NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOAPD

In the Matter of:

UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPOPATION	)	DOCKET NO. 50-537
TENNESSEE VALLEY AUTHOPITY (Clinch River Breeder Reactor Plant)	)	

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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UNITED STATES DEPARTMENT OF ENERGY x

PROJECT MANAGEMENT CORPORATION x Docket No. 50-537

x

TENNESSEE VALLEY AUTHORITY x

(Clinch River Breeder Reactor Plant) x

- -x

Nuclear Regulatory Commission

Room 550

4350 East-West Highway

Bethesda, Maryland

The conference in the above-entitled matter was convened, pursuant to notice, at 10:00 a.m.

BEFORE:

MARSHALL E. MILLER, Chairman

GUSTAVE A. LINENBERGER, JR., MEMBER

PRESENT:

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STUART TREBY, Esq.
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U.S. Nuclear Regulatory Commission

P R O C E E D I N G S

JUDGE MILLER: The conference of the parties and counsel will come to order, please.

I think that the Board has asked for the opportunity to meet with you ladies and gentlemen with regard, among other things, to motions which have been filed within the last week which it is suggested can or should have some bearing upon the scheduling.

Before we get into that, may we have the parties and counsel identify themselves for the record, please?

MR. EDGAR: George Edgar, attorney for Project Management Corporation.

MR. BERGHOLZ: Warren Bergholz, attorney for the Department of Energy.

MR. VIGLUICCI: Ed Vigluicci, attorney for Tennessee Valley Authority, and Walter LaRoche, attorney for Tennessee Valley authority.

MR. EDGAR: I should add, seated to my right is Mr. David Goeser of Westinghouse, Bethesda office, and to his right, Mr. Tom Schmute of my office.

JUDGE MILLER: And the Staff?

MR. SWANSON: Daniel T. Swanson, counsel for NRC Staff.

On my immediate left is Mr. Stuart Treby,

Assistant Chief Hearing Counsel for the NRC Staff. Also joining us today but not here at the present moment is Mr. Bradley Jones.

JUDGE MILLER: NRDC, Sierra Club, Intervenors?

(No resonse.)

JUDGE MILLER: All right. The motions which were brought to the Board's attention last week include the Applicant's motion to enforce the hearing schedule, dated 7/26/82; the Intervenors' motion to reschedule hearings, dated July 27, 1982; the Intervenors NRDC and Sierra Club motion to reconsider rulings on contentions, apparently delivered to the Board at least at 5:15 p.m. on 7/29/82, a little after hours; and then I find on the desk this morning the NRC Staff response to Applicant's motion to enforce the hearing schedule; and NRDC's motion to reschedule hearings dated 7/30/82. I guess that was just delivered. It looks as though it was just delivered.

MR. TREBY: Copies were put into the Interagency's mail system Friday evening. We have provided extra copies this morning in case the system didn't work over the weekend.

JUDGE MILLER: I don't think it was working very hard over the weekend. The Board members actually

received it for the first time this morning. So it will probably be coming along in a day or two by the normal processes.

All right, are there any other matters which should be considered by the Board and counsel in addition to the things that appertain to the various motions we described for the record?

If not, it was our plan to hear from counsel in regard to the motions and the relationships between or among the responses, or other similar motions.

Unless counsel feel otherwise, it was our belief that probably all of the positions and contentions, statements and so forth of these various filings could be encompassed the first time we hear from you. You will be given time of course to respond insofar as any rebuttal or addressing matters on all the issues concerned, but I believe unless you tell us otherwise, you could probably cover the whole ramification of these matters when you first are heard.

Is this correct? Does anyone feel constrained by that approach?

MR. EDGAR: We are prepared to do that.

JUDGE MILLER: All right.

Since the Applicant's motion to enforce the hearing schedule is first in date, we will let Mr. Edgar

go first, and you may take into account, if you wish, the responses to that motion or the recently filed Staff's position.

MR. EDGAR: Mr. Chairman, Judge Linenberger, we believe there are two issues presented by all of these filings. The first is is there any bar to proceeding to hearings on schedule. The second issue is, if there is no bar, what is the scope of those hearings?

Now, by way of introduction to the first issue, that is, is there any bar to go to hearings, I would like to make some basic points. The first is that we read in NRDC's motion to reschedule as taking a flat position of avoiding hearings at all costs. The fundamental predicate of that motion is that the Board's rulings on Contentions 1, 2, and 3 cannot be accommodate. We believe that that basic position stems from NRDC's misreading of that ruling, and we will proceed to demonstrate that fact.

The point here is that if NRDC is not prepared to go to hearing, they should not at this juncture be able to take advantage of their own mistake in misreading the Board's order. We believe that the Board's scheduling order is clear and unmistakable. NRDC's obligations under that schedule have been in

place since February of this year. It is their burden to initiate any last minute discovery on new matters, make a reasonable showing of need on those matters, and proceed to complete discovery. They have done none of these things.

In reality, they are asking for a time extension, and for the reasons which I will demonstrate, they have shown no good cause.

The real question that we must address today is how do we get to hearings. That is the practical question. The corollary to that is also what evidence can and should we take at those hearings? These hearings are going to involve the taking of evidence. There will not be a final decision coming out of these hearings in the initial phase.

Under our suggestion for the motion to enforce the schedule, we would contemplate going to a first phase of hearings on certain issues related to site suitability and other issues as to which there will be no strong dependence on the FES.

Now, given that framework, the second phase of hearings could then accommodate any Staff testimony that would come on after the first phase.

As we see it, there is only one operative rule here of significance. The NRC case law is quite clear,

that bifurcated hearings are permissible. We think that all parties, including the NRC Staff, can go to hearings on all site suitability issues. Those issues have their foundation in the Atomic Energy Act. They are entirely independent of the FES, and there is absolutely no bar to proceeding on those issues.

There is another set of issues which I will proceed to discuss in some detail which are of an environmental nature, if you will, which we also think there is a substantial basis for proceeding on. But the basic point is that Applicants and Intervenors can and should go to hearing on all contentions as scheduled. They should present their evidence. Then if there is any need to reopen, that can be done in Phase 2.

Now, I would like to proceed to consider some of NRDC's arguments. The first argument thay NRDC makes is that all parties and the Board agreed originally that supplementation would require a "new schedule."

JUDGE MILLER: Pardon me. Which are you referring to, now? You were reading, and I think that the NRDC has filed two motions.

MR. EDGAR: Yes. The first motion is the motion to reschedule hearings. That is the one I will address first because I think, Judge Miller, that that one goes to the question of whether you can go to

hearings, not to scope necessarily. It deals with scope in a much lesser sense.

The first point is that at the time the schedule was developed, the Board quite properly -- and it said on transcript page 1132 that if the issue of rescheduling were to present itself, then a re-evaluation could be undertaken possibly at a prehearing conference. That does not mean that the parties automatically expected that the schedule would be invalid. The schedule can be adjusted, as we have explained in our motion, to enforce the schedule.

The first a[illegible]nt basis for NRDC's argument beyond this is that 10 CFR 27.61(a) requires completion of an FES before LWA hearings may commence. They read that regulation as prohibitive. This, we suggest, is a totally invalid reading of 10 CFR 27.61. It is not by its terms prohibitive. If you go back to the original statement of intent in the rulemaking notice, that is at 39 Fed. Reg. 14.507, April 24, 1974, and in particular, look at page 14.508, the underlying policy of 27.61(a) is to reduce the time required for licensing. If you read 27.61(a) rationally, it merely sets the minimum time to get to hearing. Indeed, its real effect and its real underlying policy is exactly the opposite of what NRDC has suggested. Here we have an FES. Here we have

a recirculation, but 27.61 is by no means prohibitive.

You will also find authority in Douglas Point for that proposition. You will see that in Douglas Point they were not seeking an LWA as NRDC correctly points out. However, they proved the wrong point from that. The point is that in Douglas Point they were involved in site suitability issues. That case quite clearly stands for the proposition that site suitability issues can be considered independent of the FES.

The second point they make is that 10 CFR 51.52(a) does not apply to an LWA hearing, that 27.61(a) overrides. That is not so. The Staff's response explains that point quite clearly. The Staff does not belabor the point. The Staff merely points out that 10 CFR 51.52 does not involve findings. NRDC attempts to cross reference 50.10(e) into 51.52(b) and (c).

51.52(b) and (c) involve findings. Only subsections 51.52(b) and (c) contain findings which need to be made. 51.52(a) contains no findings, and it is quite appropriate that 50.10(e)(2) does not reference that subsection when discussing findings.

We submit that the attempt to use 27.61 as a prohibition is just not a matter of good common sense, and it is in direct conflict with the policy underlying

the rulemaking.

Likewise, neither NEPA nor the CEQ guidelines prohibit a hearing before the FES is completed. NEPA forbids major federal action before the FES. Early consideration of site or any other issues in a hearing is not a major federal action. The Carroll County case, 12 NRC at 25 supports that proposition.

The CEQ guidelines are in fact not either prohibitive. All the CEQ guidelines say is the FES shall "normally" precede a final Staff recommendation and the portion of the hearing related to the impact study. Those guidelines clearly contemplate discretion and departure from the normal case.

We think that the question of whether the issues are intertwined or whether they can be considered independently is an issue which this Board is entirely qualified to make and this Board should make as a matter of its discretion. We believe that we can go through each contention and show with very little difficulty that indeed we can go to hearing as scheduled on a substantial number of issues.

We shouldn't forget that what we are talking about is going to hearing on all issues by NRDC and Applicants, and then the question is scope as to Staff testimony. There is no possible denial of due process

here. NRDC will have a full opportunity to cross examine.

If there is a reason and if there is a factual basis to requestion, if new evidence appears in the final supplement, that is fine. That can be picked up in Phase 2. We cannot at this juncture reach a conclusion that NRDC would be prejudiced before all procedures have run their course.

The additional point we think is warranted for the Board's consideration involves the motion to reconsider Contentions 1, 2, and 3. What we find when we strip down the arguments presented on Contentions 1, 2, and 3 is the real issue. What NRDC is really saying is that Appendix J of the FES raises new matters. If that is so, the solution is to undertake new matter discovery. As I previously indicated, NRDC has not initiated discovery, has not made a reasonable showing of need, and has not fulfilled its obligations under the schedule.

If you look at Appendix J, the first page in the FES supplement, there is an interesting statement which the Staff makes. In the first paragraph, second sentence, the Staff says, "The Staff finds that no plant site changes have occurred that are significant to accident risk environmental concerns nor is there

significant new information relevant to environmental concerns that bears on the environmental impacts or risks of accidents as reported in the FES."

This stands quite at odds with NRDC's rather lengthy discourse on Contention 1, 2, and 3. We submit that on its face there is absolutely no reason why we cannot proceed to hearing. Moreover, there is absolutely no reason to reconsider the rulings on Contentions 1, 2, and 3. There is no real conflict with the Board's ruling. There is a conflict with NRDC's unreasonable interpretations of that ruling.

This is not a reason to postpone the hearings. I may be a reason for additional discovery, but NRDC has not taken the actions to undertake and to complete additional discovery.

With that, Your Honor, we would suggest two things: first, that the Intervenors and Applicants can go to hearing on all issues as scheduled. There is no bar of any kind to that. The second point is that the NRC staff may proceed to hearing on schedule on all site suitability issues. That is essentially Contentions 1 and 2. Included therein is Contention 2(e) which raises the adequacy of the NRC Staff's recommended Part 100.11 dose guidelines. There is no disagreement amongst the Applicants or the NRC Staff to that extent.

The Staff also indicates that they are willing to go to hearing and believe that they should go to hearing on Contentions 5(b) and 7(a)(b). We agree, and the Staff's filing adequately presents reasons for that.

As a footnote to the Staff's position on Contention 2(e), as I have indicated, 2(e) raises the issue of the adequacy of dose guidelines. When those contentions were filed, NRDC conceded on the record that 2(e) echo is coextensive with 11(d)(1)(2). So to that extent, the same subject matter would come in under either contention.

We think there are additional reasons why a broader scope of contentions can be considered than those which the NRC staff has indicated their agreement with.

I would like to briefly summarize --

JUDGE MILLER: You are off the air (indicating the microphone).

MR. EDGAR: I would like to briefly summarize the basic contentions and the reasons therefor.

We have indicated our rationale in our motion to enforce the hearing schedule, and the specific reference therein is to pages 15 through 18 of our July 26 motion to enforce the schedule. We think if the

Board examines the criteria in Douglas Point, namely, whether there is a likelihood that any early findings would retain their validity in light of the recirculation, the advantage to the public interest of early resolution, and the extent to which hearings on the issue would particularly, if the issue were later reopened, occasion prejudice to one or more litigants. There are several initial points which we would like to call to the Board's attention in this regard.

The first is we are not talking about early findings here. We are talking about the taking of evidence, and thus the question of whether findings would retain their validity is not a controlling question under the circumstances of this case. However, even if it were, because we contemplate a two phase hearing schedule, if something should occur in the FES recirculation process which would require additional information or additional supplemental testimony, that can be accommodated because it is very likely that we will have a one-month gap between Phase 1 and Phase 2.

The second point to make is that NRDC's information on all contentions has been available to the Staff at the time they drafted the supplement. The Board should recall that NRDC had discovery filed against them and they were under an obligation to

present all of their evidence in regard to their testimony and contentions prior to completion of the FES supplement.

If they have responded, then there should not be anything new which comes out during the recirculation process from NRDC.

Now, with those two introductory points, we proceed to consideration of those issues which can be considered by all parties at the initial phase of hearings.

Now, we have already indicated that both NRDC and Applicant should present all of their evidence. Now the question is on what issue should the Staff present their evidence.

The first is design alternatives, Contentions 7(a)(b). Here there is no change in the FES. There is no additional information in the supplement which was not there originally.

We think that there is a good reason why we can proceed to present all evidence on site selection. The NRC Staff's analysis differs only in format from prior analysis. The staff has employed the NRC's proposed rule on an alternative site. This sets up a formalism for analysis of alternative sites, but the substantive information does not differ.

Secondly, there is only one new site, if you will, presented in the analysis that was not previously considered. That site was mentioned in the prior FES, but now it is more fully analyzed.

We think in the total context of this site selection analysis, that the addition of one new site is not a significant difference.

JUDGE MILLER: Pardon me. What issues or subissues do the Applicants contend that the Staff's evidence should proceed on as well as that of other parties?

MR. EDGAR: That is what I am addressing now. I am sorry I did not make myself clear.

Our proposal is that the Intervenors and Applicant go on all issues. Now the question is what does the Staff go on?

The first thing is that the Staff can go on and the Staff agrees to go on Contentions 1, 2, and 3 and including 2(e), which is the validity of dose guideline values.

Now, going beyond that point, there are a number of additional contentions where we can go to hearing. The first is Contention 5 and 7(c) dealing with site selection. We think that the change in information is in fact insignificant and there is no

reason why the Staff cannot present its testimony. Remember that when the Staff presents its testimony, the Staff is not going to be making final considerations. The cost-benefit is unaffected, and indeed, is still open. We think that the parties can proceed on Contention 5(b). That deals with the effects of CRBR on nearby facilities, namely, the Oak Ridge Gaseous Diffusion Plant, Oak Ridge National Laboratory, and the Y-12 facility. That issue itself is independent of the analysis, and there is no reason why we cannot proceed to hearing.

The next issue is the decommissioning. Decommissioning is a question which is straightforward. It is finite. There are no new issues in the draft supplement relative to decommissioning. The basis for it is generic studies from PWRs and BWRs, and there is simply no reason why any findings there or any evidence there would be affected by the supplement.

JUDGE MILLER: Is that Contention 8?

MR. EDGAR: That would be Contention 8. The site suitability contentions I mentioned first would be 1, 2, 3 and as footnote to that, 2(e) is the dose guidelines, which is coextensive with 11(d) dog (1)(2).

The next one where we think we can go to hearing by all parties is health effects, namely,

Contentions 11(b) Baker and (c) Charlie. Contentions 11(b) Baker and (c) Charlie involve the analysis of residual risk and consequent genetic and somatic efects of operationg CRBRP in compliance with existing NRC radiation protection standards.

There are two components to this analysis. The first involves what are the doses. What doses do you expect from operation of CRBRP in accordance with NRC requirements? Those doses would be analyzed and developed in the FES.

We think, though, we can decouple the doses from the question of given a dose, what health effect do you expect to occur? What is your estimate of a given health effect per unit of dose?

We thus think that we can proceed to hearing on that portion of 11(b)(c) that relates to, if you will excuse the term, the multipliers that one would multiply times doses to arrive at health effects.

In summary, then, we believe that there is no reason why the parties cannot proceed to hearings on Contentions 1, 2, 3, 5, 7, 8, and 11. Following the hearing on those contentions, the second phase would be developed wherein the NRC Staff would present their evidence, and their evidence would be taken concerning Contentions 4, which is safeguards, and 6, which is fuel

cycle.

We thus submit to the Board that the real issue is not whether we should go to hearing as scheduled but rather what is the proper scope of that hearing. We submit that all parties can go to hearing on all site suitability issues, that the Applicants and Intervenors can go to hearing on all contentions, and that the NRC Staff can go to hearing on Contentions 1, 2, 3, 5, 7, and 11.

And 8. I am sorry I missed 8 from the Energy Department.

JUDGE MILLER: Does that conclude your argument?

MR. EDGAR: Yes, Your Honor.

JUDGE MILLER: All right. I suppose we should hear, then -- does the staff want to go next or following? It really doesn't matter to the Board.

MR. TREBY: The staff will go next.

Judge Miller, the staff agrees in most parts with the arguments which have been made by applicant's counsel, Mr. Edgar. We agree that the two issues before the Board are whether we should go to hearing and, secondly, if so, what is the scope of the hearing.

The staff strongly supports the view that we should go forward to the hearing on schedule beginning August 23rd. We agree that certainly, both the applicant and the intervenors can go forward on all the issues presented. The staff can go forward on certain of the issues since they are not dependent on our analysis in the FES. Those are Contentions 1, 2, 3, 5(b), 7(a) and (b).

To go back for a moment, the staff did file its response dated July 30th, 1982, which addresses our position as to whether the hearing should go forward on

schedule. I believe that essentially, it responds to the points which NRDC made in its argument as to why the hearing should be rescheduled; namely, their readings of the regulations dealing with LWAs and their reading of Section 26.71(a). For the reasons set forth in our document, we disagree, and Mr. Edgar has, in fact, summarized our views on those matters in the course of his arguments.

We also agree with Mr. Edgar's arguments as to why the fact that we have issued Appendix J should not change the Board's rulings with regard to the scope of Contentions 1, 2 and 3, which leaves us the question as to which issues the staff can go forward with in the hearing scheduled to begin August 23rd.

As I have previously indicated, the staff believes it can go forward with Contentions 1, 2 and 3 which deal with the site suitability issues. The staff does not believe that we can go forward with Contention 4 until the staff has issued its final supplement to the FES. Contention 4 deals with the question of safeguards. This is a subject which is extensively discussed in the supplement to the FES and is one that we believe there will be public comment on, and we will have further discussion of in our final supplement.

JUDGE MILLER: What else? Go ahead and tell

us the rest of the issues or contentions you feel the staff should not proceed on until the FES is issued.

MR. TREBY: We believe the staff should not proceed on Contention 5(a). Contention 5(a) deals with site meteorology and population density as being less favorable at the Clinch River site than most sites used for LWAs.

These are matters which are discussed in the course of consideration of alternative sites. We believe that actually, Contention 5(a) can be joined with Contention 7(c) and that is the way we would intend to treat it, so we do not believe that since these are matters which may be discussed in our supplement, that they are appropriate to go forward with at the first session.

JUDGE MILLER: Let me understand. 5(a) site meteorology, population characteristics and the like; the staff intends to join those with 7(c), which is what, site selection?

MR. TREBY: Alternative sites.

JUDGE MILLER: Alternative sites. Then the staff believes that the consideration of alternative sites should not be required by the staff, but the other parties could go forward? Is that correct?

MR. TREBY: Yes. As I indicated, we do

believe we could go forward with 5(b) which addresses a possible impact on other facilities.

JUDGE MILLER: Are there any others?

MR. TREBY: The staff does not believe we can go forward with 6 which deals with the fuel cycle, because again, that is a matter which is extensively discussed in the supplement and which we believe there may be comment and further information provided in our final supplement.

JUDGE MILLER: But the staff feels the other parties; namely, the applicants and intervenors, NRDC, could go forward on 6, for example?

MR. TREBY: Yes. We believe the other parties, the applicants and NRDC, can go forward on all contentions at this time. The staff can go forward on Contentions 7(a) and 7(b), which deal with the weather -- 7(a) deals with the timing of the CRBR. We think that is a matter that has actually already been spoken to by the Commission in its August 1976 decision and, in any event, is not dependent upon anything that is contained in the draft supplement that the staff has circulated.

With regard to 7(b) which deals with alternative --

JUDGE MILLER: (e)?

MR. TREBY: (b) as in Baker. We believe we can go forward with that. All discovery to date has indicated that the only alternatives relate to alternative safety systems; there has been no indication that anything dealing with the environment is involved, and we believe that is a matter that we can go forward with at this time.

7(c) I believe you have already discussed. That deals with alternative sites. That is discussed in the supplement and we believe that is a matter that needs to await the final supplement before the staff is prepared to present its position.

Contention 8 deals with decommissioning. Again, this is a matter that is discussed in the draft supplement, and we believe we need to issue our final supplement before we would be prepared to go forward with hearings and present the presentation of the staff's position.

Contention 11 the staff also believes it would not be prepared to go forward with at this time. These are matters that are discussed in the draft supplement. They deal with consequences of complying with the NRC standards for radiation protection. These are matters which are discussed in the supplement, and we would believe it appropriate to wait until the issuance of our

final supplement.

We do not agree that 2(e) and 11(d) are identical. We believe there are some differences.

That concludes --

JUDGE LINENBERGER: With respect to the health and safety consequences aspect of Contention 11, are your comments restricted to normal operation rather than as opposed to accident considerations?

(Pause.)

MR. TREBY: I guess Parts (a), (b) and (c) deal with normal operation. 11(d) does appear to deal with accident conditions. We deal with both of them, we believe, in the FES. So I guess my comments did refer to both normal and accident.

JUDGE LINENBERGER: All right.

JUDGE MILLER: Does the staff --

MR. TREBY: Let me just qualify that one further bit. That is with respect to the exception of the dose guideline values that are discussed in 2(3). We do set out certain dose guidelines which are established in Part 100. That is considered in the sute suitability report, so we believe that we can go forward with 2(e). We believe that 11(d) goes beyond that.

JUDGE MILLER: Let me inquire, Mr. Treby, whether your staff's interpretation of Section 2.761(a),

that portion which provides that a hearing on issues covered by Section 50.10(e), et cetera, should commence a hearing on those issues and Part 51 as soon a practicable after issuance by the staff of its final environmental impact statement, FES, but not later than 30 days after issuance.

Does the staff construe the language requiring the hearing on these issues commence not later than 30 days after issuance of the FES as mandatory?

MR. TREBY: No, I believe there is language in there that indicates that except in special circumstances or upon the agreement of the parties.

JUDGE MILLER: In the earlier portion when it says "not later than", does not that constitute mandatory language which contemplates earlier agreements and the like but overrules them if they are more than that? In other words, that looks pretty mandatory; that is pretty specific language.

My question is whether at least arguably, the hearing must commence not later than 30 days after the issuance of the FES.

MR. TREBY: Arguably, yes.

JUDGE MILLER: In that event, then, if intervenors are to go to hearing not later than 30 days after the FES, how would they then get discovery on the

FES? Or would that be contemplated by the precedent discovery of such information as is available, including the DES?

MR. TREBY: I believe that is the case.

JUDGE MILLER: Is that your understanding of what the Commission intended by this language or not?

MR. TREBY: I think what the Commission intended was to set a date by which the hearings would begin. It was a minimum or a maximum, I guess, of not less than 30 days. But it is my understanding that there have been cases in the past -- I am aware of cases where we have not gone to environmental issues within the 30-day period.

JUDGE MILLER: Has the issue been raised? That "not later than 30 days" cause? Has that been litigated, to your knowledge?

MR. TREBY: I am not aware of any case in which it has been litigated.

(Board conferring.)

JUDGE MILLER: Intervenors?

JUDGE LINENBERGER: Well, one clarifying question, Mr. Treby. I believe the last thing you said before the Chairman asked his question about the 30-day mandatory consideration was -- and I want to make sure I understood this correctly -- I believe you said that the

staff can go ahead in the first phase of the hearings with 2(e). Is that correct?

MR. TREBY: That is correct.

JUDGE LINENBERGER: Thank you.

JUDGE MILLER: 2 in its entirety?

MR. TREBY: Yes.

JUDGE MILLER: NRDC?

MS. FINNAMORE: Mr. Chairman and Judge Linenberger, my name is Barbara Finnamore, I am a staff attorney with NRDC also representing the Sierra Club. With me is Ellyn Weiss from Harmon and Weiss, also representing Intervenor, and Dr. Thomas Cochran, the staff scientist on NRDC.

We are here to discuss two of our motions with the Board. The first one is a motion to reschedule the hearings as they were set forth in the February 1982 order of the Board and, also, the July 19th, 1982 order of the Board.

The second is a motion to reconsider the scope of Contentions 1, 2, and 3 as set forth by the Board in its order of April 22, 1982.

I will begin with the first motion to reconsider the hearings. When the prehearing conference was held among these parties in February of this year, every party was in agreement that should the staff

decide to reconsider the impact statement, a substantial revision of the schedule would be necessitated.

I have quoted the comments of both staff and applicants to the effect that should recirculation occur, at least 5 or 6 more months would, of course, be added on to the schedule. We are at that point today. Recirculation has occurred; yet, now both the applicants and the staff have changed their positions and are arguing to the Board that the hearings can proceed on the "fast track schedule" which was set up on the assumption that recirculation would not occur.

This position of staff and applicants is in direct violation of the regulations of the Commission. In their arguments today, neither the applicants nor the staff have pointed to any reason why their position is not in violation of these regulations.

As we stated in our motion, we know we are denied the ability of the Board to regulate the sequence of hearings at the LWA stage, but we strongly disagree with the position taken by applicants and the staff that such discretion extends to permitting hearings to commence before there is a final environmental impact statement.

Now, it is very clear to us from a look at the combination of Section 50.10(e) of the regulations, 10

CFR Part 2 of the regulations and Part 51 of the regulations that no hearing on LWA issues, whether it be environmental issues or site suitability issues, may commence before an FES is issued. That means a complete and up-to-date FES.

As we stated in our motion, Section 50.10(e), which is the LWA regulations, states that the Board must make the findings required by Part 50.51(b) and (c). Applicants claim that that section only applies to findings that have to be made.

That is not true. I will point the Board to 51.52(b) which says:

"The Staff will offer the Final Environmental Impact Statement in evidence. Any party to the proceeding may take a position and offer evidence on the aspects of the proposed action covered by NEPA and this part in accordance with the provision of subpart G of Part 2 of this chapter." Therefore, 51.52(b) refers not just to the findings which must be made by the Board but also to the manner in which the parties take positions and offer evidence.

When you look at Part 2, you come across -- when you get to Part 2 Appendix A paragraph 1(c)(2), this paragraph again refers specifically to limited work authorization hearings. That part says in any proceeding relating to the issuance of a construction permit for a facility which is subject to the Environmental Impact Statement requirements of NEPA and which is the utilization facility for industrial or commercial purposes or is a testing facility, separate hearings may be held and decisions may be issued on national environmental policy and site suitability issues and other specified issues as provided by subpart F and 2.761(1).

Therefore, both the LWA rule itself and the

Part 2 Appendix A, which refers to limited work authorization specifically, requires that the hearings be held in accordance with section 2.761(a). In the Douglas Point case it also refers to 10 CFR Part 2 Appendix A as a controlling regulation for limited work authorization hearings.

As we stated in our motion, the LWA rule nowhere mentions 51.52(a.) The Douglas Point case nowhere mentions 51.52(a). And Part 2 Appendix A nowhwere mentions 51.52(a). These are the three authorities that we have that relate specifically to limited work authorizations, and each one of them requires compliance with 2.761 to control the manner in which evidence is offered and hearings are commenced.

Now, 2.761(a) could not be more clear. It states that the presiding officer shall, unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by 50.10(e)(2)(ii) and Part 51 as soon as practicable after issuance by the Staff of its Final Environmental Impact Statement but no more than 30 days after issuance of such statement.

Now, Applicants and Staff first make the point that if you look at the statement of considerations for part 2.761 it shows that the underlying policy is to

reduce the time for licensing. We agree that that is the underlying policy. We also point out to the Board that in determining how quickly a hearing can be held, 2.761 puts a 30-day limit but specifically requires that one must wait until after the FES is issued.

Therefore, no matter how quickly the Commission wished to start and proceed with LWA hearings, it recognized that these hearings must await completion of the milestone document. This is exactly the position taken by all the parties in the February prehearing conference as well as the position of the Board when it set up the schedule in February.

The Staff claims that one can read section 2.761 to allow hearings to commence before the impact statement is issued. We feel that if such a reading were plausible, the regulation would have said the presiding officer may commence a hearing on NEPA and site suitability issues before or as soon as possible after issuance of the FES.

That is not what this section says. This section says the presiding officer must commence a hearing as soon as practicable after issuance by the Staff of the impact statement.

We believe the regulation could not be clearer. In fact, if you look at the Staff's motion --

excuse me -- the response to the Applicants' and NRDC's motion on page 4, you can see that their reading of section 2.51 agrees with me. It says one can read this section either as providing a prohibition on conducting a proceeding or a deadline. But when it reads the section as providing a deadline, it agrees that the deadline is triggered by issuance of the impact statement and that the deadline does not allow commencement of the hearings before the impact statement.

JUDGE MILLER: Wait. The Staff's argument said that, the latter portion of your argument? I followed you, but what page are you referring to?

MS. FINNAMORE: I am referring to page 4 of the Staff's response, line 5.

JUDGE MILLER: Line 5.

MS. FINNAMORE: I quote, "That is, once you have an FES, you must begin a hearing as soon as practicable but not later than 30 days after issuance of the FES. This is exactly the wording used by the Licensing Appeal Board in Douglas Point.

JUDGE MILLER: Well, does that necessarily require that such hearing, which must begin no later than 30 days, could not commence earlier than that?

MS. FINNAMORE: Yes, I believe it does. As I said before, if it were to be read otherwise, the

regulation would have stated that hearings can commence before or as soon as possible after issuance of the FES.

JUDGE MILLER: Well, that says nothing if a regulation does not commence before or after. You said practically nothing.

MS. FINNAMORE: That is the reason for the regulation, that you must begin after. We believe the regulation is saying something meaningful. The only way it can be read to say something meaningful is if it reads "after."

JUDGE MILLER: All right, let us take that interpretation, "no later than 30 days after the FES is issued." Is that your position, "no later than 30 days? Is that your position?

MS. FINNAMORE: No.

JUDGE MILLER: Yes or no? I am trying to ask you something here. If you are not going to accept that, you are going to rewrite the whole thing. I am asking you whether it is mandatory under your interpretation that the hearing commence not later than 30 days after the issuance of the FES. You can tell me yes or no on that one, surely.

MS. FINNAMORE: No. I believe that it is mandatory that hearings must begin after the impact

statement is issued.

JUDGE MILLER: Not later than 30 days after?

MS. FINNAMORE: I believe they must begin not later than 30 days after issuance of such statement unless the parties agree otherwise or the rights of any party would be prejudiced thereby.

JUDGE MILLER: That is up at the beginning. The "not later than" follows. It does not precede or necessarily include the earlier statement, which is addressed to something else. Is that right?

MS. FINNAMORE: No. It is the same sentence, and we believe that --

JUDGE MILLER: The "early" part refers, does it not, to the commencement of a hearing on issues covered "as soon as practicable," unless the parties agree otherwise that the rights of the parties would be prejudiced, "commence a hearing on issues as soon as practicable," but in any event "not later than 30 days after issuance." I am not sure you have covered all that language.

I know what you are asking, but I do not think you have accounted for all of the language. You glide swiftly over "not later." The reason I am asking you is this: If not later than 30 days from issuance of the FES, that is going to give you precious little

discovery. If that is what you are asking, you should consider the consequences of such an interpretation.

If the FES is issued, let us say, September 5, by October 5 then you are going to go to hearing under your interpretation. I hope you take that into account in urging upon us the interpretation of the language.

MS. FINNAMORE: I think you misinterpreted me, Chairman Miller.

JUDGE MILLER: Maybe so. I did not think you covered that.

MS. FINNAMORE: We covered that point, as I stated before, by saying that the hearings may commence no later than 30 days after issuance of such statement unless the rights of any parties would be prejudiced thereby.

JUDGE MILLER: That precedes, and I think that refers to something else.

MS. FINNAMORE: Chairman Miller, you asked the Staff whether this issue has ever been litigated. The answer is yes. The answer is Douglas Point. In Douglas Point the Board specifically dealt with the issue of whether hearings may commence before there is a final impact statement in that case. The Board specifically said that early hearings may be meaningful, but they may not commence until after the Final Impact Statement has

been released. And in particular, the Board --

JUDGE MILLER: Which board are you talking about?

MS. FINNAMORE: I am talking about the Appeal Board in Douglas Point.

JUDGE MILLER: What did the Appeal Board say? Are you quoting from it?

MS. FINNAMORE: I am quoting from page 546 of 1 NRC.

JUDGE MILLER: All right, go ahead and read what you wish to quote from. Page 546?

MS. FINNAMORE: The Board was discussing whether LWA hearings should proceed notwithstanding the applicant's postponement of construction and operation of the Douglas Point facility for several years. The Appeal Board stated --

JUDGE MILLER: Where are you reading from? I did not see that.

MS. FINNAMORE: I am now quoting.

JUDGE MILLER: You have not quoted yet?

MS. FINNAMORE: I am now quoting.

JUDGE MILLER: Where are you quoting? I want to pick it up.

MS. FINNAMORE: I am quoting page 546.

JUDGE MILLER: But you gave me language after

you identified the page. All I want to know is where you are quoting. That is all I am asking.

MS. FINNAMORE: I am quoting page 546.

JUDGE MILLER: That is the sixth time you have told me, and in between you give me some apparently paraphrased. What line of 546? That is all I am asking, Ms. Finnamore.

MS. FINNAMORE: I am quoting from my motion, which does not have the lines on it.

JUDGE MILLER: Do you not have the case before you?

MS. FINNAMORE: I have my motion in front of me.

JUDGE MILLER: I know you have your motion. The question is do you have the case before you? I was trying to follow you.

MS. FINNAMORE: I am quoting from the sixth line from the bottom.

JUDGE MILLER: Okay. I have it.

MS. FINNAMORE: "Once the Final Environmental Statement has been released, however, it may well be possible both to pinpoint and to measure with reasonable precision and certainty many of the environmental costs which will be involved in constructing and operating the reactor. Where this can be done, a useful purpose

conceivably will be served by having those costs considered at an early hearing, notwithstanding the fact that the striking of the final NEPA balance may still be some time off."

The Douglas Point Appeal Board is arguing that one cannot pinpoint and measure with reasonable precision and certainty these environmental costs before a Final Impact Statement is released.

JUDGE MILLER: Where does it say that? Does it say that?

MS. FINNAMORE: I submit that that is what the Board is stating here.

JUDGE MILLER: I see. Okay.

MS. FINNAMORE: The reason I submit that is because the Board added an additional requirement in this case to underscore the emphasis it placed on having a final and up-to-date impact statement in place before any LWA hearings commenced.

That is due to the situation in this case where construction was delayed several years, but the Board decided to go ahead with the LWA hearings after an impact statement had been prepared and would hold a second phase of the hearing nearer to the time the construction was actually scheduled to begin.

Now, at that time time the Board said that:

Even though there had been a Final Environmental Impact Statement issued, it would require the Staff to recirculate the Final Impact Statement along with any supplement that the Staff would prepare before the second phase of the hearings would begin. That is on page 552 of the Douglas Point opinion. The Appeal Board --

JUDGE MILLER: 552?

MS. FINNAMORE: The final paragraph. The Appeal Board stated on page 553 that: "This procedure will ensure that interested agencies and the public will have the opportunity to reassess the environmental impacts of the facility in the light of any augmentation of data or changed circumstances which, in turn, should minimize the risk that stale information will be used in striking the final NEPA balance."

We submit that the Appeal Board was so concerned in this case that no LWA hearings begin before the public has had a chance to comment on an up-to-date impact statement and that the Staff has had a chance to reevaluate the statements made in its impact statement in light of public opinion and that the intervenors have the benefit of public opinion and comments from interested agencies and other groups before they be required to present their case or cross-examine other

parties, that they required something that is not normally required but was necessary given the time lag in this case: that they recirculate a Final Environmental Impact Statement to bring the public into the process.

We believe that given this precedent, there is no way that the Board can go ahead on the hearings required in this case before we have had a chance to bring the public and agencies into the process through circulation and consideration of comments to the supplement to the impact statement.

Now, this is also required by the CEQ regulations which are not, as the Applicant said, guidelines but have become mandatory procedues with which the NRC must comply. The CEQ regulations state that for adjudication the Final Environmental Impact Statement shall normally precede the final Staff recommendation and that portion of the public hearing related to the impact statement.

Now, Applicants state that this only requires compliance in normal situations. However, the CEQ regulations go on to state the exact circumstances in which it is not appropriate to wait for a Final Impact Statement before commencing a hearing on that statement. That is in the specific instance in which

the purpose of a public hearing is to gather information for use in the impact statement, and that makes logical sense because how else can one get information on what is to be in an impact statement if one must wait until after the impact statement is to be issued?

However, those specific circumstances are the only ones cited by the CEQ in which hearings may not await preparation of the final impact statement. We sumbit that for instances such as this in which the entire purpose of the environmental findings in the LWA are to determine whether the final impact statement is adequate, we feel it is absurd to require intervenors to challenge the adequacy of the final impact statement before it even exists.

We also feel that under these regulations the Board may not proceed with site suitability findings either as it is specifically prohibited by the regulations cited above, in particular, 2.761. We feel that the reasons for waiting until there is a final impact statement are legion and that they are not outweighed by any of the arguments cited by the Applicants.

We feel that as a matter of procedural due process intervenors are not able to fully gain the benefit of comments by interested agencies until those

comments exist. We feel it would severely curtail our rights of cross-examination of both the Applicants and the Staff if we cannot -- if we must go ahead with that cross-examination before there are7final comments available.

In addition, it is very possible that the Staff may change many of its positions in the impact statement on the basis of public comment. As stated in our motion, the Staff argued to the Licensing Board in the Limerick case less than a month ago that the comments of interested agencies will significantly aid them in preparation of their final impact statement on that case. We feel that Applicants and Staff's position are assuming that no changes will be made to a final impact statement, which is specifically contrary to what the Staff has just stated, specifically contrary to what happened in the impact statement issued in 1977 on this case where the Staff received comments from a number of Federal, State, and local governments as well as other expert individuals and groups.

We also feel Applicants have stated that the impact statement will not change because the Staff is aware of NRDC's position. We would like to point out to the Board that the NRDC is not the only group that is interested in nor will comment on the impact statement.

Simply because the NRC Staff is aware of our position does not mean that they will not receive substantial and significant comments from other groups whose comments must be taken account of in the public hearings that are going to be held on an LWA.

The Applicants also stated that we do have an FES. I would like to point out that there is no FES until there is a final supplement issued. And that is also in accordance with the CEQ regulations cited in our motion.

JUDGE LINENBERGER: A point of clarification, please, Ms. Finnamore. Your discussion up to now seemingly has predicated itself on a holding which you just articulated in your last sentence. There is no FES. Now, much of the case-related comments you have made have also been in that vein of, if you will, a first final FES, which only comes after review and comment, certainly. But to say that there is no FES in this case is, it seems to me, mischaracterizing it just a bit, because that would seem to say that the 1977 issuance is down the drain or evaporated or disappeared or by act of God is rendered nonexistent. And I do not think any of those things have happened.

The 1977 FES stands. It did take account of public review and other agency comments. And it is a

final document that is now being supplemented.

Now, I do not quite see how it is that you base your arguments on a situation where there is no FES and you make them applicable to a situation here where there is an FES. Can you explain that to me, please?

MS. FINNAMORE: The reason I say there is no FES is because if you look at the draft supplement, in every case relating to intervenor's contention, there has been substantial revision of the information in the 1977 FES. And in many cases, the Staff states that the information in the draft supplement replaces the information in the 1977 FES, meaning it is completely superseded by the information in the draft.

JUDGE LINENBERGER: But are there also places where the Staff's supplement says that the existing FES holds as published? Are there those places as well?

MS. FINNAMORE: The only cases in which that is true is for areas which are unrelated to intervenors' contentions.

JUDGE LINENBERGER: Are you saying the answer to my question is yes?

MS. FINNAMORE: That is right.

JUDGE LINENBERGER: So the final FES we have before us, a 1977 document, has not been washed out by the publication of the draft, it is being supplemented.

Is that your understanding? And the original FES final still stands as the document in this proceeding? Is that your understanding?

MS. FINNAMORE: That is not my understanding. Many portions --

JUDGE LINENBERGER: So this original document stands as the document in this proceeding?

MS. FINNAMORE: No, because many sections of that FES have been completely replaced by portions of the draft supplement.

JUDGE MILLER: Pardon me. You are not being responsive in your answer, I think.

JUDGE LINENBERGER: I am afraid not.

JUDGE MILLER: You have been asked whether or not there are some areas or places in the original final environmental supplement which remain unaffected by and stand as portions of the environmental study?

MS. FINNAMORE: Yes.

JUDGE MILLER: You say "some," but then you go on to something else. I think he is trying to say, are there some, and if so, what are they? Have you given heed to those?

MS. FINNAMORE: Yes. I believe I responded to that question. I believe there are certain limited areas of the FES, all unrelated to intervenors'

contentions which have not been updated by the supplement. However, I believe that until there is a complete updated discussion of every potential environmental impact of this plant, there is no FES. An FES contemplates a complete discussion of the impacts of a proposed action. We do not have a complete discussion in this case.

JUDGE MILLER: Do you not have a complete discussion if there is a statement in the draft FES now being recirculated, if there is a statement in that draft that there has been no significant change in substance? My question is in what connection? Alternatives or where do you find such a note? I do not think you are telling us.

MS. FINNAMORE: I said they only relate to issues that are not part of intervenors' contentions.

JUDGE MILLER: That is a negative. You said it three times. It does not become any more affirmative. The question that has been put to you is in what respects, in what portions is it stated in the draft being recirculated that the original FES is not changed, if there be such? We understood you to say, yes, there are some, and then you went on to a negative argument. What we are inquiring now is what are the portions which are stated not to be affected by the

draft recirculation? Now, if you do not know, we will not press you.

MS. FINNAMORE: I can look through the FES and find --

JUDGE MILLER: Have you done so?

MS. FINNAMORE: I certainly have.

JUDGE MILLER: Then tell us what you have found.

MS. FINNAMORE: I focused on the portions of the FES that are at issue in this LWA proceeding. The Board's order of July 19 said that the proceeding is for the purpose of considering intervenors' contentions 1 through 11. Every portion of the FES related to intervenors' contention 1 through 11 has been substantially revised.

As I said before, regardless of whether there is an issue in the draft supplement whereby the original FES discussion as to that specific limited portion is not changed, we submit that unless there is a full discussion of every environmental impact relating to this facility, there is no final FES on this document.

And we submit that the major environmental impacts discussed in the FES, such as the impacts of the fuel cycles, the potential impacts of accident at the plant, the costs of safeguarding the plant, and

alternative sites to the plant have all replaced areas in the 1977 FES. And until there is a final FES on those issues, there is a void.

We cannot challenge the adequacy of the FES on those issues because the 1977 discussion has been replaced and the new discussion is still in a draft form.

I would like to point out several recent decisions by the Supreme Court that state a major purpose of NEPA is to get public input into the environmental impact statements. It is a crucial step in the process. It cannot be shortcircuited by this Board in proceeding to hold hearings on the impact statement before the public has had an opportunity to participate.

We have had many letters written to the NRC by groups who wish to comment on the draft environmental impact statement. If we go ahead, you are not allowing the NRC to have the ability of these comments, you are not allowing the Staff to take these comments into account, and you are not allowing the intervenors to cross-examine the Applicants on the basis of these comments received by these expert agencies.

JUDGE LINENBERGER: Ms. Finnamore, these last few statements you have made would seem to indicate to you that contrary to what the Board has previously

stated, that this whole LWA hearing will come to a close as soon as we have taken evidence in the initial phase in the hearing and that that will be the end of it. The point has been repeatedly made that the Board cannot reach a decision on the LWA issue until the supplement has been finalized. The Board has repeatedly made the point that to the extent that finalization of the supplement changes anything, the NRC and the NRDC will both have an opportunity to respond, adjust, react to the results of public comments.

So I do not understand quite the context in which you are making these statements about what the Board will be denying to the NRC and the NRDC if it goes ahead on the limited scope of issues in an early phase while we are awaiting the finalization of the supplement.

You seem to say that we have made up our minds that we are not going to give any consideration to the finalized supplement, when we have made exactly the opposite clear right from the onset. So this bothers me a little bit that it seems to me you are not taking cognizance of a position that has been made clear for some time. Have you a comment on that?

MS. FINNAMORE: Judge Linenberger, if you are referring to the position of the Board, it is my understanding that there is no final position until

after this conference between the parties.

I would like to point out that the Douglas Point case specifically required that there be supplementation at both phases of the hearing and that there be public comments at both phases before any hearing on an LWA hearing met. This was despite the Douglas Point Appeal Board efforts to expedite the hearing process in a way that would get decisions and findings as soon as possible.

On the issue of whether you are denying us anything, I believe the points in our motion regarding procedural due process are clear that hearings must be afforded parties in a meaningful time and in a meaningful manner. The fact that we can down the road come back and discuss any issues that may or may not have come up, first of all, I think assumes that these issues will be tangential to the main ones which we wish to present in our major --

JUDGE MILLER: Where do you get that? You keep saying tangential, but you have made no attempt to address the point of whether or not there are site suitability matters which overlapping or not can proceed without in any way detracting from the ability of the NRDC or anyone else, including even the public, to address those matters overlapping or not which are

contained in the Final Environmental Statement prepared by the Staff.

Now, you have argued as though one precludes the other, and yet the Board I think has tried several times to find out why it is that a hearing of limited issues cognizable under site suitability, SS, in any way precludes full consideration including both discovery and evidentiary presentation of the FES matters after the Staff has subsequently produced it.

What is that dichotomy you seem to be assuming? We have been trying to get you to address your arguments to a different aspect, and you will not do it.

MS. WEISS: If I may, Mr. Chairman, Ms. Finnamore has been talking really about our views on whether you can proceed as a matter of law and interpretation of the rules. Our view is that you cannot, as a matter of law --

JUDGE MILLER: Cannot?

MS. WEISS: That is right. Irrespective that we don't have to establish prejudice, that it is established as a matter of the rules of the NRC that you cannot proceed as a matter of law. It is a second level argument,then.

You are asking her now: Assuming that you get by this legal barrier, show us how you will be prejudiced. That is really the issue that was treated more in the second pleading that we filed, the motion to reconsider.

JUDGE MILLER: Not really prejudiced, although I think we are getting close now to an understanding, inhibited or prohibited from going as fully as you wish and are entitled to, to matters that are in the FES, whether anywhere else or not; both discovery and evidence. That, I guess, if prejudice means that, all right.

MS. WEISS: That is sort of what I mean by it. Let me try and answer the question and see if it

satisfies you.

Putting aside for the moment the effect of really the main topic of the motion to reconsider, the scope, -- and that is Appendix J -- which raises I think unique sets of questions, but generally, what is the prejudice to NRDC with having to go forward on issues which have been supplemented by the draft, if it is assumed that we have the opportunity to come back and go over those same issues after the draft supplement has been finalized.

I think there are two distinct levels of prejudice. First of all, in our view, the issues of "site suitability" are not separable from the NEPA issues. Our contentions never contemplated that they were separable. Contentions 1, 2 and 3 in particular, insofar as they raised the general issue of the credibility of the core disruptive accident and the analysis of probability of CRbR accidents and their consequences.

We say that the staff's and the applicant's review of that issue is insufficient for site suitability purposes and for NEPA purposes. It turns out that as far as the staff is concerned, the only analysis we get of accidents which is related to the CRBR design is in Chapter 7 and now this new Appendix

J. And that is the first time that we see any association of probabilities of any accidents for the CRBR design.

In our view, we would argue that it is clear that all of the issues going to the validity and credibility of that portion of the staff's review are relevant to the LWA hearing, and if we can establish by cross examination and perhaps our own direct case and challenge to those figures which are presented in the FES that they are wrong, the consequences of that would be -- that would flow over into the findings on site suitability, on Part 100, the calculation of the source term.

In addition to the direct conclusion, we believe it would lead the Board to with respect to the validity of the section on the accident consequences in the FES.

So in summary, we don't think that the issues are separable in the way that the staff seems to suggest they are. And I think that if they ever really sat down and thought about it they would conclude that, too, because throughout our discovery and in particular, our depositions of the staff, every time we ask the people sort of under this rubric of source term, what was the accident analysis you did to see what was the maximum

credible accident under the site suitability section, the answer we kept getting was: it is a chapter in the FES.

So insofar as we have been getting answers to discovery, the staff hasn't viewed them as separable subjects, either. And the way in which NEPA and Part 100 interrelate is also apparent in Appendix J to the FES itself, which repeatedly cites back to 10 CFR Part 100. So we think they are all interrelated.

We also don't quite understand what is contemplated by this further bifurcation of the bifurcation, although I hear, from what the applicant says, that implicit in his argument is that we are going to have to meet some special burden to get these witnesses back the second time.

The only way I can visualize how it is going to proceed is that NRDC will be given presumably some time to do discovery. We will do discovery at the same time we have to come up with evidence that is now scheduled to be filed on August 13th on all of the issues.

I would point out to the Board that we are entitled to discovery, and meaningful discovery, before we have to file our direct case. One of the purposes of discovery is to enable us to prepare a direct case. I

think that almost on the face of the matter, the staff having presented us with a great deal of critical in our view new material, the fact that it is conclusary doesn't mean that it isn't critical. The fact that it is conclusory means we need to do more discovery rather than less.

So on its face, I think it is apparent that we couldn't have done discovery and digested discovery in time to file testimony on August 13th. So we have to file our direct case and cross examine the witnesses on the basis of the information that was available to us essentially before the FES supplement came out, since we won't have time to digest the stuff in the FES supplement beforehand.

Then we get a witness on the stand. Say we get a witness on the staff side who claims that a CDA isn't a credible accident; therefore, the consequences of such an accident don't have to be considered pursuant to Part 100 in doing a site suitability calculation.

We know, as a matter of fact, that there now is some analysis under Appendix J that exists apparently, although we haven't been able to get effective discovery into what it says.

Now, is it our obligation to question that witness on the material that appears in Appendix J to

challenge his conclusion that a CDA is not a credible event? Or are we entitled to sit back and wait until we have had time to digest discovery, or do we have to come and meet some burden that we could not have questioned this man in order to get him to come back a second time?

That is placing a burden on us which we have done nothing to deserve. We have endeavored in every possible way to get discovery since the very beginning of discovery in this case on what analysis has been done, if any, to associate any probabilities with particular CRBR accidents, what codes were used, and the consistent answer we have gotten from the staff and the applicant is that is outside the scope of the hearing and/or we haven't done any.

We have offered some examples in this pleading, and now for the very first time, a month late, we get the supplement to the FES which contains such figures.

Is it up to us at that point? It seems to me that we ought to be allowed -- we ought to be made whole. We ought to be given a reasonable opportunity to do discovery and go forward on the evidence, and we should not be sandbagged. If we are forced to go ahead and meet some special burden to call people back, we are being prejudiced through no fault of our own.

I want to call the court's attention to a case we found after we filed the pleading -- the motion for reconsideration -- on Thursday. It is the Hartsville case of March 17, 1978. It is at 7 NRC 341. I cite it kind of by way of anticipating the response that I think I am going to get from the applicants and staff. Let me just give an explanation first of why I think it is relevant.

I expect the staff in particular to say to us: You don't really need discovery; you could do it on the stand and/or we only intend to rely on general conclusions about accident probabilities, and we don't intend to get into specifics; and therefore, you are limited, too, you cannot get into specifics. By way of trying to obviate our argument that we have been prejudiced.

I think that there is some very relevant material in the Hartsville case on that, particularly on pages 355 and 356. The Board's access to these cases is startling, but in any case, the point in question had to do with the calculations by one witness of cesium-137 doses. He presented conclusions at the hearing, and the intervenor asked to be able to see the calculations and underlying conclusions.

The Board rejected that on the grounds that

they didn't think that would be helpful, and the Appeal Board said that it is obvious that the calculations might have revealed errors in reaching the estimate intervenors had put in to show the validity of the dose estimates, and clearly, the underlying calculations are relevant to their challenge of the dose estimates. Whether or not the party putting forward the estimates chose to bring forward their calculational methodologies or not. I think that is directly relevant to how we intend to use Appendix J.

I guess I have pretty much talked about what is in our motion to reconsider the ruling on Contention 2. If I could just make a couple more points, I think I can wind it up.

I think it is very important for the Board to go back to the prehearing conference where the rulings were made restricting the scope of the LWA, or setting the scope of the LWA hearing, and deferring certain contentions. You will see that the primary basis for these rulings -- and that, in fact, is reflected in your order on I think April 22nd as well -- that the primary basis for these rulings on scope, or at least one of the primary bases, are the assertions of both of the parties at the prehearing conference that they would be relying only on general design characteristics; that they would

not be looking at all at the specific design features of the CRBR. And that they would rely on no fault tree and event tree analyses. In particular, we singled out CRBR-1, and there was lengthy discussion in the record as to whether that would be relied on.

When we got Appendix J, the new section to the FES -- by the way, I should note for the Board that there were five pages missing from the typed version that we got. One of those pages is J-8, I think, which is the central graph-chart. Excuse me. We managed to get that one because there was a page missing in the middle of the narrative and we called up and managed to get that a couple of days after we got the main bulk of the supplement to the FES.

What we didn't realize until just a few days ago was that there are also four additional pages at the end of the analysis, and we found that out quite by accident and managed to get a copy of that last Thursday, I guess. So not until last Thursday did we have a final -- what we hope is the final version of the draft Appendix J.

The Board, I am sure, is generally familiar with what is in Appendix J. There are calculations of the probability both of the initiation of a CDA and of the failure of CRBR containment that additional

probability had to be and was, in fact, based on some review of CRBR design specifics. When we got Appendix J, Dr. Cochran made several telephone calls in an attempt to try to locate the author of it, because frankly, we were shocked that no hint that anything like this was coming had appeared in any of our depositions or our interrogatories.

We discovered that the principal author of Appendix J is a consultant, Science Applications, Incorporated, SAI, which we also discovered or remembered and confirmed was a principal consultant to the staff, to the applicant and, in fact, prepared the event trees in CRBRP-1.

We telephoned SAI, located the principal author; all of the factual assertions in here that go beyond the face of Appendix J are based on telephone conversations with that gentleman from SAI. He told us that, in fact, he had reviewed particular codes which had been assigned to us -- SASS, SIMMER, all of the codes which had been contained in the safety analysis which that consultant did, or did a substantial portion of for the applicants.

And I have generally covered why I think this represents substantial new material that entitles us to discovery. I also think, though, that the Board needs

to very seriously consider its ruling on scope. We think that Contention 1(b) and Contention 3(1) which were deferred are clearly within the scope of this Appendix J.

To the extent that Appendix J relies on the review, whether conclusory or not, of CRBR design-specific safety features, that is directly beyond the scope limitations of the LWA-1 proceedings, the general scope limitations beyond those four factors.

I guess I would just wind up by saying that the fact that the analysis that is presented in Appendix J is offered in a conclusory manner ought not to limit our ability to probe the bases for those conclusions. I think the Board ought to agree to that. The Hartsville case stands for that decision.

I have been handed our draft Contention 20 which was presented earlier in the proceeding. It has been suggested that that will offer additional support for the proposition that the FES -- that the NEPA accident analysis and the "site suitability findings" are interrelated.

We offered a contention which was number 20 that was proposed. It stated that neither applicants nor staff have adequately described the risks and consequences associated with CRBR accidents beyond the

design basis. There was an (a) and (b). The (a) was the staff concludes in the FES that CRBRP accident risks can be made acceptably low with the incorporation of certain features and design requirements. And yet, neither the staff nor applicant have adequately described these additional features or requirements nor demonstrated that they will sufficiently lower the risk of CRBR accidents. And (b), NRC policy policy reflected at 45 Federal Register 40401 requires a discussion of consequences substantially greater in scope and detail than that contained in the FES.

This contention does not now appear on the list of contentions by NRDC because it was ruled by the Board to be subsumed under Contention 2.

I guess unless the Board has any questions, other than our written pleadings I don't think there is any other particular point I want to make.

(Board conferring.)

Oh, I am sorry. I would like to make a correction to one of the pleadings.

JUDGE MILLER: Which one?

MS. WEISS: Natural Resources Defense Council, Inc. and the Sierra Club Motion to Reconsider ruling on Contentions. There is a typo on page 5, the third line from the bottom, the parenthetical. The parenthetical

should read, "(as opposed to the CRBR design-specific safety related systems.)" So that what we are doing is inserting the words "CRBR design-specific." Those words were omitted in the typing.

(Pause.)

MS. FINNAMORE: Chairman Miller, if I may make one further point regarding Section 2.761(a), as I said before, we believe it is mandatory that the FES is issued before the hearings are commenced.

If I understand the Board's hypothetical, you are reading it to be discretionary and to apply only if the parties -- to be mandatory unless the parties agree otherwise or the rights of any parties would be prejudiced thereby.

JUDGE MILLER: The 30 days you mean?

MS. FINNAMORE: No. I am talking about the section that says hearings commence after the impact statement is issued. Am I correct that that was the Board's hypothetical?

JUDGE MILLER: No, I don't think so. But go ahead, assume that it is, if you wish.

MS. FINNAMORE: Assuming it is the Board's hypothetical, we submit that in this case, the parties most certainly have not agreed that hearings may begin before that.

JUDGE MILLER: We understand that.

MS. FINNAMORE: I would also submit that no party has made the case that they will be prejudiced in the presentation of their case by having to wait until there is a final impact statement available. In fact, I think the reverse is true. Waiting until the final impact statement is available can only help every party by providing more information that every party can use. And in fact, not waiting until there is a final impact statement will severely prejudice the intervenors, as Ms. Weiss has argued just a moment ago.

(Board conferring.)

JUDGE MILLER: Would the parties care to offer additional arguments responsive to arguments that have now been made?

MR. EDGAR: I would like to make some points very briefly. I will not belabor the points.

The first thing, as to 2.761(a), the language in 2.761(a) is not prohibitive. It sets the minimum time for getting to hearings.

In addition, there are two practical problems with intervenor's reading of 2.761(a). The first thing is does is make 51.52(a) a nullity. That says the staff can't present its evidence, but any other party can, so they read that right out of the regulations.

The second thing of a practical nature that is presented by their reading of 2.761(a) is that it is in total conflict with the policy of reducing time for licensing, which is the underlying policy for that rulemaking.

Now, intervenors read the 2.761(a) as overriding 51.52(a) on the rather tortuous argument that 50.10(e)(2) references 51.52(b) and (c), but not 51.52(a); and that therefore, 51.52 does not apply to the LWA. That is, the LWA regulation.

The fact is all 2.761(a) indicates is that you are setting a minimum time to hearing. That doesn't make 51.52(a) a nullity, and you have got to read these regulations so that all parts of the regulations make sense.

Now, there is another practical problem with their interpretation. If 2.761(a) meant what it said, then you can't go to hearing on site suitability issues. We know there is a provision in the NRC regulations where, quite apart from NEPA and quite apart from the impact statement, you can go to hearing on site suitability issues. So there is another one.

Now, we do have an FES here. We have a supplement to an FES. This is not a new FES. It takes each chapter of the original FES, evaluates whether

there is any additional information and provides it. A good example here would be Appendix J where earlier on, I quoted the language from Appendix J. The staff finds no significant change in circumstances or significant new information.

Now, as to Douglas Point, you have been told by intervenors that the issue presented in Douglas Point was whether LWA hearings can begin before an FES supplement is issued; that the Appeal Board was highly conscious of this. That was not the issue presented. There is no holding in that case to that effect.

Here, we are dealing with the question of whether to take evidence. We are not dealing with the question of whether the Board is going to make a partial initial decision on Phase 1. The real issue is where is this prejudice that the intervenors are talking about? If something does come in during the comment period, there will be opportunity in Phase 2 to take care of that. There is no procedural due process issue here at all.

Intervenors have now told us -- and I must say I was somewhat surprised to hear it -- that, "we cannot challenge the adequacy of the FES now." If that is true, we ought to be talking about summary disposition here. There would be no need to go to hearing. It is

at least a fair assumption that given almost three years of discovery, the intervenors must know something about their contentions, and they must have undertaken some effort to prepare for these hearings.

The fact is we have this draft supplement, we have the site suitability report and we have had it for months. And there is absolutely no reason why we can't proceed to hearings now.

As to discovery, it seems to us that if intervenors are right that Appendix J raises all kinds of new information -- and might I add parenthetically that is not inconsistent with the Board's Contention 1, 2 and 3 rulings, and I will get to that -- but if there is new information, the issue there is whether intevenors should have discovery on that information. The issue is not: we can't go to hearings for a thousand reasons.

The schedule which the Board promulgated indicated that when milestone documents were reached, the parties had to confer and reach agreement on contentions and move forward. During the discovery they weren't even willing to negotiate to arrive at a solution.

NRDC has not been denied any discovery here. They have not availed themselves of the opportunity for

discovery. The Hartsville case has no moment here. The fact is that the issue in Hartsville was whether or not the intevenors should have access to some underlying calculations. Well, if that is the problem, then let's get that last-minute discovery done.

But the intervenors cannot and should not gain the benefit here from their failure to more forward, and particularly in light of the fact that the Board has already issued the notice of hearing, now claim prejudice.

As to Contentions 1, 2 and 3, we will not bore the Board with our response to that. The intervenors have filed a petition with the Commission; we have responded fully. Their interpretation of the Board's order is, in a word, simply incorrect. They do not understand it or alternatively, they refuse to understand it.

This little dichotomy they have developed between general design characteristics on the one hand and then their little prohibition that says no specifics of CRBR is nowhere found in the context of the Board's ruling. This case has had an SSR issued for a month. There is specific discussion in that SSR and it explicitly deals with CRBR. The point in Contentions 1, 2 and 3 is there is no need for a detailed safety review

of all systems.

Now as to their point on probabilistic analysis, here again, they either do not understand what a PRA, probabilistic risk assessment, is or refuse to understand. If you look at Contention 3(a), the one that was deferred, that talks about the need for a comprehensive probabilistic risk assessment of a kind like the Rasmussen study. Appendix J doesn't do a PRA or anything similar to it.

If those estimates of probabilistic or of failure probabilities in the staff's FES are a matter at issue, then let's get discovery. Let's get going to hearing.

The problem we have is we have heard 1000 circuitous arguments on why we cannot get to hearing, but we have not seen constructive effort to try to get there. We think the Board should rule now on three bases. First, there is no prohibition to getting to hearings on schedule. Second, the intervenors and the applicants should present all of their evidence on all contentions.

Third, the NRC staff should present their evidence in Phase 1 on all issues which have been advanced by the applicants, and then proceed to Phase 2 and proceed with the balance of their evidence.

JUDGE MILLER: Staff?

MR. SWANSON: I won't repeat the arguments dealing with the applicable law. Merely I would state that we agree with Applicants that the regulations specifically authorize the parties going forward with all issues, the Staff could go forward with the site suitability issues and issues not impcted by the draft supplement, but I would like to address arguments that have been brought up more recently by NRC.

Briefly, as to the comment period, which is the only thing that would be unavailable to Intervenors at the time they go to hearing, the comments received from Staff by the parties, obviously they don't need their own comments to go forward, and as far as comments that are received from other agencies or members of the public, they will, as Judge Linenberger indicated, have the opportunity when information comes up, to examine the Staff on that when the document is introduced into evidence. It is simply not a matter which is precluded from their line of inquiry. It will just be done from a different time.

The Douglas Point case does not preclude that. At most, it could be used for arguing that the Board should not reach final conclusions before the end of the hearings, and we agree.

The FES was a month later than we thought, but I think it is misleading to say there was a one month delay and therefore they are prejudiced by the one-month delay. The original schedule set up by the Board last February contemplated the two milestone documents, and a schedule whereby once the documents are out, that discovery would proceed, and when the last of the two documents was out, which was then estimated to be July 9th, that we would proceed with discovery and testimony and go to hearing.

Now, the Staff's FES did come out almost a month later. The site suitability report came out almost a month earlier. We think that, as a result, the Intervenors had an opportunity to commence discovery and do testimony work on the site suitability report much earlier than they had contemplated, and that this to a large extent eliminates any prejudice that could be caused by a delay in issuing the FES.

Now, to the extent that the discovery period might have been compressed, the Staff indicated it would and has in fact attempted to reach an agreement with the Intervenors whereby some scheme could be devised to expedite the conduct of discovery. The Staff has offered, for example, to provide oral answers to discovery so the answers can be given on the post. They

can be recorded somehow, for example. To date, no agreement has been reached, but we stand prepared to engage in some sort of expedited discovery scheme such as the issuance of oral responses which the Intervenors had agreed to earlier and in which we did engage in in one of the earlier phases of discovery.

We think such mechanism could cut out a substantial amount of time which otherwise would be taken up in the discovery process.

Finally, as far as Appendix J is concerned, I am going to state simply tha Appendix J and the FES was not relied on by the Staff in the derivation of the site suitability source term. That is not referenced in the site suitability report. Now, Appendix J does deal with accident analysis, and to some extent there is some relationship there. But the Staff in no way has to rely on Appendix J to, we think, to defend its case that it has developed a site suitability source term which meets the Commission's regulations.

A fuller picture will develop when the Staff presents its case on Appendix J as well in the area of accident analysis, but the mere fact that Appendix J represents accident analysis, albeit for an environmental purpose, does not in any way say that the staff is precluded from going forward on its site

suitability source term derivation that is included in the site suitability report.

In Appendix J the Staff used systems of the general type as that proposed for Clinch River, and in a few instances looked at the actual systems proposed for Clinch River, but without performing a specific safety review of that system. I do not believe that the Staff has conducted the type of review which Intervenors have alleged it has conducted, and in no way do we contend that Appendix J contemplates or constitutes the type of specific detailed design review that Intervenors are indicating they would like to get into in this hearing.

We do have the principal author of that document, or one of the principal authors, here today if the Board has the need to get more into the general review process that was used. But simply put, the Staff submits that it was a general type of review of systems in Clinch River and its issuance in no way detracts from the rulings the Board made earlier about the scope of Contentions 1, 2, and 3. We think we are prepared to go forward with Contentions 1, 2, and 3 insofar as they deal with site suitability matters, as the Staff is. We think for the most part those are site suitability contentions as well as the other contentions we indicated we were prepared to go forward on.

JUDGE MILLER: What about that conflict of interest arising allegedly from the use of SAI?

MR. SWANSON: Well, of course, that is a matter that can be taken up at the hearing, but briefly, Mr. Rumble, as I understand it, did work, a few works on the CRBRP 1 review and then left the project. CRBRP 1 has never been submitted as a licensing document in this docket, and it is not relied on by the Staff or the consultants in drafting Appendix A. So we do not believe there is any conflict there which has any bearing on this proceeding.

MS. FINNAMORE: I would like to respond.

JUDGE MILLER: NRDC, do you have any further comments?

MS. FINNAMORE: I have a couple more comments in response to what was just said.

The Applicants state that there is no legal prohibition to going ahead with the hearing. We could not more strongly disagree. The additional points that they just stated are apposite here. For example, they cite the Carroll County case in which early site findings were permitted. That case refers specifically to the early site procedures allowed under Subpart A, Part 2. Applicants have never asked for early site findings under that subsection. Those have a completely

different set of regulations applicable to them which have no relevance here. Therefore, those cases have no weight, and particularly in comparison to Douglas Point which specifically refers to an LWA hearing. I think staff has no basis for reading Douglas Point to mean that only ultimate findings must await preparation of a final FES. If that were true, the Board would not have required supplementation of the FES before the hearings were commenced but would have tried to apply the procedure that Applicants and Staff are arguing for here.

In fact, neither Applicants nor the Staff can cite any case in NRC history in which an LWA hearing began before there was a final impact statement in place or while a draft supplement was being recirculated. They claim that our position would render 51.52(a) a nullity.

As I stated before, the LWA regs, Part 2, appendix A, the CEQ regs and the applicable case law all set out the specific method by which LWA hearings must be held, and that is 27.61(a). 51.52(a), we submit, would not be rendered a nullity by our argument. It would still apply to proceedings other than LWA regulations.

And another factor in support of our argument

that 51.52(a) is inapplicable here is the very words of that statute itself. If one looks at it closely, one realizes that for purposes of an adjudicatory hearing, 51.52(a) is internally inconsistent. It requires that an EIS be issued at least 15 days prior, a draft impact statement be issued 15 days prior to any relevant hearing, and it goes on to say that Applicants and Staff and other parties -- Applicants and Intervenors can present their case before the 15 days are up.

It is very unclear to us how parties can present a hearing -- present their position on the hearing before the hearing even begins. That is what makes us think that 51.52(a) is not applicable to the hearings, formal adjudicatory hearings, and in any case, not applicable to LWA hearings such as this one in which a specific requirement is set out. This is not a tortuous argument, it is very clearly set out in Part 2, Appendix A that LWA hearings must be held in accordance with 27.61.

Applicants also state that our reading of 27.61 is in violation of the policy of going ahead without delay. We cited the Seabrook case in our pleadingss which says that the discretion of a Licensing Board to reduce delay and schedule hearing arises only in the absence of any limitation in a relevant statute

and regulation.

Here we have the limitation from both a relevant statute and a regulation. We submit that case law under NEPA makes it very clear that questions of reducing costs and delay are never sufficient to enable a court to violate NEPA by saying that it would be too costly or too time consuming to comply.

I would also like to comment briefly on the Staff's argument that there is no prejudice to Intervenors because the two milestone documents were reversed. If you look at the two milestone documents and the schedule, you will realize that the schedule would allow two rounds of discovery on an environmental impact statement update and one round of discovery on an SAS, and this is consistent with how the documents have actually come out.

The SSR is in many respects the same as the earlier SSR. The Staff places vertical bars on the discussion on the SSR whenever there was a substantial change made, but most of that document is verbatim with the one issued in 1977.

The FES, on the other hand, relates to 400 pages of new information, and I want the Board to realize that the Staff has made the decision that much of the information in that FES is significant enough

that it could not be issued just as an update, that NEPA requires public circulation and comment.

If this new information were minor, the Staff would have just come out and issued an update. In fact, all the way through since February, Staff has made the position that so far they saw nothing new. We submit that it must be pretty significant in order to be circulated.

For that reason, just switching the two dates is not enough to say that there is no prejudice to Intervenors.

I also wish to point out that they claim that we haven't tried to negotiate with them on new contentions. We have made every effort to comply with every one of the Board's deadlines and have up until this 400 page document was dumped on us at a time when only one of us was available in the office to read it and discuss it. We have spoken with the Staff regarding its proposals. We feel that they penalize us by reducing our time to ask questions or our ability to let the staff peruse the answers before they give us a response. We don't want a response off the top of their heads.

That is why we feel that compressing the schedule would hurt us in a way that is not justified

since it was the Staff that was a month late in issuing this important document.

I would also like to point out another reason why we feel that this schedule has unfairly prejudiced us, and why we are not ready to go to hearing at this point.

We issued interrogatories on the Staff site suitability document which were due on Tuesday. The Staff did not comply with the Board's recommendation or holding that they be delivered to us on the day they were due but mailed them. We did not get them until this past Friday.

There were 16 of those interrogatories which Staff simply claimed, well, we have not completed putting together the information necessary to answer this question, and it will be supplied at a later date. This information, for example, is -- it goes to the calculation of the dosages and the site suitability source term. For example, Interrogatory 36, we asked how are the inhalation dose factors calculated for thyroid, whole body, lung and bone surfaces in the SSR? The Staff claims that it has not yet gathered the information required to answer this question.

First of all, they did not ask for an extension on the time, but merely on their own

initiative decided they were no going to answer them in the time required. We never knew until last Friday that they were having trouble complying with the time schedules.

Second of all, we find it rather incredible that the Staff came out with the site suitability report in June, but here in August it has still not figured out what were the assumptions and background data upon which it developed the site suitability report. We feel that if the Staff is not ready to provide those answers and will not give those answers to us, it is totally unjustified to force us to proceed because of their dilatoriousness.

DR. COCHRAN: Mr. Chairman, if I may, I would also like to speak to this issure of prejudice since I will be doing much of the technical work.

Contentions 1, 2, and 3 related both to the site suitability issue under 10 CFR 100 and to the FES and the NEPA cost-benefit balance and the treatment of accidents.

One way to break this up terms of looking at the interrelationship is to ask what does the site suitability source term analysis under Part 100, what effect does that have on the FES analysis?

Also, secondly, what does the FES analysis,

what effect does that have on the 10 CFR 100? The one case is the effect of the site suitability source term on the FES and is most easily described and is probably less relevant to your concerns because the FES issues under the scenario you are examining will come later, but just for completeness, obviously if you make a decision about what the design basis accidents are, which is Contention 1, for purposes of 10 CFR 100, and then go from there into Contention 2 and look at the effect of that decision on the site suitability source term analysis, you have made some conclusions with regard to probabilities of accidents, whether they are credible or not, and so forth, and that feeds right into the FES analysis in, for example, in this Appendix J. And in fact that is the way the Staff has in part constructed their accident analysis in Chapter 7, Appendix J.

Now, the more difficult issue to explain, at least from my point of view, is how the FES issues Chapter 7, Appendix J affect our case on the 10 CFR 100 issues.

Now, early in the proceeding the Staff said to us and to the Board that they were not going to do any accident analysis, any CDA analysis. Therefore we could not get discovery on any of the computer codes other

than TRACT and CRAC, which they would use for their site suitability analysis, but we would not be permitted to get discovery of the staff for computer codes like SAS, VENUS, REXCOHEP, and SIMMER which are the codes the Staff has examined or utilized in the course of their safety analysis review for the construction permit.

In fact, this was a reversal of a previous Board order in 1975 or '76 when the Board said that even though the Staff was not going to utilize some of the codes, because the Applicant was utilizing them, the Intervenor had the right to find out the Staff's opinion on these matters.

The Board in 1982 reversed itself and said the Staff no longer -- Intervenors no longer have the right to get the Staff's opinion on these matters. So the Staff then proceeded to refuse to answer any of our updated discovery on these codes, and there were entire sets where they just answered the entire set of questions about SAS by saying that these were beyond the scope of discovery.

The second sort of issue that I think is important is what is the probability of a CDA being initiated, and what is the probability that it will develop in a way so that the consequences exceed the 10 CFR 100 guidelines?

Staff asserted throughout the discovery period that they weren't doing any analysis of that type, and I will just read to you from the Staff's reponse to the 25th set, which was filed on June 18 of this year.

One of them -- there are a whole host of them you should look at, but one in particular is Interrogatory Number 12, where we ask with regard to the Staff's response in the 14th set of interrogatories where the staff stated: The probability and reliability methods are used where appropriate is one of a number of techniques that aid in our engineering judgment in the safety evaluation of reactors.

The Staff's response was: The Staff is not performing probabilistic or reliability analyses for use in the LWA-1 proceeding. We have many questions that go to that issue, and we have repeatedly gotten that kind of answer, and the deposition of the staff addresses that same issue.

Then we asked also in the same set, if you will refer to the response to Interrogatory 45, where we asked them -- we said we would like to duplicate the calculations of the accident consequences in the FES. The staff said in this response that the majority of data, the computer codes used to calculate the dosages appearing in FES Table 7-2 have, however, been destroyed.

Then they go on to say, the staff is currently not depending upon the numerical values of the calculated dosages presented in Table 2 of the FES for its conclusions regarding the CRBR accidents. The staff

has re-evaluated Class 9 accident, et cetera, and this will be in the updated response.

So, contrary to Mr. Edgar's assertion that there is really no change, in fact, they have thrown out Chapter 7.2, which was the area that dealt with accidents, and said, you should see the supplement, and the calculations in the supplement are Appendix J.

Now, in our case, though, against the staff position on the 10 CFR 100, given that the staff had asserted that they were not doing any analysis of CDA accidents, to me, that implies that they can make no assumptions with regard to the conditional probability that if a CDA occurs, it will exceed the 10 CFR 100 guideline values. In other words, they maintain, and I maintain, that they have to show that the initiation of the CDA is in the neighborhood of 10^{-6} or less, because if it is less than 10^{-6} or let's say that it is 10^{-2}, 10^{-3}, or 10^{-4}, then you have to show that, well, even if is initiated, it is not going to exceed the 10 CFR 100 guidelines. Therefore, you can exclude it from the design basis accident consideration.

So, it seemed to me that they -- and I will refer you to the Denise letter, where prior to this LWA-1, this new proceeding this year, their previous statements were simply that the CDA probability of CDA

initiation was sufficiently low that it wouldn't exceed the 10 CFR 100 guidelines. Now, coming into this proceeding, they said, we are not going to look at any of this aspect of the case that involves the conditional probability that a CDA is initiated. What will be its chances of exceeding the guidelines?

That makes a much tougher burden on them to show that the initiation is of sufficiently low frequency that they don't even have to look at these issues. That is the way I was looking at this case and have been looking at the case since February of -- not since February, since the prehearing conference, I guess, where you threw out all of our contentions related to the reliability program and the computer calculations of accidents and so forth. They have been consistent in their representations to us up until they presented this document.

Now, lo and behold, in this document they present a different case, a case I thought they had to make to begin with. That is, you have to look at the conditional probabilities of a CDA exceeding the 10 CFR 100 guidelines, because as they represent in this document, by their own calculations, the probability of CDA initiation is 10^{-4}. That is the bounding number they use in Appendix J.

So, now, my case on the site suitability source term, 10 CFR 100, is prejudiced because they have now put into the record all of this analysis on the conditional probability that the CDA will exceed the guideline values given its initiation. I called up the staff and asked them, who did this analysis, how was it done? I had a telephone call with a Mr. Gerry Swift to that effect on July the 26th. Mr. Swift said that a consultant -- he said SAI had performed the probability analyses, and that another gentleman at the NRC had been involved in the TRAC and CRAC code calculations for consequences, and the probabilities and consequences were integrated by himself and these other gentlemen.

Then I called up Mr. Rumble. I asked Mr. Swift, well, who is the point man at SAI who did this work? I was given Mr. Rumble's name. I had several conversations with him. Now, Mr. Rumble, who is responsible for essentially all of the probability and reliability analysis of the staff that go to this conditional probability, and he is even responsible for the analysis of the probability of the CDA initiation. I went through the data in Appendix J, the conclusions, and asked him, how did you get this number, how did you get that number, and so forth.

Mr. Rumble told me that he -- and we also

discussed his previous work with the applicant. Mr. Rumble told me that he had worked on CRBRP 1, which was the PRA analysis that you excluded from the scope of the LWA-1 proceeding, and he had done this work for the applicant, and that he was responsible for putting together the methodology on the event trees and fault trees that went into the CRBRP 1, and after that he was pulled off of that work, and other people at SAI continued it, but he also said, though, when I asked him, how did you get these numbers that he presented in Appendix J, he said that he relied on a whole series of reliability analyses, including CRBRP 1.

I asked him, well, how did you get the conditional probability that if a CDA occurs, you will get primary containment failure from a severe explosion. He said, I looked at -- he said it was a conservative estimate based on a review of all code calculations. I said, which code calculations? He mentioned SAS, VENUS, and SIMMER, the very same codes the staff said they weren't relying on and have been asserting to me that they would not rely on.

MR. EDGAR: You did get discovery on all those codes from the applicant.

DR. COCHRAN: No, sir, George. You are wrong. I didn't get discovery upon the staff. I am

talking about the Staff.

MR. EDGAR: I just wanted to be sure --

DR. COCHRAN: No, sir, George, you are mistaken, and I will treat your issue later.

MR. EDGAR: Did you get discovery on the Applicant?

DR. COCHRAN: I got discovery on the Applicant who is relying upon -- I didn't get discovery from the Staff but I didn't pursue discovery on those issues because the staff --

JUDGE MILLER: Now, gentlemen, I think we are getting beyond the scope of the argument. We are getting some repetition. We are getting some interplay. I think you had better come to a conclusion now with your statement.

DR. COCHRAN: They have introduced the codes and the probability analysis which you excluded from the scope of the proceeding. I told you back in February that I needed at least a year of discovery because of the detail and the comprehension of this case, and your response was that I wasn't going to get it, and in any event if the FES were recirculated I would have another five months.

Now, the SAS code itself has about 40,000 different cards or statements involved in that routine.

These codes are enormous. There is an enormous amount of documentation behind these codes, and we did not pursue -- I did not pursue discovery beyond primarily just updating the first round of discovery on these things that only the applicant provided, because they were beyond the scope of this proceeding. I did not get into any of the discovery of the reliability analysis for the same reason other than to continually ask, what are you going to rely on in the LWA-1 proceeding?

Every time I get back this answer, they are not relying on probability and reliability analysis, and the limitation was that they would rely on WASH 1400 to gain some sort of perspective. This was the statement the staff made to me in the deposition. So, it is not a simple matter of me getting another two weeks or a month or two months to go back and do this kind of discovery that I was prevented from doing in the last six months to catch up.

(Whereupon, the Board conferred.)

DR. COCHRAN: I have two other points, Mr. Chairman, when you are through.

(Board conferring.)

MS. WEISS: Mr. Chairman?

JUDGE MILLER: Yes.

MS. WEISS: I was just going to ask you if we could take a couple minutes while you were referring.

DR. COCHRAN: I just had two other comments, Mr. Chairman.

JUDGE MILLER: All right.

DR. COCHRAN: One with regard to the Staff's -- with regard to the SSR, we received, as indicated earlier, the Staff's response to my discovery. Suppose for a hypothetical that Appendix J didn't exist at all and we went back to my previous undertanding of the Staff's case. I asked a number of questions directly related to how the Staff calculated with the CRAC and TRAC codes the dosages with which to assess against the guideline values and why they didn't do certain things with regard to ICRP 26 recommendations in determining what guideline values to use.

I got virtually every one of the responses that Ms. Finnamore mentioned earlier. They have yet to provide the data.

Now, they are in effect telling you that we

ought to go to hearings in two weeks and present our case on all our contentions, including this narrow part related to the calculations of the dose, and that in this two-week period, by August 6, I am supposed to get their answer and analyze all of these calculations of dose and so forth, write up the case and write up all the rest of the case. In the meantime, they cannot even get the data together in the two week period that they have to answer our contention.

JUDGE MILLER: Let us inquire about that.

What about this data they have requested that the staff has not furnished?

(Pause)

MS. FINNAMORE: Would you like me to read the numbers of the questions I am referring to?

JUDGE MILLER: No, I think the Staff's familiar with them. I am assuming they know what the interrogatories are, the information requested that you haven't received, and would inquire of the Staff whether that be so, and if so, why haven't they produced them?

We had understood that the parties, all the parties, were complying with the discovery schedules set up by the Board, and in many cases negotiated by and among the parties.

If this is a breakdown, let's find out about

it.

DR. COCHRAN: There's another point in this regard.

JUDGE MILLER: Let's take one point at a time. We don't want to get into matters which are not within the site suitability phase within the limitations that have been established by the Board or suggested by the Applicants and staff. At least let's keep our remarks to that because one does not preclude the other. In fact, there may be an absolute overlap. That doesn't mean we can't get started on some kind of evidentiary hearings.

We find there is a concreteness that comes to a trial that you do not get by a lot of hypothetical problems, worries, agonizing and all the rest of it.

So stick to what is feasible in terms of the trial.

By the way, there is nothing new about these trial dates in the prefiling of the testimony. They were established in February and March. There has been no change in the schedule. There has been no indication except insofar as the parties made their own assumptions that there would be any change in the schedule.

There are no changes to the Board's ruling at this time.

(NRC Staff conferring, and Board conferring.)

JUDGE MILLER: Yes, does Staff have the information?

MR. SWANSON: I don't think I can give you an answer which is going to help us a lot. Simply, the answer is that when we said that information is still being gathered, what we are saying simply is the people who have that information, there are some areas where specific individuals had to answer them as opposed to other people who have more of a general knowledge. Those individuals were not available at the time to respond to them.

JUDGE MILLER: Well, let me inquire first of all whether that information is proper discovery, legitimate discovery on any of the issues that the Staff and/or the Applicants have urged the Board are necessary to proceed to trial?

MR. SWANSON: I guess we would have to get into specific interrogatories.

JUDGE MILLER: I suppose so, because if you, the Staff and the Applicants are urging the Board to adhere to the schedule insofar as site suitability issues, representation has been made by NRDC that there are some discovery matters that the Staff has not supplied that are necessary to go to hearing.

Now, I think we have a right to know and they have a right to know whether or not that is correct.

MR. SWANSON: It is my understanding that those were in fact proper discovery questions, and in fact, the responses would be relevant to this phase of the hearing. However, we indicated in the response that the responses would be filed within the timeframe set out by the Board in its February 11 order, that is, by August 6, the last date for responses to outstanding discovery.

JUDGE MILLER: Then those discovery responses, under the schedule, are due by August 6?

MR. SWANSON: That is the last date for responses to outstanding discovery, yes.

JUDGE MILLER: Is the Staff able and is it going to supply the information by that date?

MR. SWANSON: Yes.

JUDGE MILLER: Then you are still on the discovery schedule.

DR. COCHRAN: Mr. Chairman, my point is that they are proposing that between August 6 and August 23, that I prepare my case on the site suitability issue. That is seventeen days. Let's suppose --

JUDGE MILLER: It has always been that amount of time. You've all had an awful lot of opportunity to

talk to us. We are getting toward the close. It doesn't do any good to repeat and repeat the statements you made. We know what the statements are. We know what the problems have been insofar as an FES is concerned. We also know what the arguments are that have been addressed to this Board, and we haven't yet ruled but we are close to doing it, as to site suitability, whether or not they overlap.

DR. COCHRAN: Two points. One is they didn't comply with the deadline. We got our discovery in early. They had ten days to answer the questions. They did not meet your deadline.

Furthermore --

JUDGE MILLER: Hold it. Let me find out about that.

Is that correct or not?

(NRC Staff conferring and Board conferring.)

MR. SWANSON: Mr. Chairman?

JUDGE MILLER: All right, we are going to recess for lunch for an hour. Now, let's return at quarter to 2:00 so it will give everybody a chance to go over these matters. They have been pretty well argued. I think the Board is going to want to know whether or not there have been any delays in discovery, if so, the nature of them, and what impact, if any, or if not, we

want the record to be complete on that.

If there are other matters that have to be argued, we will give you time and an opportunity, but it might be well, if you are going to have anything new, that you advise the other parties so we don't have to spend a lot of time on determining what the facts are.

We stand in recess until quarter to 2:00.

(Whereupon, at 12:45 o'clock p.m., the conference in the above-entitled matter recessed, to reconvene at 1:45 o'clock p.m. this same day.)

AFTERNOON SESSION

(1:45 p.m.)

JUDGE MILLER: All right. Our meeting will resume.

I think staff counsel was going to give us the information about the responses to certain interrogatory requests which the NRDC had pointed out were made, and they claim were not responded to in the appropriate time. What is the situation?

MR. SWANSON: I had forgotten how far I had gotten into it before, but just to recap the responses to interrogatories which indicated that information was being gathered was the result of an inability to reach all of the people, the people were just not available where a specific person was necessary in some instances to answer a question. These people are available now. We will be getting the answers, as we indicated, no later than Friday, and perhaps a little bit earlier.

Now, the Board's original schedule in February, February 11th schedule, of course, contemplated August 6th, Friday, as being the last day for response to outstanding discovery on new matters. We had been endeavoring to get our responses in earlier than that date, but cognizant of the Board's order of April 14th on discovery time, the 14-day turnaround

period as the deadline on the staff was for a specific period, April 30th to June 18th. It did not extend beyond that, but as I indicated, we were trying to get responses in, and in fact were able to for all but those few interrogatories where the specific individuals simply were not available to get the answers to us at that time.

The information is there, and people are now here, and we will be getting the answers soon.

JUDGE MILLER: Is there any other discovery that has not now been supplied by the staff and others?

MR. SWANSON: Well, as I understand, we are talking about some discovery that was objected to. I am not aware of whether or not there is anything that needs to be brought before the Board now or not. That is up to the intervenors. But we have been talking about some matters. There were some that we objected to.

Now, we are, of course, talking about discovery on the site suitability report.

JUDGE MILLER: Yes, site suitability. The site suitability matters are those that the staff and applicant are susceptible to remaining on track for the evidentiary hearing.

MR. SWANSON: That is correct. And as far as the FES is concerned, as we mentioned before, these

documents did switch places in terms of the order in which we earlier thought they were going to come. There was a ten-day period delay in getting the FES out from the originally proposed date of the last milestone document. As I indicated, we have proposed a method whereby perhaps we can eliminate the prejudice that would otherwise have occurred to the intervenors by that ten-day delay, and one possible way is, we, I think, indicated to intervenors informally before, was to respond orally.

For example, instead of taking, say, 14 days to respond to a set of interrogatories, if we had the questions, if we took only four days, and then gave the answers to them, again, the answers could be transcribed or whatever. That would be a way of making up those ten days.

JUDGE MILLER: Is that contemplating SSR issues or FES issues?

MR. SWANSON: I am not talking about FES issues. I was talking about discovery on the FES as a separate matter from the site suitability report. I am not aware that there is any timing problem or schedule problem on the site suitability report. We will be making that deadline without any problem, the August 6th deadline.

DR. COCHRAN: Mr. Chairman, I still had a couple of points on the table.

JUDGE LINENBERGER: Mr. Swanson, with respect to the staff's responses to these interrogatories for which the appropriate people were not available to provide the information, it is not clear to me with respect to one aspect of that whether there was some reason for NRDC to have believed that these answers would normally be available before the ultimate August 6th cutoff date. I gather that based upon the 14-day turnaround convention or agreement or whatever, NRDC did have a right to expect those answers before the 6 August date that you say you will now comply with. Is that correct or not?

MR. SWANSON: I think you would have to hear from them as to the basis for that belief. There was a 14-day period prior to that, as I indicated in the Board's April 14th order, they established -- they indicated the staff had agreed to answer interrogatories during a specific period, and that is in the April 14th order, the April 30th to June 18th period, the 14 day turnaround basis. I indicated that we, of course, endeavored to make that period even now, although the Board's order of February 11th established August 6th as the deadline date.

As I indicated, we will make the August 6th date, but we did not make the 14-day period on all questions, but now the individuals are all available, and we will try to get the answers in as soon as possible.

DR. COCHRAN: Dr. Linenberger, could I comment on that?

JUDGE LINENBERGER: It sounds to me that the NRDC did have a basis for believing a 14-day turnaround period on that set of discovery questions for which the staff now finds that they must have until 6 August to complete. All right. I just wanted to clear up that point in my own mind.

JUDGE MILLER: What are the questions or issues that are impacted by the interrogatories that you have just been discussing? What we are trying to find out is, staff has informed us, I believe, that it is the staff's view that the present hearing schedule should proceed for our August 23rd hearing by the other parties, namely, the applicants and the intervenors, and that the staff should proceed under the present schedule for Contentions 1, 2, 3, 5D, 7A, and 7D. Is that correct?

MR. TREBY: Five B baker.

JUDGE MILLER: B as in Baker?

MR. TREBY: Five B and 7 B.

JUDGE MILLER: Why on Page 2 do you say 5 D as in dog?

(Pause.)

Let's get it straight as to what your position is.

MR. TREBY: I apologize for that. It should be -- in both instances it should be B as in baker.

JUDGE MILLER: It is 5B as in baker and 7B as in baker?

MR. TREBY: That's correct.

JUDGE MILLER: Let the record reflect those changes accordingly, and the statement I just made also. Now, the question in the Board's mind is, should there be some additional time for discovery or trial preparation, whatever, according to NRDC, because of the lack of a 14-day turnaround, although the information will be filed by the cutoff date of August 6th?

DR. COCHRAN: Could I comment on that, Mr. Chairman? My microphone doesn't work. Maybe I should just speak loudly.

JUDGE MILLER: I won't ask for the cause.

DR. COCHRAN: The primary interrogatories begin at Page 17 of the staff's response to the 26th set. They relate to the table in the SSR at which the

staff presents its calculations of the dose to the maximally exposed individual and the public, and the man rem dose at the LPZ for the site suitability source term.

Now, the questions that follow from Page 17 are an effort on our part to determine and to be able to reproduce how those calculations were performed in order to get those dosages; secondly, why they made certain assumptions with regard to the choice of the guideline values against which they would compare those doses.

Now, Judge Linenberger, as a man of science, I think you should appreciate, if anyone, the difficulty one would have in receiving these data on the 6th of August and preparing direct testimony by the 13th of August in seven days on that one issue, aside from all of the other issues in this case, and just compare this time that we are allowed to do this against the time that the staff has taken in being unable to even gather the data together, much less look at it.

I would also call your attention to the staff's response to a similar question with regard to the accident calculations in Table 7.2 of the original IVS. Those were, as I referred to earlier, the data for which most of the calculations were lost, but the staff did indicate that there was some microfiche that were being held for me in the public document room for which

all the TRAC and CRAC code calculations were made.

JUDGE MILLER: Well, if that is FES, we would like to set aside FES because there is going to be plenty of time and opportunity, so stick, if you will, to SSR.

DR. COCHRAN: Mr. Chairman, I am trying to make a point.

JUDGE MILLER: Make a quick point. We have got so many problems on FES, if you say FES, I am going to cut you off.

DR. COCHRAN: My point is, I am likely on August the 6th to get the same kind of data, Mr. Chairman, and it will be in the form of microfiche or some other kind of computer printouts that are very difficult to analyze.

JUDGE MILLER: We will see what you get August 6th on the SSR issue period.

DR. COCRHAN: Now, there was a second issue that I was cut off from earlier and was not allowed to make.

JUDGE MILLER: What is that? You have taken a lot of time. I am trying to get you focused in on what we want to hear. You don't have the floor to filibuster, in case there is some misunderstanding. I don't think there is.

DR. COCHRAN: Mr. Chairman, I am not filibustering.

JUDGE MILLER: All right, then, stick to the issue, SSR. Go right ahead.

DR. COCHRAN: I would like to stick to the issue 10 CFR 100 and site suitability.

JUDGE MILLER: Okay.

DR. COCRHAN: The staff has made the statements repeatedly and they are found in the Denise letter that as part of their site suitability determination, it is based on being able to make the case that the Clinch River reactor or the reactor of the general size and type can be made as safe as a light/water reactor, and in fact the ACRS picked up on that in their recent letter, and their findings were basically that the site was suitable for a reactor which was made as safe as a light/water reactor.

So, they found the site suitable for a light/water reactor. The comparability issue which underlies the Denise letter and the site suitability analysis and the ACRS findings go to the comparability of accidents of light/water reactors and the Clinch River reactors, and those are the accidents within the design basis where one draws a line on the design basis and accidents beyond the design basis. The only

analysis that the staff has provided on the consequences and the probabilities of accidents is contained in the FES in Chapter 7.2, and that was thrown out and replaced by Appendix J in the updated analysis, and I don't see how one can do the site suitability analysis without looking at these parts of these calculations in the FES, because they go to this issue of comparability with the light/water reactor.

The other point I wanted to make earlier was, after the applicant had made the case to you that they could determine what was within and outside of the scope of this proceeding with regard to reliability analysis, we have asked them over and over again what they will rely on at the LWA-1 proceeding in the way of probabilistic analyses and reliability analyses. They have continued to stonewall up until five minutes before we came back from recess, when Mr. Edgar said, we will have that answer to Interrogatory 27, which was the one we filed with you for an adequate response, they will have that answer on August 6th.

So, we have yet to find out what type of reliability analysis applicant will rely on at the LWA-1 stage, and for you to think that I haven't been prejudiced or lost time in this case because I have had all this discovery time sort of leaves me a bit, well, I

won't say how it leaves me. It is not satisfactory.

JUDGE MILLER: Let's have a response to that, first from the staff and then from the applicant.

MR. SWANSON: The point that I understand we are addressing is whether or not an extension of discovery time should be permitted beyond August 6th.

JUDGE MILLER: We also want a response to the statement that the information is contained only in the FES and not in other information which is necessary to have an SSR analysis at a hearing.

MR. SWANSON: Well, what I hear Dr. Cochran saying or arguing is bottom line conclusion on a contention of whether or not there is adequate support for the staff's conclusion for site suitability source term, and I don't understand why, Number One, we should be arguing that now before the evidence is in, and Two, what difference that makes to our decision today. If the Board makes a finding on the basis of intervenor's argument that what we have in our site suitability report is inadequate to support our calculation for site suitability source term, so be it. That has nothing to do with whether or not he is prejudiced in his discovery rights right now.

(Board conferring.)

JUDGE MILLER: Does the applicant have anything on that point?

MR. EDGAR: Yes. The item that Dr. Cochran mentioned as Interrogatory 27 in the 19th set --

JUDGE MILLER: 27 of the 19th set?

MR. EDGAR: That was the subject of a motion to compel. After the motion to compel was dismissed, we concurred. The difficulty they have is with the response. Our response essentially said we would not rely on CRBRP-1, which is a comprehensive PRA which was done on Clinch River. The difficulty was in terms of the definition of probability analysis; that that can encompass a lot of things, and our people had difficulty in responding because they had not yet made a final determination in regard to testimony preparation on all analyses upon which they would rely. But they could say they would exclude reliance on the comprehensive PRA.

We asked NRDC about it, and we got additional definitions or probabilistic analyses, and they included "anything that addresses the probability or theory in a quantitative sense" or "anything that provides quantitative support for qualitative assessments of failure."

What we then determined to do would be to

update our discovery response and indicate that again we were not in a position to say -- given the breadth of that determination or definition, that we knew what we were going to rely on in our testimony in that respect.

What I have agreed to do now is given that they have redefined it once more in a letter from Ms. Finnamore to me, we will answer that by Friday. In any event, the analysis upon which relied in our testimony will be provided two weeks in advance of the hearing.

We cannot at this juncture today tell them with the breadth of these definitions make an informed judgment, but we will endeavor to do so and we will, in fact, meet the discovery deadline. This is the subject of testimony; it is not an original response.

MR. SWANSON: Mr. Chairman, I didn't get to make my last point.

JUDGE MILLER: We interrupted the staff in order to get the comments of everyone on that point.

MR. SWANSON: Just one more point with regard to whether or not extension should be granted for discovery. As I pointed out, we will, by Friday, have complied with the Board's order setting forth the end of discovery on the site suitability report by August 6th. I have not heard a compelling reason why there is any need to postpone that phase of the hearing.

One point that hasn't been, perhaps, brought out again is the fact that we did send out the site suitability report on the 11th of June. It may have reached -- I don't know when it reached the intervenors, but a month later on July 13th, they sent out their discovery on that.

Now, if there is an argument that insufficient time was permitted to consider responses, then I guess I am curious as to why the question didn't come out a little earlier, particularly in light of Ms. Finnamore's statement a little earlier that there was very little new in the site suitability report.

DR. COCHRAN: Mr. Swanson seems to have forgotten that he said we should hold our questions and submit the questions to them all at once. So we had to hold our questions until the bitter end.

MR. SWANSON: Well, I think Dr. Cochran is confusing that with the second round where there was a much longer period of time in which questions could be asked. But at any rate, the point still stands.

MS. FINNAMORE: Mr. Chairman, I would like to make a couple of other points on this 26th set of interrogatories which relates to the site suitability report.

In addition to the 16 interrogatories that

staff has not yet answered, despite the fact that they were due on the 27th of July, there were also 17 interrogatories that the staff called us up about, objecting to. We called them back a week ago on the 27th of July --

JUDGE MILLER: That is Tuesday of last week, isn't it?

MS. FINNAMORE: Tuesday of last week, giving our response to their objections, and we dropped 7 of those interrogatories but did not agree that the other 10 were not based on new information.

So those questions have not been answered yet either, and it is our understanding that it is not enough for the staff to answer in its interrogatories that it objects. But if the parties cannot agree, it must file an objection with the Board, which the staff has not yet done for those 10 interrogatories.

JUDGE MILLER: I assume that they are refusing to answer them on the basis of objections, and they have now said they are going to have answers to all the interrogatories by Friday, August 6th.

MS. FINNAMORE: I don't think their objections have been erased. I think they continue to object to those questions, if I am correct.

JUDGE MILLER: The Board has told you another

set of their objections. They should be in the form of a motion for a particular order, citing all the authorities or the equivalent. If responses are claimed not to be adequate, there should be a motion so the Board can decide on those forthwith.

Now, we are getting towards Friday. I am assuming now that there are not any answers or responses that are based upon objections either as to the interrogatories themselves or the adequacy of the responses. This being Monday, the 2nd.

I am assuming now that for purposes of moving this along, that there are going to be responses by everybody on or before August 6th, and there are not going to be any failures to respond or objections to the adequacy of responses at this late date.

Now, is this correct? Is everybody in the same posture on that? Applicants, how about you? He didn't hear me. By Friday is the cutoff date; therefore, there are not going to be any refusals to respond on your part, or any objections. And second, there is not going to be any contention that the answers of others are inadequate.

MR. EDGAR: We only have this one item outstanding that I discussed. We have no other items pending.

JUDGE MILLER: All right. Now what about the staff? Let's all of you get together now, because you don't want to have anything dangling or more contentions made that everybody is taking advantage of them. Let's get this over with.

MR. SWANSON: My understanding was that an agreement was reached with the intervenors, and that whatever the number left was that were not dropped would be answered.

JUDGE MILLER: They are not going to be objected to for half-way answers and because of X, Y, Z; they are going to be full-fledged answers?

MR. SWANSON: That is my understanding, yes.

JUDGE MILLER: Do you have any reason to doubt it? We can confirm on all of you.

MS. WEISS: I am sorry, Mr. Chairman, I couldn't hear the question.

JUDGE MILLER: Confirm among all of you. I want to be sure that no party of you three is going to contend from this day hence until close of discovery on the 6th, either that you don't have to answer interrogatories because, or that the answers furnished to you are insufficient because. You have conferred enough so that you know the situation and you know that at this late date, we expect full responsive answers

both ways.

DR. COCHRAN: We don't have the answers yet.

JUDGE MILLER: You don't know what they're going to be? You're not talking about -- . Now look, there aren't three counsel; there aren't even two counsel. Let's get this thing under control, too.

The staff confers; they speak with one voice. It is certainly not too much of a hardship to speak with two rather than three voices.

MS. WEISS: I think, Mr. Chairman, that we have not been informed that the staff -- the first we heard they were going to answer these questions by August 6th was today. So far as we knew, there was no specific undertaking to answer them until they made that undertaking today.

JUDGE MILLER: Hold it just a minute. When you make a statement I want to either verify it, or rule it up or down. Is that correct, staff?

MR. SWANSON: No, it is not correct.

JUDGE MILLER: What are the facts as you see it?

MR. SWANSON: The NRC staff response of July 27 contains a sentence which begins at the very bottom of the upper page and runs onto page 2. It indicates that whenever it is noted that responses are to be

provided at a later date, the staff will provide those answers as soon as possible; and in any event, no later than August 6th.

JUDGE MILLER: Is that correct, Ms. Weiss?

MS. FINNAMORE: I think Ms. Weiss was referring to the 10 interrogatories that the staff objected to, and that we did not agree to drop. And we just found a few minutes ago that they had planned to answer them.

When I spoke to counsel for the staff last Tuesday and told him we would drop 7 but would not drop the other 10, they said they would get back to me as to their response to that proposal. I heard just now that that proposal was adequate.

JUDGE MILLER: All right. Let's find out. Staff, what is your position on that?

MR. SWANSON: Well, the individual isn't here right now who talked, but my understanding is that yes, we will answer those. We will do so by August 6th.

JUDGE MILLER: Is that consistent with at least now what you understand?

MS. FINNAMORE: Our main problem with wanting answers within 14 days, as was contemplated by the Board and all the parties, was that when we received these answers on the 27th of July, we would have sufficient

time before the August 6 deadline to confer with the staff if we felt the answers were inadequate or evasive. That time has been denied us at this point. We have no idea now whether those answers will be complete under any standard of adequate discovery.

JUDGE MILLER: Let me say this. I believe the 14-day turnaround did pertain to discovery that was being held prior to this time, if my memory is correct.

MS. FINNAMORE: If you look at the regulations, Section 2.704(b) --

JUDGE MILLER: That was an agreement of counsel and parties, the 14-day turnaround by the staff. That was as a result of the stipulation as explained to the Board at that time. The staff could have objected to all of these, I suppose. They have got ground for objection. We are trying to cut through that in order to move along fairly and expeditiously.

We were then told that all the counsel had conferred on that subject and had reached certain agreements. Staff had given up their right really to require their interrogatories to go through the Board and the like which takes time and effort. In return for that, the fact was that they would shorten the time so that NRDC would have reasonably prompt responses, and that is why the Staff proposed as I recall it to have a

14-day turnaround voluntarily and not go through the Board, which would be a lot more than any 14-day turnaround.

Now, just a moment. Is that correct, staff counsel? Anybody?

MR. SWANSON: Yes, it is. And that was explicitly stated on page 12 of the Board's order of April 14th.

JUDGE MILLER: Yes, because we picked it up in our order. This was an agreement, now, of you folks as counsel. Now, that is a little bit different than coming in and telling us that you are being taken advantage of by some other responses where we wish the staff had given them to you sooner, yes. The staff understands that was our wish. They acknowledge it. They say in these particular interrogatories, to get the information, they have some problems. But in any event, the 14-day turnaround was neither applicable nor could they voluntarily follow it, if I am understanding it correctly. But in any event, they would honor the Board's order which was to have the discovery completed, the answers in and so on by the coming Friday, August 6th.

I think that is a fair statement of the record as the Board understands it. That is not quite the

same. But I believe it to be what you told the Board at that time your agreements were and the underlying reasoning.

MS. WEISS: I can accept that as your characterization of what we agreed to, given the fact the the schedule contemplates one week for the preparation of testimony before the end of discovery and the preparation of testimony, given that the context of this discussion makes it impossible for us to meet that schedule and has been made impossible by the actions of others.

JUDGE MILLER: Presumably, you are not waiting until today to start preparing your testimony at least in rough draft. We would assume all of you contemplating, and you have probably --

MS. WEISS: We have begun to prepare our testimony, and as a result of the FES we have had to throw it out and consider starting it all over again.

JUDGE MILLER: Well, you don't have to throw it all out. Whatever it is that is reasonably addressing the issues as you see them or assert them on site suitability, you certainly wouldn't have to throw out. We assume that all parties have started drafting. You don't wait until the last minute to prepare your case.

MS. WEISS: No, we don't, Mr. Chairman. But you know that our view of these issues is different from what I gather the Board's view is, what I gather from the drift of the discussion. We believe most strongly that these issues are not separable; that the FES issues are not separable.

JUDGE MILLER: Well, we think that they are. Now you have already filed things before the Commission and so forth. We don't want to get into various remedies--

MS. WEISS: Well, you asked me --

JUDGE MILLER: Hold it. We do not want to get into various remedies you pursue, but the Board feels and will tell you very shortly that in all probability the Board is not barred from proceeding on a reasonable basis with the schedule established which includes the trial date.

Secondly, it is fair, however, that those issues be scrutinized. Our most conservative view of the issues is those of the Staff because the Staff, differing in some respects from the applicants, says there are certain ones that applicants think they should meet that they say they can't.

Well, we don't want to get into that hassle, so we do feel probably -- and we are going to announce

it to you shortly --

MS. WEISS. If I might just complete my point, if the Chairman is finished?

JUDGE MILLER: You will leave me with a dangling sentence, but I don't care. Go ahead.

(Laughter.)

MS. WEISS: You were asking us, I thought, the question which began this colloquy was: Hadn't you begun to prepare your testimony or had you waited for the last minute? Our concept is yes, we had begun to prepare our testimony. We have not waited until the last minute. Our concept of this case is different.

JUDGE MILLER: That may be, yes. I am saying that it is not that you really have from the 6th until the 23rd, that you have done some work on it. And to the extent that some of the issues may be set aside as FES matters, whether you agree with it or not, if that be the result, then you will be that much farther ahead in your prepared testimony. We are helping you.

MS. WEISS: I don't think so.

(Laughter.)

MS. WEISS: I also would want to point out that the consequence of the Applicant not providing an answer at all to the question of what probabilistic risk analysis they will present is that we haven't begun to be able to begin to draft response.

JUDGE MILLER: Hold on, now. Let's find out.

Before when we met with you in March or April,

whenever it was, our understanding was that the LWA 1 issue, that you weren't going to put on evidence, and that neither the Intervenors or the Board on the LWA 1 phase were going to go into that issue.

MR. EDGAR: And I have made it plain. The problem is this. We have made it plain, we are not going to rely upon the probabilistic risk assessment. That is Contention 3A. That is out. We said that. Their definition is very imprecise of what probability analysis is. It could include adding two and two. What we have told them is straight out, we are not going to apply and use CRBRP 1. We recognize our obligation to seasonably amend. We intend to do that. We believe our answer is responsive, and we have given them the information that we know. We will accelerate our response on seasonably amending and stay within the August 6 date.

MS. WEISS: This is the example of these games.

MR. EDGAR: It is not a game.

JUDGE MILLER: Let's get down to reality and be less emotional. I think that will move us faster. We have told you that unless there is something that changes our minds substantially, we are on the verge of telling you, A, we are going to go ahead with the

hearing; B, on the given date; C, on somewhat fewer issues along the lines that have been discussed, but not none.

Now, within that framework we are trying to get you, Ms. Weiss, and all of you to the point where, while you are meeting with us, since you are not going to meet with us that often between now and Friday, let's get decisions made on those areas that are significant in terms of trial. We want to get you all to trial. We find a lot of these anticipated problems, one way or the other, reduce when we get to a trial situation. So we want to get you to site suitability and those contentions that bear relationship to them or not. That is where we are heading, so any way we could be helpful to you or others, let's do it now.

MS. WEISS: There is a big question in my mind, Mr. Chairman. I think I understand where you are going, and of course, we reserve our rights. We don't think it's right, but I understand the direction in which you are going.

One big problem that I have is this. Let me pose this as a pratical problem.

JUDGE MILLER: Okay.

MS. WEISS: Do we now set the FES supplement and the FES aside and go to trial on remaining issues as

if that FES never existed?

JUDGE MILLER: Now, by the FES, let's be clear also. We are talking about that supplemental FES which supplements the original and existing FES.

MS. WEISS: My question to you is do we set aside all of these versions? It doesn't make any sense to go to trial with the original 1977 FES now that we know that that has been changed.

JUDGE MILLER: We don't think it's been changed as much or as significantly as you think, although there is no doubt that there have been substantial changes, but we take the view that this February 1977 FES, which is the existing FES, we are talking about supplements and all that, but there is an FES that has been there for some years. We are not just prepared to say that all or even most of it gets thrown out the window. We will hear from you on those respects where you or others that say it needs modification. That we can handle in an evidentiary way. We don't throw the baby out with the bath. That's why I mentioned it, so that in terminology we don't confuse each other.

MS. WEISS: My question is do we set it all aside?

JUDGE MILLER: My answer would be no because

we do have an FES, and to the extent that the known FES bears upon site suitability, you and others may use it.

MS. WEISS: Let me pose a practical problem. We have a man on the stand, the Staff's witness, who says that he used source term X. We get to cross examine that person. Are we required to -- our reasoning is that source term is the wrong source term to use because it requires a finding that a CDA is not a credible accident. Now, are we required to cross examine that man on all material that is in or derived from the supplement to the FES?

JUDGE MILLER: No.

MS. WEISS: The original FES?

JUDGE MILLER: Clearly.

MS. WEISS: In my view, that doesn't make much sense since we know that it has been substantially changed, in my view. Or do we just cross examine him as if neither the FES nor the supplement existed, and given that we do that, do we proceed then with discovery on the draft FES and/or the final FES supplements at some later date or is that going on parallel?

JUDGE MILLER: Okay, let me confer now and get you an answer. You're entitled to it. As a practical matter, you are going to trial.

(Board conferring.)

JUDGE MILLER: Let me inquire first of all of Applicant and the Staff, a fair question has been asked by counsel for the NRDC. As we approach trial, we would sure like to resolve these matters in a fair and equitable way.

What is your response to that query as to what their cross examination under the terms she hypothesized is reasonably addressed to or not?

MR. EDGAR: Of the NRC Staff, right?

You know, the question has a framework which is that there is some underlying document at issue.

JUDGE MILLER: Do you understand what she was hypothesizing?

MR. EDGAR: Let me give you -- I've got another premise, or I'm confused, all right.

Did the Board say that we were going to hearing on site suitability issues? Was that the basic premise of the question?

JUDGE MILLER: It was my understanding as having the matters urged that were not impacted by the supplement to the existing FES, whatever it is.

MR. EDGAR: In any way?

JUDGE MILLER: In any significant way. I don't want to use the same word, but insofar --

MR. EDGAR: My view of the situation is if we

go to hearing on Contentions 1, 2, and 3, that we include in that we include in that the Staff's Appendix J of the FES and we go to hearing on schedule. The finer cut at the problem that the Board could take is to view the scope of Contention 1, 2, and 3 as encompassed by the discussion and the site suitability report, all right?

If that is the scope defined, then discussions of the analysis in Appendix J would not be in.

JUDGE MILLER: What has been the recommendation of the Applicants on that insofar as scope of cognizable issues at hearing, if one is held August the 23rd, are concerned?

MR. EDGAR: As we have indicated in our pleadings, Mr. Chairman, we think that we want to go on 1, 2, and 3, including Appendix J.

JUDGE MILLER: Staff?

MR. SWANSON: Well, to answer the Board's original question, which is somewhat narrower, again in the context, as I understand it, Staff witness testimony on Contentions 1, 2, and 3 at hearing, that probably there would be no FES offered as evidence at that time, so he would have the site suitability report testimony and examination would be limited to the scope of the testimony. If our testimony referenced the FES and

indicated the witness relied upon it, it would sure be fair game. I'm talking about the old FES. But I don't understand that to be a very likely occurrence.

So I don't --

JUDGE MILLER: How do you distinguish the Staff's position from that of Mr. Edgar where he said Appendix J of the supplement to the old FES should be gone into also by everybody except the staff, in other words, by Applicants and NRDC.

MR. SWANSON: We don't intend to rely on Appendix J for our site suitability testimony.

MR. EDGAR: Mr. Chairman, our original position was that the Intervenors and the NRDC should go to hearing on all issues, all right? I am assuming that there is no reason why they can't present their evidence on every element of 1, 2, and 3. The Staff then could be confined in its analysis to the parameters of the SSR which --

JUDGE MILLER: Just a minute. If all parties, including NRDC, go to all issues like Appendix J, then how can they do that when that is not final, when that is just a draft? That is the point they are urging, and it makes sense.

We didn't understand that you were saying that NRDC should go into cross examination of a final

document that has not yet been issued by the Staff, which is subject to comment. We didn't -- well, if that is what you are urging, tell us why.

MR. EDGAR: Your premise is that it is straight site suitability, all right? Then the scope if the SSR. That's it.

JUDGE MILLER: That is what we had supposed.

Now, does that impact upon the recommendations that you gave the Board this morning?

MR. EDGAR: Yes. That means by necessary implications you have turned some of them down.

JUDGE MILLER: Yes, I guess it would.

MR. EDGAR: That means we lost, in sum.

JUDGE MILLER: We are not saying you lost or won. We are simply trying to see how we can reasonably go to hearing and accomplish something, and yet without prejudice to the rights of Intervenors and others to have a fair shot at discovery and evidence on the supplement to the FES.

MR. EDGAR: I was confused as to the original question. I understand it now, and the answer, in my view, is the SSR, that's it.

MS. WEISS: That's that --

JUDGE MILLER: That's the Staff view, isn't it? It always has been.

MR. SWANSON: That's correct.

MS. WEISS: That answers the question partly but not completely. That answers the scope of what would be the direct case. And I must say that I thought that was what the answer to that question would be. It doesn't answer the question of what is the scope of cross examination, and a necessary corollary to that question is what cross examination can be saved for the second stage of this bi-bifurcated proceeding?

JUDGE MILLER: I will answer your second one first.

We have not purported to zero in on the FES in the future, the putative FES.

MS. WEISS: I'm sorry, you said you have?

JUDGE MILLER: Have not. We said we the Board have not zeroed in on it. Consequently we are not prejudicing anybody as to the fair scope of cross examination or testimony in the future on the FES because we have removed it from consideration here at this time, in two weeks, or whatever it is.

Now, the fact that there might be overlap doesn't bother us. Overlap all you want, but render under site suitability that which is reasonable to site suitability. We won't prejudice what you do in the FES. We are only going to take one thing at a time.

MS. WEISS: So the Board is saying that the NRDC should and indeed must reserve all questions that relate to the FES or any material presented in the FES until the FES is final and we get to that stage of the hearing?

JUDGE MILLER: We say they may. Whether or not we say they must is whether or not this is an overlap situation and the fact that some FES material might have slopped over into our site suitability, but if it does, then you should cover it as site suitability, even though you may have some other. But you don't know what the other is.

Don't speculate any more than what you want to be speculated about in the FES.

MS. WEISS: I'm wondering if in that category of what is slopped over we don't include sort of the critical piece, and that is Appendix J.

JUDGE MILLER: Appendix J in all probability, as we understand it, would not be a subject gone into. There might be portions of something. I don't want to try to anticipate everything, as to what is the reasonable scope of cross. It is a complex subject anyway. However, the whole point is that you are not going to be required to and you may not be permitted to go into Appendix J as Appendix J, which is the

supplement to an FES.

Now, to the extent that there is some overlap, all right. You will certainly be permitted to go into those matters which are reasonable cognizable as site suitability. Whether or not they might in the future might be something else. Don't worry about it. Look at site suitability.

MS. WEISS: What I'm really concerned about is would we be required to? And if you say to us, no --

JUDGE MILLER: You don't have to cross examine at all. You don't have to put on any evidence.

MS. WEISS: Would we be required to or forfeit our right to do it at a later time? That is the question I am asking.

JUDGE MILLER: No, not provided that at a later time it is reasonably within the scope of what we will then know when we see that supplement to the FES that none of us has seen.

(Board conferring.)

JUDGE MILLER: All right. Are there any questions now about the scope of issues which the Board is now considering? We have indicated to you that as a threshold matter, we have just about decided -- we still haven't quite come down it, but we are just about to tell you -- before we can file an order because it takes time to get it out, although we are going to try to work on it tomorrow.

MR. SWANSON: We have a question.

JUDGE MILLER: But we would like nonetheless to let you know as much in advance as we can. This is a Monday before the 6th, before the 23rd, so we are trying to block things out for you. If you have questions of each other, ask them so we can get us into trial.

MR. EDGAR: I would be very much interested in hearing the Board's ruling.

MR. SWANSON: We had a question because when we gave our original list of issues, we contemplated that the proposal before the Board, applicant's and our proposals, did contemplate going forward with environmental matters by parties other than the staff. And we threw in Contention 7 which is an environmental contention, we believe, not a site suitability contention because we felt that that was not addressed

by -- at least not necessarily environmental; it was one that is addressed by --

JUDGE MILLER: I see what you mean. I think we had better go back over those contentions or portions of contentions which you will now advise the Board are suitable to be addressed at the evidentiary hearing. Because I realize now you are talking more expansively on the one hand and less on the other.

So now that we are indicating to you the site suitability we are looking at, going into it won't foreclose you on something else. We will worry about that later. We are all covered. We could probably persuade you to stipulate. But if isn't, go ahead. But don't worry about the fiefdom; let's worry about getting the evidence on the site suitability in a useable form, both filed testimony, prefiled, and cross examination.

MS. WEISS: You can see, though, where this is critical to us, since these parties were taking the position that we had to go forward on everything.

JUDGE MILLER: Well, I didn't understand they were that forward, but if it is, that is going to cut down on what the Board considers reasonable. We know all of these will not be perfectly -- we are doing our best to get cognizable issues.

MR. EDGAR: Mr. Chairman, I want to make sure

I understand. You are saying we define the issue of site suitability. Now, please give me your views on the contentions which go in the site suitability category, and which would be deferred for Phase 2.

JUDGE MILLER: The site suitability category in whole or in part, but designate where it is a part.

MR. EDGAR: Understood.

JUDGE MILLER: We want to get all we can on site suitability, but we are not going to penalize anybody for going into it, if in the future when the FES supplement comes out, there may be matters they would be entitled to. We will have to sort them out to avoid repetition but I think we can all do that. We will worry about that tomorrow. Today, let's worry about site suitability.

Now, with that mind, tell us first of all, which issues or portions of them the applicants recommend. We will do the same with the staff and we will do the same with the NRDC. Do you have a problem with that, Ms. Weiss? You have a problem but is it insuperable?

MS. WEISS: You want us to go issue by issue?

JUDGE MILLER: No, we are going to take them all. I am going to take those tendered by the parties for Board consideration for a site suitability trial on

the 23rd of August.

MS. WEISS: I think we can speak -- given we know what your ruling is, we can speak to that.

JUDGE MILLER: You know pretty much what our ruling is. I will ask the applicants to go ahead, which will give you a target. Do you want a moment to think about it, Mr. Edgar?

MS. WEISS: Could we -- .

MR. EDGAR: No, that is all right. I will have it in two seconds.

MS. WEISS: I just wanted to suggest that it might be easier if we went contention by contention, if each person stated their view.

JUDGE MILLER: I don't know. Is it necessary to take each one?

MR. EDGAR: I am going to go through and give them to you.

MS. WEISS: We do have one general question which I can save for after this or do it before. I just want to let the Board know that it sort of follows on my earlier question of practicality.

JUDGE MILLER: All right. We are interested in practicality of trial preparation.

MS. WEISS: Do you want me to save it?

JUDGE MILLER: Well, since they are all

working presumably, I don't want to interrupt their train of thought.

MR. EDGAR: Mr. Chairman, I am prepared to proceed.

JUDGE MILLER: All right. Tell us what you are doing now.

MR. EDGAR: These are a list of the contentions that we see as related to site suitability. Where there is a partial relationship, I will define that. Otherwise, it is the particular contention as being solely site suitability.

Contention 1(a), Contention 2(a), Contention 2(b), Contention 2(c), Contention 2(d), particularly the containment leak rate. That talks about the containment, and for site suitability you need to know the assumed leak rate. 2(e), and that is entirely site suitability. I should note that that is, in particular, the 20 CFR Part 100.11(a) dose guideline values.

2(f) (g) and (h), partly, and the qualification placed on it would be those computer codes used for performing the 10 CFR Part 100.11(a) site suitability analysis. 3(b), 3(c) -- again, site suitability analyses only. And 3(d). That completes the list of Contention 1, 2 and 3 issues.

There is one other issue which we regard as

essentially related to site suitability; that is, 5(b). That involves the nearby facilities, the diffusion plant, ORNL and Y-12.

JUDGE MILLER: Is that it?

MR. EDGAR: That is it.

JUDGE MILLER: 1(a), 2(a), (b), (c), (d) and (e); portions or limitations upon (f), (g) and (h). 3(b), (c) and (d), and 5(b).

MR. EDGAR: Yes, sir, and there was a limitation on 3(c) relating to the codes for site suitability analysis only.

JUDGE MILLER: Okay. Does staff wish to give us their views on these projections.

MR. EDGAR: Did I say 3(c) in my last remark?

JUDGE MILLER: You said 3(c).

MR. EDGAR: 3(c), that is what I meant to say.

MR. SWANSON: We agree.

JUDGE MILLER: Now, NRDC?

MS. WEISS: Are you waiting for NRDC?

JUDGE MILLER: Yes.

MS. WEISS: I guess we would ask for a few minutes to confer.

JUDGE MILLER: Okay.

(Short recess.)

JUDGE MILLER: Ms. Weiss, have you had an

opportunity to confer and develop a position on these contentions or portions of them which have been rejected now for the site suitability phase of the hearing, which is what the Board was meaning by the trial scheduled on the 23rd of August.

MS. WEISS: Yes, we have, Mr. Chairman. I will let Ms. Finnamore speak to that point.

MS. FINNAMORE: Mr. Chairman, we stated in our motion that if the Board saw fit to bifurcate these hearings in the a way or proposition which we disagreed with strongly, as you know, it must then comply with the requirements of Marble Hill and Barnwell, two other cases cited in the motion, which state the procedures that the Board must use and the standards it must apply in determining whether to allow hearings to go forward on certain issues while hearings on other issues await issuance of a final impact statement or supplement.

The Marble Hill case is clear. Issues may go forward and parties may present evidence on those issues only if those issues are "entirely independent and unrelated" to other issues for which hearings are postponed. The Barnwell case says the same thing; that if it determines that an FES supplement is being issued and circulated, the Board can give no further consideration to the subjects involved in that

recirculation until a final supplement is prepared.

Furthermore, the Barnwell Board said that if a certain issue is related to one on which a supplement is being prepared, hearings cannot go forward on the related issue, as well. Therefore, the standard is clear.

JUDGE MILLER: Give me a citation. Which citation is that?

MS. FINNAMORE: That is ALAB 296, 2 NRC, 671, 1975 case cited on page 13 of our motion.

JUDGE MILLER: And what was the other case, Marble Hill? What is that citation?

MS. FINNAMORE: ALAB 371, 5 NRC, 409. That is a 1977 case cited on page 15 of our motion to reschedule the hearings.

In applying the standard to intervenor's contentions, it becomes rapidly clear that the ones that applicant cites; namely, 1(a), 2(a), 2(b), 2(c), 2(d), (e), (f), (g) and (h), 3(b), (c) and (d), and 5(b), cannot be entirely separated out or unrelated from the issues that are going to be postponed until the final FES draft supplement is issued in final form.

The reasons for that are the ones we have stated in our motion and reiterated today. As stated before, the question of a core disruptive accident is

one of the most potentially greatest environmental impacts that this plant could have. And the staff recognized that when it issued the final draft supplement with Appendix J. It make it very clear that this is an important subject to be discussed in the impact statement.

The Board also made it clear when it subsumed our proposed Contention 20 into Contentions 1, 2 and 3, and that Contention 20 specifically dealt with the FES discussion of core disruptive accidents.

As we have also stated before, Contention 2(e), for example, relates both to the doses to an individual and the health effects resulting from such doses. We don't believe that there is any way that one can separate ou with a fine-toothed comb those specific elements of what is, in itself, a subcontention of Contention 11.

We also feel that Contentions 3(b), other accidents that should be considered with a design basis for the plant, are issues that are environmental impact statement issues most definitely. And in addition, 5(b) we feel is an FES issue. Unlike the other, we feel Contention 5(b) is not a site suitability issue at all. 5(b) relates to the impact of nearby facilities on the suitability of the Clinch River site under NEPA, as

opposed to alternative sites.

Specifically, it relates to the Oak Ridge gaseous diffusion plant, the Y-12 and the Oak Ridge National Laboratory. If you will look at the draft supplement and notice in Appendix L a discussion of alternative sites, the nearby industrial and military transportation facilities, sites discussed in that appendix are all discussed.

The purpose of our Contention 5 --

(Pause.)

The purpose of Contention 5 is to determine whether that proposed CRBR site is significantly -- or if other alternative sites -- are significantly better than the Clinch River site because of the presence of nearby facilities, since an accident at the Clinch River might result in long-term evacuation of those facilities. It is not, and we do not propose to argue the standard in the site suitability regulatory guide, which is the reverse situation; whether accidents at those nearby facilities would impact on the reactor itself.

If you look at the first sentence in Contention 5 it is clear that this is a NEPA issue; not one that we intend to raise for site suitability purposes.

JUDGE MILLER: Is it a safety issue?

MS. FINNAMORE: It has to do with the discussion in the FES of alternative sites, and alternative sites are compared with the Clinch River site on several factors, and one of them is the presence of nearby facilities.

JUDGE MILLER: Well, would not the presence of nearby facilities be a safety as well as an environment issue?

MS. FINNAMORE: For purposes of 10 CFR 100, yes. That has to do with if an accident at those facilities would impact on the reactor.

JUDGE MILLER: Yes.

MS. FINNAMORE: That is not something we intend to argue; therefore, it doesn't --

JUDGE MILLER: Anything you don't intend to argue we won't argue about now. We are talking now about controverted issues, and anything that you don't either wish to cross examine or file pre-filed testimony on or go into as a site safety matter, don't worry about it.

MS. FINNAMORE: That is correct. I think applicants have understood our contention. It relates only to the FES and we feel it should be postponed until the supplement is issued.

JUDGE MILLER: Wait a minute. What was that? Wheel that past me again. Is it a non sequitor or is it a brown cow? I didn't quite catch the significance of your last statement. I didn't understand you. How did you wrap that one up?

MS. FINNAMORE: Applicants gave you a list of contentions that they feel relate to site suitability matters.

JUDGE MILLER: Yes.

MS. FINNAMORE: If the Board is requiring that hearings go forward on site suitability issues, these are the issues that should be heard.

JUDGE MILLER: That is what they said. Now, are you telling me what you say?

MS. FINNAMORE: I have two points. The first one is that we feel that all the issues, all the contentions mentioned by applicants, are not entirely independent and unrelated to issues that will be postponed for hearing until the supplement is issued.

JUDGE MILLER: They may not be entirely independent, but the question we are asking you now is do they have any nexus, any connection, any linkage, with site suitability safety matters?

MS. FINNAMORE: That is right. My second point was that they all do except for 5(b).

JUDGE MILLER: Then let's zero in on 5(b). If you are saying there is no connection and you are not urging it on site suitability and so forth, I think you should be addressing us on that. We are not going to find a thing totally independent. We don't accept that test. It shows that the Appeal Board -- that the Licensing Board are in the best position at these times to make these kinds of determinations, but they are not going to say intervene every time and say you have the wrong category.

They use the language in the context of the case where the question there had to be an amended notice. So if there was an amended notice, put it to applicant. ALAB 371 5 NRC is a far cry from establishing an immutable NRC principle that in order to proceed in segmenting cause for hearing and starting up for site suitability that we can entertain only those issues that are entirely independent.

So we don't think the case holds that, we don't think logic holds that. You are free to reverse us. You have a lot of things pending before the Commission and maybe the Appeal Board. I don't know and I don't really care. We are going to decide as we feel we should decide, and you are perfectly free to take whatever action you want. We are not going to take that

poin of view. It has to be entirely independent.

So, get back to the realities of the thing which are whether or not the contentions or parts of contentions that have been identified by applicants and concurred in by staff as having some reasonable relationship or significance to site suitability matters -- tell us first of all if you concur to the extent that you say yes, these are matters that should be gone into.

If you don't care, all right. You can say you don't care. Or if there are others you say we should look at on site suitability, then you might want to add more to the list. I don't know. But we are asking you to comment in terms of what we have indicated to you are the parameters of the decision the Board has made, has told you about and adheres to; namely, that we wish to proceed with an evidentiary hearing on a given date on the site safety-related matters that we have defined, the SSR. Without precluding you from putting on evidenc here, but that doesn't preclude you in the future if you want to address it. We will address that if we have to.

But other than that, you are not being injured in any way by future cross examination or putting on proof on the supplement circulated in the final final FES, or the product of that. So I do not really see how you can be hurt.

MS. FINNAMORE: The reason I bring this up is because since many of these contentions overlap, it seems to me that the Board could not make a final site suitability determination before we had an opportunity --

JUDGE MILLER: That might be. We said we are not going to make the findings. Remember? We are not going to make the findings. We are taking the evidence. Insofar as there is more to be done when we get to the findings, which will be Phase 2, okay. I will take your word for an argument that it is not relevant to what we are trying to decide today.

MS. FINNAMORE: That is what I was saying before. In our mind, all of the contentions and subcontentions mentioned by applicant are relevant to site suitability except for 5(b).

JUDGE MILLER: 5(b). What is 5(b)?

MS. FINNAMORE: Contention 5 relates to our challenges to the alternative sites review in the FES. 5(a) relates to meteorology and population density; 5(b) relates to the presence of nearby facilities.

JUDGE MILLER: All right. Now, do I understand that you don't wish to go into the issue of whether or not there are any site suitability or safety-related issues on the question of the effect or impact possibly on nearby facilities?

DR. COCHRAN: Mr. Chairman, could I respond to that?

JUDGE MILLER: Yes.

DR. COCHRAN: You threw in a ringer when you said "or safety issues."

JUDGE MILLER: Well, site suitability at least has that connotation of safety issues.

DR. COCHRAN: Let me tell you what might help you understand this issue. The applicant and the staff, for purposes of determining whether these plants can be evaucated properly, has done a dose estimate at those sites. The purpose of doing that dose estimate -- they have, at least on some occasions, maybe all occasions, used the site suitability source term as the release against which to judge what these dosages are.

Now, we might -- I would object that that is the appropriate release to assess for judging whether these can be adequately evacuated. In that limited respect, these relate, through the applicant's and the staff's analysis, to the site suitability source term. However, the contention by NRDC is a NEPA contention and is really independent of the site suitability finding.

So if you are making the statement is it related to 10 CFR 100 requirements, the answer is no. If you just casually throw in "or safety issues" the

answer is yes.

JUDGE MILLER: Well, we consider these are broad terms that really didn't have much relevance before the Calvert Cliffs opinion because you threw everything in. Since then, there has been a division between environmental and safety. There are those which have overlapped. There is no bright line between them. You have just got a little bit of leftover history like a vestigial chair, site suitability which has safety significance.

If you don't want to go into it, don't. Nobody is saying you have to or you will be penalized if you don't. If you want to save it for when you think it is appropriate, it would have to be relevant to the FES as it is finally modified and so forth. But if you are satisfied it is and you want to go into it, be my guest. We are not trying to prolong this first phase of the hearings. If you don't want to go into it, don't.

DR. COCHRAN: We want to go into it in the FES, and we don't want to be penalized for not having gone into it in site suitability.

JUDGE MILLER: I have said you won't be penalized, provided you can show it is in the appropriate broad scope of an FES supplemented issue. And you don't seem to think you will have any trouble;

you think it is all there. But surely, you could show some reasonable relevance to that to one of more of the FESs, fine. If you can do that, fine. You are not going to be penalized. It saves you typing, clean white paper and all the rest of it.

Because we are going into a limited phase of site suitability which is roughly called the safety aspects as distinguished from environmental for historical reasons. It is not trying to force you into any mold.

DR. COCHRAN: I am sorry, Mr. Chairman, but every time you throw in the word "environmental" meaning NEPA and "safety" meaning in your words "site suitability" --

JUDGE MILLER: It is more than that, of course. But here now in the preliminary stage, I am talking about site suitability having largely, not wholly, but looking at the safety side rather than the environmental side in a rough way.

DR. COCHRAN: To me, that is an incorrect perception. I would say site suitability, or the findings you have to make under 10 CFR 100 and NEPA, is routine releases and safety issues. They are both in there. Safety is not outside of environmental issues.

JUDGE MILLER: All right. I told you we are

not making findings now. We are taking evidence, but we are not making findings, remember? A, B, and C.

DR. COCHRAN: Are you making findings on Chapter 7.2 in the old FES? That is a safety issue; that is not --

JUDGE MILLER: I don't know. I don't want to get into the intricacies. We have given you the general lines. I think it is sufficient to come to trial. File your pre-filed testimony in advance. We will know then who your witnesses are going to be. We will know then, or we will start to see, what the issues are for a ruling on admissibility.

MS. WEISS: I think I understand what you have said thus far. There is one additional I think different set of issues that I would like to have the Board and the parties address if I could.

JUDGE MILLER: Okay.

MS. WEISS: We made a motion to the Board that it reconsider the scope of the issues admitted in the LWA and the scope of even those issues that weren't in the LWA. I am sure the Board is familiar with the arguments that we made.

Anticipating that the ruling may be unfavorable, or that the ruling may at least not come until after we are finished with this stage of the

proceeding, there is some additional relief that I think we require, given at the very least that I don't expect a ruling.

JUDGE MILLER: What is that, Ms. Weiss?

MS. WEISS: We need to make sure that the scope of the applicant's case primarily will not, in any way, be related to information, won't rely in any way on information or conclusions that were initially derived from using the reliability program.

In other words, when the applicants say to us that there are some codes that are being used for 10 CFR 100.11(a), the site suitability analysis, we need to know and I would like to know today if I could what those codes are. And the assurance that there will be reliance on no information that is derived from any other codes.

And then we can go ahead and prepare our case and our discovery and prepare our cross examination.

JUDGE MILLER: Let me ask the applicants.

MR. EDGAR: She just mixed three different things. We will not use any codes that are developed in our reliability program. The answer -- I really am at a loss to understand that question.

JUDGE MILLER: What are those three things?

MR. EDGAR: As we understand it, we think you

can go to hearing on Contentions 1, 2, and 3, the site suitability elements of that. The scope of the site suitability information is well defined in the staff's site suitability report. I mean, that is a finite document; it tells you just what kind of information would be used. We would follow the pattern of the staff's site suitability report.

JUDGE MILLER: Now, hold it. That is an updated SSR?

MR. EDGAR: That is correct.

JUDGE MILLER: Which indicates with black lines in the margins where there are modifications or additional material to the site suitability report of 1977. Is that correct?

MR. EDGAR: That is correct, that is correct.

JUDGE MILLER: That is the document that we did and do regard as being certainly primary in delineating issues. Does anybody have any problem with that document?

MR. EDGAR: We do not. We feel that that does establish the right scope.

JUDGE MILLER: You said there are now three matters that Ms. Weiss, you thought, was confused on.

MR. EDGAR: The first one was overlapping the reliability program and codes. The second one is the

right scope as set forth within the four corners of the staff's SSR.

JUDGE MILLER: To what extent does it go into codes?

MR. EDGAR: This gets into the third point. The codes the applicant has relied upon are not the same codes the staff has relied upon.

JUDGE MILLER: Let's identify those of the applicant's, and then let the staff speak for itself.

MR. EDGAR: The applicants have relied on -- and there has been extensive discovery upon, indeed, no limitations upon discovery of the codes -- SAS, S-A-S, VENUS, REXCOHEP --

JUDGE MILLER: How do you spell that one?

MR. EDGAR: COMRADEX -- Let me go back a step. REXCOHEP, R-E-X-C-O-H-E-P, and COMRADEX, C-O-M-R-A-D-E-X.

JUDGE MILLER: That is four you have identified. Are there anymore?

MR. EDGAR: PLUTO.

JUDGE MILLER: Okay, Pluto, come here. Is there a number five?

(Laughter.)

JUDGE MILLER: Is that truly the extent of it?

MR. EDGAR: Yes.

JUDGE MILLER: All right. Ms. Weiss, you and your colleagues wrote them down. I presume you and your colleagues know what those are.

MS. WEISS: I think Dr. Cochran knows which they are.

DR. COCHRAN: Yes.

JUDGE MILLER: Let me see which codes the staff has relied upon or will rely upon for the site suitability issues and confined to those numbers that the staff and applicants now previously furnished the Board and the parties?

MR. SWANSON: There are three, and those are the ones we previously identified to the intervenors through discovery, the TRAC code, T-R-A-C, CRAC, C-R-A-C, and HAARM, H-A-A-R-M.

DR. COCHRAN: That's all right. I know. I think it is H-A-R-M.

MR. EDGAR: We have two more, I have been advised.

JUDGE MILLER: Pluto has two more. This is going to be seven, now.

MR. EDGAR: H-A-A-3 and another one, C-A-C-E-C-O.

JUDGE MILLER: C-A-C-E-C-O, which is Number 7.

DR. COCHRAN: Mr. Chairman?

JUDGE MILLER: Yes. Are you familiar with those, Dr. Cochran? I mean, reasonably and to the extent that you recognize them?

I think we are flooding the Court Reporter.

(Laughter.)

DR. COCHRAN: Mr. Chairman?

JUDGE MILLER: Yes. I will bring you in when I can get them off the air.

(Laughter.)

JUDGE MILLER: Go ahesd.

DR. COCHRAN: There is an inconsistency with what Mr. Edgar mentioned. First he said the site suitability report establishes the scope of the site suitability analysis. Sitability, the report in the staff's case does not rest at all on the calculations that are envisioned by the SAS, VENUS, REXCOHEP, and PLUTO codes. Those would be beyond the scope of the site suitability report when we get into the analysis of the CDA itself.

The second point is --

JUDGE MILLER: Wait a minute. Let's get the first one. Do you contend that is putting the intervenors in some unfair advantage that we are going into site suitability rather than what we are calling environmental, or is this a different argument?

DR. COCHRAN: Well, you have been putting me at a disadvantage ever since you started this morning.

JUDGE MILLER: Sorry about that.

DR. COCHRAN: I am just trying to straighten out what the scope is. Initially the scope was defined by the site suitability report. Now I find the applicant has expanded the scope well beyond the site suitability report into accident CDA analyses of the type that one would do indeed with these codes and the types of calculations, for example, that are presented

in the GE report, GEFR-00523 and CRBRP Volume 3, 2 oe 3.

JUDGE MILLER: Let's assume that is so. What is the significance of your observation?

DR. COCRHAN: Well, the applicant told us in our deposition of the applicant earlier that they weren't relying on these types of codes for site suitability.

JUDGE MILLER: In the deposition, were there issues to be gone into or the interrogation of the witness limited to site suitability matters?

DR. COCHRAN: They were limited to LWA-1 matters.

JUDGE MILLER: LWA-1 is somewhat changed.

DR. COCHRAN: They said they weren't relying on these for either LWA-1 first bifurcated hearing or LWA-1 second bifurcated hearing. Now they are asserting that these are codes that they are relying upon.

JUDGE MILLER: All right. We will find out what the significance, if any, is.

MR. EDGAR: First of all, that last statement is not correct. There is no such statement in the deposition. But let me try to put this into the right focus. I have in front of me the staff's site suitability report, which is NUREG-0786.

JUDGE MILLER: What page?

MR. EDGAR: If you will turn to Pages II-18 and II-19, it is just discussion of a combination of core melt and disruptive accidents. The staff has examined this more broadly. They have used different codes. The same subject matter as contained here we would propose to address using the codes that I have listed.

JUDGE MILLER: The seven codes?

MR. EDGAR: That's right.

JUDGE MILLER: Let me inquire of the staff now.

MR. EDGAR: That is why I think it is important that we use the site suitability report as a frame of reference.

JUDGE MILLER: Heaven knows we are trying to, Mr. Edgar. All right, Staff, now what about the site suitability report and this question of the seven codes plus the comments of the NRDC on that?

DR. COCHRAN: Maybe I can clarify.

JUDGE MILLER: You confused it. I am trying to get clarification, because you threw in the fact that you said they weren't, or all these codes you said were not in the site suitability report, and Mr. Edgar has read at least some of them, and now I am trying to find

out, since he then said the staff, which did prepare the site suitability report, could give us some information. So we are asking the staff.

MR. SWANSON: I wasn't aware that there was an allegation we hadn't identified the codes. The staff uses only the three codes I have mentioned. I gave the spelling incorrectly on two of them.

JUDGE MILLER: All right, do you want to correct the record?

MR. SWANSON: I have the correct spelling now. It is TACT, T-A-C-T, not TRAC. CRAC I did spell correctly. The HAARM code is H-A-A-R-M. They are all capital letters. Those are the only three we have used.

JUDGE MILLER: Are other codes mentioned in the site suitability report that Mr. Edgar just referred us to? Your site suitability report?

MR. SWANSON: No.

JUDGE MILLER: What is the page?

MR. EDGAR: II-18 through II-19.

JUDGE MILLER: Look at that now and see if we are in agreement on that.

(Pause.)

MR. SAWYER: There are no codes mentioned on those pages. Maybe Mr. Edgar could clarify that.

MR. EDGAR: This subject matter, core melt,

and a combination of disruptive events is the subject matter that we addressed with the seven codes that I mentioned. When I say we, I mean the applicants. The staff has a different basis. To the extent the staff has used codes, they are not the same.

JUDGE MILLER: All right, NRDC, what do you say to that? And then after that, what I am trying to find out now is, I am trying to get some agreement as to the information you want insofar as it is going to help us to get to this hearing. If it is within that ambit, fine. If not, another day.

DR. COCHRAN: First of all, the site suitability report, including that section, Page II-18 to II-19, was based entirely on engineering judgments exclusive of reliance on these particular -- four of these particular codes, SAS, VENUS, REXCOHEP, and PLUTO. They do cite -- the staff in the site suitability report does rely on the codes TRAC, CRAC, and HAARM, however you pronounce it, and applicant has comparable codes that are not quite different names, different assumptions.

But applicants also stated to us in the deposition at the LWA-1 hearing which includes this aspect of the hearing they weren't relying on calculations for those codes like SAS and VENUS and

REXCOHEP, and for this particular part of the analysis on II-18 and II-19 --

JUDGE MILLER: In part, now, you are getting into a discovery matter that the Board has no knowledge of. Whatever LWA-1 was at that time, there has obviously been some modification by the staff supplemental. What we are trying to get now, so we will all know and you won't be prejudiced by what is going to be in the scope of the evidence and your right to cross examination on that site suitability. Now, try once more, Mr. Edgar.

MR. EDGAR: I would like to have a cite to that statement in the deposition. We have looked at the deposition, and no such statement was made.

JUDGE MILLER: Do this privately, because if it is a discovery matter you do not need the Board to rule on it. I think the parties can get together on that.

MR. EDGAR: The point we are trying to make is this. The analysis the staff relied on to reach the discussion in II-18 and II-19 is not the same information that the applicants are going to rely on. We intend to move forward and to present information which draws similar conclusions using the codes that I listed. More than adequate discovery, a virtual

mountain of discovery has been undertaken on that subject, and we would like to have it out on that subject.

JUDGE MILLER: We don't want to get into your discovery problems now.

MR. EDGAR: No, sir.

JUDGE MILLER: I do suggest that you and NRDC experts and counsel should get together on this to be sure that they have had fair information and it is consistent with what you consider your required update.

MR. EDGAR: Right. Now, I want to make it plain, though, that we think it is time to get to the merits of those issues.

JUDGE MILLER: We do, too.

MR. EDGAR: We are prepared to do it. NRDC has to stand up now and tell us what is wrong. We are through with discovery on this subject. We have had extensive discovery, and we would like to go to hearing.

JUDGE MILLER: Well, we are going to go to hearing. It may just be the two of us. I hope that you all come on the 23rd of August.

DR. COCHRAN: Mr. Chairman, just one other point. It was among these three there was some misunderstanding about applicant's reliability program

was ruled beyond the scope of discovery for the LWA-1 proceeding. Am I to understand in preparing the testimony for cross that applicants will not rely or cannot rely on any conclusions based on the application of that reliability program? For example, whether CDA initiators are within or withoutside the design basis?

JUDGE MILLER: Well, let's find out.

MR. EDGAR: We do not intend to rely upon the reliability program which is described specifically in Appendix C of the PSAR. That is a specific program and that is the subject of Contention 1B. That has been deferred, and we are bound by the Board's ruling on that subject.

DR. COCHRAN: Excuse me.

JUDGE MILLER: Let's see if we are seeing eye to eye. Go ahead.

DR. COCHRAN: We are not seeing eye to eye. That contention was written in 1975 or 6, and it was based on the existing reliability program which has changed over the years, and has been through presumably several rewrites and decisions. There is Appendix C of the PSAR that is titled Reliability Program, but that is only the current version of the applicant's reliability program, and my contention went to the reliability program they used from the beginning of this case when I

wrote those contentions to today, and if they derived their information on whether the CDA initiators are within or outside of the design basis on the basis of that reliability program, then I think it is beyond the scope of the hearings, and that is what I want to clarify.

MR. EDGAR: Mr. Chairman, may I respond to that?

JUDGE MILLER: You may.

MR. EDGAR: I am advised that the applicant's reliability program has always been set forth in Appendix C of the PSAR. That reliability program that may indeed be different from one Dr. Cochran saw or is thinking of in 1974, but we are relying for safety purposes on the reliability program and the NRC staff review. The program that we are relying on for that purpose is in Appendix C. If there is some prior program that was in Appendix C, then we are not relying on that for any purpose.

Therefore, when I say we are not going to rely on Appendix C, I am speaking of applicant's reliability program. There is only one. Anything else that may have been previously in that program is not something the applicants are using for any purpose.

JUDGE MILLER: That seems reasonably

straightforward, Dr. Cochran. Do you understand what he is saying, whether you agree with it or not?

DR. COCHRAN: No, Mr. Chairman. Applicant's reliability program has been used to form their determination -- in my opinion, to form their determination of whether CDA initiators are within or outside of the design basis. Now, there are lots and lots of documents that go well beyond Appendix C of the PSAR that were developed as part of that reliability program. Some of them are still current. Some of them presumably have been superseded. But the conclusions with regard to whether CDA initiators are within or outside of the design basis in my judgment was based on knowledge gained through the use of their reliability program as an integral part of that safety analysis, and I am asking you whether, if I understand this new scope of this bifurcated proceeding, whether those conclusions, if they were based on the reliability program, if we can make a showing that they were based on the reliability program, are the conclusions in or outside of the scope.

JUDGE MILLER: Mr. Edgar?

MR. EDGAR: I am at a loss to be any more specific than we can. We are trying to be absolutely precise in saying that we are not relying on Appendix

C. That is the applicant's reliability program. We cannot be responsible nor can we know what Dr. Cochran's thoughts are. He is giving his interpretation of what we did. We know what we did, and we are not going to rely on that program.

JUDGE MILLER: Well, we think that Mr. Edgar's statement is clear and responsive. That is where we will leave that. All right. Now where are we? Yes?

MR. SWANSON: If we are done with those points, I had two things I wanted to bring up. First of all, I just wanted to make it very clear that we are completing discovery on the staff's draft of the FES supplement. I just want to get an indication to the Board of what the date is. If it is the 6th, fine. If it is a Monday, fine. I just want to get it established. I don't want there to be any cloud over that issue as to when that cutoff date is.

JUDGE MILLER: The cutoff date for discovery is and remains August 6th.

MR. SWANSON: Fine. As the order said, on both the staff milestone documents.

JUDGE MILLER: Yes.

MS. WEISS: I hope you don't mean on both Staff milestone documents since we haven't had an opportunity to do discovery on the FES yet. I hope you

mean just the SSR.

MR. SWANSON: I meant both.

JUDGE MILLER: Yes. We have not projected a discovery for the FES because there not anything other than the original FES. If you want to discover that, fine. If you want to talk about something that is currently pending as a supplement to the FES, which is being recirculated, there has been no discovery schedule set.

MS. WEISS: That was my next question. Did we want to talk about the discovery schedule for the supplement to the final environmental statement?

JUDGE MILLER: We are willing to as soon as we get the site suitability and prefiled testimony squared away. If we have reached that point, fine.

MS. WEISS: I don't think we have anything further to say on what issues can be separated out for this first phase. We would like to speak some to the schedule of exactly what is required to be done for now.

JUDGE MILLER: Let us get an order. We will state it. We will follow up the order soon. But this is what our decision is: That there will be an evidentiary hearing as scheduled that will commence on August 23, as scheduled, in Oak Ridge, Tennessee, in accordance with the previously filed notice of evidentiary hearing which has been duly published in the Federal Register and so forth; that in view of the current developments with reference to the recirculated supplement to the FES, that the Board proposes to take up evidence at that time concerning (1)(a), (2)(a), (2)(b) as boy, (2)(c) as cat, (2)(d) as dog, (2)(e), also (2)(f), (g), and (h), insofar as there are limitations which have been described for the record, (3)(b), (3)(c), which has a limitation, a reference to code, (3)(f), and (5)(b).

Those are the ones which have been projected and the ones which the Board feels are the ones to be addressed in an evidentiary hearing.

Now, secondly, as far as discovery related to the site suitability report and to those contentions insofar as they concern the site suitability report is to be concluded for all purposes unless somebody tells us something now in the way of exception, for all purposes this coming Friday, August 6. Thereafter, the

prefiled written testimony, in accordance with the present schedule, I believe is due to be filed on August 13. Is that correct?

MR. EDGAR: Yes.

MR. SWANSON: Yes.

JUDGE MILLER: August the 13th. I do not know if there is anything else scheduled before we, 10 days later on the 23rd, start the evidentiary hearing. If there is now, before we get into other discovery on the recirculated DES and so forth, let us stick first of all to those things that are necessary to have clearly set forth with regard to the evidentiary hearing.

Is there anything other than those that we have now told you about?

MS. WEISS: I do not think that it is humanly possible for NRDC to have any substantial amount of testimony filed a week after the discovery is in. I just do not think we can do it.

JUDGE MILLER: Well, this has always been the schedule, so I am sorry if you do not feel that you can do it, but there has been no change. This has always been the schedule.

MS. WEISS: Except that we have had, Mr. Chairman, to take an enormous amount of time arguing over these matters, arguing over exemption requests, and

I do not think that --

JUDGE MILLER: This is the first time you have argued these matters with this Board.

MS. WEISS: We spent virtually the entire week last week writing these pleadings and consulting. All of last week was taken up in writing the two pleadings that you have before you and in arguing on the exemption requests.

JUDGE MILLER: Look, do not assail this Board with your exemption requests or anything else. We are just going to take what is before us. Now these two matters that you have filed --

MS. WEISS: I am just asking the Board to take cognizance of the fact that we have been incredibly busy through no fault of our own --

JUDGE MILLER: I do not know whose fault it is. I do not want to get into it. It is an extraneous matter that has no relationship to this trial. I am looking at this trial.

MS. WEISS: We would ask you to give us at least through the 16th to file testimony. It would have no impact whatsoever on the schedule.

JUDGE MILLER: Let me inquire. Would the extension to the 16th of prefiled testimony for NRDC as thus explained prejudice substantially either of the

other parties? Applicants?

MR. EDGAR: Is that --

MS. WEISS: That is the Monday --

JUDGE MILLER: It is projected and requested. If it doesn't prejudice you, we would --

MR. EDGAR: I am trying to answer. I just want to be sure I understand.

MR. SWANSON: That is a Monday.

MR. EDGAR: We have no objection.

JUDGE MILLER: Staff?

MR. SWANSON: We have no objection, provided that we are still continuing with simultaneous filings. In other words, all parties would file on that date. I think the Staff would have a problem if we are going to be filing and their testimony would then frame a response.

JUDGE MILLER: Yes. Certainly, the deadlines for prefiled written testimony have to be uniform in application. So what we are considering now is the request of NRDC, and the responses made by the other two parties, to extend the date for the prefiled written direct testimony from August 13 to August 16. Is that correct? Are the dates accurate so far?

All right. There being no objections, the new date, the amended date therefore, will be August 16 for

prefiled written direct testimony by all parties.

Now, is there anything else before we go into the future?

MS. WEISS: I would just like the order to reflect the Board's statements on the scope of the evidence, meaning that parties should file evidence that they under these contentions, to the extent that it is within the scope of the SSR and we will not be penalized if their direct testomony does not cover matters which are covered by the FES.

JUDGE MILLER: Well, we cannot very well, nor should we, tell the parties what to do or what to file. You try your own cases. However, we can indicate that insofar as there is any other evidence, testimonial or otherwise, which the parties wish to proffer at the time of the environmental hearings growing out of the recirculated draft supplement to the FES, insofar as they are relevant and admissible as to those matters, there will be no prohibition of putting forth the testimony or the evidence on the grounds that it could have been produced at this time.

Now, tis does not relieve you of the requirement of showing reasonable relevance as defined by the Federal Rules of Evidence, which picks it up without naming materiality.

MS. WEISS: That is exactly the question that I wanted --

JUDGE MILLER: As a subsidiary matter, there may be testimony or documents which are identical. We would not expect any party to put in identical document in that phase that would be forthcoming in the evidentiary phase. That could be identified in the record. That would simply be the normal rule of avoiding repetitious testimony or evidence. It has nothing to do with the scope of the hearing; it is simply to reserve judicial time and your own time not to have repetition. So all you have to do is identify it, and you will have the benefit of it.

So that is a corollary which I trust we understand, Ms. Weiss, and all the other parties.

MS. WEISS: Yes.

JUDGE MILLER: With that exception, it is as I stated it then. Anything further?

MR. SWANSON: I just want to make sure of one thing so that it does not come up later as an issue. The Board mentioned there were certain limitations on issues as defined by your order last April that certain issues had limitations. You mentioned some but not all. Can we simply assume that your order of last fall or last spring, your order of April 22, which defined

certain limitations on issues, but those limitations do, in fact, apply?

JUDGE MILLER: Yes. There has been no changes on those issues. There has been no changes the Board is aware of. Those are built in, and continue with ongoing contentions.

MS. WEISS: At this point, Mr. Chairman, we would ask you to certify the questions raised by our motion to reschedule the hearing; that is, the question of whether it is legally permissible to go ahead with any of these hearings prior to the Final Environmental Statement.

JUDGE MILLER: Well, the Board is familiar with its own reasons for the actions it took. We do not feel in any doubt. We do not feel that we have to go certify something or have more proceedings pending. So we will respectfully decline the request to certify.

MS. WEISS: Thank you, Mr. Chairman.

JUDGE MILLER: You are welcome.

Anything further?

MR. SWANSON: I wonder if we could just briefly postulate the amount of time that might be necessary for these three issues. It might be helpful in some preliminary planning anyway. We have substantially limited the scope of this, Board issues,

parts of 1, 2, 3, and 5. I wonder if, for planning purposes, the parties could perhaps throw out some ideas.

I think for the Staff's part we would not --

MR. EDGAR: I think the parties ought to confer on that. I do not think we need to take the Board's time. We still have, I think, another hour left in the day.

JUDGE MILLER: Yes. We suggest the parties all confer.

MR. EDGAR: If we are going to go, we ought to talk about order and documents and all kinds of details. But I think we should do that amongst counsel.

JUDGE MILLER: Let me make a suggestion to the Staff. We sometimes have the question whether the presentation of evidence and the order of cross-examination of whether the Staff should be last or not. Our belief is that it is more expeditious if we get all of the evidence on one aspect, let us say, of issues in, so that then there is only one set of witnesses or evidence put on by those who oppose. In other words, those who have the affirmative, whatever the issues are, they should get it in. To that end, we suggest the Staff should probably follow Applicants who have the burden of proof.

However, we have the caveat now that if there

are any witnesses the Staff does not want to, I will not say vouch for, but wishes to challenge the credibility or otherwise, or testimonial or documentary evidence that they wish to disassociate themselves from, then we would reconsider as to those issues.

In other words, if there is a point where the Staff says, look, we do not agree with that, and we are going to put on independent testimony which will have a different aspect, then to that extent, we would want to hear the nature of it. We would probably then permit the Staff to follow.

Otherwise, we think it is easier because the intervenors, one or more, have to put on witnesses or testimony in opposition to the affirmative case. If we do it piecemeal and we put it on the Applicants and we put them on for the Staff, then we get to arguing who did what a month ago.

So we find it more convenient. We would like the Staff to take it into consideration because it is not meant in any way as a derogation of the Staff's public responsibility or anything. But we think that in terms of handling evidence, it is more convenient.

We are indicating that that is what we have done in other cases and we will probably do here unless there are reasons where, you know, if you tell us that

there are good solid reasons why the Staff wants to either disassociate itself from or have something different from, then that is a different ballgame.

Do we understand each other? I will give you a chance to be heard.

MR. SWANSON: Yes.

JUDGE MILLER: So that gives you something on the order of proof, Ms. Weiss. We would like you to have the intervenors ready to go as soon as the affirmative case is put in on whatever issues that there are. If you feel there are some that could be separated, then we can take it up at the time, or if the evidence will come on, all of the Applicants on all these issues, and the Staff's and yours, because it is in opposition, we try to be reasonable on rebuttal to all parties insofar as it is limited to matters triggered by it.

MS. WEISS: The preference is to go issue by issue, and the intervenors would be last unless on a particular issue the Staff takes a position?

JUDGE MILLER: Generally, but I am not sure issue by issue, because I do not know the nature of it. You people will probably tell us, let us go on issue 1 and 3, for instance. I do not know if they are related in some way. Whatever is convenient for all of you.

You know, if you trap it up too much, then you are going back and forth. But then some of it makes sense. So we will leave it at least initially for your mutual recommendations on those. That order is what I was trying to indicate your preference.

MS. WEISS: That would be my preference as well.

MR. EDGAR: Judge Miller, I have a preliminary related matter before we get into FES discovery. It is tied at least to thinking about the schedule now that we are proceeding to hearing on site suitability. This site suitability will involve, among other questions, whether an HCDA should be a CDA and other major features of the design will be discussed. The project has up at Burns & Rowe a very detailed scale model of this reactor which covers about a floor of a building. It is not portable. It is huge. But we would be willing to extend to the Board and all parties on a mutually convenient date, if there is one between now and the hearings, the opportunity to visit Burns & Rowe and have a view of the plant model and have any explanations given of what the plant systems are. The offer is available. We think that the model is a useful thing to examine. Obviously, the Board is busy, but we wanted to make the offer for what it was worth.

JUDGE MILLER: Where is that located?

MR. EDGAR: It is in Oradell, New Jersey, which is approximately --

MR. GAESER: It is about an hour from the New York airports.

MR. EDGAR: I advised that it is about an hour's drive from Newark Airport.

JUDGE MILLER: We appreciate your offer. We suppose if any of the other parties want to make arrangements, that they could make them with you, Mr. Edgar. I would doubt the Board is going to have the time as such between now and the 23rd. As we get farther along, the Board might or might not. We appreciate the offer.

MR. EDGAR: I would leave it open. My idea would be the Board and parties would come up together so that we do not have any concerns of that nature. And it is there for information. You may want to postpone it, but if you would like to do it, we will make the arrangements.

(The Board conferred.)

JUDGE MILLER: I think we would defer acceptance of your offer until after we have started taking some evidence. We appreciate it, and we may well want to. We do not see our way clear between now and

the 23rd of August. This is not to say, I assume, that the offer even in the absence of the Board, would be made available to the other parties, if they wished, would it?

MR. EDGAR: That is right.

JUDGE MILLER: So that is up to them to get with you on an agreed basis.

MS. WEISS: Is that a reactor of the general size and type?

(Laughter.)

MR. COCHRAN: We have so much time we just love to go up there and spend a few days.

JUDGE MILLER: Well, the offer is there. You may do with it as you like.

Anything further?

(No response.)

JUDGE MILLER: The only remaining matter we know of is the suggestion of Ms. Weiss that she would like to talk about future discovery and scheduling on other matte. . Is that what you suggested?

MS. WEISS: Well, yes. If we are not contemplating starting discovery until the supplement is a final supplement, which I think makes a great deal of sense given that we are all going to be --

JUDGE MILLER: You are going to be busy.

MS. WEISS: -- putting aside the question of the status, we are going to be pretty darned busy on other things.

JUDGE MILLER: That would make sense.

MS. WEISS: If that is the case, then it is not necessary to set a schedule today.

JUDGE MILLER: It would be subsequent to the hearing date, I would presume.

MS. WEISS: I assume so.

JUDGE MILLER: You will be busy enough, and so will we, and then we will be in the midst of a trial. But the last day of the trial, now, if you wanted to raise it, because yes we do have to look onward. We will have more information from the Staff, for one thing, as to the timing.

MS. WEISS: The Staff made the representation last week that they expected this process of receiving the comment and digesting it to result in them having the final document ready by November 1.

If that is the case, I assume we will be done with the hearings at that point and we can start upon discovery.

JUDGE MILLER: I would hope so, yes.

MS. WEISS: I think the only issue we need to resolve today is whether we are going to wait for

discovery until that is a final document.

JUDGE MILLER: I would think so because I would think the procedure that is set up generally for the handling of NEPA and other matters is here is the draft, it could be a DES, it could be a proposed supplement or modification, whatever it may be, to an existing FES, and circulated. At any rate, you have to circulate a document. At that point, everybody can comment, including the parties, nonparties, and the public. So it would seem to be superarogation at that point to get into discovery which you do not have to repeat when you knew what the final product was with or without the discussion anybody made when the Staff adopted it and set up the FES.

MR. EDGAR: Mr. Chairman.

JUDGE MILLER: Yes.

MR. EDGAR: As Judge Linenberger points out, informal discovery could commence at any time and to be fruitfully followed at any time. We do commend it, because we know the parties have engaged in a good deal of such informal discovery. It is helpful to everyone.

Anything further?

MR. EDGAR: I would like to make a suggestion in that vein. I think we can discuss it down at Oak Ridge in more detail. But it seems to me we will have

some date when the Final Environmental Statement will be -- or final supplement after circulation -- will be available. And I see no reason why, by analogy, the Board could not apply this. the same principles in the same schedule to that it applied in its February 1982 order.

JUDGE MILLER: Well, we well might. We will ask for recommendations by the parties, discussing it precedently among themselves, and maybe we will get more or less reasonabe scheduling of dates.

MR. EDGAR: But I would like to see if we could arrive at something certain. We will lose time after we adjourn the hearings if we do not.

JUDGE MILLER: All right. Let's see if the parties can confer in advance of the conclusion at least of the evidentiary hearings on the site suitability and make recommendations, mutually supported and agreed, or you can make suggestions where you cannot, and the Board will entertain them.

Is there anything further?

MR. SWANSON: As I understand it then, the parties are under no obligation to respond to discovery at this time?

JUDGE MILLER: Correct.

MR. SWANSON: Thank you.

JUDGE MILLER: Thank you very much. We will see you the 23rd, if not sooner.

(Whereupon, at 4:05 p.m., the conference was adjourned.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

ATOMIC SAFETY AND LICENSING BOARD

(Clinch River Breeder Reactor Plant)

In the matter of: United States Department of Energy
Project Management Corporation Tennessee Valley Authority

Date of Proceeding: August 2, 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.

Jane W. Beach

Official Reporter (Typed)

Jane W. Beach

Official Reporter (Signature)