is unacceptable.

At page 6, ¶ 26, Dr. Resnikoff raises a question about the deposition of uranium particulates on the site but he does not cite any reason to believe that a regulatory standard is being exceeded.

<sup>16</sup> Dr. Resnikoff states (at 10, ¶ 20) that “[a]ny additional radiation dose to local residents increases the probability of cancers and other health effects.” I recognize that this view is a sound approach for health physicists to take and that it also is the view of an important segment of professional opinion. However, a Licensing Board found in another case — after extensive litigation — that there is no valid empirical evidence for health effects of less than 9 rads. *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 166-67 (1989).

### 1. *Holding Basin and Bog*

During operations in the years prior to 1985, liquid wastes were treated and then discharged into an unlined holding basin and, apparently, from the material in ¶ 29 (*id.* at 7), into an adjacent bog located on the plant site. According to a report cited by Dr. Resnikoff, soil samples taken in 1983 on the perimeter of the bog showed a wide range of activity, varying from a few picocuries per gram (pCi/g) to nearly 300 pCi/g. However, surface-water uranium concentrations (*id.* at 7, ¶ 32) met EPA drinking-water standards. Dr. Resnikoff concludes that the uranium concentration is not water soluble.

With respect to the Holding Basin, Dr. Resnikoff reports that a Hypalon cover was installed over the basin in 1986; this apparently had the beneficial effect of reducing migration of uranium from the holding basin. In support of this conclusion, Dr. Resnikoff cites (*id.* at 8, ¶ 34) a groundwater monitoring report prepared in 1990 to contrast with the 1983 report cited previously. He then cites an EPA trip report (*id.*, ¶ 35) that states that there is a "strong likelihood of migration of uranium along with the groundwater."

While these matters are of concern, Dr. Resnikoff has informed me that they are under surveillance by the EPA (*id.* at 6 n.6) and the NRC (*id.* at 7, ¶ 29). Thus, these are not new matters of concern to public health and safety.

### 2. *Septic System*

One liquid pathway for releases is described by Dr. Resnikoff in ¶ 13: the septic system, which receives hand-washing and shower effluents. Dr. Resnikoff avers that this system is contaminated. (The septic system is in the southwest part of the site.) In ¶ 37 (*id.* at 8-9), Dr. Resnikoff alludes to NRC inspection reports that state that the septic system has become "slightly contaminated." [Quotes added.] Whatever potential danger this problem poses, it is clearly being treated by the NRC staff: notification would be superfluous.

### 3. *Operating Experience*

Dr. Resnikoff reviews (*id.* at 9-12) the operating experience at the Concord plant and cites a number of docket records of violations, plus an enforcement conference and letter in April of 1973. He then states (*id.* at 9, ¶ 43) that "[a]fter the AEC's enforcement letter April 1973 . . . NMI's performance began to improve." Apparently there were some violations and an enforcement conference in 1983; after that time, Dr. Resnikoff does not note further violations or enforcement actions. The Staff's inspection and enforcement procedures appear to have been effective, and no new issue is presented.

#### **4. Holding Basin Remediation**

Dr. Resnikoff states (*id.* at 12, ¶ 52) that “[o]n August 13, 1987, NMI stated that a plan for permanent closure [of the holding basin] would be submitted with the next license renewal.” Dr. Resnikoff then takes issue (*id.*, ¶ 54) with the Staff’s recent requirement of the procurement by NMI of a line of credit of \$750,000 to give assurance that funds will be available to decommission the holding basin. He states that “the total, \$750,000 will hardly be enough to cover the cost of decommissioning the holding basin.”

Although Dr. Resnikoff may be right, it is difficult to see any new issue here that is not currently under Staff surveillance. Furthermore, the regulations appear to support the Staff action. Section 40.36(d) of 10 C.F.R., and Appendix A to 10 C.F.R. Part 40 are the apparent governing regulations. Appendix A, part II, cites “(e) Irrevocable letters or lines of credit . . .” as an example of financial surety arrangements generally acceptable to the Commission. Criterion 10 in Appendix A states a requirement that a minimum charge of \$250,000 (1978 dollars) must be paid to cover the costs of long-term surveillance. The regulation establishes the criteria to be used to determine the adequacy of funding arrangements to cover the cost of decommissioning. Since Petitioners do not indicate that the application of this criterion is incorrect, I presume that the Staff requirement of \$750,000 surety is in accord with these regulations. If the Petitioners feel that the rule is incorrect, the remedy is to present a petition to the Commission to amend the rule.

#### **5. Bog Remediation**

Bog remediation is another issue involving, as stated above, the EPA as well as the NRC. The State of Massachusetts also appears to be involved. Dr. Resnikoff has sketched the situation at the bog and it is clear that the cognizant agencies are monitoring the problem. Thus, Dr. Resnikoff does not specify any current issue that we might send to the NRC staff.

#### **C. Conclusion**

There is no issue important to safety or the protection of the environment that merits a referral to the Staff. One reason for this conclusion of nonreferral is that we have no reason to believe that the Staff or other responsible government agencies are handling these matters improperly.

### III. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 18th day of June 1991, ORDERED, that:

1. The Petition for a Hearing of Citizens Concerned About Nuclear Metals, the National Toxic Campaign Fund, and the National Toxics Campaign, contained in the letter from Sanford J. Lewis to John Kinneman, USNRC Region I, January 24, 1991, and supplemented in the Reply to Answer of Nuclear Metals, Inc., Regarding Petition to Intervene, June 6, 1991, is *denied*.

2. Pursuant to 10 C.F.R. §2.1251 of the Commission's Rules of Practice, this initial decision will constitute the final decision of the Commission thirty (30) days from the date of its issuance, unless an appeal is taken in accordance with 10 C.F.R. § 2.1253.

3. Any party may take an appeal from this decision with the Commission by filing a Notice of Appeal within ten (10) days after service of the [partial] initial decision. *See* 10 C.F.R. § 2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944 (Oct. 24, 1990)).

4. Each appellant must file a brief supporting its position on appeal within thirty (30) days after filing its Notice of Appeal. An intervenor-appellant's brief must be confined to issues that the intervenor-appellant placed in controversy or sought to place in controversy.

5. Within thirty (30) days after the period has expired for the filing and service of the briefs of all appellants, a party or participant who is not an appellant may file a brief in support of or in opposition to the appeal of any other party. A responding party shall file a single, responsive brief *only* regardless of the number of appellants' briefs filed. Briefs shall conform to the length and format specified in 10 C.F.R. § 2.762.

Respectfully ORDERED,

Peter B. Bloch, Presiding Officer  
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman  
Dr. Richard F. Cole  
Dr. Kenneth A. McCollom

In the Matter of

Docket No. 50-443-OLA  
(ASLBP No. 91-640-09-OLA)

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, *et al.*  
(Seabrook Station, Unit 1)

June 18, 1991

MEMORANDUM AND ORDER  
(Petition for Leave to Intervene)

BACKGROUND

The Seacoast Anti-Pollution League (SAPL) has filed a petition for leave to intervene in an operating license amendment proceeding instituted by Licensee, the Public Service Company of New Hampshire (PSNH). The Petitioner alleges that Northeast Utilities Company (NU) desires to acquire the Licensee and its rights and ownership interests in the Seabrook Nuclear Station through the creation of a wholly owned subsidiary, the North Atlantic Energy Corporation (NAEC). SAPL contends that citizens it represents live within a 10-mile emergency planning zone of the nuclear facility and would be affected by any increase in risk resulting from the proposed amendment.<sup>1</sup>

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<sup>1</sup> SAPL Petition for Leave to Intervene, April 1, 1991.

This Board was established to rule on petitions to intervene pursuant to a notice published by the Commission in the *Federal Register* on February 28, 1991 (56 Fed. Reg. 8373).<sup>2</sup>

The Petitioner alleges that NU as the principal owner and operator of another nuclear power facility (Millstone) is currently being investigated by the NRC for a possible pervasive pattern of discriminatory practices against its own employees. The employees allegedly were intimidated and harassed for bringing safety violations to the attention of NRC officials. Such conduct can amount to discriminatory practices prohibited by NRC regulations. See 10 C.F.R. § 50.7. SAPL also cites several other NU management deficiencies reported in a 1991 NRC Systematic Assessment of Licensee Performance (SALP). The petition concludes that NU should not be granted an operator's license at Seabrook if a hearing determines that either NU or its subsidiary NAEC has engaged in "suppressing employees" who communicated concerns to the NRC. This grant, in Petitioner's view, would constitute a "material increase in the hazard of the operation of the Seabrook plant."<sup>3</sup> The Licensee (PSNH) and the Staff filed objections to the petition on grounds that the matters complained of are outside the scope of the proceeding and that SAPL lacks the required standing to intervene.<sup>4</sup>

## DISCUSSION

In its notice concerning the proposed PSNH amendment (56 Fed. Reg. 8374), the Commission referenced the regulatory requirements of a petition for intervention. As provided in 10 C.F.R. § 2.714, the petition must set forth with particularity the interest of petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and the specific aspect(s) of the subject matter of the proceeding on which the petitioner wishes to intervene. The Board designated to rule on intervention requests must consider, among other factors, the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

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<sup>2</sup>56 Fed. Reg. 22,016.

<sup>3</sup>SAPL Petition at 4.

<sup>4</sup>Licensee Answer to the Petition . . . (April 11, 1991); Staff Response to . . . Petition . . . (April 22, 1991). In a Response, dated April 24, to Licensee's Answer, SAPL sought to amend its petition by submitting the names of several members residing near the Seabrook facility as its representatives. The lack of authorized representation as a deficiency in SAPL's petition is cited by both Licensee and the Staff. For purposes of this decision, we presume the validity of SAPL's representation. See *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390 (1979).

In a number of decisions, the Commission has held that judicial concepts of standing will be used to determine whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right. These concepts require a showing that (a) the action complained of will cause an injury in fact, and (b) the injury is arguably within the zone of interests protected by statutes covering the proceeding. *See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).*

The license amendment proposed herein is intended to authorize a newly created entity, NAEC, to be included as a licensee and to acquire and possess PSNH's ownership interest in the Seabrook facility. According to the Commission's Notice (56 Fed. Reg. 8373), the application for amendment reflects the transfer of ownership as part of a reorganization plan ordered by a Bankruptcy Court to resolve pending bankruptcy proceedings. In another proceeding involving a separate application, it is proposed that a different entity, the North Atlantic Energy Service Company (NAESCO) and also a NU subsidiary, become the licensed operator of the Seabrook facility. *See 56 Fed. Reg. 9384.* Since the proposed amendment here, however, speaks only to a transfer of ownership — not operation — we are constrained in our review to consider only concerns involving that transfer. Boards have limited jurisdiction in license amendment proceedings, and issues are admissible only if within the scope of the amendment application. *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).* With this background, it becomes evident that allegations concerning NRC investigations of regulatory violations by a parent organization at another licensed facility (Millstone) have no place and cannot be reviewed in the instant proceeding. As the Staff points out, the mere pendency of an investigation is not germane to licensing issues and does not show particularized harm.<sup>5</sup> This would be a valid conclusion even if the amendment application directly involved NU and concerned aspects of ownership or operational responsibility at Seabrook.<sup>6</sup>

## CONCLUSION

In view of the foregoing, we find that the Petitioner has not demonstrated any injury in fact and has alleged no basis for an interest within the scope of this proceeding. As a result, SAPL lacks standing for this proposed operating license amendment, and its petition for leave to intervene is denied.

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<sup>5</sup> Staff Response at 8-9.

<sup>6</sup> In its Response to Licensee's Answer to the Petition, SAPL attempted to broaden the petition's compass to reference NU as an owner or operator of the Seabrook facility. SAPL Response at 2.

## ORDER

For the reasons stated, it is, this 18th day of June 1991, ORDERED:

1. The SAPL petition for leave to intervene in PSNH license amendment proceeding to include NAEC as licensee, and to transfer ownership in Seabrook Station to NAEC, is denied.

2. In accordance with the provisions of 10 C.F.R. § 2.714a(a), this Order may be appealed to the Commission within ten (10) days after service of this Order. *See* 55 Fed. Reg. 42,944 (Oct. 24, 1990).

### THE ATOMIC SAFETY AND LICENSING BOARD

James P. Gleason, Chairman  
ADMINISTRATIVE JUDGE

Richard F. Cole  
ADMINISTRATIVE JUDGE

Kenneth A. McCollom (by J.P.G.)  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
June 18, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman  
Dr. Richard F. Foster  
Dr. Peter S. Lam

In the Matter of

Docket No. 030-30870-OM  
(ASLBP No. 91-629-01-OM)  
(Byproduct Material License)

FEWELL GEOTECHNICAL  
ENGINEERING, LTD.

(Thomas E. Murray, Radiographer)

June 25, 1991

In a proceeding involving an immediately effective order of the Nuclear Regulatory Commission barring a radiographer from working for a licensee for 3 years, the Licensing Board modifies the order by reducing the period of suspension to 9 months and requiring the radiographer to serve 3 months as a radiographer's assistant before being requalified as an independent radiographer.

**WILLFULNESS**

When the actions of a radiographer do not evidence a deliberate intent to violate the purposes of the procedures or rules and are based upon his own personal interpretation of what is necessary, his failure to follow the rules amounts to "a potentially significant lack of attention or carelessness toward licensed responsibilities." This conduct (which would constitute a Severity Level III violation) is far more serious than an inadvertent lapse, but less serious than, for example, the deliberate defeating of a safety-related device.

## **FALSE AND MISLEADING STATEMENTS**

While a lack of candor in responding to investigators' questions is not to be condoned, it does not require the NRC to abandon all confidence in a radiographer's ability to perform radiography in a safe manner. In this case, the lack of candor could be attributed to the radiographer's stressed and somewhat confused state of mind which was caused, at least in part, by the radiographer's wife being about to give birth and by the fact that he panicked upon being confronted by the investigators. Under these circumstances, his transgression was categorized as intermediate, between very significant and of minor concern, and was found to be comparable to a Severity Level III violation.

## **RADIOGRAPHY**

Absent any prior transgressions, a first-time failure to perform radiation surveys after radiographic operations, failure to prevent unauthorized entry into restricted areas, failure to lock the source in its shielded position, inadequate posting of restricted areas, inadequate boundary radiation surveys, and a lack of candor in responding to NRC investigators was found to be insufficient to sustain a 3-year suspension of the radiographer from his job. In its place, the Licensing Board substituted a 9-month suspension and a requirement to serve 3 months as an assistant radiographer before he could resume duties as a radiographer.

## **INITIAL DECISION**

By letter dated November 18, 1990, Thomas E. Murray timely appealed an immediately effective order of the Nuclear Regulatory Commission ("NRC") barring him from working as a radiographer for Fewell Geotechnical Engineering Ltd. ("Fewell") for a period of 3 years. The issue in this case is whether the order should be sustained, modified, or vacated. For the reasons set forth within, we modify the Commission's order.

### **I. STATEMENT OF THE CASE**

On November 2, 1990, the Deputy Executive Director of the NRC issued an order modifying the Fewell license, which provided that

Fewell Geotechnical Engineering, Ltd., shall not utilize Mr. Thomas E. Murray in any licensed activities, including, but not limited to, activities performed by radiographers, radiographers' assistants, and helpers, for a period of three years.

Staff Exh. 1, "In the Matter of Fewell Geotechnical Engineering, Ltd., Order Modifying License (Effective Immediately)," 55 Fed. Reg. 47,409, 47,410 (Nov. 13, 1990) (the Order).

Although Mr. Murray is not a licensee, the Order provided that he could request a hearing on whether the Order should be sustained. *Id.* He did so, and, following appointment of this Board on December 21, 1990, a hearing was held in Honolulu, Hawaii. Mr. Murray proceeded *pro se* although he was assisted by a certified health physicist, Phillip Manly. Tr. 179. At the hearing, testimony was presented by Mr. Murray on his own behalf, and by Messrs. Joukoff, Skov, and Lieberman for the NRC Staff. Posthearing briefs have been filed by the parties.

### A. The Activity Licensed

For purposes of this case, the NRC licensed activity at issue concerns Mr. Murray's examination of industrial pipe welds with a radiography camera to ensure that the welds were sound.

Industrial radiography is a technique of nondestructive testing that uses radioactive sources or x-rays to detect flaws in welds . . . .

Safety Requirements for Industrial Radiographic Equipment, 55 Fed. Reg. 843 (Jan. 10, 1990) ("Safety Requirements").<sup>1</sup>

The radiography camera Mr. Murray used was an Amersham Model 660 projector (S/N 3131) ("the camera"). It consisted of a metal housing of about 1 cubic foot, a radioactive source, and a 20- to 25-foot-long control cable that could move the radioactive source, sealed in a capsule, in and out of the metal housing into a stainless steel guide tube attached to the camera. Board Exh. 4; Tr. 35-45.

The camera employed iridium-192, a gamma-emitting source. Iridium-192 emits two kinds of gamma rays, one of 0.316 million electron volts (MeV) and one of 0.468 MeV, with a half-life of 73.83 days (i.e., only half as much radiation will be emitted after that period). Gamma rays are generally ten times stronger than x-rays. The total amount of radioactivity in the Amersham camera was approximately 54 curies. Tr. 131. That is enough radioactivity to cause extensive damage to tissue in contact with the source or to deliver a life-threatening dose to a person in close proximity during prolonged exposures.

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<sup>1</sup>The Safety Requirements amended 10 C.F.R. Part 34, "Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations." The Safety Requirements include a more detailed description of industrial radiography applications, but the principal thrust of the amendments related to radiographic equipment. The "Background" for the amendments, initiated in 1988, relied heavily on a study of radiographic experience from 1974 to 1984.

See NUREG/BR-0024, "Working Safely in Gamma Radiography" (September 1982).

The capsule holding the iridium-192 source is attached to a control cable that pushes the source out of the camera to take an "x-ray" image of, for example, a weld, and pulls the source back in after the image has been taken. When the iridium source is inside the camera, the source is surrounded by depleted uranium, the heavy density of which effectively prevents the gamma radiation from escaping from the camera. In that position, the source is described as being in its "shielded position." Tr. 38-44.

The source is pushed out of the camera by a crank on the control cable. Because the stainless steel source guide tube through which the encapsulated source moves in and out of the camera is not transparent or translucent, the radiographer cannot confirm visually whether the source is in or out of the camera. The 20- to 25-foot length of the control cable allows the radiographer to be a safe distance away from the source when it is exposed, i.e., outside the camera. *Id.*

Because of the significant radiation danger the exposed source represents for people, three safeguards are provided in operating the camera. First, an odometer on the control cable can be used by the radiographer. The odometer is intended to tell the radiographer whether the iridium-192 source is in or out of the camera. However, the odometer reading could be misleading if the source becomes detached from the cable. Second, a locking mechanism on the camera allows the radiographer to lock the source inside the camera in the shielded position and thus prevent the source from accidentally moving out of the shielded position. Third, a radiation survey of the camera and the source guide tube performed with a survey meter after radiographic exposure will detect the presence of an accidentally exposed source. Tr. 44.

## **B. The Fewell License**

On September 29, 1989, the Commission issued Amendment No. 1 to Fewell's Byproduct Material License No. 53-23288-01, adding Thomas E. Murray to the license as a radiographer. Item 15 of the license, as amended, incorporates by reference Fewell's September 12, 1989 letter to the NRC, which forwarded documentation of Mr. Murray's radiographic training and experience. Item 15 also incorporates by reference Fewell's original license application, NRC Form 313, dated October 24, 1988, and a supplement to the Fewell application in the form of a January 13, 1989 letter from Fewell to the NRC. Attached to the January 13, 1989 letter are sections I and IV of Fewell's

operating procedures.<sup>2</sup> Staff Exh. 2; Tr. 15-23. As a part of Fewell's application, those operating procedures became a part of the terms and conditions of the license. Finally, Item 15 of the Fewell license states that:

The Nuclear Regulatory Commission's regulations shall govern unless the statements, representations and procedures in the licensee's application and correspondence are more restrictive than the regulations.

Staff Exh. 2; Tr. 17.

The portions of Fewell's operating procedures and NRC regulations at issue here provide as follows:

1. *Radiation boundary survey.* Paragraph 2.5 of section IV of the operating procedures requires that radiation surveys be performed to establish a 2-milliroentgen-per-hour ("mR/hr") radiation boundary before commencing radiographic operations;
2. *Posting radiation boundary.* Paragraph 2.2 of section IV of the operating procedures requires that the radiation boundary be posted and roped off;
3. *Postexposure survey.* Section 34.43(b) of 10 C.F.R. and paragraph 2.6 of section IV of the operating procedures require that a radiation survey of the camera itself be made after each exposure to determine that the sealed source has been returned to its shielded position;
4. *Securing source.* Section 34.22(a) of 10 C.F.R. and section IV, paragraph 2.6, of the operating procedures require that the sealed-source assembly be secured, i.e., locked, in the shielded position after each exposure;
5. *Boundary security.* Paragraph 5.0 of section I and paragraph 2.5 of section IV of the operating procedures require the radiographer to prevent entry into the radiation boundary by individuals other than radiographers and radiographers' assistants.

Staff Exh. 2.

### C. The Events at Issue

On October 23 and 25, 1990, an NRC investigator, Philip Joukoff, and an NRC inspector, David Skov, observed Mr. Murray (unknown to him) as he conducted radiographic operations at Campbell Industrial Park, Oahu, Hawaii. Tr. 27. They took still pictures on October 23 and videotaped approximately 35 minutes of Mr. Murray's activity on October 25, 1990. Board Exh. 3; Staff

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<sup>2</sup>These operating procedures are referred to in the Order as the "Operating and Emergency Procedures." 55 Fed. Reg. at 47,409-10. In this decision we refer to them simply as "operating procedures."

Exh. 5. Murray's worksite was in a ditch alongside a highway where lengths of large-diameter pipe were being laid and welded in place. Murray was working in the ditch, about 20 feet from the road, checking the welds with his radiography camera. Opposite the highway, the back of the worksite was bounded by a temporary workroad bordering a vegetated coral formation that rose irregularly to a height of some 30 feet.

The results of the Joukoff-Skov observations were summarized in the November 2, 1990 Order of the NRC Deputy Executive Director as follows:

- (1) On October 25, 1990, Mr. Murray conducted radiographic operations without performing surveys to establish the radiation boundary;
- (2) On October 23 and 25, 1990, Mr. Murray failed to rope off any portion of the radiation boundary, and failed to post signs for most of that boundary;
- (3) On October 23, 1990, on at least 12 occasions and on October 25, 1990, on at least 5 occasions, Mr. Murray failed to perform surveys of the exposure device to determine that the sealed source had been returned to its shielded position after radiographic exposures;
- (4) On October 25, 1990, Mr. Murray failed to secure the radiographic source in the fully shielded position after each of several source exposures;
- (5) On October 23, 1990, Mr. Murray failed to prevent entry into the restricted area of individuals other than radiographers and radiographers' assistants.

Staff Exh. 1, 55 Fed. Reg. at 47,410.

In addition to the foregoing violations of NRC regulations or Fewell operating procedures, the Order charged that on October 25, 1990, the NRC investigator and the NRC inspector asked Mr. Murray whether, on October 23 and 25, 1990, he had complied with the requirements

for the conduct of surveys to assure that the source had been retracted to its fully shielded position, for the securing of the source in this shielded position after each exposure, and for preventing the entry of unauthorized personnel into the restricted area.

The Order states that, contrary to what Messrs. Joukoff and Skov had observed, Mr. Murray told them that he had complied and then demonstrated the correct survey procedures for them. *Id.*

After reciting the requirements and the violations described above, the NRC Deputy Executive Director concluded:

It appears that Mr. Murray's actions were willful because he was experienced, trained, and knowledgeable concerning NRC and Licensee requirements pertaining to surveys, to securing the source in the fully shielded position after each source exposure, and to preventing unauthorized entry into a restricted area, and because he repeatedly failed to comply with these requirements on at least two days in one week. In addition, Mr. Murray gave the NRC false information concerning his actions, contrary to the observations of two NRC employees.

Therefore, the NRC has concluded that false information was also provided willfully. As a result of these willful violations, the NRC does not have reasonable assurance that Mr. Murray will comply with regulatory requirements.

*Id.*

## II. POSITIONS OF THE PARTIES

### A. The NRC Staff

The NRC Staff asserts that the five categories of conduct in violation of the license terms and regulations either have been admitted by stipulation or established by the evidence in the case. In addition, the Staff asserts that Mr. Murray's conduct and his representations when confronted by Messrs. Joukoff and Skov amount to willfulness on Mr. Murray's part. Consequently, they conclude that the Deputy Director's November 2, 1990 sanction barring Mr. Murray from working under the Fewell license for 3 years should be sustained. *See generally* "NRC Staff's Proposed Findings and Conclusions of Law in the Form of an Initial Decision," dated March 8, 1991.

#### 1. *Proscribed Conduct*

In general, Staff relies on Mr. Murray's stipulation to the facts as described in three of the five operational procedure violations charged in the order. They presented testimony on the other two violations and assert that Mr. Murray essentially admitted one, Item 3, the camera survey, and failed to deny the other, Item 5, permitting unauthorized entry. However, standing alone, the Staff does not identify an appropriate sanction for these violations or seek to categorize their severity under Appendix C of Part 2 of the *Code of Federal Regulations* (10 C.F.R. Part 2). Rather, the Staff treats them as essentially one element in the Deputy Director's conclusion that Mr. Murray's conduct warrants his suspension for 3 years. (This is essentially a Severity Level II infraction. *See* discussion at pp. 574-75, 576 n.5, and pp. 577-79 *infra.*)

#### 2. *Willfulness and False Information*

As noted above, the NRC Order stated that Mr. Murray's actions were willful because he was "experienced, trained, and knowledgeable" in the requirements of surveying, securing the source, and preventing unauthorized entry, and, despite his background and knowledge, he repeatedly failed to comply with the requirements on October 23 and 25, 1990, while being observed by NRC investigators, Mr. Joukoff and Mr. Skov. Secondly, Staff asserts that Mr. Murray

provided false information to NRC investigators, and, because of his background and knowledge, that act had to be willful. Staff Exh. 1, *supra*, 55 Fed. Reg. at 47,410.

*a. Source Surveys*

Mr. Joukoff testified, and Mr. Skov verified, that on October 25, 1990, Mr. Joukoff asked Mr. Murray whether, on that date, he had surveyed the camera after each exposure and Mr. Murray had answered yes. Furthermore, Mr. Joukoff testified, and Mr. Skov affirmed, that Mr. Murray stated that he had secured the camera after each exposure. Tr. 67-68. Mr. Murray also demonstrated the proper method of surveying the camera after retracting the source and of locking the source after exposures. Tr. 70. However, Mr. Joukoff testified that Mr. Murray performed none of these required actions during Mr. Joukoff's observation. Tr. 71. In response to the Board's inquiry, Mr. Joukoff read his notes taken on October 25, 1990, which indicated that he had questioned Mr. Murray specifically about what had taken place on that day. Tr. 127-30.

*b. Entry of Unauthorized Personnel*

With respect to unauthorized personnel entering the radiation area, Mr. Joukoff testified that Mr. Murray told Messrs. Joukoff and Skov that unauthorized personnel had never entered the radiation area. Tr. 67-68. However, Mr. Joukoff testified that, on October 23, 1990, he witnessed six individuals who were not radiographers or radiographers' assistants within the restricted area while the source was out. He testified further that Mr. Murray had a reasonable opportunity to keep all of the individuals out of the area because he was not engaged in any other activities. Tr. 122-23.

Mr. Joukoff testified that 2 days after Mr. Murray's failure to prevent entry on October 23, 1990, Mr. Murray told him and Mr. Skov that unauthorized personnel had "never" entered the restricted area. Tr. 68. One week later, during the November 1, 1990 interview, Mr. Murray again stated that he allowed no unauthorized individuals in the restricted area while conducting radiographic operations. Board Exh. 2 at 78, 118. After being shown still photographs taken on October 23, 1990, Mr. Murray admitted that these individuals were within the 2-mR/hr boundary when the source was out. Board Exh. 3; *id.* at 154-55.

**3. Public Health and Safety**

The Staff asserts that Mr. Murray's violations of NRC regulations posed a threat to public health and safety. James Lieberman, Director of the NRC

Office of Enforcement, testified that he considered Mr. Murray's violations significant. Tr. 142, 158. He further testified that, in promulgating new regulations for radiography, it was noted that, while only 4% of radiation workers are radiographers, they account for 18% of the overexposures that occur under the jurisdiction of both NRC and the agreement states. Tr. 142; Safety Requirements, *supra*, at 843. The Statement of Considerations for the Safety Requirements reports that in the decade ending in 1984, radiographers accounted for more than half of the overexposures greater than 5 rems<sup>3</sup> to the whole body or 75 rems to the extremities, and almost 60% of the overexposures greater than 25 rems to the whole body and 375 rems to the extremities. The Commission has established a limit of no more than 5 rems per year for individual exposures. 10 C.F.R. §20.101(b)(2) (1990). The Safety Requirements also describe a number of incidents leading to overexposures, and note that all of these risks to health could have been avoided by performing a radiation survey after each radiographic exposure. Tr. 142-43.

Additionally, Mr. Skov testified that the source used by Mr. Murray on October 25, 1990, contained approximately 54 curies of iridium-192. Tr. 131. With that amount of activity, Mr. Skov concluded that

[s]ome very, very serious radiation exposures have resulted due to radiography events. Even though the population of radiographers constitute[s] only a small proportion of radiation workers working with licensed material, they have accounted for over half of the overexposures that have occurred. So there is a very significant threat to the health and safety of radiation workers, radiographers.

Tr. 132-33.

#### 4. *Sanction*

In support of the severity of the sanction, the Staff asserts that Mr. Murray's actions demonstrate that he does not have the integrity to perform unsupervised radiography. Tr. 162. The Staff asserts further that the fundamental reason for issuing the NRC order was to remove a safety hazard, namely, Mr. Murray. Thus, the Staff fixed the 3-year length of the suspension from a combination of the severity of the violations and the threat to the public health and safety that they assert Mr. Murray represents. Tr. 176.

The Staff testified that the NRC inspection program for radiography is an audit-type program. Radiography licensees are only inspected approximately once a year, absent allegations. Because it is an audit-type program, the NRC

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<sup>3</sup>A rem is a unit of measurement of biological damage by radiation. It is defined as follows: "The dose equivalent in rems is equal to the absorbed dose in rads multiplied by the quality factor." 10 C.F.R. §20.1004. For example, the quality factor for gamma radiation is 1, and for alpha particles is 20.

depends on the training, management oversight, and integrity of individual radiographers. Of the three factors, integrity is the most important because most, if not all, radiographers are well trained, and management cannot be present at all times. Moreover, if a radiographer knows management is present, he will likely do the job properly. Thus, Staff concluded, a strong sanction was clearly appropriate. Mr. Lieberman testified that the action taken in this matter was based on experiences that the Staff has had with the dangers associated with radiography when the required procedures are not followed. Tr. 142-46.

The Staff argues that the sanction is consistent with recent practice, citing Staff actions in *Western Stress, Inc.*, 56 Fed. Reg. 4311 (Feb. 4, 1991), and *C & R Laboratories, Inc.*, 55 Fed. Reg. 50,424 (Dec. 6, 1990). In *Western Stress*, a radiographer who removed his film badge was suspended for 1 year. In that case, the radiographer admitted the violation to the NRC. Tr. 161-62. In *C & R Laboratories*, the licensee fired the radiographer on its own initiative, but was required to give the NRC notice if the individual were to be rehired within 5 years. Tr. 177. The Staff noted that, until recently, it did not specify a period of years when suspending an individual from licensed activities. The NRC orders were open-ended, with a provision for relaxation by the Regional Administrator for good cause shown. The Staff asserted that in the past year, 1990, at least three individuals were removed from licensed radiographic activities for an indefinite time period. In the last 6 months, the Staff has been including a term of years for suspensions. Tr. 147-48.

In fixing the severity of Mr. Murray's sanction, the Staff also states that it took into account his employment at Finlay Laboratories, whose NRC license was terminated in 1988. The Staff had proposed to revoke the Finlay license, but the case was settled by termination of the license and a 3-year prohibition on licensed activities by Finlay. *Finlay Testing Laboratories, Inc.*, LBP-88-17, 27 NRC 586 (1988). The Staff offered no information to indicate that Mr. Murray bore any responsibility for the Finlay sanction. Nevertheless, although the Staff concluded that Mr. Murray's actions did not warrant a permanent suspension, the Staff deemed the circumstances sufficiently serious to warrant a sanction comparable to the 3-year suspension imposed on Finlay. Tr. 147-48.

The Staff also asserts that it is the responsibility of the Commission to prevent overexposures to members of the public, including radiation workers. The Staff intends to use the Nuclear Materials Safety and Safeguards (NMSS) newsletter and letters to radiographers to inform other radiation workers. If other radiographers realize that they could lose their livelihood, they might pay more attention to adhering to requirements and performing the required surveys. Tr. 149. Staff asserts that while the fundamental reason for issuing the Order was to remove the safety hazard, enforcement actions can also be used to provide notice to other individuals. The Staff notes that the Enforcement Policy states that one

of the means of achieving the purposes of the NRC enforcement programs is by “[d]eterring future violations.” 10 C.F.R. Part 2, Appendix C, §I (1990).

## **B. Position of Mr. Murray**

Mr. Murray stipulated that he acted as described in three of the five instances of conduct cited in the Order but argues that mitigating factors were present in those and the other two instances described. The Board notes that Mr. Murray is proceeding *pro se*, and takes that into consideration in reviewing his pleading and presentation of his case.

### ***1. Proscribed Conduct***

#### ***a. Radiation Boundary Survey***

Mr. Murray stipulated that he did not perform boundary surveys on October 12, 1990. Tr. 12. However, in mitigation, he asserts that rather than strictly adhere to Fewell's operating procedures, he felt that he could establish radiation boundaries on the basis of his general experience and the physical surveys he had made on prior days for adjacent parts of the worksite. Tr. 184. Further, he considered part of the surrounding area where the ground rose several feet to be inaccessible, and, consequently, there was no need to survey that part of the boundary. Tr. 180.

#### ***b. Posting Radiation Boundary***

Mr. Murray stipulates that on October 23 and 25, 1990, he “failed to rope off any portion of the radiation boundary, and failed to post signs for most of that boundary.” Tr. 12. However, in mitigation, he asserts that because of the configuration of the site, he had difficulty roping off the restricted area. In seeking a solution, he discussed the intent of radiation boundaries with an NRC Health Physicist on October 4, 1990. He concluded from this conversation that, so long as an individual received no more than 2 millirems in 1 hour, 10 C.F.R. Part 20 requirements would be satisfied without roping off the boundary. Tr. 185-86. Mr. Murray also asserted that he did not consider it necessary to post that portion of the restricted area that he believed inaccessible to the public. Tr. 189-90.

*c. Postexposure Survey*

Mr. Murray did not stipulate to the charge that

on October 23, 1990, on at least 12 occasions and on October 25, 1990, on at least 5 occasions, Mr. Murray failed to perform surveys of the exposure device to determine that the sealed source had been returned to its shielded position after radiographic exposures.

Staff Exh. 1 at 47,410. Mr. Murray is uncertain as to how many times, if any, he failed to perform the surveys. Tr. 12-14. As a general practice, he followed a self-developed method to assure himself that the source was fully retracted and shielded. This involved the use of an audible-alarm rate meter carried on his belt, the observed fluctuations of a second meter positioned near the camera, and a "feel" for turning the crank of the exposure device. An alarming dosimeter provided backup protection. Tr. 191-96. On October 25, 1990, the audible-alarm meter was inoperable so he modified his usual practice. Tr. 193. However, Mr. Murray admits that "[he] was getting too used to listening to that alarm," and "wasn't doing proper surveys." Tr. 197.

*d. Securing Source*

Mr. Murray stipulated that on October 25, 1990, he "failed to secure the radiographic source in the fully shielded position after each of several exposures" as charged in the Order. He proffered no specific explanation for this infraction.

*e. Boundary Security*

Mr. Murray declined to stipulate that on October 23, 1990, he failed to prevent entry into the restricted area by individuals other than radiographers and radiographers' assistants. He believed, based on his understanding of 10 C.F.R. § 20.105(b)(1), that individuals could be in locations adjacent to his source so long as their exposure did not exceed 2 millirems in any 1 hour. Mr. Murray testified at the hearing that he was aware that various workers at the job site were passing through the restricted area on October 23, 1990, while the source was out of the camera. Tr. 198-200, 205-06. He testified that, because of the ditch and the angle of the source, he believed that there were no safety problems. Tr. 206-07. Thus, when individual workmen who were aware of his radiographic work approached his source, he would mentally estimate whether or not they were in a safe area on the basis of the source position, distance, shielding, and time factors. Tr. 199, 200, 206.

Mr. Murray did not deny that the information he provided NRC personnel on October 25, 1990, was false. In fact, he admitted the answers he provided "were

probably what I said." Tr. 204. At an investigative interview of Mr. Murray conducted by Mr. Joukoff and Mr. Skov on November 1, 1990, he stated that because of personal reasons, he was "extremely stressed out." Board Exh. 2; Tr. 205.

## **2. Willfulness and False Information**

In his November 18, 1990 hearing request, Mr. Murray denies that his actions were willful, stating

I did not willfully violate the provisions of [Fewell's license or NRC regulations] thereby placing the health and welfare of the general public in jeopardy.

Request for Hearing at 3.

The Staff uses "willfully" in relation to the charges of violation of specific license procedures and NRC regulations and to specific false statements. Mr. Murray did not, however, address "willfulness" in his testimony in relation to any specific actions or statements. Rather, he points generally to his interpretation of NRC limits on the radiation exposure for individuals outside of a restricted area. Tr. 205-06. He attributes his violations to complacency because of the isolation and characteristics of the site, realizing, belatedly, that he had not followed proper procedures. Tr. 207.

Although Mr. Murray acknowledged that he had not followed procedures after he was shown a videotape documenting his failure to survey the camera and lock the source on October 25, 1990, and photographs of unauthorized persons entering his restricted area on October 23, 1990, Mr. Murray argued that those statements were made at times when his mind was on his wife (who was about to give birth) and on other stressful circumstances. Thus, his attention was not fully focused on his radiographic procedures or on the questions being asked. Board Exh. 2 at 140-41, 146; Tr. 202-04, 204-05, 208. He asserts further that based on conversations with workers at Finlay Laboratories, he had acquired a hostile attitude toward the NRC. Consequently, when Mr. Joukoff and Mr. Skov confronted him with a badge on October 25, 1990, "immediately [he] just panicked." Tr. 203.

Mr. Murray testified that after talking with Mr. Manly, a certified health physicist with Gamma Corporation, and Mr. Johnson of NRC Region V, his attitude toward the NRC is now entirely different and that he no longer feels that

an enemy has come inside my territory and I have to put up all these defenses and charades and to not offer any information.

I never thought for a minute that I was lying. I was just trying not to offer any information. Stupid rationale.

Tr. 209.

### III. APPLICABLE LAW

#### A. In General

The Fewell Geotechnical license was issued pursuant to 10 C.F.R. Part 34 (1990). Section 34.1 makes such licenses subject to the provisions of 10 C.F.R. Part 30. A Part 30 license may be modified,<sup>4</sup> in whole or in part, for violation of, or failure to observe any of the terms and provisions of the Atomic Energy Act or of any rule, regulation, or order of the Commission. 10 C.F.R. § 30.61(b) (1990). Furthermore, a license can be suspended for any reason for which it would not have been issued initially. 10 C.F.R. § 30.61; *see also Maurice P. Acosta, Jr.* (Reactor Operator License for San Onofre Nuclear Generating Station, Units 2 and 3), LBP-89-26, 30 NRC 195, 212 (1989) (holding in the context of reactor operator's license).

#### B. Enforcement Policy

More detailed guidance in taking enforcement actions is described in 10 C.F.R. Part 2, Appendix C ("Appendix C"). The first two sections of Appendix C describe its purpose and authority. Section III establishes five levels of severity for violations: Level I describes the most severe violations and Level V the least severe. Eight supplements to Appendix C contain examples of violations to provide specific guidance for categorizing the severity of proscribed actions. Three of these supplements are relevant to the case before us, *viz*, Supplement IV, "Health Physics"; Supplement VI, "Fuel Cycle and Materials Operations"; and Supplement VII, "Miscellaneous Matters."

Section V, paragraph C, of Appendix C, provides for the issuance of license modification orders, and specifies the "base civil penalties" that will normally be assessed against licensees such as industrial radiographers. Section V, paragraph B, specifies the appropriate upward or downward adjustments to be made to the base civil penalties according to mitigating or exacerbating circumstances.

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<sup>4</sup>The procedures the Staff must follow to impose requirements by order or to modify, suspend, or revoke a license are set out in Part 2 to Title 10 of the *Code of Federal Regulations*. *See* 10 C.F.R. § 2.200, *et seq.* (1990). Section 2.204 allows a license to be modified, effective immediately, when it is determined that the public health, safety, or interest so requires. In this case, the Staff, based on the facts set forth above, determined that the Order should be made immediately effective, a matter not contested before us. *See Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979).

Section V, paragraph E, "Enforcement Actions Involving Individuals," states in pertinent part:

Enforcement actions involving individuals . . . are significant personnel actions, which will be closely controlled and judiciously applied. An enforcement action will normally be taken only when there is little doubt that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance. Most transgressions of individuals at the level of Severity Level III, IV, or V violations will be handled by citing only the facility licensee.

More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual. Action against the individual, however, will not be taken if the improper action by the individual was caused by management failures. . . .

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In addition, NRC may take enforcement action where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted. The NRC may take enforcement action for reasons that would warrant refusal to issue a license on an original application. Accordingly, enforcement action may be taken regarding matters that raise issues of integrity, competence, fitness for duty, or other matters that may not necessarily be a violation of specific Commission requirements.

In the case of an unlicensed individual, an Order modifying the facility license to require the removal of the individual from all nuclear-related activities for a specified period of time or indefinitely may be appropriate.

#### IV. DECISION

##### A. Proscribed Conduct

Mr. Murray stipulated to the truth of the matters asserted in three of the observations made by NRC personnel and recited in the Order. Based on Mr. Murray's stipulation at trial, we find that these facts, items (1), (2), and (4) in the Order, have been established as stated. *See* p. 566, *supra*.

A significant factor in our deliberations is the safety significance of Mr. Murray's actions. That issue has two components: (1) whether actual overexposure or unnecessary exposure occurred; and (2) whether there was a significant threat of any overexposure.

We find that there was no radiation overexposure to the radiographer during the observed violations. Tr. 167. There appears to be very minor unnecessary radiation exposure to other workers who entered the restricted area, in the range of a fraction of 1 millirem. Tr. 82-89. This value of unnecessary radiation exposure was estimated by the Staff, based on a radiation survey of 15 mR/hr

at the location where one worker was when the source was out of the camera, and the short period of time the worker spent on that location. Tr. 89.

Although the violations in this case caused no overexposure to the radiographer, and caused very minor, unnecessary exposure to other individuals, of the order of a fraction of 1 millirem, the Board finds the Staff's testimony credible, namely, that Mr. Murray's violations of NRC regulations in this case posed a potential threat of overexposure to Mr. Murray himself and the general public. The evidence presented to the Board establishes that Mr. Murray's failure to conduct radiation surveys after radiographic exposures breached a significant safety barrier against accidental radiation overexposure. Tr. 142-43. This breach of a significant safety barrier against overexposure, combined with Mr. Murray's failure to rope off restricted areas and his failure to prevent entry of unauthorized individuals into the restricted areas during radiographic operations, constitutes a potential threat to both Mr. Murray and the general public.

## B. Appropriateness of the Sanction

Mr. Murray's actions at issue here are clearly within the ambit of the violations described in Appendix C, section V, paragraph E. Consequently, the imposition of some kind of enforcement action against him as an individual is in order. The question is, what kind and extent of sanction are appropriate?

The Order of November 2, 1990, directing Fewell not to use Mr. Murray in licensed activities for a period of 3 years did not include a civil penalty or an evaluation of the severity categories that might be associated with Mr. Murray's failure to follow NRC requirements and Licensee operating procedures.<sup>5</sup> Rather, the sanctions visited upon Mr. Murray were justified by the Deputy Executive Director on the grounds that "the NRC does not have reasonable assurance that Mr. Murray will comply with regulatory requirements." Staff Exh. 2, § III; Tr. 156. Unlike the explicit guidance provided in Appendix C for determining the magnitude of civil penalties, scant policy guidance is provided about the application of various sanctions where integrity and confidence are at issue.

Our task is made somewhat difficult because of the lack of a coherent enforcement scheme for byproduct materials users like radiographers. The

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<sup>5</sup> On February 7, 1991, the Administrator for Region V issued to Fewell a Notice of Violation and Proposed Imposition of Civil Penalties which did categorize the severity of the violations attributable to Mr. Murray. Board Exh. 9. The letter stated in pertinent part that

Individually, these violations would be classified at Severity Levels III, IV, and V. However, taken together, with the elements of willfulness and lack of management oversight, they constitute a very significant regulatory concern. Therefore, in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" . . . 10 CFR Part 2 Appendix C (1990), the violations have been classified in the aggregate as a Severity Level II problem.

The document was sent to the Board by memorandum dated February 7, 1991, pursuant to the Commission's Board Notification procedure.

enforcement scheme laid out in Appendix C is directed at, and was designed for, licensees. Users of byproduct material who are not directly licensed by NRC appear to have been addressed here and there in Appendix C as an afterthought. Consequently, we are required in several instances to evaluate Mr. Murray's conduct, and the sanction appropriate to it, by analogy.

We can, however, reach a reasonable judgment based upon: (1) an analysis of civil-penalty categories concerning the severity of violations; (2) a consideration of "willfulness"; and (3) an evaluation of the deliberateness of Mr. Murray's statements and actions in relation to health and safety consequences. We turn first to the level of severity.

### *Severity Levels*

Severity levels are broadly defined in Appendix C, section III, as follows:

Severity Level I and II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential impact on the public. Severity Level III violations are cause for significant concern. Severity Level IV violations are less serious but are more than minor concern; i.e., if left uncorrected, they could lead to more serious concern. Severity Level V violations are of minor safety or environmental concern.

Mr. Murray's failure to perform surveys to establish the radiation boundary and to rope off and adequately post the radiation boundary violates Fewell's operating procedures, and they are associated with the potential for individuals in an unrestricted area receiving doses in excess of 2 millirems in any 1 hour or 100 millirem in 7 consecutive days. See 10 C.F.R. §20.105(b)(1) and (2).

Supplement IV to Appendix C ("Supp. IV") contains examples of categories of violations. Paragraph D, "Severity IV," includes:

2. A radiation level in an unrestricted area such that an individual could receive greater than 2 millirem in a one-hour period or 100 millirem in any seven consecutive days.

Some evidence is available on the radiation levels in the near vicinity of radiographic work at the Campbell Industrial Park project. Mr. Skov used a survey meter to measure the dose rate at selected locations on October 25, 1990. Tr. 84-89. The highest dose that he reported was 15 mR/hr at a place where an individual had been observed on October 23rd. Mr. Skov noted that "the individual was there for only a short period of time. So he would not have received anywhere near two millirem exposure." Tr. 89.<sup>6</sup> These conditions

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<sup>6</sup> In Mr. Murray's Request for Hearing, he reconstructed by calculation the probable dose rates near his worksite for October 23, 1990. See also Tr. 89. His Figure 1 shows a maximum dose rate of 6.5 mR/hr at a dirt road some 20 feet from the source. However, these calculations were not addressed at trial.

would barely justify a Level IV severity classification and clearly were well below Level III (i.e., greater than 100 millirem in a 1-hour period). Supp. IV, ¶ C.2.

Mr. Murray's failure to perform surveys of the exposure device after radiographic exposures and to secure the radiographic source after each of several exposures is associated with the risk that a radiographer will receive excessive radiation exposure as a result of the source not having been returned to, or remaining in, a shielded position. Tr. 143-44. This situation is described in Supp. IV, paragraph C.4, as

Substantial potential for an exposure or release in excess of 10 CFR 20 whether or not such exposure or release occurs (e.g., entry into high radiation areas, such as reactor vessels in the vicinity of exposed radiographic sources, without having performed an adequate survey, operation of a radiation facility with a nonfunctioning interlock system).

Although Mr. Murray argues that alarming rate meters and dosimeters provided him with adequate protection (Tr. 74-81, 191-97), we accept the Staff's position that, absent the kind of survey specified in the operating procedures, there was substantial potential for excessive exposure. This is a Severity Level III situation. At Level II, an actual, rather than a potential, exposure would be involved. See Supp. IV, ¶ B.

Mr. Murray's failure to prevent entry into the restricted area of individuals other than radiographers, like the first two issues discussed above, is associated with the danger of individuals receiving a dose of more than 2 millirems in any 1 hour. As in the first two violations, the Severity Level is IV.

In summary, we find that each of the five violations falls under either Severity Level III or IV. In combination, however, they constitute a Severity Level III violation described in paragraph C.12 of Supp. IV as follows:

Breakdown in the radiation safety program involving a number of violations that are related or, if isolated, that are recurring that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

Near identical wording is also used in describing Severity Level III violations in fuel cycle and material operations. See 10 C.F.R. Part 2, App. C, Supp. VI, ¶ C.8 (1990). Thus, we conclude that Mr. Murray's radiographic practices on October 23 and 25 were not greater than Severity Level III — cause for significant concern, but not so perilous as to warrant Severity Level I or II classification. Appendix C, section V, paragraph E, states that "[m]ost transgressions of individuals at the level of Severity Level III, IV, or V violations will be handled by citing only the facility licensee." We turn next to the aspect of willfulness.

### C. Willfulness

The November 2, 1990 Order places great significance on the "willfulness" of Mr. Murray's actions (Order, § III), pointing out that Mr. Murray knew the proper procedures but did not follow them. Appendix C, section III, "Severity of Violations," provides some policy guidance on how "willfulness" should be taken into account.

The severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard of requirements, deception, or other indication of willfulness. The term "willfulness" as used here embraces a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements. Willfulness does not include acts which do not rise to the level of careless disregard, e.g., inadvertent clerical errors in a document submitted to the NRC. In determining the specific severity level of a violation involving willfulness, consideration will be given to such factors as the position of the person involved in the violation (e.g., first-line supervisor or senior manager), the intent of the violator (i.e., negligence not amounting to careless disregard, careless disregard, or deliberateness), and the economic advantage, if any, gained as a result of the violation. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of the violation.

Although Mr. Murray is listed on Fewell's license, he worked only part time for that company. Tr. 208-09. He was not a "first line supervisor or senior manager." In fact, he was not even a member of management. Additionally, there is no evidence of any economic advantage to him from violating procedures.

We find no evidence of *deliberate intent* by Mr. Murray to violate the purposes of the procedures or rules (i.e., the prevention of an overexposure) or to falsify records. Rather, although he failed to make boundary surveys, rope off his radiation zone, or prevent unauthorized persons from encroaching on his work area, the evidence indicates that he believed that other actions he took were adequate to prevent others from receiving a dose of more than 2 millirems in any 1 hour. Tr. 184-87, 190, 200. His precautions were based on his own personal interpretation of what was necessary, rather than careful and rigorous attention to Fewell's operating procedures. In this regard, he may have misinterpreted conversations with an NRC Health Physicist. Tr. 185-86.

Except for inattention, Mr. Murray's reasons for not properly surveying or locking the source following each exposure were not explained. He clearly was aware of the need to ensure that the source was completely retracted following an exposure, for his own safety and that of other individuals in the vicinity. Tr. 182. When he knew that he was being observed, he performed the surveys properly (Tr. 70, 141), but his testimony suggests that he frequently relied upon his own procedure, using audible alarms to assure himself that the source was retracted. Tr. 191-97. We find no deliberate intent to bypass a precaution for

ensuring that the source was retracted, but rather the substitution of personal methods for those specified in the rules.

On balance, we find Mr. Murray's actions amount to "a potentially significant lack of attention or carelessness toward licensed responsibilities." As such they are cause for significant concern. Mr. Murray's conduct is far more serious than an inadvertent lapse, but less serious than, for example, the deliberate defeating of a safety-related device or failure to prevent an overexposure. We find his failure to follow Fewell operating procedures in these situations to constitute Severity Level III violations.

#### D. False Statements

The Order of November 2, 1990, in section III, places great importance on false statements made by Mr. Murray concerning surveys of the source, which he did not make; securing the source, which he did not do; and the presence of unauthorized individuals in the restricted zone, which he did not acknowledge. Mr. Murray's denials appear to have provided the principal basis for the Deputy Director's finding of lack of integrity and, thus, the enforcement action against him personally. We note that Appendix C, section V, paragraph E, states that

Most transgressions of individuals at the level of Severity Level III, IV, or V violations will be handled by citing only the facility licensee.

More serious violations, *including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual.*" [Emphasis added.]

Consequently, we need to consider the nature and circumstances of Mr. Murray's statements.

Section VI, "Inaccurate and Incomplete Information," and Supplement VII of Appendix C address situations where a licensee official, including "a person listed as an authorized user of licensed material," provides "[i]naccurate and incomplete information" to the NRC. We note at the outset that the thrust of Appendix C on this subject focusses primarily on licensees and licensee management, not byproduct material users under a license, like Mr. Murray.

Although the language of some paragraphs of this policy guidance might be construed as descriptive of Mr. Murray's statements,<sup>7</sup> we interpret the scope of "providing inaccurate and incomplete information" as embracing quite different circumstances. At the time they were elicited, Mr. Murray's statements were not associated with any information required to be kept by the licensee and

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<sup>7</sup>For example, Appendix C, Supp. VII, ¶C, "Severity III" reads:

1. Incomplete or inaccurate information which is provided to the NRC (s) because of inadequate actions on the part of licensee officials but not amounting to a severity Level I or II violation . . . .

furnished to the NRC. They were not associated with any emergency situation or an uncontrolled status of the source. They were not associated with any actual overexposure. They were not associated with information that the NRC would rely upon. Rather, the false statements consisted of Mr. Murray's answering "yes" to questions asked by NRC employees who had already obtained photographs and a video recording showing that a forthright answer should have been "no." Tr. 67-69.

Mr. Murray's statements were initially made at the Campbell Industrial Park worksite on October 25, 1990, and were not recorded, nor was Mr. Murray under oath at the time. However, a transcript was made of the Investigative Interview on November 1, 1990, when Mr. Murray was questioned, under oath, about the same circumstances again by Mr. Joukoff and Mr. Skov. Board Exh. 2. On both occasions, Mr. Murray was under considerable stress for personal reasons. Tr. 203-05.

Our reading of the transcript of the Investigative Interview not only confirms that Mr. Murray was in a stressed and somewhat confused state of mind, but also indicates that, by repetitive leading questions, the investigators sought to elicit statements from Mr. Murray which he did not want to make. In short, Mr. Murray, while not yet aware that he had been under covert surveillance, attempted to avoid admission that he sometimes failed to follow operating procedures. In some cases, however, Mr. Murray did admit that he had not followed written procedures, or stated that he was unsure as to whether or not he had properly placed boundary markers or surveyed the source. Board Exh. 2 at 28, 30, 97-98, 100.

Mr. Murray's lack of candor in responding to the NRC investigator's questions is not to be condoned. However, we do not find his statements to arise to such a level as to require NRC to abandon all confidence in his ability to perform radiography in a safe manner. Here again, we would categorize his transgressions as intermediate, between very significant and of minor concern.

Considering the three factors of severity, willfulness, and integrity together, we conclude that the appropriate penalty level is comparable to Severity Level III.

#### **E. Sanctions in Other Cases**

The Board takes official notice of sanctions imposed by the Staff in radiography cases during the period from January 1982 to September 1990 as reported in NUREG-0940, "Enforcement Actions: Significant Actions Resolved." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-74-22, 7 AEC 659, 667 (1974). Twenty-six sanctions were imposed on radiographers during this period involving violations similar to those in this case, namely failure to perform radiation surveys after radiographic operations, failure to prevent unauthorized

entry into restricted areas, failure to lock the source in its shielded position, inadequate posting of restricted areas, and inadequate boundary radiation surveys. Only one of these twenty-six actions, *Bill Miller, Inc.*; NUREG-0940, Vol. 8, No. 1 (EA 88-155, June 1989), at II.A-83, involved willful misconduct. In that action, the licensee was charged with careless disregard because, like Mr. Murray, the radiographers were trained and knowledgeable regarding the violations they committed. The sanction imposed was an \$8,000 civil penalty for a severity Level II violation. In that case two members of the public received radiation overexposures of the order of 200 to 400 millirem.

In the twenty-six actions prior to 1990, civil penalties were imposed at the Severity III, and occasionally the Severity II, level. No licenses were suspended and no radiographers were removed in these cases.

Beginning in 1990, more severe sanctions were imposed. There were two actions (neither of which involved willful misconduct) where radiographers failed to perform radiation surveys of the camera after exposures, failed to post signs, and committed other related violations. *Consolidated NDE, Inc.*, 90-080, NUREG-0940, Vol. 9, No. 3 (EA 90-060, November 1990), at II.A-35; *Barnett Industrial X-Ray*, NUREG-0940, Vol. 9, No. 3 (EA 90-069, April 1990), at II.A-14. According to the notices of violations and confirmatory action letters issued for these actions, the radiographers in question were prohibited indefinitely from engaging in radiographic work. In the *Barnett* action, there was a significant radiation overexposure to a radiographer. In the *Consolidated* action, the licensee had committed similar violations less than 3 years earlier.

These actions are not controlling on our decision. However, even if they were, we find them clearly distinguishable on their facts from the instant case.

We turn now to Mr. Murray's training and experience.<sup>8</sup> They are summarized in an attachment to Fewell's license. Staff Exh. 2. Most of his radiographic training and experience was obtained between 1981 and 1989 while he was in the Navy, but his resume also lists a 9-month period in 1985 when he worked for Pittsburgh Testing Laboratories as a Radiographer Assistant using "1R192" [*sic*]. Although his last 3 years with the Navy included the duties of "Nuclear and Non-Nuclear Radiographer" at the submarine base Non-Destructive Testing

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<sup>8</sup> Because of its concern about the number of overexposures among radiographers, the NRC has completed, has underway, or is considering:

- (a) Development of a training manual for radiography personnel to help ensure that they understand the need for, and the application of, good radiation protection practices,
- (b) development of NRC requirements to ensure that radiographers are adequately trained and are aware of their direct responsibility for safety performance,
- (c) increased inspection of workers performing actual radiography operations,
- (d) publication of guidance for reporting events to ensure that these reports include clear information concerning equipment failures when appropriate, and
- (e) the establishment of safety requirements for radiographic equipment.

Safety Requirements, 55 Fed. Reg. at 844.

The new section 34.20 establishes the performance requirements for radiography equipment that should substantially reduce overexposures that result from malfunctions. *Id.* at 852.

Lab, Pearl Harbor, Hawaii, Mr. Murray testified that only twice during this period was a source actually used: "your hands-on experience [was] almost none." Tr. 214. After leaving the Navy, Mr. Murray was "a bartender for a little while" before becoming a radiographer on the Fewell license.<sup>9</sup>

The Board takes official notice that the NRC Standard Review Plan for Applications for the Use of Sealed Sources and Devices for Performing Industrial Radiography, dated September 1984 ("SRP"), specifies that, *inter alia*, a radiographer must have completed a minimum of 3 months (520 hours) of on-the-job training as a radiographer's assistant. SRP at 13 (September 1984). The record does not show whether or not Mr. Murray received any such on-the-job training at Fewell. NRC Region V's report documenting an inspection of Fewell made on October 4, 1990, states that "[n]o retraining [of Mr. Murray] has occurred to date." Board Exh. 1, Attachment 2, "Details." 2D. Absent such recent training, his qualifications to perform radiography independently with a sealed source appear to the Board to be in need of reinforcement.

The record discloses that Mr. Murray's radiographic procedures had been questioned on only one occasion prior to the October 23 and 25, 1990 observations: This was in March 1990 when he allowed concrete to be brought onto his worksite. Two Region V investigators contacted Mr. Murray, apparently as a result of an allegation. No violation was found because Mr. Murray had shut down his operation to allow the concrete work to be done. Tr. 115, 186-87. Neither Mr. Joukoff nor Mr. Skov were aware of any other accusations or allegations of deficient performance by Mr. Murray prior to the events of October 1990.<sup>10</sup> Tr. 116.

Although the record in this proceeding does not specifically establish that Mr. Murray lacked the knowledge to perform radiographic work, it does establish that he did not follow procedures. Consequently, additional training would be of benefit to Mr. Murray and would instill some confidence in the Staff as to the adequacy of his radiographic work.

We do not share the Staff's concern for Mr. Murray's integrity nor agree that he should be prevented from practicing his trade for an extended period of time. We do not find that Mr. Murray's "panic" responses of October 25, 1990, or his confused responses of November 1, 1990, constituted the kind of willfulness contemplated by the regulation. We certainly do not find premeditation.

If Mr. Murray is to resume his trade at all, he should be allowed to do so before his knowledge of the field is diminished or lost from lack of application.

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<sup>9</sup> Mr. Murray testified that it was "about a year-and-a-half or two years . . ." between the time he left the Navy and his listing on Fewell's license. Tr. 214. Staff Exh. 2, however, only shows a period from February to September of 1989.

<sup>10</sup> The Region V routine, unannounced inspection of Fewell's activities made on October 4, 1990, noted nine apparent violations. Board Exh. 1. However, none of these concerned the kind of infractions cited in the November 2, 1990 Order.

We find that a suspension of 9 months, beginning with the November 2, 1990 order of immediate effectiveness, represents a reasonable balance between a sanction for the severity level of his transgressions and preservation of his radiographic knowledge and skills.<sup>11</sup>

However, we also note the apparently limited time Mr. Murray has worked in the field as a Radiographer's Assistant under the tutelage of a fully qualified radiographer experienced with NRC license requirements. Therefore, we require that before resuming a position as a fully qualified, independent radiographer, Mr. Murray must first spend a period of 3 months (520 hours) in on-the-job training as a Radiographer's Assistant. Mr. Murray may serve as a radiographer's Assistant beginning August 3, 1991, wherever he may find employment. This condition is comparable to the Standard Review Plan training requirement for industrial radiography, and it will provide a constructive basis for the restoration of Mr. Murray's status as a radiographer under a byproduct materials license.<sup>12</sup> That rehabilitation is consistent with the purpose of the NRC'S enforcement system which is to sanction and deter, not to remove licensees from licensed work.

## Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 25th day of June 1991, ORDERED:

1. That the November 2, 1990 Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support's Order Modifying License (Effective Immediately) is modified by reducing the period of Mr. Murray's suspension to 9 months, or from November 2, 1990, to August 2, 1991; and

2. That Mr. Murray shall serve 520 hours as a Radiographer's Assistant before being requalified as an independent Radiographer.

\* \* \*

Pursuant to 10 C.F.R. § 2.760 (1990) of the Commission's Rules of Practice, this Initial Decision will constitute the final decision of the Commission thirty (30) days from the date of its issuance unless an appeal is taken in accordance with 10 C.F.R. § 2.762 (1990) or the Commission directs otherwise. *See also* 10 C.F.R. § 2.786 (1990).

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<sup>11</sup> We note that at a radiographer's hourly rate of \$18.00, a 3-year suspension equals, in gross, an annual salary loss of \$40,000 which would total \$120,000 over the 3-year period. Allowing an offset for other possible income, the sanction translates into the equivalent of at least a \$28,800 to \$57,600 civil penalty on Mr. Murray, an amount we find grossly disproportionate to the sequence of events at issue here. We note that the civil penalty proposed to be levied against Fewell, the licensee, is \$20,000. Tr. 217, Board Exh. 9.

<sup>12</sup> In response to a question from the Board, the Director of Enforcement indicated that a period of suspension followed by work as a radiographer's assistant and then a period of probation would be "an acceptable basis for relaxation of the order." Tr. 164. Under the circumstances of this case, we see no need for a probationary period.

Any party may take an appeal from this decision by filing a Notice of Appeal within ten (10) days after service of this Initial Decision pursuant to 10 C.F.R. § 2.762 (1990). Each appellant must file a brief supporting its position on appeal within thirty (30) days after filing its Notice of Appeal [forty (40) days if the Staff is the appellant]. An intervenor-appellant's brief must be confined to issues that the intervenor-appellant placed in controversy or sought to place in controversy. Within thirty (30) days after the period has expired for the filing and service of the briefs of all appellants [forty (40) days in the case of the Staff], a party who is not an appellant may file a brief in support of, or in opposition to, the appeal of any other party. A responding party shall file a single, responsive brief only, regardless of the number of appellants' briefs filed. Briefs shall conform to the length and format specified in 10 C.F.R. § 2.762 (1990).

**FOR THE ATOMIC SAFETY  
AND LICENSING BOARD**

**Peter S. Lam  
ADMINISTRATIVE JUDGE**

**Richard F. Foster  
ADMINISTRATIVE JUDGE**

**B. Paul Cotter, Jr., Chairman  
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland,  
June 25, 1991.**



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtliss  
Forrest J. Remick

In the Matter of

Docket No. PRM 73-9

NUCLEAR CONTROL INSTITUTE, *et al.*

June 5, 1991

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making submitted by Eldon V.C. Greenberg on behalf of the Nuclear Control Institute and the Committee to Bridge the Gap (PRM 73-9). The Petitioners requested that the Commission revise its regulations to upgrade the design-basis threat for radiological sabotage of nuclear power reactors. The Petitioners believe that the design-basis threat must be revised to include explosive-laden vehicles, such as truck and boat bombs, and to reflect the possibility of an attack by a larger number of attackers using more sophisticated weapons. The petition is denied based on a Commission determination that there has been no change in the domestic threat since the design-basis threat was adopted that would justify a change in the design-basis threat.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 73.1)**

The Commission will not revise the design-basis threat, as set forth in 10 C.F.R. § 73.1, where there has been no evidence of a change in the domestic threat since the design-basis threat was adopted.

# DENIAL OF PETITION FOR RULEMAKING

## I. THE PETITION

By letter dated January 11, 1991, shortly before the commencement of Operation Desert Storm, Eldon V.C. Greenberg, on behalf of the Nuclear Control Institute and the Committee to Bridge the Gap, filed a petition for rulemaking with the NRC. The petition was docketed as PRM 73-9. The Petitioners requested that the NRC revise its regulations in 10 C.F.R. §73.1 to upgrade the design-basis threat for radiological sabotage of nuclear power reactors. (Radiological sabotage refers to any deliberate act directed against nuclear material or a nuclear facility that could endanger the public health and safety by exposure to radiation.) The Petitioners believe that the regulation must be revised to include explosive-laden vehicles, such as trucks and boats, and to reflect the possibility of attack by a larger number of attackers using more sophisticated weapons.

The Petitioners contend that the present design-basis threat is not realistic in view of the claimed current trends in terrorism. The Petitioners state that a successful terrorist attack could cause the release of radioactivity comparable to a severe nuclear accident, and result in significant health and safety consequences and property damage. The Petitioners believe that the increased threats may be countered by measures that could be implemented for a modest cost but would protect against events with potentially catastrophic consequences.

The petition describes the Nuclear Control Institute as a nonprofit corporation that monitors nuclear programs in the United States and other countries, develops strategies to prevent and reverse the growth of nuclear armaments, and explores strategies for reducing existing nuclear arsenals, thereby helping to prevent nuclear proliferation and terrorism. The petition describes the Committee to Bridge the Gap as an organization concerned with nuclear safety and the threat of nuclear terrorism.

## II. BASIS FOR REQUEST

The NRC has established regulations in 10 C.F.R. Part 73 governing the physical protection of plants and materials. These regulations include measures related to the protection of nuclear facilities against radiological sabotage. Section 73.1, among other things, establishes the design-basis threat to be used to design safeguards systems to protect nuclear power reactors against acts of radiological sabotage.

The Petitioners state that section 73.1, as interpreted by the Commission, does not require nuclear reactor licensees to protect against radiological sabotage

attempts by a group or an individual using weapons of greater sophistication than hand-held automatic weapons or explosives, thereby excluding an attack by explosive-laden vehicles, or more than several external attackers, or attackers operating as more than one team and employing team maneuvering tactics.

The Petitioners believe that terrorist incidents that have occurred since the design-basis threat was adopted demonstrate the ability and willingness of terrorists to mount sophisticated attacks capable of causing substantial physical destruction, particularly through the use of truck bombs. Because of the Persian Gulf crisis, the growth of State-sponsored terrorism, and changes in terrorist tactics, the Petitioners believe that current regulatory standards do not provide a realistic or sufficient guarantee of public health and safety or common defense and security.

The Petitioners state that the terrorist threat has become bloodier, more sophisticated and better armed, and frequently State-supported. As a result, the Petitioners believe that the possibility of nuclear terrorism, resulting in a substantial number of casualties, is far more likely today than it was in 1979, when current regulations were promulgated.

The Petitioners believe that it is essential to upgrade the design-basis threat to protect against vehicle bomb attacks which they believe pose a grave threat to civilian nuclear power plants. The Petitioners cite the devastating effects of the truck bomb attacks in Beirut in 1983. The Petitioners state that studies have indicated the vulnerability of licensed power reactors to attack by explosive-laden vehicles and the potentially devastating consequences of such an attack.

The Petitioners believe that it is essential to change the design-basis threat to anticipate attacks by more sophisticated, larger, and better-armed groups. The Petitioners state that there are two components to this threat: (1) a larger number of attackers with the capability to act in several coordinated teams; and (2) heavier firepower. The Petitioners cite documented large group attacks on nuclear facilities in Latin America and Europe and the widespread availability of advanced weaponry as indications that the current design-basis threat is no longer realistic.

### III. REQUESTED REGULATORY ACTION

The Petitioners requested that the design-basis threat for radiological sabotage contained in 10 C.F.R. § 73.1(a)(1)(i) be amended to read as set forth below. Note that text to be added is in bold italic type and text to be removed is set off in brackets.

**§ 73.1 Purpose and scope.**

(a) \* \* \*

(1) *Radiological sabotage.* (i) A determined violent external assault, attack by stealth, or deceptive actions of several up to twenty persons operating as two or more teams with the following attributes, assistance, and equipment: (A) Well-trained (including military training and skills) and dedicated individuals, (B) inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g. provide information), an active role (e.g. facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both, (C) suitable weapons [, up to and including hand-held automatic weapons, equipped with silencers and] having effective long range accuracy, (D) [hand-carried] equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system, *in quantities transportable by vehicle*, and . . .

The Petitioners requested that the NRC take other actions necessary to ensure that the specific protective measures contained in 10 C.F.R. Part 73 are sufficient to respond to the increased design-basis threat and provide the high assurance required under 10 C.F.R. § 73.55(a) that the threat of sabotage will be effectively countered.

Because the Petitioners believe that the suggested amendments are vitally important to reduce risks to the public health and safety and the common defense and security, the Petitioners requested that the Commission make a determination on the petition within 30 days from the date of receipt and that it proceed immediately to promulgate a final rule, without issuing a proposed rule, that would adopt the requested amendments.

The Commission evaluated the Petitioners' request for expedited action. The Commission determined that the petition should be processed in accordance with its standard procedures for processing a petition for rulemaking in 10 C.F.R. § 2.802(e), but expedited by limiting the comment period to 30 days. That determination was contained in the "Notice of Receipt of Petition for Rulemaking" that was published in the *Federal Register* on January 29, 1991 (56 Fed. Reg. 3229). Interested persons were invited to submit written comments or suggestions concerning the petition by February 28, 1991.

#### **IV. PUBLIC COMMENTS ON THE PETITION**

As of March 15, 1991, the NRC had docketed 35 letters of comment: 11 from individuals, 3 from public interest groups, and the remaining 21 from industry or industrial representative organizations. In addition the NRC received three letters from Congressmen. While the comments were carefully considered by the NRC, none contained significant new information that would warrant a change in the design-basis threat. In the summary that follows, the views presented are those of the commenters.

## **A. Comments Opposing the Petition**

Twenty-one commenters opposed the petition. The main reasons cited by these commenters in support of the current regulations were:

1. The NRC Staff, in concert with the intelligence community and other federal agencies, continually monitors world events for potential threats associated with commercial nuclear facilities. These agencies have unique access to information, including sensitive or classified information not normally available to the general public.

2. Nuclear power plant licensees are in close communication with local law enforcement agencies and the NRC to ensure that any security threat in local areas is promptly identified and communicated. The response to the current Middle East situation should have (and has) heightened awareness and sensitivity on the part of licensee personnel and federal, state, and local law enforcement officers.

3. Nuclear power plant licensees have established detailed security measures, as required by the NRC in 10 C.F.R. §73.55(b) through (h), to counter the design-basis threat. These measures include:

- Physical protection barriers and illuminated isolation zones;
- Surveillance and patrols of the perimeter fence;
- Intrusion detection aids and alarm devices;
- A tactical reaction force;
- Bullet-resistant barriers for critical areas;
- A well-trained guard force capable of carrying out the provisions of an NRC-approved security plan;
- Access controls for personnel and vehicles, with searches and positive identification; and
- Capability to execute safeguards contingency plans for dealing with threats, including truck bomb threats.

In addition, nuclear power plant licensees also have established detailed security-related personnel programs, which include:

- Background investigations with FBI criminal history checks;
- Psychological testing;
- Drug and alcohol fitness-for-duty determinations; and
- Special supervisory training for behavioral observation.

Also, through the NRC's regulatory effectiveness review program, individual power reactor sites are evaluated for security vulnerabilities and their ability to counter the design-basis threat.

4. Nuclear power plant design is based on the defense-in-depth philosophy in providing adequate public protection. Massive containment structures, thick wall piping and equipment with redundant safety and shutdown systems are constructed to permit the facility to withstand the impact of earthquakes,

hurricanes, tornados, floods, and airplane crashes. Detailed training and plant-specific simulators provide added assurance. Emergency planning and public notification systems add yet another layer of capability designed to protect the public health and safety. The approved plans are periodically evaluated during exercises.

5. The Petitioners have not presented any new information related to the current situation; they have simply restated old opinions, none of which provides a basis for altering the design-basis threat in this country.

6. Several of the commenters opposing the petition took issue with the Petitioners' view that the protection measures proposed by the Petitioners could be put into place at modest cost. One commenter, a power reactor licensee, estimated the cost at \$1 million to \$3 million per year at his facility.

## **B. Comments Supporting the Petition**

Seventeen letters supported the petition. These letters are summarized as follows:

1. The most common concern stemmed from the Middle East situation that existed during the public comment period (the comment period lasted from January 29 until February 28, 1991). These commenters pointed out that Iraq had issued a "terrorist call to arms"; that the U.S. military had attacked Iraqi reactors, and thereby legitimized U.S. reactors as terrorist targets; that informed and respected Americans have warned of possible terrorist attacks within the U.S.; and that terrorist action might reasonably include reprisals against U.S. reactors.

2. Another common theme was rejection of the NRC view that the design-basis threat currently set forth in NRC regulations continues to be adequate. These commenters argue that events in the Middle East are a sufficient basis for escalating the design-basis threat to the levels called for in the petition.

3. Several commenters believe that power reactors are vulnerable to radiological sabotage; specifically, barriers may be easily breached and vital systems may be sabotaged.

4. Some commenters put forth the following cost argument: The consequence (and hence the cost) of successful radiological sabotage of a reactor is high in the extreme while the cost of protection is relatively modest. It is therefore prudent for the NRC to require the measures recommended by the Petitioners.

5. One commenter put forward the argument that barriers are already in place to protect reactors in Europe and Japan and the conclusion that only minor structural modifications would be needed to protect U.S. reactors against truck bombs.

6. One commenter suggested that the primary threat to security is deranged persons who might use trucks or suicidal air attack. The commenter concluded

that upgrading reactor protection along the lines of the petition seems cost-effective.

The above concerns raised by the commenters are addressed in the NRC Staff evaluation of the petition (Section V).

## V. STAFF EVALUATION OF THE PETITION

The NRC Staff believes that a decision on the petition can be based on response to a single pivotal issue: Has the threat of radiological sabotage of domestic nuclear reactors changed to an extent that justifies a need to upgrade the current design-basis threat? The Petitioners believe that the threat to domestic nuclear reactors has intensified in two ways: (1) the possible use of large truck bombs or boat bombs to cause radiological sabotage, and (2) the possible use of a larger number of attackers armed with heavier weapons.

The nature of terrorism was the subject of detailed analysis before the NRC published its design-basis threat (10 C.F.R. § 73.1), and it continues to remain the focus of Staff review. NRC efforts in creating the design-basis threat and the actions taken by the NRC since the publication of section 73.1 to ensure its continuing validity remain key components in the NRC safeguards program.

Thousands of acts of terrorist violence worldwide, ranging from simple attacks on property to the sophisticated, deadly bombing of civil airlines, are examined and analyzed by the NRC. The NRC uses a wide variety of information, ranging from that reported directly from the scene of the incident to that included in a finished analysis provided by the intelligence community. Throughout this ongoing daily analysis, the Staff focuses its effort on reviewing realistic, not hypothetical, adversary characteristics, including weaponry, group size, tactics, explosives, and targets. The NRC then compares what has occurred or is credible to the attributes enumerated in the design-basis threat.

With respect to truck and boat bombs of the size estimated in NRC studies as being capable of causing significant damage to domestic power reactors, the NRC Staff notes the following:

- There has been one such truck bomb in the U.S. (Math Lab, Wisconsin, 1970).
- There have been no others in the Western Hemisphere.
- There have been no others outside of an area of civil unrest.
- There have been none directed against a nuclear activity worldwide.
- There have been no boat bombs directed at any activity, nuclear or otherwise, worldwide.
- Contingency planning to protect against truck bombs has been completed for all domestic power reactors.

Based on the foregoing facts, on discussions with appropriate elements of the Executive Branch, and on NRC's independent assessment of the domestic threat environment, the NRC concludes that the likelihood of nuclear terrorism involving the use of large truck bombs against nuclear power reactors in the United States is extremely low, that a change in the design-basis threat for radiological sabotage is unwarranted, and that contingency planning is sufficient.

The NRC reviewed issues related to the waterborne vehicle bomb in 1989 and concluded that no action was required at that time. The NRC has recently reviewed these issues again and concluded that there have been no significant changes. These conclusions are based, in part, on a review of worldwide terrorist events, where the threat of waterborne vehicle bomb attack against a power reactor was found to be much less likely than the threat of a land-vehicle bomb, which itself was only a remote possibility. Accordingly, there is little basis for further considering the waterborne bomb threat at this time.

The Petitioners also believe that it is important to upgrade the design-basis threat to anticipate attacks by more sophisticated, larger, and better-armed groups; specifically (1) a larger number of attackers with the capability to act in several coordinated teams, and (2) heavier firepower.

The NRC is aware that, as described by the Petitioners, larger terrorist groups with heavier firepower than contemplated in the current design-basis threat have carried out operations in foreign countries. The NRC is also aware of one incident described by the Petitioners involving three coordinated, near-simultaneous acts of sabotage on unprotected power transmission lines serving, but some miles from, the Arizona Nuclear Power Project, Palo Verde Units 1, 2, and 3. The acts constituted no threat to the safe operation or safe shutdown of the reactors. No violence was involved against the reactors or reactor sites. The most recent of the above events is almost 5 years old at the time of this writing. They have been considered at length and evaluated by the NRC. The terrorist actions in foreign countries and the transmission line sabotage events are remote, both spatially and by the nature of the events, from constituting a direct peril to a domestic power reactor. The NRC continues to believe that, to date, there has been no significant change in weaponry, group size, State sponsorship, or targeting that warrants a modification of the design-basis threat requirements for NRC-licensed nuclear power reactors.

The following discussion presents a detailed NRC analysis and response to the significant excerpts from the petition.

### *1. Excerpt*

[N]uclear reactors need not protect against radiological sabotage attempts by (i) a group or individual using weapons of greater sophistication than hand-held automatic weapons or explosives, thus excluding attack by explosives-laden vehicles, or (ii) more than three (3)

external attackers or attackers capable of operating as more than one team, i.e., capable of employing "effective team maneuvering tactics."<sup>1</sup>

### *Response*

It is important to remember that the current design-basis threat for power reactors is a hypothetical threat statement. The statement is set forth in the regulations in positive rather than negative terms and is given in section 73.1(a)(1) as follows:

- (1) *Radiological sabotage.* (i) A determined violent external assault, attack by stealth, or deceptive actions, of several persons with the following attributes, assistance and equipment: (A) Well-trained (including military training and skills) and dedicated individuals, (B) inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both, (C) suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy, (D) hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system, and
- (ii) An internal threat of an insider, including an employee (in any position).

When the design-basis threat was developed, there was no credible threat targeting power reactors in this country. The NRC believes that this continues to be the case, notwithstanding the statements made in the petition and suggested by some commenters. In particular, although changes are occurring worldwide, the NRC has not detected, to date, any significant change to the threat environment, including weaponry, group size, State sponsorship, or targeting, that warrants a modification of the design-basis threat for NRC-licensed nuclear facilities and materials. Although the adequacy of the design-basis threat was questioned in the petition and by some commenters, the safeguards system developed from the current design-basis threat is deemed adequate and appropriate by the Commission. This system includes a physical security organization, physical barriers, access controls, detection aids, communications, testing and maintenance provisions, response provisions, armed responses, and provisions for offsite law enforcement response. It is important to note that the effectiveness of this system is not limited to the design-basis threat. In particular, in the face of a threat greater than the design-basis threat the system would not collapse but would continue to provide a level of protection that may well be adequate. In addition, power reactors are required to have contingency plans to address the truck-bomb threat. Should the domestic threat environment change significantly, NRC

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<sup>1</sup>Petition at 4.

intelligence specialists, in coordination with other government entities, would propose appropriate changes to the design-basis threat, based upon the specifics of the threat environment.

## **2. Excerpts**

This immediate threat [Iraq situation], coupled with the growth of State-sponsored terrorism and changes in terrorist tactics, indicates that the current regulatory standards, which exclude the truck bomb threat and sophisticated, large group attacks supported by substantial firepower, are neither realistic nor a sufficient guarantor of the public health and safety and the common defense and security under the Act.

### **Petition at 5.**

Since the adoption of the Commission's current standards for protection against radiological sabotage of nuclear reactors, the terrorist threat has changed in three important ways: it is bloodier; it is more sophisticated and better-armed; and it is often State-sponsored. Because the nature of the threat has changed, it is incumbent on the Commission to revise its regulations to meet the potentially more severe challenges of the 1990s.

### ***Id.* at 6.**

### ***Response***

The nature of terrorism was the subject of detailed analysis preceding publication of the NRC design-basis threat and remains the focus of continuing Staff review. NRC efforts in creating the design-basis threat requirements, and actions since their publication to ensure their continuing validity, remain key components in the NRC safeguards program.

Thousands of acts of terrorist violence worldwide, ranging from simple attacks on property to the sophisticated and deadly bombing of civil airlines, are examined and analyzed. The NRC uses a wide variety of information that is either reported directly from the scene of the incident or included in a finished analysis provided by the intelligence community. Throughout this ongoing daily analysis, the NRC focuses its effort on reviewing realistic, not hypothetical, adversary characteristics — including weaponry, group size, tactics, explosives, and targets — and compares the events that have occurred or information that is credible to the attributes enumerated in the design-basis threat statements.

On occasion, NRC effort focuses on a particular facet of terrorism or on information that suggests a trend may be developing. For example, the use of vehicle bombs in Lebanon, as discussed below, was closely examined. Similarly, the use of hang gliders, boats, the degree of sophistication exhibited, and State sponsorship have merited and continue to merit close examination.

The NRC's purpose is not to catalog every demonstrated or hypothetical terrorist attribute for subsequent inclusion in the design-basis threat statements. NRC Staff experience, analysis, and judgment, as well as the views of other federal agencies, are applied in the threat assessment process. In its continuing review, the NRC considers demonstrated attributes to determine whether or not they exceed current safeguards performance objectives. When an attribute does exceed those objectives, it then becomes the focus of additional and timely examination, including discussion with the intelligence community or special study regarding that specific attribute, to establish in a factual manner a comprehensive characterization, including the motivation, dedication, and method of operation of the adversary. Importantly, the NRC examines and includes the circumstances or context surrounding a specific terrorist incident in its deliberation.

For example, the conditions present in the civil strife of Beirut, Lebanon, that resulted in vehicle bomb attacks, are not easily replicated in the United States. Notwithstanding statements made in the petition and supported by some commenters, the NRC would argue against the likelihood of such vehicle bomb attacks domestically.

The likelihood that terrorists would attempt to perpetrate an act of nuclear terrorism is of concern to the NRC and the federal government. Based on its own analytic activities and working closely with other agencies, the NRC monitors the threat environment for indications that the likelihood of nuclear terrorism is increasing. Any report of a threat against a domestic nuclear facility receives immediate review and threats against a nuclear facility overseas receive continued attention. On this particular point, the NRC agrees with a statement made by commenters who oppose the petition: that the NRC has access to relevant sensitive or classified information not normally available to the public. Each incident, whether against a nuclear facility or not, is closely examined in the context of the design-basis threat to assess its impact. Because of the increased number of events occurring concurrently with the Middle East crisis, NRC has increased data available to base its determination of any significant change in the threat environment, with particular focus on any increased threat of nuclear terrorism. Decisionmakers are being briefed, some on a daily schedule, regarding threats and terrorist incidents worldwide, and Staff planning includes response options available to address evolving threats worldwide and domestically.

Although changes are occurring worldwide, the NRC has not detected, to date, any significant change to the threat environment, including weaponry, group size, State sponsorship, or targeting, that warrants a modification of the design-basis threat statements for NRC-licensed nuclear power reactors. Nonetheless, the NRC continues on a daily basis and with ongoing vigilance to review information

on threats and incidents to ensure that the design-basis threat statements remain adequate, prudent, and reasonable.

### **3. Excerpts**

It is equally important to upgrade the design-basis threat to anticipate attacks by more sophisticated, larger and better-armed groups. There are essentially two components to this upgrade: (1) a larger number of attackers, with the capability to act in several coordinated teams; and (2) heavier firepower.

#### **Petition at 19.**

In Latin America and Europe large group attacks on nuclear facilities have been documented, viz., the March 25, 1973, attack by fifteen terrorists on the Atucha Atomic Power Station in Argentina.

#### **Id. at 20.**

[T]he ETA, a Basque separatist terrorist group in Spain, launched nearly 100 attacks against two nuclear plants under construction, using powerful remote-detonated bombs, plastic explosives, hand grenade launchers and anti-tank rockets. The attacks resulted in more than \$7 million in damage.

#### **Id. at 21.**

### **Response**

The NRC agrees that terrorist groups larger than and with heavier firepower than contemplated in the design-basis threat have carried out operations in foreign nations. The operations were carried out in nations experiencing armed civil unrest, a situation not prevalent in the United States. The NRC has not identified, to date, any significant change or trend involving weaponry, group size, State sponsorship, or targeting that warrants a modification of the design-basis threat statements for NRC-licensed nuclear power reactors. If such a change were to occur, the NRC response would be scaled to the immediacy and scope of the threat.

### **4. Excerpt**

The Commission's regulations exempt licensees from protecting against "the effects of attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other persons . . . ." 10 CFR § 50.13. However, Petitioners understand that the Commission does not consider this exclusion to

extend to terrorist groups which operate independently, even though they may have strong links to and the support of foreign governments.

Petition at 6.

*Response*

The NRC agrees with this statement. The information on threats and incidents routinely reviewed by the NRC and considered in threat assessments, as discussed in the foregoing responses, includes activities of terrorist groups that operate independently but may have strong links to and the support of foreign governments.

**5. Excerpts**

The Commission also stated that the "defense in depth" concept of nuclear reactor design "makes[s] the releasing of radioactivity by acts of sabotage difficult" and that the consequences of sabotage would be less severe than the "successful detonation of an illicit nuclear explosive device." 42 Fed. Reg. at 10836, col. 3. As discussed *infra* in Section C, these considerations do not appear valid today in the judgment of the Commission's own Staff and outside experts.

Petition at 7.

The "unacceptable damage," noted by Sandia National Laboratories and potentially associated with a successful truck-bomb attack, maximally means the meltdown of a nuclear reactor core, releasing massive amounts of radioactivity, comparable to what would occur in a severe accident. The Commission has estimated, in the case of one reactor, that a severe accident could result in up to 130,000 acute fatalities, 300,000 latent cancers, and 600,000 genetic effects, while necessitating offsite mitigation estimated to cost \$35 billion.

*Id.* at 13.

*Response*

The NRC continues to believe that, in general, the consequences of sabotage would be less severe than the consequences from successful detonation of an illicit nuclear explosive device. An illicit nuclear explosive device would be portable and could be directed against a heavily populated area or be directed against a seat of government and detonated at a time selected for maximum explosive effect. All licensed power reactors are fixed. Moreover, as discussed below, the NRC does not believe that the consequences referred to in the petition

would appropriately serve as a primary basis for formulation of a design-basis threat.

The term "unacceptable damage," as used in reports of the Sandia study upon which the Petitioners' truck-bomb arguments are based, refers to the blast effects on a concrete wall panel and is in the section of the reports that discussed modeling of structural responses to far-field blast waves. It is not used in the reports in the sense of predicting an offsite release.

While one can conclude that using the stand-off distances developed in this report would ensure safety from a potential truck bomb threat, the report does not support the corollary conclusion, i.e., that a truck bomb, placed closer to the reactor, would necessarily result in a substantial radiological release. The massive structures, redundant safety systems, and damage mitigation features of currently licensed reactors each provide a certain, although unquantified, measure of protection against an uncontrollable release of radioactive material resulting from a truck bomb, irrespective of stand-off distance.

Acceptance of 130,000 acute fatalities,<sup>2</sup> which is the worst case presented in the document cited, implies acceptance of each of the following propositions as true:

- (1) That a terrorist group favors nuclear reactor sabotage over other targets that exist in the U.S.;
- (2) That they construct a very large truck bomb undetected;
- (3) That indicators from terrorist activity worldwide do not trigger implementation of truck-bomb contingency plans;
- (4) That the truck bomb is successfully emplaced at a reactor and detonated;
- (5) That blast distance and size are sufficient to cause significant damage;
- (6) That the reactor has been operating at power for some time;
- (7) That the reactor's redundant safe-shutdown systems are all disabled;
- (8) That containment is massively breached;
- (9) That large quantities of radionuclides are released to the atmosphere;
- (10) That the wind and other meteorological conditions are favorable to the worst-case consequences;
- (11) That there is a large city nearby in a downwind direction; and
- (12) That the local population, even that part nearest the reactor, elects to remain in place for 7 days with no mitigating measures.

The NRC considers the foregoing set of assumptions to be unlikely in the extreme and not an appropriate basis for safeguards rulemaking.

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<sup>2</sup>This estimate was reported in NUREG-0490, "Supplement to Draft Environmental Statement, San Onofre Nuclear Generating Station, Units 2 and 3" (January 1981). The corresponding estimate reported in NUREG-490, "Final Environmental Statement, San Onofre Nuclear Generating Station, Units 2 and 3" (April 1981), was 30,000.

## 6. *Excerpt*

Indeed, NCI's Task Force members unanimously concluded that "a reactor accident brought about by terrorists, even one releasing significant amounts of radioactivity, is by no means implausible and is technically feasible.

Petition at 10.

## *Response*

The NRC has accepted the notion that reactor sabotage, with radiological releases, is technically feasible for many years. Measures are employed at power reactors to protect against credible radiological sabotage scenarios. In the unlikely event of radiological sabotage, damage control, and accident mitigation measures would likely limit the amount of radioactivity released.

## 7. *Excerpts*

There has already been at least one unconfirmed threat of an Iraqi-sponsored attack on a U.S. nuclear facility. See Commission, Preliminary Notification of Threat or Unusual Occurrence — PNO-I-90-108 (Dec. 26, 1990) (noting asserted Iraqi bomb threat to the Vermont Yankee Nuclear Power Plant).

Petition at 10.

It should also be noted that the number of "safeguards events" has been increasing in the late 1980s, a disturbing trend indicating that the thought of sabotage is in currency, if not actually realized yet. See Commission, *Safeguards Summary Event List* (NUREG-0525, Rev. 16) (December 31, 1989): Testimony of Daniel Hirsch in *Oversight Hearings* at 52 and Figures 5 and 6. Hirsch noted that as of 1988 "safeguards events," including bomb hoaxes, [had] increased five-fold since the last revision to the design basis threat regulations . . . .

Petition at 10.

## *Response*

The referenced Preliminary Notification (PNO-I-90-180, Dec. 26, 1990) concerned an anonymous phone call to the Governor-elect of Vermont stating that Iraqi troops were going to bomb Vermont Yankee Nuclear Power Plant. All of the appropriate law enforcement agencies were notified of the call, including the Federal Bureau of Investigation. On the basis of other information available at the time, the caller's information was deemed to be noncredible. Incidentally, there were a number of other sabotage and attack threats to licensees during the

period of the recent Persian Gulf crisis. A listing of all such events for the period August 2, 1990, to February 21, 1991, is provided (*see Appendix*). Although there were a substantial number reported, none was considered to be significant.

The NRC has reviewed the assertion that safeguards events, including bomb hoaxes, have increased "five-fold" since the "last revision to the design basis threat regulations." A number of factors substantially account for this increase. First, NRC reporting requirements, i.e., the types of events that are required to be reported by NRC licensees, have been expanded. As the nuclear industry has implemented "Fitness for Duty" programs, more drug- and alcohol-related events have been reported, regardless of whether or not any additional risk to the safe operation of the facility was involved. Second, more firearms have been detected during required routine entry searches, although, typically, no malevolent intent toward facility was identified. Third, the number of operating reactors has increased during the past 10 years, and thus, the number of safeguards-related events has increased during the same period.

The influence of event data reported in the Safeguards Summary Event List (NUREG-0525) on the design-basis threat statements merits careful examination. Clearly, the number of events alone reported in the list does not suggest that a significant change has occurred in the threat environment. The NRC considers a variety of factors, the most important being demonstrated adversary characteristics, in determining the status of the design-basis threat statement for radiological sabotage. The events identified in the list typically represent hoaxes, i.e., noncredible threats, or adversary characteristics that fall well within the bounds of the current design-basis threat statement for radiological sabotage. Therefore, an increase in the number of reported events by itself does not warrant a change to the design-basis threats.

## **8. Excerpt**

While there has not been an identified international terrorist threat as yet against domestic licensed reactors, terrorists have been responsible for more than one-third of non-U.S. reactor incidents in the period 1970-1984. As was demonstrated by the arrest in 1988 of several individuals associated with the Syrian Socialist National Party while attempting to smuggle explosives into the United States, the existence of an undetected, international terrorist threat in the United States today is a possibility which cannot be discounted.

Petition at 11.

## **Response**

The first sentence refers to examples of the kinds of events that are under continuing review by threat evaluators at NRC.

The NRC agrees with the comment in the second sentence: “[that the] international terrorist threat in the United States today is a possibility that cannot be discounted.” The NRC differs from the Petitioners only in the details and level of response. The NRC believes that vigilant evaluation of terrorist activities, supported by current protection levels and contingency planning for even stronger protection, constitutes an adequate response.

Incidentally, the explosive involved in the cited smuggling incident was contained in a hand-carried satchel and was of a small quantity.

## *9. Excerpts*

The use of truck bombs has become a tactic of choice for terrorists. The tactic is a grave threat to civilian power plants. . . .

### Petition at 10.

While this Petition focuses primarily on truck bombs, it is also essential to protect against boat bombs. Many nuclear power plants are located adjacent to water and are thus at risk from attack by boat.

*Id.*

## *Response*

Truck bombs with explosive mass sufficient to pose a challenge to power reactors have been used in the Middle East. In the U.S., there has been only one known incident of a large truck bomb (Math Lab, Wisconsin, (1970)). There is no information that a group currently exists within the U.S. that has both the capability and motivation to carry out a truck (or boat) bomb detonation sufficiently near a power reactor that it could cause significant damage. Although the likelihood of a truck bomb event is considered to be too low to warrant a change in the design-basis threat for radiological sabotage, contingency plans were put in place as a prudent response. The likelihood of a boat bomb is considered to be much less than that of a truck bomb, which itself is only a remote possibility. Accordingly, a requirement for protection against boat bombs is considered unjustified.

## *10. Excerpt*

[I]n Western Europe, nuclear power plants are protected against truck bombs by reinforced fences and walls.

### Petition at 11.

## *Response*

The NRC participates as a member of the interagency U.S. Physical Protection Review Team which conducts technical exchanges on policies, practices, and procedures for physical protection of nuclear material and facilities with foreign governments that receive U.S.-origin nuclear material. The information derived from the exchanges is classified (foreign-government-restricted information). Accordingly, the NRC cannot discuss specific safeguards planning or programs used by foreign entities. However, there is general agreement between the U.S. and its nuclear trading partners regarding the level of physical protection that is prudent for operating power reactors. All parties commit to the physical protection criteria recommended by the International Atomic Energy Agency in its publication INFIRC/225 Rev. 2, and many, including the U.S., go beyond these minimum provisions.

### *11. Excerpts*

Although the Commission has been aware of this threat [truck bomb] at least since 1983, nonetheless it has not responded sufficiently to date.

#### *Petition at 11.*

As early as 1984, the Commission staff recommended modification of the design basis threat to include the use of truck bombs by an adversary, noting, "The use of a vehicle bomb against a nuclear facility is a feasible form of attack."

#### *Id.*

The Commission's response to the recognized truck bomb threat has been woefully deficient. While a Commission 1984 survey of the Defense Department, the Secret Service, the State Department, and the Department of Energy found that "[a]ll four agencies believe that the "truck bomb" threat in the U.S. is sufficient to prompt action" and had "implemented measures to counter the threat," . . . the Commission only determined at that time to study the issue and delay action.

#### *Id. at 15.*

Some six years after identification of the threat, on April 28, 1989, the Commission finally responded by doing no more than issuing a "Generic Letter" (No. 89-07) which calls for licensees to develop "contingency plans" to deal with the truck bomb threat, based upon a contractor report. The Generic Letter does not require licensees to plan any permanent measures against vehicle bombs, even though it is far from clear whether licensees will have sufficient warning time of a particular terrorist action to implement effective contingency plans.

#### *Id. at 16.*

The truck bomb threat is not likely to disappear. Short-term expedients, such as those reflected in Generic Letter No. 89-07, simply do not adequately address this threat, either for the near or longer term.

*Id.* at 18.

### *Response*

NRC's design-basis threats serve three purposes. They are used to develop regulatory requirements, they provide a standard with which to measure changes in the real threat environment, and they provide a standard for evaluation of implemented systems. The 1983 bombings in the Middle East were clearly beyond the capabilities attributed to the design-basis threats, and this recognition triggered NRC Staff action.

A first step was to determine the effects of large-scale explosive attacks on licensed facilities including power reactors. Before the results of the study were known, but with general awareness of the damage high explosives can cause to structures, the NRC safeguards staff concluded that, to be prudent, an immediate effort was warranted, including the development of protection requirements, defensive strategies, and guidance on vehicle barriers. This action was being taken while the U.S. intelligence agencies were gathering and assessing intelligence information on the origin and geographic extent of this new type of threat, as well as the kinds and quantities of explosives involved. Subsequently, based on information received from these intelligence agencies, it quickly became apparent that the threat of vehicle bomb attacks in the continental U.S. was not imminent, and NRC Staff resources were redirected away from immediate regulatory actions to a broader-based assessment of the entire issue. The truck bombings in the Middle East occurred in nations experiencing armed civil unrest, a situation not prevalent in the U.S. Subsequently, the truck bomb threat in the U.S. was evaluated in depth and alternatives for dealing with it were developed. None of the information developed was interpreted as indicative of a need for immediate action; also, permanent measures were considered but were deemed inappropriate. Power reactor licensees were required by Generic Letter 89-07 to develop contingency plans for providing protection against truck bombs under short notice, and to confirm in writing that they had included the threat of a vehicle bomb in their contingency planning. The NRC Staff verified that confirmations were received from licensees that these contingency plans had been developed. Temporary Instruction 2515/102 (TI 2515/102), "Land Vehicle Bomb Contingency Procedures Verification," was issued on November 29, 1989. The purpose of TI 2515/102 was to provide policy guidance for NRC regional staff to verify that power reactor licensees have performed the contingency planning required by Generic Letter 89-07. The objective of TI 2515/102 was

to verify that the licensees' contingency planning considered short-term actions that could be taken to protect against attempted radiological sabotage involving a land-vehicle bomb if such a threat were to materialize. Inspections were completed at all operating power reactor sites. For each power reactor site, NRC inspectors verified that the licensee's safeguards contingency procedures addressed the ability to respond to an NRC request to implement short-term contingency measures and the licensee has determined that any resources or equipment needed to implement short-range contingency measures would be available.

As noted in the petition, the NRC consulted with the Defense Department, the Secret Service, the State Department, and the Department of Energy. The NRC considered the extent of the protective measures they implemented in relation to the protective measures that were already in place at power reactors. The consultations were conducted as an informal information gathering by the NRC Staff. It was realized at the time of the consultations that the agencies contacted did not, in most cases, have targets analogous to those protected under NRC regulation or with comparable consequences to a postulated truck bomb attack. Because of this, it was judged reasonable that federal agency response to the truck bomb issue might be agency-specific. Nothing was found that called for immediate additional measures to protect against truck bombs at power reactors. The NRC threat evaluation staff remains vigilant in its continuing search for indications of a truck bomb threat. The NRC continues to believe that, since the likelihood of such events is considered to be so low, the actions taken constitute an appropriate response.

## 12. Excerpts

The Commission's failure to protect against truck bombs at power plants stands in contrast to its approach for protecting fuel facilities. Almost three years ago, the Commission determined it was appropriate to alter the design basis threat for theft "to include use of land vehicles by potential adversaries attempting to commit a theft" . . . Such asymmetry is nonsensical: logically the Commission cannot acknowledge "the possible use of land vehicles for breaching of perimeter barriers" — precisely the *modus operandi* of a potential truck-bomb attacker — without acknowledging the possibility of such an attack at licensed reactors.

### Petition at 17.

The current standard is somewhat ambiguous because it does not specifically include a reference to vehicular support, *i.e.*, attackers arriving by means other than foot. Chairman Zech stated during the 1988 oversight hearings: "NRC's design basis threat includes any mode of transportation — any mode of transportation — to get to the site, or through the perimeter barrier. Our design basis threat assumes any mode that could get through the

barrier — car, boat, truck or another method of transportation.” . . . Plainly the design basis threat itself should explicitly recognize this prospect.

*Id.* at 19.

### *Response*

The NRC distinguishes between (1) theft of high-enriched uranium from a fuel facility and (2) radiological sabotage of a power reactor. As discussed under the response to Excerpt No. 5, the theft might support an illicit nuclear explosive device with the potential for higher consequences than those from radiological sabotage. An illicit nuclear explosive device would be portable and could be directed against a heavily populated area or be directed against a seat of government and detonated at a time selected for maximum explosive effect. An adversary contemplating theft would be prepared and equipped differently from how he or she would be if contemplating radiological sabotage. The combination of these factors and other considerations (described below) leads to a design-basis threat for theft that differs from that for radiological sabotage.

Because it could be used in an illicit nuclear explosive device, significant quantities of special nuclear material (such as high-enriched uranium) must be protected rigorously against theft. This material exists at certain facilities administered by the Department of Energy (DOE) and at certain facilities licensed by the NRC. The two agencies coordinate to carry out a policy of maintaining fully adequate and essentially equivalent safeguards systems. During 1988, this policy led the NRC to revise its design-basis threat for theft of materials from high-enriched fuel facilities to include land vehicles used for transporting personnel, and their hand-carried equipment.

A comparability review of the protection programs for power reactor facilities has not been conducted because DOE defense-related reactors are fundamentally different from commercial units in siting, function, design, size, nuclear fuel used, safety systems, and operations.

All power reactors operating in the U.S. use low-enriched fuel. There is no high-enriched uranium at these sites. Thus, vehicle denial barriers are not required to protect against theft at operating power reactor sites.

The NRC interpretation of the design-basis threat for radiological sabotage of reactors does not preclude adversaries' use of vehicles, other than truck bombs, for transportation and for breaching protected area barriers. The interpretation also allows for boats (other than boat bombs) for transportation and for breaching the barriers. The protection system is designed independent of the type of surface vehicle. The vehicle, whatever its type, would be detected by intrusion alarms when it crosses the barrier. No delay time is credited for the barrier. In response to positions taken by the petitioner and supported by some commenters,

one could modify the design-basis threat to express this interpretation. The modification, however, would not affect the high level of protection already provided.

### **13. Excerpt**

Such protections against truck bombs can be achieved at relatively low cost. The Commission estimated in 1986, for example, that a vehicle denial system for roadway access would cost only about \$100,000–\$200,000 per facility to install and \$10,000–\$20,000 annually to maintain, while a perimeter access denial system would only cost \$500,000–\$1,000,000 per facility to install and \$25,000–\$50,000 annually to maintain. . . . Indeed, the price of protection seems small and well worth it, considering the catastrophic consequences that could be associated with successful sabotage, including significant offsite radioactive releases and the crippling of a power plant.

Petition at 18.

### **Response**

Among the issues considered by the NRC during its deliberations on the vehicle bomb were the provisions of the Commission's backfit rule. The rule states in 10 C.F.R. § 50.109(a)(3) that the Commission can require backfitting when it determines that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit, and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection. Contrary to the belief of the Petitioners and supported by some commenters, the NRC concluded that the vehicle denial system referred to in this excerpt would not provide a substantial increase in the overall protection of the public health and safety. Cost was not a deciding factor.

Incidentally, the dollar values stated by the Petitioners for perimeter access denial are not representative of the costs of providing standoff distances beyond the existing protected area, as could be required to ensure protection against "explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system, in quantities transportable by vehicle." (Petition at 22.) In some cases, significant additional expenditures would be necessary for (in certain cases) purchase of land, relocation of roads and parking lots, additional length of barrier structures, and means to monitor the integrity of the barrier. These factors could add substantially to the costs stated for the perimeter system.

## **VI. REASONS FOR DENIAL**

The Commission has considered the petition, the public comments, and the NRC Staff evaluation set forth in this notice. The Commission concludes that there has been no change in the domestic threat since the design-basis threat was adopted that would justify a change in the design-basis threat. Accordingly, the Petitioners' request to modify the design-basis threat for radiological sabotage as set forth in 10 C.F.R. § 73.1 is hereby denied.

**FOR THE NUCLEAR  
REGULATORY COMMISSION**

**SAMUEL J. CHILK  
Secretary of the Commission**

**Dated at Rockville, Maryland,  
this 5th day of June 1991.**

## APPENDIX

### Listing of Sabotage and Attack Threats to NRC Licensees for the Period August 2, 1990–February 21, 1991

1.       **Date:** 08/29/90  
          **Site:** Maine Yankee  
                  Maine Yankee Atomic Power Company  
                  Lincoln County, ME  
**Source:** Licensee's Corporate Office  
**Threat:** At 3:40 p.m., an unsubstantiated bomb threat was received at the corporate office.  
**Action:** The Maine State Police, the Augusta Police, and the FBI were notified.  
**Resolution:** Licensee and the police determined that the threat was noncredible. No further action due to the vagueness of the threat.
  
2.       **Date:** 10/22/90  
          **Site:** Georgia Nuclear Plants  
**Source:** Dekalb County Sheriff's Office through the FBI  
**Threat:** An anonymous female telephoned the Dekalb County Sheriff's Office at the Courthouse in Decatur, Georgia, and provided a partially unintelligible message regarding an alleged kidnapping that occurred at Stone Mountain, Georgia, on an unspecified date. The brief message was "covered" by the Sheriff's Department Radio traffic, making the name of the alleged victim undistinguishable. The caller stated that if the unknown victim was not returned to Stone Mountain, "they would ignite" a nuclear power plant in Georgia. The nuclear power plant to be targeted was not specified (NRC-licensed facilities in Georgia include Hatch 1 and 2 and Vogtle 1 and 2).  
**Action:** No action required.  
**Resolution:** The Sheriff's department believes that the kidnapped individual may refer to someone incarcerated in the Stone Mountain Correctional Facility, a medium-security state penitentiary located in Stone Mountain, Georgia. The FBI plans no further action.

3.       **Date:** 12/25/90  
          **Site:** Vermont Yankee  
                  Vermont Yankee Nuclear Power Corporation  
                  Windham County, VT  
**Source:** Governor-elect of Vermont  
**Threat:** At 5:40 p.m., the Governor-elect of Vermont received a telephone call from a male who stated that the Iraqi government was going to blow up the Vermont Yankee nuclear power plant.  
**Action:** The licensee was notified through the state and local police and, as a precautionary measure, increased security at the facility. Other nuclear plants in the Yankee system were also notified.  
**Resolution:** The licensee and police determined that the threat was noncredible.
4.       **Date:** 01/06/91  
          **Site:** Trojan  
**Source:** Bonneville Power Authority (BPA)  
**Threat:** BPA received a letter from a woman who stated that “[i]n the new world God would destroy dams, coal-fired plants, oil-fired plants, and nuclear power plants. PGE is the devil and will be destroyed by God within three months.”  
**Action:** BPA notified the Portland General Electric Company load dispatcher who, in turn, notified the Trojan Plant Superintendent.  
**Resolution:** The licensee determined that the threat was noncredible. The letter writer was known by the Oregon police to be mentally ill and no threat to society.
5.       **Date:** 01/10/91  
          **Site:** Transmission line  
**Source:** Consumers Power  
**Threat:** NRC Region III was notified by Consumers Power, that the Canadian Power Control had received a telephonic bomb threat to destroy the new transmission line from Detroit Edison (owner) to Ontario Hydroelectric. The bomb was set to go off in 16 hours.  
**Action:** The FBI was notified and Detroit Edison was contacted.  
**Resolution:** No bomb was found.

6.       **Date:** 01/12/91  
          **Site:** Hatch  
                  Georgia Power Company  
                  Appling County, GA  
**Source:** Georgia Power Company  
**Threat:** NRC Region II received a call from Georgia Power advising that at 12:20 a.m. on January 12, 1991, an individual drove up to Hatch's Gate 1 (owner-controlled area) in an 18-wheeler and asked to see a plant operator regarding a private business dealing. When told the operator would not be at work until January 15, 1991, the driver stated he would be back. After he got in the truck he stated, "if I pulled the wires to disable the vehicle and loaded it with explosives, I could do something."  
**Action:** The local law enforcement agency and the FBI were notified.  
**Resolution:** On January 16, 1991, the driver was identified, and his name was given to the Sheriff's office. He was arrested on unrelated theft charges. No further action was planned by the licensee.
7.       **Date:** 01/15/91  
          **Site:** Palo Verde  
                  Arizona Public Service Company  
                  Maricopa County, AZ  
**Source:** Corporation Offices, Phoenix, AZ  
**Threat:** At 8:15 a.m., the switchboard operator at the Corporation Offices, Phoenix, Arizona, received a call from a male, believed to be 30-40 years old, who stated, "I'm going to blow the place sky high."  
**Action:** No action taken.  
**Resolution:** Licensee determined that the threat was noncredible.
8.       **Date:** 01/15/91  
          **Site:** Brunswick  
                  Carolina Power and Light Company  
                  Brunswick County, NC  
**Source:** Brunswick Nuclear Power Visitors Center  
**Threat:** At 11:08 a.m., the Brunswick Nuclear Power Plant Visitors Center received a call from a male, believed to be Southern, who said in a raspy voice, "You had better evacuate the

plant because we are going to blow up Sunny Pt. (military, non-nuclear facility located near Brunswick) today.”

**Action:** Brunswick and Sunny Pt. facilities were notified, as well as the FBI.

**Resolution:** Licensee determined that the threat was noncredible.

9. **Date:** 01/15/91

**Site:** Wolf Creek

Kansas Gas and Electric Company  
Coffey County, KS

**Source:** Kansas Bureau of Investigation

**Threat:** At 2:30 p.m., the licensee was notified by the Kansas Bureau of Investigation that they were called by a female with secondhand information that someone of Iraqi descent worked at Wolf Creek, and if his country is invaded, he will sabotage the plant.

**Action:** The FBI was notified.

**Resolution:** Security of vital equipment was heightened. Result of licensee investigation was negative.

10. **Date:** 01/16/91

**Site:** Davis-Besse

Toledo Edison Company  
Ottawa County, OH

**Source:** Licensee

**Threat:** At 9:45 a.m., the licensee reported that what appeared to be a bomb (three sticks of unknown material, no power source, and no timing device) had been found in a cabinet drawer in a maintenance building which is physically removed from any vital areas but within the protected area.

**Action:** Site security responded and reported it appeared to be a hoax, but the response continued as a precautionary measure. Local law enforcement officials responded, and the FBI was notified.

**Resolution:** At 11:14 a.m., the object was identified by the licensee as a “security training device” made by one of the security officers.

11. **Date:** 01/16/91

**Site:** McGuire

Duke Power Company  
Mecklenburg County, NC

- Source: Duke Power  
Threat: Duke Power called RII to deny rumors circulating in North Carolina that McGuire was under attack by Iraqis.  
Action: FBI was notified.  
Resolution: Rumors were false.
12. Date: 01/17/91  
Site: Brunswick  
Carolina Power and Light Company  
Brunswick County, NC  
Source: Licensee  
Threat: At 1:26 a.m., the licensee received an anonymous telephone call from an individual on an outside line who said, "Want you people to know 600 hours, it will go off. Two C-4 planted and they will go off."  
Action: The FBI was notified. The licensee conducted a search with negative results.  
Resolution: The licensee determined that the threat was noncredible.
13. Date: 01/22/91  
Site: Byron  
Commonwealth Edison Company  
Ogle County, IL  
Source: Commonwealth Edison Company  
Threat: The Rock River Division (Commonwealth Edison) received an anonymous telephone call which threatened a bomb explosion at Byron in 7 minutes. Earlier in the morning, Rock River received another anonymous telephone call which threatened a bomb attack against a substation in Rockford, Illinois.  
Action: A search was conducted with negative results.  
Resolution: The licensee determined that the threat was noncredible. The caller was identified as an unstable personality who had made seven or eight calls over several days to non-energy facilities. A warrant has been issued for his arrest.
14. Date: 01/23/91  
Site: Browns Ferry  
Tennessee Valley Authority  
Limestone County, AL  
Source: Tennessee Valley Authority

**Threat:** At 11:45 a.m., the main TVA switchboard in Chattanooga, Tennessee, received a call from an unidentified male who stated, "A black Cadillac or a Nissan truck is on the way to Browns Ferry with a bomb."

**Action:** The FBI was notified. The licensee maintained heightened awareness.

**Resolution:** The licensee determined that the threat was noncredible.

15. **Date:** 01/23/91

**Site:** San Onofre

Southern California Edison Company  
San Diego County, CA

**Source:** California State Highway Patrol, Oceanside

**Threat:** At 6:50 p.m., the California State Highway Patrol, Oceanside, received a call from an individual who stated, "There is a bomb at San Onofre."

**Action:** The Sheriff's Office and San Onofre were notified. The licensee closed all but the south gate, searched vehicles at the south gate, and heightened security. The Sheriff's Department dispatched a patrol car with bomb-sniffing dogs to the site. The FBI was notified.

**Resolution:** The FBI determined that the threat was noncredible and notified the licensee.

16. **Date:** 01/23/91

**Site:** Zion

Commonwealth Edison Company  
Lake County, IL

**Source:** Zion Police Department

**Threat:** The Zion Police Department received a telephone call from an individual who stated, "There's a bomb planted at the local MacDonalds." A short time later, a second call stated, "I see you're not doing anything about the bomb at MacDonalds or the one at the Zion Nuclear Power Plant."

**Action:** The FBI was notified.

**Resolution:** The licensee and the police determined that the threat was noncredible.

17. **Date:** 01/23/91

**Site:** Turkey Point

Florida Power and Light Company  
Dade County, FL

- Source:** Dade County Metropolitan Police Department  
**Threat:** During the evening, Dade County Metropolitan Police Department received an anonymous call from an individual who stated he was with "Iraqi International," and an airplane would bomb Turkey Point at 8 p.m.  
**Action:** The call was traced to a pay telephone at a K-Mart, but no suspect was identified. The Dade Police notified the licensee. The FBI was notified.  
**Resolution:** The licensee and the police determined that the threat was noncredible.
18.       **Date:** 01/24/91  
           **Site:** Consolidated Edison Corporate Office  
                   New York  
**Source:** New York City Police Department  
**Threat:** At 1:50 p.m., the New York City Police Department advised that they received a call from an individual who stated that a bomb would go off in 10 minutes on the 2nd floor of the Consolidated Edison Corporate Offices.  
**Action:** A search was conducted with negative results.  
**Resolution:** No mention was made of an NRC-licensed facility.
19.       **Date:** 01/25/91  
           **Site:** Turkey Point  
                   Florida Power and Light Company  
                   Dade County, FL  
**Source:** AT&T  
**Threat:** At 11:35 a.m., AT&T received a call from a male with a foreign accent, who said he needed nails and a hammer to bomb the Turkey Point plant.  
**Action:** AT&T traced the call to a local residence in Hollywood, Florida. The licensee contacted the local law enforcement agency and the FBI.  
**Resolution:** The local law enforcement agency investigation determined that the call was made by an 18-year-old as a prank.
20.       **Date:** 01/25/91  
           **Site:** Oregon State University  
                   Oregon  
**Source:** The University

**Threat:** At 9 a.m., the University received a general bomb threat which stated, "Bombs will go off at several places, including Oregon State University."

**Action:** The reactor was shut down. A search was conducted with negative results.

**Resolution:** The University determined that the threat was noncredible.

21. **Date:** 01/25/91

**Site:** Davis-Besse  
Toledo Edison Company  
Ottawa County, OH

**Source:** Licensee

**Threat:** NRC Region III was notified that an individual walked into the Edison Plaza Shopping Center, Toledo, Ohio, and threatened to kill all Toledo Edison employees and destroy Toledo Edison equipment.

**Action:** FBI notified.

**Resolution:** The individual was known to the local police as he had made previous threats. The licensee filed a complaint, a warrant was issued, and the man was arrested and jailed.

22. **Date:** 01/30/91

**Site:** Limerick  
Philadelphia Electric Company  
Montgomery County, PA

**Source:** Licensee

**Threat:** At 3:46 p.m., the switchboard, in a nonprotected area, received a telephone call from an anonymous individual who said, "I put a bomb there that's going to blow up."

**Action:** The local police were notified. A search was conducted with negative results.

**Resolution:** The caller was believed to be a boy, about 8-9 years old. The licensee and police determined that the threat was noncredible.

23. **Date:** 01/31/91

**Site:** Manhattan College  
New York

**Source:** Manhattan College

**Threat:** At 12 noon, an anonymous bomb threat was received against a building at Manhattan College, Riverdale, New York, housing a nonpower reactor.

- Action:** The local police department responded. A search was conducted with negative results.
- Resolution:** The College and police determined that the threat was noncredible.
24.      **Date:** 02/04/91  
           **Site:** Arkansas  
                   Arkansas Power and Light Company  
                   Pope County, AR  
**Source:** FBI Office, Little Rock, Arkansas  
**Threat:** The FBI Office, Little Rock, Arkansas, received an anonymous telephone call from an individual who stated that Arkansas Nuclear One was going to be hit.  
**Action:** The licensee was notified and increased security.  
**Resolution:** FBI determined that the threat was noncredible.
25.      **Date:** 02/06/91  
           **Site:** San Onofre  
                   Southern California Edison Company  
                   San Diego County, CA  
**Source:** Licensee  
**Threat:** Sometime between 4 p.m. on February 5, 1991, and 7:30 a.m. on February 6, 1991, the licensee recorded a message on an answering machine which said, "The whole place is going to blow up today."  
**Action:** The FBI was notified. A copy of the tape was provided to the FBI.  
**Resolution:** The FBI determined that the threat was noncredible.
26.      **Date:** 02/14/91  
           **Site:** Cooper  
                   Nebraska Public Power District  
                   Nemaha County, NE  
**Source:** Sheriff, Auburn, Nebraska  
**Threat:** The local sheriff in Auburn, Nebraska received an anonymous bomb threat against the local hospital and against Cooper which said, "A bomb will go off in 29 minutes. . . ."  
**Action:** A search was conducted with negative results.  
**Resolution:** The licensee determined that the threat was noncredible.

27.       **Date:** 02/19/91  
          **Site:** U.S. Embassy  
              Ottawa, Canada  
**Source:** FBI  
**Threat:** The U.S. Ambassador received an anonymous threat letter that alluded to various illegal activities such as drug dealing and prostitution and contained threats against the U.S., including a threat of retaliatory kamikaze air crashes into U.S. nuclear power plants by explosive-laden planes, if Iraq was invaded by U.S. forces.  
**Action:** The Royal Canadian Mounted Police (RCMP) and the FBI were notified.  
**Resolution:** The RCMP and the FBI determined through their investigation that the threat against nuclear facilities was noncredible.
28.       **Date:** 02/21/91  
          **Site:** University of Utah  
              Utah  
**Source:** Local Police Department  
**Threat:** At 7:05 a.m., the local police department notified the University of a bomb threat against the Merrill Engineering Building. The threat was not directed against the Triga reactor which is located on the first floor.  
**Action:** A search was conducted with negative results.  
**Resolution:** The licensee and police determined that the threat was noncredible.



## CASE NAME INDEX

### ADVANCED MEDICAL SYSTEMS, INC.

CIVIL PENALTY; MEMORANDUM AND ORDER (Granting NRC Staff Motion for Summary Disposition and Terminating Proceeding); Docket No. 30-16055-CivP (ASLBP No. 89-592-02-CivP); LBP-91-9, 33 NRC 212 (1991)

### ALL NUCLEAR FACILITIES

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-91-1, 33 NRC 53 (1991)

### ARIZONA PUBLIC SERVICE COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling upon Petitions for Leave to Intervene); Docket Nos. 50-528-OLA-2, 50-529-OLA-2, 50-530-OLA-2 (ASLBP No. 91-633-05-OLA-2) (Allowable Setpoint Tolerance); LBP-91-4, 33 NRC 153 (1991)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Dismissing Scott/Bush/CREE Petitions to Intervene); Docket Nos. 50-528-OLA-2, 50-529-OLA-2, 50-530-OLA-2; LBP-91-13, 33 NRC 259 (1991)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Denying Relief Sought by Licensees' May 1, 1991 Letter); Docket Nos. 50-528-OLA-2, 50-529-OLA-2, 50-530-OLA-2 (ASLBP No. 91-633-05-OLA-2) (Allowable Setpoint Tolerance); LBP-91-18, 33 NRC 394 (1991)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Granting Mitchell Petition for Leave to Intervene and Request for Hearing); Docket Nos. 50-528-OLA-2, 50-529-OLA-2, 50-530-OLA-2 (ASLBP No. 91-633-05-OLA-2) (Allowable Setpoint Tolerance); LBP-91-19, 33 NRC 397 (1991)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Terminating Proceeding); Docket Nos. 50-528-OLA, 50-529-OLA, 50-530-OLA (ASLBP No. 91-632-04-OLA) (Shutdown Cooling Flowrate); LBP-91-20, 33 NRC 416 (1991)

### BARNETT INDUSTRIAL X-RAY

CIVIL PENALTY; MEMORANDUM AND ORDER (Approving Settlement Agreement and Terminating Proceeding); Docket No. 30-30691-CivP (ASLBP No. 91-636-03-CivP) (EA 90-102) (Materials License No. 35-26953-01); LBP-91-16, 33 NRC 274 (1991)

### CAROLINA POWER AND LIGHT COMPANY

CONSTRUCTION PERMIT; ORDER; Docket Nos. 50-400, 50-401, 50-402, 50-403; ALAB-948, 33 NRC 481 (1991)

OPERATING LICENSE AMENDMENT; ORDER; Docket No. 50-261; ALAB-948, 33 NRC 481 (1991)

### CHARLES YOUNG

DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM 50-50; DPRM-91-1, 33 NRC 55 (1991)

### CURATORS OF THE UNIVERSITY OF MISSOURI

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (RE: TRUMP-S Project) (Byproduct License No. 24-00513-32, Special Nuclear Materials License No. SNM-247); CLI-91-7, 33 NRC 295 (1991)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Question About Staff Questions); Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (RE: TRUMP-S Project) (Byproduct License No. 24-00513-32, Special Nuclear Materials License No. SNM-247); LBP-91-11, 33 NRC 251 (1991)

CASE NAME INDEX

## CASE NAME INDEX

- MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (First Initial Decision);**  
Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (RE: TRUMP-S Project)  
(Byproduct License No. 24-00513-32, Special Nuclear Materials License No. SNM-247); LBP-91-12,  
33 NRC 253 (1991)
- MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Leave to Respond to  
NRC Staff Response);** Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (RE:  
TRUMP-S Project) (Byproduct License No. 24-00513-32, Special Nuclear Materials License No.  
SNM-247); LBP-91-14, 33 NRC 265 (1991)
- FEWELL GEOTECHNICAL ENGINEERING, LTD.**  
**BYPRODUCT MATERIAL LICENSE; INITIAL DECISION;** Docket No. 030-30870-OM (ASLBP No.  
91-629-01-OM) (Byproduct Material License); LBP-91-29, 33 NRC 561 (1991)
- FLORIDA POWER AND LIGHT COMPANY**  
**CONSTRUCTION PERMIT; ORDER;** Docket No. 50-389; ALAB-948, 33 NRC 481 (1991)  
**OPERATING LICENSE AMENDMENT; DECISION;** Docket Nos. 50-250-OLA-4, 50-251-OLA-4  
(Pressure/Temperature Limits); ALAB-950, 33 NRC 492 (1991)  
**OPERATING LICENSE AMENDMENT; DECISION;** Docket Nos. 50-250-OLA-5, 50-251-OLA-5  
(Technical Specifications Replacement); ALAB-952, 33 NRC 521 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER;** Docket Nos. 50-250-OLA-6,  
50-251-OLA-6; CLI-91-5, 33 NRC 238 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Petition to  
Intervene);** Docket Nos. 50-250-OLA-6, 50-251-OLA-6 (ASLBP No. 91-625-02-OLA-6) (Emergency  
Power System Enhancement); LBP-91-2, 33 NRC 42 (1991)
- GEORGIA POWER COMPANY, et al.**  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Staff Motion for  
Reconsideration);** Docket Nos. 50-424-OLA, 50-425-OLA (ASLBP No. 90-617-03-OLA) (Facility  
Operating Licenses NPF-68 and NPF-81); LBP-91-6, 33 NRC 169 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Terminating Proceeding);**  
Docket Nos. 50-424-OLA, 50-425-OLA (ASLBP No. 90-617-03-OLA) (Facility Operating Licenses  
NPF-68 and NPF-81); LBP-91-21, 33 NRC 419 (1991)
- GOVERNOR OF IDAHO**  
**AGREEMENT STATE PROGRAM; ORDER;** CLI-91-6, 33 NRC 242 (1991)
- KANSAS GAS AND ELECTRIC COMPANY and KANSAS CITY POWER AND LIGHT COMPANY**  
**CONSTRUCTION PERMIT; ORDER;** Docket No. STN 50-482; ALAB-948, 33 NRC 481 (1991)
- KERR-McGEE CHEMICAL CORPORATION**  
**MATERIALS LICENSE; DECISION;** Docket No. 40-2061-ML; ALAB-944, 33 NRC 81 (1991)
- LONG ISLAND LIGHTING COMPANY**  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER;** Docket No. 50-322;  
CLI-91-1, 33 NRC 1 (1991); CLI-91-3, 33 NRC 76 (1991); CLI-91-4, 33 NRC 233 (1991);  
CLI-91-8, 33 NRC 461 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM OPINION AND ORDER;** Docket No.  
50-322; CLI-91-2, 33 NRC 61 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Requests  
for Intervention);** Docket No. 50-322-OLA (ASLBP No. 91-621-01-OLA) (Confirmatory Order  
Modification, Security Plan Amendment, and Emergency Preparedness Amendment); LBP-91-1, 33  
NRC 15 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Requests for  
Intervention);** Docket No. 50-322-OLA (ASLBP No. 91-621-01-OLA) (Possession-Only License);  
LBP-91-7, 33 NRC 179 (1991)  
**OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Amended  
Petitions to Intervene and to Hold Hearings);** Docket No. 50-322-OLA (ASLBP No. 91-621-01-OLA)  
(Confirmatory Order Modification, Security Plan Amendment, and Emergency Preparedness  
Amendment); LBP-91-23, 33 NRC 430 (1991)

## CASE NAME INDEX

- OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Amended Petitions to Intervene and to Hold Hearings); Docket No. 50-322-OLA-2 (ASLBP No. 91-631-03-OLA-2) (Possession-Only License); LBP-91-26, 33 NRC 537 (1991)
- REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-322; DD-91-3, 33 NRC 453 (1991)
- NIAGARA MOHAWK POWER CORPORATION
- REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-220; DD-91-2, 33 NRC 279 (1991)
- NORTHERN STATES POWER COMPANY
- OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Dismissing Proceeding); Docket Nos. 72-10, 50-282-RS, 50-306-RS (ASLBP No. 91-627-01-RS) (Independent Spent Fuel Storage Installation); LBP-91-8A, 33 NRC 210 (1991)
- NUCLEAR CONTROL INSTITUTE, et al.
- DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM 73-9; DPRM-91-2, 33 NRC 587 (1991)
- NUCLEAR METALS, INC.
- MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Information Notice: Settlement Judge); Docket No. 40-672-MLA (ASLBP No. 91-639-02-MLA) (License Renewal) (Source Material License No. SMB-179); LBP-91-22, 33 NRC 427 (1991)
- MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Dismissal); Docket No. 40-672-MLA (ASLBP No. 91-639-02-MLA) (License Renewal) (Source Material License No. SMB-179); LBP-91-27, 33 NRC 548 (1991)
- PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.
- CONSTRUCTION PERMIT; ORDER; Docket Nos. 50-443, 50-444; ALAB-948, 33 NRC 481 (1991)
- OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); ALAB-943, 33 NRC 11 (1991)
- OPERATING LICENSE; MEMORANDUM REGARDING CERTIFIED QUESTION; Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); ALAB-945, 33 NRC 175 (1991)
- OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning); ALAB-946, 33 NRC 245 (1991); ALAB-949, 33 NRC 484 (1991)
- OPERATING LICENSE; DECISION; Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); ALAB-947, 33 NRC 299 (1991)
- OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Petition for Leave to Intervene); Docket No. 50-443-OLA (ASLBP No. 91-640-09-OLA); LBP-91-28, 33 NRC 557 (1991)
- OPERATING LICENSE REMAND; MEMORANDUM AND ORDER (Resolving Issues Remanded in ALAB-937 and ALAB-942); Docket Nos. 50-443-OLR-3&5, 50-444-OLR-3&5 (ASLBP Nos. 90-619-03-OLR-3, 91-630-01-OLR-5) (Offsite Emergency Planning); LBP-91-3, 33 NRC 49 (1991)
- OPERATING LICENSE REMAND; MEMORANDUM (Certifying ALAB-939 Question); Docket Nos. 50-443-OLR4, 50-444-OLR4 (ASLBP No. 90-620-04-OLR4) (Offsite Emergency Planning); LBP-91-8, 33 NRC 197 (1991)
- OPERATING LICENSE REMAND; MEMORANDUM AND ORDER (Granting Licensees' Motion for Summary Judgment); Docket Nos. 50-443-OLR-4, 50-444-OLR-4 (ASLBP No. 90-620-04-OLR-4) (Offsite Emergency Planning); LBP-91-2A, 33 NRC 446 (1991)
- RHODES-SAYRE & ASSOCIATES, INC.
- SHOW CAUSE; MEMORANDUM AND ORDER (Granting Staff Motion for Summary Disposition); Docket No. 30-29086-SC (ASLBP No. 91-628-01-SC) (Byproduct Material License 24-18959-02); LBP-91-15, 33 NRC 268 (1991)
- RICHAED E. DOW
- SPECIAL PROCEEDING; MEMORANDUM AND ORDER; Docket Nos. 50-445, 50-446; CLI-91-9, 33 NRC 473 (1991)
- SACRAMENTO MUNICIPAL UTILITY DISTRICT
- OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Petition to Intervene); Docket No. 50-312-OLA (ASLBP No. 91-634-06-OLA); LBP-91-17, 33 NRC 379 (1991)

## CASE NAME INDEX

### SEQUOYAH FUELS CORPORATION

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Requests for Hearing and Petitions for Leave to Intervene); Docket No. 40-08027-MLA (ASLBP No. 91-623-01-MLA) (Source Material License No. SUB-1010); LBP-91-5, 33 NRC 163 (1991)

### TENNESSEE VALLEY AUTHORITY

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Dismissal of Petition); Docket Nos. 50-327-OLA, 50-328-OLA (ASLBP No. 90-635-07-OLA) (Technical Specifications, Work Schedules); LBP-91-10, 33 NRC 231 (1991)

### TULSA GAMMA RAY, INC.

ENFORCEMENT; MEMORANDUM (Filing of Direct Testimony); Docket No. 30-12319-CivP (ASLBP No. 90-618-03-CivP) (EA 89-223) (Material License No. 35-17178-01); LBP-91-25, 33 NRC 535 (1991)

### VIRGINIA ELECTRIC AND POWER COMPANY

OPERATING LICENSE; ORDER; Docket Nos. 50-338, 50-339; ALAB-948, 33 NRC 481 (1991)

### WRANGLER LABORATORIES, LARSEN LABORATORIES, ORION CHEMICAL COMPANY, and JOHN P. LARSEN

ENFORCEMENT; DECISION; Docket No. 9999004 (General License Authority of 10 C.F.R. §40.22); ALAB-951, 33 NRC 505 (1991)

## LEGAL CITATIONS INDEX

### CASES

- A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961)  
duty of appellate court when an action has become moot through happenstance; ALAB-944, 33 NRC 102 n.56 (1991)
- Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289, 320-21 (1975)  
nature of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 70 (1991)
- Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)  
weight given to inferences drawn in favor of opponent of summary disposition motion; ALAB-944, 33 NRC 144 (1991)
- Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271 (1990)  
reimbursement of licensee's attorney's fees for enforcement proceedings; ALAB-951, 33 NRC 520 n.48 (1991)
- Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974)  
burden on proponent of summary disposition motion; LBP-91-9, 33 NRC 215 (1991)
- Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976)  
academic interest as support for standing; LBP-91-17, 33 NRC 385 (1991)
- American Mining Congress v. Thomas, 772 F.2d 617 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986)  
challenges to EPA inactive site standards; ALAB-944, 33 NRC 126 n.212 (1991)
- American Mining Congress v. Thomas, 772 F.2d 640 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986)  
challenges to EPA inactive site standards; ALAB-944, 33 NRC 126-27 n.213 (1991)
- Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 156 (1991)
- Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970)  
injury-in-fact standard for standing to intervene; ALAB-952, 33 NRC 529 (1991)
- Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, aff'd on other grounds, ALAB-816, 22 NRC 461 (1985)  
demonstration of standing to intervene in license amendment proceedings; CLI-91-5, 33 NRC 239 (1991)
- Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985)  
expert opinion as a means for defeating summary judgment; ALAB-944, 33 NRC 146 (1991)
- Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986)  
treatment of inadequately briefed claim of organizational standing; ALAB-952, 33 NRC 531 n.49 (1991)
- Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985)  
resumed operation as a reasonable alternative to decommissioning under NEPA; CLI-91-2, 33 NRC 71 (1991)
- Citizens for an Orderly Energy Policy v. Cuomo, 144 Misc. 2d 281 (N.Y. Sup. Ct. 1989), aff'd, 159 A.D. 2d 141, 559 N.Y.S. 2d 381 (3d Dept. 1990), leave to appeal granted, 000 N.Y. 2d 000 (Feb. 19, 1991)

## LEGAL CITATIONS INDEX CASES

- validity of agreement between utility and state over operation of nuclear power plant; CLI-91-2, 33 NRC 72 n.3 (1991)
- Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 000 U.S. 000, 111 S. Ct. 246 (1990)
- board discretion in weighing five factors for late intervention; ALAB-950, 33 NRC 496 (1991)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsideration denied, LBP-90-25, 32 NRC 21 (1990)
- injury to legal interest as basis for standing; LBP-91-17, 33 NRC 391 (1991)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-54 (1977)
- reliance on Staff statements as basis for opposition to summary disposition motion; LBP-91-9, 33 NRC 215 n.12 (1991)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983)
- discretionary review standard; CLI-91-4, 33 NRC 236 (1991)
- procedural vehicle for review of interlocutory matters; CLI-91-3, 33 NRC 80 (1991)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986)
- standards for reopening a record; LBP-91-6, 33 NRC 172 (1991)
- Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418 (1986)
- showing necessary by opponent of summary disposition motion; LBP-91-9, 33 NRC 215 (1991)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984)
- reopening of record on basis of new information; ALAB-944, 33 NRC 120 n.181 (1991)
- Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980)
- definition of scope of proceeding in hearing notice; LBP-91-1, 33 NRC 20 (1991)
- limit on licensing board jurisdiction; LBP-91-7, 33 NRC 182 (1991)
- Competitive Enterprise Institute v. National Highway Traffic Safety Admin., 901 F.2d 107 (D.C. Cir. 1990)
- basis for establishing organizational standing; LBP-91-1, 33 NRC 23 (1991); LBP-91-17, 33 NRC 382 (1991)
- organizational standing when agency's action interferes with organization's informational purposes and activities; LBP-91-7, 33 NRC 188 (1991)
- Competitive Enterprise Institute v. National Highway Traffic Safety Admin., 901 F.2d 107, 122 (D.C. Cir. 1990)
- demonstration of injury in fact for purpose of standing to intervene; LBP-91-23, 33 NRC 432 (1991)
- Competitive Enterprise Institute v. National Highway Traffic Safety Admin., 901 F.2d 107, 123 (D.C. Cir. 1990)
- injury to informational interests as basis for standing to intervene; LBP-91-26, 33 NRC 543 (1991)
- Consolidated Edison Co. of New York (Indian Point, Unit 2), ALAB-209, 7 AEC 971 (1974)
- motion to reopen based on staff working paper; ALAB-944, 33 NRC 120 n.181 (1991)
- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975)
- standard for institution of show-cause proceedings; DD-91-2, 33 NRC 292 (1991); DD-91-3, 33 NRC 458-59 (1991)
- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975)
- abuse-of-discretion standard for overturning Staff's show-cause order; LBP-91-15, 33 NRC 272 (1991)
- Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 315 n.2 (1981)
- appeal board authority to request amicus brief from EPA; ALAB-944, 33 NRC 97 (1991)
- Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 n.10 (1983)
- regulatory weight of staff technical positions; ALAB-944, 33 NRC 116 (1991)

**LEGAL CITATIONS INDEX**  
**CASES**

- Consumers Power Co. (Big Rock Point Nuclear Plant), LBP-80-4, 11 NRC 117, 125 (1980)  
showing necessary for admission of contentions; LBP-91-19, 33 NRC 400 (1991)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973)  
burden of proof in materials licensing proceeding; ALAB-944, 33 NRC 110 (1991)
- Consumers Power Co. (Pallisades Nuclear Power Facility), LBP-81-26, 14 NRC 247 (1981), rev'd on other grounds, ALAB-670, 15 NRC 493 (1982)  
economic interests as basis for standing; LBP-91-17, 33 NRC 390 n.36 (1991)
- County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)  
burden of demonstrating mootness; ALAB-944, 33 NRC 102 (1991)
- Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982)  
statement of material facts accompanying motions for summary disposition; LBP-91-9, 33 NRC 215 (1991)
- Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243-45 (D.C. Cir. 1980)  
nature of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 70 (1991)
- Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988)  
failure of intervention petition to demonstrate injury in fact; LBP-91-26, 33 NRC 539 (1991)  
showing necessary to demonstrate standing to intervene; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186, 192 (1991); LBP-91-17, 33 NRC 382 (1991)  
support required to establish organizational and representational standing; LBP-91-23, 33 NRC 432 (1991)
- Delmarva Power & Light Co. (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979)  
changed circumstances as basis for vacation of decision; ALAB-944, 33 NRC 110 n.108 (1991)
- Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 156 (1991)
- Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978)  
appealability of order allowing extension of time to correct standing defects in intervention petition; CLI-91-4, 33 NRC 236 (1991)
- District of Columbia v. Schramm, 631 F.2d 854, 862 (D.C. Cir. 1980)  
nature of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 70 (1991)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-74-22, 7 AEC 659, 667 (1974)  
examples of sanctions against radiographers; LBP-91-29, 33 NRC 581 (1991)
- Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973)  
obligation of parties to inform licensing boards of significant and relevant new information; ALAB-944, 33 NRC 115 n.147 (1991)
- Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982)  
qualification of witness as an expert; ALAB-950, 33 NRC 501 (1991)
- Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984)  
geographic proximity as basis for organizational standing; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186 (1991)
- Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976)  
NRC authority to require a licensee to operate a nuclear power plant; CLI-91-2, 33 NRC 71 (1991)
- Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 764 (1949)  
application of dictionary definitions to interpretation of regulations; ALAB-944, 33 NRC 140 (1991)
- Farmers Union Cent. Exch. v. FERC, 584 F.2d 408, 410, 416-17, 421-22, 424 (D.C. Cir.), cert. denied, 439 U.S. 995 (1978)  
state responsibility to provide procedures in licensing hearings after transfer of NRC regulatory authority; ALAB-944, 33 NRC 150 (1991)

## LEGAL CITATIONS INDEX

### CASES

- Finlay Testing Laboratories, Inc., LBP-88-17, 27 NRC 586 (1988)  
prior employment considerations in determining severity of penalties for radiographer; LBP-91-29, 33 NRC 570 (1991)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 630 & n.10 (1988)  
discovery requests prior to formal admission of contentions; ALAB-947, 33 NRC 315 (1991)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989)  
demonstration of standing to intervene in license amendment proceedings; CLI-91-5, 33 NRC 239 (1991); LBP-91-2, 33 NRC 44 (1991)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)  
injury-in-fact showing necessary for intervention in operating license amendment proceeding; LBP-91-1, 33 NRC 22 (1991); LBP-91-4, 33 NRC 155 (1991); LBP-91-7, 33 NRC 186 (1991)  
judicial concepts of standing; ALAB-952, 33 NRC 529 (1991)  
presumption of injury as basis for standing to intervene on license changes; LBP-91-23, 33 NRC 432 (1991); LBP-91-26, 33 NRC 539 (1991)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981)  
standard for grant of summary disposition; ALAB-944, 33 NRC 144 (1991)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 697, aff'd, ALAB-660, 14 NRC 987 (1981)  
showing necessary for admission of contentions; LBP-91-19, 33 NRC 400 (1991)
- General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987)  
standard for appellate review; ALAB-947, 33 NRC 365 n.278 (1991)
- General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 166-67 (1989)  
radiation dose limits for health effects; LBP-91-27, 33 NRC 553 n.16 (1991)
- Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-851, 24 NRC 529 (1986)  
appeal rights of intervenors who have withdrawn from proceedings; ALAB-952, 33 NRC 528 n.31 (1991)
- Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987)  
treatment of inadequately briefed issues on appeal; ALAB-947, 33 NRC 322 (1991)
- Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131-32 (1987)  
burden on opponent of summary disposition motion; ALAB-950, 33 NRC 499 (1991)
- Government of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976)  
authority of Commission to take official notice of settlement agreements; CLI-91-2, 33 NRC 75 (1991)
- Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24, 226 (1974)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-2, 33 NRC 44 (1991); LBP-91-4, 33 NRC 156 (1991)
- Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976)  
interlocutory appeals, standard for grant of; CLI-91-3, 33 NRC 80 (1991)
- Hartford Life Insurance Co. v. Title Guarantee Co., 520 F.2d 1170 (1975)  
ignorance of the law as excuse for untimely motion; LBP-91-27, 33 NRC 550 (1991)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1977)  
requirements for obtaining organizational standing to intervene in an operating license amendment proceeding; LBP-91-4, 33 NRC 158 (1991)

## LEGAL CITATIONS INDEX

### CASES

- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390 (1979)  
lack of authorized representation for organizational intervention; LBP-91-28, 33 NRC 558 (1991)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979)  
good cause for late filing of appeals by laypersons; CLI-91-5, 33 NRC 241 (1991)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979)  
intervenor replies to applicant and staff filings; LBP-91-17, 33 NRC 381 (1991)  
opportunity to respond to answers opposing intervention petition; LBP-91-2, 33 NRC 45 (1991)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980)  
interlocutory appeals, standard for grant of; CLI-91-3, 33 NRC 80 (1991)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 (1980)  
showing necessary for admission of contentions; LBP-91-19, 33 NRC 399 (1991)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979)  
basis for organizational standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 158 (1991)
- licensing board leeway in judging sufficiency of intervention petitions; LBP-91-19, 33 NRC 401 (1991)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6 (1987)  
right of Staff to require that allegations be substantiated; CLI-91-9, 33 NRC 479 (1991)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979)  
geographic proximity as basis for organizational standing; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186 (1991)
- Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977)  
authorization required for representational standing; ALAB-952, 33 NRC 530 (1991)
- Joseph J. Macktal, CLI-89-12, 30 NRC 19 (1989)  
right of Staff to require that allegations be substantiated; CLI-91-9, 33 NRC 479 (1991)
- Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968)  
deferral of action pending decision in state court, out of comity; CLI-91-8, 33 NRC 467 (1991)
- Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576-77 (1975)  
licensing board leeway in judging sufficiency of intervention petitions; LBP-91-19, 33 NRC 401 (1991)
- Karcher v. May, 484 U.S. 72, 83 (1987)  
effect of transfer of jurisdiction from one authority to another on pending litigation; ALAB-944, 33 NRC 103 (1991)
- Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900 (1987)  
effect of transfer of jurisdiction from one authority to another on pending appeals; ALAB-944, 33 NRC 102 n.58 (1991)
- Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 132-33 (1991),  
petition for review pending  
interpretation of regulations; ALAB-951, 33 NRC 514 (1991)
- Klapprott v. United States, 335 U.S. 601, 614-15 (1949)  
authority of courts to vacate judgments; ALAB-944, 33 NRC 110 (1991)
- Kleppe v. Sierra Club, 427 U.S. 390, 399 (1976)  
nature of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 70 (1991)
- Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725, 743 (3d Cir. 1989)  
applicability of CEQ guidelines to NRC; CLI-91-2, 33 NRC 72 n.3 (1991)

**LEGAL CITATIONS INDEX  
CASES**

- Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 729-30 (3d Cir. 1989)  
challenges to adequacy of staff environmental review; ALAB-944, 33 NRC 111 n.112 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 153-54 (1986), aff'd in part and rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987)  
exclusion of testimony at threshold; ALAB-947, 33 NRC 375 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, review declined, CLI-88-11, 28 NRC 603 (1988)  
interpretation of regulations; ALAB-944, 33 NRC 132 (1991); ALAB-951, 33 NRC 514 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 289, 293, 297, review declined, CLI-88-11, 28 NRC 603 (1988)  
interpretation of "full-participation" emergency exercises; ALAB-949, 33 NRC 489 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 434, review declined, CLI-88-11, 28 NRC 603 (1988)  
revocation of license amendment because of mootness; ALAB-944, 33 NRC 149 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 507 (1988)  
weight given to FEMA findings on adequacy of emergency planning; ALAB-947, 33 NRC 313 n.15 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515 (1988)  
legal controversy over staging area as basis for deficiency in emergency planning; ALAB-947, 33 NRC 351 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 263 n.97 (1989)  
responsibility for supervising compliance with party's commitments or licensing board's conditions; ALAB-947, 33 NRC 318 n.40 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986)  
fundamental flaw standard for challenges to adequacy of emergency exercises; ALAB-947, 33 NRC 375 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 887-88 (1987)  
presumption that American Red Cross will respond during a radiological emergency; ALAB-947, 33 NRC 334 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207 (1990)  
Commission authority to review a licensee's decision to cease operation of a nuclear power plant; LBP-91-17, 33 NRC 384 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1 (1991)  
issuance of possession-only license prior to submission of decommissioning plan; LBP-91-17, 33 NRC 389 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61 (1991)  
consideration of alternatives to decommissioning, need for; LBP-91-17, 33 NRC 390 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991)  
supervisory authority of Nuclear Regulatory Commission; LBP-91-7, 33 NRC 182 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76 (1991)  
interlocutory appeals of rulings on intervention petitions; CLI-91-4, 33 NRC 235 (1991)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991)  
operating license amendment as segmentation of major federal action under NEPA; LBP-91-17, 33 NRC 391 (1991)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-06 (1983)  
responsibility for supervising compliance with party's commitments or licensing board's conditions; ALAB-947, 33 NRC 318 n.40 (1991)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986)  
standards for reopening a record; LBP-91-6, 33 NRC 172 (1991)

**LEGAL CITATIONS INDEX**  
**CASES**

- Massachusetts v. NRC**, 924 F.2d 311 (D.C. Cir. 1991), petition for cert. filed, 59 U.S.L.W. 3755 (U.S. May 7, 1991)  
purpose of one-year requirement for onsite emergency exercise; ALAB-949, 33 NRC 490 (1991)
- Massachusetts v. NRC**, 924 F.2d 311, 322 (D.C. Cir. 1991)  
finality of licensing action for purposes of appeal; ALAB-944, 33 NRC 103 n.64 (1991)
- Massachusetts v. NRC**, 924 F.2d 311, 322-30 (D.C. Cir. 1991), petition for cert. filed, 59 U.S.L.W. 3755 (U.S. Apr. 25, 1991) (No. 90-1657)  
need for examination of hypothetical dose savings in determining "reasonable assurance" of adequacy of protective measures; ALAB-947, 33 NRC 314 (1991)
- Massachusetts v. United States**, 856 F.2d 378 (1st Cir. 1988)  
validity of realism rule; ALAB-947, 33 NRC 311 n.8 (1991)
- Maurice P. Acosta, Jr. (Reactor Operator License for San Onofre Nuclear Generating Station, Units 2 and 3)**, LBP-89-26, 30 NRC 195, 212 (1989)  
cause for suspension of radiographer's license; LBP-91-29, 33 NRC 574 (1991)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)**, CLI-83-25, 18 NRC 327 (1983)  
academic interest as support for standing; LBP-91-17, 33 NRC 385 (1991)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)**, CLI-83-25, 18 NRC 327, 331 (1983)  
burden on intervention petitioner to establish standing to intervene; LBP-91-2, 33 NRC 44 (1991)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)**, CLI-83-25, 18 NRC 327, 332-33 (1983)  
judicial concepts of standing; ALAB-952, 33 NRC 529 (1991); LBP-91-28, 33 NRC 559 (1991); LBP-91-5, 33 NRC 164 (1991)  
showing necessary to acquire standing to intervene in an operating license amendment proceeding; LBP-91-1, 33 NRC 21, 28 (1991); LBP-91-4, 33 NRC 155 (1991); LBP-91-7, 33 NRC 185 (1991)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)**, LBP-83-76, 18 NRC 1266, 1273 (1983)  
denial of contentions because of failure to state a claim upon which relief might be granted; LBP-91-21, 33 NRC 424 (1991)
- Michael F. Dimun, M.D.**, LBP-87-9, 25 NRC 175 (1987)  
standard for revocation of licenses; LBP-91-15, 33 NRC 272 (1991)
- Miller v. United States**, 492 F. Supp. 956, 962-63 (E.D. Ark. 1980), *aff'd*, 654 F.2d 513, 514 (8th Cir. 1981)  
resumed operation as a reasonable alternative to decommissioning under NEPA; CLI-91-2, 33 NRC 71 (1991)
- Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)**, ALAB-130, 6 AEC 423, 424 n.2 (1973)  
distinction between licensing board and intervention board; LBP-91-18, 33 NRC 395 (1991)
- Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)**, ALAB-130, 6 AEC 423, 425-26 (1973)  
showing necessary for admission of contentions; LBP-91-19, 33 NRC 399 (1991)
- Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)**, ALAB-140, 6 AEC 575 (1973)  
treatment of unbriefed appeals filed by laypersons; CLI-91-5, 33 NRC 241 (1991)
- Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana**, 472 U.S. 237, 249-50 (1985)  
interpretation of regulations; ALAB-944, 33 NRC 133 (1991)
- Natural Resources Defense Council v. EPA**, 822 F.2d 104, 129 n.25 (D.C. Cir. 1987)  
nature of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 70 (1991)
- Natural Resources Defense Council v. EPA**, 822 F.2d 104, 113 (D.C. Cir. 1987)  
interpretation of regulations; ALAB-944, 33 NRC 134 (1991)

## LEGAL CITATIONS INDEX

### CASES

- Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983)  
injury-in-fact standard for intervention; LBP-91-1, 33 NRC 22 (1991)  
interest requirements for intervention on operating license amendment; LBP-91-5, 33 NRC 165 (1991); LBP-91-7, 33 NRC 185 (1991)
- NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)  
agency discretion to use rulemaking or adjudication for announcing new requirements of general applicability; ALAB-951, 33 NRC 518 n.39 (1991)
- Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980)  
definition of scope of proceeding in hearing notice; LBP-91-1, 33 NRC 20 (1991)
- Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980)  
limit on licensing board jurisdiction; LBP-91-7, 33 NRC 182 (1991)
- Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978)  
abuse-of-discretion standard for overturning Staff's show-cause order; LBP-91-15, 33 NRC 272 (1991)
- Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523 (1980)  
economic interests as basis for standing; LBP-91-17, 33 NRC 390 n.36 (1991)
- NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975)  
resumed operation as a reasonable alternative to decommissioning under NEPA; CLI-91-2, 33 NRC 71 (1991)
- NRDC v. EPA, 822 F.2d 104, 126-31 (D.C. Cir. 1987)  
NEPA review requirements for alternatives to decommissioning; LBP-91-1, 33 NRC 17 (1991)
- NRDC v. Morton, 458 F.2d 827, 834, 837 (D.C. Cir. 1972)  
resumed operation as a reasonable alternative to decommissioning under NEPA; CLI-91-2, 33 NRC 71 (1991)
- Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 740-41 (1978)  
zone of interests protected by Atomic Energy Act and National Environmental Policy Act;  
ALAB-952, 33 NRC 529 (1991)
- Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978)  
showing necessary to establish injury in fact for purpose of intervention; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186 (1991)
- Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979)  
immediate effectiveness of license modifications; LBP-91-29, 33 NRC 574 n.4 (1991)
- Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986)  
finality of licensing action for purposes of appeal; ALAB-944, 33 NRC 103 n.64 (1991)
- Pacific Gas and Electric Co. v. Energy Resources Comm., 461 U.S. 190, 222-23 (1983)  
state control over energy decisions; CLI-91-2, 33 NRC 72 n.3 (1991)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983)  
burden on applicant in materials license proceeding; ALAB-944, 33 NRC 110 n.112 (1991)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 835 n.58 (1984)  
responsibility for supervising compliance with party's commitments or licensing board's conditions;  
ALAB-947, 33 NRC 318 n.40 (1991)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-82-10, 16 NRC 1205, 1207 n.4 (1982)  
design changes requiring a license amendment; ALAB-944, 33 NRC 115 n.149 (1991)

## LEGAL CITATIONS INDEX

### CASES

- Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977)  
establishment and purpose of intervention licensing board; LBP-91-18, 33 NRC 395 (1991)
- Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 218-19 (1983)  
Commission authority to compel operation of a nuclear power plant; LBP-91-17, 33 NRC 384 (1991)
- Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980), aff'd, ALAB-612, 12 NRC 317 (1980)  
board authority to correct Staff oversight; LBP-91-6, 33 NRC 173 (1991)
- Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978)  
regulatory weight of staff technical positions; ALAB-944, 33 NRC 116 (1991)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984), aff'd sub nom. Anthony v. NRC, 770 F.2d 1066 (3d Cir. 1985)  
hearing rights on license amendments; ALAB-944, 33 NRC 150 (1991)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 n.163 (1984)  
hearing rights on license amendments; ALAB-944, 33 NRC 150 (1991)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984)  
economic interest as a ratepayer as basis for standing in NRC licensing proceedings; LBP-91-1, 33 NRC 23 (1991); LBP-91-7, 33 NRC 186 (1991)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1433 (1982)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 156 (1991)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982)  
establishment of organizational standing by identifying members sought to be represented; LBP-91-26, 33 NRC 539-40 (1991)  
showing necessary to establish organizational standing to intervene; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186 (1991)  
supporting statement to establish organizational standing to intervene; LBP-91-23, 33 NRC 433 (1991)
- Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1976)  
principles of contention pleading; LBP-91-19, 33 NRC 400 (1991)
- Pickus v. United States Bd. of Parole, 543 F.2d 240, 242 (D.C. Cir. 1986)  
discretion in deciding whether a case is moot; ALAB-944, 33 NRC 104 (1991)
- Piedmont Heights Civil Club, Inc. v. Moreland, 637 F.2d 430, 436 (5th Cir. 1981)  
resumed operation as a reasonable alternative to decommissioning under NEPA; CLI-91-2, 33 NRC 71 (1991)
- Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)  
denial of due process by failure to allow cross-examination on summary disposition motion; LBP-91-9, 33 NRC 228 (1991)
- Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 464 (1962)  
light in which contention pleading is viewed; LBP-91-19, 33 NRC 402 (1991)
- Pope v. Illinois, 481 U.S. 497, 517, 107 S. Ct. 1918; 95 L. Ed. 2d 439 at 455 (1987)  
ignorance of the law as excuse for untimely motion; LBP-91-27, 33 NRC 550 (1991)
- Porter County Chapter of the Izaak Walton League of America v. AEC, 533 F.2d 1011 (7th Cir. 1976), cert. denied, 429 U.S. 545 (1976)  
weight given to Regulatory Guide criteria in determining acceptability of contentions; LBP-91-21, 33 NRC 422 (1991)

## LEGAL CITATIONS INDEX

### CASES

- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)  
criteria for establishing standing to intervene; LBP-91-2, 33 NRC 44 (1991)  
interest requirements for intervention on operating license amendment; LBP-91-7, 33 NRC 185 (1991)  
standing to intervene in operating license amendment proceedings; LBP-91-1, 33 NRC 21 (1991)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)  
economic interests as basis for standing; LBP-91-17, 33 NRC 390 n.36 (1991)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976)  
judicial concepts of standing; ALAB-952, 33 NRC 529 (1991)  
showing necessary to acquire standing to intervene in operating license amendment proceedings; LBP-91-4, 33 NRC 155 (1991)
- Powell v. McCormack, 395 U.S. 486, 496 (1969)  
definition of mootness; ALAB-944, 33 NRC 102 (1991)
- Process Gas Consumers Group v. USDA, 694 F.2d 728, 769 (D.C. Cir. 1981)  
NRC review to determine what environmental evaluation will be required for decommissioning; CLI-91-2, 33 NRC 70 n.1 (1991)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)  
scope of contentions, limitations on; LBP-91-19, 33 NRC 400 (1991)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980)  
Commission authority to provide guidance at the earliest possible time in a proceeding; CLI-91-2, 33 NRC 74 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984)  
economic interests as basis for standing; LBP-91-17, 33 NRC 390 n.36 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Unit 2) CLI-84-6, 19 NRC 975, 978 (1984)  
economic interest as a ratepayer as basis for standing in NRC licensing proceedings; LBP-91-1, 33 NRC 23 (1991); LBP-91-7, 33 NRC 186 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 345-47 (1989)  
denial of summary disposition motion; ALAB-944, 33 NRC 144 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-935, 32 NRC 57, 70 & n.49 (1990)  
extent of licensees' obligation to comply with NUREGs; ALAB-947, 33 NRC 318 n.37 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991)  
content of appellate briefs; ALAB-949, 33 NRC 488 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 515-17 (1977)  
Commission authority to provide guidance at any point in the course of a proceeding; CLI-91-2, 33 NRC 74 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 417-18 (1989)  
rebuttable assumption attached to FEMA findings on adequacy of emergency planning; ALAB-947, 33 NRC 313 n.15 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990)  
Commission authority to provide guidance at any point in the course of a proceeding; CLI-91-2, 33 NRC 74 (1991)

## LEGAL CITATIONS INDEX CASES

- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 249 n.47 (1990)  
weight given to FEMA findings on adequacy of emergency planning in context of immediate effectiveness review; ALAB-947, 33 NRC 313 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877 (1974)  
light in which record and affidavits relative to summary disposition are viewed; LBP-91-9, 33 NRC 215 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 8 AEC 877, 878-79 (1974)  
light in which contention pleading is viewed; LBP-91-19, 33 NRC 402 (1991)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983)  
evidentiary/affidavit requirements for opponent of summary disposition; LBP-91-9, 33 NRC 215 (1991)
- Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981)  
waiver of appeals on issues not addressed in appellate brief; CLI-91-5, 33 NRC 241 n.4 (1991)
- Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-51 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732 (3d Cir. 1982)  
treatment of inadequately briefed issues on appeal; ALAB-947, 33 NRC 322 (1991)
- Quivira Mining Co. v. NRC, 866 F.2d 1246, 1260 & n.17 (10th Cir. 1989)  
validity of Part 40, Appendix A criteria; ALAB-944, 33 NRC 128, 136 (1991)
- Quivira Mining Co. v. NRC, 866 F.2d 1252 n.8 (10th Cir. 1989)  
interpretation of 10 C.F.R. Part 40, Appendix A, Criterion 1; ALAB-944, 33 NRC 128 (1991)
- Rockwell International Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340-41 (1990)  
appointment of presiding officer as settlement judge; LBP-91-22, 33 NRC 428 (1991)
- SEC v. Chenery, 332 U.S. 194, 201-02 (1947)  
agency discretion to use rulemaking or adjudication for announcing new requirements of general applicability; ALAB-951, 33 NRC 518 n.39 (1991)
- Sierra Club v. Morton, 405 U.S. 727, 739 (1972)  
broad public interests as basis for participation by an organization in NRC adjudicatory processes; LBP-91-1, 33 NRC 28 (1991)
- Sierra Club v. Morton, 405 U.S. 727, 739 (1972)  
grievances that do not meet injury-in-fact test for standing to intervene; ALAB-952, 33 NRC 530 (1991)
- Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972)  
academic interest as support for standing; LBP-91-17, 33 NRC 385 (1991)
- South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982)  
board discretion in weighing five factors for late intervention; ALAB-950, 33 NRC 496 (1991)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, rev'd on other grounds sub nom. GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1983)  
emergency planning arrangements necessary medical treatment of contaminated injured individuals; ALAB-947, 33 NRC 325 (1991)
- Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)  
dismissal of party for failure to meet contention filing requirements; LBP-91-13, 33 NRC 262 (1991)
- Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982)  
effect of changed circumstances on decision pending on appeal; ALAB-944, 33 NRC 109 (1991)
- Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-82-26, 16 NRC 880, 881 (1982)  
precedential weight given to vacated decision; ALAB-944, 33 NRC 110 (1991)

**LEGAL CITATIONS INDEX**  
**CASES**

- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418, 1421 (1977)  
loss of employment as basis for standing to intervene; LBP-91-17, 33 NRC 391 (1991)
- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418, 1421 n.4 (1977)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 156 (1991)
- Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1)*, ALAB-868, 25 NRC 912, 924 n.42 (1987)  
content of appellate briefs; ALAB-949, 33 NRC 488 (1991)
- Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-89-6, 29 NRC 348 (1989)  
standing to file motion for reconsideration; CLI-91-2, 33 NRC 69 (1991)
- Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, ALAB-599, 12 NRC 1, 2 (1980)  
interlocutory appeals, standard for grant of; CLI-91-3, 33 NRC 80 (1991)
- Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, LBP-82-17, 15 NRC 593, 595-96 (1982)  
burden on opponent of summary disposition motion; LBP-91-9, 33 NRC 215 (1991)
- Toledo Edison Co. (Davis-Besse Nuclear Power Station)*, ALAB-300, 2 NRC 752, 758 (1975)  
finality for purposes of appeal; ALAB-943, 33 NRC 12 (1991)
- Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 740 n.16 (3d Cir. 1982)  
applicability of CEQ guidelines to NRC; CLI-91-2, 33 NRC 72 n.3 (1991)
- Transnuclear, Inc. (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations)*, CLI-77-24, 6 NRC 525, 531 (1977)  
grievances that do not meet injury-in-fact test for standing to intervene; ALAB-952, 33 NRC 529 (1991)
- Union Electric Co. (Callaway Plant, Unit 1)*, ALAB-740, 18 NRC 343, 346 (1983)  
standard for establishing defects in quality assurance or emergency planning that would preclude licensing; ALAB-947, 33 NRC 326 n.73 (1991)
- United States v. Comley*, 890 F.2d 539, 542 (1st Cir. 1989)  
Staff responsibility to review and resolve health and safety issues; CLI-91-9, 33 NRC 478 (1991)
- United States v. Garde* 848 F.2d 1307, 1310 & n.6 (D.C. Cir. 1988)  
effect on lower court decision when case becomes moot while appeal is pending; ALAB-944, 33 NRC 103 (1991)
- United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987)  
protection of alleged's First Amendment association rights; CLI-91-9, 33 NRC 479 (1991)
- United States v. Hiland*, 909 F.2d 1114 (1990)  
ignorance of the law as excuse for untimely motion; LBP-91-27, 33 NRC 550 (1991)
- United States v. Kentucky Utility Co.*, 927 F.2d 252 (6th Cir. 1991)  
effect of FOIA request for documents on their preservation by government agency; ALAB-947, 33 NRC 315 n.23 (1991)
- United States v. McGovern*, 87 F.R.D. 590, 593 (M.D. Pa. 1980)  
denial of subpoenaed information seen as thwarting Staff's health and safety responsibilities; CLI-91-9, 33 NRC 478 (1991)
- United States v. Monteleone*, 804 F.2d 1004, cert. denied, 480 U.S. 931, 107 S. Ct. 1567 (1986)  
ignorance of the law as excuse for untimely motion; LBP-91-27, 33 NRC 550 (1991)
- United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)  
effect of state assumption of jurisdiction over mill tailings on NRC jurisdiction in materials license proceeding; ALAB-944, 33 NRC 101, 102 (1991)
- United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)  
burden of demonstrating mootness; ALAB-944, 33 NRC 102 (1991)

## LEGAL CITATIONS INDEX

### CASES

- US Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987)  
effect of state assumption of jurisdiction over mill tailings on NRC jurisdiction in materials license proceeding; ALAB-944, 33 NRC 100 (1991)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974); ALAB-246, 8 AEC 933, 934, reconsideration denied, ALAB-250, 8 AEC 990 (1974)  
showing necessary for admission of contentions; LBP-91-19, 33 NRC 400 (1991)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974)  
regulatory weight of staff technical positions; ALAB-944, 33 NRC 116 (1991)  
weight given to Regulatory Guide criteria in determining acceptability of contentions; LBP-91-21, 33 NRC 422 (1991)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987)  
showing necessary to obtain organizational standing in materials license amendment proceeding; LBP-91-5, 33 NRC 165 (1991)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550 (1978)  
Commission authority to compel operation of a nuclear power plant; LBP-91-17, 33 NRC 384 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973)  
Commission discretion in allowing intervenors to cure defects in intervention petitions; LBP-91-7, 33 NRC 195 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973)  
basis for allowing intervenors to amend intervention petitions; LBP-91-1, 33 NRC 40 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973)  
contention pleading standards for pro se intervenors; LBP-91-19, 33 NRC 401 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 156 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979)  
geographic proximity as basis for organizational standing; LBP-91-1, 33 NRC 22 (1991); LBP-91-7, 33 NRC 186 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979)  
geographic proximity as basis for standing to intervene in operating license amendment proceeding; LBP-91-4, 33 NRC 155 (1991)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980)  
standard for grant of summary disposition; ALAB-944, 33 NRC 144 (1991)
- Warth v. Seldin, 422 U.S. 490 (1975)  
injury-in-fact standard for standing to intervene; ALAB-952, 33 NRC 529 (1991)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984)  
standard for institution of show-cause proceedings; DD-91-3, 33 NRC 459 (1991); DD-91-2, 33 NRC 292 (1991)

## LEGAL CITATIONS INDEX CASES

- Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983)  
standard for reversal of licensing board's grant of discretionary intervention; ALAB-952, 33 NRC 532 (1991)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1819-21 (1982), *aff'd* on other grounds, ALAB-719, 17 NRC 387 (1983)  
safety relevance of surveillance test procedures; LBP-91-19, 33 NRC 411 (1991)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983)  
limitation on admissible issues in operating license amendment proceedings; LBP-91-28, 33 NRC 559 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 1 C.F.R. 305.88-5
  - responsibilities of settlement judges; LBP-91-22, 33 NRC 428 (1991)
- 10 C.F.R. Part 2
  - need for factual and legal predicate to warrant imposing license conditions; ALAB-951, 33 NRC 518 (1991)
  - sanctions for radiographer's violations of operational procedures; LBP-91-29, 33 NRC 567 (1991)
- 10 C.F.R. 2.101(a)
  - review of license amendment and design changes following transfer of NRC regulatory authority to state; ALAB-944, 33 NRC 108 (1991)
- 10 C.F.R. Part 2, Subpart B
  - litigability of confirmatory orders; CLI-91-4, 33 NRC 236 n.1 (1991)
- 10 C.F.R. 2.200, et seq.
  - procedures for modifying, suspending, or revoking a license; LBP-91-29, 33 NRC 574 n.4 (1991)
- 10 C.F.R. 2.202
  - modification of general license authorizations; ALAB-951, 33 NRC 518 (1991)
  - standard for institution of show-cause proceedings; DD-91-2, 33 NRC 292 (1991)
- 10 C.F.R. 2.202(b)
  - replies to suspension orders; ALAB-951, 33 NRC 511 (1991)
- 10 C.F.R. 2.203
  - standard for approval of settlement agreements; LBP-91-16, 33 NRC 275 (1991)
- 10 C.F.R. 2.204
  - immediate effectiveness of confirmatory orders; LBP-91-1, 33 NRC 18 (1991)
  - immediate effectiveness of license modifications; LBP-91-29, 33 NRC 574 n.4 (1991)
  - modification of general license authorizations; ALAB-951, 33 NRC 518 (1991)
- 10 C.F.R. 2.206
  - denial of request for action on management capability, torus wall thinning, and generic safety issues at Nine Mile Point; DD-91-2, 33 NRC 281-93 (1991)
  - effect of denial of intervention on result of 2.206 filings; LBP-91-27, 33 NRC 552 (1991)
  - need for consideration of terrorist threats against nuclear facilities during Gulf War; DD-91-1, 33 NRC 53 (1981)
  - request for action on roof storage of low-level radioactive waste at Shoreham; DD-91-3, 33 NRC 453 (1991)
  - right to petition to revoke a license; CLI-91-2, 33 NRC 73 n.4 (1991)
- 10 C.F.R. Part 2, Subpart G
  - formal hearing procedures for materials licensing actions; ALAB-944, 33 NRC 95 n.12 (1991)
- 10 C.F.R. 2.707
  - board duty to respond to letter pleadings; LBP-91-18, 33 NRC 396 (1991)
  - dismissal of intervention petition for failure to file contentions; LBP-91-20, 33 NRC 418 (1991)
- 10 C.F.R. 2.708(c)
  - motion to strike unsigned reply; LBP-91-21, 33 NRC 422 n.4 (1991)
- 10 C.F.R. 2.713(c)
  - contemptuous conduct; LBP-91-13, 33 NRC 262 (1991)

**LEGAL CITATIONS INDEX  
REGULATIONS**

**10 C.F.R. 2.714**

content of intervention petitions; LBP-91-4, 33 NRC 154 (1991); LBP-91-28, 33 NRC 558 (1991)  
dismissal of intervention petition for failure to meet standing requirements; ALAB-952, 33 NRC 527  
(1991)

intervention in operating license amendment proceeding; CLI-91-1, 33 NRC 3 (1991)

publication of intervention rules in notice of hearing; LBP-91-4, 33 NRC 154 (1991)

standing to intervene; LBP-91-19, 33 NRC 398 (1991)

violation of intervention rights by premature ruling on availability of certain specified relief; CLI-91-2,  
33 NRC 68, 69, 74 n.7 (1991)

**10 C.F.R. 2.714(a)**

burden on intervention petitioner to establish standing to intervene; LBP-91-2, 33 NRC 44 (1991)

content of intervention petitions; ALAB-952, 33 NRC 529 (1991)

criteria for establishing standing to intervene; LBP-91-2, 33 NRC 44 (1991)

discretionary intervention, standard for grant of; ALAB-952, 33 NRC 532 (1991)

**10 C.F.R. 2.714(a)(1)**

application of third and fifth factors to emergency exercise contention; ALAB-946, 33 NRC 246 (1991)

five-factor test for late intervention applied to motion to reopen; ALAB-949, 33 NRC 487 (1991)

five-factor test for late intervention; ALAB-950, 33 NRC 495, 496 (1991)

hearing rights on operating license amendments; LBP-91-7, 33 NRC 185 (1991)

standard for intervention in operating license amendment proceeding; LBP-91-1, 33 NRC 21 (1991)

**10 C.F.R. 2.714(a)(1)(i)-(v)**

application of late-filing criteria to amicus pleading; CLI-91-8, 33 NRC 469 (1991)

**10 C.F.R. 2.714(a)(2)**

amendment of intervention petition to establish standing; LBP-91-26, 33 NRC 538 (1991)

aspect requirement for intervention; LBP-91-4, 33 NRC 159 (1991); LBP-91-17, 33 NRC 383 (1991)

contents of intervention petitions in operating license amendment proceedings; LBP-91-1, 33 NRC 21  
(1991)

extension of time to correct standing defects in intervention petition; CLI-91-4, 33 NRC 235 (1991)

failure of petitioners to meet intervention requirements in operating license amendment proceeding;

LBP-91-1, 33 NRC 18, 28, 30, 34, 38, 40 (1991); LBP-91-7, 33 NRC 182, 191, 194 (1991)

failure to establish standing to intervene on operating license amendment; LBP-91-23, 33 NRC 431, 433  
(1991)

particularity required of intervention petitions; CLI-91-5, 33 NRC 239 (1991); LBP-91-7, 33 NRC 193  
(1991); LBP-91-26, 33 NRC 540 (1991)

**10 C.F.R. 2.714(a)(3)**

amendment of intervention petitions; LBP-91-4, 33 NRC 160 (1991)

pleading requirements for nontimely petitions; LBP-91-4, 33 NRC 159 (1991)

**10 C.F.R. 2.714(b)**

purpose of basis requirement for contentions; ALAB-947, 33 NRC 372 n.310 (1991)

threshold for admission of contentions; LBP-91-19, 33 NRC 398 (1991)

**10 C.F.R. 2.714(b)(1)**

contention filing requirements; LBP-91-4, 33 NRC 160-61 (1991)

contention requirement for intervention; LBP-91-18, 33 NRC 395 (1991)

penalty for failure to satisfy requirements of; LBP-91-13, 33 NRC 261 (1991)

principles of contention pleading; LBP-91-19, 33 NRC 400 (1991)

**10 C.F.R. 2.714(b)(2)**

contention requirement for intervention; LBP-91-18, 33 NRC 395 (1991); LBP-91-20, 33 NRC 417  
(1991)

principles of contention pleading; LBP-91-19, 33 NRC 400 (1991)

**10 C.F.R. 2.714(b)(2)(ii) and (iii)**

construction of pleadings; LBP-91-19, 33 NRC 402 (1991)

information to be provided in support of contentions; LBP-91-19, 33 NRC 406 (1991)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 2.714(b)(2)(iii)
  - appealability of order dismissing parties; LBP-91-13, 33 NRC 263 (1991)
  - default with respect to contention filing requirements; LBP-91-13, 33 NRC 262 (1991)
  - dismissal of contentions for failure to set forth a genuine dispute with applicant; LBP-91-21, 33 NRC 423, 424 (1991)
  - information to be filed with contentions; LBP-91-13, 33 NRC 261 n.7 (1991)
- 10 C.F.R. 2.714(d)
  - discretionary intervention, standard for grant of; ALAB-952, 33 NRC 532 (1991)
- 10 C.F.R. 2.714(d)(1)
  - interest requirement to demonstrate standing to intervene; ALAB-950, 33 NRC 496 (1991)
- 10 C.F.R. 2.714(d)(2)(ii)
  - denial of contentions because of failure to state a claim upon which relief might be granted; LBP-91-21, 33 NRC 424 (1991)
  - parallel to Federal Rules of Procedure; LBP-91-19, 33 NRC 402 (1991)
  - rejection of contentions that would not entitle petitioner to relief; LBP-91-19, 33 NRC 399 (1991)
- 10 C.F.R. 2.714a
  - treatment of interlocutory appeals under; CLI-91-3, 33 NRC 77, 79 (1991)
- 10 C.F.R. 2.714a(a)
  - appeals of intervention denials; LBP-91-2, 33 NRC 47 (1991); LBP-91-20, 33 NRC 418 (1991)
  - deadline for appeals; CLI-91-5, 33 NRC 240 (1991)
- 10 C.F.R. 2.714a(b)
  - appealability of intervention denial; LBP-91-20, 33 NRC 418 (1991)
- 10 C.F.R. 2.715(c)
  - city participation as interested government under; ALAB-944, 33 NRC 96 (1991)
  - participation as interested state where stay is not appropriate; CLI-91-8, 33 NRC 469 (1991)
  - scope of participation under; ALAB-944, 33 NRC 96 n.21 (1991)
- 10 C.F.R. 2.715(d)
  - application of late-filing criteria to amicus pleading; CLI-91-8, 33 NRC 469 (1991)
  - unopposed response filed as amicus pleading; CLI-91-8, 33 NRC 464, 468 (1991)
- 10 C.F.R. 2.718
  - licensing board discretion to order further filings in connection with summary disposition; ALAB-950, 33 NRC 500 (1991)
- 10 C.F.R. 2.718(h), (m)
  - appointment of presiding officer as settlement judge; LBP-91-22, 33 NRC 428 (1991)
- 10 C.F.R. 2.730
  - board disposition of pleading by letter; LBP-91-18, 33 NRC 396 (1991)
  - replies to responses to motions; CLI-91-8, 33 NRC 469 (1991)
- 10 C.F.R. 2.730(c)
  - board duty to respond to letter pleadings; LBP-91-18, 33 NRC 396 (1991)
  - licensing board discretion to order further filings in connection with summary disposition; ALAB-950, 33 NRC 500 (1991)
- 10 C.F.R. 2.734
  - amendment of motion to address pleading requirements of; ALAB-949, 33 NRC 486 (1991)
  - criteria for reopening a record; ALAB-949, 33 NRC 487 (1991); LBP-91-6, 33 NRC 172 (1991)
- 10 C.F.R. 2.734(a)
  - criteria for reopening a closed record; ALAB-944, 33 NRC 118 (1991)
- 10 C.F.R. 2.734(a)(3)
  - affidavit requirement for motions to reopen; ALAB-949, 33 NRC 487 (1991)
  - challenge to adequacy of staff environmental review; ALAB-944, 33 NRC 121 (1991)
- 10 C.F.R. 2.734(b)
  - affidavit support for motions to reopen; ALAB-944, 33 NRC 122 (1991)
  - affidavit support required for motions to reopen; ALAB-944, 33 NRC 118 (1991)

**LEGAL CITATIONS INDEX  
REGULATIONS**

- 10 C.F.R. 2.740(b)(1)
  - discovery requests prior to formal admission of contentions; ALAB-947, 33 NRC 315 (1991)
  - prohibition against discovery prior to a prehearing conference; LBP-91-9, 33 NRC 228 n.67 (1991)
- 10 C.F.R. 2.740-2.742
  - authorization for commencement of discovery; LBP-91-19, 33 NRC 414 (1991)
- 10 C.F.R. 2.743(b)(3)
  - filing of prepared testimony in civil-penalty proceedings; LBP-91-25, 33 NRC 536 (1991)
- 10 C.F.R. 2.743(c)
  - expert sponsorship of evidence; ALAB-950, 33 NRC 501, 503 (1991)
- 10 C.F.R. 2.743(i)
  - official notice of documents found in docket of a proceeding; ALAB-947, 33 NRC 317 n.33 (1991)
  - official notice of significant new information; ALAB-947, 33 NRC 310, 347 n.190 (1991)
- 10 C.F.R. 2.749
  - content of summary disposition motions; LBP-91-15, 33 NRC 270, 271 (1991)
  - grant of summary disposition because of failure to find issues in dispute; ALAB-950, 33 NRC 497 (1991)
  - jurisdiction for summary judgment; LBP-91-18, 33 NRC 395 (1991)
  - misapplication of summary disposition standard; ALAB-944, 33 NRC 144 (1991)
  - support required for summary disposition motion; LBP-91-24, 33 NRC 448 (1991)
- 10 C.F.R. 2.749(a)
  - replies to responses to summary disposition motions; ALAB-950, 33 NRC 500 (1991)
  - statement of material facts accompanying motions for summary disposition; LBP-91-9, 33 NRC 215 (1991)
- 10 C.F.R. 2.749(b)
  - burden on opponent of summary disposition motion; LBP-91-24, 33 NRC 451 (1991)
  - qualification of witness as an expert; ALAB-950, 33 NRC 498, 500, 501 (1991)
- 10 C.F.R. 2.749(d)
  - showing necessary for grant of summary disposition motion; LBP-91-15, 33 NRC 271 (1991)
  - standard for grant of summary disposition; ALAB-944, 33 NRC 144 (1991); LBP-91-9, 33 NRC 214 (1991)
- 10 C.F.R. 2.751(a)
  - agenda of prehearing conference on license amendment; LBP-91-23, 33 NRC 444 (1991)
- 10 C.F.R. 2.756
  - reason for board's use of informal procedures to resolve issues; LBP-91-6, 33 NRC 170, 172 (1991)
  - resolution of contentions informally; LBP-91-21, 33 NRC 421 (1991)
- 10 C.F.R. 2.758
  - applicability to enforcement actions; ALAB-951, 33 NRC 512 n.19 (1991)
  - prohibition on challenges to regulations; LBP-91-19, 33 NRC 408, 410 (1991)
- 10 C.F.R. 2.758(a)
  - applicability to cases other than initial licensing; ALAB-951, 33 NRC 512 n.19 (1991)
- 10 C.F.R. 2.759
  - authority for appointment of settlement judges; LBP-91-22, 33 NRC 428 (1991)
  - NRC position on settlement of or compromise on safety issues; LBP-91-6, 33 NRC 172 (1991)
- 10 C.F.R. 2.760
  - effectiveness of order approving settlement agreement; LBP-91-16, 33 NRC 275 (1991)
  - effectiveness of order terminating proceeding; LBP-91-21, 33 NRC 425 (1991)
  - finality of licensing board decisions; LBP-91-15, 33 NRC 272 (1991)
- 10 C.F.R. 2.762
  - appeals of order terminating proceeding; LBP-91-21, 33 NRC 425 (1991)
  - finality of decisions where appeals have been taken; LBP-91-15, 33 NRC 272 (1991)
  - length of appellate briefs; LBP-91-15, 33 NRC 273 (1991); LBP-91-27, 33 NRC 556 (1991)
  - scope of participation as interested state; ALAB-944, 33 NRC 96 n.21 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.764
  - approval of license amendment during pendency of license amendment proceeding; CLI-91-8, 33 NRC 471 (1991)
  - effectiveness of order terminating proceeding; LBP-91-21, 33 NRC 425 (1991)
- 10 C.F.R. 2.764(b)
  - issuance of license amendments despite pendency of an appeal; ALAB-944, 33 NRC 97 n.27 (1991)
- 10 C.F.R. 2.780
  - meeting between Commissioners and licensee as violation of ex parte rule; CLI-91-3, 33 NRC 78 (1991)
- 10 C.F.R. 2.781(a)(2)
  - service of licensing documents on all interested parties; CLI-91-8, 33 NRC 471 (1991)
- 10 C.F.R. 2.785
  - appeals of dismissal of contentions; LBP-91-21, 33 NRC 425 (1991)
  - appeals of intervention denials; LBP-91-2, 33 NRC 48 (1991)
  - deadline for appeals of initial decisions; LBP-91-27, 33 NRC 556 (1991)
  - filing deadlines for supporting briefs on appeal; LBP-91-9, 33 NRC 230 (1991)
  - transfer of jurisdiction to hear appeals from appeal boards to the Commission; CLI-91-5, 33 NRC 240 (1991)
- 10 C.F.R. 2.786
  - appeals of order terminating proceeding; LBP-91-21, 33 NRC 425 (1991)
  - finality of licensing board decisions; LBP-91-15, 33 NRC 272 (1991)
- 10 C.F.R. 2.788
  - criteria for grant of a stay; CLI-91-8, 33 NRC 467 (1991)
- 10 C.F.R. 2.788(d)
  - limit on size of stay motions; CLI-91-8, 33 NRC 468 n.2 (1991)
- 10 C.F.R. 2.788(e)
  - limitation on applicability of stay motions to effectiveness of decisions that have already occurred; CLI-91-8, 33 NRC 468 (1991)
  - motion for stay treated as motion for reconsideration; CLI-91-8, 33 NRC 468 n.2 (1991)
- 10 C.F.R. 2.802(e)
  - expedition of petition for rulemaking; DPRM-91-2, 33 NRC 590 (1991)
- 10 C.F.R. Part 2, Subpart L
  - informal procedures for materials license proceedings; CLI-91-7, 33 NRC 296 n.2 (1991); LBP-91-5, 33 NRC 164 (1991)
- 10 C.F.R. 2.1205
  - timeliness of intervention petitions; LBP-91-27, 33 NRC 549 (1991)
- 10 C.F.R. 2.1205(c)
  - content of requests for hearing on materials license amendment; LBP-91-5, 33 NRC 164 (1991)
- 10 C.F.R. 2.1205(c)(2)
  - timeliness of intervention petition in materials license amendment proceeding; LBP-91-5, 33 NRC 167 (1991)
- 10 C.F.R. 2.1205(g)
  - content of requests for hearing on materials license amendment; LBP-91-5, 33 NRC 164 (1991)
  - issues litigable in materials license amendment proceedings; LBP-91-5, 33 NRC 166 (1991)
- 10 C.F.R. 2.1205(j)
  - interest and standing obligations of intervention petitioners; LBP-91-5, 33 NRC 167 (1991)
- 10 C.F.R. 2.1205(n)
  - finality of intervention order for purpose of appeal; LBP-91-5, 33 NRC 168 (1991)
- 10 C.F.R. 2.1209(c), (l)
  - appointment of presiding officer as settlement judge; LBP-91-22, 33 NRC 428 (1991)
- 10 C.F.R. 2.1213
  - staff participation in informal proceedings; LBP-91-5, 33 NRC 164 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.1233(a) and (d)  
right of intervenors to respond to Staff facts or arguments in Subpart L proceedings; LBP-91-14, 33 NRC 266 (1991)
- 10 C.F.R. 2.1241  
authority for appointment of settlement judges; LBP-91-22, 33 NRC 428 (1991)
- 10 C.F.R. 2.1251  
finality of initial decision for appeal purposes; LBP-91-27, 33 NRC 556 (1991)
- 10 C.F.R. 2.1251(c)  
Commission guidance on implementation in Subpart L proceedings; CLI-91-7, 33 NRC 296 (1991)
- 10 C.F.R. 2.1251(c)(1)  
failure of initial decision to satisfy requirements of; CLI-91-7, 33 NRC 297 (1991)
- 10 C.F.R. 2.1251(c)(3)  
failure of initial decision to satisfy requirements of; CLI-91-7, 33 NRC 297 (1991)
- 10 C.F.R. 2.1253  
finality of initial decision; LBP-91-27, 33 NRC 556 (1991)
- 10 C.F.R. Part 2, Appendix C  
basis for director's decision to levy Severity Level III violation; LBP-91-9, 33 NRC 226 (1991)  
basis for Staff calculation of civil penalty; LBP-91-9, 33 NRC 225 (1991)  
guidance on enforcement actions; LBP-91-29, 33 NRC 574 (1991)  
SALP relationship to enforcement action; DD-91-2, 33 NRC 279 (1991)
- 10 C.F.R. Part 2, Appendix C, I  
deterrence aspect of enforcement programs; LBP-91-29, 33 NRC 571 (1991)
- 10 C.F.R. Part 2, Appendix C, III  
definition of severity levels of violations; LBP-91-29, 33 NRC 577 (1991)  
willfulness factor in determining severity of violations; LBP-91-29, 33 NRC 579 (1991)
- 10 C.F.R. Part 2, Appendix C, III n.2  
definition of requirement; ALAB-951, 33 NRC 519 (1991)
- 10 C.F.R. Part 2, Appendix C, V.A  
purpose of notice of violation; ALAB-951, 33 NRC 519 (1991)
- 10 C.F.R. Part 2, Appendix C, V.C(3)(a), (b), (c)  
conditions appropriate for issuance of license revocation order; ALAB-951, 33 NRC 519 n.41 (1991)
- 10 C.F.R. Part 2, Appendix C, V.C(3)(d)  
standard for revocation of licenses; LBP-91-15, 33 NRC 272 (1991)
- 10 C.F.R. Part 2, Appendix C, V.E  
citing facility licensees for individual's violations; LBP-91-29, 33 NRC 578, 580 (1991)
- 10 C.F.R. Part 2, Appendix C, V.H  
Board responsibility to specify why noncompliance justifies license revocation; ALAB-951, 33 NRC 520 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. IV  
examples of categories of violations; LBP-91-29, 33 NRC 577 (1991)  
Severity Level III violation regarding adequacy radiation surveys and worker safety; LBP-91-9, 33 NRC 227 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. VI  
Severity Level III violation regarding access to licensed materials; LBP-91-9, 33 NRC 227 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. VI, B  
severity classification of failure to return source to shielded position; LBP-91-29, 33 NRC 578 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. VI, C.2  
severity classification of radiation levels in radiographer's work area; LBP-91-29, 33 NRC 578 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. VI, C.4  
severity classification of failure to return source to shielded position; LBP-91-29, 33 NRC 578 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. Part 2, Appendix C, Supp. VI, C.8, C.12  
severity level of combined violations; LBP-91-29, 33 NRC 578 (1991)
- 10 C.F.R. Part 2, Appendix C, Supp. VII, C  
examples of violations classified as Severity Level III; LBP-91-29, 33 NRC 580 n.7 (1991)
- 10 C.F.R. 19.2, 20.2  
applicability to Part 40 licensees; ALAB-951, 33 NRC 510 n.7 (1991)
- 10 C.F.R. Part 20  
applicability to general license holders; ALAB-951, 33 NRC 512 (1991)  
applicability to Part 40 licensees; ALAB-951, 33 NRC 510 n.7 (1991)  
dose limitations to public from radiographic operations; LBP-91-29, 33 NRC 571 (1991)  
posting of radioactive areas; DD-91-3, 33 NRC 456 (1991)
- 10 C.F.R. 20.101  
Severity Level III violation regarding adequacy radiation surveys and worker safety; LBP-91-9, 33 NRC 227 (1991)
- 10 C.F.R. 20.101(a)  
excessive radiation exposure of licensee employee; LBP-91-9, 33 NRC 214, 222, 223 (1991)
- 10 C.F.R. 20.101(b)  
limits on whole-body radiation dose; LBP-91-9, 33 NRC 214, 222 n.44 (1991)
- 10 C.F.R. 20.101(b)(2)  
exposure limits for radiographers; LBP-91-29, 33 NRC 569 (1991)
- 10 C.F.R. 20.102  
Severity Level III violation regarding adequacy radiation surveys and worker safety; LBP-91-9, 33 NRC 227 (1991)
- 10 C.F.R. 20.105(b)(1)  
failure to maintain boundary security during radiographic operations; LBP-91-29, 33 NRC 572 (1991)
- 10 C.F.R. 20.201(b)  
inadequate radiation surveys of hot cell; LBP-91-9, 33 NRC 214, 223 (1991)
- 10 C.F.R. 20.1004  
definition of rem; LBP-91-29, 33 NRC 569 n.3 (1991)
- 10 C.F.R. 20.1301  
dose limits for depleted uranium processing operations; LBP-91-27, 33 NRC 553 (1991)
- 10 C.F.R. 21.2  
applicability to Part 40 licensees; ALAB-951, 33 NRC 510 n.7 (1991)
- 10 C.F.R. Part 30  
modification of licenses because of violations; LBP-91-29, 33 NRC 574 (1991)
- 10 C.F.R. 30.34  
Commission authority to require supplemental information from license applicant and to incorporate such into license; LBP-91-9, 33 NRC 224 n.49 (1991)
- 10 C.F.R. 30.34(e)  
applicability of regulatory revisions to byproduct materials license; LBP-91-11, 33 NRC 252 (1991)  
Severity Level III violation regarding adequacy of radiation surveys and worker safety; LBP-91-9, 33 NRC 227 (1991)
- 10 C.F.R. 30.52  
authority for NRC inspection of licensees; LBP-91-15, 33 NRC 271 (1991)
- 10 C.F.R. 30.61  
cause for suspension of radiographer's license; LBP-91-29, 33 NRC 574 (1991)
- 10 C.F.R. 30.61(b)  
modification of licenses because of violations; LBP-91-29, 33 NRC 574 (1991)
- 10 C.F.R. 34.1  
applicability of Part 30 to licenses under; LBP-91-29, 33 NRC 574 (1991)
- 10 C.F.R. 34.22(a)  
securing of radiographer's sealed source assembly, responsibility for; LBP-91-29, 33 NRC 565 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 34.43(b)  
postexposure survey of radiographer's camera, responsibility for; LBP-91-29, 33 NRC 565 (1991)
- 10 C.F.R. 35.26(b)  
Commission authority to require supplemental information from license applicant and to incorporate such into license; LBP-91-9, 33 NRC 224 n.49 (1991)
- 10 C.F.R. Part 40  
means for modifying terms and conditions of a license issued under; ALAB-951, 33 NRC 517 (1991)
- 10 C.F.R. 40.20  
licensing authority for depleted uranium; ALAB-951, 33 NRC 509 (1991)
- 10 C.F.R. 40.20(a)  
acquisition of specific licenses; ALAB-951, 33 NRC 510 (1991)  
lack of understanding of regulation as excuse for noncompliance with; ALAB-951, 33 NRC 515 n.30 (1991)  
Staff authority to impose additional requirements on general license holders; ALAB-951, 33 NRC 516 (1991)
- 10 C.F.R. 40.22  
chemical processing of depleted uranium under a general license; ALAB-951, 33 NRC 509 (1991)  
interpretation of source material amount limitations; ALAB-951, 33 NRC 510, 513, 514, 515, 516 (1991)
- 10 C.F.R. 40.22(b)  
interpretation of source material amount limitations under general licenses; ALAB-951, 33 NRC 515 (1991)
- 10 C.F.R. 40.22(c)  
limits on uses of source material; ALAB-951, 33 NRC 515 n.25 (1991)
- 10 C.F.R. 40.23  
possession of transient shipments of source material; ALAB-951, 33 NRC 514 n.23 (1991)
- 10 C.F.R. 40.28  
custody and long-term care of source material; ALAB-951, 33 NRC 514 n.23 (1991)
- 10 C.F.R. 40.36(d)  
financial qualifications for site remediation; LBP-91-27, 33 NRC 555 (1991)
- 10 C.F.R. 40.4  
definition of license; ALAB-951, 33 NRC 517 n.36 (1991)  
definition of source material; ALAB-951, 33 NRC 509 n.4 (1991)  
quantities of source material for which no license is required; ALAB-951, 33 NRC 518 n.38 (1991)
- 10 C.F.R. 40.41  
interpretation of; ALAB-951, 33 NRC 517 (1991)
- 10 C.F.R. 40.71  
definition of license; ALAB-951, 33 NRC 517 n.36 (1991)  
interpretation of; ALAB-951, 33 NRC 517 (1991)
- 10 C.F.R. Part 40, Appendix A  
adequacy of cell design for onsite storage of mill tailings; ALAB-944, 33 NRC 104 (1991)  
applicability to onsite storage of mill tailings; ALAB-944, 33 NRC 96 (1991)  
financial qualifications for site remediation; LBP-91-27, 33 NRC 555 (1991)  
license amendment specifying safety features for onsite disposal of mill tailings; ALAB-944, 33 NRC 98 (1991)  
scope of cost-benefit analysis; ALAB-944, 33 NRC 129 (1991)
- 10 C.F.R. Part 40, Appendix A, Introduction  
economic considerations in materials licensing decisions; ALAB-944, 33 NRC 138 n.266 (1991)  
right of licensees to propose alternatives to mill tailings requirements; ALAB-944, 33 NRC 127 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 1  
ability of mill tailings disposal cell to resist erosion; ALAB-944, 33 NRC 119 (1991)  
active maintenance of mill tailings disposal sites; ALAB-944, 33 NRC 141 (1991)  
considerations in judging the adequacy of existing tailings sites; ALAB-944, 33 NRC 135-37 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- economic considerations and difference between new and existing sites; ALAB-944, 33 NRC 120-21 (1991)  
goal of; ALAB-944, 33 NRC 135 (1991)  
licensee-proposed alternatives to; ALAB-944, 33 NRC 132, 134 (1991)  
maintenance of mill tailings disposal sites; ALAB-944, 33 NRC 112, 113 (1991)  
population consideration in selection of mill tailings disposal site; ALAB-944, 33 NRC 147 n.312 (1991)  
siting features necessary for isolation of mill tailings; ALAB-944, 33 NRC 131 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 3  
ability of mill tailings disposal cell to resist erosion; ALAB-944, 33 NRC 119 (1991)  
adequacy of vegetative cover for above-grade disposal of mill tailings; ALAB-944, 33 NRC 113 (1991)  
preferred option for disposal of mill tailings; ALAB-944, 33 NRC 147 n.312 (1991)  
prime option for disposal of mill tailings; ALAB-944, 33 NRC 104-05 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 4  
ability of mill tailings disposal cell to resist erosion; ALAB-944, 33 NRC 119 (1991)  
site and design standards for disposal of mill tailings; ALAB-944, 33 NRC 105 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 4(d)  
design of final rock cover over mill tailings disposal site; ALAB-944, 33 NRC 147 n.312 (1991)  
erosion reduction barrier for mill tailings disposal cell; ALAB-944, 33 NRC 145 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 6  
ability of mill tailings disposal cell to resist erosion; ALAB-944, 33 NRC 119 (1991)  
longevity requirement for mill tailings disposal cell; ALAB-944, 33 NRC 119, 127 (1991)  
performance standards for mill tailings disposal system; ALAB-944, 33 NRC 105-06 (1991)
- 10 C.F.R. Part 40, Appendix A, Criterion 12  
ability of mill tailings disposal cell to resist erosion; ALAB-944, 33 NRC 119 (1991)  
maintenance of mill tailings disposal sites; ALAB-944, 33 NRC 106, 112, 113 (1991)
- 10 C.F.R. 50.2  
definition of "decommissioning"; LBP-91-1, 33 NRC 21 n.4 (1991)
- 10 C.F.R. 50.7  
licensee discrimination against employee whistleblowers; LBP-91-28, 33 NRC 558 (1991)
- 10 C.F.R. 50.12  
exemption from emergency preparedness requirements under possession-only license; LBP-91-1, 33 NRC 37 (1991)
- 10 C.F.R. 50.13  
exemption of licensees from protecting against the effects of sabotage; DPRM-91-2, 33 NRC 598 (1991)
- 10 C.F.R. 50.20(b), 50.22(c) and (d)  
environmental assessment requirements for possession-only license; LBP-91-1, 33 NRC 37 (1991)
- 10 C.F.R. 50.47  
applicability to operating license amendment to reduce emergency preparedness levels under possession-only license; LBP-91-1, 33 NRC 39 (1991)  
change in state government plans for participation in emergency planning; ALAB-947, 33 NRC 310 (1991)
- 10 C.F.R. 50.47(a)(1)  
challenge to FEMA's findings on adequacy of emergency planning; ALAB-947, 33 NRC 313 (1991)  
emergency planning finding necessary for issuance of operating license; ALAB-947, 33 NRC 325, 336 (1991)  
need for examination of hypothetical dose savings in determining "reasonable assurance" of adequacy of protective measures; ALAB-947, 33 NRC 314, 340 (1991)
- 10 C.F.R. 50.47(a)(2)  
status of FEMA findings on an emergency plan; ALAB-947, 33 NRC 313, 314 (1991)

**LEGAL CITATIONS INDEX  
REGULATIONS**

- 10 C.F.R. 50.47(b)  
examination of hypothetical dose savings in determining "reasonable assurance" of adequacy of protective measures; ALAB-947, 33 NRC 314, 340 (1991)
- 10 C.F.R. 50.47(b)(10)  
need for beach shelter survey to make protective action recommendations; ALAB-947, 33 NRC 338 (1991)
- 10 C.F.R. 50.47(b)(15)  
training of emergency response personnel; ALAB-946, 33 NRC 247 (1991)
- 10 C.F.R. 50.47(c)(1)  
applicability of utility rule when state government changes its position on participation in emergency planning; ALAB-947, 33 NRC 311 (1991)  
challenges to licensing board's application of; ALAB-947, 33 NRC 311 n.9 (1991)
- 10 C.F.R. 50.47(c)(1)(iii)  
applicability to state-sponsored emergency plans; ALAB-947, 33 NRC 373 (1991)  
interpretation of realism rule; ALAB-947, 33 NRC 330, 331 (1991)
- 10 C.F.R. 50.54(q)  
applicability to operating license amendment to reduce emergency preparedness levels under possession-only license; LBP-91-1, 33 NRC 39 (1991)
- 10 C.F.R. 50.54(x) and (y)  
preclusion of deviation from license conditions or technical specifications; DPRM-91-1, 33 NRC 57, 59-60 (1991)
- 10 C.F.R. 50.55a  
torus design requirements; DD-91-2, 33 NRC 290, 291 (1991)
- 10 C.F.R. 50.55a(g)  
impermissible challenge to; LBP-91-18, 33 NRC 395 (1991)
- 10 C.F.R. 50.55a(g)(4)  
challenge to; LBP-91-19, 33 NRC 408 (1991)
- 10 C.F.R. 50.58(b)  
notice requirements for proposed no significant hazards consideration determinations; LBP-91-23, 33 NRC 442 (1991)
- 10 C.F.R. 50.58(b)(6)  
board involvement in no significant hazards determinations; LBP-91-17, 33 NRC 381 n.2 (1991)  
hearing rights on staff's no significant hazards consideration determination; LBP-91-23, 33 NRC 442 (1991)  
licensing board authority to review Staff's no significant hazards consideration determination; LBP-91-7, 33 NRC 183 (1991); LBP-91-26, 33 NRC 545 (1991)
- 10 C.F.R. 50.61  
scope of operating license amendment proceedings; ALAB-950, 33 NRC 500 (1991)
- 10 C.F.R. 50.61(a)(3)  
definition of beltline region in reactor vessel; ALAB-950, 33 NRC 497 n.4 (1991)
- 10 C.F.R. 50.75  
activities that must await approval of a decommissioning plan; CLI-91-2, 33 NRC 73 n.5 (1991)
- 10 C.F.R. 50.75(a)-(e)  
funding for decommissioning; CLI-91-1, 33 NRC 9 (1991)
- 10 C.F.R. 50.75(f)  
cost estimates for decommissioning; CLI-91-1, 33 NRC 9 (1991)  
decommissioning plan requirements for possession-only license; CLI-91-1, 33 NRC 5, 6 (1991)
- 10 C.F.R. 50.82  
activities that must await approval of a decommissioning plan; CLI-91-2, 33 NRC 73 n.5 (1991)  
decommissioning plan requirements for possession-only license; CLI-91-1, 33 NRC 9 (1991); LBP-91-7, 33 NRC 181 (1991)  
equivalency of defueled operating license and possession-only license; CLI-91-1, 33 NRC 4 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- possession-only license prior to decommissioning; LBP-91-17, 33 NRC 383 (1991)
- timing of a federal action that triggers NEPA requirements; CLI-91-2, 33 NRC 71 (1991)
- 10 C.F.R. 50.82(a)
  - decommissioning plan requirements for possession-only license; CLI-91-1, 33 NRC 6 (1991)
- 10 C.F.R. 50.91
  - authorization for change in technical specifications; LBP-91-21, 33 NRC 420 (1991)
  - board involvement in no significant hazards determinations; LBP-91-17, 33 NRC 381 n.2 (1991)
- 10 C.F.R. 50.91(a)(4)
  - effect of no significant hazards determination on issuance of license amendment; LBP-91-2, 33 NRC 43 n.1 (1991)
  - issuance of staff no significant hazards determination operating license amendment; ALAB-950, 33 NRC 495 (1991)
- 10 C.F.R. 50.91(b)
  - litigability of adequacy of significant hazards consideration determination; LBP-91-26, 33 NRC 545 (1991)
- 10 C.F.R. 50.92
  - authorization for change in technical specifications; LBP-91-21, 33 NRC 420 (1991)
  - board involvement in no significant hazards determinations; LBP-91-17, 33 NRC 381 n.2 (1991)
  - effect of no significant hazards determination on issuance of license amendment; LBP-91-2, 33 NRC 43 n.1 (1991)
- 10 C.F.R. 51.10(d)
  - litigability of confirmatory orders; CLI-91-4, 33 NRC 236 n.1 (1991)
- 10 C.F.R. 51.100
  - need for environmental impact statement for license amendment; LBP-91-26, 33 NRC 545 (1991)
- 10 C.F.R. 51.101
  - requirements for obtaining a possession-only license; CLI-91-1, 33 NRC 5 (1991)
- 10 C.F.R. 51.101(a)
  - NEPA review requirements for possession-only license; LBP-91-17, 33 NRC 389 (1991)
- 10 C.F.R. 51.104(b)
  - litigability of license amendment actions; CLI-91-4, 33 NRC 235 (1991)
  - operating license amendment as segmentation of major federal action; LBP-91-23, 33 NRC 434 (1991)
- 10 C.F.R. 50.109(a)(3)
  - application of backfitting requirement to security provisions against truck bombs; DPRM-91-2, 33 NRC 608 (1991)
- 10 C.F.R. Part 50, Appendix B
  - quality assurance program at Palo Verde, adequacy of; LBP-91-19, 33 NRC 412 (1991)
- 10 C.F.R. Part 50, Appendix E, IV.F.1
  - deadline for full-participation emergency exercises; ALAB-949, 33 NRC 486 (1991)
  - interpretation of; ALAB-949, 33 NRC 487 (1991)
  - prelicensing onsite exercise requirements; ALAB-949, 33 NRC 488 (1991)
  - scope of emergency exercises; ALAB-947, 33 NRC 309 (1991)
- 10 C.F.R. Part 50, Appendix E, IV.F.1 n.4
  - scope of prelicensing onsite emergency exercise; ALAB-949, 33 NRC 489, 490 n.18 (1991)
- 10 C.F.R. Part 50, Appendices G and H
  - fracture toughness and reactor vessel material surveillance program requirements; ALAB-950, 33 NRC 496 (1991)
- 10 C.F.R. Part 50, Appendix G, IIF
  - definition of beldline region in reactor vessel; ALAB-950, 33 NRC 497 n.4 (1991)
- 10 C.F.R. Part 50, Appendix H, IIC
  - integrated reactor vessel surveillance programs; ALAB-950, 33 NRC 497, 502 (1991)

## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. Part 51
  - decommissioning plan requirements for possession-only license; CLI-91-1, 33 NRC 7 (1991); LBP-91-7, 33 NRC 184 (1991)
  - NEPA requirements for decommissioning; CLI-91-1, 33 NRC 6-7 (1991)
- 10 C.F.R. 51.14(a)
  - environmental review requirements for operating license amendments; LBP-91-1, 33 NRC 33 (1991)
- 10 C.F.R. 51.21, 51.22
  - environmental review requirements for operating license amendments; LBP-91-1, 33 NRC 33 (1991)
- 10 C.F.R. 51.22(c)
  - absence of categorical exclusion from environmental review as basis for requiring such review; LBP-91-23, 33 NRC 436 (1991)
- 10 C.F.R. 51.22(c)(2)
  - categorical exclusion for security plan amendment; LBP-91-23, 33 NRC 436 n.2 (1991)
- 10 C.F.R. 51.22(c)(9)
  - environmental review requirements for possession-only licenses; CLI-91-1, 33 NRC 6 (1991)
- 10 C.F.R. 51.22(c)(12)
  - categorical exclusions from environmental review requirements for operating license amendments; LBP-91-1, 33 NRC 33 (1991)
- 10 C.F.R. 51.26(a)
  - discussion of EIS scoping prior to decision to prepare an EIS; CLI-91-2, 33 NRC 74 (1991)
- 10 C.F.R. 51.28, 51.29
  - consideration of resumed operation without NEPA scoping process; CLI-91-2, 33 NRC 74 (1991)
- 10 C.F.R. 51.34(b)
  - litigability of license amendment actions; CLI-91-4, 33 NRC 235 (1991)
  - operating license amendment as segmentation of major federal action; LBP-91-23, 33 NRC 434 (1991)
- 10 C.F.R. 51.95(b)
  - environmental review requirements for decommissioning plans; CLI-91-1, 33 NRC 6 (1991)
- 10 C.F.R. Part 61
  - definition of active maintenance relative to mill tailings disposal sites; ALAB-944, 33 NRC 106 (1991)
- 10 C.F.R. 61.1(b)
  - applicability to mill tailings; ALAB-944, 33 NRC 143 (1991)
- 10 C.F.R. 61.1(b)(2)
  - applicability to mill tailings; ALAB-944, 33 NRC 142 (1991)
- 10 C.F.R. 61.2
  - applicability to mill tailings; ALAB-944, 33 NRC 143 (1991)
  - definition of active maintenance relative to mill tailings disposal sites; ALAB-944, 33 NRC 107, 113, 141, 142 (1991)
- 10 C.F.R. 61.44
  - goal of; ALAB-944, 33 NRC 142 (1991)
- 10 C.F.R. 61.59(b)
  - duration of custodial care of waste disposal sites; ALAB-944, 33 NRC 142 n.286 (1991)
- 10 C.F.R. 73.1
  - amendment to upgrade design-basis threat for radiological sabotage, denial of request for; DPRM-91-2, 33 NRC 588, 590, 609 (1991)
- 10 C.F.R. 73.1
  - protection of nuclear power plants against terrorist attacks; DPRM-91-2, 33 NRC 593 (1991)
- 10 C.F.R. 73.1(a)(1)
  - reduction in security for possession-only license; LBP-91-23, 33 NRC 438 (1991)
- 10 C.F.R. 73.1(a)(1)(i)
  - proposed amendment to upgrade design-basis threat for radiological sabotage; DPRM-91-2, 33 NRC 589-90 (1991)
- 10 C.F.R. 73.55
  - litigability of security risks of possession-only license; LBP-91-23, 33 NRC 439 (1991)

**LEGAL CITATIONS INDEX  
REGULATIONS**

- 10 C.F.R. 73.55(a)
  - level of assurance required that threat of sabotage will be effectively countered, adequacy of; DPRM-91-2, 33 NRC 590 (1991)
- 10 C.F.R. 73.55(b) through (h)
  - security measures at nuclear power plants to counter design-basis threats; DPRM-91-2, 33 NRC 591 (1991)
- 10 C.F.R. 100.11(a)
  - challenge to standard for iodine exposure to thyroid; LBP-91-19, 33 NRC 410 (1991)
- 10 C.F.R. Part 150
  - effect of section 274 agreement on pending proceedings; ALAB-944, 33 NRC 102 n.54 (1991)
- 10 C.F.R. 150.31(b)(3)(i)
  - state responsibility to provide procedures in licensing hearings after transfer of NRC regulatory authority; ALAB-944, 33 NRC 150 (1991)
- 10 C.F.R. 170.11
  - exemptions from license fees; LBP-91-15, 33 NRC 269 (1991)
- 10 C.F.R. 170.12(g), 170.31(3)(P)
  - authority of NRC to levy inspection fees; LBP-91-15, 33 NRC 269, 271 (1991)
- 14 C.F.R. 91.3
  - preclusion of deviation from license conditions or technical specifications; DPRM-91-1, 33 NRC 59 (1991)
- 40 C.F.R. Part 192
  - guidance for disposal of mill tailings; ALAB-944, 33 NRC 143 (1991)
  - NRC application and implementation of; ALAB-944, 33 NRC 96 (1991)
  - onsite disposal of mill tailings; ALAB-944, 33 NRC 97 (1991)
- 40 C.F.R. 192.00-.23
  - EPA standards for inactive sites; ALAB-944, 33 NRC 126 (1991)
- 40 C.F.R. 192.20(a)(1)
  - purpose of EPA mill tailings regulations; ALAB-944, 33 NRC 147 (1991)
- 40 C.F.R. 192.30-.43
  - EPA standards for active sites; ALAB-944, 33 NRC 126 (1991)
  - standards for mill tailings disposal sites; ALAB-944, 33 NRC 120 n.178 (1991)
- 40 C.F.R. 192.32(b)(1)(i)
  - longevity standard for mill tailings disposal sites; ALAB-944, 33 NRC 127 (1991)



LEGAL CITATIONS INDEX  
STATUTES

16 U.S.C. 824a(c)

DOE authority to order operation of a nuclear power plant; CLI-91-2, 33 NRC 73 (1991)  
Act of Jan. 4, 1983, §§18-22, Pub. L. No. 97-415, 96 Stat. 2067, 2077-80 (1983)

purpose of; ALAB-944, 33 NRC 125 n.207 (1991)

Administrative Procedure Act, 7(c), 5 U.S.C. 556(d)

filing of prepared testimony in civil-penalty proceedings; LBP-91-25, 33 NRC 536 (1991)

Atomic Energy Act, 42 U.S.C. §§2011 et seq.

zone of interests protected by; ALAB-952, 33 NRC 529 (1991)

Atomic Energy Act, 11e(1)

return of Idaho's authority over byproduct material to NRC; CLI-91-6, 33 NRC 243 (1991)

Atomic Energy Act, 11e(2), 42 U.S.C. 2014(e)(2)

definition of tailings; ALAB-944, 33 NRC 94 n.3 (1991)

return of Idaho's authority over byproduct material to NRC; CLI-91-6, 33 NRC 243 (1991)

state assumption of jurisdiction over mill tailings; ALAB-944, 33 NRC 100 (1991)

Atomic Energy Act, 11z, 42 U.S.C. 2014(z)

definition of source material; ALAB-951, 33 NRC 509 n.4 (1991)

Atomic Energy Act, 61, 42 U.S.C. 2091

definition of source material; ALAB-951, 33 NRC 509 n.4 (1991)

Atomic Energy Act, 62, 42 U.S.C. 2092

licensing authority for depleted uranium; ALAB-951, 33 NRC 509 (1991)

quantities of source material for which no license is required; ALAB-951, 33 NRC 518 n.38 (1991)

Atomic Energy Act, 81, 42 U.S.C. 2111

termination of civil penalty proceeding; LBP-91-16, 33 NRC 275 (1991)

Atomic Energy Act, 83, 84

NRC authority to manage mill tailings sites; ALAB-944, 33 NRC 124 (1991)

Atomic Energy Act, 84(a)(1), 42 U.S.C. 2114(a)(1)

economic considerations in materials licensing decisions; ALAB-944, 33 NRC 138 (1991)

NRC responsibilities for management of byproduct materials; ALAB-944, 33 NRC 126, 127 (1991)

Atomic Energy Act, 84(c), 42 U.S.C. 2114(c)

flexibility in individual licensing decisions; ALAB-944, 33 NRC 129 (1991)

licensee-proposed alternatives to 10 C.F.R. Part 40, Appendix A, Criterion 1; ALAB-944, 33 NRC 129, 134 (1991)

right of licensees to propose alternatives to mill tailings requirements; ALAB-944, 33 NRC 126, 127 (1991)

Atomic Energy Act, 108, 42 U.S.C. 2138

NRC authority to order operation of nuclear power plant; CLI-91-2, 33 NRC 66, 72, 73 (1991);

LBP-91-7, 33 NRC 184 (1991)

Atomic Energy Act, 161

NRC authority to manage mill tailings sites; ALAB-944, 33 NRC 124 (1991)

Atomic Energy Act, 161b, 42 U.S.C. 2201(b)

Commission authority to regulate possession and use of source material; ALAB-951, 33 NRC 516 (1991)

**LEGAL CITATIONS INDEX**  
**STATUTES**

- Atomic Energy Act, 161(b), (c), (f), (o), 42 U.S.C. 2201(b), (c), (f), and (o)  
termination of civil penalty proceeding; LBP-91-16, 33 NRC 275 (1991)
- Atomic Energy Act, 161i, 42 U.S.C. 2201(i)  
Commission authority to impose restrictions on facilities using source material; ALAB-951, 33 NRC 516 (1991)
- Atomic Energy Act, 182, 42 U.S.C. 2232  
reasons for revocation of a license; ALAB-951, 33 NRC 519 n.45 (1991)
- Atomic Energy Act, 182(s), 42 U.S.C. 2232  
Commission authority to require supplemental information from license applicant and to incorporate such into license; LBP-91-9, 33 NRC 223-24 n.49 (1991)
- Atomic Energy Act, 186, 42 U.S.C. 2236  
conditions appropriate for issuance of license revocation order; ALAB-951, 33 NRC 519 (1991)  
reasons for revocation of a license; ALAB-951, 33 NRC 519 n.45 (1991)
- Atomic Energy Act, 186(c), 42 U.S.C. 2236(c)  
NRC authority to order operation of nuclear power plant; CLI-91-2, 33 NRC 66, 72, 73 (1991);  
LBP-91-7, 33 NRC 184 (1991)
- Atomic Energy Act, 188, 42 U.S.C. 2238  
NRC authority to order operation of nuclear power plant; CLI-91-2, 33 NRC 66, 72, 73 (1991);  
LBP-91-7, 33 NRC 184 (1991)
- Atomic Energy Act, 189, 42 U.S.C. 2239  
hearing rights on license amendments; ALAB-944, 33 NRC 108 (1991)
- Atomic Energy Act, 189(s)(1)  
hearing rights on operating license amendments; ALAB-944, 33 NRC 150 (1991); LBP-91-1, 33 NRC  
21 (1991); LBP-91-7, 33 NRC 185 (1991)
- Atomic Energy Act, 236, 42 U.S.C. 2284  
burial of low-level radioactive waste on site prior to issuance of possession-only license; DD-91-3, 33  
NRC 455, 457 (1991)
- Atomic Energy Act, 274, 42 U.S.C. 2021  
encouragement of transfer of NRC regulatory authority to states; ALAB-944, 33 NRC 103 (1991)  
NRC authority to manage mill tailings sites; ALAB-944, 33 NRC 124 (1991)  
transfer of regulatory jurisdiction over section 11(e)(2) byproduct material; ALAB-944, 33 NRC 94, 96,  
99, 100 (1991)
- Atomic Energy Act, 274b, 42 U.S.C. 2021(b)  
authority of state to reissue specific license under agreement state program; ALAB-951, 33 NRC 511  
(1991)
- Atomic Energy Act, 274j(1)  
return of Idaho's Agreement State Program to NRC; CLI-91-6, 33 NRC 243 (1991)
- Atomic Energy Act, 274o(3), 42 U.S.C. 2021(o)(3)  
state responsibility to provide procedures in licensing hearings after transfer of NRC regulatory  
authority; ALAB-944, 33 NRC 150 (1991)
- Atomic Energy Act, 275  
NRC authority to manage mill tailings sites; ALAB-944, 33 NRC 124 (1991)
- Energy Reorganization Act, 210  
protection of whistleblowers; LBP-91-19, 33 NRC 413 (1991)
- Equal Access to Justice Act, 5 U.S.C. 504  
reimbursement of licensee's attorney's fees for enforcement proceedings; ALAB-951, 33 NRC 520 n.48  
(1991)
- Federal Register Act, 44 U.S.C. 1507  
publication of Commission's intent with regard to regulatory language; ALAB-951, 33 NRC 515 n.30  
(1991)
- National Environmental Policy Act, 102(2)(C)  
need for environmental impact statement prior to decommissioning; LBP-91-17, 33 NRC 383 (1991)

## LEGAL CITATIONS INDEX STATUTES

- National Environmental Policy Act, 42 U.S.C. 4321  
challenge to staff proposal for indeterminate onsite storage of tailings as improper segmentation;  
ALAB-944, 33 NRC 95 (1991)
- National Environmental Policy Act, 42 U.S.C. §§4321 et seq.  
zone of interests protected by; ALAB-952, 33 NRC 529 (1991)
- New York Public Authorities Law 1020, et seq. (McKinney Supp. 1990)  
creation of entity to acquire and decommission nuclear power plant; CLI-91-1, 33 NRC 4 (1991)
- Uranium Mill Tailings Radiation Control Act, 2(a), Pub. L. No. 95-604, 92 Stat. 3021-22  
reason for enactment of statute; ALAB-944, 33 NRC 123 n.196 (1991)
- Uranium Mill Tailings Radiation Control Act, 2(b)(1) and (2), Pub. L. No. 95-604, 92 Stat. 3022  
purposes of statute; ALAB-944, 33 NRC 124 (1991)
- Uranium Mill Tailings Radiation Control Act, 18(a), Pub. L. No. 97-415, 96 Stat. 2077  
termination of EPA standards-setting authority; ALAB-944, 33 NRC 125 n.208 (1991)
- Uranium Mill Tailings Radiation Control Act, 101(8), Pub. L. No. 95-604, 92 Stat. 3021, 3023 (1978)  
definition of tailings; ALAB-944, 33 NRC 94 n.3 (1991)
- Uranium Mill Tailings Radiation Control Act, 101-115, 92 Stat. 3022-33  
DOE responsibilities under; ALAB-944, 33 NRC 124 (1991)
- Uranium Mill Tailings Radiation Control Act, 201-206, 92 Stat. 3033-41  
NRC responsibilities under; ALAB-944, 33 NRC 124 (1991)
- Uranium Mill Tailings Radiation Control Act, 203, 205, 92 Stat. 3036, 3039  
EPA responsibilities under; ALAB-944, 33 NRC 124 (1991)



LEGAL CITATIONS INDEX  
OTHERS

- American Meteorological Society, *Glossary of Meteorology* 446 (1959)  
definition of probable maximum precipitation event relative to erosion of mill tailings disposal cell;  
ALAB-944, 33 NRC 107 (1991)
- Federal Rules of Civil Procedure 8(f)  
construction of pleadings; LBP-91-19, 33 NRC 402 (1991)
- Federal Rules of Civil Procedure 12(b)(6)  
basis for contention admission standard; LBP-91-19, 33 NRC 399 (1991)  
parallel of NRC contention pleading standards with; LBP-91-19, 33 NRC 402 (1991)
- Federal Rules of Civil Procedure 56  
weight given to pleading of opponent of summary judgment; LBP-91-19, 33 NRC 402 (1991)
- Federal Rules of Civil Procedure 60(b)  
new evidence as basis for vacation of decision; ALAB-944, 33 NRC 110 (1991)
- H.R. Conf. Rep. No. 884, 97th Cong., 2d Sess. 45-47 (1982)  
amendment of UMTRCA because of EPA failure to meet legislative deadlines for standard setting;  
ALAB-944, 33 NRC 125 n.207 (1991)
- H.R. Rep. No. 1480, 95th Cong., 2d Sess., pt. 2, at 25 (1978)  
description of public health hazard from mill tailings; ALAB-944, 33 NRC 124 n.196 (1991)
- 2 Moore's Federal Practice, § 12.07[2] (2d ed. 1990)  
parallel of NRC contention pleading standards with Federal Rules; LBP-91-19, 33 NRC 402 (1991)
- 6 Moore's Federal Practice, § 56.15[3] (2d ed. 1990)  
weight given to pleading of opponent of summary judgment; LBP-91-19, 33 NRC 402 (1991)
- 1A Sutherland, *Statutory Construction* § 31.06 (4th ed. 1984)  
interpretation of regulations; ALAB-944, 33 NRC 132 (1991)
- 2A Sutherland, *Statutory Construction* § 46.06 (4th ed. 1984)  
interpretation of regulations; ALAB-944, 33 NRC 133 (1991)
- U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 50-53 (1947)  
challenges to regulations in cases other than initial licensing; ALAB-951, 33 NRC 512 n.19 (1991)
- U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act*, 77-78 (1947)  
filing of prepared testimony in civil-penalty proceedings; LBP-91-25, 33 NRC 536 (1991)
- Webster's Third New International Dictionary 1609 (1971)  
definition of "overriding" relative to consideration of siting features for mill tailings disposal;  
ALAB-944, 33 NRC 140 (1991)
- 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 430 (2d ed. 1984)  
discretion in deciding whether a case is moot; ALAB-944, 33 NRC 104 (1991)
- 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, at 93-95 (1983)  
definition of material fact; ALAB-944, 33 NRC 144 (1991)



## SUBJECT INDEX

### ABUSE OF DISCRETION

in Staff order to show cause; LBP-91-15, 33 NRC 268 (1991)

### ACCIDENTS

loss of condenser vacuum; LBP-91-19, 33 NRC 397 (1991)

### ADJUDICATORY BOARDS

role of; ALAB-950, 33 NRC 492 (1991)

### ADJUDICATORY PROCEEDINGS

consideration of NRC Staff NEPA review; ALAB-944, 33 NRC 81 (1991)

mootness pending appeal; ALAB-944, 33 NRC 81 (1991)

### ADMINISTRATIVE PROCEDURE ACT

judicial notice of matters beyond reasonable controversy; CLI-91-2, 33 NRC 61 (1991)

### AFFIDAVITS

in support of summary disposition motions; ALAB-950, 33 NRC 492 (1991)

### AGREEMENT STATE PROGRAMS

return of Idaho's jurisdiction to NRC; CLI-91-6, 33 NRC 242 (1991)

### AGREEMENT STATES

hearing rights on transfer of authority to; ALAB-944, 33 NRC 81 (1991)

transfer of jurisdiction to; ALAB-944, 33 NRC 81 (1991)

### AGREEMENTS

See Settlement Agreements

### AMENDMENT

of intervention petitions; LBP-91-1, 33 NRC 15 (1991); LBP-91-26, 33 NRC 537 (1991)

See also Operating License Amendment Proceedings; Operating License Amendments

### AMERICIUM

effect of laboratory fire on dissemination of; LBP-91-12, 33 NRC 253 (1991)

license condition limiting possession and use to 10 curies; LBP-91-12, 33 NRC 253 (1991)

### AMICUS PLEADINGS

treatment of unopposed motion to file response as; CLI-91-8, 33 NRC 461 (1991)

### APPEAL BOARDS

authority to act on new matters; ALAB-944, 33 NRC 81 (1991)

standard of review; ALAB-947, 33 NRC 299 (1991)

### APPEAL PANEL

jurisdiction to hear appeals; CLI-91-5, 33 NRC 238 (1991)

### APPEALS

dismissal for failure to brief issues properly; ALAB-947, 33 NRC 299 (1991); CLI-91-5, 33 NRC 238 (1991)

interlocutory, on intervention orders; CLI-91-3, 33 NRC 76 (1991); CLI-91-4, 33 NRC 233 (1991)

late-filed, good cause for; CLI-91-5, 33 NRC 238 (1991)

mootness during pendency of; ALAB-944, 33 NRC 81 (1991)

mootness of issues; ALAB-946, 33 NRC 245 (1991)

of denial of late intervention; ALAB-950, 33 NRC 492 (1991)

of intervention denials in license amendment proceedings; CLI-91-5, 33 NRC 238 (1991)

SUBJECT INDEX

## SUBJECT INDEX

- of intervention denials; LBP-91-13, 33 NRC 259 (1991); CLI-91-4, 33 NRC 233 (1991); LBP-91-20, 33 NRC 416 (1991)
- premature, dismissal of; ALAB-943, 33 NRC 11 (1991)
- test of finality for purposes of; ALAB-943, 33 NRC 11 (1991)
- APPELLATE REVIEW**
  - by Commission instead of appeal boards; CLI-91-5, 33 NRC 238 (1991)
- ATOMIC ENERGY ACT**
  - Commission authority to establish standards and instructions governing possession and use of source material; ALAB-951, 33 NRC 505 (1991)
  - compensation for licensee's expenses to operate a facility during war or national emergency; CLI-91-2, 33 NRC 61 (1991)
  - DOE responsibilities under; CLI-91-2, 33 NRC 61 (1991)
  - finding necessary to order operation of a nuclear power plant; CLI-91-2, 33 NRC 61 (1991)
  - hearing rights on materials licenses; ALAB-944, 33 NRC 81 (1991)
  - hearing rights on transfer of jurisdiction to Agreement State; ALAB-944, 33 NRC 81 (1991)
  - transfer of jurisdiction to Agreement State; ALAB-944, 33 NRC 81 (1991)
- BEACH POPULATIONS**
  - sheltering during radiological emergencies; LBP-91-24, 33 NRC 446 (1991)
- BOARDS**
  - See Adjudicatory Boards; Appeal Boards; Licensing Boards
- BRIEFS**
  - appellate, content of; ALAB-950, 33 NRC 492 (1991)
- BURDEN OF PROOF**
  - on licensees; ALAB-944, 33 NRC 81 (1991)
- BYPRODUCT MATERIALS**
  - disposal of; ALAB-944, 33 NRC 81 (1991)
  - return of Idaho's Agreement State Program jurisdiction to NRC; CLI-91-6, 33 NRC 242 (1991)
- BYPRODUCT MATERIALS LICENSES**
  - applicability of regulatory revisions to; LBP-91-11, 33 NRC 251 (1991)
- CERTIFICATION**
  - See Directed Certification
- CIVIL PENALTY PROCEEDINGS**
  - dismissal because of approval of settlement agreement; LBP-91-16, 33 NRC 274 (1991)
- CONDITIONS**
  - See License Conditions
- CONFIDENTIALITY**
  - of sources, First Amendment rights of alleged; CLI-91-9, 33 NRC 473 (1991)
- CONFIRMATORY ORDER MODIFICATION**
  - discontinuance of some maintenance at Shoreham; LBP-91-1, 33 NRC 15 (1991)
- CONTEMPT**
  - failure to formally withdraw from proceeding as; LBP-91-13, 33 NRC 259 (1991)
- CONTENTIONS**
  - admission standards in NRC proceedings; LBP-91-19, 33 NRC 397 (1991)
  - admitted, discovery in the absence of; ALAB-947, 33 NRC 299 (1991)
  - dismissal of intervention petition for failure to file; LBP-91-20, 33 NRC 416 (1991)
  - information to be provided with; LBP-91-13, 33 NRC 259 (1991); LBP-91-19, 33 NRC 397 (1991)
  - late-filed, application of third and fifth factors; ALAB-946, 33 NRC 245 (1991)
  - late-filed, denial of motion to admit; ALAB-949, 33 NRC 484 (1991)
  - limits on scope of; LBP-91-19, 33 NRC 397 (1991)
  - pleading requirements in license amendment proceeding; CLI-91-4, 33 NRC 233 (1991)
  - pleading standards; LBP-91-19, 33 NRC 397 (1991)
  - purpose and scope of; ALAB-947, 33 NRC 299 (1991)
  - requirement for intervention; LBP-91-18, 33 NRC 394 (1991); LBP-91-21, 33 NRC 419 (1991)

## SUBJECT INDEX

### COOLANT

See Reactor Coolant System

### COST-BENEFIT ANALYSIS

NRC responsibility under UMTRCA; ALAB-944, 33 NRC 81 (1991)

### COUNCIL ON ENVIRONMENTAL QUALITY

regulations, weight given by NRC to; CLI-91-2, 33 NRC 61 (1991)

### CYCLONE SEPARATORS

filtration of depleted uranium particulates through; LBP-91-27, 33 NRC 548 (1991)

### DECISIONS

initial, immediate effectiveness of; ALAB-944, 33 NRC 81 (1991)

unreviewed administrative, applicability of Munsingwear principle; ALAB-944, 33 NRC 81 (1991)

unreviewed, precedential effect of; ALAB-944, 33 NRC 81 (1991)

See also Finality of Decisions; Vacation of Decision

### DECOMMISSIONING

applicability of regulatory revisions to byproduct materials license; LBP-91-11, 33 NRC 251 (1991)

authority of NRC; CLI-91-2, 33 NRC 61 (1991)

consideration of alternatives to; CLI-91-2, 33 NRC 61 (1991)

NEPA review requirements for; LBP-91-17, 33 NRC 379 (1991)

resumed operation as alternative under NEPA; LBP-91-26, 33 NRC 537 (1991)

right of licensee to initiate; CLI-91-8, 33 NRC 461 (1991)

segmentation of; LBP-91-23, 33 NRC 430 (1991)

### DECOMMISSIONING PLANS

environmental impact statements for; CLI-91-4, 33 NRC 233 (1991)

NRC approval of; CLI-91-2, 33 NRC 61 (1991)

requirements for possession-only licenses; CLI-91-1, 33 NRC 1 (1991); LBP-91-7, 33 NRC 179 (1991);

LBP-91-17, 33 NRC 379 (1991); LBP-91-26, 33 NRC 537 (1991)

### DEFAULT

on contention-filing requirement of the intervention rule; LBP-91-13, 33 NRC 259 (1991)

### DEFINITIONS

dictionary, application to interpretation of regulations; ALAB-944, 33 NRC 81 (1991)

like terms from another part of an agency's regulations as; ALAB-944, 33 NRC 81 (1991)

of mootness; ALAB-944, 33 NRC 81 (1991)

of source material; ALAB-951, 33 NRC 505 (1991)

### DEPARTMENT OF ENERGY

responsibilities under Atomic Energy Act; CLI-91-2, 33 NRC 61 (1991)

### DESIGN

of mill tailings disposal sites; ALAB-944, 33 NRC 81 (1991)

### DESIGN-BASIS THREAT

sabotage of nuclear power plants, denial of request for revision of regulations on; DPRM-91-2, 33 NRC 587 (1991)

### DIESEL GENERATORS

See Emergency Diesel Generators

### DIRECTED CERTIFICATION

of licensing board question, appeal board acceptance of; ALAB-945, 33 NRC 175 (1991); LBP-91-8, 33 NRC 197 (1991)

purpose of; CLI-91-3, 33 NRC 76 (1991)

### DISCOVERY

in the absence of admitted emergency exercise contentions; ALAB-947, 33 NRC 299 (1991)

materials licensing proceedings; LBP-91-9, 33 NRC 212 (1991)

prior to grant of hearing; LBP-91-6, 33 NRC 169 (1991)

### DISMISSAL OF PROCEEDING

settlement agreement as cause for; LBP-91-16, 33 NRC 274 (1991)

## SUBJECT INDEX

- withdrawal of intervenors as basis for; LBP-91-8A, 33 NRC 210 (1991); LBP-91-10, 33 NRC 231 (1991)
- DOSE**  
from depleted uranium processing; LBP-91-27, 33 NRC 548 (1991)  
standard for iodine exposure to thyroid; LBP-91-19, 33 NRC 397 (1991)
- DOSIMETERS**  
failure of licensee employees to read; LBP-91-9, 33 NRC 212 (1991)  
failure to calibrate; LBP-91-9, 33 NRC 212 (1991)
- EFFECTIVENESS**  
See Immediate Effectiveness
- EMBRITTELEMENT**  
from irradiation; ALAB-950, 33 NRC 492 (1991)
- EMERGENCIES**  
compliance with license conditions during; DPRM-91-1, 33 NRC 55 (1991)  
See also General Emergency; Site Area Emergency
- EMERGENCY DIESEL GENERATORS**  
bypass of jacket-water high-temperature trip during emergency start conditions; LBP-91-6, 33 NRC 169 (1991); LBP-91-21, 33 NRC 419 (1991)
- EMERGENCY EXERCISES**  
discovery to obtain documents relative to; ALAB-947, 33 NRC 299 (1991)  
full-participation, interpretation of; ALAB-949, 33 NRC 484 (1991)  
mootness of appealed issues; ALAB-946, 33 NRC 245 (1991)
- EMERGENCY OPERATIONS FACILITY**  
Seabrook, adequacy of; ALAB-946, 33 NRC 245 (1991)
- EMERGENCY PLANNING**  
applicability of regulatory revisions to byproduct materials license; LBP-91-11, 33 NRC 251 (1991)  
evacuation time estimates; ALAB-947, 33 NRC 299 (1991)  
FEMA review of; ALAB-947, 33 NRC 299 (1991)  
medical services arrangements; ALAB-947, 33 NRC 299 (1991)  
realism rule applied in absence of state and local government participation in; ALAB-947, 33 NRC 299 (1991)  
regulatory guidance for; ALAB-947, 33 NRC 299 (1991)  
training of emergency response personnel; ALAB-947, 33 NRC 299 (1991)
- EMERGENCY PLANNING ZONES**  
identification of special populations in; ALAB-947, 33 NRC 299 (1991)
- EMERGENCY PLANS**  
amendment of, at Shoreham; LBP-91-1, 33 NRC 15 (1991)  
broad-scope licenses; LBP-91-11, 33 NRC 251 (1991)  
content on protective measures; ALAB-947, 33 NRC 299 (1991)  
deficiencies in content of; ALAB-947, 33 NRC 299 (1991)  
evaluation of sufficiency of content of; ALAB-947, 33 NRC 299 (1991)  
fundamental flaw standard for challenges to; ALAB-947, 33 NRC 299 (1991)  
legal dispute over applicants' planned use of facility as a staging area; ALAB-947, 33 NRC 299 (1991)  
monitoring capacity during radiological emergency; ALAB-947, 33 NRC 299 (1991)  
posthearing changes to; ALAB-945, 33 NRC 175 (1991); LBP-91-8, 33 NRC 197 (1991)  
route guides for evacuation of schoolchildren; LBP-91-3, 33 NRC 49 (1991)  
shelter structure diversity; ALAB-947, 33 NRC 299 (1991)  
sheltering of beach populations; ALAB-945, 33 NRC 175 (1991); LBP-91-8, 33 NRC 197 (1991);  
LBP-91-24, 33 NRC 446 (1991)  
utility plan as a substitute; ALAB-947, 33 NRC 299 (1991)
- EMERGENCY PREPAREDNESS**  
onsite emergency exercise requirements; ALAB-949, 33 NRC 484 (1991)

## SUBJECT INDEX

### EMERGENCY RESPONSE PERSONNEL

- firefighter response during radiological emergency; ALAB-947, 33 NRC 299 (1991)
- realism rule applied to; ALAB-947, 33 NRC 299 (1991)
- training of; ALAB-947, 33 NRC 299 (1991)

See also Offsite Response Organization

### EMPLOYEES

- See Licensee Employees

### EMPLOYMENT

- loss of, as basis for standing to intervene; LBP-91-17, 33 NRC 379 (1991)

### ENERGY

- See Department of Energy

### ENERGY REORGANIZATION ACT

- DOE and NRC responsibilities under; CLI-91-2, 33 NRC 61 (1991)

### ENFORCEMENT ACTIONS

- appropriateness of license revocation; ALAB-951, 33 NRC 505 (1991)
- SALP program relationship to; DD-91-2, 33 NRC 279 (1991)

### ENFORCEMENT PROCEEDINGS

- prepared testimony in civil penalty proceedings; LBP-91-25, 33 NRC 535 (1991)

### ENVIRONMENTAL IMPACT STATEMENT

- consideration of resumed operation as alternative to decommissioning; LBP-91-23, 33 NRC 430 (1991); LBP-91-26, 33 NRC 537 (1991)
- for license amendment, need for; CLI-91-4, 33 NRC 233 (1991); LBP-91-26, 33 NRC 537 (1991)
- litigability of need for; CLI-91-4, 33 NRC 233 (1991)
- scoping process under NEPA; CLI-91-2, 33 NRC 61 (1991)

### ENVIRONMENTAL PROTECTION AGENCY

- regulations, NRC responsibility to comply with; ALAB-944, 33 NRC 81 (1991)

### ENVIRONMENTAL REVIEW

- absence of categorical exclusion for licensing actions as basis for requiring such review; LBP-91-23, 33 NRC 430 (1991)
- challenges to adequacy of; ALAB-944, 33 NRC 81 (1991)
- consideration of alternatives to decommissioning; CLI-91-2, 33 NRC 61 (1991)
- decommissioning-related, for possession-only license; CLI-91-1, 33 NRC 1 (1991)

### EQUAL ACCESS TO JUSTICE ACT

- interpretation of; ALAB-951, 33 NRC 505 (1991)

### EROSION

- of mill tailings disposal site; ALAB-944, 33 NRC 81 (1991)

### EVACUATION

- of schoolchildren, change in emergency plan for; LBP-91-3, 33 NRC 49 (1991)
- scheduling of vehicles; ALAB-947, 33 NRC 299 (1991)

### EVACUATION TIME ESTIMATES

- for special facilities; ALAB-947, 33 NRC 299 (1991)
- purpose of; ALAB-947, 33 NRC 299 (1991)
- supporting material required for; ALAB-947, 33 NRC 299 (1991)

### EVIDENCE

- sponsorship by expert witnesses; ALAB-950, 33 NRC 492 (1991)

### EXPERT WITNESSES

- defeat of summary disposition with; ALAB-944, 33 NRC 81 (1991)
- qualifications of; ALAB-950, 33 NRC 492 (1991)

### FAIRNESS

- administrative, in licensing board decisions; CLI-91-7, 33 NRC 295 (1991)

### FEDERAL COURTS

- vacation of decisions, basis for; ALAB-944, 33 NRC 81 (1991)

## SUBJECT INDEX

### FEDERAL EMERGENCY MANAGEMENT AGENCY

authority to review utility-sponsored emergency response plans; ALAB-947, 33 NRC 299 (1991)

### FEES

inspection, license revocation for nonpayment of; LBP-91-15, 33 NRC 268 (1991)

### FILTERS

See HEPA Filters

### FINALITY OF DECISIONS

for purpose of appeal; ALAB-943, 33 NRC 11 (1991)

### FINANCIAL QUALIFICATIONS

for site remediation; LBP-91-27, 33 NRC 548 (1991)

### FIRE SPRINKLERS

for research reactors; LBP-91-12, 33 NRC 253 (1991)

### FIRES

credibility of, in research laboratory handling plutonium and americium; CLI-91-7, 33 NRC 295 (1991)

loadings and barriers in research reactor laboratory; LBP-91-12, 33 NRC 253 (1991)

propagation in research reactor laboratory; LBP-91-12, 33 NRC 253 (1991)

### FRACTURE TOUGHNESS

regulatory requirements; ALAB-950, 33 NRC 492 (1991)

### GENERAL EMERGENCY

protective action recommendations; LBP-91-24, 33 NRC 446 (1991)

### GENERAL LICENSES

effectiveness of; ALAB-951, 33 NRC 505 (1991)

restriction on amounts of source material; ALAB-951, 33 NRC 505 (1991)

revocation of authority for chemical processing of depleted uranium; ALAB-951, 33 NRC 505 (1991)

standards for issuance of; ALAB-951, 33 NRC 505 (1991)

### GENERATORS

See Emergency Diesel Generators; Steam Generator Tubes

### GENERIC SAFETY ISSUES

implementation of letters and bulletins concerning Nine Mile Point; DD-91-2, 33 NRC 279 (1991)

### HALF-LIVES

of mill tailings; ALAB-944, 33 NRC 81 (1991)

### HEALTH EFFECTS

of radon emissions; ALAB-948, 33 NRC 481 (1991)

### HEARING REQUESTS

on source material license renewal; LBP-91-5, 33 NRC 163 (1991)

### HEARING RIGHTS

on materials licenses; ALAB-944, 33 NRC 81 (1991)

on transfer of jurisdiction to Agreement State; ALAB-944, 33 NRC 81 (1991)

### HEPA FILTERS

filtration of depleted uranium particulates through; LBP-91-27, 33 NRC 548 (1991)

license condition requiring; LBP-91-12, 33 NRC 253 (1991)

### HIGH PRESSURIZER PRESSURE TRIP

reactor pressure increase after; LBP-91-19, 33 NRC 397 (1991)

### IDAHO

Agreement State Program, return of jurisdiction to NRC; CLI-91-6, 33 NRC 242 (1991)

### ILLINOIS

transfer of NRC jurisdiction to; ALAB-944, 33 NRC 81 (1991)

### IMMEDIATE EFFECTIVENESS

of licensing board initial decisions; ALAB-944, 33 NRC 81 (1991)

### INFORMAL HEARINGS

timeliness of intervention petitions; LBP-91-27, 33 NRC 548 (1991)

## SUBJECT INDEX

### INFORMAL PROCEEDINGS

- licensing board authority to conduct; LBP-91-6, 33 NRC 169 (1991)
- materials license renewal; LBP-91-5, 33 NRC 163 (1991)
- right of intervenors to respond in; LBP-91-14, 33 NRC 265 (1991)

### INSPECTION

- fees, license revocation for nonpayment of; LBP-91-15, 33 NRC 268 (1991)

### INTERESTS

- informational, as basis for standing to intervene; LBP-91-26, 33 NRC 537 (1991)

### INTERPRETATION

- of 10 C.F.R. 2.1251(c); CLI-91-7, 33 NRC 295 (1991)
- of Equal Access to Justice Act; ALAB-951, 33 NRC 505 (1991)
- of regulations; ALAB-951, 33 NRC 505 (1991)

### INTERVENORS

- pro se, pleading standards for; CLI-91-5, 33 NRC 238 (1991); LBP-91-19, 33 NRC 397 (1991)
- right to respond in Subpart L proceedings; LBP-91-14, 33 NRC 265 (1991)
- withdrawal of; LBP-91-8A, 33 NRC 210 (1991); LBP-91-10, 33 NRC 231 (1991)

### INTERVENTION

- appeals of denials of; CLI-91-5, 33 NRC 238 (1991)
- aspect requirement for; LBP-91-4, 33 NRC 153 (1991)
- contention requirement for; LBP-91-18, 33 NRC 394 (1991)
- discretionary; ALAB-952, 33 NRC 521 (1991)
- in operating license amendment proceeding, ownership changes as basis for; LBP-91-28, 33 NRC 557 (1991)
- in operating license amendment proceedings, geographic proximity as basis for standing; LBP-91-1, 33 NRC 15 (1991)
- injury-in-fact standard for; LBP-91-4, 33 NRC 153 (1991); LBP-91-7, 33 NRC 179 (1991)
- legal requirements for; LBP-91-1, 33 NRC 15 (1991); LBP-91-7, 33 NRC 179 (1991)
- letter pleading for; LBP-91-18, 33 NRC 394 (1991)
- on materials license renewal; LBP-91-5, 33 NRC 163 (1991)
- organizational, lack of authorized representation for; LBP-91-28, 33 NRC 557 (1991)
- particularity and basis requirements for; LBP-91-2, 33 NRC 42 (1991)
- standing and contention requirements for; LBP-91-21, 33 NRC 419 (1991)

### INTERVENTION PETITIONS

- amendment of; CLI-91-4, 33 NRC 233 (1991); LBP-91-1, 33 NRC 15 (1991); LBP-91-26, 33 NRC 537 (1991)
- content of; LBP-91-28, 33 NRC 557 (1991); LBP-91-4, 33 NRC 153 (1991)
- dismissal for failure to file contentions; LBP-91-20, 33 NRC 416 (1991)
- late-filed, dismissal for lack of cause; LBP-91-27, 33 NRC 548 (1991)
- late-filed, five-factor test for; ALAB-950, 33 NRC 492 (1991)
- leeway in judging sufficiency of; LBP-91-19, 33 NRC 397 (1991)
- particularity required of; CLI-91-5, 33 NRC 238 (1991); LBP-91-26, 33 NRC 537 (1991)

### INTRUSION BARRIER

- for mill tailings disposal site; ALAB-944, 33 NRC 81 (1991)

### IODINE-131

- dose standard for exposure to thyroid; LBP-91-19, 33 NRC 397 (1991)

### IRRADIATION

- See Neutron Irradiation

### JURISDICTION

- appellate, transfer to Commission; CLI-91-5, 33 NRC 238 (1991)
- grant of summary disposition, lack of; LBP-91-18, 33 NRC 394 (1991)
- Idaho's Agreement State Program, return to NRC; CLI-91-6, 33 NRC 242 (1991)
- in license amendment proceedings; LBP-91-28, 33 NRC 557 (1991)

## SUBJECT INDEX

- limitations on, through Notice of Hearing; LBP-91-7, 33 NRC 179 (1991)
- transfer to Agreement State; ALAB-944, 33 NRC 81 (1991)
- LICENSE CONDITIONS**
  - amendment of regulations to preclude deviation from; DPRM-91-1, 33 NRC 55 (1991)
  - compliance during emergencies; DPRM-91-1, 33 NRC 55 (1991)
  - HEPA filters in research laboratory; LBP-91-12, 33 NRC 253 (1991)
- LICENSEE EMPLOYEES**
  - harassment and intimidation for reporting safety violations; LBP-91-28, 33 NRC 557 (1991)
- LICENSEES**
  - burden of proof on; ALAB-944, 33 NRC 81 (1991)
  - sabotage and attack threats during 1990-91; DPRM-91-2, 33 NRC 587 (1991)
  - See also Management Capability
- LICENSES**
  - broad-scope, emergency plan requirements; LBP-91-11, 33 NRC 251 (1991)
  - quantities of source material not requiring; ALAB-951, 33 NRC 505 (1991)
  - revocation for nonpayment of inspection fees; LBP-91-15, 33 NRC 268 (1991)
  - specific, for source material; ALAB-951, 33 NRC 505 (1991)
  - transfer of; CLI-91-8, 33 NRC 461 (1991)
  - See also Byproduct Materials Licenses; General Licenses; Materials Licenses; Operating Licenses; Possession-Only Licenses; Revocation of License
- LICENSING BOARDS**
  - authority to ask questions; LBP-91-6, 33 NRC 169 (1991)
  - authority to review Staff's significant hazards consideration determination; LBP-91-7, 33 NRC 179 (1991); LBP-91-26, 33 NRC 537 (1991)
  - error in rulings of law; ALAB-951, 33 NRC 505 (1991)
  - intervention boards distinguished from hearing boards; LBP-91-18, 33 NRC 394 (1991)
  - jurisdiction in license amendment proceedings; LBP-91-28, 33 NRC 557 (1991)
  - leeway in judging sufficiency of intervention petitions; LBP-91-19, 33 NRC 397 (1991)
  - responsibilities for resolution of issues; ALAB-947, 33 NRC 299 (1991)
- MAINTENANCE**
  - discontinuance at Shoreham; LBP-91-1, 33 NRC 15 (1991)
  - of mill tailings disposal sites; ALAB-944, 33 NRC 81 (1991)
- MANAGEMENT CAPABILITY**
  - at Nine Mile Point; DD-91-2, 33 NRC 279 (1991)
- MATERIAL FALSE STATEMENTS**
  - false and misleading statements to investigator by radiographer; LBP-91-29, 33 NRC 561 (1991)
- MATERIALS LICENSE PROCEEDINGS**
  - discovery in; LBP-91-9, 33 NRC 212 (1991)
- MATERIALS LICENSES**
  - hearing rights on; ALAB-944, 33 NRC 81 (1991)
  - renewal, hearing request on; LBP-91-5, 33 NRC 163 (1991)
  - See also Byproduct Materials Licenses
- MEDICAL SERVICES ARRANGEMENTS FOR CONTAMINATED INJURED INDIVIDUALS**
  - disputed testimony in the nature of a dissertation; ALAB-947, 33 NRC 299 (1991)
  - host hospital capacity planning; ALAB-947, 33 NRC 299 (1991)
- MILL TAILINGS**
  - compensation for inadequate disposal site features; ALAB-944, 33 NRC 81 (1991)
  - design of disposal sites; ALAB-944, 33 NRC 81 (1991)
  - disposal sites, performance standards for; ALAB-944, 33 NRC 81 (1991)
  - distinction between new and existing sites; ALAB-944, 33 NRC 81 (1991)
  - maintenance requirements for disposal sites; ALAB-944, 33 NRC 81 (1991)

## SUBJECT INDEX

### MONITORING

- capacity during radiological emergency; ALAB-947, 33 NRC 299 (1991)
- radiation levels in containment as basis for Protective Action Recommendations; LBP-91-3, 33 NRC 49 (1991)

### MOOTNESS

- burden to demonstrate; ALAB-944, 33 NRC 81 (1991)
- definition of; ALAB-944, 33 NRC 81 (1991)
- of appealed emergency exercise issue; ALAB-946, 33 NRC 245 (1991)
- pending appeal; ALAB-944, 33 NRC 81 (1991)

### MOTION TO QUASH

- subpoena demanding identification of whistleblowers, denial of; CLI-91-9, 33 NRC 473 (1991)

### MOTIONS

- form of; CLI-91-8, 33 NRC 461 (1991)
- letters as; LBP-91-18, 33 NRC 394 (1991)
- nontimely, dismissal of; CLI-91-9, 33 NRC 473 (1991)
- replies to answers to; CLI-91-8, 33 NRC 461 (1991)

### NATIONAL ENVIRONMENTAL POLICY ACT

- actions that trigger requirements of; CLI-91-2, 33 NRC 61 (1991)
- challenges to Staff environmental review; ALAB-944, 33 NRC 81 (1991)
- definition of "federal action"; CLI-91-2, 33 NRC 61 (1991)
- environmental analysis required for decommissioning; CLI-91-2, 33 NRC 61 (1991)
- environmental impact statements for license amendments; CLI-91-4, 33 NRC 233 (1991)
- resumed operation as alternative to decommissioning under; LBP-91-26, 33 NRC 537 (1991)
- review requirements for possession-only licenses; CLI-91-1, 33 NRC 1 (1991); LBP-91-17, 33 NRC 379 (1991)
- scope of agency powers under; CLI-91-2, 33 NRC 61 (1991)
- scoping process under; CLI-91-2, 33 NRC 61 (1991)
- segmentation of major federal actions; CLI-91-4, 33 NRC 233 (1991)

### NATIONAL FIRE PROTECTION ASSOCIATION

- fire sprinkler recommendations for research reactors; LBP-91-12, 33 NRC 253 (1991)

### NEUTRON FLUENCE

- technical discussion of; ALAB-950, 33 NRC 492 (1991)

### NEUTRON IRRADIATION

- material degradation from; ALAB-950, 33 NRC 492 (1991)

### NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION

- effectiveness of operating license amendment; CLI-91-8, 33 NRC 461 (1991)
- licensing board authority to review; LBP-91-7, 33 NRC 179 (1991); LBP-91-17, 33 NRC 379 (1991)
- litigability of adequacy of; LBP-91-23, 33 NRC 430 (1991); LBP-91-26, 33 NRC 537 (1991)

### NOTICE

- See Official Notice

### NOTICE OF HEARING

- definition of scope of litigable issues in; LBP-91-1, 33 NRC 15 (1991); LBP-91-23, 33 NRC 430 (1991)
- limitations on board jurisdiction through; LBP-91-7, 33 NRC 179 (1991)

### NOTIFICATION

- time frame for special facilities during radiological emergency; ALAB-947, 33 NRC 299 (1991)

### NRC POLICY

- transfer of jurisdiction to Agreement State; ALAB-944, 33 NRC 81 (1991)

### NRC REVIEW

- of threat environment during Gulf War; DD-91-1, 33 NRC 53 (1991)

## SUBJECT INDEX

### NRC STAFF

authority and responsibility to review and resolve allegations; CLI-91-9, 33 NRC 473 (1991)  
receipt and review of subpoenaed materials where Staff misconduct is alleged; CLI-91-9, 33 NRC 473 (1991)

### NUCLEAR POWER PLANTS

NRC authority to mandate operation of; CLI-91-2, 33 NRC 61 (1991)  
sabotage and attack threats during 1990-91; DPRM-91-2, 33 NRC 587 (1991)  
transfer of ownership; CLI-91-2, 33 NRC 61 (1991)

### NUCLEAR REGULATORY COMMISSION

appellate review by; CLI-91-5, 33 NRC 238 (1991)  
authority to approve transfer of facility; CLI-91-2, 33 NRC 61 (1991)  
authority to establish standards and instructions governing possession and use of source material; ALAB-951, 33 NRC 505 (1991)  
authority to mandate operation of a nuclear power plant; CLI-91-2, 33 NRC 61 (1991)  
authority to provide guidance during course of a proceeding; CLI-91-2, 33 NRC 61 (1991)  
decommissioning authority; CLI-91-2, 33 NRC 61 (1991)  
discretion whether to use rulemaking or adjudication for announcing new requirements of general applicability; ALAB-951, 33 NRC 505 (1991)  
jurisdiction over Idaho's Agreement State Program, return of; CLI-91-6, 33 NRC 242 (1991)  
responsibility to comply with EPA regulations; ALAB-944, 33 NRC 81 (1991)  
scope of authority; CLI-91-8, 33 NRC 461 (1991)  
supervisory authority; CLI-91-8, 33 NRC 461 (1991)

### NUREG-0654

weight given to applicant's lack of compliance with; ALAB-947, 33 NRC 299 (1991)

### OFFICIAL NOTICE

acceptance of licensee's declarations at face value, in absence of basis to do otherwise; CLI-91-8, 33 NRC 461 (1991)

### OFFSITE RESPONSE ORGANIZATION

capabilities of; ALAB-947, 33 NRC 299 (1991)

### OPERATING LICENSE AMENDMENT PROCEEDINGS

appeals of denials of intervention in; CLI-91-5, 33 NRC 238 (1991)  
dismissal of intervention petition for failure to file contentions; LBP-91-20, 33 NRC 416 (1991)  
geographic proximity as basis for standing to intervene in; LBP-91-4, 33 NRC 153 (1991); LBP-91-23, 33 NRC 430 (1991)  
licensing board jurisdiction in; LBP-91-28, 33 NRC 557 (1991)  
scope of; LBP-91-1, 33 NRC 15 (1991); LBP-91-7, 33 NRC 179 (1991)  
standing to intervene in; ALAB-952, 33 NRC 521 (1991); LBP-91-1, 33 NRC 15 (1991); LBP-91-17, 33 NRC 379 (1991); LBP-91-26, 33 NRC 537 (1991)

### OPERATING LICENSE AMENDMENTS

effectiveness of; CLI-91-8, 33 NRC 461 (1991)  
need for environmental impact statement on; LBP-91-26, 33 NRC 537 (1991)  
no significant hazards consideration; CLI-91-8, 33 NRC 461 (1991)  
possession-only license; LBP-91-7, 33 NRC 179 (1991)  
as segmentation of major federal action; LBP-91-17, 33 NRC 379 (1991); LBP-91-23, 33 NRC 430 (1991)  
setpoint tolerance for pressurizer safety valves; LBP-91-4, 33 NRC 153 (1991)

### OPERATING LICENSES

onsite emergency onsite exercise requirements; ALAB-949, 33 NRC 484 (1991)  
See also Possession-Only Licenses

### PERSIAN GULF WAR

protection of nuclear plants during; DD-91-1, 33 NRC 53 (1991)

### PLUTONIUM

effect of laboratory fire on dissemination of; LBP-91-12, 33 NRC 253 (1991)

## SUBJECT INDEX

### POLICY

See NRC Policy

### POSSESSION-ONLY LICENSES

approval for Shoreham; CLI-91-8, 33 NRC 461 (1991)

definition of; CLI-91-1, 33 NRC 1 (1991)

need for decommissioning plan for; CLI-91-1, 33 NRC 1 (1991); LBP-91-7, 33 NRC 179 (1991);

LBP-91-26, 33 NRC 537 (1991)

NEPA review requirements; LBP-91-17, 33 NRC 379 (1991)

### PRECEDENTIAL EFFECT

of unreviewed Commission decisions; ALAB-944, 33 NRC 81 (1991)

### PRESIDING OFFICER

appointment as settlement judge; LBP-91-22, 33 NRC 427 (1991)

### PRESSURE/TEMPERATURE LIMITS

for reactor coolant system, revision of technical specifications; ALAB-950, 33 NRC 492 (1991)

### PROOF

See Burden of Proof

### PROTECTIVE ACTION RECOMMENDATIONS

monitoring radiation levels within containment as basis for; LBP-91-3, 33 NRC 49 (1991)

shelter-in-place concept; LBP-91-24, 33 NRC 446 (1991)

### QUALIFICATIONS

of expert witnesses; ALAB-950, 33 NRC 492 (1991)

See also Financial Qualifications

### QUALITY ASSURANCE

adequacy of program at Palo Verde; LBP-91-19, 33 NRC 397 (1991)

### RADIATION

exposures of licensee employees in hot cell; LBP-91-9, 33 NRC 212 (1991)

monitoring levels in containment as basis for Protective Action Recommendations; LBP-91-3, 33 NRC 49 (1991)

See also Dose

### RADIATION SURVEYS

boundary, by radiographers, failure to perform; LBP-91-29, 33 NRC 561 (1991)

hot cell, inadequacies in; LBP-91-9, 33 NRC 212 (1991)

### RADIOACTIVE RELEASES

airborne, from processing of depleted uranium; LBP-91-27, 33 NRC 548 (1991)

### RADIOACTIVE WASTE

low-level, rooftop storage of reactor components; DD-91-3, 33 NRC 453 (1991)

storage of mill tailings; ALAB-944, 33 NRC 81 (1991)

### RADIOGRAPHER

suspension from licensed work; LBP-91-29, 33 NRC 561 (1991)

### RADON EMISSIONS

health effects; ALAB-948, 33 NRC 481 (1991)

### RADON-220

releases from mill tailings; ALAB-944, 33 NRC 81 (1991)

### RADON-222

releases from mill tailings; ALAB-944, 33 NRC 81 (1991)

### REACTOR COOLANT SYSTEM

pressure/temperature limits; ALAB-950, 33 NRC 492 (1991)

### REACTOR TRIP

See High Pressurizer Pressure Trip

### REACTOR VESSEL

material surveillance program requirements; ALAB-950, 33 NRC 492 (1991)

### REALISM RULE

interpretation of; ALAB-947, 33 NRC 299 (1991)

## SUBJECT INDEX

### RECONSIDERATION

motion for, in Subpart L proceedings; LBP-91-14, 33 NRC 265 (1991)

### REFERRAL OF PROCEEDINGS

to Commission because of abolition of appeal panel; ALAB-948, 33 NRC 481 (1991)

### REGULATIONS

applicability of 10 C.F.R. Part 61 to mill tailings disposal; ALAB-944, 33 NRC 81 (1991)

CEQ, weight given to, by NRC; CLI-91-2, 33 NRC 61 (1991)

challenges to; ALAB-951, 33 NRC 505 (1991)

impermissible challenge to 10 C.F.R. 50.55a(g); LBP-91-18, 33 NRC 394 (1991); LBP-91-19, 33 NRC 397 (1991)

decommissioning plan requirements for possession-only licenses; CLI-91-1, 33 NRC 1 (1991)

definition of like terms from another part of an agency's regulations; ALAB-944, 33 NRC 81 (1991)

deviation from, during emergencies; DPRM-91-1, 33 NRC 55 (1991)

interpretation of 10 C.F.R. 2.1251(c); CLI-91-7, 33 NRC 295 (1991)

interpretation of 10 C.F.R. 50.54(x) and (y); DPRM-91-1, 33 NRC 55 (1991)

interpretation of 10 C.F.R. 50.75 and 50.82; CLI-91-2, 33 NRC 61 (1991)

interpretation of 10 C.F.R. Part 50, Appendix E, IV.F.1; ALAB-949, 33 NRC 484 (1991)

interpretation of 10 C.F.R. 73.1; DPRM-91-2, 33 NRC 587 (1991)

interpretation of, guidance on; ALAB-944, 33 NRC 81 (1991); ALAB-951, 33 NRC 505 (1991)

performance standards for mill tailings disposal sites; ALAB-944, 33 NRC 81 (1991)

revised, applicability to existing byproduct materials licenses; LBP-91-11, 33 NRC 251 (1991)

source material; ALAB-951, 33 NRC 505 (1991)

### REGULATORY GUIDES

failure of applicants to comply with; ALAB-947, 33 NRC 299 (1991)

grounds for limiting an applicant's choice of options in; LBP-91-21, 33 NRC 419 (1991)

weight given to; ALAB-944, 33 NRC 81 (1991)

### REOPENING A RECORD

criteria for; ALAB-944, 33 NRC 81 (1991)

denial of motion for; ALAB-949, 33 NRC 484 (1991)

Staff working paper as basis for; ALAB-944, 33 NRC 81 (1991)

### RESTRICTED AREAS

failure of radiographer to prevent unauthorized entry into; LBP-91-29, 33 NRC 561 (1991)

### REVIEW

discretionary, standards for; CLI-91-4, 33 NRC 233 (1991)

interlocutory, procedural vehicle for; CLI-91-3, 33 NRC 76 (1991)

of show-cause determination, standard for; LBP-91-15, 33 NRC 268 (1991)

See also Appellate Review; Environmental Review; NRC Review

### REVOCAION OF LICENSE

appropriateness of; ALAB-951, 33 NRC 505 (1991)

chemical processing of depleted uranium; ALAB-951, 33 NRC 505 (1991)

finding necessary to order operation of a nuclear power plant after; CLI-91-2, 33 NRC 61 (1991)

lack of record and decision to support license amendment authorization; ALAB-944, 33 NRC 81 (1991)

### RULES OF PRACTICE

administrative fairness in licensing board decisions; CLI-91-7, 33 NRC 295 (1991)

appeals of orders entered on intervention petitions; CLI-91-4, 33 NRC 233 (1991)

appellate review by Commission rather than an appeal board; CLI-91-5, 33 NRC 238 (1991)

avoidance of subpoenas; CLI-91-9, 33 NRC 473 (1991)

briefs on appeal; ALAB-950, 33 NRC 492 (1991)

burden of proof on licensee; ALAB-944, 33 NRC 81 (1991)

challenges to Commission regulations; ALAB-951, 33 NRC 505 (1991)

confidential information; CLI-91-9, 33 NRC 473 (1991)

contention purpose and scope; ALAB-947, 33 NRC 299 (1991)

discovery in the absence of admitted emergency exercise contentions; ALAB-947, 33 NRC 299 (1991)

## SUBJECT INDEX

discovery prior to grant of hearing; LBP-91-6, 33 NRC 169 (1991)  
discretionary interlocutory review, standard for; CLI-91-3, 33 NRC 76 (1991); CLI-91-4, 33 NRC 233 (1991)  
discretionary intervention; ALAB-952, 33 NRC 521 (1991)  
dismissal of appeal for failure to brief issues properly; ALAB-947, 33 NRC 299 (1991)  
expert opinion as means to defeat summary disposition; ALAB-944, 33 NRC 81 (1991)  
finality of decisions for purpose of appeal; ALAB-943, 33 NRC 11 (1991)  
form of motion; CLI-91-8, 33 NRC 461 (1991)  
immediate effectiveness of licensing board initial decisions; ALAB-944, 33 NRC 81 (1991)  
informal procedures; LBP-91-6, 33 NRC 169 (1991)  
interlocutory appeals on intervention orders; CLI-91-3, 33 NRC 76 (1991)  
intervention petitions; ALAB-950, 33 NRC 492 (1991)  
irreparable injury standard for stay of agency action; ALAB-944, 33 NRC 81 (1991)  
justification for late filing of appeals; CLI-91-5, 33 NRC 238 (1991)  
limits on participation; CLI-91-8, 33 NRC 461 (1991)  
material fact as it applies to summary disposition; ALAB-944, 33 NRC 81 (1991)  
mootness pending appeal; ALAB-944, 33 NRC 81 (1991)  
nontimely motions to quash; CLI-91-9, 33 NRC 473 (1991)  
particularity and basis requirements for intervention; LBP-91-2, 33 NRC 42 (1991)  
party receiving nuclear plant as party to proceeding to transfer license; CLI-91-8, 33 NRC 461 (1991)  
prepared testimony in civil penalty proceedings; LBP-91-25, 33 NRC 535 (1991)  
procedural vehicle for interlocutory review; CLI-91-3, 33 NRC 76 (1991)  
qualifications of expert witnesses; ALAB-950, 33 NRC 492 (1991)  
reopening a record; ALAB-944, 33 NRC 81 (1991)  
representational standing to intervene; ALAB-952, 33 NRC 521 (1991)  
responsibilities of parties to inform boards of new information; ALAB-944, 33 NRC 81 (1991)  
revocation of license; ALAB-944, 33 NRC 81 (1991)  
service of motions to quash; CLI-91-9, 33 NRC 473 (1991)  
settlement judges; LBP-91-22, 33 NRC 427 (1991)  
sponsorship of evidence; ALAB-950, 33 NRC 492 (1991)  
Staff authority and responsibility to review and resolve allegations; CLI-91-9, 33 NRC 473 (1991)  
standard for institution of show-cause proceedings; DD-91-2, 33 NRC 279 (1991); DD-91-3, 33 NRC 453 (1991)  
standard for review of show-cause determination; LBP-91-15, 33 NRC 268 (1991)  
standing to intervene; LBP-91-21, 33 NRC 419 (1991)  
standing to intervene in operating license amendment proceedings; ALAB-952, 33 NRC 521 (1991)  
stay of agency action, criteria for; CLI-91-8, 33 NRC 461 (1991)  
stay requests, length of; CLI-91-8, 33 NRC 461 (1991)  
summary disposition, replies to responses to; ALAB-950, 33 NRC 492 (1991)  
summary disposition, standard for grant of; ALAB-944, 33 NRC 81 (1991)  
timeliness of Subpart L intervention petitions; LBP-91-27, 33 NRC 548 (1991)  
vacation of decision because of changed circumstances; ALAB-944, 33 NRC 81 (1991)  
weight given to inferences drawn from opponent of summary disposition; ALAB-944, 33 NRC 81 (1991)

### RULES OF PROCEDURE

motions for reconsideration in Subpart L proceedings; LBP-91-14, 33 NRC 265 (1991)  
right to respond in Subpart L proceedings; LBP-91-14, 33 NRC 265 (1991)

### SABOTAGE

litigability of risk of, in operating license amendment proceeding; LBP-91-23, 33 NRC 430 (1991)  
threats against licensees during 1990-91; DPRM-91-2, 33 NRC 587 (1991)  
truck and boat bombs, denial of request for inclusion in regulations; DPRM-91-2, 33 NRC 587 (1991)

### SAFETY

See Generic Safety Issues

## SUBJECT INDEX

### SAFETY VALVES

- intervenor challenge to setpoint adjustments; LBP-91-18, 33 NRC 394 (1991)
- main steam and pressurizer setpoints; LBP-91-19, 33 NRC 397 (1991)
- pressurizer safety, setpoint tolerance for; LBP-91-4, 33 NRC 153 (1991)

### SALP PROGRAM

- purpose of; DD-91-2, 33 NRC 279 (1991)
- relationship to enforcement; DD-91-2, 33 NRC 279 (1991)

### SANCTIONS

- dismissal of parties; LBP-91-13, 33 NRC 259 (1991)
- for failure to comply with board orders; LBP-91-20, 33 NRC 416 (1991)
- license revocation for nonpayment of inspection fees; LBP-91-15, 33 NRC 268 (1991)

### SEABROOK STATION

- technical support center and emergency operations facility; ALAB-946, 33 NRC 245 (1991)

### SEALED SOURCE

- failure to lock in shielded position; LBP-91-29, 33 NRC 561 (1991)

### SECURITY

- at Shoreham, reduction in; LBP-91-23, 33 NRC 430 (1991)

See also Design-Basis Threat

### SECURITY PLANS

- amendment to reclassify vital areas and equipment at Shoreham; LBP-91-1, 33 NRC 15 (1991)
- protection against truck bombs; DD-91-1, 33 NRC 53 (1991)

### SEPTIC SYSTEMS

- as pathway for radioactive releases; LBP-91-27, 33 NRC 548 (1991)

### SERVICE OF DOCUMENTS

- motions to quash subpoenas; CLI-91-9, 33 NRC 473 (1991)

### SETPOINTS

- allowable tolerances for safety valves; LBP-91-19, 33 NRC 397 (1991)

### SETTLEMENT AGREEMENTS

- judicial notice of; CLI-91-2, 33 NRC 61 (1991)
- standard for approval of; LBP-91-16, 33 NRC 274 (1991)
- withdrawal of intervenors because of; LBP-91-10, 33 NRC 231 (1991)

### SETTLEMENT JUDGES

- appointment of presiding officer as; LBP-91-22, 33 NRC 427 (1991)

### SHELTERING

- beach populations; ALAB-945, 33 NRC 175 (1991); LBP-91-8, 33 NRC 197 (1991)
- diversity of structures; ALAB-947, 33 NRC 299 (1991)
- shelter-in-place concept; LBP-91-24, 33 NRC 446 (1991)

### SHOW-CAUSE ORDER

- standard for review of; LBP-91-15, 33 NRC 268 (1991)

### SHOW-CAUSE PROCEEDINGS

- basis for institution of; DD-91-2, 33 NRC 279 (1991); DD-91-3, 33 NRC 453 (1991)

### SITE AREA EMERGENCY

- protective action recommendations; LBP-91-24, 33 NRC 446 (1991)

### SITE REMEDIATION

- financial qualifications for; LBP-91-27, 33 NRC 548 (1991)

### SITE SUITABILITY

- mill tailings disposal; ALAB-944, 33 NRC 81 (1991)

### SOURCE MATERIAL

- Commission authority to establish standards and instructions governing possession and use of; ALAB-951, 33 NRC 505 (1991)
- definition; ALAB-951, 33 NRC 505 (1991)
- regulations governing possession and use of; ALAB-951, 33 NRC 505 (1991)
- restrictions on amount of; ALAB-951, 33 NRC 505 (1991)

## SUBJECT INDEX

- return of Idaho's Agreement State Program jurisdiction to NRC; CLI-91-6, 33 NRC 242 (1991)
- types of licenses governing; ALAB-951, 33 NRC 505 (1991)
- SPECIAL FACILITIES**
  - notification time frame for radiological emergencies; ALAB-947, 33 NRC 299 (1991)
  - treatment on an individual basis in preparing evacuation time estimates; ALAB-947, 33 NRC 299 (1991)
- SPECIAL NUCLEAR MATERIALS**
  - return of Idaho's Agreement State Program jurisdiction to NRC; CLI-91-6, 33 NRC 242 (1991)
- SPECIAL POPULATIONS**
  - identification of, for emergency planning purposes; ALAB-947, 33 NRC 299 (1991)
- SPRINKLERS**
  - See Fire Sprinklers
- STAFF TECHNICAL POSITIONS**
  - motion to reopen based on; ALAB-944, 33 NRC 81 (1991)
  - regulatory weight given to; ALAB-944, 33 NRC 81 (1991)
- STANDING TO INTERVENE**
  - amendment of intervention petition to establish; LBP-91-26, 33 NRC 537 (1991)
  - appeal of intervention ruling allowing extension of time for amendment of basis for; CLI-91-4, 33 NRC 233 (1991)
  - geographic proximity as basis for; LBP-91-2, 33 NRC 42 (1991); LBP-91-13, 33 NRC 259 (1991)
  - geographic proximity as basis for, in operating license amendment proceeding; LBP-91-1, 33 NRC 15 (1991); LBP-91-4, 33 NRC 153 (1991)
  - informational interests as basis for; LBP-91-26, 33 NRC 537 (1991)
  - injury-in-fact test for; LBP-91-2, 33 NRC 42 (1991); LBP-91-17, 33 NRC 379 (1991); LBP-91-23, 33 NRC 430 (1991)
  - interest requirements for; LBP-91-7, 33 NRC 179 (1991); LBP-91-21, 33 NRC 419 (1991)
  - judicial concept of; ALAB-952, 33 NRC 521 (1991); LBP-91-1, 33 NRC 15 (1991); LBP-91-4, 33 NRC 153 (1991); LBP-91-28, 33 NRC 557 (1991)
  - loss of employment as injury for purposes of; LBP-91-17, 33 NRC 379 (1991)
  - in materials license renewal proceeding; LBP-91-5, 33 NRC 163 (1991)
  - in operating license amendment proceedings; ALAB-952, 33 NRC 521 (1991); CLI-91-5, 33 NRC 238 (1991)
  - organizational, basis for; ALAB-952, 33 NRC 521 (1991); LBP-91-4, 33 NRC 153 (1991); LBP-91-7, 33 NRC 179 (1991); LBP-91-23, 33 NRC 430 (1991)
  - presumptive, in operating license amendment proceedings; LBP-91-26, 33 NRC 537 (1991)
  - representational; ALAB-952, 33 NRC 521 (1991); LBP-91-26, 33 NRC 537 (1991)
  - representational, supporting statement required for; LBP-91-23, 33 NRC 430 (1991)
  - showing necessary to establish; LBP-91-7, 33 NRC 179 (1991)
  - zone-of-interests test; LBP-91-17, 33 NRC 379 (1991)
- STATES**
  - See Agreement State Programs; Agreement States
- STAY**
  - criteria for grant of; CLI-91-8, 33 NRC 461 (1991)
  - irreparable injury standard for; ALAB-944, 33 NRC 81 (1991)
  - length of motion; CLI-91-8, 33 NRC 461 (1991)
  - treatment as motion to reconsider; CLI-91-8, 33 NRC 461 (1991)
- STEAM GENERATOR TUBES**
  - rupture, scenario for; LBP-91-19, 33 NRC 397 (1991)
- SUBPOENAS**
  - avoidance by alleging Staff misconduct; CLI-91-9, 33 NRC 473 (1991)
  - demanding identification of whistleblowers, motion to quash; CLI-91-9, 33 NRC 473 (1991)
- SUMMARY DISPOSITION**
  - affidavits to be submitted in connection with; ALAB-950, 33 NRC 492 (1991)
  - burden on opponent of; LBP-91-9, 33 NRC 212 (1991)

## SUBJECT INDEX

- content of motions for; LBP-91-15, 33 NRC 268 (1991)
- expert opinion as means to defeat; ALAB-944, 33 NRC 81 (1991)
- jurisdiction to grant; LBP-91-18, 33 NRC 394 (1991)
- material fact as applied to; ALAB-944, 33 NRC 81 (1991)
- replies to responses to; ALAB-950, 33 NRC 492 (1991)
- showing necessary for grant of; ALAB-944, 33 NRC 81 (1991); LBP-91-9, 33 NRC 212 (1991); LBP-91-15, 33 NRC 268 (1991)
- weight given to inferences drawn from opponent of; ALAB-944, 33 NRC 81 (1991)
- SUMMARY JUDGMENT**
  - treatment of pleadings opposing; LBP-91-19, 33 NRC 397 (1991)
- SURVEILLANCE TESTING**
  - delay during emergencies; DPRM-91-1, 33 NRC 55 (1991)
  - Palo Verde program adequacy; LBP-91-19, 33 NRC 397 (1991)
- TAILINGS**
  - See Mill Tailings
- TECHNICAL SPECIFICATIONS**
  - amendment of; ALAB-952, 33 NRC 521 (1991)
  - amendment of regulations to preclude deviation from; DPRM-91-1, 33 NRC 55 (1991)
  - amendment to permit bypass, in emergency start conditions, of jacket-water high-temperature trip of emergency diesel generators; LBP-91-6, 33 NRC 169 (1991)
  - revision of pressure/temperature limits; ALAB-950, 33 NRC 492 (1991)
- TECHNICAL SUPPORT CENTER**
  - Seabrook, adequacy of; ALAB-946, 33 NRC 245 (1991)
- TERRORISM**
  - protection of nuclear plants during Gulf War; DD-91-1, 33 NRC 53 (1991)
- TESTING**
  - See Surveillance Testing
- TESTIMONY**
  - prepared, in civil penalty proceedings; LBP-91-25, 33 NRC 535 (1991)
  - rejection of dissertation for failure to provide information relevant to central issue being litigated; ALAB-947, 33 NRC 299 (1991)
- THORIUM**
  - byproduct materials, radon-220 releases from; ALAB-944, 33 NRC 81 (1991)
- TORUS**
  - wall thinning at Nine Mile Point; DD-91-2, 33 NRC 279 (1991)
- TRAINING**
  - of emergency response personnel; ALAB-947, 33 NRC 299 (1991)
- URANIUM**
  - byproduct materials, radon-222 releases from; ALAB-944, 33 NRC 81 (1991)
- URANIUM, DEPLETED**
  - liquid wastes from processing of; LBP-91-27, 33 NRC 548 (1991)
  - radioactive emissions from processing operations; LBP-91-27, 33 NRC 548 (1991)
  - revocation of license for chemical processing of; ALAB-951, 33 NRC 505 (1991)
- URANIUM MILL TAILINGS RADIATION CONTROL ACT**
  - compensation for inadequate siting features; ALAB-944, 33 NRC 81 (1991)
  - cost-benefit analysis; ALAB-944, 33 NRC 81 (1991)
  - distinction between new and existing mill tailings disposal sites; ALAB-944, 33 NRC 81 (1991)
  - maintenance requirements for disposal sites; ALAB-944, 33 NRC 81 (1991)
  - NRC responsibility to comply with EPA regulations; ALAB-944, 33 NRC 81 (1991)
  - performance standards for mill tailings disposal sites; ALAB-944, 33 NRC 81 (1991)
  - purpose of; ALAB-944, 33 NRC 81 (1991)

## SUBJECT INDEX

site flexibility requirements; ALAB-944, 33 NRC 81 (1991)  
validity of; ALAB-944, 33 NRC 81 (1991)

### VACATION OF DECISION

federal court practice; ALAB-944, 33 NRC 81 (1991)  
new evidence as basis for; ALAB-944, 33 NRC 81 (1991)

### VALVES

See Safety Valves

### VIOLATIONS

Severity Level III; LBP-91-9, 33 NRC 212 (1991)  
willfulness of conduct as a consideration in setting severity level of; LBP-91-29, 33 NRC 561 (1991)

### WASTE DISPOSAL

holding basin and bog with liquid wastes from depleted uranium operations; LBP-91-27, 33 NRC 548 (1991)

See also Radioactive Waste

### WEATHER

probable maximum precipitation; ALAB-944, 33 NRC 81 (1991)

### WHISTLEBLOWERS

harassment and intimidation at Palo Verde, allegations of; LBP-91-19, 33 NRC 397 (1991)  
motion to quash subpoena demanding identification of; CLI-91-9, 33 NRC 473 (1991)

### WITNESSES

See Expert Witnesses



## FACILITY INDEX

- HB. ROBINSON, Unit 2; Docket No. 50-261  
OPERATING LICENSE AMENDMENT; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)
- NINE MILE POINT NUCLEAR STATION, Unit 1; Docket No. 50-220  
REQUEST FOR ACTION; April 2, 1991; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206;  
DD-91-2, 33 NRC 279 (1991)
- NORTH ANNA POWER STATION, Units 1 and 2; Docket Nos. 50-338, 50-339  
OPERATING LICENSE; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)
- PALO VERDE NUCLEAR GENERATING STATION, Units 1, 2, and 3; Docket Nos. 50-528-OLA,  
50-529-OLA, 50-530-OLA  
OPERATING LICENSE AMENDMENT; May 14, 1991; MEMORANDUM AND ORDER  
(Terminating Proceeding); LBP-91-20, 33 NRC 416 (1991)
- PALO VERDE NUCLEAR GENERATING STATION, Units 1, 2, and 3; Docket Nos. 50-528-OLA-2,  
50-529-OLA-2, 50-530-OLA-  
OPERATING LICENSE AMENDMENT; February 19, 1991; MEMORANDUM AND ORDER  
(Ruling upon Petitions for Leave to Intervene); LBP-91-4, 33 NRC 153 (1991)
- OPERATING LICENSE AMENDMENT; April 24, 1991; MEMORANDUM AND ORDER  
(Dismissing Scott/Bush/CREE Petitions to Intervene); LBP-91-13, 33 NRC 259 (1991)
- OPERATING LICENSE AMENDMENT; May 3, 1991; MEMORANDUM AND ORDER (Denying  
Relief Sought by Licensees' May 1, 1991 Letter); LBP-91-18, 33 NRC 394 (1991)
- OPERATING LICENSE AMENDMENT; May 9, 1991; MEMORANDUM AND ORDER (Granting  
Mitchell Petition for Leave to Intervene and Request for Hearing); LBP-91-19, 33 NRC 397  
(1991)
- PRAIRIE ISLAND NUCLEAR GENERATING PLANT, Units 1 and 2; Docket Nos. 72-10, 50-282-RS,  
50-306-RS  
OPERATING LICENSE AMENDMENT; March 14, 1991; MEMORANDUM AND ORDER  
(Dismissing Proceeding); LBP-91-8A, 33 NRC 210 (1991)
- RANCHO SECO NUCLEAR GENERATING STATION; Docket No. 50-312-OLA  
OPERATING LICENSE AMENDMENT; May 1, 1991; MEMORANDUM AND ORDER (Ruling on  
Petition to Intervene); LBP-91-17, 33 NRC 379 (1991)
- SEABROOK STATION, Unit 1; Docket No. 50-443-OLA  
OPERATING LICENSE AMENDMENT; June 18, 1991; MEMORANDUM AND ORDER (Petition  
for Leave to Intervene); LBP-91-28, 33 NRC 557 (1991)
- SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443, 50-444  
CONSTRUCTION PERMIT; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)
- SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443-OL, 50-444-OL  
OPERATING LICENSE; January 7, 1991; MEMORANDUM AND ORDER; ALAB-943, 33 NRC 11  
(1991)
- OPERATING LICENSE; March 20, 1991; MEMORANDUM REGARDING CERTIFIED QUESTION;  
ALAB-945, 33 NRC 175 (1991)
- OPERATING LICENSE; May 10, 1991; DECISION; ALAB-947, 33 NRC 299 (1991)
- SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443-OL-1, 50-444-OL-1  
OPERATING LICENSE; April 11, 1991; MEMORANDUM AND ORDER; ALAB-946, 33 NRC 245  
(1991)

## FACILITY INDEX

- OPERATING LICENSE; June 21, 1991; MEMORANDUM AND ORDER; ALAB-949, 33 NRC 484 (1991)
- SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443-OLR-3&5, 50-444-OLR-3&5
- OPERATING LICENSE REMAND; January 29, 1991; MEMORANDUM AND ORDER (Resolving Issues Remanded in ALAB-937 and ALAB-942); LBP-91-3, 33 NRC 49 (1991)
- SEABROOK STATION, Units 1 and 2; Docket Nos. 50-443-OLR-4, 50-444-OLR-4
- OPERATING LICENSE REMAND; March 12, 1991; MEMORANDUM (Certifying ALAB-939 Question); LBP-91-8, 33 NRC 197 (1991)
- OPERATING LICENSE REMAND; May 30, 1991; MEMORANDUM AND ORDER (Granting Licensees' Motion for Summary Judgment); LBP-91-24, 33 NRC 446 (1991)
- SEQUOYAH NUCLEAR PLANT, Units 1 and 2; Docket Nos. 50-327-OLA, 50-328-OLA
- OPERATING LICENSE AMENDMENT; March 18, 1991; MEMORANDUM AND ORDER (Dismissal of Petition); LBP-91-10, 33 NRC 231 (1991)
- SHEARON HARRIS NUCLEAR POWER PLANT, Units 1, 2, 3, and 4; Docket Nos. 50-400, 50-401, 50-402, 50-403
- CONSTRUCTION PERMIT; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)
- SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OLA
- OPERATING LICENSE AMENDMENT; January 8, 1991; MEMORANDUM AND ORDER (Ruling on Requests for Intervention); LBP-91-1, 33 NRC 15 (1991)
- OPERATING LICENSE AMENDMENT; January 24, 1991; MEMORANDUM AND ORDER; CLI-91-1, 33 NRC 1 (1991)
- OPERATING LICENSE AMENDMENT; February 21, 1991; MEMORANDUM OPINION AND ORDER; CLI-91-2, 33 NRC 61 (1991)
- OPERATING LICENSE AMENDMENT; February 28, 1991; MEMORANDUM AND ORDER; CLI-91-3, 33 NRC 76 (1991)
- OPERATING LICENSE AMENDMENT; March 6, 1991; MEMORANDUM AND ORDER (Ruling on Requests for Intervention); LBP-91-7, 33 NRC 179 (1991)
- OPERATING LICENSE AMENDMENT; April 3, 1991; MEMORANDUM AND ORDER; CLI-91-4, 33 NRC 233 (1991)
- OPERATING LICENSE AMENDMENT; May 23, 1991; MEMORANDUM AND ORDER (Ruling on Amended Petitions to Intervene and to Hold Hearings); LBP-91-23, 33 NRC 430 (1991)
- OPERATING LICENSE AMENDMENT; June 12, 1991; MEMORANDUM AND ORDER; CLI-91-8, 33 NRC 461 (1991)
- REQUEST FOR ACTION; May 14, 1991; DIRECTOR'S DECISION UNDER 10 C.F.R. §2.206; DD-91-3, 33 NRC 453 (1991)
- SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OLA-2
- OPERATING LICENSE AMENDMENT; June 13, 1991; MEMORANDUM AND ORDER (Ruling on Amended Petitions to Intervene and to Hold Hearings); LBP-91-26, 33 NRC 537 (1991)
- ST. LUCIE NUCLEAR POWER PLANT, Unit 2; Docket No. 50-389
- CONSTRUCTION PERMIT; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)
- TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250-OLA-4, 50-251-OLA-4
- OPERATING LICENSE AMENDMENT; June 24, 1991; DECISION; ALAB-950, 33 NRC 492 (1991)
- TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250-OLA-5, 50-251-OLA-5
- OPERATING LICENSE AMENDMENT; June 28, 1991; DECISION; ALAB-952, 33 NRC 521 (1991)
- TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250-OLA-6, 50-251-OLA-6
- OPERATING LICENSE AMENDMENT; January 23, 1991; MEMORANDUM AND ORDER (Ruling on Petition to Intervene); LBP-91-2, 33 NRC 42 (1991)

## FACILITY INDEX

OPERATING LICENSE AMENDMENT; April 3, 1991; MEMORANDUM AND ORDER; CLI-91-5,  
33 NRC 238 (1991)

VOGTE ELECTRIC GENERATING PLANT, Units 1 and 2; Docket Nos. 50-424-OLA, 50-425-OLA  
OPERATING LICENSE AMENDMENT; February 28, 1991; MEMORANDUM AND ORDER (Staff  
Motion for Reconsideration); LBP-91-6, 33 NRC 169 (1991)

OPERATING LICENSE AMENDMENT; May 15, 1991; MEMORANDUM AND ORDER  
(Terminating Proceeding); LBP-91-21, 33 NRC 419 (1991)

WEST CHICAGO RARE EARTHS FACILITY; Docket No. 40-2061-ML

MATERIALS LICENSE; February 28, 1991; DECISION; ALAB-944, 33 NRC 81 (1991)

WOLF CREEK GENERATING STATION, Unit 1; Docket No. STN 50-482

CONSTRUCTION PERMIT; June 11, 1991; ORDER; ALAB-948, 33 NRC 481 (1991)

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