NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

UNITED STATES DEPARTMENT OF ENERGY	:	
PROJECT MANAGEMENT CORPORATION	:	
TENNESSEE VALLEY AUTHORITY	:	DOCKET NO. 50-537
	:	
(CLINCH RIVER BREEDER REACTOR)	:	

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UNITED STATES OF AMERICA

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4350 East West Highway
5th Floor
Bethesda, Maryland

Tuesday, April 6, 1982

The prehearing conference in the above-entitled matter convened, pursuant to notice, at 9:00 a.m.

BEFORE:

MARSHALL E. MILLER, Chairman
GUSTAVE A. LINENBERGER
Atomic Safety and Licensing Board

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P R O C E E D I N G S

(9:00 a.m.)

JUDGE MILLER: All right. We will come to order, please.

MR. SWANSON: Off the record.

(A discussion was held off the record.)

JUDGE MILLER: We will come to order, ladies and gentlemen. Since, apparently, you have come to no conclusions on whatever it was you were discussing, you can resume it at recess or lunch hour.

I think we had left off now with the conclusion of former 14, which is now renumbered 8 and that will be in the form in which it was admitted in 1977 -- '76, I am sorry.

We now go on to former 16, which will be renumbered as 9, dealing with the presence of liquid radioactive effluents and the like. The Applicant I think has the most broad-ranging objections, so you may proceed on that, if you will, Mr. Edgar.

MR. EDGAR: Our position here is that there is no good cause for admission of this Contention. It is a late-filed Contention. The real issue here is whether there is new information relating to this Contention.

Our position is set forth at pages 18 through 21 of our March 19 filing. Essentially, our position

starts with NRDC's statement that new information is available in the Environmental Impact Report of the Tennessee Synfuels Association.

The fact is that the Applicant's environmental report as of 1976 and before provided a full discussion of radioactivity in the Clinch River sediments. Indeed, the references cited in the environmental report are the same references relied upon in the Tennesses Synfuels Association report.

Further, NRDC made reference to an apparent discrepancy in the sampling techniques or intervals which were employed first in the Tennessee Synfuels report and, secondly, in the environmental report. There is no discrepancy. Indeed, the environmental report contains a finer grid for sampling than the Tennessese Synfuels Association.

Now if you look at pages 15 through 16 of NRDC's filing, they recognize that indeed this question of sampling intervals just does not hold much water. Instead, they now come to a new basis, if you will. If you look at page 16 they say that one of the documents discovered during NRDC's research is ORNL 37-21, Status Report Number 5, on the Clinch River study, which was not cited in the ER.

Now one ought to examine what that status

report is. The fact is that Status Report Number 5 was one of six status reports which culminated in the "comprehensive report of the Clinch River Study, ORNL 40-35, April 1967," which happens to be reference 12 to the ER. Thus, status report number 5 is nothing more than the predecessor report to the comprehensive report.

The fact here is simple. There is no new information and indeed there is no change in that information since the very early stages of the environmental report. Thus, we can only conclude that there is no new information available to justify admission of this Contention.

JUDGE MILLER: Very well. I think the Staff takes a similar position, does it not, in part?

MR. SWANSON: That is correct. We believe that the primary concern here is the lack of good cause and I wondered, now that we are embarking on new Contentions, if it might be appropriate to just briefly go over our general comments on what we think are the parameters for deciding whether or not a new Contention should be admitted.

JUDGE MILLER: Yes, we have no objection. We have read it, but I think it might be helpful if you would summarize both for the recordo and for the other parties present here.

MR. SWANSON: Shall we go first?

JUDGE MILLER: You may proceed.

MR. SWANSON: As we indicated in our response, the appropriate regulation in determining whether or not a late-filed Contention should be admitted at this time is 10 CFR 2.714(a). That regulation sets forth five factors which must be considered in determining whether or not the late-filed Contentions should be admitted.

The first factor, good cause, if any, for failure to file on time. The second factor is availability of other means whereby petitioner's interests will be protected. The third factor is the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.

The fourth is the extent to which petitioner's interest will be represented by existing parties. And the last factor is the extent to which petitioner's participation will broaden the issues or delay the proceeding.

JUDGE MILLER: We might just note in passing that originally there were four factors and the good cause under West Valley were something that the Board and parties were required to look at with a provision a year and a half or two years ago, and now brings in good

cause as one of the factors, in case anybody has read some of the older cases.

MR. SWANSON: That is correct. As the Staff notes in its pleading and response at page 4, in circumstances where no good cause excuse is tendered for the lateness of the filing of the Contention then the Intervenors' demonstration of the other factors must be particularly strong. That proposition is set forth in ALAB 431.

The Staff briefly treated the second, third and fourth factors in its response. At that time it did not have available a submission from the petitioner on these factors, but we believe now, looking at the petitioner's response to our objections, that the same general arguments can be set forth, namely that the second factor -- that of the availability of other means whereby petitioner's interests will be protected -- does not or should not be weighed heavily for the admission of additional Contentions.

The Staff agrees that there are no other effective means for protecting their interests. However, this factor, to some extent, in that regard would weigh in favor of admission of Contentions. However, since Intervenors could have raised these revisions or new Contentions not based on new

information at any time in the past up to the time that the hearings were suspended, as to those matters for which good cause has not been shown we believe this factor should not be weighed heavily in favor of admission.

The third factor the Board must consider is the extent to which Intervenors' participation may be reasonably expected to assist in developing a sound record. The Staff submits that NRDC's submission of their performance in past hearings does not do us any good in deciding what they are going to be able to do on these specific proposed new Contentions.

Unless we have a showing which is useful to the Board in determining how they can assist in developing the record in these areas, that this factor should not be given weight towards admitting these late-filed Contentions either.

The fourth factor, the extent to which Intervenors' interest will be represented by existing parties also should have little weight in this proceeding, in the view of the Staff. The Intervenors have been parties to this proceeding. They have been represented by able counsel and they may represent their own interests.

These interests are exemplified by the

Contentions which they already sought to have admitted and did succeed in having admitted in this proceeding. Intervenors' proposed new Contentions constitute an attempt to expand these interests substantially.

Their original interests should be considered in the Contentions that exemplify that interest in deciding whether or not this factor should be weighed heavily toward admitting their Contentions. Since they were already parties, had set forth the interest and had established Contentions which exemplified that interest, we believe this factor should have no weight in the balancing.

Rather, we think that the last factor is one which is also determinative in each case of the new Contentions for which good cause has not been shown. That factor is the extent to which a new issue will broaden the issues or delay the proceeding.

As the Staff indicated or indicates in response to each specific Contention, with, I think, two exceptions, of the new proposed Contentions, the Staff simply feels that good cause has not been shown and that when you look particularly at the last factor, the extent to which the addition of a Contention will broaden the issues or delay the proceeding, that factor must be weighed heavily against admitting the

Contentions.

The Staff will not repeat its quote on page 7 of its pleading but merely refer the Board again to two different occasions where the Appeal Board, in ALAB 292 and in ALAB 354, indicated that the delay factor is a particularly significant one where you have an inexcusably tardy petition for the submission of new issues.

The Staff is particularly concerned about this factor in light of what we perceive to be perhaps a lessening or a failure to consider fully the weight that should be given to the good cause factor by the Board in considering these new Contentions. We believe that merely by brushing aside good cause and looking at whether or not an issue is relevant or even significant ignores the Commission's regulations and the interpretations of those regulations by the Appeal Board and the Commission.

We believe that the Board must consider all five factors and that they cannot simply ignore a new Contention and ignore the good cause or lack of good cause for raising it at this time or the delay factor.

The Staff has considered overnight the overall effect of admitting all of the proposed new Contentions, 16 through 24, and it is our belief that when you sum

the net effects up of increasing the workload caused by discovery and testimony and preparation and prehearing filings on these additional Contentions that it is very unlikely that the Staff would be able to meet the date that it had earlier set for its environmental and site suitability documents for this summer.

The Staff considers it is very important to consider on a point-by-point basis these factors and sincerely hopes that the Board will keep in mind all five factors and not just the significance or relevancy of an issue in deciding whether or not a newly-proposed Contention should be admitted.

Now we have very little else to add to what the Applicant stated regarding Contention 16, merely that we believe the petitioners in their response to objections did not set forth new information which we believe establishes good cause for admission of this Contention.

Thank you.

JUDGE MILLER: Let me inquire first. Is the Staff on target in the production and preparation of the documents which will have a triggering effect? As you know, the Board has set up a schedule. The Board desires very strongly that evidentiary hearing on this LWA matter commence the last week of August and that to

accomplish that the Staff made certain I will not say committments set in concrete, but best efforts, at any rate, when we conferred with you at Oak Ridge.

Is the Staff on target with the production of those documents?

MR. SWANSON: Yes, it is. The Board had asked, as I recall, for a status update in, I think, early April and I think now we can report that yes we are still on target for the June 22 date for the environmental update report and July 9 for the safety issues to be considered.

JUDGE MILLER: We are glad to hear that and we exhort you to continue to stay on course because our schedule is dependent in certain material respects on those target dates being met.

MR. SWANSON: Excuse me one minute.

JUDGE MILLER: Is there any question about slippage or are we still on target, hopefully?

(Counsel for NRC Staff conferring.)

MR. SWANSON: The Staff informs me that I think they had factored into the July 9 date for the site suitability safety issues report the inclusion of LWA-2 factors in anticipation of the worst case in terms of scheduling, that the exemption might be granted and that the Applicants would then seek an LWA-2.

An LWA-2 application has not come in and we do not anticipate one at this time, so that by deleting LWA-2 safety matters from the site suitability report there is apparently an improved chance that that document may come out in late June also.

JUDGE MILLER: We are happy to hear that. Let me inquire now, Mr. Edgar, were you listening and do you concur with the statement that there are not anticipated LWA-2 factors?

MR. EDGAR: Well, not at the same scope. It is my understanding that it is still an open question in the Staff review. There may be some limited issues related to the base mat, but I do not think we are talking about anywhere near the same scope that we were talking about at the time of the prehearing conference.

If you recall, at that time --

JUDGE MILLER: Let me interrupt you just a moment. Now I want the Staff to listen to this because later on, you know, we look at transcripts and we find we passed each other in the night and this, I think, is important, that we have square, eyeball-to-eyeball commitments to the extent that we can, so please state your understanding now, Mr. Edgar, and then we will get back to Staff.

MR. EDGAR: Yes, right. As of the time of the

prehearing conference we are talking about a scope of LWA-2 issues that encompassed bringing the reactor building up to grade. At this juncture it is my understanding the discussions are still open as to including some limited issues relating to the base mat only, which is a lesser included set than that expressed by bringing the building up to grade.

JUDGE MILLER: Could you be a little more specific now so our record will be very clear on those matters that you consider to be still ongoing with the Staff's analysis and then we will see if the Staff agrees.

MR. EDGAR: Well, the best expression I can give you is that those safety issues related to the base mat placement, all right, which would be some -- well, it would be essentially those safety issues involved in the severe accidents. You would not tieing in the containment liner, so you would subtract that out.

You would probably have some structural or site-related criteria to that base mat. But it is essentially the severe accident issues related to the base mat. In our judgment, they are not incrementally or qualitatively different than that which one would look at in the LWA-1 context under Contentions 2, 3, and 4.

JUDGE LINENBERGER: I would like your comment here, Mr. Edgar, with respect to quality assurance matters associated with base mat placement. You talked about accident considerations. Are there?

MR. EDGAR: Yes. There would be certain QA issues related to the base mat. You are not talking about the whole spectrum of QA issues if you go that way.

JUDGE LINENBERGER: Understood.

MR. EDGAR: But there would be certain issues related to or within the quality assurance program. There would be elements of that program that bear directly on base mat placement, concrete and steel.

JUDGE LINENBERGER: Thank you.

JUDGE MILLER: Now let me inquire of the Staff. You heard Mr. Edgar's explanation of the Applicant's position and belief in this matter. Let us be certain whether or not the Staff fully concurs.

MR. SWANSON: If in fact Mr. Edgar was saying that their contemplation is to go forward at this present time to get permission to include a base mat, to construct a base mat along with an LWA-1, the Staff position is that construction of a base mat, of course, is an LWA-2 matter and that in fact that specific construction activity has not been applied for at this time with the Staff.

As of this time we have an LWA-1 application in house. That is what we are reviewing and the only safety matters that are currently being reviewed for this document that will come out in late June or early July are site suitability matters, in other words, safety matters which relate to a plant of this size and type at this site.

At this time the Staff is not reviewing, in connection with that document, any base mat construction.

JUDGE MILLER: Well, then, you two are not in total agreement, are you?

MR. SWANSON: Apparently now.

JUDGE MILLER: Let's get it resolved because you are quite correct on these and other matters. Now we want to know precisely what the issues are to be in our August hearing, which we are pretty determined to hold on schedule, and insofar as we do not have agreement now on that issue we had better get that resolved presently because we do not want to jeopardize our evidentiary hearing, Mr. Edgar.

MR. EDGAR: I understand that. I think, though, that if the resolution is to eliminate the base mat issues, then that makes the schedule better inasmuch as the original schedule was predicated on more.

I recognize the need to get it resolved and we

will proceed promptly to do that in direct contact with the Staff.

JUDGE MILLER: Well, before we finish our session today, our conference with parties and counsel, we are going to want to have some pretty explicit commitments from all parties concerning the scheduling and those matters which could impact upon scheduling, of which this would be one, although I believe now you are getting close to agreement as to what we are going to do into at the evidentiary hearing.

But we will expect you right down the line to dictate into the record now what the issues are, harmonize them with the dates we have given you, and the scheduling. We are glad to hear that the Staff apparently has gained perhaps a little bit of time, but we want to have it explicit in our transcript before we adjourn.

All right, now let's see. The second matter I have to ask the Staff before we ask for response or responses from the Intervenors is you have alluded to the remaining Contentions 16 through 20-some, whatever they are, as being new Contentions or at least newly-drafted and phrased Contentions. Is that correct?

MR. SWANSON: Sixteen through 24, that is correct.

JUDGE MILLER: Twenty-four. All right. Now since this is the first of the new Contentions, you have emphasized heavily the fifth factor, the extent to which the introduction of these issues would broaden the issues or delay. We would like to know as to this particular issues and then others as we go along, but this particular Contention, formerly 16 and now renumbered 9, what are the delay factors that you attribute to this particular Contention, so far as you can.

(Counsel for NCS Staff conferring.)

MR. SWANSON: Apparently on a relative scale this Contention would be of a moderate category in terms of delay or impact on the Staff's scheduling in terms of preparation of testimony and other matters that might be brought up by this Contention. The effect will be on the Radiological Assessment Branch's ability to accommodate discovery on other Contentions in their area and the review of input from the Applicants and, of course, their preparation of Staff documents.

So on a relative scale, I guess moderate.

JUDGE MILLER: All right. NRDC, do you wish now to respond to the objections to the admission of new Contentions as a group, if you wish to address the comments of Staff, and then, with particularity, former

Contention 16, presently renumbered 9.

MS. WEISS: Yes, Mr. Chairman. Before I get into that we just want to make the point on the record, before we go too much further again -- we made it several times at the last prehearing conference -- that the schedule for this hearing is dependent upon the decision not to recirculate the final environmental statement.

JUDGE MILLER: We understand that.

MS. WEISS: And predicated upon that I have provided a general statement of how we believe the standards for Contentions ought to be interpreted and I will not repeat it all.

Generally, the Contentions fall into two categories. One smaller category are Contentions that relate directly to the 1977 FES, which directly challenged conclusions in the FES. It is the Applicant's and Staff's position that if we did not raise those Contentions on the February 1970 FES before this proceeding was terminated in April that the door is forever closed.

JUDGE MILLER: The proceeding was not terminated. It was suspended. It was a carefully worded order, if you recall. Okay.

MS. WEISS: Pardon me.

JUDGE MILLER: That is all right.

MS. WEISS: We think that that is an unreasonably inflexible position. It seeks to overlook completely what was happening in the winter and spring of 1977. Certainly NRDC was well aware of the impending deferral of the project and one important thing that it overlooks is that NRDC had sent out discovery on the FES within the time limits provided by the Board and had received no answers.

Now the party who did not provide us answers in 1977 says that we were obligated to amend our Contentions before they had even answered our interrogatories on the FES. Frankly, we think that is a preposterous position for them to take and we have provided you some cases which suggest that it is the obligation of an Intervenor, when raising Contentions on a Staff licensing document which is issued mid-stream, to particularize his contentions via discovery before having them admitted, and we think that we were clearly entitled to wait for answers before we added new Contentions on the FES.

JUDGE MILLER: Does that argument apply now to the Contention number 9, the consideration of liquid radioactive effluents?

MS. WEISS: No.

JUDGE MILLER: We will bear that in mind, but we wish now that you would focus and target yourself toward the present Contention 9 because there I did not recall that the situation prevailed.

MS. WEISS: Contention 16, which has been renumbered 9, Mr. Chairman, is a situation where events since the suspension of the proceeding prompted NRDC to look back at an issue which had not really grabbed our attention in 1975 and, in addition, there has been a change in the regulations in Part 20, a change on June 6, 1979, to extend the ALARA principle to all licensed and unlicensed activities where it applied previously only to license activities and to to extend all of the limits in part 20 to licensed and unlicensed activities.

In any case, the publication of the 1981 environmental impact report by the Tennessee Synfuels Association prompted NRDC's experts to reexamine this question and in our view the evidence that has been uncovered to date suggests that there are levels of radioactivity in the river sediment near the barging area for the CRBR.

JUDGE MILLER: Now you have heard and read the objections that have been raised by the Applicants and Staff to that portion of the justification of your Contention. It might be well if you addressed yourself

now with specificity to their replies to you.

MS. WEISS: Well, we have conceded that when we went back to look -- what we did, taking the TSA report, it showed measurements at one-half mile intervals. We went back to look at the ER and we saw a figure which showed the results of testing at two-mile intervals. That is figure 2.8-6.

And that prompted us -- the wide swings in data prompted us to look further. The Applicant is correct that figure 2.8-11 in the October 1981 amendment does show quarter-mile intervals data. We overlooked that the first time we went back. I am not even sure whether it was inserted in our version of the ER.

JUDGE MILLER: I do not think it was, but at any rate it turns out that the Applicants apparently were correct that the sampling were at still shorter intervals, namely one-quarter. Isn't that right, as they contend?

MS. WEISS: The October 1981 amendment does show sampling at quarter-mile limits. However, I point out to the Board that if you go back to consult the reference, the data has not been published.

JUDGE MILLER: Well, whether or not, if what alerted you was your belief that the intervals were greater than you had realized and then further scrutiny

indicates they are not greater in fact but they are lesser, doesn't that sort of blunt the basis for your attempt to inject this as a new issue?

MS. WEISS: Well, further scrutiny indicates that there were samplings at shorter intervals, but further scrutiny makes the question of whether -- what the magnitude of the levels of radioactivity are in the sediment even a stronger question.

It is true that the reason we looked originally may have been because we did not -- we misread a document or did not find the latest -- the latest figure, but that does not obviate the fact that when we did look we found that there seems to be a significant public health question, an ALARA question, raised by the levels of the river sediment.

JUDGE MILLER: Do you think serendipity set in to help the Intervenors in this instant?

MS. WEISS: Serendipity? I do not know. I do not think it is serendipitous if there are high radioactivity levels in the sediment.

JUDGE MILLER: It was not what you were looking for. You found it when you were looking for something else and it turned out not to be there.

MS. WEISS: Well, we were prompted to look by a difference in measurements, but when we looked we

found the information that we think raises a significant public health question, a significant ALARA question.

And if I could just respond to the claim that this would significantly broaden the issues, it is true that every new issue broadens the issues, but I think it is apparent generally that the Staff's position is inflexible with regard to any new issue, any modification. It opposes everything. It simply does not want any new issues in, irregardless of the significance of the question.

I think that the factor that they tend to ignore throughout all of their arguments is the need to develop a sound record on one of the most important licensing cases that has come before the NRC in many, many years.

Now when the Staff tells you that adding an issue may make it more difficult for them to meet an arbitrary deadline, that is because they have not assigned sufficient staff to this case. I do not know what they have to do that is more important, but their failure to assign sufficient staff to complete their review and get ready for the case should not be used to the detriment of NRDC.

I also think that they overlook the fact that this proceeding has been dead for five years, through no

fault of ours, moribund for five years. Had it been a new application in 1980 or 1981 there would be no question that we would be able to raise these issues. They are sufficiently specific and they are sufficiently pertinent and relevant, so I do not think that the Board, under these circumstances, ought to give a great deal of weight to the factor of this raising a new issue.

JUDGE MILLER: Well, you are raising a number of new issues and the Board has to follow the regulations, of course, which have the five factors when you have a non-timely or untimely raised issue by way of contentions.

Now the Board does not mechanically believe that every new issue is, per se or automatically, an untimely issue, but in order to determine whether or not it is, which I believe is the Staff's position at least so far, we have to find out what was available to the Intervenors and any other Intervenors -- there are other Intervenors not present today -- at the time these Contentions were being gone over.

They were the subject of considerable study by the Commission itself, as well as by the Appeal Board. These Contentions, these pleadings, which is what Contentions are, were very thoroughly gone over over a period of several years prior to the action taken to

suspend the proceedings in the spring of 1977.

There has been a great deal of discovery, as NRDC points out, and it participated in a number of it. We can tell by the fact that you filed the 23rd set of interrogatories. We know very well that 23 comes after 22, for example, so we cannot just ignore those matters.

We are giving you flexibility by not saying that every new issue is necessarily untimely, but we certainly expect you to show why it is not untimely, and here it would appear that the Staff and the Applicants have given some pretty significant factors as to what was known to the Intervenors at the time that we were within 60 days of starting the LWA hearing in 1977.

Now we have heard you, but I am not myself satisfied -- I have not conferred with my fellow Board member -- that you have really persuaded us as to the objections that been here articulated by the Applicant and by the Staff, but we want to be sure that you have full opportunity so to do. We want you to know the framework in which we, as a Board, view these matters.

MS. WEISS: Would the Board permit Dr. Cochran to speak briefly to these matters?

JUDGE MILLER: Yes. I think before Dr. Cochran starts, Judge Linenberger has a question or observation or whatever it may be.

JUDGE LINENBERGER: Well basically, this is a question about the meaning, the meaning of thrust of this contention, and before Dr. Cochran starts to address further the intervenors' position here, I would like to get a couple of things clarified as to what the contention means. It may impact the decision about admissibility.

On page 18 of intervenors' revised statement there is a paragraph lettered (d) at the bottom of the page that I find a bit confusing. Does the paragraph (d), as intervenors propounded, allege that applicants will not meet the "as low as reasonably achievable objective" in their discharges to the river?

DR. COCHRAN: No, sir.

JUDGE LINENBERGER: Is it then -- you say the answer is no. Let me take you one more step, then. At least is it intervenors' position then that the applicants will meet the "as low as reasonably achievable criterion," but that release added to what may reside in sediments, radioactivity that may reside

in sediments, that added situation is what the intervenor is unhappy about?

DR. COCHRAN: What we are -- we have a separate contention that goes to the ALARA issue that is part of 8 with respect to the operation of the facility.

JUDGE LINENBERGER: You have an ALARA issue in this one, it is page the bottom of page 18.

DR. COCHRAN: What we are addressing here is simply that the activities associated with barging and storing up the sediment in the river and possible stream channelization, are inconsistent with the ALARA principle because the alternative of bringing the equipment in by rail would not incur these additonal risks. It would not stir up the activity.

JUDGE LINENBERGER: In other words, you are saying the answer to my question is yes, that your concern is that the "as low as reasonably achieveable" releases when added to activity that may reside in the sediment in the river, that the sum of those will be larger than you feel is appropriate.

DR. COCHRAN: I am suggesting that we set aside any routine releases from the plant for purposes of addressing part (d) of this contention. I only ask the question, are you reducing the exposures as low as reasonably achievable by conducting the construction

activities utilizing the barge traffic and so forth, or is there a better approach, for example, by bringing the equipment in by rail and not building a barge platform and not channeling -- dredging the river, and not stirring up the river sediment with any barge traffic.

JUDGE LINENBERGER: All right, sir, but don't you see the problem that exists with the way you have framed this contention? You have talked about effluents that the applicant is going to discharge. You used the word "effluents" and you say your concern is at a time during the construction phase when there will be no effluents, so you are not really concerned about effluents, despite the fact you say you are. You are really concerned about stirring up sediment during the construction phase.

This contention does not really, as I have read and perhaps show me where I am wrong, say that it is confined just to the construction phase. The way it is worded I see it applying during the operating phase when the applicant is releasing certain effluents. Now, are you restricting --

DR. COCHRAN: I understand the difficulty. Perhaps it is not worded properly. If you go back and read the preamble --

JUDGE LINENBERGER: Yes, I have read it.

DR. COCHRAN: We are talking about effluents in White Oak Creek, and those are the -- I am talking about the radioactivity in the sediment. I apologize for not stating it in a way that is perfectly clear, but these effluents are the effluents that are already there from other activities.

JUDGE LINENBERGER: They are not applicants' effluents that you are worried about?

DR. COCHRAN: The applicant is the Department of Energy. It is their effluents, they put them there.

JUDGE LINENBERGER: Yes, sir, but Clinch River is the facility we are dealing with. And when you use the word effluents, I have to think of it in terms of what is before us.

Now, I think I have heard you say -- and I would like to get agreement with you -- that in the context of this contention, you are not talking about effluents from the Clinch River operation; you are talking only about the construction phase storing up sediment, is that correct?

DR. COCHRAN: That is correct.

JUDGE LINENBERGER: Okay, fine, thank you. I did not read that from the way this was worded. That is all I wanted to understand.

DR. COCHRAN: I would --

JUDGE LINENBERGER: That takes care of my problem.

JUDGE MILLER: I think you had asked, Dr. Cochran, to address yourself to some other aspect of our discussion.

DR. COCHRAN: I think we may have clarified it in this last issue. I do not wish to address the timeliness or anything, but just what I see as the problem here, that I think whether or not you admit this contention you should be looking at it in any case. If you look at the figure in the ER which is Figure 2.8-86, where the data spread is larger than the data at the initial two-mile intervals, you see these wide swings in the data.

The question that immediately is raised in my mind is, do you have enough sampling points along the river to know that you have not missed peaks inbetween these sampling points, and that you will also, after this plant is operating, you will be able to distinguish the activity, you know, in a monitoring sense -- the activity emitted from the Clinch River reactor, from the activity emitted previously from White Oak Creek or everytime there is some sampling the applicant or the operator of the plant, is he simply going to say no, that did not come from Clinch River, that came from

upstream at White Oak Creek. And therefore, we are not releasing abnormal amounts of activity.

So I think it is important to have a careful sampling of the river, not only with respect to the barging activities but with respect to -- because it will impact the monitoring capability during the operation of the plant.

Now, the thing that was perhaps most troubling to me and which is in -- was this ORNL 37.21 report that Mr. Edgar mentioned. And on page 86 of that report, it is a discussion of some previous channeling activities in the White Oak Creek above the Clinch River site. And they channeled the stream, dredged it out and dumped the dredged material on two islands, Scrub Island and Jones Island. Then they went out and measured with a survey meter the activity levels on top of that dredged material, and it is four and a half rems per year.

That is a sizeable amount of activity, and so my concern would be is your sampling good enough so that you know when you start dredging downstream to allow these barges to come up, and dredging in the area where you are going to make the barge port, are you going to be dumping activity that is going to give you exposure levels in that range at the Clinch River site. And these impoundment ponds or wherever, and I just do not

think that is consistent with good health physics practices, if you can barge in the reactor vessel and the other reactor vessel and the other components -- I mean if you can rail them in rather than barge them in. And so I think you ought to be looking at that.

Now, they claim they have new -- these additional sampling areas, yet they have not -- I have not seen the raw data yet. There is some of them that if you look at their figure that Mr. Edgar refers to, Figure 2.8-91 in the ER, you have some datapoints that he says are greater than 100 picocuries per gram with no limit. You do not know what the upper limit would be of the activity in those samples, and the data is not published yet. So it is a kind of wait and see approach whether he is going to have an adequate sampling capability or not.

And furthermore, these high, high data points are in the area where the barge traffic will be. They are just upstream or just downstream from the proposed barge port.

JUDGE LINENBERGER: Dr. Cochran, you used the term good health physics practices. You also quoted a number of four and a half rem per year which, if my health physics background serves me right, is a dose rather than activity level. Is that four and a half rem

a dose that a person would get if he laid on this pile for -- slept on this pile continually for a year, or what is that dose that you quoted?

DR. COCHRAN: That does is the dose including natural background radiation, so it is, in effect --

JUDGE LINENBERGER: To whom doing what?

DR. COCHRAN: To a person that would --

JUDGE LINENBERGER: That would sit on --

DR. COCHRAN: That would be standing on the pile for a year.

JUDGE LINENBERGER: Thank you.

DR. COCHRAN: It is an hourly dose multiplied by 8600 and something.

Good health physics practices -- when I say that I mean the ALARA principle applies.

JUDGE MILLER: Is this ALARA to the construction or is it ALARA to the guy that stands there for a year? I guess I am thinking of contributory negligence in this sense. I will withdraw that.

MR. EDGAR: I really think the point is being missed here. We have basically -- if you go back to Section 2.8 of the ER, radioactive sediments in the Clinch River were not a matter that was casually mentioned. There are pages upon pages of discussion. There are tables, charts, there was extensive monitoring

to baseline that river as part of the pre-construction monitoring program.

If anyone reads the ER, they cannot come away without understanding that there was careful monitoring of the Clinch River sediments. It is almost like being hit in the face by a board. You cannot miss the fact that NRDC was put on notice on this issue. I have heard Dr. Cochran. I cannot -- I still have not heard his reasoning as to why the issue was not raised. We are talking about good cause here. If good cause is to have any meaning, it is non-existent here.

The report that Dr. Cochran mentions, as to which the activity and the doses became overlapping, that in fact was a predecessor report to the comprehensive report that was referenced in, and the data from which was displayed in, the ER.

(Board conferring.)

JUDGE LINENBERGER: One question to you, Mr. Edgar. I should know the answer to this but I am not sure I do. Does applicant have to get an NPDES permit?

MR. EDGAR: Yes.

JUDGE LINENBERGER: Does that permit have any provisions with respect to activity levels?

MR. EDGAR: No. But the NRC staff -- and you can look at the FES and the ER -- there is a requirement

to have a pre-construction radiological monitoring program, a construction radiological monitoring program and an operational radiological monitoring program. That picks it up definitively.

JUDGE LINENBERGER: Thank you.

(Board conferring.)

JUDGE MILLER: To what extent did the FES go into this matter? We have had the statement for the record by Mr. Edgar as to the environmental report, the ER. Now, what happened then when the staff brought to bear its analysis in the FES, if there was one filed?

(Counsel for NRC staff conferring.)

JUDGE MILLER: I think the Board is ready to rule on this. We will relieve you of the necessity. We presume you will have this and other matters in your mind as you continue analyses. The Board feels that as to this contention newly-numbered 9, that good cause has not been shown.

We have informed the intervenors that we were not going to rule mechanically that every newly-proferred contention is automatically untimely. It is not necessarily. It may be, but it is not necessarily, and we therefore have given you the opportunity here and will on the remaining newly-framed contentions, the opportunity to show good cause and the

other factors. But remember that good cause does, in a sense, get into factual matters.

It is not the rule that a pleading can just state fairly generally and leave it to the discovery process to flesh it out. We feel that the area now we are in of new contentions, that there is a requirement both under our rules and the Board in executing those rules requiring the showing of good cause, which in part is a factual matter, we just do not believe that the showing necessary to permit this contention has been shown. We will therefore deny the request.

It take it it is in the form actually of a motion for leave to file new contention, because in accordance with the regulations that it has been considered, and this contention will therefore be denied.

MS. WEISS: Can I ask the Board just a housekeeping question?

JUDGE MILLER: Sure.

MS. WEISS: This is the first one that has been renumbered and then denied. I am just wondering when we provide you with a final --

JUDGE MILLER: I can tell you the quick answer. Nine has now vanished. We renumber so we could consider it, so you will have the record now for appeal purposes. It may therefore refer to its prior original

designation that you had given it because as far as the Board is concerned, it is no longer a contention. It remains in the record, but as far as the Board is concerned there is now no contention 9.

MS. WEISS: So the next --

JUDGE MILLER: The next one which is cognizable or viable will be 9, whatever it may be originally.

We now come to originally numbered contention 17 which gets into the matter of the demonstration, according to the intervenors, of sufficient fuel to be available for the Clinch River breeder reactor. It has been opposed by both applicants and the staff on the grounds that it goes into matters which are proscribed or removed from this Board's consideration by virtue of the commission's earlier ruling as to the scope of contentions which are permitted, which are within the jurisdiction of the Licensing Board.

I would say that there appears to be considerable merit to those contentions. We will therefore not ask that those arguments be repeated, but we will go directly now into asking NRDC to show us why this question of available fuel is properly before the Board in light of the commission's earlier decision.

MS. WEISS: Let me just quote for the Board

the question that was specifically deemed litigable by the commission in the earlier decision. And it is at page 92 of that decision. Quote, "The likelihood that the proposed CRBR project will meet its objectives within the LMFBR program 'a benefit in the NEPA cost-benefit analysis' is an issue relevant to this proceeding."

On its face, that is the contention. Neither applicants nor staff have demonstrated that sufficient fuel would be available for CRBR operation to enable the CRBR to demonstrate the objectives of the LMFRB program and remain in operation for a sufficient length of time to justify the project.

It seems to me beyond dispute that that is precisely the question which the commission left to be litigated by this Board. The likelihood that the project will meet its objectives, that is -- we crafted the contention so that it would fit precisely within that issue, and it seems to me clear that it does do that.

JUDGE MILLER: Well, you might consider the quotation as set forth on page 22, I guess, of the applicants' wherein the commission said that in deference to the basic objective of the Act is required of the commission and its components separation of

responsibilities so as to avoid undue interference with DOE's overall planning functions. If nothing else, the Act makes clear that we must decide the present issues so as to put the Nuclear Regulatory Commission in the position of scrutinizing afresh the judgments on long-range energy research and development issues made by the agency, to which such judgments were primarily confided.

It is therefore argued by the applicants and the staff that the assertion of this issue as to whether or not there would be sufficient fuel is really a programmatic or planning issue which is outside the permissible scope of this proceeding, and that the question of the availability of fuel for Clinch River or any other, I suppose, is a matter relating only to the judgments of DOE as to national defense programs, breeder reactor programs and so forth, which must be taken as a given under the commission's rule.

MS. WEISS: It seems to me that the only thing that is taken as a given is that that objective of the LMFBR program is the definition of benefit. And that is clearly the commission's decision, rather than need for power. The likelihood that the project will meet the objectives as set out by ERDA, DOE -- that is the given. I mean the given is that the program is a good.

That is the question that we are not allowed to argue.

The likelihood that it will meet that program is an open question. We are not raising issues about the wisdom of the LMFBR program. We are only raising a question about the likelihood that the breeder will achieve the objectives which are stated for it in that program.

JUDGE MILLER: You are getting programmatic now.

MS. WEISS: No, no. I am saying we are taking that as a given. We are taking the definition of the program as a given. We are only questioning the likelihood that the CRBR will achieve the objectives defined in the program; we are not questioning the program.

JUDGE MILLER: Let me get you straight. What is it you mean by the program? I think you are using it in a different sense from the programmatic objection.

MS. WEISS: The LMFBR program, the research and development program of which the breeder is a part. We cannot question the wisdom of that program or that it is a good program or that it is a benefit. Those are the givens that are off-bounds under the commission decision. What is clearly in bounds is the likelihood that the breeder will achieve those objectives as those

objectives are defined by ERDA.

JUDGE MILLER: Aren't those objectives research and development?

MS. WEISS: Absolutely. And if it cannot operate, it cannot achieve those objectives. And if it does not have fuel, it cannot operate.

JUDGE MILLER: How long does it have to operate or have fuel? Does it have to be for the life of the plant, as you seem to be contending?

MS. WEISS: No, I think that is an open question.

JUDGE MILLER: You contend there is no fuel available?

MS. WEISS: We contend there is insufficient fuel available for it to be able to demonstrate the maintainability, economic feasibility, et cetera --

JUDGE MILLER: Now you are getting into other matters, aren't you?

MS. WEISS: Excuse me?

JUDGE MILLER: Now you are getting into other matters, aren't you?

MS. WEISS: Not at all, not at all.

JUDGE LINENBERGER: Well, Mr. Chairman and intervenors, let me just note here what we see as a stumbling block in this contention. The comments you

have made in support of admissibility of the contention really go to the lead-in paragraph at the top of page 19 of your revised statement. That lead-in paragraph is not followed by the words "for the reasons that". Therefore, the Board construes that subparagraphs (a), (b) and (c) are indeed parts of the contention.

If that is an improper construction, please advise us, but as it was laid before us, that is the way we construe it.

Now, we see subparagraphs (a), (b) and (c) regarding availability of fuel and possible competing of fuel with DOE requirements and other requirements for plutonium as being completely separable considerations from the likelihood of the CRBR meeting the objectives of the LMFBR program. They are separable considerations.

The first paragraph standing alone is, indeed, consistent with the commission's order of August 1976. But the three subparagraphs appear to us to be completely separable considerations, and you have not argued those considerations. You have only argued the first paragraph. We have no problem with the first paragraph as such as to being consistent with 4 NRC 67. The problem we have is with the subparagraphs.

MS. WEISS: We would be willing to put in "for the following reasons." That would not change our

intention or our meaning.

JUDGE LINENBERGER: You have not put them in.

MS. WEISS: I am not sure that that --

JUDGE LINENBERGER: I you are moving to amend the contention, let us hear that, too. But we are discussing the contention as you have presented it to us.

MS. WEISS: If the Board believes that that would make the difference between admissibility or inadmissibility, we would move to amend the contention in that way. It would in no way change what we intended.

JUDGE LINENBERGER: Well, we are not sitting here coaching you as to how you should frame your contentions. We take it as framed, and that is our observation on it. So that is really all I have to say right now. I have explained what our problem is.

MR. SWANSON: Mr. Chairman.

JUDGE MILLER: Yes.

MR. SWANSON: Excuse me, I would just like to add a point here, since we are talking about the commission's decision and its interpretation just where the admissible contentions lie. Even were we to add the words "for the following reasons", I believe the objections that have been stated thus far equally are applicable. The introductory paragraph is concerned with the availability of sufficient fuel to enable the

CRBR to demonstrate its objectives.

The staff would note that an earlier proposed contention of the intervenors, contention 11 which is set out in full in footnote 6 of the commission's August 1976 decision, and particularly subpoint (c), the availability among other things of a breeder reactor fuel cycle to support the CRBR or commercial LMFBR economy, that was a contention which was physically ordered to be thrown out by this commission.

Clearly, the issue has already been decided and, of course, this Board did, in accordance with the commission's decision, throw out that contention. I think adding the words, "for the following reasons" make this contention no more a viable contention which is within the scope of this proceeding.

MS. WEISS: If I may point out to the Board, that does not fully state the contention that was dropped -- that was stricken by the commission. It leaves out the crucial language. The language that was stricken was "the availability, cost and benefit of a breeder reactor fuel cycle to support the CRBR, or a commercial LMFBR economy." And that came out when the commission said you cannot look into the programmatic questions.

MR. SWANSON: The point is, of course, that

the whole contention went out, the availability of the cost, the benefits, as well as subpart (b) which dealt with uranium supplies.

MS. WEISS: It seems to us if you cannot fuel the breeder then it cannot achieve its objectives. We do not care what its objectives are, DOE can define them in any way that they wish, and that will be taken as a benefit. But if you cannot run the thing, it cannot achieve its objectives. It would be the same as if you could not get steel to build the vessel. If you could not build it, it could not achieve its objectives.

JUDGE MILLER: Isn't that a judgment, a matter of judgment, as the commission used the term, and isn't it a judgmental matter that is left to DOE or DOE or others, not to the commission?

MS. WEISS: I do not see, if you say that this issue is out, what issue is left then, when the commission left -- specifically left open the question of the likelihood that the CRBR will meet the programmatic objectives.

JUDGE MILLER: Design and location I suppose are obvious things. Alternative design, alternative sites. Those are the matters I suppose that were left open. I certainly do not think that we are going into availability of steel, its impact on national events,

whether or not we have enough fuel. Those do not seem to be matters that are cognizable when we are looking at this Clinch River breeder reactor.

On page 92, as you know, of the decision, the commission set forth what we were to take as givens, to be assumed as established. I guess they put it a little more elegantly at that point, which includes a need for a liquid-metal fast breeder reactor program, including its objectives, structure and timing; the need for a demonstration to scale facility to test the feasibility of liquid-metal fast breeder reactors when operated as part of a power generation facility in an electric utility system, including its timing and objectives.

MS. WEISS: But the commission left open two levels of issue. It said all site-specific, plant-specific issues are open. Those are the issues which the chairman just described. We go on under our NEPA responsibilities, and given all of the limitations which the chairman read -- that is, we may not inquire into the wisdom of the program ; we take the program as given, we deem the program a benefit. Nonetheless, the commission under its NEPA obligations just look at whether the CRBR is likely to meet those objectives, and that is a second level issue beyond the site-specific, plant-specific issues.

JUDGE MILLER: And that includes the availability of fuel, whether it be for the operation of an experimental or demonstration scale, or one year or two years.

MS. WEISS: If that is the reason why the breeder is unlikely to demonstrate its objectives, if that is the factual predicate, then yes, that is what this Board has to look at. I do not see it would be any different if we came to you and said there is not enough steel to build the vessel.

JUDGE MILLER: Do you think we are going to go into this limited work authorization and then the subsequent, if there be one, construction permit proceeding? Are we going to go into such factors as -- if you believe that they would be open to question -- the availability of steel or the collective bargaining agreement to be made or how we stand with reference to dealing with Japan? These seem to us to be large issues, wholly beyond the scope of this proceeding.

MS. WEISS: We have not raised any of those issues.

JUDGE MILLER: We know, but we do not see that they are very much different. Do you want us to start counting the availability of fuel? What kind of fuel are you talking about?

MS. WEISS: The fuel that is required to fuel the CRBR.

JUDGE MILLER: Well, what is that?

MS. WEISS: That is largely plutonium.

JUDGE MILLER: All right, so we are talking about plutonium. Now --

MS. WEISS: Just because we are talking about plutonium and plutonium is used for weapons, and it may be an uncomfortable question to open -- does not viciate the fact that it goes precisely and directly to a question which this commission left open as part of its NEPA obligations.

JUDGE MILLER: I am afraid the Board does not agree with you as to what is left open. When we look at (a) according to DOE policy, the need for plutonium for the U.S. weapons program takes precedence over the need for plutonium for the liquid-metal fast breeder reactor program. We just do not think that we are competent or desirous of going into that matter. We think it was taken from us by the commission's rulings and we think that it is an effort to go wholly beyond that which is the proper scrutiny of this particular plan, this particular site, this particular Clinch River breeder reactor.

So, we are going to sustain the objections to

contention 17 almost as a matter of law, frankly. And we will not permit -- we do not leave to the intervenors to file contention 17 dealing with the fuel question.

All right, we proceed now to number 18, which does get into quality assurance and other matters. Eighteen is objected to on the question of timeliness and other matters, other reasons why the applicants and the staff also oppose the acceptance of the contention for litigation. We will hear from applicants, staff and then the intervenors, please.

MR. EDGAR: One initial point of clarification which relates to Judge Linenberger's earlier comment. We do have this open question that we are obligated to get back to the Board on on the scope of the LWA, and I should have some resolution at the break, I hope, if I can contact our management. That has a bearing, obviously. Judge Linenberger foreshadowed that question, but I think there are other considerations that the Board needs to take into account.

The first is that even if you go to an LWA-2, which is limited to the base mat, you still have very specific limits on the scope of examination of the QA as it would relate only to the steel and mat placement. But even beyond that, we think there are two essential questions that the Board should consider.

The first is what is the new information here, and more importantly, what is the nexus of that new information to CRBRP and the Clinch River QA program. It is one thing, as Intervenors have done at pages 21 and 22 of their response to our objections, to say, well, there is a widespread, broad industry problem here in the QA area, and then to say, well, Clinch River is no different from anyone else in the industry, ergo the contention ought to go in.

In our judgment, that totally lacks

specificity and basis. We would not have any means of preparing to confront that contention. We believe that the Intervenors are obligated to show two things: new information which relates to Clinch river in the QA area, and secondly, to provide sufficient particularity in regard to this contention that there is a reasonable basis to prepare to meet the issue.

There is a significant problem of a moving target if one merely cites back in the contention the regulations. It merely says in a broad sense the Applicants will not comply with the regulations. That in itself is not sufficiently particular to give us fair notice of what the issue is. In any event, we believe that this issue, acceptance so far as it would be qualified by the point I raised earlier in connection with Judge Linenberger's comment, this issue is not necessary for any broad-scale inquiry in regard to an LWA.

MR. SWANSON: We have relatively little to add. The argument set forth by the Staff in its pleading agrees with that just described by Mr. Edgar, and that is that there appears to be no new information that the Intervenors are setting forth to substantiate good cause, and indeed, if you look at their response to objections, they do not argue that there are new

requirements, merely that there is an increased awareness to the Staff's understanding.

This awareness has manifested itself in an increased inspection effort, but to date there have been no changes in the requirements for the quality assurance program that would be part of the review of the Staff of Clinch River. If such a change were to be made, then we would face that issue at that time as to whether or not good cause exists, but as of now, good cause simply has not been asserted for adding a contention on QA at this time.

The same requirements apply now as before, and this is a contention which could have been raised at any time prior to the suspension of hearings.

JUDGE MILLER: Intervenors.

MS. WEISS: Yes, Mr. Chairman. I am sorry to have to make the record a little confusing, but before I respond on what is numbered Contention 18, I would like to make a formal request to amend the language of Contention 17 and then have the Board rule on the amended language if they would.

We would like to amend the language of Contention 17 to add the language "for the following reasons:" to the end of the first paragraph.

[Board conferring.]

JUDGE MILLER: So that you may have your record, leave will be granted to the Intervenors to amend formerly numbered Contention 17 of the revised contentions, revised statement of contentions and bases filed March 5, 1982 by adding at the end of the first paragraph -- changing the period to a comma -- the following words: "for the following reasons:".

The amendment is allowed. The proposed or proffered contention reads as amended and the Board adheres to its ruling that the contention will not be allowed.

MS. WEISS: Thank you, Mr. Chairman.

JUDGE MILLER: You are welcome. Now, do you wish to address --

MS. WEISS: Yes.

JUDGE MILLER: Okay.

[Laughter.]

MS. WEISS: On the question of whether we have cited new information, I would simply argue to the Board that we are not required to cite new information; what we are required to do is to establish good cause. One way to do that is to cite brand new information, new facts that have come to light, and another way, I think, is to point, as we have in this contention, to developments industry-wide which show pervasive,

consistent failures of QA.

Essentially every time the Commission has looked, the NRC has looked in any detail at the quality assurance of any particular point in the past couple of years, they have found frightening, pervasive failures on QA. It may well be that somebody who is trained in the nuclear industry would have known in 1975 the state of quality assurance. We did not and we do not think we should be held to that standard of knowledge. As a practical matter, the extent of this problem has just come to the attention of the public.

As far as the claimed lack of specificity, I think that we have been as specific as we could reasonably expect to be at this time. I really do not believe that the Applicant or the Staff is in any genuine doubt about what they have to show as far as notice pleading goes. They have to show that the QA program meets the Commission's rules, presumably that even if the specificity stopped at this stage, that is what they would show.

We think that we have shown enough to establish a threshold question about the abilities of the Applicants and the Staff to ensure conformance to QA. We do not question that this is not an LWA-1 issue except if we get into LWA-2, and then there are some

limited questions about the work that is important to safety done within the scope of that. But this is our only chance to get in issues relevant to the construction permit too.

So, you know, this is our one shot at it, and whether it is an LWA-1 or not, it does not matter, it seems to us.

[Board conferring.]

JUDGE LINENBERGER: A question with respect to the last paragraph on page 19, which concludes "or that such program would protect the public health and safety adequately even if it complies with NRC requirements."

Now, I can fairly directly read that to say that irrespective of meeting NRC requirements and quality assurance, it is not good enough, and it is but a short step from there for me to say that in essence that statement is challenging the adequacy of NRC requirements with respect to quality control.

How say you to this?

MS. WEISS: We do not intend to challenge the adequacy of the requirements, but --

JUDGE LINENBERGER: Do you wish us to disregard that language, then, at the bottom of page 18? It is pretty explicit.

MS. WEISS: Yes, you are right.

JUDGE LINENBERGER: Are you moving to amend the contention --

MS. WEISS: Could we just confer for a few minutes?

[Counsel for Intervenors conferring.]

JUDGE MILLER: We will take about a ten-minute recess.

[Recess.]

JUDGE MILLER: Have the Intervenors, Applicants, et al been able to conclude their caucus?

MR. TREBY: We will go check.

[Pause.]

JUDGE MILLER: All right, we will resume the proceeding.

Ms. Weiss, have you had an opportunity to confer as you requested?

MS. WEISS: Yes, we have, Mr. Chairman. We have reviewed subparts (a) and (b) of the contention and we find that they are fully consistent with amending language of the first paragraph of the contention in the following manner. It is a contention numbered 18 in the revised statement of contentions and bases of Intervenors, NRDC and Sierra Club, and we would propose to include the following language immediately following the number 18: "Neither Applicants nor Staff have

demonstrated that Applicant's quality assurance program to be applied to the design, fabrication, construction and testing of the structure, systems and components of the facility is adequate to meet NRC requirements."

We would excise the following language: "or that such program would protect the public health and safety adequately even if it complies with NRC requirements."

JUDGE MILLER: Very well. We consider proposed Contention 18 to be amended in accordance with the description you have just read into the record.

MS. WEISS: Thank you, Mr. Chairman.

JUDGE MILLER: All right. Pardon me.

Do you have anything further to add, Staff? Mr. Swanson.

MR. SWANSON: No.

JUDGE MILLER: Very well.

Ms. Weiss?

MS. WEISS: I have nothing further, Mr. Chairman.

[Board conferring.]

JUDGE MILLER: The Board will deny the request for leave to file Contention 18. We will say that it is our understanding that quality assurance is, of course, a very important matter, that it is both covered by our

regulations and is an ongoing matter for both the Staff and the Applicants.

And we point out further that when we get into or towards the construction permit phase as distinguished from the limited work authorization, your proposed contention will be no more untimely than it is now because you have raised the question now as early as you felt that you should or could. And if you have any bases other than a simple blanket statement that there has been no demonstration, in other words, you will not be debarred by our denial of Contention 18 at this time and at this juncture.

You will not be denied automatically an opportunity to file some kind of contention going into these matters with the specificity and with the bases and good cause which the Board feels is lacking at this time.

We will now come to proposed Contention 19 regarding the plans for coping with the emergencies and the like. This has been addressed by both Applicants and Staff. Applicants point out that it originally contained only general language but there have been specific allegations in subparts (a) through (g) which were added during the process of negotiation.

Let me say on behalf of the Board we do

recognize the fact that the parties have in good faith met and attempted to negotiate and in some cases have successfully negotiated some of these contentions, language as well as matters of discovery. This is a practice that the Board had asked the parties to follow, and we commend you for doing it because it is very helpful both to the Board and, I think, to the proceeding itself.

Let's see who wishes to go first on this. Applicants?

MR. EDGAR: We have three basic points here. We think that the contention lacks in terms of particulars and a nexus to CRBRP. We further do not believe that this is the kind of contention which requires a full inquiry in connection with an LWA.

Lastly and our third point is that to the extent that it involves the question of the CDA, and likewise to the extent that NRDC contends on page 24 of its response that the rule here does not serve the purpose for which it was intended, then in that event it is incumbent upon NRDC to apply for a waiver under 10 CFR 2.758, which they have not done, and having not done so, the contention would be barred.

In short, we believe that the arguments here on Contention 19 run parallel to those in regard to QA

and that for similar reasons that contention should be denied.

JUDGE MILLER: Staff.

MR. SWANSON: I would like to expand on that, on the concerns previously stated, if I may. First of all, the introductory paragraph, as indicated, is directly a challenge to the regulations as presently worded. The wording "or that such plans would protect the public health and safety adequately even if they comply with NRC requirements appears to be -- I cannot see how it can be interpreted any other way than as a challenge to Appendix E to Part 50.

But those regulations simply do not go far enough to protect the public health and safety even if complied with. That is a direct challenge and, I would submit, an improper challenge to the regulations, and that part in and of itself is grounds for striking that portion of the contention.

JUDGE MILLER: That portion is even if they comply with the last clause in the first paragraph.

MR. SWANSON: It begins with "or." In otherwords, after the first comma in the introductory paragraph: "or that such plans would protect the public health and safety adequately even if they complied with NRC requirements.

I think in addition to reciting portions of emergency planning regulations, many of which were there in substance although they have been changed since 1970, we need to be concerned with certain key words that were left out of Appendix E to Part 50 when the subparts were drafted up.

Throughout Part II of Appendix E, which is the section of the regulations dealing with emergency plans at the construction permit stage, the emphasis is on the requirement for a description of preliminary analysis reflecting the need to include the various subparts.

Now, the subparts set forth in this contention, besides being, we believe, defective in that they merely restate the parts of the Appendix E without setting forth specific concerns, we believe leaves out some important elements of the criteria, the requirements in Appendix E, II, and that we need to constantly keep in mind that at the construction permit stage, all we are talking about is a description of preliminary analysis; we are not talking about a final plan, we are not talking about a plan that had to be ready for implementation, but we are at the preliminary stage.

Now, to the extent that Intervenors may argue that they could not be any more specific in their

subparts than to merely restate the regulations because of information that they have not had a chance to read, maybe the answer is that they are guessing that they are going to be getting an emergency plan which is defective and they just want to take a general shot at it now.

Now, it seems to me that perhaps they are also then guessing whether or not good cause has yet been established for raising the contention at this late date. Merely to restate a contention, we believe, is an inadequate manner of raising a contention. It does not provide the parties any basic for preparing specifically their review or their testimony, and we believe that the contention is fatally deficient on that ground. In other words, that the contention is vague, it lacks specificity required and that it merely restates the regulation.

Now, if we look at Subpart (f) as well, I think that is the only subpart that does not generally paraphrase or restate the regulation. There they launch off on a whole new area as to whether or not specific measures necessary to cope with a core disruptive accident must be factored into the proposed emergency plans.

Such analysis is not required by Appendix E, and we believe in this area too as well as in the last

phrase of the introductory paragraph, we have a direct challenge to the requirements set forth by the Commission in Appendix E, and we believe that an adequate basis has not been set forth for proceeding under 2.758 challenging the regulations in that regard.

These concerns, coupled with those set forth by the Applicants, we believe are sufficient to warrant the rejection of this new contention at this time.

JUDGE MILLER: You say "at this time." Suppose that in the future an emergency plan is prepared, filed, analyzed and so forth which the Intervenors believe for certain reasons to be inadequate or insufficient? Could they have an adjudication of such matters, and if so, how and when?

[Counsel for NRC Staff conferring.]

MR. SWANSON: Yes. I think the applicable standard is if on reviewing a new piece of information there exists significant new information which they could not have previously had and used to formulate a contention, then they should at that time raise the proposed new contention or modification of one and set forth in specificity as required by 2.714 with good causes for raising that contention at that time.

JUDGE MILLER: Why would they have to show good cause? By good cause, I assume you mean one of the

factors for untimely filed contentions; is that correct?

MR. SWANSON: Yes. I stand corrected.

JUDGE MILLER: If it is within the scope, then, and not previously reasonably available, it would not be untimely, would it?

MR. SWANSON: It would under your hypothetical. That would, I think, satisfy the first factor of good cause.

JUDGE MILLER: It would satisfy all factors because it would not be untimely, and the five factors pertain to untimely or nontimely contentions, do they not?

MR. SWANSON: The regulations require specifically contentions to be required at a specific time which is past.

JUDGE MILLER: Provided that the information is available, our cases hold. That is why -- I know there is a split in the staff on this. That is why when, for example, an FES is filed which for the first time fairly reasonably raises matters that were not there heretofore required to be anticipated by Intervenors or others, some Boards, at least, and probably including this one, have held that if a showing is made of either the new information, changes of circumstances or other matters, that the result is that

the application, the request for leave to file that contention thus triggered is not untimely. Not being untimely, you do not have the five factors, but you certainly scrutinize closely to see if the underlying factual basis is there and the availability, triggering of information and the like.

Now, does not the Staff accept that analysis?

MR. SWANSON: I think the analysis you were just describing is an analysis that can be performed for coming up with the same net result, but the fact remains that 2.714 requires filing at a time certain, which in any proceeding -- well, let's take this proceeding. It has passed. Now the same reasoning, I think, goes into your analysis as would an analysis specifically of the five factors, and the result would be the same.

JUDGE MILLER: I know, but I am not talking about the result now; I am talking about the method of analysis. For example, suppose there were a significant change in, departure from the plans for this particular facility, significant, substantial, announced a week from now. Surely you would not contend that Intervenors could not raise matters fairly admissible for the first time upon the change, would you?

MR. SWANSON: No, we would not. But I am saying that under your scenario they would have

satisfied the five factors for raising a contention.

JUDGE MILLER: Do you think that if there were a substantial, significant change in the design, which would be within the scope, therefore, of the information to be gained, which we take as a given by the Commission rules and so forth, that we would start worrying about the five factors? Do you think we would really be troubled much by that?

Now, the Staff has taken different positions on this question in different cases. I want the record to be fair to you in that regard, and there are two different views.

MR. SWANSON: I think the controlling factor is we cannot ignore the requirement under 2.714. I think the scenario you are pointing to represents a clear-cut indication where a petitioner would succeed, they would clearly have shown good cause for filing at that time and not before.

JUDGE MILLER: He would have been showing good cause. He would not have had available under my hypothesis a significant and substantial change made for the first time in the design of a liquid-metal fast breeder plant, Clinch River.

MR. SWANSON: Precisely.

JUDGE MILLER: Do you think we would worry

much about expanding the issue whether somebody else adequately represented the other factors of the five? Do you think they would be applicable as such, is what I am asking the Staff to take a position on, because if you are going to take that position, then we are going to have to make a ruling now.

We had thought that these matters could be left for future developments if they occurred, but if you are going to take the position now that you are going to have a timeliness and a five-factor test on matters such as emergency planning and the like, we may have to rethink our bases.

We do not think the staff should be too mechanical on this thing. We think in fairness to the public interest there should be a clear possibility in the event of substantial and significant changes that we do not have to parse everything and look at the five factors. If it is that clear and it is triggered by some action, whoever takes it, we think at that point that they should have the opportunity.

Now, if you are going to tell us that the Staff takes a different position, then we will have to factor that in to the way that we are approaching these suggested new contentions.

MR. SWANSON: No, all I am telling you is our

interpretation of the requirements of the Commission's regulations. I think in the situation that you mentioned, the Staff would probably stipulate that a contention should be admitted, and avoid the mechanistic process that you indicate.

JUDGE MILLER: Staff does not stipulate jurisdiction to a Board, now does it, any more than any other party. You can stipulate all you want, but it is a matter for adjudication and decision by the Board, isn't it?

MR. SWANSON: Very definitely. What I am saying is that rather than pressing for a point-by-point determination in the scenario that you presented, the Staff would probably stipulate that its position is that the five factors are satisfactorily accounted for by thge petitioner and that its position is that the new contention should be admitted.

JUDGE MILLER: Mr. Edgar, we would like to hear from you on this point because it does have implications for the future.

MR. EDGAR: Well, I would like to consider one other element of this, and I did raise it in my argument, but I would like to emphasize it if I could. One of the things that the Board posed here was when should this issue be considered, and in our judgment

this issue or set of issues, however described or pleaded, are unnecessary for an LWA. This is CP on a threshold basis, and --

JUDGE MILLER: We recognize that position. Our question then goes further, the next step that I think you should address post-LWA.

MR. EDGAR: And then you go to CP.

JUDGE MILLER: Wherever you go, wherever you are.

MR. EDGAR: Understood. So what we are talking about is another phase in any event.

JUDGE MILLER: Yes.

MR. EDGAR: And we are talking about deferring. In my judgment the contention should be deferred. It should be made more specific. We have stated those objections, but the practical solution here is to defer the contention, and I might comment there that we are on an exceptionally schedule here. The Board has put everybody on notice that there is no room for movement. Everybody has got to put maximum effort into this thing to meet the Board's end date.

JUDGE MILLER: True.

MR. EDGAR: If you take that constraint, and in my mind it is a very important, practical one, then we should not be considering contentions now and

undertaking discovery now which can divert the resources of the parties and the Board and detract from the objective of getting to these hearings and resolving the issues.

I think it is in Intervenors, the Staff and Applicant's interest alike to defer this issue until some subsequent phase. There is no point in expending anybody's resources now on a matter which is totally unnecessary to a position.

JUDGE MILLER: Let me inquire. First of all, the Board is not going to be in a position of drafting contentions. We have been told by the Commission we are not to do it and we are not about to do it. You know the arguments that have been made about this clause are that such plans would protect the public health and safety adequately even if they complied with requirements.

Is it your voluntary choice to do anything about this in this Contention 19?

MS. WEISS: Let me just explain that. That is intended to apply only to subsection (f). Subsection (f) provides the sole issue that goes beyond compliance with Appendix E. Our point in subsection (f) is that the emergency plan should take into account special measures that may be required in the event of CDA.

It is in some ways dependent on the result of the earlier contentions. In fact, it is largely dependent upon the result of the litigation of the earlier Contentions 2, 3 and 4, I think.

There has been an argument made that this represents a challenge to Appendix E. We have responded to that with particular reference to the documents which form the basis for the drawing of the ten-mile line, the ten-mile EPZ incorporated in Appendix E, and those are cited in the rule itself.

That document was a document which considered various accident sequences for light-water reactors and established a planning basis for drawing EPZs based upon solely the consideration of LWR accident sequences and the application of some judgment beyond but clearly was limited to consideration of LWR sequences.

Our argument would be that (f) is not a challenge to the rules because it raises issues that were explicitly not considered when the rule was adopted. That is the argument as far as that goes, and that is the only section of the contention to which that language "even if they comply with NRC requirements" is intended to go.

JUDGE MILLER: That is an effort as residual cleaning. Our question is -- The Staff has raised the

question that if you attempt to inject the element of residual impacts, that you are in effect, although not expressly doing so, challenging the regulations.

MS. WEISS: We believe that it is the only way in which one can challenge the regulations, that is, if one asked the Board to resolve a question that was already resolved in the rulemaking, and this question was specifically not addressed and not resolved in the rulemaking. It did not look at what the appropriate EPZ should be for breeders. So there is nothing inconsistent with the rule in asking them to consider something that was not addressed or considered in the rulemaking.

JUDGE MILLER: That does not quite address the matter. Even if they comply with requirements, whatever they may be at that time, which now denotes futurity, you are still alleging as a pleading matter that even if they comply with NRC requirements, that that is a basis for a challenge. That is what you are saying.

That troubles us. I will be frank about it.

MS. WEISS: Well --

[Counsel for Intervenors conferring.]

JUDGE MILLER: I think you may have a Hobson's choice. We do think that the suggestion by Mr. Edgar, Applicant's counsel, does make sense because we are on a schedule for trial in August. The Board is inclined at

this time to defer consideration of this Contention 19, which would then be renumbered 9, but we are either going to strike that or you are going to withdraw it, so I might just as well put the matter bluntly for the record.

MS. WEISS: I would prefer to have you strike it.

JUDGE MILLER: It is stricken. Consider it stricken. Consider that the first paragraph, then, ends with the words "are adequate to meet NRC requirements.", period, and that the remainder of that clause or those clauses are stricken. Being stricken, Contention No. 19 is renumbered 9 and is deferred for consideration subsequent to the LWA evidentiary hearing and partial initial decision.

MS. WEISS: May I just briefly speak to that?

JUDGE MILLER: You may, but you are taking a chance. You ought to quit while you are ahead.

MS. WEISS: We do not have any problem with it being deferred if it is understood by the parties that we will have the opportunity to have discovery on it.

JUDGE MILLER: I am not going to bargain about it. It is deferred until then. There will be no discovery about it then unless it is tied into some other admitted contention. We want to have our record very clear, so we do not want to bargain; we do not want to have loose strings.

Now, if you want to confer with your colleagues, make your choice. Fine.

MS. WEISS: I am not asking to bargain with the Board.

JUDGE MILLER: Nothing is understood. It is deferred until after LWA. Period.

(Counsel for Intervenors conferring.)

MS. WEISS: I am sorry. I understood the Board to have ruled pretty clearly, so I do not have anything else.

JUDGE MILLER: We gave you -- in a certain limited area we gave you certain choices and wanted you to make your decision on them.

MS. WEISS: Then I am sorry. I do not understand what the choices were.

JUDGE MILLER: Well --

(Board conferring.)

JUDGE MILLER: Okay. We will consider that the record then is clear.

MS. WEISS: I do not want my client to be prejudiced because of my failure to understand something that the Board was saying. Could I ask your indulgence to explain to me what the choice was?

JUDGE MILLER: We thought that you wanted to confer with your associates, and that is what you have been doing for the last five minutes.

MS. WEISS: As to what question?

JUDGE MILLER: You were conferring about it, in part, the original choice that the Board gave you to withdraw voluntarily the portions going into residual matters. You said you would rather the Board ruled. The Board therefore ruled by striking it and declaring the rest was deferred.

There was some question you raised or one of your associates raised -- Mr. Greenberg, maybe you did -- as to what you are going to do in discovery. That is where you went off into conference. Where does this leave us in discovery. And you were going to talk, and

then you never came back.

Now, there is the state of the record as my memory gives it to you.

MS. WEISS: I see.

JUDGE MILLER: Okay.

MS. WEISS: Well, we just would want to make the point to the Board that the effect of the ruling is to preclude us from discovery on this issue, and we believe that that puts us in something of a Catch-22 situation, because that would be the way that we would develop the information that would enable us to present a contention with some greater specificity.

The reason why we cannot now is because there was no emergency plan. So far as I know there is none yet. But beyond making a plea to the Board that you allow us to have this contention in for the purposes of discovery. I have nothing more to add.

JUDGE MILLER: Maybe you misunderstood what we said about discovery. We said we are deferring it until after the evidentiary hearing and after the partial initial decision made on LWA. During that deferred period we do not intend to hear discovery or anything else pertaining to it unless it relates to some other admitted contention we have not had time to go through. It might be, but it sure will not be on the basis of

this Contention 19, now 9.

Now, what happens after that depends, I suppose, on many things.

MS. WEISS: We would have to --

JUDGE MILLER: The events, so on and so forth. So --

MS. WEISS: We would have to come back before the Board and make a request to have the contention admitted after the LWA stage.

JUDGE MILLER: The posture of it now is that it is deferred for consideration. Presumably anybody could make a motion to bring it to the Board's attention after the barrier of the time deferral or suspension.

Now, since in part you are seeking to challenge a plan that has not yet been devised, if I understand you, or at any rate circulated and so forth, it does seem that you might be a little premature in that sense. How do you know what is wrong with a plan you have never seen and neither has anybody else in that sense now?

MS. WEISS: Well, there is a threshold LWA question.

JUDGE MILLER: Yes.

MS. WEISS: On evacuability. Now, the licensee is going to have to come forward and make some

showing on that which it has not yet done.

JUDGE MILLER: We assume whatever issues are necessary will be covered. Let us put it that way. I think that issue is a very narrow one. This is not an island where you can practically without argument on the facts say thus and so, and it is either or is not totally incapable of some type of evacuation. But short of that I do not know how far we are going to get into --

MS. WEISS: It is certainly a much narrower question than compliance with the full requirements of Appendix E. But your obligation was to come forward with our contentions today.

JUDGE MILLER: You came forward. You have one deferred. Now, I suggested to you a while ago that if you want to keep drilling away on this, you are tempting the Board very sorely to strike the whole thing; and that is then when you start conferring again, and I do not hear from you for ten minutes.

MS. WEISS: You will not hear from me any more today on this contention I promise you, Mr. Chairman.

JUDGE MILLER: Okay. It is then deferred until after the LWA partial initial decision.

Now we come to originally designated Contention 20, CRBR accidents beyond the design basis. It is objected by both applicants and the staff.

Do applicants wish to go first?

MR. EDGAR: Yes. We have two basic points to make here. Our arguments are set forth at pages 30 all the way up through 35 of our March 19 filing; but let me draw the Board's attention to page 36 of NRDC's revised basis dated March 5th.

JUDGE MILLER: Page 36?

MR. EDGAR: Page 36. The discussion begins on page -- the bottom of page 35 and carries over to the top of page 36. It relates this discussion -- it provides the intervenors' basis for the admission of Contention 20. And the significant thing here is on page 36, and NRDC concedes the following: "While arguably this contention might have been asserted in 1977" --

JUDGE MILLER: You are fading on us.

MR. EDGAR: NRDC states the following: "While arguably this contention might have been asserted in 1977, it was intervenors' position, never ruled upon by the Board, that the FES was inadequate and should have been recirculated prior to the hearing."

Now, Mr. Chairman, that NRDC position was related to the question of national sites; in particular, NRDC's motion alleged that the DES for Clinch River did not give sufficient notice of issues as

to national sitings.

That FES recirculation argument is now being advanced to support the late filing of a contention that has to do with design features under accident conditions. The question of national sites and the question of design features under accident conditions are poles apart and indeed totally unrelated.

We submit, Your Honor, that the basis for NRDC's submission of the contention simply is irrelevant.

Now, another point that NRDC makes that is worthy of mention, and that is if one examines the discussion on page 28 of their response to our objection, we find the discussion concerning the Commission's so-called Class 9 accident policy statement in regard to environmental statements. And NRDC indicates that the policy statement is new information that gives rise to the basis for admitting the contention.

Now, we think this severely begs the question. It has been no secret since the inception of these proceedings, and particularly no secret to NRDC, that the role of the hypothetical core disruptive accident, indeed the Class 9 accident, has been an issue in the review process with the NRC staff.

Both the DES and the FES clearly raise the

Class 9 accident issue. This was on the table. Just look at NRDC's original Contentions 2, 3 and 4 and see whether they knew that there was a question of whether there was a Class 9 accident issue here.

We think NRDC has simply come up with a late thought for a totally irrelevant reason; and that is, the Class 9 policy statement has nothing to do with it. They had adequate notice as to why this contention might have been raised earlier.

Now, there is a final point here that we think goes again to the question of the Board's schedule and to the question of practical management of this hearing process. If the Board examines original Contentions 2, 3 and 4, which are now Contentions 1, 2 and 3 under the admitted numbering system, you will see that 20 is really subsumed or covered by 2, 3 and 4. To the extent that it is necessary to consider accident issues in connection with the LWA, Contentions 2, 3 and 4 cover it. And it is totally unnecessary to consider the scope of Contention 20 in these proceedings.

Thus, we believe that for the reason that NRDC had adequate notice to raise the contention, and for the second reason that the contention is unnecessary to the Board's decision here, it should not be admitted.

JUDGE MILLER: It was our memory that Class 9

accidents were included in the scope of the contentions in this fast breeder reactor case five years ago. Has there been some change in the position taken by the intervenors? We thought that it had been asserted that it was recognized by both the parties and the Board at that time to be an issue.

MS. WEISS: Yes.

JUDGE MILLER: Class 9.

MS. WEISS: This contention goes directly to the analysis of Class 9 accidents in the impact statement, which is a precise analysis of risks and consequences. So it could not have been raised until the FES came out in February 1977.

Now, it is our view that this is not an untimely contention. The first time it could have been raised was February 1977. Sure, the question of whether the design basis was properly drawn and whether CDAs ought to be in the design basis, those were all questions that arise on the safety side from the FAR. But the NEPA analysis of risks and consequences cannot be challenged until the document appears which purports to satisfy the requirements for making that analysis. That was not until February '77.

We urge the Board to look at the practical considerations of what was going on at that time.

(Board conferring.)

JUDGE MILLER: We will hear from the staff.

MR. SWANSON: Yes. I think -- we are trying to look up the date here, but the staff wants to clarify one point. Analysis of Class 9 accidents was not for the first time raised in the FES. It was considered in the draft environmental statement.

JUDGE MILLER: On page 33 -- wait a minute. That is the applicants'. I am sorry. The point, however, is raised that not only the FES but the DES in sections are cited at page 33 of the applicants' response to the revised statements.

Are those the passages that the staff is now referring to?

MR. SWANSON: Yes. The second point is that to the extent they are concerned about Class 9 accidents and consequences in terms of environmental issues, as the Board admitted, old Contention 3 -- I guess it is still Contention 3 -- that is the very term, analyses of CDAs and the consequences.

JUDGE MILLER: Old 3 is now 2.

MR. SWANSON: Two. Excuse me, excuse me.

JUDGE MILLER: I just want to keep these numbers straight for the transcript when we go back through them. The old 3 is renumbered 2.

MR. SWANSON: I am sorry. Old 3, now number 2, deals specifically with the analyses of CDAs and the consequences. The analysis by the Applicants and staff are inadequate for purposes of licensing the CRBR performing the NEPA cost-benefit analysis. So I thi we already have that issue in. It is simply not a new matter that was raised for the first time in the FES.

I just want to raise one further point which we did mention in our response, and that is related to Contention 20(a). And that is the assertion that even if we were to assume at the time the FES came out in February that that was inadequate time or that the climate was such that they were not bound to raise the contention at that time.

Even if that argument were to prevail, the intervenors have referenced a document yesterday in connection with their argument about former Contention 2, now Contention 1, which we also reference in our response on page 26, that being the May 6, 1976 letter from Mr. Denise of the staff to Mr. Caffey of DOE.

That document set for the additional design requirements that would reduce, in the staff's view, the likelihood of accidents to an acceptable level. That document was, as the intervenors pointed out yesterday, attached to the FES; but at the time that letter was

sent out a copy was also sent to Dr. Cochran of NRDC and was in fact the subject of extensive discovery by the NRDC in their eleventh set of interrogatories to the staff. This was no new bit of information that popped up for the first time in February of '77 or for which any argument, credible argument could be made now that it is new information to be raised for the first time now.

The staff had set forth its position before. It could have been challenged soon after the May 6, '76 letter was sent out. The FES just merely indicated that the staff had previously described additional design requirements which would reduce the likelihood of accidents to an acceptable level. It did not raise any new items.

The staff position simply is that the intervenors had been put on notice as early as May 6, '76 that this -- what the staff's position was; and we think that it is extremely untimely for them at this time to come forward with a contention on this matter. So we think that additional factor weighs quite heavily in favor of throwing that out as part of the contention.

JUDGE LINENBERGER: Mr. Swanson, did the staff respond to that eleventh set of interrogatories?

MR. SWANSON: Yes, we did. We can give you

the specifics.

JUDGE LINENBERGER: That is all right. I can accept that. I just wondered if that was a matter that was hanging.

MR. SWANSON: Yes, we did.

JUDGE LINENBERGER: Thank you.

MR. SWANSON: We responded in January '77.

JUDGE MILLER: January 1977?

MR. SWANSON: Yes.

JUDGE MILLER: Anything further from staff?

MR. SWANSON: No.

JUDGE MILLER: Very well.

Intervenors.

MS. WEISS: Well, this is the first time that the staff has put forward the argument that this contention would not have been timely even if raised in February of March of 1977.

Now, they seem to be claiming that in order to preserve an issue challenging the FES, one has to challenge it at the draft stage. Our forum for raising issues about --

JUDGE MILLER: Draft stage of a final environmental --

MS. WEISS: That is what the staff said to you, that this issue was clearly raised in the DES, and

we had to raise it -- bring the contention to the Board at that time.

JUDGE MILLER: What the staff said was on May 6, 1976, Appendix I of the staff's FES contained a copy of the letter from Mr. Denise and so forth, which is described by the staff.

MS. WEISS: The Denise letter is attached to the February '77 FES.

JUDGE MILLER: The letter -- let's see, yes, yes. I think you are right.

MS. WEISS: It was written earlier.

JUDGE MILLER: That was the date of the letter. It was included as Appendix I to the staff's FES which was filed either January, as you said, or you are telling me now February '77, is that right?

MS. WEISS: And we were aware that that was their guidelines, those were the guidelines that they were using at that point. However, our forum for challenging the DES first of all is the comments to the DES.

JUDGE MILLER: Pardon me?

MS. WEISS: Our forum for challenging the DES is first of all our comments to the DES.

JUDGE MILLER: Did you make the comments along these lines?

MS. WEISS: Yes.

JUDGE MILLER: How were they handled by the staff then?

MS. WEISS: They wrote the FES which --

JUDGE MILLER: Normally the staff refers to comments, I believe. Maybe we can find it. Several of you have the document.

(Counsel for intervenors conferring.)

MR. SWANSON: We are still looking to see whether or not there is a specific reference. It is quite clear that they provided comments. We considered them, and it was factored into our response.

Now, as we indicated on page 26 of our response, on page 7-11 we indicated that previously described features and requirements, the incorporation of these features and requirements would make the accident risk acceptably low. And, of course, attached to the FES was in fact the letter which spelled out the specifics of the staff's position.

JUDGE MILLER: This is the Denise letter?

MR. SWANSON: It does not mention the Denise letter at that time. The Denise letter was, as previously mentioned, was an attachment.

JUDGE MILLER: What was it that spelled out the staff's position?

MR. SWANSON: It was the Denise letter.

JUDGE MILLER: Oh, okay.

MR. SWANSON: A copy of which I indicated was sent to NRDC at the time it was written.

JUDGE MILLER: One thing that the Board is curious about is why the merits of your apprehensions are not adequately covered and pleaded as issue matters in revised Contentions 1, 2 and 3.

MS. WEISS: If the Board -- we have been rifling around trying to find our comments and their responses. If the Board would not mind, I would like to address that first and then talk about indeed whether it is subsumed.

The essence of our contention -- I feel I have to backtrack because it has been obfuscated somewhat -- is that the conclusion in the FES that accident risks can be made acceptably low with the incorporation of certain unspecified design features without describing those design features and requirements as insufficient to provide justification for the conclusion that the risks will be as low as stated, now we raised -- therefore, it is generally raising a question of uncertainty that your analysis, your data, your justification does not provide enough reason for us to reach the conclusion -- for us to accept your conclusion

that the risks can be made acceptably low.

We first raised that in our comments which are reproduced in the FES beginning at page A-48. And if you look at page A-56 and A-57, we raise the claim that the staff has not identified the structures, systems or components which will assure that the risk is as the FES or the DES claimed.

The NRC responds to that point on page 11-27, 11-28 of the FES, and it says to us on page 11-28 because the facility has significant developmental aspects, the DES discussion necessarily was less firm regarding the specific event consequences and risks. However, in an attempt to assure the discussion was complete --

JUDGE MILLER: I did not follow that. I cannot hear.

MS. WEISS: That part is really --

JUDGE MILLER: Are you deleting it? What are we doing?

MS. WEISS: It is not necessary. I think the important point is the concession that the DES statement was not firm.

JUDGE MILLER: What happens to that point? Just it just dangle off into uncertainty or disappear or what? I mean they are discussing it now in the FES. Is

there any further pursuit of the matter? Does it just die?

MS. WEISS: It appears in Section 7.1.3, 7.1.4 of the FES on pages 7-10 and 7-11. And the pertinent conclusion that we are challenging appears in the section entitled 7.1.4.

JUDGE MILLER: What page?

MS. WEISS: Page 7-11.

JUDGE MILLER: Thank you.

MS. WEISS: Under the heading "Accident Conclusions," the design information and evaluations available at this time have been reviewed. Based on this review our conclusion is that the accident risks can be made acceptably low with the incorporation of the features and requirements in the design as discussed above.

That conclusion is not ripe, it seems to me, until you have a licensing document. You do not have a licensing document until you have an FES, and that is the point at which one ought to have the opportunity to challenge it, when it is the final conclusion, which it is not until you have an FES by definition.

Had we challenged at the DES stage, their response would have been that is still under review. So we exhausted the remedies available to us at the DES

stage by making the comments which raised that precise question. And I think that we are entitled now to challenge the final conclusion of the FES.

JUDGE MILLER: Who wishes to respond?

MR. EDGAR: Mr. Chairman, we have very little to add here. We simply note that this whole set of issues under Contention 20 were clearly a matter of widespread knowledge to all parties very early on. The DES raises the Class 9 point. The Denise letter was a working document.

JUDGE MILLER: The issue argued now by Ms. Weiss is it was premature to raise the question until the FES was filed. How do you answer that?

MR. EDGAR: That is just not so. If you have notice of information, you should come forward. There was no, at least to my knowledge, nothing that militates in that direction.

JUDGE MILLER: Except you do not know what the FES is going to say. If you speculate about it, then you are charged with being premature, imprecise and all the rest of it.

MR. EDGAR: It is not a question of being premature or speculative on the question of whether this facility would be the subject of a review on severe accidents and that the design basis issues would be

contested. This has been known since day one. And I reiterate my point, and I do not think the Board has an answer to this, at least thus far, that Contentions 1, 2 and 3 adequately cover this point. There is no need for a new contention.

JUDGE MILLER: We asked to have a response to that, and the intervenors wished to give us the product of their search of the record which we had asked for. So now I suppose it would be timely and appropriate, Ms. Weiss, for you to tell us why in your judgment admitted Contentions 1, 2 and 3 do not permit you to raise the issues set forth in your proposed Contention 20.

(Counsel for intervenors conferring.)

JUDGE MILLER: It appears to the Board that the issues which you are concerned about could be covered by the pleadings denominated in Contentions 1, 2 and 3. If they can, there is no sense spending a lot more time on this one.

MS. WEISS: I think that they could be, Mr. Chairman, but what we would like in the interest of making it clear, what we are intending to raise --

JUDGE MILLER: You are making it pretty clear. There is a record. There is a transcript. Nobody is going to be in any doubt what you want to raise if they are cognizable under 1, 2 and/or 3.

You have your pleading. You have alerted everybody. We spent some considerable time on this. We doubt if any more is justified, and we doubt if this contention is therefore necessary. But if you wish to present some additional reasons besides what has been covered by yourself and other parties, you are welcome to do so.

Somehow we cannot get a clearcut commitment that the issue is cognizable under 1, 2 and 3. We got a lot of circumlocution. So let's get right down to it. Is it or is it not, and if not, why not?

MS. WEISS: Well, I think our problem is the contention was written before -- contention which is now number 2 was written before the FES, and so it was not --

JUDGE MILLER: That may be, but a contention has a life of its own; it goes on. And if you raise successfully an issue, you still have your issue. You are not pleading evidence now. You are not required to. You are going to have to answer some interrogatories, I am sure. But if it is a valid contention and it is admitted, why do you need the frosting on the cake? You have a lot of other problems.

(Counsel for intervenors conferring.)

MS. WEISS: The only clarification that we would seek is as a result of some comments that I made

in response to questions from Mr. Linenberger yesterday about the relationship between Contention 1 and Contention 2, contentions that are now numbered thus.

JUDGE MILLER: What do you want to do, withdraw whatever it was you said to Judge Linenberger?

MS. WEISS: So nobody will be confused I just want -- if it is clear that we are raising these NEPA issues, these issues under what is now numbered Contention 2, the consequence of that would be that even if we do not prevail on Contention 1, Contention 2 would have some live aspects. That is the only correction that I would want to make to that, because NEPA requires an analysis of Class 9 accidents whether -- which are not in the design basis.

JUDGE MILLER: All right. You made your point. I do not think you have any vulnerability on that. You will stand or fall on what the contentions are as well as what the NEPA or safety considerations are, but you are not being foreclosed in any way.

MS. WEISS: Given the discussion that we have had today, we would propose then to withdraw Contention 20 and to raise those issues under Contention 2.

JUDGE MILLER: All right. The record will show that Contention No. 20 in the revised statement is withdrawn, and the transcript will reveal whatever the

discussion has been.

We will now come to previously numbered Contention 21. Do applicants wish to go first on that?

MR. EDGAR: Yes. The basic thrust of Contention 21 is that applicants' proposed system for classifying, categorizing postulated design basis accidents as described in the PSAR, Table 15.1.2-1 is arbitrary and, by implication, inadequate.

The first point of information we would note is that the applicants' classification system has not changed in any material respect or significant respect since 1976. More significantly, we believe that in regard to this contention there is no showing of information, and we note that the intervenors raised some questions of some British steam generators and some LWR steam generators, but there is no showing of nexus there that, a) the information is relevant to Clinch River, and b) material to an admitted contention. Likewise, there is no showing that the information is of recent vintage. But --

JUDGE MILLER: In what respect is there duplication with Contentions 2 and 4?

MR. EDGAR: I am getting to that, and we think that 2, 3 and 4 adequately cover the issues that need to be addressed at the LWA. If there is some very detailed

questions of -- fine questions of accident analysis can easily be deferred to the CP. I mean this is --

JUDGE MILLER: Hold it a minute. You said 2, 3 and 4, which is what you have --

MR. EDGAR: I am sorry, Mr. Chairman.

JUDGE MILLER: I want the record to show that you are now referring to the newly numbered 1, 2 and 3, correct?

MR. EDGAR: That is correct. I misspoke myself. When I used 2, 3 and 4 in this context I meant the newly renumbered 1, 2 and 3. But more significantly, we think that, a) the contention can be handled by 2, 3 and 4, but more significantly, the contention can be deferred until the CP.

JUDGE MILLER: Staff?

MR. SWANSON: We really do not have much to add to that. I think the discussions previously discussed by the Applicants and as we set forth in our pleading address the question.

He referenced a table in that Contention that has totally inconsequential changes in it. It just does not exist, good cause -- in other words, new information -- to justify the filing of this Contention at this time.

JUDGE MILLER: Do you consider that the substance of this Contention is covered by existing newly-numbered Contentions, 1, 2, and 3, as the Applicants believe?

MR. SWANSON: Yes. It certainly could be.

JUDGE MILLER: Do you think it is?

MR. SWANSON: Yes.

JUDGE MILLER: Not just arguably. I would like to have a statement of position.

MR. SWANSON: Yes.

JUDGE MILLER: All right. We will hear from Intervenors.

JUDGE LINENBERGER: Excuse me.

JUDGE MILLER: I am sorry. I did not mean to --

JUDGE LINENBERGER: Before Intervenors speak

here, I would like them to include in whatever they have to say something in response to a situation that is bothering me.

The Contention addresses the adequacy of this table 15.1.2-1 of the PSAR -- adequacy for the purposes of protecting radiological health and safety. My own perusal of that table leads me to believe that the table really is not intended to offer any sort of specific guidance on protection of the public. It is a categorizing or classifying of various kinds of events, and I do not see anything in the PSAR that indicates it is offered for any other purpose.

Therefore, to beat that table on the head because it does not protect the health and safety of the public just raises a question in my mind. So if you could address that along with whatever else you have to say here on this Contention, the Board would appreciate it.

MS. WEISS: Well, you are right, of course, Judge Linenberger, and we do not intend to challenge the table. What we meant by the Contention, and I can only conclude that is was awkwardly worded because it seems to have touched off misunderstandings on all sides, we are challenging the system which is described in the table, and that system is for classifying and

categorizing events within the design basis.

That is what makes this Contention different from those which challenge the design basis. This takes the design basis essentially as you find it and what it attempts to question instead is a system of categorizing faults as likely, unlikely or extremely unlikely, and that is described in the table 15.1.2-1 and also table 15.1.2-2, which we attached to our response.

There is a relationship between the categorization of an event and the acceptance criteria. Acceptance criteria flow from your categorization as --

JUDGE MILLER: Let me interrupt you for a moment. It has been contended in here also that the revised, revised Contentions 1, 2, and 3 do sufficiently plead the matter which is the substance of what you are attempting. What is your position on that?

MS. WEISS: Well, we intend -- we do not see that it does. We are not challenging the design basis and we are not going into DCAs or accidents beyond the design basis.

JUDGE MILLER: What are you challenging?

MS. WEISS: The method of setting the design criteria based on the classification of events within the design basis. We take the design basis as given and then the question is --

(Counsel for Intervenors conferring.)

MS. WEISS: There is a system for classifying potential events as likely, unlikely, or extremely unlikely. Consequences flow from that with respect to the acceptance criteria, and the new information does not have to do with the system which has always been proposed -- the Staff has not yet accepted it, by the way -- but with the categorization of, for example, problems that would result from steam generator failures.

JUDGE MILLER: I am having trouble following you in the sense of what difference does it make? I am interposing the demur since we are discussing pleadings. So what -- a legal so-what?

MR. COCHRAN: It makes no difference to me whether we argue it under a Contention called 1 or a Contention called 22.

JUDGE MILLER: Could it be argued by 1, 2, or 3?

MR. COCHRAN: Yes, as long as we are preserving -- everybody understands --

JUDGE MILLER: That is what they are all telling the Board. The Board understands the matter itself. The substantive matter is cognizable under Contentions 1, 2, and 3. If that be so, we would like to get to the end of the pleading matters.

MR. COCHRAN: I just hope that the Staff and the Applicant do not come back and say we are overreaching that because now we are going into these matters.

MR. EDGAR: I think there is a point that the Board should focus on here, and that is remember that as the Contention is worded, the last part of it says: For purposes of protecting radiological health and safety. Secondly, that we are talking about accidents within the design basis and acceptance criteria therefor, and thus we are talking about the fine grid of safety analysis here within the ambit of this Contention.

In our judgment, most of this Contention, the broad of scope of inquiry within this Contention, should be deferred to the CP. There are elements of this --

JUDGE MILLER: We are talking about whether or not it is reasonably within 1, 2, and 3 and, if not, what are the limiting factors.

MR. EDGAR: That is what I am trying to get at. I am saying 1, 2, and 3 get at the outer limits of the design basis. I mean, if you have done your job on 1, 2, and 3, then the other accidents within this design basis should not be a problem.

In other words, you have bounded their consequences and you have examined their effects and

thus there is some interplay here that you have to take a look at where you are drawing lines. But I think a lot of this, you know, most of this inquiry is properly in what I call the hard core safety review issues.

Maybe the NRC Staff has some comment on that, but I just want to make sure that that is reflected.

JUDGE MILLER: The more I listen to you the less harmony I seem to get. You told me it was cognizable under 1, 2, and 3. The Staff agreed. We had some discussion and finally the Intervenors say all right, if it is reasonably encompassed there we are not insistent on setting it forth in this form.

I do not expect you to start backing away from it.

MR. EDGAR: I do not want to confuse things, Mr. Chairman.

JUDGE MILLER: I am sure you don't. So unconfuse me now. Why doesn't this in all reasonable aspects --

MR. EDGAR: It is encompassed.

JUDGE MILLER: Raised under 1, 2, and 3?

MR. EDGAR: It is. It is.

JUDGE MILLER: All right. In that event, why what is your pleasure, Ms. Weiss?

MS. WEISS: Based upon the discussion that has

preceded, we would propose to withdraw the Contention that is numbered 21 in the revised statement of Contentions and bases of Intervenors NRDC and Sierra Club and litigate those issues under previously admitted Contentions.

JUDGE MILLER: One, 2, and 3?

MS. WEISS: Yes.

JUDGE MILLER: Leave is granted. We will now come to Contention 22, renumbered Contention 10.

We are having an awful lot of trouble with poor little orphan Contention 10. It keeps going page after page and never gets to light anywhere. Let's try this one, number 22.

(Laughter.)

JUDGE MILLER: Applicants, do you want to go first?

MR. EDGAR: Mr. Chairman, we have briefed this at some great length in our March 19 filing at pages 37 through 40, covered the point. The essential issue here is whether the ALARA concept should apply to the accident case and whether this is simply an extension of the old Contention 8. When I say "old" I mean the originally admitted, so-called ALARB contention.

In a word, we think as a matter of law that the ALARA concept has specific meaning within the NRC

regulations. It does not apply to accidents. Furthermore, we do not believe that there is good cause for a late filing even if that were not the case.

But we feel that that issue is straightforward here. It has been adequately briefed that ALARA, as advanced by the Intervenors, is just as a matter of law incorrect.

JUDGE MILLER: The Staff takes, in part at least, the same position, doesn't it?

MR. SWANSON: Entirely the same position. As we briefed the issue on pages 30 and 31, we think very clearly as a matter of law ALARA does not apply to accident considerations. We think the Intervenors' argument raised on page 33 that the reason a specific reference to accidents did not appear in the Contention was a miscommunication.

It is hardly a justification for raising it now, but even if it were raised back then the argument would have been the same. As a matter of law it would be an impermissible Contention. It would be a challenge, we believe, to the Commissions regulations and should not be admitted at this time either.

JUDGE MILLER: We have read your statements and some of the cases cited. We must say that we are almost persuaded it is, as a matter of law, a

misapplication of ALARA regulation principles.

However, you are entitled to be heard on your Contention why it is not, why ALARA is applicable not to normal operations but to accidents of this type.

MS. WEISS: Essentially our position is that the fact that ALARA is not explicitly -- an ALARA analysis is not explicitly required for an accident situation and has not been performed in prior licensing by NRC for accident situations does not mean that the rules preclude its application to an accident situation.

The only mention of ALARA is in Part 20. That goes, of course, to exposures from routine releases. We are not challenging Part 20. We are seeking to have the Board apply what we believe is the appropriate meaning of ALARA as it has been developed by the national and international standard-setting organizations to the accident analysis.

(Board conferring.)

JUDGE MILLER: The Board is of the belief that at this time -- and, of course, the Commission is studying these matters and may come down with something in the future -- as of this time we just do not believe that the ALARA regulations do apply to accidents in that sense and do apply during normal reactor operations.

Now if at some time the Commission makes a

change, of course, you will be entitled to raise the question then because it will then for the first time as we are ruling become applicable. But our ruling is that at the present time the Board feels it is bound by the existing regulations and that the ALARA principles do not apply in the manner sought to be established by Intervenors.

Consequently, previously-numbered 22 will not be permitted to be filed as a cognizable issue. We will, therefore, now go to 23, which may or may not become number 10.

(Laughter.)

Applicants.

MR. EDGAR: I would like to call the Board's attention in this connection to some very specific things in NRDC's filing and our own.

First, our filing of March 19 addresses our position on the Contention at pages 41 through 42, but let us look at NRDC's response at page 41, which happens to be fortuitous.

In connection with page 41, if you read the explanation of the question you see that the thrust of the Contention and what they are seeking to get at here is related to and flows from the UCS petition for emergency and remedial action on equipment qualification.

In particular, the two enumerated paragraphs at the bottom of page 41 indicate that Intervenors are seeking to challenge NRC's standards for reviewing environmental qualification and the lack of documentation of qualification throughout the industry.

Reading over to page 42, there is another interesting presumption or perspective on this problem in the very last paragraph. And NRDC says they would like to have discovery here to develop further specificity and, indeed, they say NRDC must first receive the documentation of prototype test results and analyses of CRBR safety equipment in order to determine the extent to which the equipment meets GDC-4.

What we are dealing with here is the safety or normally the CP issue associated with equipment qualification. Indeed, the last cited portion on page 42, when you are talking about prototype test results and analyses you are talking about operating license data, specific equipment qualification results on specific equipment.

We would submit to the Board that NRDC's answer itself makes it abundantly clear that this issue has no place in the context of an LWA proceeding, that in fact the sensible approach here would be to defer the issue. There is no need for discovery, particularly

when we are dealing, as here, with a very tight schedule. There is not need to take any effort and to consume the resources of the parties when the matter at issue is unnecessary to a decision on the LWA.

JUDGE MILLER: Staff?

MR. SWANSON: We agree with that analysis of the Intervenors' basis, proposed basis for the Contention.

JUDGE MILLER: You agree it should be deferred?

MR. SWANSON: That is correct.

JUDGE MILLER: All right. If you all agree to defer it I am going to defer it.

MS. WEISS: We would agree to defer it, Mr. Chairman. I just would not like my absence to answer any further to indicate that I agree with what was said. The Contention was misrepresented, but we would agree to defer it.

JUDGE MILLER: All right. In that event, then, Contention 23, which is now renumbered revised Contention 10, is deferred until after the limited work authorization evidentiary hearing and partial initial decision.

By the way, we probably have some other Contentions in there which may well be safety matters. We have not yet addressed the point of which ones are

appropriate for continued discovery and consideration at the LWA. The Applicants have listed some. The Board has some in mind. We will go over that when we finish the Contentions, which we hope to be soon.

MR. EDGAR: Our discovery motions get to that.

JUDGE MILLER: Now we are going to the last Contention, 24, which if it survives will be revised number 11.

MS. WEISS: Mr. Chairman, I think we may be able to short-circuit some of the discussion on 24 in view of the discussion that we had earlier on Contention 21. We believe that 24 is cognizable -- I am sorry. It was the discussion in connection with Contention 20.

We think Contention 24 is cognizable under the Contention that is currently numbered 2, because 24 goes to a finding that is required for the licensing. That is, that the CRBR can be constructed and operated at the proposed location without undue risk, et cetera. So we think that it comes underneath Contention 2, so long as it is clear that the subparts of Contention 2 do not state all of the issues in their entirety.

JUDGE MILLER: The Board understands that revised Contention 2 lists subissues that it does not delimit by virtue of the phrase "for the following reasons" or whatever.

MS. WEISS: Right.

JUDGE MILLER: With that understanding, we believe that the record shows that the Intervenors withdraw Contention 24 on the grounds that it is covered by the matters which they wish to go into under Contention 2 as revised. Is that correct?

MS. WEISS: Yes, Mr. Chairman.

JUDGE MILLER: Are there any objections?

MR. EDGAR: None.

JUDGE MILLER: Staff?

MR. SWANSON: We have no objection to the procedure, although we are rather concerned at Ms. Weiss' representation that there is seems to be an open-ended issue embraced by Contention 2.

Our concern with 24 was it was so broad it certainly could fit within 2. It could probably fit within a few other Contentions also. We have no problem with the procedure just indicated by the Board, but I did not want our silence to be interpreted as agreeing that it is an open-ended Contention 2, that simply because it lacks the words "for the following reasons" that we could come up with numbers 5 through 25 at the hearing suddenly with the assertion that these were implicit.

JUDGE MILLER: What are you saying?

MR. SWANSON: Well, I hope we have some finality to these Contentions, that perhaps they may not be as specific as what we may end up with at the end of the discovery process, but I hope that the Board is not acknowledging that there is an open-ended possibility to expand 2 without further leave of this Board.

JUDGE MILLER: If the matter is covered by 2, it is covered by 2. It does not take any further action of the Board. If it is not covered by it, it is not.

MR. SWANSON: I agree.

JUDGE MILLER: We are not giving a declaratory judgment.

MR. SWANSON: That is fine.

JUDGE MILLER: We now have 10 revised Contention -- yes, 10. We are going to recess in about five minutes for lunch and then we are going to reconvene at 1:30. I think before we go into the motions now, some of which involve Contentions admitted or not admitted or matters of that kind, it would be appropriate for us to review which of the admitted Contentions, as revised and as constituting some finality for pleading purposes and the precise wording, I think we have agree that Ms. Weiss on behalf of the Intervenors will file, first showing to the opposing counsel so that there is agreement on the language of

these Contentions.

They will then be lodged with the reporter so that it or they may be attached physically to the transcript of this conference. Are we in agreement so far?

MS. WEISS: Yes.

JUDGE MILLER: Okay. Now it would be wise, I believe -- and you may decide whether you want to do it now since you have previously addressed yourselves to it to some extent or after the recess -- we would like to know which of these issues in the form of admitted cognizable Contentions are appropriate for ongoing discovery and evidentiary presentation at our evidentiary hearing the last week in August, and which ones need not or should not be the subject of either ongoing discovery during that period of trial preparation but will be taken up both for discovery and whatever other purposes are deemed appropriate following the partial initial decision on LWA.

What is your pleasure?

MR. SWANSON: Mr. Chairman, I think the Staff would very much appreciate having the opportunity to talk this over over lunch and take it up after.

JUDGE MILLER: We will recess for lunch. We will reconvene at 1:30. We will take that up as the

first matter before then going into whatever motions there are or other matters that the Board has to consider.

MS. WEISS: There is just one other thing, Mr. Chairman. The parties have reached an agreement on Contention 8(b), which you had taken under advisement, and we can talk about that now or later. It makes no difference to me. I just wanted to let you know.

JUDGE MILLER: We will do that when we get back, but that is a Contention under the revised current numbering now 8(b) as in boy.

MR. EDGAR: I am not sure we have an agreement on that, but we have been talking.

JUDGE MILLER: We will take it up after lunch.

(Whereupon, at 12:12 o'clock p.m., the hearing recessed, to reconvene at 1:30 o'clock p.m., the same day.)

AFTERNOON SESSION

(1:30 p.m.)

JUDGE MILLER: We will come to order, please. Was there something with reference to the new number 8 Contention that you wanted to advise the Board about, Ms. Weiss?

(Pause.)

Are you waiting for me?

MS. WEISS: Oh, 8(d). I am sorry. Did you want to talk about Contention 8 now?

JUDGE MILLER: I thought you did. That is why I was giving you the opportunity.

MS. WEISS: I think we have some agreement on most 8(d) a narrow point of disagreement, and I think I would prefer to let Mr. Edgar address it and then I would follow him, if that is okay by the Board.

JUDGE MILLER: Is this the newly numbered 8 or is this the old number 8?

MS. WEISS: This is the old 8.

MR. EDGAR: Old.

MS. WEISS: It does not have any number at the present time, I do not think.

JUDGE MILLER: Okay. I think I see what you mean.

MR. SWANSON: Specifically, we have old

8(d)(1) only.

JUDGE MILLER: Yes, okay.

MR. EDGAR: Mr. Chairman, it was my understanding you were going to assign that a number toward the end of the sequence.

JUDGE MILLER: Yes, that would be number 11 if it has any vitality.

MR. EDGAR: That is right.

JUDGE MILLER: That will be renumbered to new number 11 because we left off with number 10, having gone through the -- okay.

MR. EDGAR: One thing that may be useful here to set the baseline, I believe the Staff has a marked up copy of the Contention and if I could suggest, first of all, one change upon which the parties have reached agreement.

In the text of 8(d)(1) --

JUDGE MILLER: 11(d)(1). It just got christened, so I cannot blame you for that.

MR. EDGAR: 11(d)(1), under subparagraph (1) there is in the second line the phrase "once in a lifetime organ dose." The parties would suggest that that read instead, "10 CFR 100.11 organ dose." Am I correct?

MR. SWANSON: Yes.

MS. WEISS: Yes.

MR. EDGAR: So the change consists of striking "once in a lifetime" and inserting "10 CFR 100.11". All right.

The next point in our filing, at pages 14 through 16, our filing dated March 19, we had rephrased the Contention to say it was acceptable to us if it was more particularlized in regard to the documents, ICRP 26 and 30. We are withdrawing that objection on the basis that Dr. Cochran has represented on the record that the new knowledge here is in fact the recommendations of the ICRP in reports 26 and 30, as modified, in regard to certain weighting factors as to which and EPA have a different view than the ICRP.

In other words, Dr. Cochran takes the approach of the two ICRP documents but some specific numbers or weighting factors in there he has disagreement and we figure we can pin that down on discovery and so, to that extent we are okay. We have no problem.

The remaining --

JUDGE LINENBERGER: Mr. Edgar, before you go further, is there a citation you can give us to the weighting factors that NRC considers to be appropriate?

MR. EDGAR: Well, I do not have them and we were going to get them on discovery. Perhaps Dr.

Cochran could do that.

MS. WEISS: NRC or NRDC?

JUDGE LINENBERGER: NRC. I understood Mr. Edgar to say that NRC and EPA concurred that certain different weighting factors should be used. I was wondering if these are documented somewhere.

MR. COCHRAN: The EPA has had -- put out a document where they proposed modifications to the occupational exposure limits, and their proposed weighting factors are in that document. The NRC Staff has prepared some very early draft materials, some changes, to 10 CFR 20 that would incorporate, presumably, their own view of the weighting factors.

We have -- are seeking through discovery to more precisely define what the latest numbers that EPA is proposing and what the latest numbers the NRC is proposing --

JUDGE LINENBERGER: Is the answer to my question, though, then you do not have a citation to give me?

MS. WEISS: We do not have that with us. We could tell you what the latest information that we have after we go back to our office. We could provide that to the Board if you would like.

JUDGE LINENBERGER: Well, no, not for now. I

just thought if you had it I would like to note it down. Thank you very much.

MR. EDGAR: In any event, our approach to this in regard to our first objection is simply to undertake discovery and pin down the similarities and differences.

JUDGE MILLER: That may well be the most expeditious way to handle it.

MR. EDGAR: Understood. Now we have a residual problem here and that deals with the question of the extent to which the Board will and can entertain a challenge to the 25 rem whole-body and 300 rem thyroid values in 10 CFR 100.11.

It is our position that a challenge should not be entertained or allowed. We think that one of the implications of Dr. Cochran's approach in advancing ICRP 26 and 30 would be to undertake a challenge to the thyroid value.

He has indicated to me that he does not intend to challenge the whole-body value of 25, but in effect and ultimately there is no way from the standpoint of applying the ICRP 26 and 30 methodology that he can avoid a challenge to the thyroid value of 300.

We think that that issue may as well be decided up front. If we are going to challenge the 300 to the thyroid then, in my mind, that is impermissible

under NRC's regulations and we would like to know that right now. We do not need to wait for that answer.

MS. WEISS: Do you want to ask a question or do you want me to hold forth?

JUDGE LINENBERGER: I want to be sure we understand what you are saying, Mr. Edgar, and also whether Dr. Cochran agrees with it. But insofar as organ exposures are concerned -- and here I am trying to see if I understand you, Mr. Edgar, by restating it in my own words, insofar as organ exposures are concerned, it is Dr. Cochran's position, I believe you have said, that certain revised and more appropriate weighting factors should be used but that the implication of these -- of adopting these revised weighting factors would be in effect -- would cause, in effect, a different result than the 25 rem and 300 rem whole-body and thyroid values found in Part 100.

MR. EDGAR: That is correct, with one exception. And it would in effect cause a revision of the thyroid value. It would accept the whole-body value. It would accept -- a-c-c-e-p-t.

JUDGE LINENBERGER: Okay. Now, Dr. Cochran, pardon me, is that a proper characterization of your position as I have stated and Mr. Edgar has amended it?

MR. COCHRAN: Very close, but not quite.

JUDGE LINENBERGER: Okay. Please clarify.

MR. COCHRAN: First of all, the ICRP approach that we are refering to essentially applies a limit on this weighted sum of organ dosage, including the whole-body dose, and it also goes further to say that in order to ensure that one does not -- protects against non-stoichiometric effects we will provide a cap on the dose to any individual organ.

Now let's just suppose that I were to prevail with respect to -- that that approach would be adopted but would suggest for -- at least for dosage -- for organs like lung, bone, liver, that that approach should be adopted and that furthermore the capping value for the dosages for those particular organs -- bone, lung and liver -- should be 30 rems.

I mean, just for the sake of an argument, let's assume that is where we came out. Now the residual problem that Mr. Edgar and I are quibbling over is now that we have established that capping value for these other organs by the ICRP approach and the way it would be implemented, if one stuck with this fact of the existing regulations, one would apply to the thyroid, so I would say look, we are not challenging the thyroid limit.

All we are saying is, with respect to this one

single organ, that if you do not stay not only under the 300 rem limit set by the regulations but also this lower capping value that there is a residual risk involved that is excessive. So that is the sole area of dispute and in fact we presented our case of next August right now. You can decide it now or later.

JUDGE MILLER: That is fair.

(Laughter.)

MR. COCHRAN: We are going to get the same amount of discovery on the ICRP documents, the weighting factors and so forth because you have to apply it to the other organs and there is no dispute about that. It is just this final top of the pyramid that we are arguing on.

JUDGE LINENBERGER: Keep the microphone just a moment longer, if you will, sir. This is something I wanted to ask yesterday and overlooked it. To what extent, if at all, does the situation you have just described challenge any of the conclusions of BEIR III?

MR. COCHRAN: Of course, we have the BEIR III report in front of us. Now only with respect to the weighting values, when one assigns those values one has to -- one has to make some assumptions about the relative risk for equivalent dosages to different organs.

JUDGE LINENBERGER: These are the risk

estimators of BEIR III.

MR. COCHRAN: That is right. You can go to BEIR III. You can go to the Commission 10 CFR 20 or wherever to get the information to assist you in determining what those weighting factors ought to be.

Frankly, the BEIR III numbers may turn out to be the appropriate ones, but one needs to find out -- I mean, I would like to find out what the Commission's thinking is, what the EPA's thinking is, what the Applicant's thinking is with regard to what those individual risks are for purposes of assigning these weighting factors, and that is why I have asked for production of documents on how they are addressing this very same issue with respect to occupational standards, proposed standards.

It is not that we are challenging the standards. We just need the same data source in order to make the proper judgments about what those weighting factors ought to be.

JUDGE LINENBERGER: Okay. Thank you.

MR. SWANSON: I wonder if we could ask a clarifying question. We are just trying to -- I guess we still have one point of confusion. It is our fault. We did not ask about this during the break, and it is this. Are we talking about an accident situation?

It appears when you are referencing 100.11 we are talking about site suitability criteria for an accident situation, whereas it is our understanding that ICRP report 26 deals with normal operations. I cannot resolve that apparent conflict.

MR. COCHRAN: The ICRP approach is a formalism by which one can take into account the fact that one might be exposed to external whole-body radiation simultaneously with exposure to various organs and whether one should use this new formalism as opposed to the formalism that everybody has been using to date, which is based on this concept of a critical organ.

Now granted the most logical place that most countries in the world would apply this new formalism initially is to occupational exposures and to exposures to the public. There is nothing inherent in the methodology, though, that says if you are establishing limits for other purposes, for example criteria for designing containments and so forth and siting reactors, that the same concept should not be applied.

I mean, if you took that -- made that argument, then you would have to argue that you should not be applying the old approach in that respect either, but in fact you already are.

MR. SWANSON: The Contention is clearly

addressing an accident situation.

MR. COCHRAN: We are addressing 10 CFR 100.11 situations.

(Board conferring.)

MR. SWANSON: Thank you.

JUDGE MILLER: What is the Staff's position?

MR. SWANSON: Well, we agree that it is an appropriate change to change the once in a lifetime organ dose to a reference to 100.11. The concept in general, residual risk, is all right, but I think we do need to have a specific basis and we get down to what appears to be a round-about challenge to the 300 rem value that should precede a determination of whether or not the Contention should be let in as is or perhaps modified or otherwise treated differently.

I am not sure that we have this -- the Staff has not heard the basis yet for this specific challenge.

JUDGE LINENBERGER: Well, the position that I tentatively find myself in -- I will not speak for the Chairman here at the moment -- and I do not pledge not to change this position in the future, but the position I find myself in just now is that I do not quite see why there is a problem if inferentially a case can be made that certain revisions to weighting factors ought to be made, and it is seen that that in turn can be argued

against the 300 rem value.

It seems to me it ought to be possible to approach this and keep those two things separate. Now maybe I am oversimplifying things here, but that is the way it looks to me and I do not speak for the Chairman here. Does the Staff see some reason why one cannot or should not keep these matters separate?

(Counsel for NRC Staff conferring.)

MR. SWANSON: Do I understand Judge Linenberger to be asking whether or not the Contention could be admitted for the purpose of considering the effects of a change in the weighting process but without expressly allowing a challenge to the 300?

I mean, if that were the case --

JUDGE LINENBERGER: In effect, yes, but let me explain why I say "in effect", because you may have -- you may need to straighten me out here.

I am saying in effect yes, because, rightly or wrongly -- you tell me -- I am saying that what we are dealing with primarily in this Contention is a source of radiation not generally encountered or not encountered in any major way in light-water reactor proceedings, and if the proper way to deal with this different source of radiation turns out ultimately to point to perhaps an inconsistency between its results and what is already in

Part 100 expressed as 300 rem, that is potentially a technical challenge, if you will, but it is not a legal kind of thing and it seems to me that we should not refuse to listen to questions of, if they are properly supported, to issues that go to the right way to treat plutonium exposures.

Now if you have -- want to pull the rug out from under me here, help yourself. I do not claim per se to have the last word, but it is kind of a novel situation, it seems to me.

MR. EDGAR: I do not think it is novel. I think what we have here is a regulation. If there is evidence that suggests that the regulation should be changed, a proper forum for that is in a rulemaking, and I think that is what we are being told.

We would not have a problem if the Intervenors stipulate or the Board rules that there will be no challenge to the 25 whole-body and the 300 thyroid and take the Contention for what it is, litigate it and we will see what happens.

I do no think -- well, I do not think -- I think our point of difference is narrow and I think the solution is straightforward.

(Board conferring.)

JUDGE MILLER: Contention 11, as renumbered,

will be admitted as modified.

MS. WEISS: The other portions of 11 were not challenged. I just wanted to make it clear that that ruling would include all of the old 8.

JUDGE MILLER: The ruling includes the Contention, however subparts there may be, and the as-modified refers to the modification as read into the record.

Now you will formulate all Contentions. I probably should get them initiated by all -- you probably should get them initiated by all counsel and submit them for inclusion in the transcript.

MR. SWANSON: Unfortunately, I do not have the benefit of a transcript, but my notes indicate that when we went through all other aspects of for er 8 yesterday, the Board numbered it Contention 6, separated out 8(d)(1). Are my notes wrong? Okay, sorry.

JUDGE MILLER: Was 8 what we were just looking at?

MR. SWANSON: I guess I was concerned 8(d)(1) was separated out for a separate number to be considered later.

JUDGE MILLER: That is why we just -- is that the one we were just talking about? That is why we said we would later, and the later is now and it is 11,

because the end of the Contentions were 10.

MR. SWANSON: But all of former 8, then, is going to be one numbered Contention.

JUDGE MILLER: Eleven.

MR. SWANSON: Okay.

JUDGE MILLER: All right. I suppose we are now at the point, are we not, to take up motions? I will hold for the moment several where my notes indicate the parties say they are going to negotiate and proceed first to the two groups of motions, I believe.

Let me see if I have -- what I am looking at now is Applicant's motion for protective order dated 3/29/82, points of authority in support of it which I was told in the course of discussions bore some applicability to NRDC's ninth request to Applicants for admission dated 3/18, NRDC's 16th set of interrogatories to Applicants -- interrogatories to Applicants, dated, I think, 3/18, and NRDC's request to Applicants for production of documents.

I was told, if I understand correctly, that these all at least have some relationship to the Applicant's motion for protective order and its points and authorities in support. Is this correct so far?

MR. EDGAR: Yes.

JUDGE MILLER: Now there is a subsequent one,

Applicant's motion for protective order to NRDC's 17th set, so that was filed, I think, April 2. We are going to give Ms. Weiss an opportunity to examine that, so I will put that at the end, at any rate, of the motions.

Are there other motions regarding discovery that we should take up at this time?

MR. JONES: Mr. Chairman, did you mention the Staff's motion for protective order also? It is a motion for protective order of the 22nd set of interrogatories to the Staff.

JUDGE MILLER: I have objections to -- well, yes, put in the objections, then motion for protective order under a date of April 2.

MR. JONES: That is correct.

MR. GREENBERG: Mr. Chairman.

JUDGE MILLER: Yes.

MR. GREENBERG: There were submissions made on the 19th of March related to the general approach to discovery between now and the hearing date, and after the meeting yesterday afternoon counsel for the Applicants, the Staff and NRDC met in order to try to agree upon a general approach to discovery prior to the commencement of the LWA-1 hearing.

We did reach an agreement following that meeting. I would be happy to deal with that now or

after we discuss the motions.

JUDGE MILLER: Let me see. Is that the Intervenors' statement of position regarding discovery matters?

MR. GREENBERG: Yes, it is.

JUDGE MILLER: Filed March 19.

MR. GREENBERG: It is that --

JUDGE MILLER: Pardon me.

MR. GREENBERG: It is that and both the Applicants and the Staff in their filings of March 19 responding to Contentions also dealt with general discovery issues.

JUDGE MILLER: I am not sure -- the filings of March 19 regarding Contentions?

MR. GREENBERG: Yes.

JUDGE MILLER: Oh, those we have just been over in the past two days?

MR. GREENBERG: Well, at the -- I do not have the documents in front of me, but at the end of the submissions of both the Applicants and the Staff there is a discussion of general discovery questions independent of the discussion of the Contentions.

JUDGE MILLER: Yes. All right. If you have come to some semi-agreement, you might state it for the record. Let's see if we can get it in final form.

MR. GREENBERG: Well, thank you, Mr. Chairman, and certainly counsel for Applicants and Staff are free to take issue, but I think what I will state does reflect the agreement that was reached yesterday afternoon.

As I said, we sat down to try to resolve the issues raised in our pleadings of March 19, and we reached the following agreement.

First, by April 15, 1982, Intervenors would serve all discovery requests with respect to old Contentions, and the Applicants --

JUDGE MILLER: Are you varying now the schedule?

MR. GREENBERG: No, we are not varying the schedule.

JUDGE MILLER: Oh.

MR. GREENBERG: This is so-called first-round discovery on old Contentions. We would get our questions out by April 15. We understand that the Applicants and the Staff would get their questions out by April 15, so that all the answers will be in by April 30, the date specified in the Board's prehearing order of February 11. We have already proceeded with some of that discovery. We have outstanding sets and the remainder would be completed by April 15.

I should add, in this connection, that we have two sets of discovery outstanding to the Staff. We had hoped that the Staff would be able to respond to those sets within 14 days and we felt that no more time than that was necessary. However, Staff has stated that they would not be able to comply within that period and in order to reach an agreement on the overall schedule we are not going to object to the Staff's filing its responses on April 30.

Now the second key event occurs on April 30, and on April 30 all responses to old discovery, that is, discovery filed in the 1975-1977 period, will be updated and served. In addition, we will receive by that date answers to all our new questions with respect to old Contentions.

The next period is a period we refer to as second round discovery, running from April 30 to June 18. That is consistent, again, with the Board's order of February 11, and during that period, first of all, we would proceed with follow-up discovery to the extent any is necessitated on questions related to old Contentions, and that follow-up discovery could either derive from responses to some of our newer interrogatories or from updates to prior discovery.

And in effect we are talking about one round,

and I will explain in a litte bit greater detail what we mean by round of this follow-up discovery. In addition, during this period from April 30 to June 18 we contemplate that we would take discovery with respect to new Contentions.

Now as a practical matter that may not be very extensive, given the Board's rulings of this morning, although I would include within the category of new Contentions new parts to old Contentions that were admitted by the Board yesterday or today, and we contemplate in effect that there would be two rounds of discovery, as it were, with respect to those issues -- a first set of questions seeking to elicit basic information and then any follow-up that was necessary -- all to be completed by June 18.

Now we are going to proceed somewhat differently, and we are talking here about NRDC in its approach to both the Department of Energy and the Staff. The Department of Energy asked that we proceed during this follow-up period on a Contention-by-Contention basis or at least on a multiple Contention basis in getting out some of these follow-up questions, so that we might ask first a series of questions, follow-up questions, related to Contentions 1, 2, 5, and then subsequently questions related to 6,

2, 10.

And we also agreed that we would try to develop a schedule for that follow-up discovery, although it is difficult to say that is a binding schedule. There would be some targets that we would aim for to allow the Department of Energy and the other Applicants to plan for responses to discovery.

The Staff did not want to proceed in that fashion. It preferred to get all our discovery requests in one bunch and not have it staggered, and in order to meet that requirement we have agreed that we would provide all the updated discovery requests and we are just talking about updates here or follow-up discovery in one package to the Staff.

The Staff has agreed that it would answer interrogatories during this period, April 30 to June 18, on a 14-day turnaround basis and it is further agreed that Intervenors need not go to the Board in the first instance for permission to take discovery of the Staff.

Now there were two other points that were agreed upon which I should emphasize. The first is that during the follow-up period there may be a mix of discovery. It may turn out that it is most efficient in follow-up to take some depositions rather than proceed by interrogatory with respect to all matters or requests

for admission.

We contemplate that there may be some depositions. To the extent that depositions do not cover a particular of follow-up it may be appropriate also to have some interrogatories, but we do not anticipate an overlap between the depositions and the overall -- and the interrogatories.

Finally, I believe that all the parties would reserve the right to object to particular discovery requests on substantive grounds, whatever legal objections they may have to specific questions, although not objections to this overall approach.

That pretty much wraps up what we have agreed to yesterday afternoon and I hope the presentation accurately reflects the discussions we had.

JUDGE MILLER: It sounds very sensible. We will inquire, first of all, if this is an accurate representation of the agreements reached among the parties.

MR. EDGAR: There are two minor items. One, a point of emphasis which I am fairly certain is not an element of disagreement. I think it is an element of agreement that in the follow-up discovery -- and we are basically talking about two blocks of discovery here -- first follow-up on our discovery updates which are due

April 30, the last day, if you will; secondly, follow-up in regard to new information relating to old Contentions, discovery which has been ongoing.

In those two classes, the Intervenors will go by Contention and try to come in with one set per Contention. That was the essence of it.

MR. GREENBERG: Yes, we may include several Contentions in one set.

MR. EDGAR: Understood, but the point we talked about yesterday was that we were not going to have a succession of sets coming in on the same Contention so you never knew when your task was done with that group of people.

The second thing that I can reserve comment on now, if the Board wishes, but I would like to address it, is a new item. When we talked about this we did not have in front of us all of the rulings that the Board has made on Contentions, but Mr. Greenberg said something that we had not discussed, which had to do with new parts to old Contentions, and I think we need to probably confer amongst ourselves and understand just what that means and how we apply that within this set of agreements.

I am not sure we are going to disagree. I think we need to talk about it.

MR. GREENBERG: Our concept there is that we would have one initial set of questions and one follow-up set of questions.

MR. EDGAR: We are going to need to talk about what we mean by a new part to an old Contention.

JUDGE MILLER: That can be refined, I take it, by conference among counsel.

MR. EDGAR: Yes.

JUDGE MILLER: Any further clarification?

MR. EDGAR: No. Those are the only two items of which I am aware.

JUDGE MILLER: So far as the Applicants are concerned, then, this does reflect the agreement that they have reached.

MR. EDGAR: That is correct.

JUDGE MILLER: Okay, now we will inquire of the Staff.

MR. JONES: As stated, I think that reflects the agreements we reached yesterday. The Staff would want to note that although we are not requiring that interrogatories be approved by the Board first, we still reserve the right, if there is a particular question that we feel does not meet the requirements of 2.710(h)(2)(ii), that we may object on that basis but that we would not require that they go before the Board

in the first instance as the rules require.

JUDGE MILLER: Where does that leave us?

MR. GREENBERG: That was not the understanding that I thought we had reached yesterday. I thought we agreed that you may make substantive objections to interrogatories on the grounds that they are outside the scope of Contentions or not otherwise consistent with the Board's order, but we would not be in a position of having the Staff go back at its discretion, basically, to the Board to seek to cut of discovery.

JUDGE MILLER: That was my understanding of yours and then, implicitly, Mr. Edgar's description of the agreement. The Staff seems to have a slightly different version now, if we are following you correctly.

MR. JONES: I guess maybe we are disagreeing over what "substantive" is. For the Staff that means a substantive objection in the sense that the regulation provide that the interrogatories must be necessary to a decision and not obtainable from any other source. I am not sure that objection would be even available to the Applicant.

JUDGE MILLER: We do not believe it would be, but on the other hand it was our understanding of this agreement that that is in a sense of matter of form that by now the counsel, by conferring, know pretty well what

their broad areas of discovery area.

The Staff was willing, for that purpose, to waive the right that it has to require the Board to rule. That is what we understood to be what you all agreed.

MR. JONES: No. I think perhaps there is some misunderstanding. Under the rules, supposedly the interrogatories would have to be filed with the Board in the first instance before they were even filed on the Staff. That is what we are waiving, is the requirement that they, before they are even sent to the Staff to answer, they be found by the Board to be both necessary and not obtainable from any other source.

JUDGE MILLER: What else would the Board be ruling on in the case of interrogatories addressed to Staff? That is the whole nutshell, is it not?

MR. JONES: I am not sure I understand what you are saying.

JUDGE MILLER: Well, I thought you would waive some of the formal requirements. The only formal requirement that the Board is aware of in the case of the Staff's right to require a Board ruling is what you just described. Now either you waive it or you do not. We understood you people knew what you were talking about. You were willing to waive the requirement that

the Board make the findings that the regulations set out before you are required to answer.

We do not know anything other than that that the Board would be doing anyway.

MR. JONES: What we are willing to waive is the requirement that the Board rule on the whole set of interrogatories before we even look at them.

JUDGE MILLER: We do not care about that whole or half. What do you want us to do? We thought you were willing to go ahead and answer, give the information, just as the others are doing. Now why --

MR. JONES: As long as the questions are appropriate, but if they are not necessary to a decision and they are not -- they are obtainable from some other source they are not going to be appropriate questions.

JUDGE MILLER: What are you waiving, then? You are not waiving anything.

MR. JONES: I do not know any other way to say it. We are waiving the requirement that they file interrogatories with the Board before the Staff even looks at them.

JUDGE MILLER: We do not care if you want to be shielded from looking at these perhaps impious interrogatories, it makes no difference to us. You are not waiving anything the way you have described it.

Maybe you are. I do not know. Is this what you were all talking about?

MR. EDGAR: Well, I do not think we had a three-way conversation along these lines, but I am wondering if this is such a really big problem. I think what we are talking about is a difference in procedure whereby instead of the Board having to be involved at every juncture of the discovery process vis-a-vis discovery to the Staff, the Staff would respond to discovery but preserve its objections if it wishes to object, and all parties have preserved their objections, that one of the Staff's objections would include the 2.720 and presumably parties would confer and that would not be abused.

I really do not think they are going to have that big a problem with it. I really think that that is something that can write its own answer. It is gratuitous in my part in that sense. I am saying it is slightly gratuitous on my part. It is not my discovery and, you know, we were addressing the things that we had agreed upon, the Applicants, on the stuff to us, but I really think we can work something out on that.

JUDGE MILLER: I thought you had.

MR. EDGAR: Well, I think it has.

MR. GREENBERG: I thought we had too, and I

was looking for a set of symmetrical obligations here. One of the parts of this agreement, as mentioned in my presentation, was that we would be getting our information to -- our questions to the Staff toward the end of that second round period. If they were going to basically preserve their right to come back in and argue that none of this is necessary or that it can be obtained from other parties, we may really be in a pickle at the very end of that discovery period.

JUDGE MILLER: I am aware of that. I will say this, that the Staff's practice has been to voluntarily respond to a great deal of discovery requests, including interrogatories, and that they have always asserted their right to have the Board make a finding before they were required to.

I do not know that the Board would have to look at it first. The Staff, I should think, would look at it at least simultaneously to decide whether or not they wanted to raise what might be a technical question. But setting that aside, the Staff has traditionally responded. Unless there has been some sharp change in Staff practice, I do not see why they would not continue, at least to that extent, because you have here an agreed timing.

If you are going to stand on your rights, you

might just as well, as far as the Staff is concerned, file everything promptly and the Board will rule. But I will tell you this. The Board does not, in discovery, believe in too great a reliance on technical matters. We find that it is both time-saving and more fair for information to be given, to be given more or less voluntarily.

Staff might have a technical objection. (a) it saves time. By the time it is put in the hopper you are going to have some time elapsed and, secondly, it is more fair to the parties and it certainly brings out the facts in a timely fashion, which is the purpose of discovery.

And that is why we asked you voluntarily to confer and to make available information, even though it might be a close question in your mind, resolve in favor of giving information. We are all going to live by the same facts. So I would say that the Staff does not seem to be responding in a way in which I understood the agreements were going, but I do not think you can have it both ways.

You either have to cooperate and have it be a mutual thing because you are going to seek discovery as well as give it, and, if not, if everybody is going to stand on form, all right, start firing the form and we

will start firing back rulings very rapidly.

MR. TREBY: Well, Mr. Chairman, I think the Staff is attempting to cooperate and to reach some sort of agreement. I think that we are, by agreeing that we will accept discovery and we will attempt -- and we will answer those voluntarily, we are in fact saving the Board the burden of first looking at these Contentions, determining which ones do or do not meet the requirements of 2.720(h)(2)(ii).

We are also saving the Board the problem of assigning the time, since, as you know, the regulations do not provide us any special time for the Staff to answer the interrogatories. We have now indicated we are going to answer them in two weeks. What the Staff is preserving is having agreed to those things.

There may well be certain contentions which are filed with the Staff or interrogatories, excuse me, interrogatories which are filed with the Staff which the Staff believes are objectionable, either because they are not necessary to the decision in this case -- that is almost the same objection as they are not relevant -- so that that is approximately the same objection.

But we also believe that we are entitled to make the objection on the grounds that the information is obtainable elsewhere, that you could as easily and

probably have, since we have been getting a lot of duplicate questions, gotten this information from the Applicant.

We are not willing to give up that objection and I think that it is reasonable on the Staff to wish to preserve that potential objection. But let me point out that it has been the Staff's practice in this case, as in many others, to talk with the Intervenors to discuss our objections to see if we cannot work them out first before we try to make them in writing, and we will continue to try to do that so that we do not burden the Board.

JUDGE MILLER: That is correct. That is what we have asked all parties to do.

MR. GREENBERG: Mr. Chairman, in the interest of moving things along and getting an agreement, perhaps I can suggest that we will allow the Staff to preserve that possibility. I do not think it has been abused in the past. But we did talk yesterday about giving us notice within ten days if there was an intent to object or seek a protective order, and I wondered if I can confirm that that commitment is still outstanding.

JUDGE MILLER: Is that still outstanding?

MR. JONES: That is fine, yes.

JUDGE MILLER: Consider it as modified in that

respect. Anything further?

MR. GREENBERG: No.

JUDGE MILLER: Okay.

All right, any other matters now before we go into the motions?

(No response.)

JUDGE MILLER: All right. What is the first matter -- the Applicant's motion for protective order with regard to NRDC's 16th set of interrogatories and ninth request for admissions and fifth request for production of documents, all of which were served on March 18 and the Applicant has filed a motion for protective order supported by points and authorities dated March 29, and there is also the matter of -- I think we were to take up at the same time -- the NRDC's request of Applicants for admissions of 3/18 and NRDC's 16th set of interrogatories to the Applicants.

Is that correct?

MR. EDGAR: Yes.

JUDGE MILLER: Okay. Who has -- you have the originaly motion, I guess, Mr. Edgar.

MR. EDGAR: Yes. You are going to have to bear with me just a little on new and old numbers because, you know, this motion is based on the old Contention numbers, so I will try to keep that in mind.

I would like to raise two things primarily. The first thing, if I could direct the Board's attention to our motion of the 29th of March, paragraph 3 on page four --

JUDGE MILLER: Fuel availability?

MR. EDGAR: Yes, and paragraph 4 on page five.

JUDGE MILLER: All right.

MR. EDGAR: And I will not go on and summarize the arguments presented in the motion or the memorandum of points and authorities on these two points since, first, as to paragraph 3, fuel availability, the Board ruled out that Contention, which was old Contention 17, and, secondly, as to paragraph 4, which is application of ALARA to accidents, the Board ruled out old Contention 22.

So for the reasons set forth in those arguments and based on the Board's rulings, we think that the discovery in connection with those two items, as enumerated in paragraphs 3 and 4, should not be had.

JUDGE MILLER: Very well. What does that leave, then, as matters in controversy?

MR. EDGAR: There are two matters in controversy. If I could refer you to page three, paragraph 1, page three of the motion, paragraph 1, safeguards, page three of the motion, pages three and

four of the motion, paragraph 2, occupational exposure limits.

If I may, I would like to argue those in inverse order and just briefly summarize the first one, occupational exposure. That is rather straightforward. You will see in connection with interrogatories 2 and 3, at page nine of Intervenors's 16th set of interrogatories and in regard to request for production 2 at page four of its fifth request for production of documents, Intervenors have requested information regarding draft and proposed EPA rules on occupational exposure limits.

This Board's April 6, 1976 ruling or order relating to contention 8 explicitly held that intervenors may not challenge the occupational exposure limits in 10 CFR Section 21.101. Discovery that goes beyond this and relates to these limits is, again, improper for the reason that the contention itself is improper and has been previously ruled out. And for that reason we think that the discovery should not be had.

(Board conferring.)

MS. WEISS: Mr. Chairman, is a response appropriate to that now?

JUDGE MILLER: Yes, yes.

MS. WEISS: You have just admitted contention 11(d)(1), and when Dr. Cochran was explaining what the intent of that is, what the purpose of it is, he directed himself specifically to the relationship of the latest EPA and NRC positions to the questions raised about what risks should be assigned to doses to the various organs. That is a question that is now going to be litigated, and we are simply asking for the information in EPA's latest position, and the applicants' position with respect to what those weighting factors should be.

We are not challenging any rule; we are just

looking for the technical basis for setting weighting factors for the various organs.

MR. EDGAR: Mr. Chairman, we submit that the interrogatory is itself -- contradicts that characterization. On page 9 of the 16th Set of Interrogatories you can read items 2 and 3. It says, identify the latest EPA position with respect to proposed occupational exposure limits. Item 3 says identify the latest applicant position with respect to proposed occupational exposure limits.

This goes beyond the existing regulations, and we think the Board has ruled here previously.

JUDGE LINENBERGER: What were the pages you were reading from?

MR. EDGAR: Sixteenth set of interrogatories, page 9. And the document request, the fifth document request, number four, or page 4.

JUDGE LINENBERGER: Thank you.

(Board conferring.)

JUDGE MILLER: How does the proposed occupational exposure limits of either EPA or the applicants, how does that fit into your contention that you have identified, 11(d)(1), is it not?

DR. COCHRAN: Could I answer that?

JUDGE MILLER: Yes.

DR. COCHRAN: The EPA is in their proposed standards -- at least as of the date they went public with them for public comment and hearings -- was adopting the ICRP 26 approach with the modification of some of the weighting factors and the limiting caps on the various organ dosages.

Now, I am aware that there has been an exchange of correspondence within the administration between EPA and DOE, and EPA and NRC staff, as with respect to whether these modifications are appropriate and advisable and so forth, and whether they can live with them. And what I am seeking with regard -- in the request for production of documents is this package of material so that I can see what the staff position is and what the applicants' position is with respect to the various risk numbers assigned, and therefore, the weighting factors, and any capping limits and so forth.

We are not challenging the occupational exposure data, but we want to see what their basic assumptions are with regard to the risks and weighting factors and whether, for example, the gonads should be included as an organ of risk when you do this weighted sum or whether it should be excluded. That would be one difference between the ICRP approach and the EPA approach.

Now, the only thing we have done with respect to the interrogatories is we expect to get this package of material. We would like them to identify which is the latest version so they do not come back at a later date and say oh, well, that is what we -- that was our position in September but our position has, of course, changed, and so forth, so you are arguing from the wrong documents now.

So it would be nice to know what their current position is, and that is what we are asking for in the interrogatories. We are asking for the data base, how their position has changed over this period of the last couple of years.

MR. EDGAR: NRC has exposure limits in Part 20. These exist, they are the rules for occupational exposure. The applicants are required to meet those regulations. We cannot see how a request that says tell me what is going to happen at EPA has anything to do with matters which are relevant to this proceeding.

DR. COCHRAN: I have to come in and argue whether these weighting factors are appropriate. I think this discovery goes to whether the particular weighting factors that EPA is proposing that --

JUDGE MILLER: What does that have to do with the issues in this case? That is what I am not quite

following.

DR. COCHRAN: We are going to set appropriate dose limits for organs such as bone and lung, and also perhaps liver with respect to 10 CFR 100.11, and what I am proposing is that we adopt procedurally, for establishing what those appropriate limits are, the approach that the ICRP 26 has taken, and it is the same approach that EPA is proposing to use in -- with regard to occupational exposures.

Now, if we know that all the folks onboard, the applicant, the NRC, the EPA and the NRDC, are going to propose to use the same weighting factors with respect to occupational exposure, then I do not have a hard selling job to say that those are the weighting factors that ought to be applied with respect to 100.11, when we get to the bone and the lung. But --

JUDGE MILLER: Ought to be applied instead of what?

DR. COCHRAN: Instead of this approach that the applicant and staff are currently taking in the existing documents, which is based on the concept of a critical -- of establishing a limit for critical organ. And they go through a procedure by which they say the critical organ limit for the bone that would be equivalent to a whole body limit of 25 rems is 150

rems. I frankly do not think that is the appropriate approach to take -- using the concept of the critical organ and trying to match the 150 for the bone to the 25 to the whole body.

JUDGE MILLER: Isn't that the way the regulations have presently established?

DR. COCHRAN: There are no regulations for establishing the appropriate limits for bone and lung vis a vis releases of actinides for purposes of establishing site suitability under 10 CFR 100.11.

We are starting from scratch with respect to actinide release and limitations of exposure to these other organs. And the question that will be before the Board is when we establish these new limits, are we going to take the ICRP 2 approach or are we going to take the ICRP 26 approach.

MR. EDGAR: He is posing a different question here. This interrogatory does not have to do with weighting factors or Part 100. This interrogatory says plainly identify the latest EPA position with respect to proposed occupational exposure limits. That is exactly what the Board ruled upon on April 6 of 1976 and said no, we are not going to get into the proposed EPA occupational exposure limits.

MS. WEISS: I think that Mr. Edgar is

confusing the standard for admissibility of evidence with the standard for discovery, which is far broader and anything reasonably calculated to lead to possibly relevant evidence should be allowed on discovery.

JUDGE MILLER: To lead to admissible evidence.

MS. WEISS: That is right, and to the extent that there should be, we fully expect, particularly in the document request, that there will be discussions by EPA of why it is proposing to adopt these exposure limits which will bear on what the dose limits should be for bone, lung, liver under Part 100. That would be evidence that would be relevant with respect to contention 11(d), and we think that we ought to be allowed at least to see if that exists.

JUDGE MILLER: 11(d) refers to the guideline values for permissible organ doses used by applicants and staff.

MS. WEISS: 11(d) now goes precisely -- it has been amended, modified to reference Part 100.11.

JUDGE MILLER: The approach utilized by them in establishing 10 CFR 100.11 organ dose equivalent limits corresponding to whole body dose is inappropriate and so forth.

MS. WEISS: Right. We think the documents that would be discoverable under this, these two

interrogatories and the request for production, will give us evidence that will support us in arguing that the ICRP approach ought to be used because it more closely approximates the correct risk resulting from doses to various organs which will be an issue.

(Board conferring.)

JUDGE MILLER: What was the Board's ruling with refering to occupational exposure limits in --

MR. EDGAR: I will find it here.

JUDGE MILLER: Does staff happen to recall? Do you know the approximate date?

MR. EDGAR: Yes. It is April 6, and we have it cited here. We have it cited to the NRC reports. If you look on page 4 of our motion, footnote 4, --

JUDGE MILLER: What is the page of, the April 6, 1976?

MR. EDGAR: In the original text in the slip opinion form. Look on page 11.

JUDGE MILLER: What I have is the published part that was published, starting with page 430.

MR. EDGAR: 435 is the correct page, Mr. Chairman, and you will see a caption there which is labeled contention 8, and right under that caption contention 8 you will see the ruling to which I refer. Direct challenge to the occupational dose limits.

DR. COCHRAN: Mr. Chairman.

JUDGE MILLER: Yes?

DR. COCHRAN: Let me give you a better history. NRDC had a petition as of 1975 both to the NRC and the EPA to change the occupational exposure limits, and it was based on the argument that was made with respect to -- that was ruled out by the Board -- to the best of my recollection, went to the issue of the genetic consequences and whether one should utilize -- my recollection was that the argument was that we had said that would the applicant admit that if they adopted the approach that we recommended in our petition, that that was ALARA. That that would be a standard -- that that would be a risk less -- as low as reasonably achievable, and that was ruled out as a challenge to the standard.

The documents that I am seeking here go to an entirely different approach for establishing occupational exposure. And it is whether or not you will adopt the ICRP 26 approach and if so, which is being recommended by the EPA, what risk factors. Do you take the BEIR numbers or do you take somebody else's numbers to assign these weighting factors.

Now, we want to look at that and see. It may be that the Department of Energy has not attacked the

weighting factors at all. That would tell us that they are, in a sense, accepting the EPA weighting factors, or it may be they are attacking them and we could see what their position is on these matters.

MR. EDGAR: All Dr. Cochran is saying is that he filed a petition some years ago which was not accepted. Now he has changed his rationale, but nevertheless, he is still trying to do the same thing, which is to attack the regulation. There is no difference.

(Counsel for intervenors conferring.)

JUDGE MILLER: Mr. Edgar, in what way would there be any harm done if the documents and the interrogatories were permitted at this stage?

MR. EDGAR: Well, I would like to address that. One could argue that well, having a little discovery go on is not harmful, but I really think it is under these circumstances, that we have an extremely tight hearing schedule. We all have finite resources. This is not necessary to a decision and it does, indeed, conflict with the rulings of t e Board. And --

JUDGE MILLER: We have been told that it does not conflict, that there are no regulations which cover this squarely in the case of plutonium. Do they or do they not?

MR. EDGAR: That is incorrect. There are existing occupational standards for exposures to plutonium. You can look in 10 CFR Part 20 and they are right there. And I do not think Dr. Cochran would disagree with the existence of standards.

JUDGE MILLER: What are the existing standards, Dr. Cochran?

DR. COCHRAN: We are not debating the existing occupational exposure standards which cover exposures to plutonium and every other type of radiation. We are not debating the limits to routine releases to the environment which are covered under 10 CFR 20. We are debating what should be the appropriate standard for 10 CFR -- limits in 10 CFR 100.11.

Now, one has two choices. One can use the approach that is being considered with respect to changes in the occupational exposure standard, or one can go back and adopt the -- something along the lines or similar to the approach that has been used in the past and is currently being used for an occupational exposure standard.

We are at a junction where we are going to establish a new approach for handling these accident situations. You can -- Edgar wants to eliminate, Mr. Edgar wants to eliminate the discovery so that we cannot

argue why we should use the new approach, and therefore, he will have a better opportunity to defend the old approach. And I think that is unfair.

(Board conferring.)

JUDGE MILLER: 100.11, as I understand it, relates to accident situations and does not cover plutonium presently, is that correct?

DR. COCHRAN: That is correct.

JUDGE MILLER: Mr. Edgar, is that correct?

MR. EDGAR: That is correct. Well, let me -- it applies to site suitability analysis. All right. And it is a guideline value or design value. But what the interrogatory asks for is occupational exposure standards, and that is in Part 20, that is an existing regulation.

JUDGE MILLER: Yes, but it is one that does not apply to accidents, LWA or plutonium, 100.11. Occupational exposure does not apply to 100.11.

MR. EDGAR: No, it does not.

JUDGE MILLER: Or vice versa.

MR. EDGAR: Absolutely, it does not. But he is not asking for that, Mr. Chairman; he is asking for the information on the occupational standards which do cover plutonium and which are in Part 20.

JUDGE MILLER: Would it not be some evidence

as to the nature and effects of plutonium exposure under certain circumstances? And if so, why is not relevant in the broad discovery sense? I am inclined to believe that it probably should be, Mr. Edgar, but I want to give you the chance --

MR. EDGAR: Mr. Chairman, it is in my mind extremely remote.

JUDGE MILLER: It may be remote, it may be extremely remote, but that is really not decisive at this point. Now we are getting into discovery, we are going to fine tune all these things later and not too much later.

MR. EDGAR: But one adjunct of that is that we can get a better definition of the scope, of what these intentions are, and we are going to be talking about that later on today. But --

JUDGE MILLER: If you don't hurry up, it is going to be tomorrow.

MR. EDGAR: You will pardon me there, but in my mind we can gain insight into the scope of these contentions and what we have to do to prepare in these proceedings through the discovery process. And when you have a really clear one like this where what he is really trying to do is to get into another rulemaking by an indirect route --

JUDGE MILLER: Why do you say that?

MR. EDGAR: Well because, look at the interrogatory. It says, give me -- identify the latest EPA position.

JUDGE MILLER: All right. That is something that has been the subject of certain exchanges of documents we are told and discussions between and among your client, the Department of Energy, EPA and possibly others.

MR. EDGAR: Right.

JUDGE MILLER: What is so strange about that?

MR. EDGAR: The document request says provide all written correspondence relating to applicants' opinion with regard to establishment of new occupational dose limits as proposed in draft and proposed rules by EPA during the last four years.

JUDGE MILLER: All right, what is so tough about that?

MR. EDGAR: Well, we are going to rely on the existing regulations. They may or may not --

JUDGE MILLER: The existing regulations in Part 100.11 do not cover accidents and do not cover plutonium, I am told. And that is --

MR. EDGAR: No, they do not cover -- no.

JUDGE MILLER: I am sorry. Do cover accidents

and not occupational. Is that --

MR. EDGAR: That is right, you have stated that correctly. And he is getting into a broad scale inquiry into a totally different subject that this Board has already ruled out. That is all I am saying.

JUDGE MILLER: What we ruled out, as I understand it is we were not going to get into the contentions that wanted us to go into what we regarded as a challenge to the existing regulations on occupational exposure. That is apples. This is oranges. This is discovery going to certain effects in an accident sequence under Part 100.11.

Now, why is th re not at least some reasonable connection between the studies that go into that and those that have gone into or may go into proposed occupational exposure limits? We are not challenging or going into the occupational limits, but we are taking a look, since this is an admitted contention, at the approach that you and the staff have used in your 100.11 approach in establishing equivalent limits and so forth.

(Board conferring.)

JUDGE MILLER: The Board is going to rule that the discovery request, both interrogatories and documents, may be had; however, subject to the following condition or understanding which will be articulated by

my expert, Dr. Linenberger.

(Laughter.)

Didn't I pass the buck? He said I could not do it.

(Laughter.)

JUDGE LINENBERGER: Consistent with our order of April 6, 1976, we will not permit a challenge to the occupational dose limit values. To the extent that the document that Dr. Cochran seeks and answers to interrogatories that he seeks offer him some illumination as to a proper way to approach the question of exposures to actinides, we feel that this discovery is appropriate.

We will not countenance, however, challenging the occupational dose values, dose limits themselves.

MR. JONES: Mr. Chairman, if the staff could just jump in here for a moment.

JUDGE MILLER: Now you jump in. You leave me floundering for half an hour. Go ahead.

(Laughter.)

MR. JONES: I am afraid I am not going to help you in that respect anyway. In I think most of the instances where you are going to be discovering an objection to an interrogatory by the applicants, the staff has the identical interrogatory. If we can say

me, too on whatever your rulings are, it will save us having to deal with those later.

JUDGE MILLER: Fair enough, that will expedite things. Thank you.

All right. Now what is our next hassle?

MR. EDGAR: Our next hassle --

JUDGE MILLER: I am a lawyer. I should not even be doing this.

(Laughter.)

Go ahead.

MR. EDGAR: Our next --

MS. WEISS: George, there is just one --

JUDGE MILLER: Does someone have a question?

MS. WEISS: Yes. You were correct I think that all the questions on the interrogatories about fuel availability are mooted, but I would not agree that your objections on the ALARA contention are mooted. Let me just direct the Board to the right place.

That is paragraph number 4 on page 5 of the motion for the protective order. All of the discovery requests in question are spelled out in the Applicant's memorandum of points and authorities in support of the motion for protective order beginning on page 20, going through to page 23.

Those requests for admissions were proposed by NRDC under two separate contentions, Contention 8(a) and Contention 22. Contention 22 is out. That was the contention that said to have the Board look at accidents, apply ALARA to accidents. That is out.

Contention 8(a) has now been renumbered 11(a) and is still in. It is one of the ones from 1976. I would just suggest, we have gone through these, that 14, 20, 22 to 24, and 11 and 13 are related directly to the contention which has not been admitted and therefore must go out, but that the remainder are related equally to the contention which is still in, and therefore should stay in.

MR. EDGAR: All right. I would like to respond to that. The point that they have labeled 8(a) in my mind is not significant. They have contended all along, apparently, according to their most recent pleading, that they meant to include it within Contention 8(a), so we will -- I do not think that that

means much, but there is another point that the Board ought to take into account here.

If you look at the admissions which go in the ninth set from pages 5 to 10 and you read them as a logical sequence, you will see that going from 1 to 24, what the beginning is and what the end is, and the end result is an attempt to demonstrate or buttress Dr. Cochran's argument that the ALARA applies to accidents.

Now, if you have any doubt as to whether that is where he is headed with the argument, you might want to look at NRDC's response to our objections to the contention at pages 34 all the way up through page 39, and read the discussion in the text of NRDC's responsive pleading and then compare it to the language in the admission.

DR. COCHRAN: That is not necessary. We will admit that.

MR. EDGAR: The language is the same; will you admit that?

DR. COCHRAN: I will admit that that was the original intent. What I am suggesting is we have an ALARA contention. We might just as well find out what ALARA means, at least with respect to routine exposures. They are relevant, but if the original intent governs whether they are admissible, then I will

abide by the Board. It is certainly relevant, ought to be able to ask them again with respect to what is relevant.

MR. EDGAR: All I am suggesting to you is that those admissions constitute the very rationale that NRDC argued in support of the admission of Contention 22.

DR. COCHRAN: We are not going to argue the rationale. That is out.

MR. EDGAR: If the rationale is out and the contention is out, then why do you need discovery which is the same as the rationale that the Board has rejected?

JUDGE MILLER: This is not quite discovery; this is a request for admissions following -- these are requests for admissions, this is not discovery.

MR. EDGAR: It is a mode of discovery, Mr. Chairman.

JUDGE MILLER: It is a mode establishing certain matters for use at trial. That is a little bit different. That is not an interrogatory. There is a difference. In trial you will find out if you are not a little cautious about some of these things.

MR. EDGAR: Okay.

JUDGE MILLER: I know it is in the same section, both under the Rules of Civil Procedure and ours, but there is a difference. Admissions, admissions

given and their use at trial and their use without further foundation.

MR. EDGAR: Why do we need an admission in connection with --

JUDGE MILLER: Save him from having to make the proof if you will admit it.

MR. EDGAR: The Board has overruled the contention, so there is no need for proof.

JUDGE MILLER: Overruled one contention. The argument is that there is still an ALARA issue.

MR. EDGAR: And I am trying to point out to you that these admissions here, requests for admissions are in fact NRDC's rationale for admission of the contention. They are co-extensive, they are identical.

JUDGE MILLER: If they are co-extensive, what difference does it make? They still have one which they contend is relevant, so the fact that it is not relevant because it is moot to another really does not --

MR. EDGAR: The Board has made a ruling as a matter of law that ALARA does not apply to accidents. These admissions go to an attempt to establish the contrary position.

JUDGE MILLER: Now wait a minute --

MR. EDGAR: That is exactly what they are trying to do, and that is how they were argued in the

responsive pleading. They are how they are logically designed in the set of admissions.

MS. WEISS: I think, you know, it seems to me it is getting a little out of hand. We have attempted to excise all of their requests for admissions that related to the contention which has not been admitted by the Board. Those which remain clearly relate to a definition of the ALARA principle. There are ALARA contentions remaining. Do you dispute that if we filed them tomorrow under Contention 8(a), that you would have to address yourself to them? If you do not dispute that, it is simply a matter of form that we are arguing over.

MR. EDGAR: I think we are arguing a little more than a matter of form. I think we are arguing -- Dr. Cochran candidly admitted the purpose of those admissions and the fact that they were identical with the responsive pleading.

JUDGE MILLER: I do not think that mechanically establishes that, Mr. Edgar. They do have Contention 11(a), which states that neither the Applicants nor the Staff have shown that exposures to the public and plant employees will be as low as reasonably achievable. That is an existing, ongoing contention.

Now, going through the request for admissions that you have alluded to, the fact that they may have been developed or used for something else, accidental matters to which ALARA has been held not to apply, does not solve it. It is only the beginning, it is not the end of the problem.

The question is whether that which remains is reasonably relevant, which in the discovery sense is fairly broad, applies, and it looks to us as though it does, as though it would. However, if you have something in here, go through the request for admissions one, two, three, if there are some that you say could apply only to the mooted matter and could not reasonably apply to the existing 11(a), then we will hear you.

We have looked through and we do not see any, but --

MR. EDGAR: You do not see any that would not apply?

JUDGE MILLER: That would not apply to 11(a)? Yes.

MR. EDGAR: Well --

JUDGE MILLER: Which one?

MR. EDGAR: You have to throw out 24. I am going to read from the bottom. You have to throw out 24, back to 22.

JUDGE MILLER: 24 to 22, isn't that an odd way to approach it?

MR. EDGAR: All right.

MS. WEISS: We agreed --

MR. EDGAR: Let me have your list again.

JUDGE MILLER: What do you have, 22 to 24, request for admissions, and those are out, as I understand it.

MS. WEISS: We agreed to withdraw those. I think that is --

JUDGE MILLER: All right. Request for admissions 22, 23, 24. With reference to -- well, Roman numeral III, Contentions 8(a) and 22, which have now been renumbered on the one hand and denied on the other, are hereby deleted. Now --

MS. WEISS: There were some others, too.

JUDGE MILLER: Now, if you will how me, then, starting with page 21 and going back to 1, which ones you claim are wholly irrelevant in the broad sense to the remaining ALARA contention of 11(a), we will be glad to listen to you. Is Staff going to jump in here? I mean this is a good time if you are going to come to our aid.

[Laughter.]

Be thinking guys.

Go ahead.

MS. WEISS: We would think 20 should go out as well.

JUDGE MILLER: All right, 20 is out. And as a matter of fact, screen these carefully, now, because if there is any question about going out, knock them out, please.

MS. WEISS: We also think that 14 should go out.

JUDGE MILLER: Hold it; 14 is out.

MS. WEISS: And 13 should go out.

JUDGE MILLER: Which one?

MS. WEISS: Number 13 should go out.

JUDGE MILLER: How did we get this backward habit, Mr. Edgar. I am going to be reading the newspaper right to left.

Okay, go ahead.

MS. WEISS: And 11 should go out.

JUDGE MILLER: And 11 is out. Fine, 11 is out.

Are there any more, now? If they are doubtful, knock them out because we want to get right down to what is necessary for the proper development of 11(a), but we do not want to impinge upon the objections that have been raised by the Applicant.

MR. EDGAR: Okay, Mr. Chairman. I do not see

the point in belaboring it further. We have stated our position. The Intervenors have withdraw, by my count, 11, 13, 14, 20, 22 through 24, and we would like a ruling as to whether we have to answer the balance.

[Board conferring.]

JUDGE MILLER: The Board then rules that the Applicants shall answer the remaining unstricken requests for admissions that you have just described, Mr. Edgar.

All right, now what is --

MR. JONES: Can Staff ask for a clarification of NRDC? Our numbers match yours when you say 22 through 24.

JUDGE MILLER: They either match them or they jolly well will because they will see that they do. I think they will undertake to do that. Please strike the corresponding requests to the Staff, whatever the numbers may be, to match those that have just been removed as to the Applicants, please.

Okay, Mr. Edgar, what is next?

MR. EDGAR: The final point is expressed at page 3 of the motion, paragraph numbered 1, and the subject is safeguards. The interrogatories in question in our judgment go far beyond the bounds of the admitted contention. We believe that three basic limitations

must apply here. The first is that the contention was not admitted to look at the adequacy of safeguards, and DOE and even NRC licensed fuel cycle facilities. Rather the contention was admitted for a limited purpose in conjunction with the NEPA cost-benefit balance.

We further think that a full-scale inquiry into NRC licensed facilities is improper and that an inquiry into facilities outside NRC jurisdiction is improper. In essence what we are looking for is an attempt to ascribe some reasonable bounds --

JUDGE MILLER: All right, let's hear from Intervenors on that.

MR. EDGAR: Okay.

JUDGE MILLER: We previously considered that. We are inclined to agree with the fact that we adequacy-type of discovery versus the more --

MR. GREENBERG: Perhaps, Mr. Chairman, adequacy is an infelicitous word in these circumstances.

[Laughter.]

JUDGE MILLER: No, it is a perfectly good word.

MR. GREENBERG: In these circumstances it may help to explain matters to go back and try to focus on what NRDC originally thought this contention was all about.

JUDGE MILLER: You know, I am awfully tired of

having to go back. It is getting late in the day. Start at the end and work back. Start with today and then yesterday.

[Laughter.]

MR. GREENBERG: The basic point, Mr. Chairman, this contention, Contention 5 is aimed at determining risks and consequences of certain intentional acts at the CRBR and fuel cycle facilities for purposes of a NEPA cost-benefit analysis. The essence of our discovery is to try to develop information which allows us to assess the potential risks and consequences of those intentional acts.

We are not challenging the adequacy of Commission regulations, we are not challenging the adequacy of safeguards at other facilities, we are not looking at the LMFBR fuel cycle. We are trying to develop an appropriate information base so that we can assess the NEPA cost-benefit analysis, and that is all there is to it.

JUDGE MILLER: That is the long way around the mulberry bush. We are inclined to deny the requests which are contained in -- let's see, you have interrogatories and requests for admissions, haven't you?

MR. GREENBERG: No.

MR. EDGAR: We have it catalogued here on page

3 of our motion under safeguards. In the first two lines we have catalogued the discovery requests to which we object.

JUDGE MILLER: Those are Interrogatories 4 and 5 at pages 7 and 8 of the interrogatories.

MR. EDGAR: Right. And then we have a request for production.

JUDGE MILLER: Request for production at pages 1 and 2 of the request for production of documents. Is that sufficiently identified for record purposes?

MR. EDGAR: Yes.

JUDGE MILLER: All right.

The Board will rule that those interrogatories need not be answered and that document and those documents need not be produced.

Now, what is the next one?

MR. EDGAR: The next is the Applicant's April 2, 1982 motion for a protective order and accompanying memorandum of points and authorities. I might suggest to the Board at the outset that the discussion in the first four enumerated paragraphs of that motion at pages 2 through 4 are irrelevant at this point since we have reached agreement on an approach to discovery, and that has been stated for the record this morning -- I mean, excuse me, this afternoon after the lunch break. So

that the focus of concern here is as to paragraphs 5 and 6 of the motion as set forth at pages 4 and 5.

In essence we have the same set of arguments which apply to this motion as applied to the motion which the Board just considered in regard to safeguards: that Contention 5 was admitted for a limited purpose, and I will refer here to our motion or accompanying memorandum of points and authorities at page 6 to the end; that Intervenors; discovery request raised programmatic generic issues outside the scope of a licensing proceeding; that Intervenor's discovery requests raised issues outside the Board jurisdiction; and lastly, that Intervenors' interrogatories raise issues which need not be considered in an LWA or even a construction permit proceeding.

MR. GREENBERG: Mr. Chairman, if I might, I would like to respond to that. The Applicants paint with a very broad brush here and do not really specify to any great extent the particular interrogatories which pose problems for them. I would like to take a moment, if I could, to explain what kind of information we are trying to develop here and what our rationale is.

Applicant's position seems to be that about the only discovery that we can take under Contention 5 relates to compliance with current regulatory

requirements. That, in our view, is far too narrow an approach to take to this particular contention, and indeed we believe that viewpoint was specifically rejected by the Board in April 1976 when it admitted Contention 5 for NEPA cost-benefit purposes.

The question is how do you go about developing information to make that NEPA cost-benefit assessment, and the interrogatories that we have put forward and the requests to produce are simply an effort to try to develop some information with respect to the risks and consequences of safeguards at the CRBR and supporting fuel cycle facilities.

Now, in order to develop that information, you cannot limit yourself to the CRBR, you cannot limit yourself to specific fuel cycle facilities. If you look at the final environmental statement which has been prepared by the Staff, the analysis of safeguards is premised upon an evaluation of safeguards, risks and consequences at a variety of facilities, and then there are projections of what those future risks and consequences might be.

What we are endeavoring to do here is develop information which explains how the Staff reached the judgments it reached that probabilities of death are low or that the consequences of safeguards incidents might

be limited, and we believe that kind of discovery is perfectly appropriate in the NEPA cost-benefit context. I think Applicants are taking far too narrow a view of what NEPA cost-benefit is all about.

We are looking at all costs associated with a particular facility or series of measures at that facility, economic costs, social costs, technical costs. It is not a narrowly-focused inquiry. And in order to develop the information to evaluate that NEPA cost-benefit assessment, it is essential to develop the kind of information base that we simply do not have at this point.

I think that the distinction that is attempted to be drawn between adequacy and risks, on the one hand, and costs, on the other hand, is a wholly artificial one. If there are risks associated with particular measures or the use of particular fuels, those risks can result in costs, and we are trying to get a handle on that.

MR. JONES: Mr. Chairman, if the Staff could jump in, maybe we could help on this one. This has been a recurrent problem with the interrogatories on safeguards that the Staff has noted, and it has to do with the nature of the FES review that the Staff does. The Staff will never be judging the adequacy of any of

the fuel cycle facilities safeguards simply because none of the ones that are proposed will be NRC licensed. The only facility that will ever be reviewed, and that will be at the OL stage for adequacy, is the CRBR facility itself.

With respect to the rest of those facilities, and really with respect to the FES on Clinch River, the FES analysis goes to the extent of not questioning the adequacy but of looking at the safeguards that have been proposed or are in existence at those facilities in assessing what the environmental impacts of the safeguards are and whether there will be any increase in those impacts that can be attributable to adding Clinch River products to that fuel cycle if it is an existing facility, will it be expanded, that sort of question.

This is where we get into the problem whether they are not only asking us for information on adequacy of other facilities. This is a question we will never answer at this stage or any other from the standpoint of an NRC review, and this is what is creating really some problems with us.

We have no problem with giving them information that we may have as to what safeguards exist at a facility that has been proposed for the fuel cycle. That certainly is relevant as to what the

environmental impacts of those safeguards are, but as to whether that is adequate, it is something that we just do not have jurisdiction to question now or even in the future.

MR. GREENBERG: Mr. Chairman, at the risk of repetition, I do not --

[Board conferring.]

JUDGE MILLER: We have been talking about costs. Are we speaking about environmental costs?

MR. JONES: Yes, that would be what would be appropriate for the FES review.

JUDGE MILLER: Now, would we also be considering the cost of providing safeguards in some type of NEPA cost-benefit balancing, possibly?

MR. JONES: That certainly would be one of the factors that go into the balancing, yes.

JUDGE MILLER: Those are the only two respects in which costs are evaluated by the Staff in this proceeding, if I understand it.

MR. JONES: That is correct.

[Board conferring.]

JUDGE MILLER: What are the numbers of the interrogatories, by the way?

MR. EDGAR: I can refer the Board to page 5 of our motion. They are catalogued down at the bottom of

the page. Practically speaking, there are 19 interrogatories in the set and it is every one but 1 and 19. But we have broken the interrogatories out to correlate them with the arguments. They are correlated here and they are correlated in the memorandum of points and authorities.

[Pause.]

JUDGE LINENBERGER: I noticed with respect to several interrogatories here in a grouping of 7 to 18 here questions involving what measures have been taken and then questions involving what measures have not been taken.

I would like to understand from intervenors why they think asking applicant to tell them what measures were not taken is a reasonable request.

MR. GREENBERG: Well, what we are concerned with here is assessment of risk and in a determination to take some measures and not take others. Presumably an evaluation is made that some measures are going to be more effective. We are going to try to understand what measures were deemed ineffective, what the basis for that determination was. So it does seem to us --

JUDGE LINENBERGER: But you did not ask that question. You just said what has not been done. Well, that is an open-ended question if I ever heard one.

MR. GREENBERG: We are really referring to what measures have been considered in light of the specific recommendations made in a variety of reports. And what we try to do, Judge Linenberger, in these interrogatories is try to be specific and limit the request to specific reports and analyses that have been issued over the last five years which have made various

recommendations to reduce risks in the fuel cycle. And we are trying to get a handle on what particular actions have been taken to reduce those risks, because we believe they are relevant to evaluating this facility and its supporting fuel cycle for cost-benefit purposes.

(Board conferring.)

JUDGE MILLER: It is the Board's belief that the series of interrogatories here go well beyond the scope of admissible or permissible discovery with regard to safeguards. That is what your interrogatories with regard to Contention 5 as originally numbered, is that correct?

MR. GREENBERG: Now Contention 4.

JUDGE MILLER: Which is now Contention 4.

The Board, therefore, will sustain the objections of both applicants and staff to those series of interrogatories addressed to safeguards contained in NRDC's twenty-second set of interrogatories to the staff, and what was your same number?

MR. EDGAR: Seventeen.

JUDGE MILLER: Seventeen set of interrogatories to the applicants.

MR. GREENBERG: Mr. Chairman, one point of clarification I did not understand that Mr. Edgar was objecting to all the interrogatories.

MR. EDGAR: No, we did not have -- we did not have an objection on 1 and 19.

JUDGE MILLER: One and 19?

MR. EDGAR: Right.

JUDGE MILLER: What about the staff?

MR. TREBY: We are willing to answer 1 and 19 also.

JUDGE MILLER: They are willing to answer them all?

MR. TREBY: No. Just 1 and 19. And it is set 23 rather than 22.

JUDGE MILLER: Oh, set 23.

MR. TREBY: Right.

JUDGE MILLER: Set 23 to the staff. The staff then shall answer interrogatories 1 and 19, is that correct?

MR. TREBY: That is correct.

MR. JONES: I am not sure what the numbers are for us, but they are the corresponding ones.

JUDGE MILLER: Now, what are the interrogatory numbers that the applicants have not objected to and hence should be willing to answer?

MR. EDGAR: Numbers 1 and 19 of the seventeenth set of NRDC interrogatories to the applicants.

JUDGE MILLER: All right. Applicants and staff shall therefore answer interrogatories 1 and 19 of the sets thus described for the record.

MR. TREBY: Excuse me. May I correct myself? I guess our number is 1 and 20.

JUDGE MILLER: One and 20 for the staff. Of which set now?

MR. JONES: The 23rd.

JUDGE MILLER: The 23rd set of interrogatories of the intervenors to the staff, and the applicants are going to stand on 1 and 19 of the 17th set of interrogatories from the intervenors to the applicant.

MR. EDGAR: Yes.

MR. GREENBERG: Mr. Chairman, I must say this leaves me with some uncertainty as to the scope of our Contention 4.

JUDGE MILLER: Safeguards?

MR. GREENBERG: Correct.

JUDGE MILLER: It looks like it is not going to be that far-ranging for one thing. We have quite a bit on our plate, as you can understand, and so we are willing to have you on a reasonable basis. We are not being technical about the scope of relevance. We do regard it as being broader for discovery purposes, but there have to be some limits as to the range --

MR. GREENBERG: I guess what I am saying is I do not understand what those limits are at this point, since virtually all of our discovery has now been thrown out except for two questions. And those questions specifically go to simply certain measures which are being taken or may be taken at the CRBR plant and supporting fuel cycle facilities, certain specified measures.

But what you have done is you have not allowed us to discover any information with respect to safeguards risks or safeguards consequences, although it would seem to us --

JUDGE MILLER: You started out elsewhere. You started out with so far-ranging a thrust that in order to get it limited to what we deemed to be relevant even for discovery purposes here, yes, you were left with 1 and 19 or 1 and 20.

MR. EDGAR: Mr. Chairman, I wanted to remind the Board you asked me earlier today to come back -- to try to straighten out this apparent difference we had with the staff on the LWA-1 scope.

JUDGE MILLER: Yes.

MR. EDGAR: And I have done that, and I was wrong, in a word. I had the wrong information.

The LWA-1 request is now the only thing before

the NRC staff. The applicants are looking at the advisability of a limited LWA-2 request, but that would come after any LWA-1. So in terms of what is before the Board, the game plan is to go for the one. If it makes sense to go for two, it would be done but as an increment after the LWA-1. So I do not think we are in disagreement with the staff, and I think I misstated the facts.

JUDGE MILLER: Well, we are glad to have it corrected. We are then going to be considering both the discovery and the evidentiary hearing in August, the LWA-1 matters.

MR. EDGAR: Yes, yes.

JUDGE MILLER: Now, what other motions are there?

MR. EDGAR: You had asked for some discussion on the subject of a sort on the contentions, I believe.

MS. WEISS: There is still staff -- staff has some remaining objections to discovery which I think we should go into.

JUDGE MILLER: Let's hear from the staff then.

MR. JONES: I think most of our objections have been taken care of, but there are a couple. One that was in the document, the 22nd set which we filed, objection to the 22nd set of interrogatories which was

filed on April 2nd by the staff.

The other is a disagreement on a document request which I verbally last night conveyed our objection. And one of those has been resolved, and I guess we still have one left. So if we can deal with those two matters, then we will be set.

JUDGE MILLER: Well, now, are you referring now to the staff's objections to NRDC's 22nd set of interrogatories to the staff and a motion for protective order filed for two?

MR. JONES: That is correct.

JUDGE MILLER: I see. That is the one you referred to, Ms. Weiss.

MS. WEISS: Yes, yes.

JUDGE MILLER: Okay. Let's see. Who wants to lead off on that?

MR. JONES: Well, I will state what the disagrement is, and I am not sure I understand the counterarguments, so let me deal with that.

We objected to three series of questions because the contention was not yet admitted, and it was discovery on those contentions. We have resolved two of those. The difference of opinion I guess is respect with old Contention 23 which is now -- okay. It was renumbered as Contention 10 and deferred. I assume that

would likewise defer the interrogatory questions related to that contention, and I am informed it may not.

JUDGE MILLER: The present renumbered Contention 10 has been deferred which relates to the systems necessary to establish and maintain a safe cold shutdown and so forth.

MR. JONES: I believe that is correct.

JUDGE MILLER: That is a contention, all right. Now, pursuant to that contention you have filed a motion for a protective order. What page do we look at there to find out the remaining viable dispute?

MR. JONES: Our objection appears starting on page 6 of our filing, and we had put three sets together which had the same objection.

JUDGE MILLER: Yes. Okay. Okay.

Now, the 22nd set of interrogatories to the staff.

MR. JONES: That is correct.

JUDGE MILLER: And which ones are now at issue?

MR. JONES: Beginning on page 12 there are a series of three questions, the last one having subparts (a) through (g). I am sorry. Five questions, the third one having subsections (a) through (g) on Contention 23. That is now Contention 10 which has been deferred.

And I believe NRDC indicated they had some

position that it might fall under an admitted contention, and I just have not heard the argument yet.

JUDGE MILLER: All right. We did defer Contention 10, that is true, until after the initial -- partial initial decision.

Now, does there remain anything up until that point?

MS. WEISS: No.

JUDGE MILLER: Well, then, the interrogatory and other discovery with relation to Contention 10 are likewise deferred, is that correct?

MS. WEISS: Yes. The only nature of my argument is that I think that all of these questions would be relevant to Contentions 1, 2 and 3. We are asking about accident analysis primarily, and I think that they are relevant under 1, 2 and 3. And maybe the way to resolve that is really just to have us talk to the staff and take a look at it, if we could take five minutes.

JUDGE MILLER: We do not mind. How much more do we have to do?

MS. WEISS: I think that is the last.

MR. JONES: I have one part of the document request, but that is all.

MS. WEISS: Just one minor discovery point

left.

JUDGE MILLER: All right. We will take a short recess then. If there is anything else that occurs to you, housekeeping or otherwise, let's get it all wrapped up when we come back.

(Recess.)

JUDGE MILLER: The hearing will resume.

There was to be a conference, I believe.

MR. JONES: Mr. Chairman, I think we have agreed on both of the discovery points we had so that they should resolve themselves.

JUDGE MILLER: Very good. Do you want it stated for the record so we will know which --

MR. JONES: We have agreed the interrogatories under Contention No. 23 are conceivably relevant to parts of new numbered 1, 2 and 3. And in a moment I believe we are going to be arguing about whether any portions of 1, 2 or 3 should be deferred until after LWA, and I think that will resolve our problem on these interrogatories.

JUDGE MILLER: All right. Intervenors agree?

MS. WEISS: Yes, Mr. Chairman.

JUDGE MILLER: Does that include the motion to compel responses?

MR. JONES: Excuse me. We do not have a motion to compel, do we?

JUDGE MILLER: Motion for a protective order?

MR. JONES: Yes. I think we have resolved all the matters either through --

JUDGE MILLER: That is the one dated April 2.

MR. JONES: Yes.

JUDGE MILLER: Objection to NRDC's 22nd set of interrogatories to the staff and motion for protective order. That has been resolved by the parties?

MR. JONES: Most of that is identical to the rulings on the applicant which will apply, and that takes care of it.

JUDGE MILLER: Fair enough. Thank you.

MR. JONES: If it would be preferable, we can go through very quickly and indicate for the record what the decision was on each of our portions.

JUDGE MILLER: Oh, the decision made with regard to the applicants which are applicable equally to the staff?

MR. JONES: That is correct.

JUDGE MILLER: Well, do you have it just before you there, numbers?

MR. JONES: I think I can go through very quickly, yes.

JUDGE MILLER: Okay.

MR. JONES: Our first two objections were to interrogatories 4(a) through (e) and 5(a) and (b) under Contention 5. Those were disallowed. Those identical interrogatories were disallowed against the applicant, and so they would be disallowed against us.

On Contention 8 we had objected to

interrogatories 3, 4 and 5 and 7, 8 and 9, and 7 and 8 were identical to the applicants' objections, and that was resolved, and in the course of that we will withdraw the objections to the other interrogatories. They are of the same nature, so we will answer those.

With respect to the questions on Contention 8, interrogatories 10 through 12, our understanding is that 8(d) has now been admitted as modified, and those interrogatories would be appropriate.

Contention 23 -- under the old Contention 23 we just stated that that will be resolved with respect to your ruling on deferring contentions. And with respect to Contention 24 I believe we agreed that that has been subsumed.

(Counsel for NRC staff conferring.)

MR. JONES: We had one statement I guess that when the staff -- when the Board deferred Contention 23, which is now Contention 10, it likewise would have deferred those portions of 1, 2 and 3 that addressed those same items.

MS. WEISS: That is different. I mean I thought we were -- the agreement was we would leave it to the Board to see what portions of 1, 2 and 3 are deferred and which ones are going.

JUDGE MILLER: I think we were going to take

those up as soon as we are through.

MR. JONES: I guess we can deal with that in a moment then.

MS. WEISS: And on Contention 24, which we withdrew on the understanding that that was subsumed in Contention 2, I just want to make it clear for the record that your position is now that you will answer those.

MR. JONES: That is correct.

MS. WEISS: Okay.

JUDGE MILLER: Is this statement accurate then?

MS. WEISS: Yes, Mr. Chairman.

JUDGE MILLER: Is there anything else we should have stated on the record now in order to show the resolutions of Board -- the parties have been able to arrive at? Is that covered?

(No response.)

And there is one other matter, and that relates to what contentions should still be the subject of ongoing discovery and of evidentiary proceedings. We want to be clear so that the parties will not be under any undue burden, and so they can focus because it is a pretty tight schedule.

Does anyone have that in mind? I know that the applicants and maybe the staff at some point have

given us the numbers, but I am not sure how they may have been modified by the actions of the last couple of days.

Does somebody want to lead off on that? Which contentions or issues reflected by contentions should logically be deferred until after the evidentiary hearing, whether it be in whole or in part of an ongoing contention?

The Board has set some contentions definitely for deferral under the Board's ruling, but we know that there are others or portions of others where the parties may wish to suggest that they would prefer not to have to be devoting unnecessary time and energy to it now in order to take care of the remainder which definitely are up for trial.

Mr. Edgar, are you ready to go forward?

MR. EDGAR: Yes. If I may, I would like to take new contentions 1, 2 and 3 as a group for the moment. We know what they are. We have had very extensive discovery on that. We are heavily engaged in the updating process now. There are two areas within those contentions that I think that we should earmark as items for deferral.

The first is the question of accidents within the design basis on envelope within the logical

structure of 1, 2 and 3. There is no need to go into that at the LWA stage.

The second area --

JUDGE MILLER: Is that the LWA-1 stage?

MR. EDGAR: Yes, sir.

JUDGE MILLER: That is all we are focusing on right now.

MR. EDGAR: That is correct. Then -- and I will try to use new numbers here consistently if I can. As far new Contention 4 -- I mean as for Contention 4 as admitted by the Board at these prehearing meetings, I think the point here is reflected in the Board's rulings on the safeguards, that we do not need to go into adequacy. We do not need to go into the details of a specific security plan, but whether the inquiry here is limited to the scope of the cost-benefit analysis.

As for admitted Contention No. 5, it is our judgment that that is litigable at the LWA stage. We would note the limitations that the Board expressed in admitting the contention as to the scope of inquiry concerning the Y-12 facility.

As for Contention 11, which is admitted Contention 11, formerly Contention 8, there are several areas which the Board should consider here. The first is under 8(a) -- I am sorry -- 11(a). I stand

corrected. The ALARA finding as to the plant and as to employees is a CP finding, and it flows from the Part 50 regulations.

Of course, 11(b) is a residual risk statement of the contention which requires discussion of the effects of compliance with the regulation. We think 11(d), as in dog, relates to site suitability and thus is within the scope of an LWA finding. LWA-1, that is.

Turning to Contention 6, the fuel cycle, we think is appropriate for LWA given the limitations expressed by the Board when that contention was admitted.

Seven, Contention 7, which was old Contention 10, now Contention 7, we think that, which basically is alternatives and site selection, is appropriate for the LWA.

New Contention 8, or as admitted, Contention 8, old 14, or what we call 1976 Contention 14, that was admitted in that formulation, as admitted by the Board's 1976 order, is an LWA-type issue.

And the remaining issues are the subject of specific rulings by the Board either excluding the contentions or expressly deferring them. And I would not repeat that except to mention that.

JUDGE MILLER: Applicants -- I am sorry -- intervenors.

MS. WEISS: That is very close to how we had seen things. I would like to just talk about one of those or two at the most.

JUDGE MILLER: Okay.

(Counsel for intervenors conferring.)

MS. WEISS: I would wonder if you have identified which portions of Contentions 1, 2 and 3 you believe relate to accidents within the DBA and therefore ought to be deferred.

MR. EDGAR: I am just stating an area which I do not think is necessary for trial. That is all. The basic logic of 1, 2 and 3 defines what we need to indicate.

MS. WEISS: Are you saying that you think 1, 2 and 3 should be deferred or should be in or parts should be deferred?

MR. EDGAR: No, no. I said 1, 2 and 3 should be litigated.

(Counsel for intervenors conferring.)

JUDGE MILLER: I am confused now about 1, 2 and 3. I seem to have it in both columns, and if it is portions of it, that is one thing, but otherwise I have a heck of a conflict here.

What is your position?

MR. EDGAR: Let me state cur position. Maybe

someone has characterized our position. We think that you litigate 1, 2 and 3. That is our position.

JUDGE MILLER: In the LWA hearing, both in discovery and trial?

MR. EDGAR: That is right. And we think we have done that.

JUDGE MILLER: What was this about, the accidents within the --

MR. EDGAR: I am just taking -- there is an old 21 that goes into 1, 2 and 3, and I do not think you need to spend much time with accidents within the design basis envelope.

JUDGE MILLER: Do we need to spend any time?

MR. EDGAR: I do not think you need to spend any in the context of an LWA.

JUDGE MILLER: You are not saying it needs to be deferred. You are just saying don't waste your time.

MR. EDGAR: That is right. When I say defer, Mr. Chairman, let me suggest this, that that might be fair game for a CP; that is the detailed examination of design basis accidents. It is in every PSAR. That is probably a proper area of inquiry, but I do not think you need to get into it at this juncture, and that is what I was trying to say.

JUDGE MILLER: What don't we need to get into

at this juncture?

MR. EDGAR: Accidents within the design basis.

JUDGE MILLER: That is to be deferred.

MR. EDGAR: That is correct.

JUDGE MILLER: That is what I had in the first place. Okay. So that goes in the deferred column. Then 1, 2 and 3 except for that matter goes in the trial column.

MR. EDGAR: Right.

JUDGE MILLER: It is in both then. Okay. Does everybody understand what we are doing here now?

MS. WEISS: Yes. I understand what has been proposed anyway.

JUDGE MILLER: Now your comments on it, and we will talk to the staff and get as much agreement as we can.

DR. COCHRAN: Judge Miller, I would like to make one comment about what is in and out of 3.

JUDGE MILLER: Okay.

DR. COCHRAN: I generally agree with Mr. Edgar's characterization that what we really are talking about is the design basis event, the old, what is it, 21? The old 21 is now in 3. Most of that can be deferred. There are some minor details that would be in, but we can envelope them within our discussion of

whether or not they are design basis events or not. So I do not think it is a problem. I just wanted to -- do not want to precisely rule out everything we had in mind under 21.

JUDGE MILLER: Okay. Do you understand, Mr. Edgar, what he is talking about?

MR. EDGAR: I understand, and I think that that is a fair statement.

JUDGE MILLER: Okay. Now we have two of you in line. Now let me try the staff.

MR. SWANSON: Not unanimous.

(Laughter.)

Let me just get a clarification. I think our discussion will be confined to 1, 2 and 3, but just let me get a clarification, because I did not hear you mention new 11(c), but I assumed you grouped 11(b) and (c) together, is that right, or --

JUDGE MILLER: As what, being deferred or tried?

MR. SWANSON: As being LWA matters.

JUDGE MILLER: Eleven?

MR. EDGAR: Let me check it.

MR. SWANSON: You mentioned 11(b) was the residual effects.

MR. EDGAR: I grouped (b) and (c) together,

yes, you are correct.

JUDGE MILLER: Where did you group them?

MR. EDGAR: In the LWA.

JUDGE MILLER: (b) and (c)?

MR. EDGAR: Right.

JUDGE MILLER: That is to be tried?

MR. EDGAR: That is right.

JUDGE MILLER: That is not what I have.

JUDGE LINENBERGER: That is not what I wrote down from what you said.

JUDGE MILLER: I thought you had 11(d) for one thing.

MS. WEISS: I did understand you to say 11(b) and (c) were LWA-1.

JUDGE MILLER: (b) and (c) are LWA-1.

MS. WEISS: And (d).

JUDGE MILLER: (b), (c) and (d).W

MS. WEISS: Everything but (a).

JUDGE LINENBERGER: Oh, okay.

MR. EDGAR: Right. That is what I said. That is what I had hoped --

JUDGE MILLER: (a) is deferred. The rest of them were to be tried.

MR. EDGAR: That is what I intended to say. I may have misspoken.

JUDGE MILLER: Okay. Staff?

MR. SWANSON: Staff agrees with that, but where we would like to propose parsing out issues is in 1, 2 and 3, because we believe there are elements of both LWA matters and CP matters encompassed in those contentions. I think the only way to do it is to do it by subcategory. Using the new numbering system we believe 1(a) is an LWA matter, but that the rest of 1 is more suitable or it can be postponed for the construction permit.

JUDGE MILLER: 1(a).

MR. SWANSON: 1(a) is an environmental matter dealing with CDA inititators, 1(a) only.

JUDGE MILLER: 1(a) ought to be tried now?

MR. SWANSON: Right. The rest relates more to the type of analysis that is suitable for and would be included in the staff's safety evaluation report.

And in new number 2 we believe that, taking it by parts, 2(a) is an LWA matter; 2(b) and 2(c) also are environmental LWA matters, but that 2(d), 2(f), 2(g) and 2(h) are CP matters. I skipped over 2(e) because 2(e) we believe is also an environmental matter, an LWA matter.

JUDGE MILLER: So far for trial you have now 2(a), (b), (c), and (e).

MR. SWANSON: That is correct.

JUDGE MILLER: Okay.

MR. SWANSON: Of 2, and then, of course, 1(a).

JUDGE MILLER: 1(a), correct.

MR. SWANSON: Now, of new contention 3 we believe (b) and (c) are suitable for trial now, LWA; that (a) and (d) are CP matters. And we would agree with the rest of the characterization of the contentions.

JUDGE MILLER: All right. Now, let me see if we have agreement by applicants and intervenors to these modifications.

MS. WEISS: We definitely do not agree with that, and I understand it to be inconsistent with what the applicant said. I have not been able to discern at this point, but there is an illogical thread that supports putting these subissues into one or another category. It seems to be dictated by what the staff usually looks at in their SER and what they usually look at in their site suitability report.

But it seems to me they are seeking to artificially separate these subissues in such a way that it would be unable -- the Board will not have before it a sufficient record to allow it to reach a conclusion on the ultimate questions which are clearly required to be resolved under NEPA.

LWA-1 cannot be issued until all the NEPA findings are made, not just some. And the reasonable assurance standard applies at the LWA stage just as much as it does at the CP or OL stage. It is not a lesser order of proof required or a lesser burden of proof required.

And certainly if the CDA ought to be considered within the design basis, that is going to change large parts of the FES with respect to its conclusions about the risks and consequences of accidents.

It should automatically change the analysis under Part 100 for site suitability in that it would change the source term dramatically, and certainly site suitability is a question that has to be resolved at this stage. All the Part 100 findings have to be made.

JUDGE MILLER: What are the issues, in a general way, which are cognizable and necessary for an LWA-1 hearing?

MS. WEISS: The Board must resolve with finality all NEPA issues. It must make all of the conclusions called for by Part 51 that would have to be made for the issuance of a CP.

JUDGE MILLER: That is to say all of the environmental findings required at the CP stage must be

made at the LWA-1 as well as a preliminary finding that the site is a suitable one for the type of reactor proposed from the standpoint of radiological health and safety.

MS. WEISS: Correct.

JUDGE MILLER: Is that your understanding?

MS. WEISS: That is what the rule provides.

JUDGE MILLER: Are you all in accord on that?

MR. EDGAR: Yes.

MR. SWANSON: Yes.

JUDGE MILLER: After the LWA-1 finding has been made and determining there are no unresolved safety issues relating to the additional activities proposed, then we could go into LWA-2, but we are not at that stage yet, is that correct?

MR. EDGAR: Yes.

MR. SWANSON: Yes.

MS. WEISS: That is correct.

JUDGE MILLER: And then LWA-2 may be combined with an LWA-1 or may be considered at a later time, and you have all chosen to go that route. All right. I guess those are the general principles.

Now, how do we apply them?

MR. SWANSON: Well, just setting forth the appropriate general principle, as applicant recently

cleared up, we are not considering LWA-2 at this time so the Board does not have to make a finding that there are no unresolved safety questions.

JUDGE MILLER: Correct.

MR. SWANSON: The staff believes that there is a rational means for distinguishing between those items which go towards that resolution of safety issues for the construction permit versus those that are necessary to make environmental or site suitability findings.

Now, boards in the past, for example, taking Appendix I, have -- and ALARA issues have determined that indeed -- which I think is analogous to considering the accident analysis that we have put off to the CP stage -- have indicated that for the environmental finding you take a certain scenario that the staff would have to show there is reasonable assurance that that scenario can be accommodated, in this case that a CDA can safely be put in a category of a low enough probability so it does not have to be a design basis accident, show reasonable assurance that that can be so, and that there is reasonable assurance that the safety systems can be designed to in fact make that a reality, that in fact the core disruptive accident is not necessary to be a design basis accident.

So the environmental costs of reducing that probability are acceptably low, and of course, that the environmental cost of this core disruptive accident with its low probability are factored into the cost-benefit analysis. We do not have to show with the kind of detail that would be required at the CP stage that in fact the ssfety analysis has been done, the design features have been accounted for, so that this will, in fact, be accomplished.

In other words, you do not have to do all of the safety review necessary for a CP in order to make the environmental findings. Obviously, if the Board were later to find that the staff or applicants had not demonstrated that the design features could safely reduce the probability of a CDA so that could be discounted as a design basis accident, then that would necessarily have affected prior environmental findings if the Board in making those findings, had assumed that they could be reduced -- the probability could be reduced.

But that does not mean that you have to take the converse and go to finality for CP purposes merely to make environmental findings. And it is for that reason that the staff believes that taking them in turn, contention 1(b) dealing with reliability program --

excuse me, the applicants' reliability program -- or 1(b)(1), sufficient failure mode data pertinent to CRBR systems predicting probability of CDA's, or (2) applicants' projected data base encompassing all credible failure modes and human elements, (b)(3) that they establish that CDA's have a sufficiently low probability that it can be exluded from their projected -- you know, their projected data base and excluded -- let me back up.

(b)(3) dealing with the data described in applicants' projected data base, even if obtained, does not establish that CDA's have a sufficiently low probability that they may be excluded from the design basis. In other words, the detailed analysis that would have to be gone through to establish that. Or (b)(4), that applicants have not established that the test program used for the reliability program will be completed prior to their projected date of completion of construction of the CRBR. Similarly for parts of new contention 2 (2)(d) dealing with design of containment, 2(f) dealing with computer codes, or 2(g), the computer models and codes and input data, and then finally 2(h), dealing with containment design again.

And similarly with new contention 3(a) the comprehensive analysis comparable to the Rasmussen

report, or 3(d), the what I assume here is the TMI Lessons Learned issues dealing with human error are matters which can appropriately be left to the final safety analysis that is done for purposes of a construction permit analysis.

MS. WEISS: What the staff is saying, Mr. Chairman, is while conceding that you all have to make a finding on whether the CDA should be included within the design basis -- in other words, whether or not the design basis has been appropriately drawn, while conceding that you need to make that finding, they are saying you can only look at certain information and you must take their assertions, based on whatever vague grounds there are. You cannot probe further.

I mean if you look at what they have done as a practical matter to these contentions, you see what they have done. Contention number 1 is the envelope of DBA's should include the CBA, an admitted contention.

Neither applicants nor staff have demonstrated through reliable data that the probability of CDA initiators is sufficiently low to enable them to be excluded. Okay. They are generous, we can litigate that. But we cannot look into any other of the subparts that will enable you to make a conclusion on that. You cannot look into the reliability program which is

claimed to be capable of eliminating CDA's from the design basis. You cannot look at the methodology which is the fault tree and event tree methodology which is claimed to support this conclusion that the probability will be low. You cannot look at the data base which goes into the fault tree and event tree analysis and so on and so on.

The assertion seems to be that we are limited by the level of vagueness and uncertainty that they are at, and we are certainly not so limited.

JUDGE LINENBERGER: If they have not done their analyses, doesn't that impose a limitation on you?

MS. WEISS: No, sir. If they have not done their analyses, it is their job to convince you that this plant ought to be licensed despite the absence of any analysis that would justify a conclusion that CDA's should be exluded.

JUDGE LINENBERGER: Well excuse me, but you give me a problem when you say -- talk about licensing the plant when we are at an LWA, proceed at your own risk phase of the proceeding. How can you talk about licensing the plant there?

MS. WEISS: I think the LWA's frequently is misunderstood. This Board need make all of the findings required under NEPA. All parties concede that the

question of the design basis envelope is a question that must be resolved under NEPA because it bears directly on the source term which goes to site suitability, and it bears directly on the analysis of risk and consequence of accidents which the FES must include.

Simply because this is an LWA does not mean that one can make that finding to a lesser degree of certainty. Reasonable assurance applies at every stage.

JUDGE LINENBERGER: Isn't all you are really saying, Ms. Weiss, is that we may make a finding with respect to the LWA issue which later on, if things go to a construction permit hearing, we may find we had inadequate bases to make, and have to modify our decision? And that indeed puts us in a strange position. But I think that is really what you are telling us and that is something that we averted to just yesterday, that this could indeed happen.

MS. WEISS: I am saying that that result is forbidden -- well, I am not saying it could not happen, but that result is not contemplated under the LWA rules. You are not supposed to look to some lesser degree, apply some lesser burden of proof. You have been given the requirement of resolving these issues under NEPA. That is not lesser responsibility. The burden of proof required to make those findings is no

less great than it is to answer those questions on the safety side.

You cannot say we are going to sort of take a half a look now and then we will take a whole look later, and if we made some mistakes in the half a look we can correct them. That is not what the LWA rule contemplates, I submit.

JUDGE LINENBERGER: All I am saying is I think I hear you objecting to the position that the Board will find itself in, rather than the position that intervenors are finding themselves in. And at this point it is nice to have you worrying about the Board, but that is not really why we are there, I think.

MS. WEISS: Well, what I am worried about is whether we will be able to bring you the evidence to allow you to make a decision. I mean, if --

JUDGE MILLER: You are contending it affects the scope of ongoing discovery as well as the evidentiary aspects of the LWA.

MS. WEISS: Absolutely.

MR. EDGAR: I would like to take exception to that statement because the discovery that we have had on these contentions -- and there is a pile of it -- has made no distinction. It has just gone. It has been filed, it has been answered. So I think we can do that

sort right now and people have not done the kind of detailed categorization that the staff just went through.

The staff's position has some fundamental logic to it, but I do not think you can just do a sort like a go/no-go cage, and say one is CP, one is LWA. Some of these are a matter of degree. You know, it is a question of how much information. I think the staff's sort is a good first cut at it, but it is really incumbent on the parties to come forward with their evidence and say what they think is sufficient.

We have approached this one from the standpoint of we will let all the discovery go; we know we want to say in terms of sufficiency under these contentions, and we will stand or fall on that. I think the staff's sort is correct logically, but you cannot -- when they do it, you cannot say well, we are going to exclude that area totally. You are going to be putting in elements of that information.

And I am not sure we can settle anything here and now. I do not think you can do it in the abstract. You have to do it in the testimony, almost.

JUDGE MILLER: Yes, but the Board --

MR. EDGAR: And for discovery I do not think you have to reach it because we have not had that problem.

JUDGE MILLER: Well, you have not had a lot of problems because you have not addressed them, too. You have had a lot of discovery but there is a lot more down the pike.

Now, the Board wants to make clear that we called this conference; we did it and we said we will consider all pending motions. We want it clearly understood that we were going to hear them so far as we could. Apparently, we were able to, as it worked out, but we have a big pile of material that we have gone through. We have made rulings, the parties hve been very good about sitting down and refining in some instances, and adjusting and accommodating their mutual positions.

However, let me suggest this to you. In a sense, the Board was teaching you right from wrong, but we were teaching you wrong first because we do not want to have to do this again. We do not want to have to be the target of all these papers, and that is why we used the Comanche Peak procedure simply as an analogue.

But we think in the future now as you get down to this hard work of discovery, it is now more focused because you have e contentions, and as these matters are discussed and debated, I think there is more refinement of points of view going on. But you all have

a lot of work to do both in the discovery and its various aspects and the schedule which has been adopted, and then accomodated by the parties, which makes sense, leading up to a trial.

Now, we do not want to be the target of these continuing motions. We want you to be able to sit down and resolve them, so that is very well. We appreciate the fact that maybe at this point we cannot say whether 1(b) or (d) or (c) is or is not on the discovery side of the ledger, but somebody has to do it and that somebody is you.

So to the extent that you say something is not necessary for a decision now, okay, but you are going to live with it. You start filing the motions, we are going to flip them out. We are trying now to cover -- we are trying to cover all that we can. It is only in extreme situations that the Board wants to get involved now in further discovery and pleadings. And we let you have considerable leave. We encouraged you to file everything you want. We tried to teach you right from wrong and that is wrong. We did it because of the stated reasons.

We had a five-year gap, we had many things to bring together. Certain mutuality of debate and analysis was necessary. Let me say that the Board

appreciates the fact that all of you participated in a very good faith and genuine way and achieved results. But whatever you leave hanging now is going to have to be resolved essentially by you folks. I hope you are keeping that in mind when you say that the things will evolve as we get on with discovery, because you are going to be the ones that are discovering an evolving. The Board only to a limited extent.

MR. EDGAR: One, two and three in my mind are a special case. I can deal with the others. And I think the sort we went through on that -- there may be small differences but the parties are essentially in accord on that. When you get one, two and three you are into some very fine detail which requires some very specific expertise, and it is hard for me to take a contention which has an overlap between its subparts and say this is in, this is out, sitting here at this table.

In the context of a discovery request or preparing testimony, I think that problem is tractable, so --

JUDGE MILLER: I know in testimony it is tractable because we will be there and rule. But what about the period of time inbetween? That is what is concerning the Board.

MR. EDGAR: I do not have a unique or easy

answer to that question. It is just a complex subject and we are going to have to confer amongst each other to get it sorted out.

I can tell you the most complex one here is one, two and three, yet that is the area where we have had the least discovery dispute. I do not know why that is, but that is the case.

JUDGE MILLER: All right, the Board is content to leave it there. You have agreement on many aspects of ongoing discovery vis a vis issues and contentions. There are some areas you do not have agreement. We will expect you to resolve it, and you have assured us when you get down to concrete matters you will be able to. You have in the past. We are content to leave it at that if you are.

Anything further that needs to be said now, considering that we might not meet with you again for a while? We have other cases, too, you know, and obligations, just as you folks have. Anything further?

I did not mean to disregard the state of Tennessee. I realize that you recently changed your status from that of a direct party to that of an interested state, but by not calling upon you to express your views we certainly did not mean to indicate we were not interested. Is there anything that you would like

to bring before the Board?

MS. BRECKENRIDGE: I cannot think of anything.

MR. SWANSON: I just wanted to make sure I understand the ruling and also how it affects some of the fringe -- I will call them fringe contentions, the ones that were deferred for CP purposes. One of which anyway NRDC claims is related to 1, 2 and 3. Do I understand that the Board is not prepared at this time to parse out subsections of 1, 2 and 3? Is that correct?

JUDGE MILLER: That is correct because the parties are not prepared, as we understand it, to give us any clear guidance on it.

MS. WEISS: We agreed, didn't we?

JUDGE MILLER: To the extent that you are, yes, we will rule if you want us to.

MR. SWANSON: The staff set forth one proposal and apparently the other two parties have counter proposals, so --

MR. EDGAR: Why don't we get together and talk about that? That is --

JUDGE MILLER: You see, the Board is willing to leave that. Essentially 1, 2 and 3, that is the heart of it, I agree with you. We are going to leave it that you get together and talk and that you will resolve it by talking somehow. I do not know. Last man out of

the room, turn out the lights.

MS. WEISS: I hope it does not come to a fight.

JUDGE MILLER: We do not want to come and go through this again, so if you want us to rule we will rule now. But there seems to be enough questions in the minds of staff vis a vis the others and so forth that we were going along with the mutual suggestions that you could and would work these matters out.

All right, if you want -- do you want to go back? We have heard the arguments a[illegible] we know applicants and intervenors are essentially in agreement on particularly all of the 1, 2 and 3 at any rate, which seems to be the bulk of the non-agreement with staff.

MR. SWANSON: Well, this I suspect is going to be a fundamental difference, but I wonder if maybe we should take a very limited time, say five minutes, and just see if there is any possibility of an approach that is worth pursuing discussion. If not, then the staff may want this -- will want the Board to rule on it.

JUDGE MILLER: We are at your disposal. We have all spent a lot of time. A lot of you have spent a lot of money. We fortunately live near. Yes, if it will assist you, do you want to take what, a five or ten-minute recess? We are at your disposal. We are not trying to rush anybody. We want to be fair and

reasonable, so to the extent you can agree, great. It is much better because you can accomodate each other's conflicting desires.

To the extent you cannot, lay it on the line, the Board will rule. We may be wrong. We will do the best we can, we will not dilly-dally. So you get your druthers. How about five minutes, ten minutes? Ten minutes?

MR. SWANSON: Ten minutes.

JUDGE MILLER: Fine.

(Recess.)

JUDGE MILLER: All right. Were you ladies and gentlemen able to accomplish anything by conference?

MS. WEISS: Mr. Chairman, we spoke to the licensee -- the Applicant and the Staff. Essentially, as you are aware, the Applicant and the Intervenors are in agreement. The Staff is not in agreement. I am convinced that the difference between us is the difference on how the Board ought to make the ultimate findings on the merits of Contentions 1, 2, and 3, that Staff will be arguing that it does not need to look at CRBR-related data to make the finding that the design basis has been drawn correctly.

It will be our assertion on the merits that they cannot -- that this Board cannot make a conclusion about whether a reactor of the general design or type can be cited without looking at CRBR's specific information, that the assertion by itself is not supported and that what the Staff seeks to do now is to limit our ability to prove our case on the merits.

They are essentially asking for the Board to rule in advance of the hearing on the ultimate merits of Contentions 1, 2, and 3.

MR. EDGAR: Let me state for the record, I am not sure that I agree with all of those statements by any stretch of the imagination. But I think we can

manage to deal with Contentions 1, 2, and 3 as a matter of proof.

I think the Staff's logic in terms of how it sorts out what is in and what is out is essentially correct, but there are matters of degree there that need to be addressed, and I do not think that I disagree with their logic at all. We can hear from the Staff in much more detail here, but I do not want the impression to be painted that we are in disagreement with the logic that they express in terms of how you sort this Contention.

JUDGE MILLER: I am not sure I understand your point.

MR. EDGAR: Let me give you an example.

JUDGE MILLER: Okay.

MR. EDGAR: If you look at Contention 1, new Contention 1, the Staff says 1(a) is one in which the probability of certain initiators is low enough that you can exclude CDAs from the design basis. Then (b) goes to the reliability program, which is part of the basis for exclusion. We do not think you have to go through the full-blown reliability program as a matter of proof here.

We think it is a much more limited scope of review at the LWA stage and that a great deal of this fits at the CP. By the same token, we do not believe

you can exclude all consideration, you know, a priori. I do not think it fits that mechanically.

JUDGE MILLER: Well, you have given us a description on the one hand, and on the other hand --

MR. EDGAR: I cannot do any better with it.

JUDGE MILLER: Where do you come down? Be concrete. You look at it somewhat but not as much as --

MR. EDGAR: We intend to present testimony. We will put on experts to give you their views as to what they feel is sufficient for this purpose, a reasonable finding that you can arrive at your definition of design basis.

But that is not the answer for all times.

JUDGE MILLER: The reliability program?

MR. EDGAR: That is right.

JUDGE MILLER: Are you talking about (b)?

MR. EDGAR: To a limited part.

JUDGE MILLER: What evidence would you put on on (b)? What would you not feel you were required to put on or to produce discovery on on (b)?

MR. EDGAR: We have not made any distinctions on discovery to this stage. We just have not done it.

JUDGE MILLER: Do you plan to? Do you think the decisions on discovery will flow from the limited nature, if there be a limited nature, of the

consideration of these matters in an LWA-1 hearing?

MR. EDGAR: I find it almost impossible to do a priori without seeing the specific facts.

JUDGE MILLER: That is the Board's problem. We are doing an a priori, a priori -- thirdhand removed.

MR. EDGAR: I really cannot offer a simple answer.

JUDGE MILLER: Give me a complicated answer. Give me any kind of an answer except to say you have to look at it, but you do not have to look at it much. That does not really enlighten me very much. I know you have a problem because you have not gone through it.

The subparagraphs you have gone through where you have your experts with you who have gone through --

MR. EDGAR: I do not have any of them with me at this juncture. I honestly do not, and that is what it would take to give you a complete answer here.

JUDGE MILLER: All right. When do you want to reconvene? There is no sense in messing around with this. Sometime -- pick yourself a date next week. Bring all your experts in. Let's have all the information. We are going to have to make a ruling of record. I think one day ought to be sufficient, but there is no sense in fooling around with it.

Am I a quorum of one? I just lost my partner.

(Laughter.)

JUDGE MILLER: Okay. Week after next. What is the date? Pick a date the week after next.

Dr. Cadet Hand will not be here. He is tied up in a matter in Berkeley, California. He was precommitted for ' er a month and he did ask us to proceed by quorum, which we are doing, so we are now checking Judge Linenberger's calendar for the earliest possible date and we will expect you to file in advance what you want.

Now do not wait until the two or three days before because we have had problems. We would like to have data, memoranda, whatever you want. Give the other parties, as well as the Board, a reasonable shot at it that is not just two days. How about the 19th or the 20th? That is Monday or Tuesday.

Does anybody have any insuperable obstacles?

MS. WEISS: It is not the dates that I am worried about so much as what is going to be going on.

JUDGE MILLER: You are going to address some interrogatories, if you have not, some document production where you go on your theory of this to the scope you deem necessary. Do not go all the way since there is some indication we do not have to and should not go into the whole scope safety review of a CP.

Okay, that is one parameter. But short of that, keep it as limited as you can for the purposes as you desire to make a record. We want the Applicants to do the same thing and we want the Staff to do whatever they can do and have your experts both assist you in advance and have them here so we can get right down to it, because we are going to have to make some fundamental rulings.

There is no sense in kicking it around in the abstract. So as soon as we can do it, that is the soonest we can address it. It gives you a chance in a meaningful way to get down to details too.

MR. SWANSON: We think that is a good idea. Could we just get one clarification? I mentioned before the fringe issues. Perhaps we are limited to 9 -- I am talking about new numbers now -- 9 and 10, which were the old numbers 19 and 23. At least as to 23 we had an outstanding question as to whether or not discovery should go forward.

The Board had deferred -- I am talking now old 23, new 10. The Board had deferred that Contention.

JUDGE MILLER: The new number 9?

MR. SWANSON: New number 10, I believe.

MR. EDGAR: They went to the CP.

MR. SWANSON: That is --

MR. EDGAR: There is no discovery on them.

JUDGE MILLER: That is deferred. The Board deferred that.

MR. SWANSON: Okay. If discovery is deferred on that, there is no outstanding question, then.

JUDGE MILLER: The Board had ordered discovery and evidentiary matters on that one be deferred until after the initial -- partial initial decision, so that is already taken care of.

MR. SWANSON: Thank you.

JUDGE MILLER: Any others now that you had? Is it 1, 2, and 3 now that we need to address in depth?

MR. EDGAR: That is right.

JUDGE MILLER: Okay. That is 1, 2, and 3. If there are any others, name them now, because we are going to take whatever time is necessary to go into whatever depth is required.

(No response.)

JUDGE MILLER: All right. We will meet on Tuesday, 9:00 a.m., hopefully in this courtroom -- 9:00 a.m., Tuesday, April 20. Do as much as you can in advance and exchange papers and let the Board have them. As I say, do not file anything two to three days before the hearing because that is not fair and it does not help.

Anything further?

(No response.)

JUDGE MILLER: All the rulings we made here will stand. We will bring out an order and they will be reflected in that. This will be a continuation for the purpose of ruling upon the matters to be ongoing discovery in Contentions 1, 2 and 3.

MS. WEISS: Mr. Chairman, we are trying to think of what we have to do in the next two weeks, the time before these hearings that you have set on the 19th. We have a final deadline of the 15th to get out all of our discovery requests on existing Contentions.

We have budgeted that essentially full time for the next ten days. As you are aware, this is an extraordinarily tight schedule. We then have, as we calculate it, another two weeks to do all of our discovery on new Contentions and additions and revisions to Contentions newly admitted.

We really have -- well, we have to update all of our answers by April 30. I just do not see how we can do all of this within the -- something has to give. The schedule as it is now set up does not permit NRDC to meet all these obligations.

JUDGE MILLER: You will have to do the best that you can then. We set up a schedule that we

believed to be feasible and the fact that you were unable to agree on certain matters, I am afraid, is not going to be justification for slipping the schedule.

MS. WEISS: Well, we do not -- we have never -- well, it is our view that the schedule was marginally feasible to begin with, and if the parties could not agree, that is not our fault. I do not think we should suffer from it.

JUDGE MILLER: We are not trying to assess fault, but in fact the parties cannot agree and we have seen and believed that all of you have been in good faith. We do not think there is any --

MS. WEISS: We would simply ask the Board to give us some extra time on the discovery schedule to accommodate this additional burden.

JUDGE MILLER: I am sorry. We cannot permit slippage. I have told you this from the start.

MS. WEISS: It seems to me that the schedule is being elevated to it has a life of its own. It does not. It is there to accommodate as quick as we can possibly move towards a hearing, and I think we have gotten beyond the point of it is as quick as we can possibly move, and we are getting to the point where our ability to participate meaningfully in this case is being rather severely prejudiced.

JUDGE MILLER: Well, we do not agree, but we are sorry if you feel that way. These matters have been pending for a long period of time. The fact that the parties have not been able to address all of them is both understandable, but it is not something that is going to delay the trial. We want to get to trial. We thought you knew that.

You know, the wintertime you lawyers go down where lawyers gather, whether it be Florida or Arizona. I suspect Intervenors' counsel do not have the luxury that lawyers have who have wealthier clients, but everybody goes out, makes speeches, sits on panels, tells how you get a 7, 8, 9, 10-year delay on the licensing process upon adjudicatory -- nobody ever asks the Board what were its problems.

You all make big, fat speeches. Now I do not mean any of you personally.

(Laughter.)

JUDGE MILLER: But I mean lawyers generically that are handling these matters. Now the Board is making a good faith and determined effort to get it to trial and these are part of the frictions and the problems. I practiced law a number of years. I know the problems, but I know also that when you have to do something you bring to bear the facilities that you need

to do it, and I think you will find that you have a lot more capability, resiliency, imagination and ingenuity than you now think and you are all in the same boat.

MS. WEISS: I do not think so.

JUDGE MILLER: You all have the problems of time. You are going to be doing discovery and interrogatories. You will be doing them on 1, 2, and 3 anyway.

MS. WEISS: I think they are in the Queen Elizabeth and we are in a leaky rowboat, so we are not all in the same boat.

(Laughter.)

JUDGE MILLER: That may be. I told you you have my sympathy, but sympathy never yet prepared a trial brief.

MS. WEISS: That is right.

JUDGE MILLER: We are down to trial. There is no fooling around about it. I know your problems and I can sympathize with them, but on the other hand I am afraid we are going to go to trial. That is the way anything gets resolved here.

And I find also there is a marvelous flurry of activity, the adrenalin -- again present company excepted -- the adrenalin of lawyers seems to bubble up starting about a week, maybe ten days before they are

going to go to trial, come to a conference, and that is why these flood of papers comes.

You pointed out how they come at the last minute. There is a very peculiar but very persistent correlation there, and so we are telling you what the problems are and how the Board feels that it is necessary to go to hearing now. Do the best that you can. We are not going to insist on perfection, but you have given these matters some thought. They are not new to you.

You all have certain strategic objectives in mind and certain tactical objectives as well, and you are coming into conflict on some of them. That is understandable, but the world is not going to stop. You just might be able to adjust some of these things if you sit down and talk real hard and give as well as take.

But if you cannot, then give us the information, come on in, and we will make the ruling. I am afraid I cannot say much more than that.

If there is nothing further, we will stand adjourned until the date that we will meet with you. Thank you.

(Whereupon, at 5:06 o'clock p.m., the hearing was adjourned, to reconvene at 9:00 o'clock a.m, Tuesday, April 20, 1982.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

Atomic Safety and Licensing Board

in the matter of: U.S. Department of Energy Project Management Corp., TVA
(Clinch River Breeder Reactor)

Date of Proceeding: April 6, 1982

Docket Number: 50-537

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

David S. Parker

Official Reporter (Typed)

(SIGNATURE OF REPORTER)