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INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - June 1990

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Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
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Foreword

Digests and indexes for issuances of the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking are presented in this document. These digests and indexes are intended to serve as a guide to the issuances.

Information elements common to the cases heard and ruled upon are:

- Case name (owner(s) of facility)
- Full text reference (volume and pagination)
- Issuance number
- Issues raised by appellants
- Legal citations (cases, regulations, and statutes)
- Name of facility, Docket number
- Subject matter of issues and/or rulings
- Type of hearing (for construction permit, operating license, etc.)
- Type of issuance (memorandum, order, decision, etc.).

These information elements are displayed in one or more of five separate formats arranged as follows:

1. Case Name Index

The case name index is an alphabetical arrangement of the case names of the issuances. Each case name is followed by the type of hearing, the type of issuance, docket number, issuance number, and full text reference.

2. Digests and Headers

The headers and digests are presented in issuance number order as follows: the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking.

The header identifies the issuance by issuance number, case name, facility name, docket number, type of hearing, date of issuance, and type of issuance.

The digest is a brief narrative of an issue followed by the resolution of the issue and any legal references used in resolving the issue. If a given issuance covers more than one issue, then separate digests are used for each issue and are designated alphabetically.

3. Legal Citations Index

This index is divided into four parts and consists of alphabetical or alphanumerical arrangements of Cases, Regulations, Statutes, and Others. These citations are listed as given in the issuances. Changes in regulations and statutes may have occurred to cause changes in the number or name and/or applicability of the citation. It is therefore important to consider the date of the issuance.

The references to cases, regulations, statutes, and others are generally followed by phrases that show the application of the citation in the particular issuance. These phrases are followed by the issuance number and the full text reference.

4. Subject Index

Subject words and/or phrases, arranged alphabetically, indicate the issues and subjects covered in the issuances. The subject headings are followed by phrases that give specific information about the subject, as discussed in the issuances being indexed. These phrases are followed by the issuance number and the full text reference.

5. Facility Index

The index consists of an alphabetical arrangement of facility names from the issuance. The name is followed by docket number, type of hearing, date, type of issuance, issuance number, and full text reference.

CASE NAME INDEX

CASE NAME INDEX

CASE NAME INDEX

DIGESTS
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-90-1 HOUSTON LIGHTING AND POWER COMPANY (South Texas Project, Units 1 and 2), Docket Nos. 50-498, 50-499; ENFORCEMENT; February 8, 1990; ORDER

A The Commission denies the motion of Mr. John Corder for a protective order staying the enforcement of an administrative subpoena issued to him by the NRC Staff in connection with his concerns and allegations regarding the South Texas Project. The Commission believes that Mr. Corder is in a position to comply with the subpoena, notwithstanding the pendency of an FOIA request he filed with the NRC.

B The NRC Staff's request that an alleger provide to it any concerns that the alleger had not provided previously should not be construed as an invitation to allow an alleger the opportunity to review all prior NRC Staff actions on his previous concerns or allegations, or to pass judgment on the technical correctness of the NRC Staff's actions. Rather, the purpose of the request is to give the alleger the opportunity to express concerns to the Staff that he may have failed to furnish previously because of the existence of a settlement agreement, entered into by the alleger and his former employer, which may have been read to restrict the alleger from bringing his concerns to the agency.

C The Commission believes that an alleger need not await the processing of a pending FOIA request regarding his previous concerns and allegations in order to comply with an administrative subpoena requesting that he provide the NRC with information on whether he withheld safety concerns from the NRC, developed new concerns since his termination of employment with the Licensee, or has an interest in the manner in which his previously expressed concerns were addressed.

CLI-90-2 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; March 1, 1990; MEMORANDUM AND ORDER

A The Commission addresses a certified question from the Appeal Board seeking guidance on whether testimony concerning particular accident scenarios and their projected dose consequences is admissible for purposes of judging the adequacy of an emergency plan. The Commission determines that such testimony is inadmissible. The Commission reiterates that emergency plans are to be evaluated against the sixteen planning standards of 10 C.F.R. § 50.47(b), which are directed toward reasonable assurance of protective measures for a broad spectrum of accidents.

B The rulemakings of 1980 and 1987 establish that emergency planning as a general matter is considered part of first-tier ("adequate") protection.

C For the purpose of deciding whether proffered testimony on dose reduction in a specific scenario should be admitted as relevant to evaluation of emergency planning, it is immaterial whether the emergency planning regulations are considered first-tier ("adequate") or second-tier ("extra-adequate") protection.

D Emergency planning is "essential." But it is only common sense to acknowledge that emergency plans are a backstop, a second or third line of defense that comes into play only in the extremely rare circumstance that engineered design features and human capacity to take corrective action have both failed to avert a serious mishap.

E In the text of its emergency planning regulations, in rulemakings on the subject of emergency planning, and in adjudicatory decisions interpreting those regulations, the Commission has made clear that judgments on the adequacy of emergency planning are to be based on conformity with the planning standards set forth in 10 C.F.R. § 50.47(b).

F Nothing in 10 C.F.R. 50.47 contains any suggestion that calculations of dose consequences are intended to play a role in the evaluation of an emergency plan's adequacy. Consideration of specific accident

...quences and their potential dose consequences has been rendered unnecessary by the promulgation of generic guidance that incorporates and synthesizes data on a range of accidents and their consequences.

G It is by applying the generic guidance of the sixteen planning standards of 10 C.F.R. 50.47(b) to the review of individual emergency plans — not by attempting to predict the effects of particular hypothetical accidents occurring under particular hypothetical conditions of weather, time of year, and time of day — that the NRC satisfies itself that the goal of achieving dose reductions is met.

H The final emergency planning rule, as amended in 1987, should have left little doubt as to the Commission's intent, which may be summarized as follows: Emergency plans are to be evaluated on their own merits, against the sixteen planning standards of 10 C.F.R. § 50.47(b), with presumptive validity accorded to FEMA's expert judgments on offsite planning; that the evaluation does not entail consideration of the dose consequences that might be calculated under various hypothetical circumstances; and that a plan judged adequate against those planning standards is considered generally comparable to any other plan that has been found adequate.

I A determination of standards of decisionmaking, made by rule, is not for individual adjudicatory boards to alter. Parties dissatisfied with the rule's approach may petition to change the rule, or they may attempt, by requesting a waiver of the rule, to show why it should not be applied to a particular case.

CLI-90-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL; OPERATING LICENSE; March 1, 1990; MEMORANDUM AND ORDER

A The Commission decides to allow the Atomic Safety and Licensing Board's authorization of a full-power license for the Seabrook Nuclear Power Station Unit 1 to become effective under its regulations during the pendency of further appeals and other administrative proceedings. In reaching its immediate effectiveness review, the Commission denies Intervenors' request for relief in the nature of mandamus. Requests for stays of full-po... license authorization are also denied; however, a brief housekeeping stay is provided to permit the filing of ... cial stay motions.

B By regulation and a long line of case precedent, the Commission has explicitly retained supervisory power to step in at any stage of a proceeding to decide any matter itself. See 10 C.F.R. § 2.764(e)(3)(i) and (f)(2)(i); e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977).

C The NRC's rules provide one extra step in the oversight of licensing decisions, the "immediate effectiveness review." To explain, when an Atomic Safety and Licensing Board authorizes the issuance of a license, that decision, like that of a trial court, need not await the completion of all appeals to become effective.

D As a rule, the effectiveness review examines the reasonableness of the Licensing Board's decision without reaching any formal and final decision that no further review and revision of the decision could ever be required and without prejudice to later adjudicatory resolution of issues still in controversy.

E The Commission's "authority to intervene and provide guidance in a pending proceeding is not limited by the terms of 10 C.F.R. 2.786(a) [regulation stating the ordinary practice for review]." Seabrook, CLI-77-8, supra, 5 NRC at 516. The Commission has inherent supervisory authority over adjudicatory proceedings, and "there is every reason why the Commission should be empowered to step into a proceeding. . . ." United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976), quoted in Seabrook, CLI-77-8, supra, 5 NRC at 516.

F Commission rules do not expressly provide for immediate mandatory relief. However, the Commission would be willing to grant relief of this sort in appropriate circumstances. Relief in the nature of mandamus is a drastic remedy, warranted only in unusual circumstances and only where there is a failure to obey a clear direction to perform a nondiscretionary duty and where no other relief is available.

G A review of NRC rules and prior NRC decisions does not suggest the existence of any clear, nondiscretionary duty on the part of the Licensing Board to delay full-power authorization pending completion of remand proceedings or resolution of all pending matters. In fact, a review of prior precedents indicates past examples of where, as here, permits or licenses were authorized while remand proceedings and motions were still pending — Seabrook, CLI-77-8, supra, 5 NRC at 521; Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 159-60, 169-70 (1978); Long Island Lighting Co. (Shoreham

Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531 (1984). See also Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986) (per curiam) upholding issuance of a full-power license notwithstanding pendency of motions to reopen.

H Where there is a remand or pending motion, the matter of license or permit issuance must be considered on a case-by-case basis.

I The authority of the Board to authorize issuance of a full-power license notwithstanding pendency of remands and motions relating to emergency planning issues can be traced to a specific provision (10 C.F.R. § 50.47(c)) of the NRC's emergency planning regulations.

J All issues that are relevant to compliance with 10 C.F.R. § 50.47(b) emergency planning standards are not necessarily material to license issuance because, under 10 C.F.R. § 50.47(c), compliance issues may not be significant and therefore need not be resolved prior to license issuance.

K Safety issues, including emergency planning issues, can be categorized in terms of the Licensing Board's duty to complete the proceedings itself as opposed to referring the matter to the staff for informal resolution.

L A licensing board may refer minor matters that in no way pertain to the basic findings necessary for issuance of a license to the Staff for post-hearing resolution. Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984).

M While parties are invited by our rules to file effectiveness comments under 10 C.F.R. § 2.764, the principal avenue for relief for parties seeking to preclude license issuance pending appeals is to seek a stay under 10 C.F.R. § 2.788.

N Of the four stay factors, it is well established that "the most crucial [factor] is whether irreparable injury will be incurred by the movant absent a stay." Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

O Commission procedures that permit licensing boards to evaluate whether a remand need block authorization of a license, require all contentions after the original stage to be subject to certain "timeliness" requirements, and allow the Commission to step into a proceeding at any stage to offer guidance to the parties are neither unprecedented nor aberrations; they have been in force for years and have been applied to numerous nuclear power plant licensing proceedings before this one.

P The Commission has stated repeatedly and categorically that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. See, e.g., Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1985).

Q Available funding will approximate what, under the Commission's decommissioning rules, would be required for decommissioning of a plant that had been in operation for a long period of time and that sum is found sufficient to offset any claim of irreparable injury from lack of decommissioning funds.

R It is well settled that speculation about occurrence of a nuclear accident does not constitute the kind of irreparable injury that would warrant a stay of full-power operations. E.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing New York v. NRC, 550 F.2d 745, 756-57 (2d Cir. 1977), and Virginia Sunshine Alliance v. Hendrie, 477 F. Supp. 68, 70 (D.D.C. 1979).

S When the licensing board has authorized and the Commission's immediate effectiveness review has favored license issuance, the grant of a stay would be contrary to the public interest which underlies the mandate to the Commission in 5 U.S.C. § 558 to complete license application proceedings within a reasonable time with due regard for the rights of the parties.

CLI-90-4 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA (Spent Fuel Pool Amendment); OPERATING LICENSE AMENDMENT; April 5, 1990; MEMORANDUM AND ORDER

A On certification by the Appeal Board of its ruling reversing an Intervenor's environmental contention concerning a spent fuel pool accident, ALAB-919, 30 NRC 29 (1989), the Commission vacates that part of the Appeal Board's decision that amounts to a holding that an accident with a probability on the order of 10^{-4} per reactor year is remote and speculative, without prejudice to a later Commission determination

on what the limits should be. The Commission directs the Appeal Board, on remand, to develop further information before a judgment is made on whether the accident at issue here is remote and speculative.

B The Commission does not read the Supreme Court's decision in Robertson v. Methow Valley Citizens Council, 490 U.S. 000 (1989), to say that an accident can be excluded from NEPA consideration on the sole ground that it presents a "worst case."

C What is important for purposes of NEPA consideration is the likelihood of occurrence of the accident in question. If the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law.

CLI-90-5 ROCKWELL INTERNATIONAL CORPORATION (Rocketdyne Division), Docket No. 70-25-ML (Special Nuclear Material License No. SNM-21); MATERIALS LICENSE RENEWAL; April 13, 1990; MEMORANDUM AND ORDER

A The Commission affirms ALAB-925, 30 NRC 709 (1989), but provides comments to underscore its agreement with the Appeal Board's interpretations of three provisions of the Commission's new rules of procedure governing materials licensing adjudications. Further, the Commission recommends that a settlement judge be utilized in appropriate circumstances and expresses the view that this device is already permitted under the Commission's rules for adjudicatory proceedings.

B The submission of questions to a party by the presiding officer is appropriate only after a ruling has issued on the initial request for hearing and after the NRC Staff has made the hearing file available in accordance with 10 C.F.R. § 2.1231 and after parties have filed their initial written presentations in accordance with 10 C.F.R. § 2.1233(b) or (c).

C Where an administrative judge's involvement in the settlement process could be extensive (more than providing encouragement to parties or holding a conference in open session), the Commission believes that utilization of a settlement judge should be considered.

D The Commission believes that resort to a settlement judge may be accomplished under its present rules which encourage settlements (10 C.F.R. §§ 2.759, 2.1241), endow presiding officers with the authority to hold conferences before or during hearings for settlement (10 C.F.R. §§ 2.718(h), 2.1209(c)), and allow presiding officers to take any other action consistent with the Atomic Energy Act, the Administrative Procedure Act, and Commission rules of practice (10 C.F.R. §§ 2.718(m), 2.1209(l).

E Utilization of the settlement judge cannot be mandatory and cannot accrue to a party's detriment. In addition, in view of the fact that a settlement judge might engage in ex parte discussions and form a judgment on the merits of a party's position during the course of negotiations, the settlement judge's communications and dealings with the presiding officer on the merits of issues, and the parties' positions will have to be circumscribed.

F A party will hardly be in a position to appeal the grant or denial of a hearing request unless the presiding officer has issued a written decision explaining how the demands of § 2.1205(g) have or have not been met.

CLI-90-6 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; June 8, 1990; ORDER

A The Commission accepts a referral from its Appeal Board to address the merits of Intervenors' motion to reopen the Seabrook record to litigate a contention relating to the use at that facility of certain pressure-measuring devices ("Rosemount transmitters"). The Commission denies the motion because it finds that Intervenors have not made the required showing under 10 C.F.R. § 2.734(a) for reopening a closed record. The Commission defers, until a later date, the matter of additional guidance on reopening motions filed very late in the adjudicatory process and the appropriate forum for initial consideration of technical issues lacking nexus to matters before either of its subordinate panels.

B A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied: (1) the motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) the motion must address a significant safety or environmental issue; (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. 10 C.F.R. § 2.734(a).

C A motion to reopen a closed record is not timely where intervenors did not act promptly after information relevant to the contention they sought to litigate became available.

D Intervenors who have public information relating to the matter they seek to raise for at least 10 months prior to filing a motion to reopen or at least some 7 weeks' notice of applicants' actions with respect to the matter in question, could and should have moved more promptly than a full 4 weeks thereafter, especially given that the record had long since closed and the Commission's immediate effectiveness decision was expected imminently.

E The Commission reasonably demands that contentions filed after the hearing is under way — let alone concluded — be filed promptly after receipt of the information needed to frame these contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 414 (1989), citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-50 (1983). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 482 (1989) (settled that promptness is required).

F Intervenors fail to present an actual "significant safety issue" when they have not adduced sufficiently persuasive evidence at the threshold to create a reasonable belief that an applicant's program and continuing compliance with a Staff-prescribed enhanced surveillance program will be insufficient to provide the requisite assurance of plant safety.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-926 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320-OLA (Disposal of Accident-Generated Water); OPERATING LICENSE AMENDMENT; January 19, 1990; DECISION

A The Appeal Board affirms the Licensing Board's decision, LBP-89-7, 29 NRC 138 (1989), authorizing a license amendment for the accident-damaged Unit 2 reactor at Three Mile Island. The amendment will permit the evaporation by forced heating over a one- to two-year period of the water that has accumulated onsite from the accident and ensuing decontamination activities.

B "An appellant's brief must clearly identify the errors of fact and law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided." 10 C.F.R. § 2.762(d)(1).

C An appellant's "brief must contain sufficient information and cogent argument to alert the other parties and the appellate tribunal of the precise nature of and support for the appellant's claims." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986). Accord id., ALAB-856, 24 NRC 802, 805 (1986); id., ALAB-837, 23 NRC 525, 533-34 (1986); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-57 (1982).

D The Appeal Board will not generally consider matters that are not adequately briefed. Any party who has insufficiently articulated its claims must bear full responsibility for any possible misapprehension of those arguments caused by the inadequacies of its brief. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131-32 (1987); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983).

E The Appeal Board does not hold pro se parties to the same standard for briefs as parties represented by counsel. See Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982).

F Issues or arguments that are not made readily apparent or comprehensible by an intervenor's brief will be deemed to be waived and accordingly will not be addressed by the Appeal Board. Similarly, when intervenors do not explain what material facts are in dispute, why those facts are material, and why the Licensing Board's treatment of those issues was in error, the issues are deemed to be waived.

G In reviewing factual findings, it is well settled that the Appeal Board is "not free to disregard the fact that the Licensing Boards are the Commission's primary fact finding tribunals." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975).

H The Appeal Board will only "reject or modify findings of the Licensing Board if, after giving its decision the probative force it intrinsically commands, [the Appeal Board is] convinced that the record compels a different result." Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). The Appeal Board "must be persuaded that the record evidence as a whole compels a different conclusion and [the Board] will not overturn the hearing judge's findings simply because [the Board] might have reached a different result . . . ." General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 473 (1987).

I The burden of going forward with evidence to support a contention that a license or amendment should not be issued is on the party asserting such a contention. However, this burden must be distinguished from the ultimate burden of proof on the issue of whether a license or license amendment should be issued,

which is on the applicant. See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).

J The Licensing Board's decision, its supporting adjudicatory record, and the supplement to the Final Programmatic Impact Statement form the complete environmental record of decision. 10 C.F.R. §§ 51.102(c), 51.103(c). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-06 (1985), aff'd in part and review otherwise declined, CLI-86-5, 23 NRC 125 (1986), remanded in part on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719 (3d Cir. 1989).

ALAB-927 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; February 26, 1990; MEMORANDUM AND ORDER

A The Appeal Board denies an intervenor's motion to reopen a portion of the record in the operating license proceeding involving the Seabrook nuclear power facility as untimely and because it does not present an "exceptionally grave issue," within the meaning of 10 C.F.R. § 2.734(a)(1).

B The Commission's Rules of Practice explicitly require the denial of an untimely motion to reopen a record unless the motion presents "an exceptionally grave issue." 10 C.F.R. § 2.734(a)(1).

C Where two licensing boards were considering different aspects of an emergency response alert and notification system, pendency of reopening motion before one licensing board based on a particular event does not excuse delay of three months in filing a motion to reopen before the second board based on the same event because the first board could not assess the impact of that event upon those matters that were within the jurisdiction of the second board. Cf. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 429 (licensing board can dismiss a party from only the part of the proceeding within that board's purview), review declined, CLI-88- 11, 28 NRC 603 (1988). This being so, there was no potential for "the dual litigation of the same issue with possibly inconsistent results." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 439 (1989).

ALAB-928 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML; MATERIALS LICENSE AMENDMENT; March 27, 1990; MEMORANDUM

A On March 13, 1990, the Appeal Board denied motions for a stay of the Licensing Board's decision in LBP-90-9, 31 NRC 150 (1990), authorizing an amendment to the materials license held by Kerr-McGee permanently to dispose of radioactive thorium mill tailings, other associated waste, equipment, building rubble, and contaminated soils. The Appeal Board issues a memorandum containing the reasons for that earlier denial.

B In ascertaining whether a stay pending appeal is warranted, consideration must be given to the following criteria: (a) whether the moving party has made a strong showing that it is likely to prevail on the merits; (b) whether the moving party will be irreparably injured unless a stay is granted; (c) whether granting a stay would harm other parties; and (d) where the public interest lies. 10 C.F.R. § 2.788(e).

C Concerning the stay criteria, the burden of persuasion is on the movant, and while no one criteria is dispositive, "[t]he most significant factor in deciding whether to grant a stay request is 'whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted.'" Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984) (quoting Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980)). See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

D Absent a stay, an applicant's expenditures toward development of the proposed site during the appeal process must be taken into account in any required future analysis comparing a proposed site to alternative sites.

E The Commission has held that absent an applicant's bad faith in its environmental reporting, "the [cost-benefit] analysis on remand should be done on the basis of the factual predicate existing at the time of the analysis." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 532 (1977). Furthermore, "the larger the commitment of resources to one site, the less likely it is that an alternative site will remain feasible." Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977). Accordingly, without a stay, a party advocating an alternative site may be irreparably injured if much time and money will be spent on the proposed site

pending appeal. See id. at 1188; Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 634 (1977).

F Absent a finding of irreparable injury, an Appeal Board may not grant a stay unless "a reversal of the decision under attack is not merely likely, but a virtual certainty." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989).

G The mere listing of several grounds for appeal, without more, is insufficient to establish that the movant is likely to prevail on the merits.

H The following technical issue is discussed: Alternate Sites.

ALAB-929 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, OH 44041), Docket No. 30-16055-SP; SPECIAL PROCEEDING; March 30, 1990; DECISION

A The Appeal Board accepts the Licensing Board's referral in LBP-89-11, 29 NRC 306 (1989), and reverses the Board's ruling concerning the applicability of the Equal Access to Justice Act to materials license suspension proceedings.

B Appeal boards are delegated authority to review rulings referred by licensing boards in proceedings conducted pursuant to 10 C.F.R. Part 2, Subpart G. 10 C.F.R. § 2.785(a), (b)(1).

C A licensing board may refer a ruling for interlocutory appellate review when the board determines that such review "is necessary to prevent detriment to the public interest or unusual delay or expense." 10 C.F.R. § 2.730(f).

D An appeal board is not obliged to accept all referred rulings. See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981). Rather, this discretionary review is exercised "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

E Even though the Marble Hill criteria have not been met, an appeal board may exercise its discretion and accept a licensing board's referral if the ruling involves a question of law, has generic implications, and has not been previously addressed on appeal. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). See also Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712 n.1 (1989).

F The Equal Access to Justice Act (EAJA) provides that an agency that conducts an adversary adjudication shall award attorney's fees to a prevailing party unless the position of the agency was substantially justified or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). An "adversary adjudication" as used in the EAJA is an adjudication under section 554 of the Administrative Procedure Act (APA) in which the United States is represented by counsel, but excludes an adjudication for the purpose of establishing or fixing a rate or for the granting or renewing of a license. 5 U.S.C. § 504(b)(1)(c).

G An adjudication under section 554 of the APA is required by statute to be determined on the record after opportunity for an agency hearing. 5 U.S.C. § 554(a). Sections 554, 556, and 557 of the APA set forth the procedures that an agency must follow in such a formal, on-the-record hearing. 5 U.S.C. §§ 554, 556-557.

H A materials license suspension proceeding is not an "adversary adjudication" for the purposes of the EAJA because the Atomic Energy Act does not require such a hearing to be on the record pursuant to APA section 554.

I It is the enabling statute (i.e., the Atomic Energy Act), and not the APA that determines whether an on-the-record hearing is required. Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1202 (D.C. Cir. 1984). See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972).

J In any issue of statutory interpretation, "the 'starting point' must be the language of the statute itself." Lewis v. United States, 445 U.S. 55, 60 (1980) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

K Whether the words "on the record" or "formal" hearing appear in a statute is not controlling on the issue of whether an APA section 554 hearing is required. See United States v. Florida East Coast Ry., 410

U.S. 224, 238 (1973); Allegheny-Ludlum, 406 U.S. at 757; Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977). But "in the absence of these magic words . . . Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA." City of West Chicago v. NRC, 701 F.2d 632, 641 (7th Cir. 1980), aff'g Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982).

L There is no statutory requirement for formal hearings in proceedings involving the grant or amendment of a materials license. Kerr-McGee, 15 NRC at 252.

M There is a longstanding assumption concerning reactor operating license and construction permit cases that the Atomic Energy Act requires on-the-record hearings. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

N Section 181 of the Atomic Energy Act directs that "[t]he provisions of [the Administrative Procedure Act] shall apply to all agency action taken under this chapter," except where classified information is involved. 42 U.S.C. § 2231. This section alone, however, does not dictate the observance of any particular APA procedures. Kerr-McGee, 15 NRC at 247 n.13; West Chicago, 701 F.2d at 642 & n.8.

O Section 186b of the Atomic Energy Act does not require a formal APA, on-the-record hearing for license revocation or suspension actions; rather, it mandates that the provisions of section 558(c) of the APA be followed. 42 U.S.C. § 2236(b).

P Section 558(c) of the APA provides that (except in cases of willfulness or those in which the public health, interest, or safety requires otherwise) a licensee must be given written notice of a proposed withdrawal, suspension, revocation, or annulment of a license and an opportunity to demonstrate or achieve compliance with all lawful requirements. 5 U.S.C. § 558(c).

Q Section 558(c) of the APA does not require or contemplate a section 554 hearing for license suspension or revocation actions. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074 (7th Cir. 1982).

R The NRC has uniformly provided an opportunity for on-the-record hearings in license suspension proceedings. See 10 C.F.R. §§ 2.202, 2.700.

S The Commission's Rules of Practice provide for informal hearings in proceedings involving materials licenses, except for those concerned with enforcement actions, which still require formal adjudication under 10 C.F.R. §§ 2.700, et seq. 54 Fed. Reg. 8269, 8270, 8276 (1989) (to be codified at 10 C.F.R. § 2.1201).

T Longstanding agency practice cannot supply the statutory requirement for a hearing of the formality specifically required by the EAJA. See West Chicago, 701 F.2d at 642. Cf. Railroad Commission of Texas v. United States, 765 F.2d 221, 227-28 (D.C. Cir. 1985) (even if a proceeding is adjudicatory in nature, section 554 is applicable only if the enabling statute mandates a formal hearing).

U As a waiver of sovereign immunity, the EAJA must be strictly construed. See St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446 (D.C. Cir. 1989); Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir. 1988); Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089 (7th Cir. 1984).

V Waivers of sovereign immunity must be strictly construed. Action on Smoking and Health v. CAB, 724 F.2d 211, 225 (D.C. Cir. 1984).

W Despite the fact that, although not required by statute, an agency may voluntarily conduct formal on-the-record hearings like those described in section 554 of the APA, the EAJA does not apply to such proceedings and may not serve as the basis for an award of attorney's fees. St. Louis Fuel, 890 F.2d at 447-51; Owens, 860 F.2d at 1366-67; Smedberg, 730 F.2d at 1092-93. Contra Escobar Ruiz v. INS, 838 F.2d 1020, 1023-30 (9th Cir. 1988) (en banc).

ALAB-930 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket No. 50-443-OL-1 50-444-OL-1 (Rosemount Transmitters); OPERATING LICENSE; April 2, 1990; MEMORANDUM AND ORDER

A The Appeal Board refers intervenors' motion to reopen the record and admit late-filed contentions regarding the defective Rosemount transmitters to the Commission.

B Where finality has attached to some but not all issues, an appeal board will entertain new matters only if there is a "reasonable nexus" between those matters and the issues remaining before the board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979). A "reasonable nexus" does not mean a "total identity or commonality of issues" but,

rather, has reference simply to "a rational and direct link." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-797, 21 NRC 6, 8 (1985); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980).

C The fact that an Appeal Board properly has before it issues concerning emergency planning does not justify its consideration of newly raised issues concerning the possible failure of transmitters.

D The Commission's regulations confer a fundamental right to seek a reopening of the record on any issue germane to the outcome of the proceeding so long as (1) the proceeding is not yet complete, and (2) the reopening standards as set forth in 10 C.F.R. § 2.734 have been met. See 10 C.F.R. § 2.734; 51 Fed. Reg. 19,535 (1986).

E The "reasonable nexus" test does not preclude an intervenor from advancing a new contention arising from recent developments of safety significance. Rather, the function of the test is to ascertain the appropriate forum to entertain ab initio a party's claim that the requirements of 10 C.F.R. § 2.734 for the reopening of a record have been satisfied.

F The determination as to whether a "reasonable nexus" exists is not strictly speaking a matter of an appeal board's authority to act on a particular motion to reopen a record to introduce a new contention. It is, instead, a matter akin to venue — the inquiry being where, given the subject of the contention and the then status of the proceeding, the motion is best considered initially.

G Where neither the Licensing Board nor the Appeal Board currently is considering issues with a "rational and direct link" to the substance of a new contention that might serve as the basis for reopening a record, the Commission is the appropriate adjudicatory body to rule on such a motion.

ALAB-931 SAFETY LIGHT CORPORATION, et al. (Bloomsburg Site Decontamination), Docket Nos. 030-05980, 030-05981, 030-05982, 030-08335, 030-08444; ENFORCEMENT ACTION; April 23, 1990; MEMORANDUM AND ORDER

A The Appeal Board grants directed certification of (1) the Licensing Board's denial in LBP-90-7, 31 NRC 116 (1990), of a motion to dismiss for lack of jurisdiction and (2) a companion ruling in LBP-90-8, 31 NRC 143 (1990), that lifted a previously entered stay of a staff order requiring immediate payments into a trust fund for cleanup of a site. The Appeal Board affirms both decisions while adding a modification concerning payment provisions.

B A request for certification brought by a party does not invoke appeal board jurisdiction as a matter of right but rather seeks only the exercise of a discretionary power. See 10 C.F.R. § 2.718(i); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

C Section 183 of the Atomic Energy Act proscribes the assignment or transfer of a license or any right under that license "in violation of the provisions of [the Act]." 42 U.S.C. § 2233(c).

D The Commission's Rules of Practice require that the following factors be considered in deciding whether stay relief is appropriate: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the party will be irreparably injured unless a stay is granted, (3) whether the granting of a stay would harm other parties, and (4) where the public interest lies. 10 C.F.R. § 2.788(e). See Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

E An appeal board will undertake discretionary interlocutory review "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

F While an appeal board will take into account an agreement of the parties that interlocutory review is appropriate, it will decide itself whether there is sufficient cause for the exercise of its discretionary authority to review an interlocutory order.

G A licensing board's view of its own jurisdictional boundaries over a contention in some circumstances can affect the basic structure of the proceeding, making interlocutory review appropriate. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 437 (1989).

H A jurisdictional ruling that determines the status of a party in an enforcement proceeding heavily influences the shape of the proceeding and accordingly is properly the subject of interlocutory review.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

I If a licensing board has previously denied a party's motion for a pendente lite stay, the party may be able to obtain review of such ruling as a matter of right by renewing its stay request before an appeal board. See, e.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-364, 5 NRC 35, 36 (1977).

J Although 10 C.F.R. § 2.788 by its terms applies only to stays of the effectiveness of a decision or action of a licensing or appeal board pending the filing and disposition of an appeal from such decision, a licensing board presiding over the hearing on an NRC staff administrative enforcement order is empowered to consider whether such an order should be effective during the pendency of the proceeding. See 10 C.F.R. § 2.718(m) (licensing board may take any action consistent with the Atomic Energy Act, the Rules of Practice, and the Administrative Procedure Act).

K Upon an appeal board's determination that an interlocutory order is reviewable, a supplemental order closely connected with the first order may also be the subject of such review.

L Section 184 of the Atomic Energy Act, 42 U.S.C. § 2234, which prohibits the transfer, assignment, or disposal of licenses, "directly or indirectly, through transfer of control of any license to any person" without NRC's consent, is applicable to byproduct material licenses issued under section 81 of the Act and 10 C.F.R. Part 30. See 42 U.S.C. § 2111; 10 C.F.R. § 30.34(b).

M The principle of corporate law that a transfer of stock is not a transfer of corporate assets is inapplicable for the purposes of determining whether there has been a "transfer of control of any license" under the terms of section 184 of the Atomic Energy Act.

N In interpreting the Atomic Energy Act, the plain meaning and a practical application of the terms of the statute control, particularly in the absence of legislative history to the contrary.

O A shareholder is deemed to have control of a corporation, "when she [or he] determines corporate policy, whether by personally assuming management responsibility or by selecting management personnel." In re N&D Properties, Inc., 799 F.2d 726, 732 (11th Cir. 1986).

P The control of a license is in the hands of the person or persons who have the ultimate right to decide how the licensed activities should be conducted.

Q A parent corporation's sale of 100% of the stock of its NRC-licensed subsidiary constitutes a "transfer of control of any license" for the purposes of section 184 of the Atomic Energy Act.

R "Control" of a license within the meaning of section 184 of the Atomic Energy Act is found in the person or persons who, because of ownership or authority explicitly delegated by the owners, possess the power to determine corporate policy and thus the direction of the activities under the license.

S The extent to which a subsidiary's day-to-day operations are actually supervised by the parent is irrelevant to determining whether there has been a "transfer of control" of a license for the purposes of section 184 of the Atomic Energy Act.

T The failure of a licensee to notify the Commission of the sale of 100% of its stock constitutes an unauthorized transfer of control under section 184 of the Atomic Energy Act.

U "Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation." Capital Telephone Co. v. FCC, 498 F.2d 734, 738 n.10 (D.C. Cir. 1974).

V A licensing board has not failed to provide an opportunity to respond as required by 10 C.F.R. § 2.730(c), where it simply reassessed sua sponte the previous filings of both parties as the result of a request to provide reasons for a previous, unexplained ruling.

ALAB-932 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; May 31, 1990; DECISION

A In reviewing LBP-88-32, 28 NRC 667 (1988), concerning the New Hampshire Radiological Emergency Response Plan (NHRERP) for the Seabrook Station, the Appeal Board affirms those portions of LBP-88-32, 28 NRC 667, regarding "Response Personnel Adequacy," "Human Behavior in Emergencies," and "Evacuation Time Estimates (ETEs)," and unpublished Licensing Board rulings on Seacoast Anti-Pollution League (SAPL) Contentions 4 and 5, except that the Appeal Board reverses and remands the Licensing Board's ruling on ETEs for further calculations relative to the "hidden vehicles" described in ¶ 9.120 of LBP-88-32. Thus, the Appeal Board addresses the remainder of issues concerning the NHRERP not covered by ALAB-924, 30 NRC 331 (1989), petitions for review pending. In addition, the Board

further explains some matters in light of CLI-90-2, 31 NRC 197 (1990), petition for review pending sub nom. Massachusetts v. NRC, No. 90-1132 (D.C. Cir. filed Mar. 7, 1990), the Commission's recent decision in which it discussed whether emergency planning requirements are "adequate protection" standards within the meaning of section 182 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2232).

B For purposes of judging the adequacy of state and local response personnel resources, individuals properly are considered to be "available" to provide services if they are within an organization or "pool" that is a candidate to perform a particular response function.

C The Licensing Board's conclusion that (1) "temporal availability" of response personnel (i.e., the ability to participate in response activities on a twenty-four hour basis, and (2) "volitional availability" of response personnel (i.e., the willingness to participate in response activities), is more properly addressed and evaluated as part of the "planning" and "implementation" process (including the full-scale emergency response exercise), rather than in assessing the adequacy of response personnel resources "pools," is a reasonable one that is not at odds with any existing regulatory requirement.

D The declaration in 10 C.F.R. § 50.47(b)(1) that each principal response organization must have "staff to respond and to augment its initial response on a continuous basis" and the guidance in NUREG-0654 Criterion II.A.4 that "[e]ach principal organization shall be capable of continuous (24-hour) operations for a protracted period" do not require or suggest any particular time by which a response organization must be "fully staffed" or any particular method by which staffing adequacy must be demonstrated.

E Section IV.D.3 of Appendix E to 10 C.F.R. Part 50, while mandating that the licensee must have the capability to notify state and local officials within fifteen minutes of declaring an emergency and that the capability must exist to notify the public of a situation requiring urgent action within fifteen minutes of notifying state and local officials, does not require any particular time for attaining full response organization staffing or any particular method by which staffing adequacy must be demonstrated.

F In the absence of any compelling showing that significant segments of those in the response personnel "pools" being relied upon as a principal planning basis to establish response personnel resources adequacy are for one reason or another likely to be "unavailable," there was no need for emergency planners to make a separate "availability" showing as part of the process undertaken to identify those "pools."

G A party that fails to put forth allegedly relevant information on direct examination is not entitled to have that information considered because it could have been elicited during cross-examination.

H "Section 50.47(a)(2) does not require deferment of any hearing on State and local government emergency response plans to await FEMA's issuance of final findings on those plans. Rather, what that [s]ection contemplates is a licensing decision based on the best available current information on emergency preparedness." Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 775 (1983) (citation and footnote omitted). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-776, 19 NRC 1373, 1379 (1984); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 379-80 (1983).

I It is for the Licensing Board to judge at exactly what stage an emergency plan is sufficiently developed to allow for hearings and a decision, taking into account the evidence on the current state of the plan. Zimmer, ALAB-727, 17 NRC at 775.

J The admission of surrebuttal testimony is a matter within the discretion of a Licensing Board, particularly when the party sponsoring the testimony reasonably should have anticipated the attack upon its evidence. See Cellular Mobile Systems v. FCC, 782 F.2d 182, 201-02 (D.C. Cir. 1985).

K It is a "settled principle of appellate practice that an appellant is ordinarily precluded from pressing issues or advancing arguments not presented to the trial tribunal," except possibly in the case of "serious substantive issues." ALAB-924, 30 NRC at 358.

L In reviewing Licensing Board findings based on the testimony of applicants' expert witnesses, "[t]he possibility that inconsistent or even contrary inferences could be drawn if the views of [intervenors'] experts were accepted does not prevent the trial board's findings from being supported by substantial evidence." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 866 (1975) (citations omitted).

M After giving the Licensing Board's factual findings the probative force they intrinsically command regarding aberrant behavior by the general public, the Appeal Board concludes there is no basis for reversing that finding.

N A Commission observation in its immediate effectiveness review concerning the adjudicatory record is not binding upon the Appeal Board. See 10 C.F.R. § 2.764(g).

O Planning officials are required to develop "[g]uidelines for the choice of protective actions during an emergency." 10 C.F.R. § 50.47(b)(10). To this end, planners also are to "provide an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway EPZ [(i.e., emergency planning zone)] for transient and permanent populations." Id. Part 50, App. E, § IV.

P An evacuation time estimate (ETE) should be prepared "based on a dynamic analysis (time-motion study under various conditions) for the [EPZ]." NUREG-0654 Criterion II.J.10.I. See also Appendix A to NUREG-0654.

Q "[T]he [ETE] analysis is intended to reflect a realistic time for completing an evacuation." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 244 (1986); see also Limerick, ALAB-836, 23 NRC 479, 486 (1986). With this information in hand, "emergency coordinators can then decide what protective actions (e.g., sheltering or evacuation) are warranted in the circumstances, if a radiological emergency occurs." Limerick, ALAB-845, 24 NRC at 244; see also Limerick, ALAB-836, 23 NRC at 486.

R The ETE is only a planning tool; as such, Commission regulations establish no particular time limits for completing an EPZ evacuation. See Limerick, ALAB-845, 24 NRC at 244; Limerick, ALAB-836, 23 NRC at 486.

S There is no regulatory requirement that the State permanently assign existing police resources to a particular location to ensure that there are no staffing delays in the event of a radiological emergency. Simply because additional police resources will be needed in a particular location in the event of a radiological emergency and will require some period of time to arrive, this potential for delay does not require that permanent police staffing in that area be "beefed up" to a degree beyond what is otherwise required to provide adequate law enforcement protection under normal circumstances. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 536 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985).

T The Appeal Board may take official notice of the State of New Hampshire Traffic Management Manual accompanying the New Hampshire Radiological Emergency Response Plan. See 10 C.F.R. § 2.743(i).

U If a particular accident sequence requires that protective action be taken when state and local emergency response efforts are not fully mobilized, response officials would have to weigh whatever increased risks may be attendant upon taking a particular protective action (such as an evacuation) without having the planned response personnel in place.

V In producing ETEs, planners should include "[e]stimates of transient populations . . . such as peak tourist volumes." NUREG-0654, App. 4, at 4-3.

W For the ocean beach area within the EPZ, NUREG-0654's guidance to calculate the ETEs on the basis of "peak tourist volumes" is well served by the use of the "reasonable expectable occupancy" method (i.e., a method that uses an estimate of parked vehicles, as well as vehicles in transit, on a peak representative day).

X When the vehicle count used in calculating the ETE for the beach population was based on an estimate of the actual number of vehicles on a representative peak day and when "convincing unrebutted testimony" had been presented that there were "hidden vehicles," i.e., vehicles not observable from aerial photographs (and such number of vehicles was set forth in the Licensing Board's findings), the Board erred in not requiring that those hidden vehicles be incorporated within the appropriate ETE calculations.

Y While there may be an independent responsibility on the part of the State to incorporate revised ETEs into an emergency plan, see NUREG-0654 Criterion II.J.10.l-m, the applicant rather than the State is responsible for preparing an amended set of ETEs, see 10 C.F.R. Part 50, App. E, § IV; NUREG-0654 Criterion II.J.8.

Z When full-power authorization has been made effective, in remanding matters, the Appeal Board must consider the impact of its action upon that authorization. Limerick, ALAB-845, 24 NRC at 234; Limerick, ALAB-836, 23 NRC at 250; see CLI-90-3, 31 NRC at 230.

AA When additional calculations mandated by the Appeal Board to correct an ETE deficiency do not require significant time or resources to complete and are not likely to result in a profound change in the present ETEs, an existing licensing authorization need not be vitiated. See 10 C.F.R. § 50.47(c)(1).

BB When, in conformance with a Commission policy statement, applicants (1) had provided a list of local medical facilities capable of administering care to contaminated individuals, and (2) had committed to comply fully with any additional Commission requirements that might be imposed in response to a judicial determination overturning the Commission's previous interpretation of the scope of necessary medical services arrangements under 10 C.F.R. § 50.47(b)(12), the Licensing Board properly rejected an intervenor's contention challenging applicants' compliance with the requirements of 10 C.F.R. § 50.47(b)(12).

CC When a party fails to controvert material facts as established by another party in support of a motion for summary disposition, they are effectively admitted. See 10 C.F.R. § 2.749(a).

DD Emergency planning is an "adequate protection" standard under section 182 of the Atomic Energy Act (AEA). CLI-90-2, 31 NRC at 210-13.

EE To determine whether an emergency plan provides "adequate protection," the plan must be assessed in terms of whether it meets the sixteen planning standards of 10 C.F.R. § 50.47(b). CLI-90-2, 31 NRC at 213, 217.

ALAB-933 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; June 7, 1990; MEMORANDUM AND ORDER

A The Appeal Board grants the applicants' and the staff's motions either to strike or to dismiss as premature intervenors' appeals of the Licensing Board's May 3, 1990 memorandum and order, except insofar as those appeals addressed the dismissal of one of the intervenors from the proceeding.

B The criteria for reopening a record are set forth in 10 C.F.R. § 2.734.

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

D A licensing board order that dismisses a party from the proceeding possesses sufficient finality to be appealable.

E The appropriate vehicle for seeking a speedy merits disposition of an assertedly insubstantial appeal is a motion for summary affirmance, not a motion to dismiss.

F While the Appeal Board may invoke its discretionary authority to review interlocutory orders by way of directed certification, see 10 C.F.R. § 2.718(i), it will not normally do so unless either of the established tests for the exercise of that authority is met; see also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

G A protective notice of appeal is appropriate when there is any room for question respecting the finality for appeal purposes of a licensing board order. See ALAB-906, 28 NRC 615, 619 (1988).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-90-1 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; January 8, 1990; MEMORANDUM AND ORDER (Ruling on Intervenors' Motions to Admit a Late-Filed Contention and Reopen the Record Based upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY)

LBP-90-2 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; January 9, 1990; MEMORANDUM AND ORDER (Denying Intervenors' Motion to Reopen Record Regarding Proposed Amendment to Operating License Application)

LBP-90-3 NORTHERN STATES POWER COMPANY (Pathfinder Atomic Plant), Docket No. 30-05006-MLA (ASLBP No. 90-599-01-ML) (Byproduct Material License No. 22-08799-02); MATERIALS LICENSE AMENDMENT; January 10, 1990; MEMORANDUM AND ORDER

A Where requestor for standing provides no nexus between the injury claimed and the proposed licensing activity, the claim of injury is purely speculative and legally insufficient to establish standing.

B A person who regularly commutes past the entrance of a power plant site, sought to be decommissioned, may be presumed to have the requisite interest that she might be affected by the decommissioning, and meets the judicial standards for standing under 10 C.F.R. § 2.1205(g).

LBP-90-4 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-4, 50-251-OLA-4 (ASLBP No. 89-584-01-OLA) (Pressure-Temperature Limits); OPERATING LICENSE AMENDMENT; January 16, 1990; MEMORANDUM AND ORDER

A The Licensing Board sustains the prior issuance of an immediately effective license amendment by granting the Licensee's Motion for Summary Disposition on the last contention remaining in this proceeding. The Board finds that the Intervenors seek to litigate matters outside the scope of the proceeding, fail to adequately establish the existence of a disputed material fact as to those matters within the scope of the proceeding, and seek to impose testing procedures not required under 10 C.F.R. Part 50.

B The purpose of the summary disposition procedure set out in 10 C.F.R. § 2.749 is to avoid holding hearings on issues where there is no genuine dispute of material fact. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).

C Where a summary disposition motion is supported by affidavit, 10 C.F.R. § 2.749(b) requires the opposing party to state specific facts, rather than rely on mere allegations or denials, to show that there is a genuine issue of fact. Absent such a showing, summary disposition will issue if the movant has satisfied his burden of establishing that no genuine issue as to any material fact exists.

D Appendix H to 10 C.F.R. Part 50 provides that reactors in an integrated surveillance program (ISP) must have "similar" design and operating features; it does not require identical operating features. 10 C.F.R. Part 50, Appendix H, II.C.1 (1989).

E Proposals to modify Commission-imposed testing methodologies that a Licensee is authorized and obligated to follow must be dismissed as an attack on a Commission regulation, and, to the extent they constitute a petition for rulemaking, are outside the jurisdiction of a Licensing Board.

F The following technical issues are discussed: Fracture Toughness/Ductibility; Neutron Fluence.

LBP-90-5 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-4, 50-251-OLA-4 (ASLBP No. 89-584-01-OLA) (Pressure-Temperature

Limits); OPERATING LICENSE AMENDMENT; January 16, 1990; MEMORANDUM AND ORDER (Denying Petition to Intervene)

A The Licensing Board denies a petition to intervene filed 11 months after the close of the time specified in the Notice of Opportunity for Hearing as inexcusably late, and not otherwise justified based on a consideration of the other four factors set out at 10 C.F.R. § 2.714(a)(1).

B While all the factors set out at 10 C.F.R. § 2.714(a)(1) must be considered and none is dispositive, the most important of the five factors is the presence or absence of "good cause" justifying the lateness of the petition. Absent "good cause," a petitioner bears a heavy burden to justify a late intervention based on the remaining four factors.

C As a general rule, a decision to remain silent, and refrain from intervening in a timely manner, is not justification for a Board to permit intervention in an untimely manner, and the Licensing Board finds no statute, regulation, policy statement, or Commission case law that even suggests that employees of an applicant or licensee are entitled to a generic exemption from the Commission's procedural rules.

D A licensing board does not foreclose the possibility that special facts might exist which would warrant a departure from the general rule that one cannot successfully stand on his rights to file an untimely petition after sitting on his rights to file a timely petition. However, mere assertions of fears of retaliation do not establish the type of special facts necessary.

E A licensing board will not assume that the fact employee might have been the victim of retaliation after date for filing timely petition to intervene has passed so infected or controlled the employee's actions prior to that date as to render him effectively incapable of exercising his rights under the Commission's rules of practice as protected by section 210 of the Energy Reorganization Act.

F While newly arising information has been recognized as "good cause" for a late-filed petition to intervene, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), previously available information newly acquired by a petitioner has not. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984).

G While an early decision of the Appeal Board suggested that the door was open on the question whether publication in the Federal Register was sufficient, standing alone, to put potential intervenors on notice, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), that door was subsequently closed in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), ALAB-341, 4 NRC 95 (1976), wherein the Appeal Board summarily rejected a petition to intervene filed beyond the period specified in the applicable Federal Register.

H A claim by a petitioner that it was lulled into inaction because it relied on another party or entity to represent its interests does not constitute "good cause." See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796 (1977).

I The existing parties, the public, and the Licensing Board have a cognizable interest in the timely and orderly conduct of licensing proceedings. Thus, the fact that petitioners were prepared to go forward with their arguments immediately and that intervention would not delay an already issued license amendment do not fully answer the policy considerations underlying the Commission's concerns under the last factor of 10 C.F.R. § 2.714(a)(1). A party has a right to discover, prior to hearing, the nature and factual bases of all other parties' litigation positions. Board refused to grant intervention under these circumstances where significant delay could be avoided only at the expense of the discovery rights of the existing parties to the detriment of the orderly and efficient conduct of any future hearing.

J While a broadening of the issues due to the grant of a late-filed petition to intervene might not be of critical importance at the earlier stages of a case, the Licensing Board found this consequence to be a strong argument against such intervention where it occurs toward the end of the proceeding, particularly where no "good cause" exists to justify the delay in seeking intervention.

LBP-90-6 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA-4 (ASLBP No. 89-595-03-OLA) (Construction Period Recapture); OPERATING LICENSE AMENDMENT; January 26, 1990; MEMORANDUM AND ORDER (Ruling on Petition for Leave to Intervene Filed by the State of Vermont)

A The Licensing Board grants the State of Vermont's request for a hearing for the purpose of opposing the grant of a license amendment to extend the Vermont Yankee Nuclear Power Station operating license to a full 40-year term, and admits one of nine proposed contentions for litigation.

B In determining whether a petitioner has standing, the Commission has held that contemporaneous judicial concepts of standing are controlling. Thus, there must be a showing (1) that the action being challenged could cause "injury-in-fact" to the person seeking to intervene and (2) that such injury is arguably within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act.

C "Abstract concerns" or a "mere academic interest" in the matter which are not accompanied by some real impact on a petitioner will not confer standing. Rather, the asserted harm must have some particular effect on a petitioner, and a petitioner must have some direct stake in the outcome of the proceeding.

D While there is little guidance in NRC case law concerning the meaning of "aspect" as the term is used in 10 C.F.R. § 2.714, a petitioner may satisfy this requirement by identifying general potential effects of the licensing action or areas of concern that are within the scope of the public health and safety matters that may be considered in the proceeding.

E Where a proposed licensing action concerns a nuclear facility within a state, which has potentially significant effects on the environment of a state and the health, welfare, and safety of its citizens, a state has standing to intervene in a proceeding.

F The issue of whether a proposed license amendment does or does not involve a significant hazards consideration is not litigable in any hearing that might be held on the proposed amendment because the finding is a procedural device whose only purpose is to determine the timing of the hearing (before or after issuance of the amendment).

G Since an environmental report (ER) is required only for actions that would require an environmental impact statement (EIS) under the Commission's regulations, no ER is required in connection with a proposed construction period recapture amendment to extend an initial operating license to a full 40-year term because the Commission's regulations at 10 C.F.R. § 51.20(b) does not specify that type of action as requiring an EIS. Only an environmental assessment (EA) is required in connection with such license amendments.

H A contention asserting that an environmental impact statement (EIS) or environmental report (ER) is required to support a proposed licensing action would need to claim that the action presents potentially significant environmental impacts or unresolved issues of irretrievable commitment of resources, and the bases would need to identify those impacts or resources, the litigation of which is not proscribed by the Commission's regulations.

LBP-90-7 SAFETY LIGHT CORPORATION, et al. (Bloomsburg Site Decontamination), Docket Nos. (030-05980, 030-05981, 030-05982, 030-08335, 030-08444 (ASLBP Nos. 89-590-01-OM, 90-598-01-OM-2); ENFORCEMENT; January 29, 1990; ORDER (Denying Motions to Dismiss NRC Orders Issued March 16, 1989, and August 21, 1989, for Lack of Jurisdiction)

A The Licensing Board denies respondent's motion to dismiss for lack of jurisdiction, concluding that the failure of the original licensee to fully inform the Commission of corporate reorganizations and sales of controlling blocks of stock rendered all successor corporations liable for the costs of decontamination of sites previously under the control of the original licensee, and subject to the enforcement authority of the Commission and the jurisdiction of the Board.

B By section 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2234, Congress established a strong public policy prohibiting the "transfer of control of any license" by every conceivable means, without the prior written and informed consent of the Commission. This broad and sweeping statutory language was clearly intended to prescribe the alienation in any manner or form of any license or right to utilize or produce special nuclear material, without the specified Commission action.

C Any person or corporation that chooses to engage in licensed nuclear byproduct material activities, is not completely free to conduct itself in a business-as-usual manner. There are substantial constraints upon unfettered business actions and forms resulting from the high degree of regulatory oversights, direct or consequential. Not surprisingly, such limitations apply to issues involving the direct or indirect transfer of licenses, significant changes in corporate and other licensees, and matters related to the liability and responsibility for the decontamination of sites and facilities used in licensed activities.

D The Atomic Energy Act of 1954, as amended, requires a full, fair disclosure to be made by licensees of actions involving the transfer or control of licensees, so that the NRC can make an informed judgment whether such actions are in accordance with the Act. Clearly, financial and other considerations related to

decontamination of the site of licensed nuclear byproduct activities could and should be reviewed by the NRC in fulfilling its statutory responsibilities.

E Where NRC is denied the opportunity to review the effect of significant changes in a licensee's corporate organization due to the licensee's failure to comply with statutory disclosure requirements, the transfers of control of a licensee by corporate restructuring were invalid as to the NRC which is obligated by statute to disregard them.

F The prohibitions against unapproved transfers of control of licenses enacted by Congress cannot be ignored or avoided by licensees or by the NRC itself. Attempted transfers of ownership and control by a licensee were ineffective to eliminate NRC jurisdiction over the succeeding entities because the transfers were in violation of statutory requirements.

G Massive transfers such as 100% of stock ownership and fundamental changes in corporate structure, ownership, and control are the same as attempted transfers or assignments of licenses.

H The strong public policy enunciated by Congress in barring unapproved transfers of control of licensees is controlling, and hence there can be no avoidance of such mandatory reporting requirements by NRC acquiescence, delays, laches or equitable estoppel, notification of the SEC or the licensee's own shareholders, alleged proper business motivations, spinoffs, or the provisions of 10 C.F.R. Part 50.

LBP-90-8 SAFETY LIGHT CORPORATION, et al. (Bloomsburg Site Decontamination), Docket Nos. 030-05980, 030-05981, 030-05982, 030-08335, 030-08444 (ASLBP Nos. 89-590-01-OM, 90-598-01-OM-2); ENFORCEMENT; February 8, 1990; ORDER

A The Licensing Board reconsiders and modifies its prior stay pendente lite of the immediate effectiveness of one of two Staff enforcement orders. The Staff order in question required the parties to begin monthly payments into a fund intended to defray the costs of a site characterization study, and made the monies in that fund immediately available for expenditure. In modifying its prior stay, the Licensing Board permits the requirement of payment to become immediately effective but stays any expenditure of such funds pending further order of the Board.

B The four-factor test was codified by the Commission with regard to requests for stays of immediately effective decisions in 10 C.F.R. § 2.788. Although the regulation does not explicitly apply to decontamination enforcement orders, it is logical to apply those well-recognized standards in considering the equitable remedy of a stay of such orders.

C In a decontamination enforcement proceeding, the public interest is the most important consideration. This factor argues against a stay where the documentary record tends to establish that it is in the public interest for prompt action to be taken to require corporations and others responsible for polluting a site with nuclear contamination to clean up the site.

LBP-90-9 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE AMENDMENT; February 13, 1990; INITIAL DECISION (Ruling on All Remaining Issues)

A This Initial Decision directs Staff to issue a license amendment to Kerr-McGee Chemical Corporation which will permit it to dispose of certain thorium mill tailings in an engineered disposal cell to be constructed on its West Chicago, Illinois site. It follows LBP-89-35, 30 NRC 677 (1989), in which certain issues were resolved in Kerr-McGee's favor on cross-motions for summary disposition, and certain other limited issues were set down for hearing.

B In this Initial Decision, the Licensing Board interprets Criterion 1 to 10 C.F.R. Part 40, Appendix A, finds facts following a hearing on those limited issues, and decides a motion for summary disposition of all other issues remaining to be decided. The Licensing Board concludes that Kerr-McGee's proposed disposal cell satisfies the requirements of 10 C.F.R. Part 40, Appendix A, by wide margins and that there is a high degree of assurance that no significant contamination will occur as a result of the disposal of the West Chicago mill tailings in it.

C Criterion 1 requires that the goals of remoteness from population and hydrologic factors must be optimized in choosing among alternative mill tailings disposal sites.

D The Introduction to Appendix A provides that consideration must be given to economic factors in choosing among alternatives and permits applicants to propose alternatives to specific requirements. These provisions dictate that the Appendix A criteria must be applied flexibly with due consideration of the costs of achieving certain benefits under the criteria.

E Where the evidence supports the conclusion that the proposed disposal cell will have only a negligible impact on groundwater quality, there is no justification for incurring the expense of disposing of the mill tailings at another site where the impact on groundwater might be less.

F Analyses of disposal cell behavior must have an appropriate degree of conservatism. They should permit realistic predictions of the impact of the proposed disposal cell which, to the extent they err, overstate that impact. However, they should not be so conservative as to be misleading, overstating that impact to the extent of calling the feasibility of the proposed cell into question.

LBP-90-10 ROCKWELL INTERNATIONAL CORPORATION (Rocketdyne Division), Docket No. 70-25 (ASLBP No. 89-594-01-ML) (Special Nuclear Material License No. SNM-21) (Request to Renew to October 1990); MATERIALS LICENSE AMENDMENT; March 19, 1990; MEMORANDUM AND ORDER

A The Presiding Officer in this proceeding, which is governed by Subpart L of 10 C.F.R. Part 2, grants in part Applicant's motion to strike certain concerns and parts of concerns of the Intervenors pursuant to 10 C.F.R. § 2.1233(e).

B The Presiding Officer reviews each of the concerns mentioned in Applicant's motion to strike and determines, based on specific facts related to each concern, what portions of the motion to strike may be appropriately granted.

C To strike a concern or a part of a concern on the ground of redundancy, the Presiding Officer must find redundancy within the filing of a particular intervenor. Alleged redundancy with another intervenor does not create grounds for a motion to strike.

D The presiding officer suggests that the parties reassess their settlement positions and consider further negotiations leading toward settlement.

E Applicability of quality assurance (Appendix B to Part 50) to plutonium processing and fuel fabrication plants.

LBP-90-11 ROCKWELL INTERNATIONAL CORPORATION (Rocketdyne Division), Docket No. 70-25 (ASLBP No. 89-594-01-ML) (Special Nuclear Material License No. SNM-21) (Request to Renew to October 1990); MATERIALS LICENSE AMENDMENT; March 30, 1990; MEMORANDUM AND ORDER (Reconsideration: Homeowners and LAPSR)

A In response to Intervenors' motion, the presiding officer readmitted the Santa Susana Homeowners Association as a party along with two of its concerns.

B Relevant newspaper articles, properly indexed and attached for reference purposes to an intervenor's basic case, generally will be sufficient grounds to withstand a motion to strike.

C A concern that population has grown in the vicinity of a facility for handling special nuclear materials will not withstand a motion to strike when it is unaccompanied by supported allegations that the resulting risk of radiation release will exceed 10 C.F.R. Part 20 standards for allowable radiation exposures.

D A concern about additive effects from toxic and radioactive materials that is not part of a NEPA concern, shall be struck because there is no regulatory requirement that such alleged additive effects be considered other than in a NEPA context.

LBP-90-12 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; May 3, 1990; MEMORANDUM AND ORDER (Ruling on Certain Remanded and Referred Issues)

LBP-90-13 BALTIMORE GAS AND ELECTRIC COMPANY (Calvert Cliffs Independent Spent Fuel Storage Installation), Docket Nos. 72-8, 50-317, 50-318; MATERIALS LICENSE; May 15, 1990; MEMORANDUM AND ORDER (Termination of Proceeding)

A The Licensing Board terminates a proceeding in which, prior to the issuance of a Notice of Hearing, the only petitioner seeking a hearing elected to withdraw.

LBP-90-14 BASIN TESTING LABORATORY, INC. dba BASIN SERVICES, INC., Docket No. 15000033-SC/CivP (ASLBP No. 90-601-01-SC/CivP) (EA 88-265) (General Licensee Under, 10 C.F.R. § 150.20); CIVIL PENALTY; May 30, 1990; MEMORANDUM AND ORDER (Order Approving Settlement Agreement and Terminating Proceeding)

A The Licensing Board approves a settlement agreement between the NRC Staff and Licensee subject to an Order Imposing Civil Monetary Penalty and an Order to Show Cause Why License Should Not Be Suspended, and grants the parties' joint motion to terminate the proceeding.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-90-15 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440-OLA (ASLBP No. 90-605-02-OLA); OPERATING LICENSE AMENDMENT; June 11, 1990; MEMORANDUM AND ORDER (Granting Petition to Intervene)

A This Memorandum and Order reviews a petition to intervene and contention filed in response to a notice indicating that Licensees had applied for an amendment to their operating license which would delete cycle-specific parameter limits and other cycle-specific fuel information from the Perry Technical Specifications and substitute a provision allowing Licensees to set these limits in accord with NRC-approved methodology. The contention raises an argument that grant of the amendment will unlawfully deprive petitioner of its hearing rights under § 189a of the Atomic Energy Act. The Board indicated that in its view, because it was not possible to ascertain from the application whether the license amendment would vest any substantial discretion in Licensees in determining the cycle-specific parameter limits, the contention is admissible. Licensees and Staff were afforded an opportunity to seek reconsideration prior to the Board's order admitting the petitioner and its contention.

B Section 50.36 of the Commission's regulations requires that power reactor Technical Specifications must include those matters as to which the imposition of rigid conditions or limitations is necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Cycle-specific parameter limits are such matters. The Commission may not abdicate its responsibility to review and approve license amendment applications that raise such matters by granting licensees substantial discretion in determining them.

C An interested member of the public is entitled to an opportunity for hearing on an application for an amendment to a power reactor license.

LBP-90-16 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-5, 50-251-OLA-5 (ASLBP No. 90-602-01-OLA-5) (Technical Specifications Replacement) (Facility Operating Licenses Nos. DPR-31, DPR-41); OPERATING LICENSE AMENDMENT; June 15, 1990; MEMORANDUM AND ORDER (Prehearing Conference Order: Parties and Contentions)

A The Licensing Board admits an intervenor after detailed consideration of issues of standing, timeliness, and the admissability of contentions. Five of fifty-six contentions are admitted. The admission of safety issues is based on genuine issues of fact arising because of Applicant's admission that a particular change in technical specifications is a "relaxation" and because of an error or omission in the accompanying analysis. The admission of environmental issues is based on genuine issues of fact raised with respect to safety issues that might ultimately result in a finding that the change in specifications is "a major federal action."

B An organization may gain standing based on the standing of a "member," providing that the member is more than just a passive contributor without any control over its operation. Furthermore, the "member" on whom membership is based must be a member for herself and not for another organization whose standing has not been demonstrated.

C Allegations of harassment and intimidation must be documented. After an opportunity for documentation has been afforded, unsupported defamatory allegations may be struck from the record.

D A nonlawyer representing an organization stated — as part of a filing that alleged harassment and intimidation — that he no longer authorized that organization to represent him. Nevertheless, since no other basis for standing exists and his withdrawal would deprive the organization of standing, it is appropriate to give the nonlawyer a second chance to consider the implications of his withdrawal.

E In applying the Commission's newly adopted standard for the admission of contentions, the Board finds that a petitioner must identify an error or omission in Applicant's analysis in order to gain admission for its contention. Merely stating, in reliance on an admission of Applicant, that a change in its technical specifications is a "relaxation" is not sufficient to gain admission for a contention when Applicant's analysis accompanies its admission. Petitioner must also identify an error or omission in the accompanying analysis to create a genuine issue of fact and gain admission for its contention.

F With respect to environmental issues, the Board admitted two contentions because genuine issues of fact with respect to safety contentions could ultimately result in a finding that this case entails "a major federal action."

G For a pressurized water reactor: risks during out-of-service time; combined limit for thermal power, pressurizer pressure, and the highest operating loop coolant temperature; change in mode reduction requirements; RCS boron concentration; BAT boron concentration surveillance; outage time for one channel of heat tracing; rod drop time.

LBP-90-17 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-SP (ASLBP No. 87-545-01-SP) (Suspension Order); SUSPENSION OF LICENSE; June 12, 1990; MEMORANDUM AND ORDER (Granting NRC Staff Motion for Summary Disposition and Terminating Proceeding)

A In this case the Licensing Board grants summary disposition of four issues posited by Advanced Medical Systems, Inc., challenging the lawfulness of a summary license suspension order under the provisions of 10 C.F.R. §§ 2.200-2.206 and 10 C.F.R. § 30.61.

B The lawfulness of a summary license suspension order issued under 10 C.F.R. §§ 2.200-2.206 and 10 C.F.R. § 30.61 is determined by whether or not a Director's decision to issue the order is an abuse of discretion under the considerations announced in Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173 (1975).

C A Director's decision to issue a summary license suspension order under 10 C.F.R. §§ 2.200-2.206 and 10 C.F.R. § 30.61 must be based upon reliable, probative, and substantial evidence. "Substantial" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

D Only the evidence available to the Director at the time a decision is made to issue a summary license suspension order under 10 C.F.R. §§ 2.200-2.206 and 10 C.F.R. § 30.61 is relevant to a determination of whether or not the Director's decision to issue the order is an abuse of discretion. Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173 (1975), citing Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-38, 7 AEC 12 (1973).

E A summary license suspension order issued under 10 C.F.R. §§ 2.200-2.206 and 10 C.F.R. § 30.61 is facially clear if the licensee can reasonably discern from the order the issues upon which it would need to seek discovery if a hearing is requested under 10 C.F.R. § 2.202(b).

LBP-90-18 CURATORS OF THE UNIVERSITY OF MISSOURI, Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (Re: TRUMP-S Project) (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247); MATERIALS LICENSE AMENDMENT; June 15, 1990; MEMORANDUM AND ORDER (Admitting Parties and "Areas of Concern"; Deferring Action on a Stay)

A The presiding officer admits two parties, after detailed consideration of standing questions, and admits six of seven areas of concern presented by those parties. He defers action on a request for a stay on the ground that the criteria for a stay have not been met but that adequate information is not currently available for use by the intervenors.

B The presiding officer found that residence of a member of a concerned organization within 2 miles of an experiment utilizing 10 grams of plutonium was adequate to establish standing. He said, following Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 41 (1990), that: "[F]or an organization to have standing it must show injury in fact to its organizational interests or to the interest of members . . . who have authorized it to act for them. Where the organization is depending upon injury to the interest of its members or sponsors to establish standing, the organization must provide with its petition identification of at least one member or sponsor who will be injured, a description of the nature of that injury, and an authorization for that organization to represent that individual in the proceeding. The injury in fact must be arguably within the zone of interests protected by statutes covering the proceeding."

C An organization may not be an intervenor unless the areas of concern it advances are consistent with its organizational purpose.

D A petitioner must show "injury in fact" in order to obtain standing. However, the phrase "injury in fact" does not bear its ordinary English meaning and refers to an injury that may be possible should a proposed governmental action proceed. Nor is it required that as part of consideration of standing that a petitioner prove that injury will actually occur. It is enough to have reasonable grounds for believing that injury may occur.

E The "injury in fact" test is the same for formal adjudication and for Subpart L cases.

F The presiding officer admitted six of seven areas of concern, pointing out that a petitioner need not even state a concern, just an "area of concern." One area of concern, relating to fears concerning an alleged effect of this experiment on nuclear proliferation, was excluded because there was no showing of any legal basis for the claim and it was therefore not germane to the license.

G When petitioner fails to rely on any legal materials to assert that a project improperly risks "nuclear proliferation," they have not stated a legally cognizable "area of concern" that is germane to the pending application for a license.

H Petitioners' are required to file a request for a stay at the outset of their case, even though information relevant to their need for a stay may not be available to them. Consequently, the presiding officer reviewed the criteria for granting a stay and deferred action based on the lack of relevant information available to the Petitioners.

I Petitioners' arguments that they have a right to a hearing prior to the granting of a license or amendment, with respect to the amendment of a special materials license, is arguably meritorious but nevertheless impermissible as a challenge to the agency's procedural regulations.

J When a petition has been filed without any formal notification that a licensing action is pending, the time of actual notice from which timeliness is reckoned is the time of actual notice that there is a licensing action pending in which a person may be permitted to intervene.

K The following technical issues are discussed: Neptunium; Americium; Plutonium; Dispersion of plutonium through fire or explosion, model of.

LBP-90-19 NORTHERN STATES POWER COMPANY (Pathfinder Atomic Plant), Docket No. 30-05004-MLA (ASLBP No. 90-599-01-ML) (Byproduct Material License No. 22-08799-02); MATERIALS LICENSE AMENDMENT; June 21, 1990; ORDER TERMINATING PROCEEDING

A Unilateral withdrawal of request for hearing, which formed the sole basis for granting a hearing on an application to amend a byproduct material license to decommission power reactor buildings, removes all justiciable issues before the Presiding Officer and brings the proceeding to an end.

LBP-90-20 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning Issues); OPERATING LICENSE; June 27, 1990; MEMORANDUM AND ORDER (Following Prehearing Conference)

LBP-90-21 ST. MARY MEDICAL CENTER—HOBART and ST. MARY MEDICAL CENTER—GARY, Docket Nos. 030-31379-OM, 030-01615-OM (ASLBP No. 90-612-04-OM) (EA 90-071) (Order Suspending Brachytherapy Activities and Modifying License) and PORTER MEMORIAL HOSPITAL (Valparaiso, Indiana), Docket No. 030-12150-OM (ASLBP No. 90-615-05-OM) (EA 90-072) (Confirmatory Order Suspending Brachytherapy Activities and Modifying License); SUSPENSION OF ACTIVITIES AND MODIFICATION OF LICENSE; June 26, 1990; PREHEARING CONFERENCE ORDER (Deferral and Termination of Respective Proceedings)

A In a Prehearing Conference Order governing two proceedings, the Licensing Board (1) grants a joint motion of all parties to defer for 30 days all activities in one proceeding, to accommodate settlement negotiations, and (2) grants the request of the only petitioner for intervention in the other proceeding to withdraw his request for a hearing, thus terminating that proceeding.

LBP-90-22 CURATORS OF THE UNIVERSITY OF MISSOURI, Docket Nos. 70-00270, 30-02278-MLA (ASLBP No. 90-613-02-MLA) (Re: TRUMP-S Project) (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247); MATERIALS LICENSE AMENDMENT; June 29, 1990; MEMORANDUM AND ORDER (Additions to the File)

A The presiding officer required the Staff to consider a new standard for determining the proper contents of a hearing file in a Subpart L case pursuant to 10 C.F.R. § 1.1231.

B In this Subpart L case, involving areas of concern related to fears of serious harm to public safety, the Presiding Officer, acting pursuant to, required the Staff to include in the hearing record: any NRC report (including inspection reports and findings of violation) and any correspondence between the NRC and Licensee, during the last 10 years, that Intervenors could reasonably believe to be relevant to any of their admitted areas of concern (an area of concern is a general area that is not sharply delimited to specific words used in describing the concern).

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

DD-90-1 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250, 50-251; REQUEST FOR ACTION; March 22, 1990; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A In this final Director's Decision, the Director of Nuclear Reactor Regulation responds to remaining issues left open by Partial Director's Decision DD-89-5, 30 NRC 73 (1989), as well as additional issues raised by Thomas J. Saporito in two subsequent Petitions. The Petitioner requested that the NRC take certain immediate actions with regard to Turkey Point Nuclear Generating Plant, Units 3 and 4, alleging as bases for his requests that there had been reprisals against employees for reporting safety concerns and a chilling effect on reporting safety concerns as a result of discrimination and harassment, that his employment had been adversely affected after engaging in protected activity as defined in 10 C.F.R. § 50.7, that the Licensee and its counsel acted improperly in connection with Petitioner's hearing before the Department of Labor, and that there had been a falsification and destruction of documents at the facility. For reasons set forth in the Petition, the Director denies the Petitioner's requests.

B The institution of proceedings in response to a request pursuant to 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised.

DD-90-2 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; OPERATING LICENSE; May 4, 1990; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of Nuclear Reactor Regulation denies a Petition, and its amendment, filed by JoAnne Bier Bearmon on behalf of Concerned Citizens for the Charlevoix Area requesting that the Nuclear Regulatory Commission order Consumers Power Company to update and retrofit its Big Rock Point Plant to meet all current safety design and radioactive-effluent criteria and to prohibit continued operation until such time as those objectives are met. The Petitioners alleged that the NRC and Consumers Power Company jointly have improperly used cost/benefit criteria and "grandfathering" to defer implementation of safety criteria, resulting in large radioactive emissions from Big Rock Point; that Big Rock Point does not meet current NRC safety standards; and that an environmental impact statement is required for continued operation of the facility.

B The principle is firmly established that persons may not use 10 C.F.R. § 2.206 procedures for reconsideration of issues previously decided.

C While the NRC is precluded from taking costs into account in establishing or enforcing the requisite level of adequate protection of the public health and safety, costs in devising or administering requirements that afford protection above and beyond that level may be considered.

D The National Environmental Policy Act of 1969 does not require environmental impact statements for major federal actions that preceded its effective date.

E The following technical issues are discussed: Radwaste Systems; Radioactive Dose to Workers; Operating and Maintenance Costs; Gaseous Waste System; Probabilistic Risk Assessment; Land Disposal of Low-Level Waste.

DD-90-3 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-A, 50-323-A; ANTITRUST; June 14, 1990; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation (NRR) has ruled upon a petition filed by the Northern California Power Agency (NCPA) requesting that the NRC take certain enforcement actions

against Pacific Gas & Electric Company (PG&E) for allegedly violating the antitrust license conditions for its Diablo Canyon Nuclear Units.

B Based upon a Federal District Court's findings and other information that has been provided to the NRC, the Director has concluded that PG&E violated the Diablo Canyon antitrust license conditions by refusing to provide certain California cities partial requirements wholesale power and transmission services.

C PG&E also has violated the antitrust license conditions for the Diablo Canyon units by including language in tariffs filed with the Federal Energy Regulatory Commission (FERC) that precludes interested parties from contesting the terms and conditions of those filings. These restrictive provisions provide PG&E with an unfair advantage in its dealings with other power systems by forcing them to take service under whatever terms PG&E provides. These provisions are inconsistent with the intent of the license conditions since the purpose of License Condition (9)a is to enable conceptual differences between parties in service schedules and tariffs to be resolved at FERC.

D The following technical issues are discussed: Refusals to provide partial requirements wholesale power and transmission services; Refusals to provide appropriate service schedules and tariffs.

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
CASES

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
REGULATIONS

LEGAL CITATIONS INDEX
STATUTES

LEGAL CITATIONS INDEX
STATUTES

LEGAL CITATIONS INDEX
OTHERS

LEGAL CITATIONS INDEX
OTHERS

SUBJECT INDEX

SUBJECT INDEX

FACILITY INDEX