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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judge  
Peter B. Bloch**

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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In the Matter of )  
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THE CURATORS OF )  
THE UNIVERSITY OF MISSOURI )  
 )  
(Byproduct License )  
No. 24-00513-32; )  
Special Nuclear Materials )  
License No. SNM-247) )  
\_\_\_\_\_ )

Docket Nos. 70-00270  
30-02278-MLA  
  
RE: TRUMP-S Project  
  
ASLBP No. 90-613-02-MLA

**LICENSEE'S RESPONSE TO  
"INTERVENORS' MOTION FOR RECONSIDERATION ...  
AND EMERGENCY ORDER ... PART I"**

In "Intervenors' Motion for Reconsideration ... and  
Emergency Order ... Part I" ("Part I Motion") (undated, served by  
Federal Express on November 12, 1990), Intervenors filed Part I  
of what will apparently be a 2-part motion by Intervenors for  
reconsideration of the Memorandum and Order (Licensee's Partial  
Response Concerning Temporary Stay) LBP-90-38 (Nov. 1, 1990).

Intervenors requested that various portions of  
LBP-90-38 be deleted. In the Memorandum and Order (Clarification  
of LBP-90-38) (the "Clarification Order") (Nov. 15, 1990), the  
Presiding Officer changed one sentence in LBP-90-38, deleted  
another sentence and deleted one of the ordering paragraphs.  
Although the Presiding Officer stated that such clarification was  
issued "[u]pon consideration of 'Intervenors' Motion for Order  
Recommending Formal Hearing, or in the Alternative Requiring Oral

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Presentations," the effect appears to be to grant some of the relief requested in the Part I Motion, or, at least, to moot some of the relief requested. Accordingly, under its discussion of each of Intervenor's three numbered arguments below, Licensee will point out whether a request for relief has been mooted and will respond only if the request is still outstanding or if Licensee believes that Intervenor's argument, even if moot, should not stay unanswered in the record.

Additionally, Intervenor requested that the Presiding Officer "immediately" direct the NRC Staff to hold in abeyance the Order in LBP-90-38 (presumably the Staff's issuance of the additional amendment to License SNM-247 authorized by the Presiding Officer under the second ordering paragraph on page 13 of the slip opinion of LBP-90-38) until the propriety of that Order had been resolved. Part I Motion at 1, 13. Since the Clarification Order deleted the second ordering paragraph, presumably the request for such "immediate" relief is moot. However, it should be noted that Intervenor had made no showing justifying an immediate directive to the staff to do or not to do anything. In essence, Intervenor were requesting a stay of the Presiding Officer's previous order or, more precisely, an immediate temporary stay. But they had made none of the showings required under §2.788(e) and they certainly had not made a showing of the existence of an "extraordinary case" under §2.788(g). Even if the Staff had issued the license amendment prior to the Presiding Officer's ruling on the motions for

reconsideration, such action could have readily been undone later if the Presiding Officer had so decided, with no injury to any party. The Intervenors simply proclaimed "urgency" (Part I Motion at 1), where none existed. Thus, the Presiding Officer would have had to deny Intervenors' request for "immediate" action.

**Argument 1: Presiding Officer's Jurisdiction to Authorize Issuance of the Amendment**

Intervenors' first argument was that the Presiding Officer lacked jurisdiction to authorize issuance of a license amendment involving possession of Pu-241. Since the Clarification Order deleted such authorization, such argument appears to be moot.

However, since Intervenors raised some basic questions concerning the Presiding Officer's jurisdiction, Licensee believes that the record should reflect the errors in Intervenors' first argument and their various subarguments. 1/

First, it should be noted that Intervenors err in persisting in treating the 1.21 curies of Pu-241 as if it were a distinct radiation source, separate and apart from the 10 grams of Pu-239/Pu-240 that were the subject of Licensee's application and were covered by the license amendment issued by the NRC. But the Pu-241 is not a distinct source, it is interspersed throughout the 10 grams of Pu-239/Pu-240. Since the Presiding

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1/ Licensee responds to Intervenors' argument regarding Am-241 (Part I Motion at 6) under Argument 3 below.

Officer has jurisdiction over the license amendment that authorized possession and use of the 10 grams of Pu-239/Pu-240, within the scope of admitted concerns in this proceeding he has jurisdiction over whether such license amendment should be upheld, modified, suspended or revoked. Modification of the license amendment could include the removal or clarification of existing license conditions, the addition of new restrictions or the clarification of present licensing language. Any such modification ordered by the Presiding Officer would have to be implemented through a license amendment, but that does not mean that the Presiding Officer would be exceeding his jurisdiction over the existing license amendment. To the contrary, the license amendment would simply be the regulatory mechanism through which the NRC Staff would implement directives lawfully issued by the Presiding Officer.

The Presiding Officer recognized that the Pu-241 was interspersed throughout the Pu-239/Pu-240 that is explicitly mentioned in the application and license amendment. 2/ If any

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2/ It should be noted that, once again, Intervenors have misrepresented the statements of others. They asserted that "The Presiding Officer has recognized (pp. 5-6) that the Licensee possesses an isotope which it is not authorized to possess, plutonium 241." Part I Motion at 2. Instead, the Presiding Officer stated exactly the opposite, i.e., that Licensee "can also possess the associated <sup>241</sup>Pu." LBP-90-38 at 6 n.11. Although this statement was deleted by the Clarification Order, this subsequent action does not legitimize Intervenors' false assertion regarding the Presiding Officer's statements.

(continued...)

party had demonstrated (within the scope of admitted concerns) that additional restrictions were required because of the presence of such Pu-241, the Presiding Officer could direct the imposition of such restrictions through an additional license amendment. By the same token, if he had decided (within the scope of admitted concerns) that the issued license amendment was unclear, he could order it to be modified to resolve any ambiguities. Accordingly, assuming that the issues raised by Intervenors were within the scope of admitted concerns, the Presiding Officer would have the jurisdiction to direct the issuance of an amendment regarding possession of Pu-241, which, in the view of Licensee, essentially clarified the existing license amendment. 3/

Thus, Intervenors' argument that there was "no application for the proposed license amendment" (Part I Motion at 2-3) was irrelevant. Many licensing proceedings result in the issuance of amendments reflecting the Presiding Officer's determinations. Such determinations are based on the record of

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2/ (...continued)

Intervenors are also mistaken in their characterization of the alleged "authorized limit of curies" in Amendment No. 12. See Part I Motion at 2 n.l. In Licensee's application, it identified the Pu-239/Pu-240 by mass (10 grams) and associated curie content (710 millicuries). Trace contaminants (including Pu-241 and Am-241) did not have to be identified, their associated curie content did not have to be included on the license application, and the license amendment did not limit such curie content.

3/ However, as Licensee has previously stated, such amendment was neither necessary nor warranted.

the proceeding; they do not required new "applications." The public is not deprived of a hearing. It had the opportunity to participate in the proceeding resulting in the amendment; just as Intervenors have the opportunity to participate in this hearing. If the Presiding Officer's decision is flawed, Intervenors can appeal; they do not have the right to start a new, separate proceeding before another NRC presiding officer.

Intervenors' argument regarding the amendment not being "licensee-initiated" (Id. at 2-3) was similarly flawed. Licensee does not have to "initiate" amendments that result from a hearing. In fact, during the hearing process an applicant or licensee may become subject to amendments imposing restrictions that it not only did not "initiate" but actively opposed. 4/

Intervenors were mistaken in their argument that, if the Presiding Officer believed that the subject license amendment should have dealt with Pu-241, he was only authorized to set the amendment aside. Part I Motion at 4-5. As discussed above, he

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4/ Intervenors' reference to the October 1, 1990, letter from Licensee's counsel to the Office of the Secretary was inapposite. That letter did not deal with an amendment directed by a presiding officer within the scope of a hearing, but involved a license amendment issued by the NRC Staff without an application having been filed.

It should also be noted that Intervenors have mischaracterized a statement in the October 1, letter. In a letter to the Presiding Officer dated November 7, 1990, Intervenors' counsel stated that "Licensee objected" to Intervenors sending a copy of an earlier request for hearing to the Presiding Officer. Licensee had not "objected," it had simply pointed out that the Presiding Officer had "no jurisdiction" in that matter.

is also authorized, as appropriate and within the scope of admitted concerns, to order the imposition of additional restrictions or the clarification of the issued amendment.

Intervenors misread §2.1251(a) as preventing the Presiding Officer from reaching final determinations on discrete issues at appropriate times. Part I Motion at 5. It is commonplace in NRC practice for presiding officers to issue partial initial decisions, and nothing in Subpart L is to the contrary.

Intervenors are correct in their argument that the Presiding Officer's determination regarding the Pu-241 interspersed in the Pu-239/Pu-240 could have constituted res judicata in a subsequent proceeding. Id. at 5. This does not mean, however, that the Presiding Officer lacked jurisdiction to do so. If he was mistaken in his substantive determination, Intervenors have an opportunity to so convince him by their motions for reconsideration or in the ongoing proceeding, or to convince the Commission in a subsequent appeal.

Finally, as may be deduced from Licensee's reference to "the scope of the admitted concerns" in the foregoing discussion, Licensee questions whether all of the issues raised by the Intervenors regarding Pu-241 are properly before the Presiding Officer. The presence of Pu-241 may be factually relevant to the admitted concerns in several ways: whether the amount of plutonium licensed to or possessed by Licensee exceeds 2 curies and thereby triggers some emergency planning requirement (Concern

No. 4); whether the consequences of a fire take into account the presence of Pu-241 (Concern No. 1); and, perhaps, whether administrative procedures take into account the presence of Pu-241 (Concern No. 3). To the foregoing extent, Licensee does not object to the Presiding Officer's consideration of the Pu-241 content of the licensed Pu-239/Pu-240.

However, no admitted concern deals with the separate legal issue of whether Licensee has been authorized to possess Pu-241. Thus, such issue (including the legal question of whether the Presiding Officer can or should take any action based on the Licensee's alleged lack of authorization to possess Pu-241) is not before the Presiding Officer. 5/

**Argument 2: Authority to Consider the License Application Amended**

Although Intervenors' literary allusions were amusing, they were not a substitute for the presentation of sound legal arguments and hard facts (rather than conjecture), both of which were prominently missing from the Part I Motion.

What is not amusing is that Intervenors persisted in asserting that the Presiding Officer had ruled exactly the opposite of his actual ruling. Although they claimed that he ruled "that the license does not authorize the Licensee to

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5/ In fact, this issue may be a compliance or enforcement question that can be raised, if at all, in a request for NRC Staff action under § 2.206, rather than in a proceeding on the issued license amendment.



possess what it possesses" (*Id.* at 8), as noted above, his actual ruling was that Licensee "can also possess the associated <sup>241</sup> Pu."

Apart from such misstatement, Intervenors' second argument was that the Presiding Officer lacked authority to "consider the license application to be amended to contain this new information." Part I Motion at 7-9. This argument was also mooted by the deletion of the pertinent language by the Clarification Order.

However, it should be noted that Intervenors' argument was mistaken because they failed to focus on the substance of the Presiding Officer's action. It is standard administrative agency practice, including before the NRC, that evidence can be introduced in a licensing proceeding to support, clarify and even modify a license application. It is Licensee's position that the information it provided in "Licensee's Submittal ...." (Oct. 30, 1990), including the Affidavit of Dr. J. Steven Morris Regarding Plutonium Content (the "Morris Plutonium Affidavit") (Oct. 29, 1990), concerning Regulatory Guide 10.3 and NRC licensing practice clarified and supported that its application and the issued license amendment incorporated, without the need for explicit identification, all non-significant contaminants (e.g., the Pu-241) interspersed within the Pu-239/Pu-240. In Licensee's view, the effect of the Presiding Officer's determination was simply to acknowledge that, in light of such information, the

application was sufficient. Whether the application was deemed to be clarified, supported or modified was of no import.

**Argument 3: Deficiencies With Respect to Americium**

Since the Clarification Order did not deal with americium, this portion of the Part I Motion does not appear to be moot.

It is difficult for Licensee to comprehend Intervenors' first subargument under Argument 3. Id. at 9. Intervenors' Written Presentation had variously asserted that Licensee possesses at least 5.3 to 21.4 curies of plutonium or 5-120 curies of plutonium, and that such amount exceeds 2 curies of plutonium and thus triggers the emergency planning requirements of § 70.22(i). In a common sense ruling at note 9 on page 5 of LBP-90-38, the Presiding Officer stated that americium will not be included in computing the amount of plutonium. Intervenors are free to disagree, but the Presiding Officer correctly determined that americium is not plutonium and cannot be considered in quantifying the amount in curies of plutonium.

Intervenors' second subargument was that the application and license amendment were deficient because they did not identify the presence of americium. Id. at 9-13. The short answer to this argument is clear; it is the same as the answer with respect to Pu-241 provided in Licensee's Submittal of October 30 (particularly in the Morris Plutonium Affidavit at ¶¶ 7-9, 17, and 29-33) and in "Licensee's Motion for Partial

Reconsideration ...." (Nov. 16, 1990). When interspersed in a 10-gram sample of Pu-239/Pu-240, the  $<.07$  curies of Am-241 is not a significant contaminant, because it is not a major dose-contributant. Thus the Am-241, just like the Pu-241, did not need to be identified in the application or the license amendment.

In the course of their argument (Part I Motion at 9-13), Intervenor mischaracterized the relevant scientific principles and facts. Intervenor apparently consider such pleadings to be appropriate advocacy. Licensee considers such pleadings to be a misuse of the regulatory process.

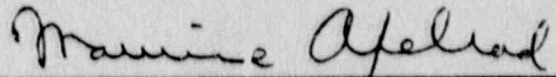
In any event, instead of Intervenor's penchant for empty rhetoric, Licensee prefers to rely on objective, sworn evidence. Accordingly, enclosed is the Affidavit of Dr. Susan M. Langhorst Regarding Relative Radiological Risk Associated with Trace Americium-241 in Plutonium Standard (Licensee's Exhibit 15). Since Dr. Langhorst's affidavit is relatively short and straight-forward, Licensee will not prolong this pleading by summarizing it. It can eloquently speak for itself.

Finally, as discussed above with respect to Pu-241, Licensee questions whether all of the issues raised by Intervenor regarding the presence of Am-241 in the Pu-239/Pu-240 standard are properly before the Presiding Officer. The presence of such Am-241 may be factually relevant to Concerns Nos. 1, 2 and 3. However, since no admitted concern deals with the separate legal issue of whether Licensee has been authorized to

possess such Am-241, such issue is not before the Presiding Officer.

In summary, each of Intervenors' requests for relief should be denied.

Respectfully submitted,



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