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NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1993

U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
Vol. 38, No. 6
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NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1993

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

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

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of Docket No. 93-01-Misc

STATE OF NEW JERSEY
(Department of Law and Public Safety's
Requests Dated October 8, 1993) December 3, 1993

The Commission denies the petition for leave to intervene and request for an adjudicatory hearing filed by the State of New Jersey on the legality of barge shipments because there is no pending application for a license or permit for either the Philadelphia Electric Company or the Long Island Power Authority related to the fuel shipments. Moreover, even if there were such a proceeding, New Jersey failed to satisfy Commission rules governing intervention in hearings or reopening of proceedings.

RULES OF PRACTICE: INTERVENTION (STANDING)

Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a.

ATOMIC ENERGY ACT: CLASS OF LICENSE

A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the term of the rule, "without the filing of applications with the Commission or the issuance of licensing documents to particular persons." 10 C.F.R. § 70.18. NRC rules establish many

general licenses, including a general license for NRC licensees to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. § 71.12.

ATOMIC ENERGY ACT: REQUIREMENT OF HEARING; REQUIREMENT OF LICENSE

There would be no point to the NRC's general licensing scheme if a licensee's mere use of a general license triggered individual licensing proceedings.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); UNTIMELY INTERVENTION PETITIONS

Good cause is the weightiest of the late intervention standards. Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining factors. New Jersey gave short shrift to the remaining four factors.

MEMORANDUM AND ORDER

Introduction

In this Order the Commission denies the petition for leave to intervene and request for an adjudicatory hearing filed on October 8, 1993, by the State of New Jersey Department of Law and Public Safety ("New Jersey").

New Jersey seeks a hearing on the legality of a series of barge shipments along New Jersey's coast. The shipments involve a total of 33 barge trips to move 560 slightly irradiated nuclear fuel assemblies from the Shoreham nuclear power plant in New York to the Limerick nuclear power plant in Pennsylvania. Several trips had been completed at the time of New Jersey's request; the remainder are ongoing and should be concluded during 1994.

As we amplify below, there is not now, nor was there at the time of New Jersey's request for a hearing, any pending application for a license or permit for the Philadelphia Electric Company ("PECo"), owner of the Limerick plant, or for the Long Island Power Authority ("LIPA"), owner of the Shoreham plant, related to the fuel shipments. Accordingly, there are no "proceedings" in which New Jersey may intervene or be provided a hearing. Moreover, even were there an ongoing proceeding related to the fuel shipments or a closed proceeding that could in some manner be resuscitated, New Jersey has failed to satisfy our rules governing intervention in hearings or reopening of proceedings.

The shipment of the Shoreham fuel was also the subject of a request for NRC action filed by New Jersey under 10 C.F.R. § 2.206. The request is currently under consideration by the Director of the Office of Nuclear Materials Safety and Safeguards. On October 22, 1993, the Director denied that portion of the request seeking immediate action. Previously, in connection with a lawsuit that New Jersey filed to halt the Shoreham-to-Limerick barge shipments, the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court each denied requests to enjoin the shipments.

Background

In a scheduling order issued on October 14, the Commission stated that New Jersey appeared to seek (1) late intervention for "good cause" and a hearing on PECo's license amendment (dated June 23, 1993) allowing PECo to receive and possess Shoreham's fuel, and (2) intervention and a hearing on LIPA's "transfer and transportation of the Shoreham fuel." Unpublished order, October 14, 1993 (quoting New Jersey's 10/8/93 filing at 44 and 46). The Commission's October 14 order sought comment by the parties on: (1) whether at this time either matter referenced by New Jersey gives rise to an opportunity for a hearing under section 189 of the Atomic Energy Act; and (2) if so, whether New Jersey's submission meets the applicable standards for intervention under 10 C.F.R. § 2.714.

The Commission set an expedited briefing schedule allowing for initial and responsive comments by New Jersey, PECo, LIPA, and the NRC Staff. On October 20, New Jersey, PECo, and LIPA filed responses. The NRC Staff filed its response, as scheduled, on October 22. Thereafter, on October 26, LIPA and New Jersey filed replies.[1]

Positions Presented

New Jersey seeks a hearing on the grant of PECo's license amendment allowing it to receive and possess LIPA's fuel and on LIPA's use of its general license under 10 C.F.R. § 71.12 to transport the fuel. New Jersey also maintains that the NRC must notice an opportunity for a hearing on a license for LIPA to transfer fuel to PECo. New Jersey believes that late intervention is permissible

[1] By failure to observe the Commission's rules on formal requirements for documents — i.e., by single-spacing rather than double-spacing its reply brief — New Jersey significantly exceeded the permitted length of the document. *See* 10 C.F.R. § 2.708(b). No party having requested that the filing be rejected, we accept it with the admonition that in fairness to all parties, ~~any~~ further ignoring of the Commission's rules may lead to appropriate sanctions. *See* 10 C.F.R. § 2.709.

here because it did not receive certain knowledge of the coastal barge shipments in time to come to the Commission sooner. New Jersey does not dispute that it has failed thus far to fulfill specific requirements that govern intervention under our rules.

LIPA and PECo, as well as the NRC Staff, argue in essence that at this time there is no live "proceeding" on the transport of the Shoreham fuel and therefore no right of New Jersey to intervene. These parties also oppose late intervention. While there are differences among LIPA, PECo, and the NRC Staff on the precise balancing of the late intervention factors, they all agree that the balance tilts clearly against intervention.

Analysis

I. WHETHER UNDER SECTION 189 OF THE ATOMIC ENERGY ACT ANY OPPORTUNITY FOR A HEARING ON THE SHOREHAM FUEL MATTER ARISES AT THIS TIME IN THE PECo OR LIPA DOCKETS

The Atomic Energy Act's hearing provision, section 189a (42 U.S.C. § 2239(a)), states that an opportunity for a hearing must be offered in "any *proceeding* . . . for the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control . . ." (emphasis added). Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992). PECo, LIPA, and the NRC Staff have amply demonstrated that there is no pending proceeding here.

A. PECo License Amendment to Receive and Possess Slightly Irradiated Fuel

License amendments are one of the specified agency actions that give rise to an opportunity for a hearing under section 189a. Accordingly, on March 31, 1993, the NRC published notice of PECo's proposed amendment to allow it to use slightly irradiated fuel at Limerick, and asked anyone who intended to request a hearing to do so by April 30. *See* 58 Fed. Reg. 16,851 (1993). The NRC received no requests for a hearing. The NRC granted PECo's license amendment on June 23. *See* 58 Fed. Reg. 36,449 (1993).

Not until October 8, 1993, did New Jersey come to the Commission with its request for intervention and a hearing on the PECo license amendment. The request came more than 6 months after the NRC had first solicited hearing

requests, nearly 4 months after issuance of the amendment itself and 2 to 4 months after New Jersey became aware of the proposed barge shipments (depending on whose version of events one credits). By any definition the PECo license amendment proceeding was over at the time of New Jersey's hearing request. Section 189a does not provide for a hearing opportunity in closed cases. *See Comanche Peak*, CLI-92-12, 36 NRC at 67.

Even if an already-completed section 189a proceeding somehow could be restarted, a number of factors cut against doing so here. *Cf. Cities of Campbell v. Federal Energy Regulatory Commission*, 770 F.2d 1180, 1191-92 (D.C. Cir. 1985) (agency discretion to reopen closed matter "reserved for extraordinary circumstances"). First, PECo's license amendment issued months ago, and the 60-day judicial review period established by the Hobbs Act (28 U.S.C. § 2342) — during which a final agency decision arguably remains alive and subject to revision by agency adjudication — expired on August 22, well before New Jersey sought a hearing. *Cf. Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650 (1980). Second, with LIPA and PECo now well into their series of shipments (and stays having been denied), starting a section 189a hearing now seems unlikely to lead to meaningful relief. Finally, as we explain below, New Jersey has not offered "good cause" for coming to the Commission so late.

In sum, the NRC decision to grant the PECo license amendment may no longer be revisited in a section 189a hearing. New Jersey has advanced various legal arguments against the PECo license amendment in two existing forums: a pending federal court case (now in the court of appeals) and a pending petition for NRC action under 10 C.F.R. § 2.206. It is those forums, not a late-starting agency adjudicatory hearing, to which New Jersey now must look for relief.[2]

B. LIPA's General License to Transport Fuel

New Jersey's request for a hearing on LIPA's authority to transport and transfer the Shoreham fuel rests on a misconception of what a general license is and how it operates. A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the terms of the rule "without the filing of applications with the Commission or the issuance

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[2] The NRC views New Jersey's judicial challenge to NRC actions as outside the court's jurisdiction. The federal district court agreed with the NRC's jurisdictional position, and the court of appeals recently affirmed. *New Jersey v. LIPA*, Civ. No. 93-4269 (GEB) (D.N.J., Oct. 12, 1993), *aff'd*, No. 93-5613 (3d Cir., Dec. 1, 1993).

New Jersey's section 2.206 petition, on the other hand, was filed with the right forum, the NRC itself, and conceivably could lead to agency adjudicatory hearings were the NRC to find cause to believe that the PECo license amendment was issued improperly. In that case, the agency might begin an enforcement action against PECo under 10 C.F.R. § 2.202, where New Jersey, on a proper showing, could intervene (presuming PECo requested a hearing). It is also possible that the NRC would decide to take "other action as would be proper" (10 C.F.R. § 2.206(a)).

of licensing documents to particular persons." 10 C.F.R. § 70.18. NRC rules establish many general licenses (*e.g.*, 10 C.F.R. §§ 31.9, 40.21, 70.19), including a general license for NRC licensees to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. § 71.12.

Thus, contrary to New Jersey's submission, LIPA was not required to obtain an individual license or license amendment for transporting the Shoreham fuel to PECo.[3] LIPA already had authority to transport the fuel under the general license created by 10 C.F.R. § 71.12. It is well established, of course, that an administrative agency may proceed by generic rule rather than by case-by-case adjudication. *See, e.g., American Hospital Ass'n v. National Labor Relations Board*, 111 S. Ct. 1539, 1543 (1991). In such situations the rule establishing the general license, in effect, *replaces* individual licensing proceedings. There would be no point to the NRC's general licensing scheme if, as New Jersey apparently believes, a licensee's mere use of a general license triggered individual licensing proceedings.

New Jersey suggests that the NRC's issuance and amendment of a certificate of compliance for the Shoreham fuel's shipping cask open the door to a section 189a hearing opportunity. But, assuming (without deciding) that a certificate of compliance triggers a section 189a hearing opportunity, New Jersey has neither offered good reason for demanding a hearing so late (the cask's longstanding certificate of compliance was amended slightly on August 19, 1993) nor explained in any detail what litigation over the cask design would accomplish, as NRC rules demand. *See* 10 C.F.R. § 2.1205(c), (d).[4] Indeed, New Jersey's papers nowhere suggest that the cask is in any way defective or unsafe. New Jersey's main grievance — the routing of the barge shipments — has nothing to do with the cask's certificate of compliance, which issues to the cask vendor, not to LIPA or PECo.

In sum, we cannot agree that New Jersey can challenge LIPA's use of its general transport license in an adjudicatory hearing or that New Jersey properly has sought a hearing on the certificate of compliance issued for the Shoreham

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[3] Nor was LIPA required to obtain a special license to *transfer* the Shoreham fuel. As the possessor of the Shoreham license, it is already authorized to transfer the fuel to another licensee, such as PECo, pursuant to an NRC rule. *See* 10 C.F.R. § 70.42(b)(5).

[4] Where (as here) the NRC has issued no *Federal Register* notice, NRC rules on materials licenses require prospective intervenors (1) to seek a hearing within 30 days after receiving "actual notice" of the agency action or within 180 days after agency action, whichever is earlier (10 C.F.R. § 2.1205(c)(2)), and (2) to "describe in detail" the timeliness of the hearing request and how the result of a hearing would affect the intervenor's concerns (10 C.F.R. § 2.1205(d)). Here, New Jersey did not submit any hearing request to the NRC until its October 8 letter — much more than 30 days after New Jersey (by its own admission) had received actual notice of the Shoreham-to-Limerick barge shipments — and to this date has not "described in detail" how litigation over the cask design would affect its concerns.

shipping cask. We therefore cannot agree that a hearing on the transport and transfer questions is necessary under section 189a.

II. WHETHER NEW JERSEY'S SUBMISSION MEETS THE APPLICABLE STANDARDS FOR INTERVENTION UNDER 10 C.F.R. § 2.714

Given that our analysis shows that there is no section 189a proceeding in which New Jersey may intervene, we need not reach the second question briefed by the parties. However, for completeness, we shall address how New Jersey's petition would fare under our standards for untimely intervention set forth at 10 C.F.R. § 2.714(a)(1)(i)-(v).

The first and principal test for late intervention is good cause for lateness. This factor addresses not only why the Petitioner did not file in the time provided in the notice of opportunity for hearing, but why it did not file as soon thereafter as possible. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Here, on the basis of documentation by LIPA, PECo, and NRC Staff, we conclude that New Jersey had sufficient awareness as early as June (or possibly May) 1993 of a significant likelihood of barge shipments off its coast. This awareness would have allowed New Jersey to request intervention and a hearing prior to issuance of the PECo license amendment. Common sense suggests that objections at the earliest possible stage can be accommodated more easily than those raised months later.

Not only did New Jersey not file promptly upon learning of the barging option, it failed to file promptly upon learning on August 9 that barging was the chosen option. Our concern is not that New Jersey was "sleeping on its rights" altogether (*see* New Jersey's October 26 filing at 3) — it apparently did initiate a number of meetings and ultimately brought suit in federal district court — but rather that it saw no need to bring us in the first instance its complaint with the administrative handling of this matter. As experienced litigators, New Jersey's attorneys presumably knew that bypassing the NRC in favor of bringing suit in the district court, whose jurisdiction was questionable, was at New Jersey's peril.

Even were we to agree *arguendo* that New Jersey needed some time to decide on a legal course of action after learning of the definite choice by LIPA and PECo to ship by barge, the time by which New Jersey was able to file complete papers and a brief before the United States District Court on September 21 sets an outside limit to the time in which we might have expected a comprehensive

filing here addressing all the matters required under our rules.[5] New Jersey filed nothing with the Commission, however, until October 8, *after* the NRC had raised entirely predictable jurisdictional objections in the district court. New Jersey, in short, has offered no good cause for its untimely effort to initiate a hearing process at the NRC.

Good cause is the weightiest of the late intervention standards. Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining factors. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), *reconsideration denied*, CLI-89-6, 29 NRC 348 (1988), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990). New Jersey has given short shrift to the remaining four factors, and we will not address them at length.

We cannot weigh the third factor — the extent to which an intervenor's participation "may reasonable be expected to assist in developing a sound record" — in New Jersey's favor. New Jersey has not set out with the required particularity the precise issues it intends to cover, a summary of evidence or the identity of its witnesses. *See Comanche Peak*, CLI-88-12, 28 NRC at 611 (citing cases). Indeed, New Jersey acknowledges as much, promising a future cure.

Nor can we count the fifth factor — the potential to "delay" the proceeding or "broaden" the issues — on New Jersey's side of the ledger. Obviously, while one perhaps cannot meaningfully "delay" a hearing that never began, convening a hearing at this late date would "delay" final resolution of the license amendment's validity and "broaden" the issues by creating litigation where none existed.

As to the second and fourth factors, we agree with NRC Staff that there is no "other means" for New Jersey to protect its interest (second factor) and that, because there is no proceeding, there is no "existing party" representing New Jersey's interest. But, in the totality of the surrounding circumstances, the weight we give these factors is slight. *See Comanche Peak*, CLI-93-4, 37 NRC

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[5] For example, New Jersey did not fully provide required information on the contentions that it wishes to litigate, did not provide responses on several of the factors of section 2.714, and to this date has not addressed the necessary factors for a motion to reopen. As the Commission stated just recently:

> in order to obtain a new hearing when the record has been closed, as in this case, a potential intervenor must "satisfy [both] the late intervention and reopening criteria." CLI-93-1, 37 NRC at 3. While neither the late intervention nor the reopening regulations specifically mandate that the two separate criteria be addressed in the *same pleading*, our decisions require that both be addressed when a petitioner seeks to intervene late in a proceeding for which the record has closed . . . . [I]t is in the petitioner's interest to address both sets of standards contemporaneously . . . .

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993) (emphasis in original, footnote omitted).

at 74 (citing cases). They cannot possibly overcome New Jersey's failure to demonstrate "good cause" for lateness.

Finally, New Jersey seeks to excuse its tardiness by pointing to cases where the NRC has permitted intervention 6 weeks to 4 years out of time. *See* New Jersey's October 26 filing at 3. But those cases are easily distinguished as involving lengthy construction permit or operating license proceedings where hearings already had been granted and were just beginning or, although under way, were far from completion. The present case is entirely different: there is no ongoing hearing for New Jersey to enter as simply an additional party.

Conclusion

For the foregoing reasons, we deny New Jersey's request for intervention and for adjudicatory hearing.

It is so ORDERED.

For the Commission[6]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of December 1993.

[6] Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket No. 30-32240-CivP
(ASLBP No. 93-661-01-CivP)
(EA 93-082)
(Byproduct Material License
No. 11-27085-01)

TWIN FALLS CLINIC &
HOSPITAL

December 8, 1993

Where settlement of a matter as proposed by the parties is in the public interest, it should be approved by the Licensing Board.

ORDER
APPROVING AND INCORPORATING STIPULATION FOR SETTLEMENT OF PROCEEDING AND SETTLING AND TERMINATING THE PROCEEDING

Upon consideration of the Joint Motion for Order Approving and Incorporating Stipulation for Settlement of Proceeding and Settling and Terminating the Proceeding, and upon consideration of the Stipulation for Settlement of Proceeding executed by the NRC Staff and Twin Falls Clinic & Hospital, we find that settlement of this matter as proposed by the parties is in the public interest and should be approved. Accordingly, before the taking of any testimony and

without trial or adjudication of any issue of fact or law, and upon the consent of the parties, the Stipulation for Settlement of Proceeding is hereby approved and incorporated into this Order, pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2111, 2201(b), and 2201(o), and is subject to the enforcement provisions of the Commission's regulations and chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* This proceeding is hereby terminated.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 8, 1993

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 030-32240-CivP
(EA 93-082)
(Byproduct Material License
No. 11-27085-01)

TWIN FALLS CLINIC &
HOSPITAL

STIPULATION FOR SETTLEMENT OF PROCEEDING

I.

On August 6, 1993, the Staff issued an Order Imposing Civil Monetary Penalty (Civil Penalty Order) in the amount of $5,000 to Twin Falls. The Civil Penalty Order followed the issuance of a Notice of Violation and Proposed Imposition of Civil Penalty dated May 20, 1993 (Notice of Violation). Twin Falls Clinic & Hospital requested a hearing in connection with the Civil Penalty Order on August 11, 1993.

The subject of the Civil Penalty Order is Twin Falls' failure to establish and implement a Quality Management Program as required by 10 C.F.R. § 35.32. The base penalty for this failure, as outlined in Appendix C to Part 2 — General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, App. C, is $2,500. This base penalty was escalated 100%, bringing the penalty imposed to a total of $5,000, because the Staff concluded that Twin Falls had received specific prior notice of the requirement imposed by 10 C.F.R. § 35.32 and had failed to act on such notice. *See* 10 C.F.R. Part 2, App. C, § VI.B.2(d).

Twin Falls admitted in its response to the Notice of Violation that it had in fact failed to comply with the Quality Management Program regulation, due to "human error." However, Twin Falls has taken issue with the amount of the penalty imposed.

An inspection of Twin Falls was conducted in March 1993 concerning whether Twin Falls had implemented a Quality Management Program, which was required by regulation to be in place by January 1992. Following the inspection, which confirmed that Twin Falls had not implemented a Quality Management Program, the Staff issued the Notice of Violation to Twin Falls accompanied by a letter that stated in part that "NRC's inspection determined that the nuclear medicine department's files contained NRC correspondence which informed [Twin Falls] of the revision of 10 CFR Part 35 and the effective date of the rule." The letter continued to inform Twin Falls that the base penalty for failure to establish and implement a Quality Management Program was being escalated because Twin Falls had received information concerning the Quality Management Program requirement, but had failed to act upon it.

Upon further investigation, the Staff has determined that while several notices and informational mailings regarding the Quality Management Program requirement were sent to Twin Falls from as early as July 1991 through 1992, the inspection of Twin Falls in March 1993 in fact did not reveal that Twin Falls had received that correspondence. In view of the Staff's determination, the statement in the letter transmitting the Notice of Violation that "NRC's inspection determined that [Twin Falls'] files contained NRC correspondence" was not accurate.

Given that the Notice of Violation was issued based on an erroneous understanding of the evidence gathered by the inspection, the Staff is willing to reduce the penalty to the base amount. Twin Falls, acknowledging that it had in fact violated 10 C.F.R. § 35.32, is willing to pay the base penalty of $2,500; thus, the parties are willing to compromise and settle this matter by Twin Falls paying a total civil monetary penalty of $2,500.

In consideration of the terms and provisions of this Stipulation, Twin Falls is willing to withdraw its request for a hearing with prejudice and otherwise waive its hearing and appeal rights regarding this matter; the Staff is willing to deem payment of $2,500 by Twin Falls as full resolution of the Civil Penalty Order.

The parties have entered into this Stipulation for the settlement of this proceeding, which is subject to the approval of the Atomic Safety and Licensing Board, before and without the taking of any testimony or trial or adjudication of any issue of fact or law. The parties further acknowledge that the terms and provision of this Stipulation, once approved by the Atomic Safety and Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, as amended (Act), 42, U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*

II.

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the NRC Staff and Twin Falls Clinic & Hospital as follows:

1. Payment by Twin Falls Clinic & Hospital of a civil penalty of $2,500, in accordance with paragraph 2 below, shall constitute full satisfaction of the Order Imposing Civil Monetary Penalty, dated August 6, 1993.

2. Within 30 days of the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Twin Falls Clinic & Hospital shall pay a civil penalty in the amount of $2,500, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States. Payment by mail should be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555.

3. Twin Falls Clinic & Hospital withdraws with prejudice its request for and otherwise waives its right to a hearing in connection with this matter, and waives any right to contest or otherwise appeal this Stipulation once approved by the Atomic Safety and Licensing Board.

FOR THE NRC STAFF: FOR TWIN FALLS CLINIC & HOSPITAL:

(/s/ Steven R. Horn) 11/22/93 (/s/ Brent Bodily) 11/ /93

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Presiding Officer
Jerry R. Kline, Special Assistant

In the Matter of

Docket No. 40-08027-MLA
(ASLBP No. 91-623-01-MLA)
(Source Material License
No. Sub-1010)

SEQUOYAH FUELS CORPORATION

December 15, 1993

The Presiding Officer issues a Memorandum and Order allowing the Sequoyah Fuels Corporation to withdraw its license renewal application and to terminate the license renewal proceeding.

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION

Although the power of a presiding officer to grant a withdrawal on prescribed terms and conditions under 10 C.F.R. § 2.107(a) involves discretionary judgment, the Commission's regulation is modeled on Rule 41(a)(2) of the Federal Rules of Civil Procedure and its exercise is reviewable for any abuse. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

In supporting conditions on the withdrawal of an application, the record must reveal that the proceeding demonstrates some legal injury to a private or public

interest that the conditions are designed to eliminate. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 (1981).

LICENSING BOARDS: JURISDICTION

The jurisdiction and power of a presiding officer in specific cases are limited by the authority delegated by the Commission. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

The discretionary responsibility of the presiding officer to consider imposing conditions on a license withdrawal must be exercised with due regard to the legitimate interests of all parties in the proceeding. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *see also American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

The purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).

RULES OF PRACTICE: DISMISSAL OF PROCEEDINGS

The common law rule supporting the withdrawal regulation reflects that an applicant has an unqualified right to have an action dismissed unless the dismissal would legally prejudice other parties in a way other than by instituting a future proceeding of the same kind. *See Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19-21 (1935).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION

Even if a withdrawal request comes *after* the issuance of a hearing notice, 10 C.F.R. § 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application.

RULES OF PRACTICE: INTERPRETATION

Regulations should be construed to avoid absurd results and provide expression to their intended purpose. *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

Conditions imposed on a license renewal application withdrawal by a presiding officer must not only bear a relationship to the conduct and legal harm at which they are aimed, but the harm must be documented in the record. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976).

LICENSE AMENDMENT: DECOMMISSIONING PLAN

Because the licensee's request to conduct decommissioning in accordance with an overall decommissioning plan generally has been considered a license amendment request, interested parties have been able to exercise hearing rights under section 189(a) of the Atomic Energy Act. *See Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 237 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). *But see* Commission Staff Requirements Memorandum, Chilk to Parler and Taylor, June 30, 1993, where hearings on a reactor decommissioning plan are considered wholly a matter of Commission discretion.

MEMORANDUM AND ORDER

(Withdrawal of Application and Termination of Proceeding)

The Sequoyah Fuels Corporation (SFC) has moved to withdraw a pending license renewal application, without prejudice, and terminate this proceeding.[1] The

[1] Motion for Withdrawal of Application and Termination of Hearing, July 12, 1993.

Native Americans for a Clean Environment (NACE) and the Cherokee Nation (hereinafter referred to jointly as Intervenors) submitted a joint response raising no objection to the withdrawal concerning the Licensee's "production-related" activities. However, they oppose dismissal of the proceeding on "nonproduction" activities under the pending licen. e.[2] The State of Oklahoma's Department of Wildlife Conservation (State), another participant in the proceeding, filed a motion requesting the imposition of conditions on the withdrawal.[3] The Staff and SFC both take issue with Intervenors' request concerning nonproduction activities and the license conditions proposed by the State.[4] In addition to the motion and responses on the withdrawal petition, a conference was held to obtain clarification of the pleadings and to develop an adequate record. Questions were submitted to the parties, and SFC and the Staff were required to respond to relevant questions posed by the Intervenors. The Staff also responded to additional questions from the Presiding Officer.[5]

Background

Since 1970 SFC has operated an NRC-licensed nuclear fuel processing facility located 2.5 miles southeast of Gore, Oklahoma, near the confluence of the Illinois and Arkansas Rivers. The site area is comprised of an 85-acre industrial site and about 2000 acres of peripheral agricultural lands, grasslands, and forests. Water from the rivers has been impounded in the vicinity of the plant to form the Robert S. Kerr Reservoir which receives liquid effluents discharged from the site. SFC Holding Company, a parent of SFC, owns an additional plot of some 10,000 acres about 11 kilometers (7 miles) west of the facility, where raffinate spreading occurs.[6]

The plant was licensed for the conversion of uranium oxide (U_3O_8) into uranium hexafluoride (UF_6) in February 1970. In 1987 the license was amended to permit operation of a second process for the reduction of depleted UF_6 to UF_4. The industrial part of the site holds five principal buildings used for manufacturing, warehousing, and offices. In addition to uranium processing,

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[2] Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Sequoyah Fuels Corporation's Motion for Withdrawal of Application and Termination of Hearing, and Request for Prehearing Conference, July 26, 1993. "Nonproduction," which is not defined, apparently includes all activities authorized under the SFC license relating to decommissioning.

[3] Oklahoma Department of Wildlife Conservation's Request That Conditions Be Placed on the Application to Withdraw filed by Sequoyah Fuels Corporation, July 29, 1993.

[4] NRC Staff's Answer to Sequoyah Fuels Corporation's Motion for Withdrawal of Application and Termination of Hearing, August 9, 1993; Response to NACE and Cherokee Nation Opposition to Oklahoma Department of Wildlife Conservation Request for Conditions, and to NRC Staff Answer, August 23, 1993.

[5] *See* Conference Transcript, October 7, 1993; Presiding Officer Memoranda and Orders, October 8 and November 5, 1993; SFC's and Staff's Responses to Conference Questions (Oct. 15 and 21, 1993); Staff Response to Memorandum and Order (Nov. 12, 1993); SFC Response (Nov. 17, 1993).

[6] Raffinate is a liquid byproduct of plant processing which is applied as a fertilizer.

the site has facilities used for production of fluorine from hydrofluoric acid (HF), bulk storage of chemicals and fuels, storage of yellowcake, and a number of retention ponds used for impoundment of fluoride-contaminated wastes, untreated raffinates, and liquid fertilizer. During the life of the plant, the licensed uranium conversion processes required storage and use of hazardous chemicals such as HF, nitric acid (HNO_3), sulfuric acid (H_2SO_4), ammonia (NH_3), tributylphosphate, and hexane. Plant processes and water treatment systems were used to recover or neutralize acids and solvents before entry into offsite effluent discharges. Discharge of chemicals, radium, and uranium in offsite effluent waste streams is regulated by the NRC license and federal and State of Oklahoma discharge permits.

Raffinates were treated by neutralization and precipitation of heavy metals from liquid wastes in clarifier basins. After sedimentation of metal sludges, the remaining liquid, consisting of dilute neutralized solutions of ammonium nitrate, was applied as a fertilizer. Considerable fertilizer solution remains in storage ponds at the site after the recent cessation of operations, and application to site land is expected to continue for several years until the supply is exhausted.

The liquid fluoride waste was treated to induce precipitation of solid fluorides in clarifier basins. Overflow from the basins was added to a combination waste stream and discharged offsite.

Offsite discharges of a combination waste stream are made into a local ephemeral stream that ultimately flows into the Kerr Reservoir across a narrow strip of Corps of Engineers' property. The combination stream includes industrial wastewater effluents such as cooling water, treated scrubber discharges, treated sanitary waste, and boiler blowdown water. Chemical and heavy metal discharges are monitored at an outfall.

The SFC license was renewed for 5 years in 1985 and a 10-year extension was requested on August 29, 1990. Under NRC's regulations, existing licenses do not expire until an agency determination is made on timely applications for renewal.[7]

After requests for a hearing on SFC's license renewal application were received,[8] a Presiding Officer was designated[9] and a hearing granted.[10] The areas of concern listed by the parties included apprehension over management competence, threats to the environment, public health and safety from the facility operations, and noncompliance with regulatory requirements. The parties agreed

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[7] 10 C.F.R. § 40.43(b).

[8] Native Americans for a Clean Environment, Request for Hearing, September 28, 1990.

[9] 55 Fed. Reg. 46,744 (Nov. 6, 1990).

[10] Presiding Officer, Memorandum and Order, January 24, 1991. In addition to NACE, the State of Oklahoma (Department of Wildlife Conservation) and the Cherokee Nation were admitted as participants in the proceeding.

that a hearing on the issues would only be meaningful after the Staff completed safety and environmental reviews, then scheduled for January 1992.[11]

On February 16, 1993, the Licensee changed its plans about operating. SFC notified the NRC of the Corporation's decision to cease operations of its facilities by July 31, 1993, and requested termination of its license. Its notification also submitted a preliminary plan for completing decommissioning (PPCD).[12] The Staff subsequently advised the parties in this proceeding that it was discontinuing review of the license renewal application. *See* Board Notification 93-04 (Mar. 1, 1993).

Party Positions

1. Licensee's Position

The Licensee contends that the proceeding should be mooted and the withdrawal of the license application granted without prejudice or the imposition of conditions.[13] Citing the general rule that dismissals are ordinarily granted without prejudice, SFC maintains that no demonstrable legal harm — the test for imposing terms or conditions — would emanate to any party or the public interest from the withdrawal of its application.[14] The Licensee argues that any request for the Presiding Officer to delay the license renewal withdrawal to hold hearings on issues raised during the proceeding or subsequent NRC licensing actions could not properly be granted under the Commission's regulations. These matters, and decommissioning activities, in SFC's view, are beyond the jurisdiction of the Presiding Officer. They can only be confronted in future NRC licensing actions or by seeking redress in other administrative proceedings.[15]

2. Intervenors' Position

In referring to the Commission's regulations on granting withdrawals as discretionary, the Intervenors aver that a withdrawal is not permissible in this case on grounds that SFC has continuing responsibilities under the existing

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[11] After a number of operating deficiencies, inspection and enforcement actions by the NRC, with the scheduling of Staff reviews being delayed, a revision of the License Renewal Application was submitted on September 9, 1992.

[12] SFC Letter to Bernero at 2, February 16, 1993.

[13] The pertinent NRC regulation provides: "The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the Presiding Officer may prescribe. 10 C.F.R. § 2.107(a).

[14] Motion for Withdrawal at 4-5; *see Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

[15] SFC Motion for Withdrawal at 4-7.

license and the issues in the case are not moot. In a somewhat diffuse presentation, the Intervenors allege that the regulation requiring Commission notification of license termination (10 C.F.R. § 40.42(b)) does not suspend a license renewal proceeding. However, if it were to be considered as having been suspended, the Licensee nevertheless did not satisfy regulatory requirements to submit a completed NRC-314 form concerning the disposition of materials, a radiation survey report or a plan to complete decommissioning. And, if the Licensee were permitted to withdraw its application, SFC, in their view, would have to be considered as not having filed an application for license renewal. The license then, it is contended, would have previously expired with SFC unable to comply with 10 C.F.R. § 40.42(c)(1) requirements. These requirements call for completing a number of decommissioning activities prior to license expiration.

The Intervenors argue further that the Commission's rule continuing licenses beyond their expiration date (10 C.F.R. § 40.42(e)) is not applicable here. The Intervenors contend that the time of SFC's license has already been extended under 10 C.F.R. § 40.43(b) when the renewal application was filed and that application is still pending in this case. Consequently, it does not become *necessary* (as required by section 40.42(e)) to have it extended under this regulation regarding licease termination. In other words, that extension is only necessary where a license expires without a request for renewal pending. Intervenors also allege that SFC does not meet another condition of this latter regulation inasmuch as it authorizes the extension of the license term only for possession of "residual source material present as contamination." Intervenors point to the Licensee's preliminary plan for the completion of decontamination where an amount of bulk source material is also shown to be present on the site.[16]

Finally, in the Intervenors' view, the issues in this case have not been mooted by SFC's decision to stop production at its facilities, but are of a continuing nature under the pending license renewal application. The rationale advanced is that, since SFC has not submitted a plan to decommission and intends to conduct decommissioning activities for the next 5 years before doing so, the issues concerning these activities have not been mooted and remain alive for adjudication, citing *Pacific Gas and Electric Co.* (Humboldt Bay Power Plant, Unit 3), LBP-86-1, 23 NRC 25 (1986). According to the Intervenors, these issues include the adequacy of decommissioning funding, adequacy of SFC's groundwater monitoring plan, risks of raffinate disposal, adequacy of SFC's contingent emergency plans and the adequacy of SFC's management and programs to ensure safe operations. Due to the levels of contamination at the facility, it is alleged that the public interest requires a hearing on these issues

[16] Intervenors' Opposition at 10-15.

and activities. And further, NRC's obligation under the National Environmental Policy Act (NEPA) to evaluate the existing level of contamination and its environmental impacts would also be subverted by a dismissal of the proceeding. To permit operating without litigating these issues would be tantamount, in the Intervenors' view, to permitting operation under an expired license without a renewal review. To terminate the license without such a review would contravene the provisions of section 40.43(b) and violate Intervenors' legal rights to a hearing under section 189a of the Atomic Energy Act.[17]

In the face of the motion to withdraw from a license renewal proceeding and terminate its license, Intervenors insist instead on a hearing on the license renewal to consider the nonproduction activities that the Licensee will perform under its existing license. As Intervenors would have it, the Licensee, unable to comply literally with end-of-license conditions of 10 C.F.R. § 40.42, must continue to seek renewal in order to determine the propriety of its nonproduction activities. Otherwise, Intervenors contend, SFC would have its license extended, without consideration of the issues raised against renewal, for at least the 5-year period, or until it files a final decommissioning plan.[18] By that time, the Intervenors allege, most of these issues would have been mooted because the decommissioning activities would have been completed. If, however, these activities are reviewed in a contested proceeding, Intervenors contend that the Presiding Officer could establish a new date for the expiration of SFC's license to enable the Licensee to be in compliance with the termination of license regulatory requirements in section 40.42.[19]

In summary, the Intervenors argue that since the Licensee cannot comply with the regulations concerning the expiration and termination of licenses, and with continuing responsibilities relating to issues that have not been mooted, a hearing on the license renewal application is required to be held and a new date established for the SFC license to expire. The Intervenors request a prehearing conference to identify concerns germane to a revised license renewal proceeding, and to establish the scope and schedule for the hearing. As an alternative, although opposing any conditional withdrawal, should the Presiding Officer permit SFC to withdraw its license renewal application, a prehearing conference is requested to determine what issues must be litigated for the purpose of imposing conditions on such withdrawal.[20]

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[17] *Id.* at 15-23.

[18] The Intervenors mistakenly characterize the time planned by SFC to submit a final decommission plan as covering 5 years. As Licensee points out, it actually is a 3 1/2-year (late 1996) period. *See* SFC Response to Conference Questions at 10 n.6. SFC does propose a 5-year period for NRC to complete approval of the final plan.

[19] *See* Tr. 191-98; Intervenors' Opposition at 12-17, 23-24.

[20] Intervenors' Opposition at 23-24.

3. *State Position*

The State does not oppose SFC's motion for withdrawal but does request the imposition of the following conditions: (1) that the Licensee be required to complete a biomonitoring assessment tailored to its decommissioning activities;[21] (2) that SFC provide funding adequate to complete decommissioning and correct natural resource damage caused by non-source-material contamination (the State also requests an opportunity to review and comment on the financial assurances required); (3) that SFC obtain a water quality certification from the State as required by federal and state law; (4) that decommissioning protect against non-source-material contamination; and (5) that, prior to approval of a decommissioning plan, SFC's operations be required to safeguard environmental resources. The State additionally requests an opportunity to comment on all operational activities conducted by SFC prior to the completion of its decommissioning plan.[22]

4. *Staff Position*

The Staff contends that SFC's license renewal application withdrawal should be granted without further hearings or conditions.[23] It argues that efforts to continue the license renewal proceeding are inappropriate since SFC's motion to withdraw and proceed with decommissioning has rendered the proceeding moot. And it alleges that the Intervenors' alternative request to continue the proceeding to determine what conditions should be imposed for the termination of the case has also been mooted by SFC's action. The Staff declares that Intervenors' reliance on *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site) (May 4, 1979) (unpublished)[24] is misplaced since, unlike the instant case, dismissal of a license renewal application and termination of a proceeding at the time of the *Sheffield* decision would have deprived the NRC of jurisdiction. Under current regulations (section 40.42), the Staff avers, the Commission's regulatory authority now continues until decommissioning has been completed.[25]

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[21] The State requests an opportunity to provide a biomonitoring plan tailored to SFC's decommissioning activities and attached to its motion a plan prepared in anticipation of SFC's continued operation. *See* State Request at 3-4 and Exhibit A.

[22] State Request at 3-7.

[23] Staff Answer at 7-19. Although additional time was granted the Staff to consider whether conditions should be imposed by the Presiding Officer concerning SFC's decommissioning funding, the Staff subsequently decided to pursue the matter outside of the hearing process under its own independent regulatory responsibilities. *See* Staff Supplemental Answer at 2-3.

[24] *Aff'd*, ALAB-606, 12 NRC 156, 158 (1980).

[25] Staff Answer at 7-8.

The Staff opposes the five conditions proposed by the State mainly on grounds of prematurity and relevance. Most of the State's concerns, the Staff indicates, may be raised when SFC submits its decommissioning plan. Thus, objection is raised to the State's request for the Presiding Officer to impose conditions requiring a biomonitoring plan, water quality certifications under federal and state law, and the safeguarding of environmental resources. In connection with the request that SFC be held responsible for removing hazardous wastes (not source material), the Staff states that jurisdiction over such wastes is in the Environmental Protection Agency (EPA). Finally, on grounds of vagueness, the Staff opposes the State's requested condition concerning adequate SFC funding for decommissioning.[26]

5. *SFC Response*

In responding to the pleadings of Intervenors, the State, and the Staff, the Licensee reiterates its basic position that the Presiding Officer's only authority and responsibility in this proceeding is to determine whether conditions should be imposed upon SFC's withdrawal of its license application. And in the absence of demonstrable legal harm to any party or the public interest, the withdrawal of its license application should be approved by the Presiding Officer without conditions, and the proceeding terminated as moot. SFC argues that there is no demonstrable legal harm here. The Licensee is merely performing licensed activities that are limited, as a consequence of its notification of termination, to activities related to decommissioning and control of access to restricted areas. The Staff, SFC avers, has the continuing responsibility to ensure that the Licensee complies with all regulatory requirements and restrictions and, to this end, the license cannot be terminated under section 40.42(e) until decommissioning is completed. Consequently, no legal harm can ensue to the Intervenors or public.[27] SFC also discounts the precedential value of the *Sheffield* case cited by Intervenors. SFC argues that the regulation extending licenses until terminated by the Commission was not in existence at the time of that decision. Had the case been decided otherwise, the agency would have lost jurisdiction over it.[28]

The Licensee characterizes Intervenors' reliance on the *Humboldt Bay* case as a misreading in Intervenors' contention that the submission of a decommissioning plan rendered the license renewal in that proceeding moot. It is SFC's view that, like the present case, it was the Licensee's decision to withdraw its

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[26] *Id.* at 10-18; *also see* Staff Supplemental Answer at 2 n.1.
[27] *See* SFC Response at 3-9.
[28] *See id.* at 9-11.

application that rendered the proceeding moot, and not the filing of a decommissioning plan.[29]

On the Intervenors' claims that SFC has not complied with applicable regulatory requirements relating to the expiration and termination of Part 40 licenses, SFC responds again that the Staff and not the Presiding Officer has regulatory jurisdiction over decommissioning and control of the Licensee's activities. The Licensee states that the Staff is exercising its regulatory authority and has recognized SFC's notification of ceasing operations of its facilities. The Licensee further claims to have met the technical requirements of section 40.42, that the regulation must be read "reasonably" to accommodate premature closings, and that available "preliminary" survey data have been supplied to the NRC. The Licensee states that it has taken action to remove its licensed product and begin decommissioning.[30] SFC also indicates that it is in compliance with a proposed Commission rule on "Timeliness in Decommissioning of Materials Facilities," which provides clarification for meeting the requirements on furnishing survey information.[31]

Issues

The controversy framed by the pleadings presents a review of a presiding officer's authority and responsibility under the Commission's regulations in 10 C.F.R. §§ 2.107(a) and 40.42: Is a presiding officer's jurisdiction in a proceeding concerning a license application's withdrawal request restricted to the imposition of terms or conditions on the applicant's withdrawal and limited to proscribing only those terms directed at redressing a demonstrable legal harm?

Neither the Intervenors nor the State acknowledge any limitations on the Presiding Officer's authority in this proceeding. The Intervenors assert a regulatory power of the Presiding Officer to deny a withdrawal motion and to hold hearings on license renewal to consider decommissioning activities authorized under the existing license. Where, as allegedly the case here, regulatory requirements have not been met, Intervenors assert that the authority also exists to establish a new license extension (expiration) date to coincide with the completion of licensed decommissioning activities and the submission of a final decommissioning plan.

Intervenors raise the question whether SFC's filing of its preliminary plan for the completion of decommissioning, with a final plan forthcoming a number of

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[29] *Id.* at 12-14. The *Humboldt Bay* decision is cited by both SFC and Intervenors in support of their respective positions. As the decision is silent on whether the withdrawal of an application would have been granted in the absence of a decommissioning plan, it does not appear to provide support for either party.

[30] SFC Response at 16-21 & n.15.

[31] 58 Fed. Reg. 4099, 4102 (Jan. 13, 1993).

years in the future, complies with regulatory demands or can be viewed as an effort to eliminate hearings for interested persons, organizations, or members of the public. In the same vein, does such a filing defer the necessity for obtaining a water quality certificate until a final plan is submitted? And can the lack of adequate financial assurances to carry out decommissioning pose obstacles to a license renewal withdrawal motion? Would the denial of conditions requested by the State legally prejudice that party or would an SFC withdrawal result in legal harm to it?

Decision

1. Jurisdiction

It is a well-settled doctrine that a presiding officer's responsibility in considering motions for withdrawal of license renewal applications is not unfettered. Although the power to grant a withdrawal on prescribed terms and conditions under section 2.107(a) involves discretionary judgment, its exercise is reviewable for any abuse.[32] The Appeal Board has noted that in supporting conditions on the withdrawal of an application, the record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate.[33]

It is also clear that the jurisdiction and power of a presiding officer in specific cases are limited by the authority delegated by the Commission.[34] However, even though the withdrawal of an application for renewal of a license generally has the effect of mooting the issues between the parties, the discretionary responsibility of the presiding officer to consider imposing conditions on such withdrawal is an important duty that must be performed. And the performance of that duty must be exercised with due regard to the legitimate interests of all parties in the proceeding.[35]

It has been observed that the purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions."[36] Nevertheless, the common law rule supporting the withdrawal regulations reflects that an applicant has an unqualified right to have an action dismissed unless the dismissal would legally prejudice other parties in a way other than by instituting a future

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[32] The Commission rule is similar to Rule 41(a)(2) of the Federal Rules of Civil Procedure. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (1976).

[33] *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 (1981).

[34] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Stations, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

[35] *See supra* note 32; *see also American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963).

[36] *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1961).

proceeding of the same kind.[37] In NRC adjudicatory history, there have not been a substantial number of contested license application withdrawal cases. In those proceeding that have occurred, most have been concerned with reactor construction permits and site restoration.[38]

2. *Regulatory Requirements*

NRC's regulatory requirements controlling the expiration and termination of licenses do not appear to contemplate a situation where, as here, a licensee who has filed for license renewal, suddenly and unexpectedly notifies the Commission of a cessation of its operational activities and requests termination of its license.[39] The applicable regulation (section 40.42) instead appears to consider that a licensee, at the time it notifies the Commission of a decision to terminate activities, will not only cease operating and dispose of source material but will immediately submit a plan for the completion of decommissioning.

The regulations call for the submittal of decommissioning cost estimates and a plan for ensuring adequate funds to complete decommissioning.[40] In the matter before us, SFC has submitted neither a decommissioning plan nor a plan acceptable to the Staff ensuring the adequacy of funds to complete it.[41]

SFC's preliminary plan for completion of decommissioning calls for the submission of an initial plan to complete decommissioning during calendar year 1995 and a final plan toward the end of 1996. The plan also contemplates NRC approval of the final plan by the end of 1998, its implementation through the end of the year 2002, and license termination following that date.[42] In short, a 9-year period is contemplated under SFC's current proposal to complete decommissioning of its licensed facility. This is a facility characterized currently as having an unknown degree of contamination.[43] It appears, therefore, that under this schedule, Intervenors and the State will not have an opportunity to

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[37] *See Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19-21 (1935).

[38] *E.g., Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 2 and 3), LBP-81-33, 14 NRC 586 (1981).

[39] It should be noted that less than one week after a status conference on the license renewal application was held by the Presiding Officer (Nov. 17, 1992), and attended by top officials of SFC and wherein no mention was made of a cessation of operations, the NRC was informed that the Licensee was discontinuing its activities and had entered into a contract with a newly created partnership to carry out its contractual obligations. Letter, Sheppard to Bernero, November 23, 1992. Apparently, negotiations looking to a discontinuance of SFC operations were under way prior to July 1992. *See* Commission Briefing on Status of General Atomic-Sequoyah Fuels Facility at 43-44, December 21, 1992.

[40] *See* 10 C.F.R. § 40.42(c)(2)(i) and (iii)(D).

[41] *See* Order issued to SFC and General Atomics, October 15, 1993. The Licensee, in the notice of termination of activities (February 16, 1993) did file a preliminary plan to complete decommissioning and an indication of financial resources for it.

[42] *Id.*, Preliminary Plan for Decommissioning, Figure 9-1.

[43] In a Demand for Information issued on December 29, 1992, at 2, the Staff referenced the contamination of the SFC facility, soil, and groundwater as requiring remediation. The Staff quotes the Licensee's estimates of several million cubic feet of material and soil as contaminated. *See* NUREG-1444, at A-190.

confront the Licensee's decontamination program with their safety, health, and environmental concerns for an extended period of time, if at all.

A central question in this proceeding then is whether, when the concerns of Intervenors and the State may be adjudicated only in the distant future, if at all, a hearing can be held or terms and conditions imposed on the license withdrawal to protect their interests now. Both the Licensee and Staff argue in the negative based on an alleged want of jurisdiction over decommissioning matters.

The recommendations of the Intervenors, which, in contrast to the State, do not call for conditions to be imposed on the withdrawal, are considered here first. Again, the Intervenors' position runs the following trail: The Licensee has not complied with the requirements of section 40.42. It has not filed a decommissioning plan or other documents required under section 40.42(b). Nor has it met the requirements of section 40.42(c), if it should be considered to have its renewal application withdrawn. In such a situation the filing of a notice requesting a termination of its license under section 40.42(b) does not suspend or terminate a license renewal proceeding, and to permit SFC to conduct nonproduction activities at the facility until a decommissioning plan is finally filed would permit operation without a license review and violate Intervenors' right to a hearing under section 40.43(b). Further, section 40.42(e) is not applicable to the present case since, where a license renewal application has been filed, it never becomes *necessary* to have the license continue by virtue of that section since it already continues under section 40.43(b) by reason of the pending license renewal application.[44]

Accordingly, in the Intervenors' view, a license renewal hearing must be held on those SFC preliminary plan site activities to be performed prior to the submission of its final decommissioning plan. In that hearing, Intervenors will be able to litigate their concerns, which have not been mooted on these non-production activities, and the Presiding Officer can then authorize an extension of the existing license to a future date to permit the Licensee to comply with regulatory requirements for the termination of its operations. Intervenors submit that the regulations contemplate the foregoing procedure.[45]

The first weakness in Intervenors' legal scenario is their contention that the Commission, and thus the Presiding Officer, has discretion to deny an improper request for withdrawal of a license application. If a withdrawal request comes *after* the issuance of a hearing notice, section 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application. The only discretion in play here involves the possible imposition of terms or conditions to accompany such a withdrawal.

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[44] *See* Tr. 103-06, 189-201; Intervenors' Opposition at 10-17.
[45] Tr. 190.

The Intervenors claim the *Sheffield* case as precedential authority for denying a dismissal in situations where licensees have continuing responsibilities.[46] It appears clear in that case, however, that the Licensing Board refused to permit a withdrawal of a renewal application because an order to show cause why the licensee should not continue at the site, and for which a hearing had been requested on that Order, was pending before the Commission.[47] Consequently, the issue before the Board had the potential of being subsumed by the matter before the Commission.

The Intervenors' second mistake is based on a disjointed reading of several NRC regulations, which deal with the expiration, termination, and renewal of material licenses. In sum, the various sections of these prescriptions (section 40.42) are *in pari materia* and should be construed together, not separately and distinctly, as Intervenors' interpretation would have it.[48] In the main, Intervenors would have us subscribe to the proposition that the notification and termination regulations in question have limited applicability to a licensee's premature termination of operations. In this view, SFC's effort has not qualified under section 40.42(b), cannot qualify under section 40.42(c), and is not relevant to section 40.42(e).

First, it must be clarified that no claim has been made that section 40.42(b) terminates a renewal application.[49] The regulation merely requires a notification and request for license termination (which SFC complied with) when a licensee has made a termination decision. Further, Intervenors' assertion that SFC failed to comply with section 40.42 because it has not supplied a completed NRC-314 form (disposition of materials) or radiation survey does not comport with a reasonable interpretation of what that provision requires. In fact, the agency only expects such a final report at the completion of decommissioning and will accept preliminary documentation characterizing the site's condition that is sufficient to permit NRC to evaluate a decommissioning plan.[50] And there is no allegation that SFC has not furnished that information.

The section covering a continuation of licenses beyond expiration dates (section 40.42(e)) would seem to have only one purpose — that being that it maintains the agency's jurisdiction over licensees (like SFC) involved in decommissioning activities. No reasonable explanation has been forthcoming from Intervenors on why that provision would cover cases where licenses have

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[46] Intervenors' Opposition at 10-12.

[47] *Id.*, Attachment on *Sheffield* case. It should be noted that Intervenors' indication that the Appeal Board affirmed this decision is misleading. *See* Intervenors' Opposition at 11. The Appeal Board decision makes clear the withdrawal of license matter was not before it. *Sheffield*, 12 NRC at 163 n.17.

[48] *See Erlenbaugh v. United States*, 409 U.S. 239 (1972).

[49] *See* Intervenors' Opposition at 13.

[50] Proposed Rule on Timeliness in Decommissioning of Materials Facilities, 58 Fed. Reg. at 4102; *see* SFC Response at 18-19 and SFC Response to Conference Questions at 5-6.

expired without a renewal application being filed, but not those where a renewal application has been applied for and subsequently withdrawn with a termination notice submitted under section 40.42(b). Absent such a license continuation provision, in this instance the existing license, past its due date for renewal, would have expired and, with no decommissioning plan in operation, the NRC's responsibility for ensuring the removal of contaminated material with appropriate controls would be jeopardized. This result could not have been intended by the Commission in adopting this regulation.

The next error in the Intervenors' case centers on the position that section 40.42 cannot be applicable to this case since the Licensee could not comply with all its requirements when it notified the NRC of the cessation of its operations. This view considers as an insurmountable flaw the fact that on or before the expiration date of the license, SFC did not file a decommissioning plan or fulfill the demands of subsections (c)(1) and (c)(2) concerning the disposal of source material and reporting the results of a radiation survey.[51]

To meet Intervenors' expectations in this case — for a license renewal hearing — would constitute a new and adventuresome exercise in a presiding officer's jurisdictional authority. Such a decision not only would require a licensee to continue an unwilling involvement in a license renewal proceeding, but would minimize and perhaps negate the NRC Staff's regulatory role in approving and overseeing current decommissioning activities.[52] Further, it could delay the decontamination of critical areas and hamper the conduct of an important public policy. No interpretation can support this procedure as being within the power of the Presiding Officer in imposing terms and conditions on the withdrawal of a license renewal application. Nor can the proposition that such a procedure was contemplated by the Commission's rules be supported. Regulations should be construed to avoid absurd results and provide expression to their intended purpose.[53]

3. *Regulatory Compliance*

Although a valid claim of incomplete compliance with regulatory requirements can be raised as it has been in the circumstances of this case, it seems clear that the dictates of section 40.42(b) to notify the Commission of a decision to terminate licensed activities has been implemented here. The words of the regulation, "promptly, in writing," only serve to emphasize this obligation. The Licensee contends that the provisions of section 40.42 must be read reasonably

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[51] *See* Intervenors' Opposition at 12-14; Tr. 196-98.

[52] The Staff recently reported its continuing oversight program of SFC's decommissioning activities. *See* NRC Staff Response to Memorandum and Order (Nov. 12, 1993).

[53] *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938).

with due consideration given to the circumstances existing when the notification was filed.[54]

As indicated previously, the difficulty posed by the facts of this case arises from the failure of the regulations to specifically provide for those circumstances where a licensee abruptly ceases operations when a renewal application is pending. And that difficulty is compounded where the facility and site in question are contaminated to perhaps a substantial, but unknown degree.[55] However, the scope of regulations, like statutes, should be interpreted by determining their purpose through a consideration of their context, structure, and scheme. Here, that consideration leaves no room for concluding that section 40.42 would not be applicable to a premature closing of licensed materials facilities.[56] If that conclusion were to be unacceptable, and the licensee not permitted to conform reasonably to that section's requirements, the agency would be cast in the role of dictating business decisions in requiring continued although unwanted licensed operations. Even though the current state of the regulations concerning license terminations need clarifications, this does not negate their general adaptability to the situation before us.

Over the last 15 years, the Commission has come to realize that each type of nuclear facility requires decommissioning activities tailored to the problems specific to the facility in question. As recently as 1990, the Commission identified over forty of its materials licensees' sites that would not fit the mold of routine decommissioning and that warranted "special attention." The NRC instituted a Site Decommissioning Management Plan (SDMP) to identify and resolve issues associated with the timely cleanup of these sites. By 1992, the Commission approved an Action Plan to describe the NRC's case-by-case approach for accelerating remediation of the SDMP sites.

However, during this time period, the Commission also recognized inherent difficulties associated with a case-by-case approach to timely decontamination and decommissioning. Such an approach often required the Commission to issue *orders* to establish schedules for timely action. Since the Commission viewed timeliness in decommissioning as a generic issue rather than an enforcement issue, there was clearly a need for definitive regulations that specify acceptable time periods for decommissioning nuclear facilities when licensed activities have ceased.

On January 13, 1993, the Commission issued a proposed rulemaking to require timely decontamination and decommissioning by nuclear licensees. The proposed rule establishes specific requirements for (1) timely decommissioning

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[54] Sequoyah Fuels Corporation's Response to Conference Questions at 1-4.

[55] SFC has been notified by the Staff that due to large areas of contaminated soils, *inter alia*, the Sequoyah site will be included in the 1993 Update of the Commission's Site Decommissioning Management Plan. *See* Letter, Bachmann to Administrative Judges, October 29, 1993.

[56] *United States v. Cooper Corp.*, 312 U.S. 600, 607 (1941); *see also Choteau v. Burnet*, 283 U.S. 691 (1931).

of the entire site at the end of all licensed activity at the site, and (2) timely decommissioning of separate buildings and outdoor areas where licensed activities have ceased. The proposed rulemaking purports to clarify some of the same issues brought to the fore by SFC's decision to terminate its license during the pendency of its license renewal application by addressing license termination, expiration, revocation, denial of renewal, and their relationship to each other.[57] The proposed rule also makes clear that decommissioning and timeliness criteria apply to all licensees for whom the authorization to perform licensed activities has expired, regardless of whether the expiration was voluntary or involuntary.[58] The question remains whether the proposed rule will provide adequately for premature license termination.

In the facts of this case, however, it is clear that the Intervenors' objective — adjudication of nonproduction activities in a renewed license hearing — would have us construct an artificial forum to compel the SFC to continue the pursuit of that which it declines, and has no current obligation, to do — the litigation of decommissioning activities permitted under its license.

Nothing is more basic in NRC adjudicative proceedings than that jurisdiction is limited to the matters in controversy among the parties.[59] The issues referenced by Intervenors — adequacy of funding decommissioning, adequacy of a groundwater monitoring plan, safety and environmental risks of raffinate disposal, adequacy of contingency emergency plan and the adequacy of SFC's management to conduct safe operations — are matters and issues that can only be engaged, if at all, in a differently designated proceeding. These are matters relating to decommissioning and, as such, are beyond this Presiding Officer's present jurisdiction. Here SFC's withdrawal motion — outside of consideration of conditions on the withdrawal — disposes of the controversy. Thus, there is no foundation to support, as the Intervenors' request, a conference to establish the scope of license renewal hearing.[60]

Unlike Intervenors, the State requests the imposition of conditions, mostly in the environmental area, on SFC's withdrawal motion.[61] Basically, the State asks for assurances through a monitoring program that the Licensee will protect and repair damages to the natural resources of the area during decommissioning and will provide the necessary finances to complete decommissioning. It also requests SFC compliance with federal and state water quality certification

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[57] 58 Fed. Reg. at 4100.

[58] *Id.* at 4101.

[59] *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 n.1 (1986); *see* 10 C.F.R. § 2.1251(d).

[60] Intervenors also requested a prehearing conference to assist in determining the imposition of conditions on an SFC license withdrawal decision. This request received no consideration, however, since Intervenors conclude their request with the statement that such conditions would be inappropriate. *See* Intervenor's Opposition at 24.

[61] *See* State Request at 3-7. The State withdrew its requested condition dealing with hazardous waste in agreeing that such material is solely within EPA's jurisdiction; *see* Tr. 218.

requirements. Except for the assurances requested on financial commitments and possibly the water quality certification permits, the State's concerns focus on the Licensee's activities and performance during decommissioning. As indicated, *supra*, these matters are beyond the scope of this Presiding Officer's authority and consequently must be denied. In order for these matters to be considered, they would also have to meet the test that the conditions requested must not only bear a relationship to the conduct and legal harm at which they are aimed, but the harm must be documented in the record.[62] That test cannot be met here.

The two other withdrawal conditions requested require additional comment. The financial assurance obligation for financing decommissioning was required to be complied with as a part of the license renewal proceeding. SFC, in fact, was to produce this assurance in a revised decommissioning funding plan to be submitted on November 30, 1992.[63] The revised plan was not submitted as promised, and on December 29, 1992, the NRC issued a Demand for Information requiring SFC and its parent corporation, General Atomics (GA), to submit a Decommissioning Plan and a Decommissioning Funding Plan. The Licensee responded to the Demand by referencing its notification of the termination of activities under its license filed the same date (Feb. 16, 1993). As indicated, that notification included its preliminary plan to complete decommissioning and a suggested plan for ensuring the availability of adequate funds for that purpose.[64]

As of the date of this decision, the Staff has not approved or commented upon SFC's preliminary plan and has issued an Order requiring the Licensee and GA to provide additional financial assurances for decommissioning.[65] In essence, the condition requested by the State and the Commission's Order are directed at the same objective — financial assurances to complete decommissioning. Since this matter will be considered in a subsequent adjudicative proceeding, the complex details and extent of decommissioning financing will be more appropriately reviewed and resolved in the context of that proceeding. Accordingly, the request for a condition in this area is denied here.

4. Water Quality Issues

In resolving the request pertaining to a water quality certification, a review of the development of this issue seems pertinent. Counsel for the State of Oklahoma raised the issue early in this proceeding whether SFC had obtained

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[62] *LeCompte*, 528 F.2d at 604-05.

[63] Revision 1, License Renewal Application at 6-1, 2 (Sept. 30, 1992).

[64] Letter, SFC to Bernero at 5-6, February 16, 1993.

[65] NRC Order to Sequoyah Fuels Corporation and General Atomics, October 15, 1993. A hearing has been requested by both organizations on this Order.

a valid water quality certification from the State, as required by the provisions of section 401(a)(1) of the Clean Water Act. During the Presiding Officer's conference on October 7, 1993, the State pursued the issue further, clarifying its arguments. The State alleges that an application for a 401 certification is required at the time of authorizing an activity that might impact water quality in the State, and in the case of SFC, such certification must be obtained each time the NRC renews SFC's nuclear license.[66] Moreover the State alleges that SFC has never acquired a 401 certificate in the past and that it still lacks a valid certificate at this time.[67]

SFC offered somewhat conflicting statements concerning the certificate. It argued that it was issued a certificate "a long time ago,"[68] although members of the SFC management could not recall at the time of the conference what SFC's water quality responsibilities were under the 401 certification process.[69] However, SFC stated that the validity of its current license as issued previously or renewed previously is not affected by the State's concerns about any 401 certification.[70] The conference ended with neither a clear resolution of this issue nor an explanation of how the presence or absence of the 401 certificate affected SFC activities prior to the time it submits its decommissioning plan.

On November 5, 1993, the Presiding Officer issued a Memorandum and Order requesting information from the Staff relating to three issues, one of which concerned the 401 certification process. That three-part question queried the Staff: (a) Has SFC ever obtained a 401 water quality certification? (b) does SFC currently have a 401 water quality certification? and (c) must a 401 water quality certification be in place prior to *any* decontamination efforts by the Licensee? The Staff's answer to part (a) relied solely on a legal interpretation made by the NRC Assistant General Counsel early in 1989 that SFC had come into compliance with the certification requirement by having received a "functionally and legally equivalent" section 401 certification from the State.[71] The Staff's response further asserted that the "functionally and legally equivalent" 401 certification was a Disposal Permit numbered WD-75-074 which was issued by the State in October of 1988 and which was to expire in September of 1993.[72] As to part (c) of the Presiding Officer's question, the Staff simply stated that there is no specific NRC regulation that a 401 certificate be in place

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[66] Tr. 112, 113, 118, 119, 211, 212.
[67] Tr. 109.
[68] Tr. 116.
[69] Tr. 111.
[70] Tr. 117.
[71] NRC Staff's Response to Memorandum and Order (Requesting Information) (Nov. 12, 1993) at 3. The letter is from S. Treby, NRC Assistant General Counsel for Rulemaking and Fuel Cycle, to Dean A. Couch, General Counsel, Oklahoma Water Resources Board, dated February 1, 1989.
[72] *Id.*

prior to decontamination efforts and that the Staff could not address what State requirements may exist.[73]

SFC filed its own response to the Presiding Officer's questions. In that response, it fully agrees with the Staff that the NRC Assistant General Counsel's legal opinion should prevail, i.e., that there was a functional and legally equivalent certification issued by the State in the past. However, we learn subsequently in SFC's response that this 401 certification may not be the 401 certification alluded to by either the State or the NRC Staff. The certificate that SFC cites was issued by the Oklahoma Water Resource Board on September 14, 1988, for NPDES Permit No. OK 0000191. SFC claims that this certificate was "issued for the SFC facility by the U.S. Environmental Protection Agency ('EPA') and is currently in effect."[74] That is not the same certificate referenced by the Staff as the financial and legal equivalent to a 401 certificate.[75] As to part (c) of the Presiding Officer's question, SFC again raises what amounts to a regulatory defense based upon its filing a notification of termination of activities pursuant to section 40.42(b). In SFC's own words,

> [s]ince the conduct of these decontamination efforts under the present NRC license does not require the grant of any additional authority by the NRC, such [decontamination] efforts cannot give rise to the need for any further Section 401 certification.[76]

Even though the State did not respond to the Staff's reply, what is apparent from the foregoing is that there remains, on the record, a strong disagreement between the State of Oklahoma (which regulates the Clean Water Act program in the State), the Staff of the NRC, and SFC itself as to whether SFC is in compliance with that Act. The State says it is not, and even if it was in compliance, SFC's certificate expired in September 1993. The Staff says the SFC holds a functionally and legally equivalent certificate but sidesteps the issue of whether or not it remains in effect since it was set to expire in September 1993.[77] SFC argues that since it is no longer seeking a federal licensing action, no section 401 certification is currently required. SFC also infers that since its nuclear license remains in effect under the provisions of section 40.42, its 401 certification remains in effect as well, but it does not set forth any regulatory authority for the statement, and it fails to address the fact that it references a different permit from that found by the Staff to be a functional and legal equivalent to a 401 certificate.

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[73] *Id.* at 4.

[74] SFC Response to November 5, 1993 Memorandum and Order (Requesting Information) (Nov. 17, 1993) at 2-3.

[75] *Id.* at 4 & n.2. The Staff's functional and legal equivalent certificate was referenced to Disposal Permit No. WD-75-074 issued in October 1988. Staff Response at 3 and attached letter from S. Treby to D. Couch. SFC's 401 certificate is referenced to NPDES Permit No. OK 0000191 issued in September 1988.

[76] *Id.* at 5.

[77] Staff Response to Memorandum and Order at 3-4.

At this juncture, it remains unclear how either the 401 certification, or the lack thereof, affects SFC's nuclear license, as that license continues during this interim decontamination and decommissioning period. However, the issue persists, unfortunately, beyond this Presiding Officer's jurisdiction.

5. *Public Participation in Decommissioning*

A basic issue raised in this proceeding, as previously indicated, concerns the omission of participation by the Intervenors and the State, and a public discussion of their concerns, during an extensive period of time before the Licensee's decommissioning plan is submitted and approved by the Commission.

The present state of regulatory guidance for a licensee curtailing operations prior to license expiration provides little illumination to either licensees or members of the public. And this is particularly obvious if the termination of licensed operations is done abruptly. In the normal case, the regulations appear to contemplate a cessation of operations to occur simultaneously with the license expiration date and the requirements of section 40.42(c) including submission of a decommissioning plan to be complied with at that time. In this case, however, that information is being provided "*to the extent practicable*"[78] (emphasis added), with delivery of a plan for decommissioning delayed for a 3-year period.[79] Again, the Licensee contends that in view of the obligatory regulatory requirement of section 40.42(b) commanding prompt notification to the NRC when a decision is reached to terminate activities, the decommissioning and information submittal provisions of section 40.42 must be read reasonably.[80] In the light of the overall purpose of this regulation, this is a practical judgment that cannot be quarreled with.

One of the pacing tasks in SFC's decommissioning efforts is the development and implementation of a site characterization plan, an activity designed to determine the extent, location, and movement of existing contamination. This effort is considered essential to evaluate the risks of alternatives for disposition of contaminated material, facilities, or equipment.[81] The SFC's current plan for site characterization consumes a 3 ½-year period.[82] As previously noted, the Staff has listed the Sequoyah site in the agency's Site Decommissioning Management Plan. The agency's Action Plan for these sites calls for the submission of a site characterization plan within 12 months after the commencement of decommissioning, which coincides with the cessation of operations.[83]

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[78] SFC Letter of Notification to NRC at 3, February 16, 1993.
[79] *Id.*, Figure 9-1.
[80] SFC's Response to Conference Questions at 1-2, October 15, 1993.
[81] *See* Tr. 85-86, 127-29.
[82] *See* SFC Preliminary Plan for the Completion of Decommissioning, Figure 9-1.
[83] *See* 57 Fed. Reg. 13,391 (1992); SFC Preliminary Plan for Decommissioning, Figure 9-1.

Although the agency's Action Plan does not contain enforceable standards, and with timeliness in decommissioning considered a issue, the proposed rule currently under consideration recommends that licensees like SFC would have 12 months after notification of terminating operations to submit a final decommissioning plan and 18 months to complete it. This compares with SFC's current plan of some 5 years to prepare its final decommissioning plan and four more to implement it.

The Staff was questioned during the recent conference on time delays in decommissioning and indicated that additional site characterization work was required at the Sequoyah site.[84] SFC has previously performed extensive site characterization activities at the Sequoyah facilities and surroundings.[85] These efforts covered groundwater contamination, uranium migration pathways, site and environmental characterizations, and plans for monitoring air and liquid effluent releases and involved extensive site characterization. That effort raises questions on whether the lengthy period currently proposed by SFC for this purpose is reasonable.

The submittal and consideration of decommissioning plans is a matter, as indicated, beyond the jurisdictional limits of this Presiding Officer. The question presented in this proceeding, nevertheless, is whether a protracted decommissioning schedule can effectively preclude the participation of Intervenors and the State through having their safety and environmental concerns effectively mooted. Or put another way, can those concerns be protected by conditions placed on the licensee's withdrawal of its renewal application. The Presiding Officer thinks not.

Under the present state of NRC's regulations, interested members of the public and other governmental entities are able to scrutinize the decommissioning activities of a licensee in an adjudicatory proceeding only if the licensee seeks an amendment to its existing license. Because the Licensee's request to conduct decommissioning in accordance with an overall decommissioning plan generally has been considered a license amendment request, interested parties have been able to exercise hearing rights under section 189(a) of the Atomic Energy Act.[86] A lengthy decommissioning schedule, like the one here, if approved by the Staff, with the Licensee's continued ability to carry on permitted decom-

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[84] Tr. 127-30.

[85] The site characterization work is documented in "Facility Environmental Investigation Plan" (Oct. 15, 1990), "Main Process Building Investigation Final Findings Report" (Dec. 15, 1993), "Environmental Report" (Aug. 8, 1990), "Responses to NRC Inquiry on Environmental Assessment" (Sept. 4 and Oct. 30, 1992) and a revised "Environmental Program for Sequoyah Facility" (Sept. 30, 1992) which included a 1990-91 "Facility Environmental Investigation."

[86] *See Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 237 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). *But see* Commission Staff Requirements Memorandum, Chilk to Parler and Taylor, June 30, 1993, where hearings on a decommissioning plan approval are considered wholly a matter of Commission discretion.

missioning activities under its existing license, might have the effect of mooting some of the allegations made in the Intervenors' and State's complaints now before the Presiding Officer. However, since the Commission will be soon considering a final rule on the timeliness of materials licenses decommissioning, the particular circumstances involved in this proceeding will be in front of the Commission for consideration if changes are to be made.

Conclusion

The Presiding Officer concludes that the end of this proceeding has produced the results prayed for in the original concerns of the Intervenors — the cessation of SFC's licensed activities. The license here to operate has been terminated and the activity on resource material is limited solely to decommissioning and restricting entry to the site. Further, Intervenors and the State may have a future opportunity to contest any decommissioning activities beyond those called for in the existing license when a plan for them is submitted to the Commission.[87] And the Commission's regulatory remedies for administrative actions and relief are available in the interim period.[88] The Staff, during their review of SFC's preliminary decommissioning plan, may also require additional license amendments for decommissioning activities, which could open other hearing opportunities to scrutinize the Licensee's operations.[89] The Staff's current review apparently covers most of the areas that the parties have expressed concern over — monitoring, environmental impact, raffinate program, financial assurances.[90]

In light of the foregoing, therefore, it is concluded that Intervenors' argument in opposition to the withdrawal of the license renewal application is without merit and the request by the State to impose conditions on the license withdrawal must be denied. Therefore, the Licensee's motion to withdraw its application for license renewal is granted and this proceeding is hereby terminated.

Order

1. The motion of Sequoyah Fuels Corporation for withdrawal of its license renewal application and the termination of the proceeding is granted.

2. The request of Native Americans For a Clean Environment and the Cherokee Nation for a prehearing conference to consider issues for a revised

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[87] *See supra* note 86.

[88] *See* 10 C.F.R. § 2.206.

[89] *See* Tr. 160-61. The Staff recently asked SFC to request license amendments in connection with SFC's decommissioning. *See* Uttal Letter to Administrative Judge, December 2, 1993.

[90] *See* Tr. 97, 100, 137, 162.

license renewal hearing on nonproduction activities of the Sequoyah Fuels Corporation is denied.

3. The request of the Oklahoma Department of Wildlife Conservation to place conditions on the Sequoyah license withdrawal concerning a biological evaluation, natural resource damage correction, non-source-material contamination, decommissioning funding guarantees, and water certificate requirements is denied.

4. In accordance with 10 C.F.R. §§ 2.1251(a) and 2.786, this Decision constitutes the final action of the Commission 30 days after the date of issuance on December 15, 1993, unless any party petitions for Commission review or the Commission takes review of the decision *sua sponte*. Commission review of this Order may be sought by filing a petition for review within 15 days after service of this Decision. Any other party to the proceeding may, within 10 days after service of a petition for review, file an answer supporting or opposing Commission review. Requirements regarding the length and content of a petition for review and the length and content of an answer to such a petition are specified in 10 C.F.R. § 2.786(b)(2)(3).

Be It So ORDERED.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 15, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Harry Foreman
Ernest E. Hill

In the Matter of

Docket No. 30-16055-CivP-R
(ASLBP No. 93-682-01-CivP-R)
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row,
Geneva, Ohio 44041)

December 14, 1993

MEMORANDUM AND ORDER

On September 30, 1993, the Commission issued CLI-93-22, 38 NRC 98, which reversed this Board's summary disposition of one violation as set forth in LBP-91-9, 33 NRC 212 (1991) and remanded to the Board "for further proceedings consistent with this order all issues related to that violation." (CLI-93-22, 38 NRC at 100.)

In LBP-91-9, the Board concluded that no genuine issue of material fact existed with regard to whether AMS failed to comply with the provisions of 10 C.F.R. § 20.201(b) prior to two entries into a hot cell on November 6 and 21, 1984. The Board's reasoning was based on several facts: there was a substantial underestimation of actual doses received during those entries; on the days of the entries only a hand-held survey instrument was used at the door of the hot cell to determine estimated exposure rates; on the days of the entries, a remote probe used to detect and remove radioactive pellets was uncalibrated.

In remanding this issue, the Commission provides guidance that outlines the direction the Board must now take. The Board is directed to "consider not only the result from the radiation level readings but also the procedures AMS used to survey for radiation hazards." (38 NRC at 109.) "[T]he scanning for pellets [is to be] considered when determining if a genuine issue remains regarding the adequacy of the survey." (*Id.* at 110.) "[S]ection 20.201 requires consideration of more than just quantitative measurements of radiation levels . . . . [i]t also requires . . . consideration of physical surveys of the location of materials and equipment." *Id.*

Moreover, the Commission directs the Board "before commencing with any evidentiary hearing on this matter, [to] direct the parties to address the question of whether, in light of our findings on appellate review, a genuine issue remains regarding the adequacy of AMS' survey." (*Id.* at 111.)

In deference to the Commission's instructions, the Staff shall file its motion regarding the adequacy of the AMS survey and the possible termination of this proceeding with the Board by close of business, January 14, 1994. AMS shall respond with its answer and any motion by close of business, January 28, 1994.[1]

IT IS SO ORDERED.

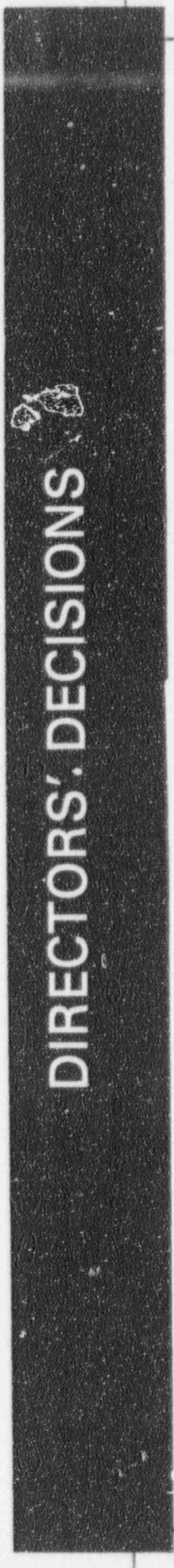
FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 14, 1993

[1] The Commission stated that its decision to remand Violation 2 to the Licensing Board may ultimately necessitate a modification of the severity level and/or penalty amount, if the Staff fails to prove the occurrence of Violation 2. (38 NRC at 118-19.) Therefore, the Commission remanded the issue of the appropriateness of the severity level and penalty amount to the Licensing Board for further proceedings consistent with the disposition of Violation 2. (*Id.* at 119.) Accordingly, this issue will be taken up separately from and subsequently to the filing of motions regarding Violation 2, if necessary.

Directors' Decisions Under 10 CFR 2.206



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

U.S. DEPARTMENT OF ENERGY
(Hanford Site) **December 2, 1993**

The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed by the Confederated Tribes and Bands of the Yakima Indian Nation requesting that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes at the Hanford Site in the State of Washington and to expedite regulation thereof in accordance with the provisions of 10 C.F.R. Part 30 or other applicable chapters of the *Code of Federal Regulations*. As basis for the request, the Petitioner asserts that DOE currently is in violation of Part 30 requirements for a license since "various near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks," but meeting the 10 C.F.R. Part 60 definition of "geologic repository," have received and currently hold in "long-term storage" or "disposal," "high-level radioactive waste."

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

Application of section 202(4) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842(4), to determine NRC's jurisdiction with respect to certain storage tanks at Hanford turns upon the intention of Congress or DOE at the time the facilities were authorized and not on the likelihood that the tanks might in fact be used for long-term storage.

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

DOE has advised NRC that it intends to retrieve and process the high-level wastes in both single-shell and double-shell tanks for disposal in an offsite repository. Should DOE undertake to dispose of these wastes *in situ*, then the NRC would exercise its regulatory authority, as applicable, under section 202(4).

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

The legislative history with respect to section 202(4) of the Energy Reorganization Act of 1974 is clear that Congress did not intend for NRC to regulate any existing facilities, at least until such time as they might be authorized for use as long-term storage or disposal facilities.

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

The cribs, ditches, and trenches are not "facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste" and they are not subject to the licensing or related regulatory authority of the NRC pursuant to section 202(4) of the Energy Reorganization Act of 1974.

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

INTRODUCTION

By a petition dated July 9, 1991, the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Indian Nation or Petitioner) filed a request, pursuant to 10 C.F.R. § 2.206, that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes at the Hanford Site in the State of Washington and to expedite regulation thereof in accordance with the provisions of 10 C.F.R. Part 30 or other applicable chapters of the *Code of Federal Regulations*. The petition asserts, in support of this request, that DOE currently is in violation of 10 C.F.R. Part 30 requirements for a license since "various near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks," but meeting the 10 C.F.R. Part 60 definition of "geologic repository," have received

and currently hold in "long-term storage" or "disposal," "high-level radioactive waste." The petition was signed by Mr. Russell Jim, Manager, Environmental Restoration/Waste Management Program of the Yakima Indian Nation, on behalf of Petitioner.

By letter to Mr. Jim dated March 21, 1992, I acknowledged receipt of the petition. Notice of receipt was published in the *Federal Register* on April 2, 1992 (57 Fed. Reg. 11,343). I subsequently determined that additional information was needed concerning DOE activities at Hanford, and on August 19, 1992, I wrote to DOE to request such information. A copy of this letter was sent to Mr. Jim. DOE provided its response on April 13, 1993. Based on the information obtained from DOE, and for the reasons given below, I have now concluded that the Petitioner's request should be denied.

BACKGROUND

The petition addresses "near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks" that are alleged to be used, or to have been used, for the "long-term storage" of "high-level radioactive waste" at the Hanford Site. The issue that I must resolve is whether any of the facilities at the Hanford Site meet this description and, if so, whether they are subject to regulation by the U.S. Nuclear Regulatory Commission (NRC). The Petitioner has identified, as the applicable provision of law, section 202(4) of the Energy Reorganization Act of 1974, 42 U.S.C. 5842(4), which reads in part as follows:

> SEC. 202. . . . the Nuclear Regulatory Commission shall . . . have licensing and related regulatory authority pursuant to chapters 6, 7, 8, and 10 of the Atomic Energy Act of 1954, as amended, as to the following facilities of the Administration:
>
> . . .
>
> (4) Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration, which are not used for, or are part of, research and development activities.[1]

I agree with the Petitioner that this is the applicable statutory provision and I will proceed, therefore, to consider whether any or all of the activities, of the types identified by the Petitioner, at the Hanford Site are within the scope of this law.

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[1] The "Administration" refers to the Energy Research and Development Administration, the functions of which were transferred to the Secretary of Energy pursuant to section 301 of the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7151.

DISCUSSION

The petition deals with two quite different kinds of facilities — those in which wastes are currently being stored pending future treatment or disposal activity (i.e., the single-shell tanks) and those in which wastes have been disposed of with no specific intention to further treat or recover them (i.e., the cribs, ditches, and trenches). I conclude that neither of these kinds of facilities involves activities that are presently subject to the jurisdiction of NRC.

The Single-Shell Tanks

The issue of NRC's jurisdiction, under section 202(4), with respect to certain storage tanks at Hanford was resolved in *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979). The Court of Appeals there concluded that the application of section 202(4) turns upon the intention of Congress or DOE at the time the facilities were authorized and not on the likelihood that the tanks might in fact be used for long-term storage. Applying this standard, the Court found that double-shell storage tanks for which funds for construction were authorized in appropriations acts for fiscal years 1976 and 1977 were not authorized for long-term storage and, accordingly, "they are not within the licensing authority of NRC."

As the single-shell tanks were constructed between 1944 and 1964,[2] their status was not specifically adjudicated in *NRDC*. I have no doubt, however, that those tanks were viewed at the time of their construction as being intended for short-term management alone, and as such they would not be subject to NRC jurisdiction.[3] And DOE has declared that it is continuing "storage and maintenance" of the wastes in those tanks, with a view to further decisions when sufficient data become available.[4] In this regard, DOE recently completed a reassessment of its plans for the management of all Hanford tank wastes[5] and DOE has advised NRC that it intends to retrieve and process the high-level wastes in both the single-shell and double-shell tanks for disposal in an offsite

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[2] U.S. Department of Energy, Final Environmental Impact Statement (FEIS), "Disposal of Hanford Defense High-Level, Transuranic and Tank Wastes, Hanford Site, Richland, Washington," December 1987 (DOE/EIS-0113), 2.A.2.

[3] My understanding conforms to the views reflected in the legislative history when the Energy Reorganization Act was passed. See, in particular, the reference in the Senate Report to the "temporary tanks in AEC storage facilities." S. Rep. No. 93-980, 93d Cong., 2d Sess. 60 (1974).

[4] FEIS, *supra* note 2, at 1.1.12.

[5] U.S. Department of Energy, Strategy Plan for Management of Hanford Tank Wastes, WHC-EP-0501, Rev. 1, March 31, 1993.

repository.[6] Notwithstanding these plans, DOE may experience difficulties in waste retrieval and some wastes may remain in storage in these tanks. Should DOE undertake to dispose of these wastes *in situ*, then the NRC would exercise its regulatory authority, as applicable, under section 202(4).

Moreover, the legislative history is clear that Congress did not intend for NRC to regulate any existing facilities, at least until such time as they might be authorized for use as long-term storage or disposal facilities. As cited by the Court in *NRDC*, the reporting Senate Committee declared that "it is not the intent of the committee to require licensing of such storage facilities [for long-term storage of high-level radioactive wastes] which are already in existence or of storage facilities which are necessary for the short-term storage of radioactive materials incidental to . . . R. & D. activities." *See NRDC*, 606 F.2d at 1267. The same report contrasted "the wastes which are leaking from temporary tanks in AEC storage facilities," which would not be subject to NRC regulation, with "new facilities now being planned for long-term storage," which would have to meet NRC licensing standards. *Id.* Similarly, in the Conference Report cited by the Court, it was noted that facilities for long-term storage of high-level wastes were not then in existence — a clear indication that the Hanford tanks were not the type of facility that the statute was designed to reach. *Id.*

The Cribs, Ditches, and Trenches

In its letter of April 13, 1993, the Department of Energy provides some information regarding the wastes that the Atomic Energy Commission (predecessor to DOE) had authorized to be discharged into near-surface facilities. The information suggests, but does not conclusively demonstrate, that the material that was so discharged was not "high-level radioactive waste" within the meaning of the Energy Reorganization Act.[7] In the final analysis, however, this makes no difference. As I have already noted, NRC has jurisdiction only as to facilities or activities that were to be authorized subsequent to enactment of the Energy Reorganization Act. DOE informs us that the liquid wastes in question were discharged over a period of time beginning in the 1940s and ending in the 1960s and that such disposal at the site was considered permanent. Under these circumstances, I must conclude that the cribs, ditches, and trenches are not "facilities authorized for the express purpose of subsequent long-term storage

[6] Letter from J.C. Tseng, Director, Office of the Hanford Program, U.S. Department of Energy to R.L. Ballard, Chief, Geology and Engineering Branch, Division of High-Level Waste Management, U.S. Nuclear Regulatory Commission, May 18, 1993.

[7] *See* Nuclear Regulatory Commission, "States of Washington and Oregon: Denial of Petition for Rulemaking," 58 Fed. Reg. 12,342 (Mar. 4, 1993).

of high-level radioactive waste" and that they are not subject to the licensing or related regulatory authority of the NRC.

I observe, as the Conference Report did in 1974, that the absence of NRC regulation does not reduce in any way the responsibility of DOE to ensure that all storage or disposal of radioactive waste must be completely acceptable from the standpoint of the public health and safety and the protection of the environment. *See NRDC,* 606 F.2d at 1267-68. DOE obligations in this regard are reflected in the Atomic Energy Act, the National Environmental Policy Act, the Federal Facilities Compliance Act, and other laws.

CONCLUSION

The petition provides no basis for NRC to require submittal of a license application from the DOE for HLW on the Hanford site. The cited statute and NRC regulations do not apply to the HLW in storage or the other wastes in permanent disposal at the Hanford site and provide no basis for the requested action. Therefore, I find no basis in the petition for requiring a license application from DOE. Accordingly, the petition of the Yakima Indian Nation is denied in its entirety.

FOR THE NUCLEAR
REGULATORY COMMISSION

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

Dated at Rockville, Maryland,
this 2d day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-271

VERMONT YANKEE NUCLEAR
POWER CORPORATION
(Vermont Yankee Nuclear Power
Station) December 14, 1993

The Director of the Office of Nuclear Reactor Regulation denies petitions filed with the Nuclear Regulatory Commission (NRC) Staff by Michael J. Daley on behalf of the New England Coalition on Nuclear Pollution (Petitioner) on April 8, 1993, and April 11, 1993, requesting the NRC to take immediate action to require that the Vermont Yankee reactor remain in cold shutdown until plant management can provide proof that the emergency diesel generators at the plant are able to meet their safety function. Petitioner sought relief based on assertions that (1) diesel generator "A" was damaged by overload conditions suffered during testing in August through October of 1990; (2) the "B" unit also suffered under the same testing regime; (3) one of the causes of the repeated failures of the "A" unit in the summer of 1992 was the damage from this testing; (4) the overloading resulted from inappropriate actions taken in response to an NRC-identified violation indicating that the emergency diesel generators had for 20 years not been tested at loads consistent with the maximum expected accident load; and (5) the foregoing raises a number of questions that must be immediately answered if Vermont Yankee is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup power systems.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Design basis emergency diesel generator capacity; definition of load for emergency diesel generators, including

real load, reactive load, power factor; diesel generator cylinder liner failure, including role of overload in causing, role of fatigue (from operation) in causing, resulting from original manufacturing flaws in liners, and likelihood of recurrence/probability of existence of other hidden flaws; relation of surveillance and other testing to detection of cyliner liner flaws in emergency diesel generator; and overload of other equipment.

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

I. INTRODUCTION

By letters dated April 8, 1993, to Thomas T. Martin, Regional Administrator, Region I, and April 11, 1993, to Ivan Selin, Chairman of the U.S. Nuclear Regulatory Commission (NRC), on behalf of the New England Coalition on Nuclear Pollution (Petitioner), Michael J. Daley requested enforcement action regarding the Vermont Yankee Nuclear Power Station (VYNPS). Both letters were referred to the Office of Nuclear Reactor Regulation for consideration pursuant to 10 C.F.R. § 2.206, and have been treated together as a single petition requesting enforcement action.

The petition asked the NRC to take immediate action to require that the reactor at the VYNPS, owned and operated by the Vermont Yankee Nuclear Power Corporation (the Licensee), remain in cold shutdown until plant management can provide proof that the emergency diesel generators (EDGs) at the plant are able to meet their safety function.

The petition sought relief based on the assertions that (1) EDG "A" was damaged by overload conditions suffered during testing in August through October 1990; (2) EDG "B" also suffered under the same testing regime; (3) one of the causes of the repeated failures of EDG "A" in the summer of 1992 was the damage from this testing; (4) the overloading resulted from inappropriate actions taken in response to an NRC-identified violation indicating that the EDGs had for 20 years not been tested at loads consistent with the maximum expected emergency load; and (5) the foregoing raises a number of questions that must be answered immediately if Vermont Yankee (VY) is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup power systems. In addition, the Petitioner asserted that a recent VY report casts doubt on the ability of the Licensee's current surveillance and maintenance programs to ensure that the EDGs can meet their safety function.

The Petitioner's request that the Commission take immediate action to require that the VY reactor remain in cold shutdown was denied for the reasons expressed in my letter to the Petitioner of June 21, 1993.

The NRC Staff review of the issues raised in the petition is now complete pursuant to section 2.206. For the reasons set forth below, the petition is denied.

II. BACKGROUND

During the period August 6, 1990, through October 3, 1990, the NRC Staff conducted a safety systems functional inspection (SSFI) at the VYNPS. The SSFI team reviewed the Licensee's surveillance testing of the station's EDGs pursuant to the plant Technical Specifications (TSs). The team concluded that the surveillance procedure, which called for the test to be conducted at a power factor of 1.0, did not take into consideration the actual generator electrical current that would result from the lagging power factor of the emergency loads. Most of the emergency loads are reactive or inductive loads, such as electric motors. They cause the current to lag behind the voltage in generators and transmission lines. Thus, the reactive loads require more current than purely resistive loads for any given power level with a constant voltage value. This increased current in the generator will lead to increased heating without increasing the mechanical load on the diesel engine that drives the generator. This phenomenon is a well-known characteristic of electric power systems. It is quantified by the term "power factor," which is the ratio of the mechanical load (or real load) in kilowatts (kW) to the total electrical load (or reactive load plus real load) on the generator in kilovolt-ampere (kVA). A power factor of 1.0 signifies no reactive load. Increasing reactive load reduces the power factor. A realistic test power factor would be between 0.8 and 0.9. The team concluded that the test had not adequately demonstrated the operability of the EDGs in accordance with TS 4.10.A.1a, which requires that the monthly EDG test be conducted at the "expected maximum emergency load."

While the Licensee's contractor was determining the appropriate test load for compliance with the TS during August through October 1990, the Licensee revised the surveillance procedure to require, on an interim basis, testing at a higher real load (3200 kW vs. 2750 kW), although still with a power factor of 1.0. The Licensee considered this value to be electrically equivalent to the calculated maximum emergency load of 2751.2 kW at a power factor of 0.85. The "A" EDG was tested twice at the interim load of 3200 kW. The "B" EDG was tested three times at this load. Correspondence from the manufacturer (Fairbanks Morse) on September 12, 1990, in response to a Licensee request for guidance, stated that the maximum load at which the Licensee's EDGs can be run for 1 hour without reducing the standard maintenance interval is 3025 kW. Therefore, the Licensee's tests at 3200 kW had exceeded the mechanical load limit specified for the engines (real power in kW).

Following recognition of the diesel overloads, the Licensee conducted inspections of key load-bearing components of the diesel engines (e.g., piston pins and bushings, connecting rods, main bearings) according to manufacturer recommendations. Minor deficiencies, which appeared to be unrelated to the overload conditions, were identified and corrected. The NRC Staff reviewed the Licensee's response to the original SSFI test load concern, the determination of adequate EDG test loads, and the response to the engine overload conditions. The Staff expressed concerns regarding the interface between the Licensee's engineering support group and plant operations personnel. Specifically, the Staff was concerned about the time required to incorporate the engineering analysis in plant procedures, and the adequacy of the technical review of the determination of the interim test load. The Staff expected that the Licensee would have (1) identified the surveillance procedure for the EDGs as potentially needing modification based on the engineering analysis (it was not so identified) and (2) incorporated the results of the analysis into the procedure by the time of the inspection. These concerns were documented in Inspection Report 50-271/90-10.

Between October 1990 and May 1992, the EDGs at VY were operated on a monthly basis at between 2500 and 2750 kW at a power factor of 0.85 (approximately the expected maximum emergency load including both real and reactive load) pursuant to TS 4.10.A.1a. No evidence of faults related to the overloads was observed during this period.

During the monthly surveillance test of the "A" EDG in May 1992, the Licensee declared the engine inoperable due to low jacket coolant pressure and discolored coolant water. Upon investigation, the Licensee discovered a crack in the #7 cylinder liner. The Licensee replaced the liner. During the monthly surveillance test of the "A" EDG in June 1992, the Licensee declared the engine inoperable again due to low jacket coolant pressure. Upon investigation, the Licensee discovered a crack in the #10 cylinder liner. The Licensee then replaced all of the cylinder liners in the "A" EDG. The new cylinder liners are of a new design and made of materials having improved characteristics compared with the original cylinder liners. In addition, the new cylinder liners were tested before installation by fluorescent magnetic particle testing, and no flaws were found.

On August 12, 1992, the Licensee issued Licensee Event Report (LER) 92-017 which reported the EDG cylinder liner failures of May and June 1992 and the Licensee's planned corrective actions. On February 19, 1993, the Licensee issued LER 92-017, Revision 1, which provided its conclusion that the cause of the liner failures was "original flaws in the cylinder liner castings . . . propagated through the cylinder wall from a combination of fatigue cycles, below specification tensile strength, . . . and engine overload conditions . . . in 1990."

On April 6 through April 8, 1993, the NRC Staff inspected VY's EDG maintenance and surveillance programs, including the Licensee's actions to

resolve previously identified problems (including the overloads and cylinder liner failures). On the basis of their review, the inspectors identified seven unresolved items that warranted further investigation to determine whether or not violations had occurred. These items related primarily to inadequacy of documentation needed to "permit proper management review or identification and correction of deficiencies." (*See* Inspection Report No. 50-271/93-10.) The inspectors also cited one violation of the Commission's regulations regarding quality assurance records for the replacement cylinder liners in the "A" EDG. The inspectors evaluated these issues in conjunction with all of their findings and in light of the performance history of the Licensee's EDGs (including the overloads and cylinder liner failures), and concluded that, as set forth below, there is reasonable assurance that the EDGs are capable of performing their safety function.

III. DISCUSSION

The following discussion addresses the issues raised in the petition, including specifically numbered questions posed in the petition. This discussion also addresses the assertions of the petition regarding the history of the failures of the "A" EDG in the summer of 1992 and its implications for the reliability of the Licensee's EDGs with respect to the regulatory requirements.

A. Effect of Overloads on EDGs at VY

The petition asserts that the "A" EDG was damaged by the overloads described above, that the "B" EDG experienced similar overload conditions, and that the "A" EDG suffered repeated failures, in part due to the damage caused by the overloads. The Staff has concluded that the "A" EDG was inoperable due to through-wall cracks in the #7 and #10 cylinder liners, as described above. One factor contributing to the cracks was the overload conditions; these overload conditions caused propagation of existing flaws in the cylinder liners but did not initiate those flaws. Rather, flaws that existed before the overloads were exacerbated by the overload conditions.

Cylinder liners #7 and #10 contained manufacturing defects before the overload conditions occurred. Routine fatigue cycles before the overload conditions caused some propagation of these flaws. The overload conditions accelerated the flaw propagation. Immediately following the overloads, the flaws remained embedded (i.e., not through-wall), and the engine was operable. Further fatigue cycles from operation of the EDG over the next 19 months (primarily monthly surveillance runs) propagated the flaws until they became through-wall during the surveillance test runs on May 29, 1992, for cylinder

#7, and June 23, 1992, for cylinder #10, when they were discovered. It is unlikely that the flaws became through-wall before these dates because, if that had been the case, the failure indications (including low jacket coolant pressure and discolored jacket coolant) would have appeared during an earlier surveillance test. In addition, the flaw propagation rate may have been accelerated by substandard material tensile strength (observed in tests performed after the failed cylinder liners were removed). Therefore, the Staff concluded that the overload conditions did not initiate the cylinder liner cracks in the "A" EDG in 1990. Rather, the failures of the cylinder liners in 1992 were caused by flaws in the liners that existed before the overloads occurred. Had the manufacturing defects not been present, the liners would not have failed following the overloads. As stated above, all the cylinder liners in the "A" EDG were replaced upon the failure of the liners in cylinders #7 and #10; based on the new design, material construction, and testing of the replacement cylinder liners, and in view of the failure of the original defective cylinder liners only after 20 years of service, the Staff concludes that there is no basis to conclude that the new cylinder liners will fail prior to the expiration of the license.

The "B" EDG has experienced significantly fewer operating hours, and therefore fewer fatigue cycles, than the "A" EDG. In addition, its operating history since the last overload event in October 1990 indicates that the engine is fully operable. To date, the "B" EDG has operated satisfactorily in monthly surveillance tests for more than 3 years after the overloads. Given that the "B" EDG has undergone significantly fewer fatigue cycles than the "A" EDG and in view of the role of fatigue cycles in causing the propagation of existing flaws in the cylinder liners, as more fully discussed below, the Staff concludes that there is reasonable assurance that the "B" EDG will meet its safety function and that the Licensee's decision to defer the periodic overhaul of that engine and replacement of the cylinder liners to the 1993 refueling outage was acceptable. The Licensee overhauled the "B" EDG during the September 1993 refueling outage. The Licensee replaced all the cylinder liners in the "B" EDG during the overhaul. The original cylinder liners have been examined by fluorescent magnetic particle testing and hardness testing, and the Licensee found neither flaws nor low tensile strength in those liners. This demonstrates that the overload events would not cause cylinder liner failure.

B. Design-Basis EDG Capacity

As discussed in the background section (above), in August 1990 an NRC SSFI team reviewed the Licensee's EDG surveillance program. At that time, VY's EDG surveillance procedure required a test load of 2500-2750 kW. The Licensee conducted the surveillance tests at a power factor of 1.0. The Vermont Yankee Final Safety Analysis Report (FSAR) indicates that the expected maximum

emergency load is 2751.2 kW. VY's TS 4.10.A.1a requires that the EDGs be run during monthly surveillance tests "at expected maximum emergency load." The inspection team noted that the test conditions did not account for the additional heat generation in the generator caused by the reactive nature of the typical emergency loads. This additional heating, however, would not affect the mechanical load on the engine.

In response to the team's finding, the Licensee undertook an engineering analysis to determine the appropriate test conditions, including a reduced power factor of 0.85 with correspondingly higher generator currents. In the interim, the Licensee decided to test the engines at 3200 kW with a power factor of 1.0 to approximate the expected maximum emergency generator currents. A test at this real load would produce a similar amount of heat in the generator as a test at the expected real and reactive loads. The Licensee failed to note at that time that 3200 kW would exceed the rated mechanical load of the engine.

The petition asserts that the overloads resulted from inappropriate Licensee response to an NRC-identified violation, indicating that the EDG had not been tested at loads consistent with the maximum expected accident load. The loads at which the EDGs had been tested prior to August 1990 were consistent with the expected maximum emergency mechanical load on the diesel engine. The Licensee's use of a power factor of 1.0 resulted in test currents, and therefore generator heat loads, less than those resulting from the expected maximum emergency loads (total electrical load). The Licensee now tests the EDGs at 2500-2750 KW and a power factor of 0.85. These test conditions realistically approximate the expected maximum emergency loads as specified in the VY FSAR and in accordance with Regulatory Guide (RG) 1.9, Revision 3, "Selection, Design, Qualification, and Testing of Emergency Diesel Generator Units Used as Class 1E Onsite Electric Power Systems at Nuclear Power Plants." Although the Staff concluded that the Licensee's previous test conditions violated the TS in that they did not realistically approximate the expected current and resultant heat generation in the generator during an emergency, the Staff also concluded that the EDGs had been tested at currents that demonstrated sufficient mechanical, electrical, and heat removal capacity to provide confidence in the ability of the generators to perform their safety function during the relatively short period until the Licensee could determine more appropriate test conditions.

C. Petitioner's Specific Questions

The petition asserts that the foregoing assertions regarding overloading and the design capacity of the "A" and "B" EDGs raise questions "that must be answered immediately if VY is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup

power systems." The Staff has reviewed the questions and assertions in the petition and the technical issues surrounding the overload events of 1990, the cylinder liner failures of 1992, and VY's decision to postpone the overhaul and cylinder liner replacement in the "B" EDG until the fall 1993 refueling outage.

The Petitioner's questions are all based on the conclusion that the "A" EDG was damaged as a consequence of being overloaded during surveillance testing in 1990. The basis for this conclusion is the Petitioner's interpretation of the root cause findings regarding cylinder liner cracks that were reported in LER 92-017, Revision 1, dated February 19, 1993. As discussed in section A above, the Staff acknowledges that the overloads of the "A" EDG may have increased the rate of propagation of existing flaws, but does not agree that the overloads initiated the flaws or were the sole cause of the propagation of those flaws. This position is discussed in more detail below.

In LER 92-017, Revision 1, the Licensee states that the root cause of the through-wall cylinder crack propagation was a *combination* of fatigue cycles, below-specification cast-iron tensile strength, and engine overload conditions that caused *original* flaws in the cylinder liners to propagate. Propagation of these original flaws into through-wall cracks would have occurred at some point due to fatigue cycles from engine operation, even if the overloads had not occurred. At most, the overloads caused the rate of propagation to increase. Overloading of the "A" EDG was not the cause of flaw initiation and, without the pre-existing flaws, the overload conditions to which the Licensee's EDGs were subjected would not have significantly contributed to premature cylinder liner failure. As stated above, the Licensee replaced all the cylinder liners in the "A" EDG upon the failure of the liners in cylinders #7 and #10 and replaced all the cylinder liners in the "B" EDG during the overhaul of that EDG in the September 1993 refueling outage, which was recently completed. Based on the new design, material construction, and testing of the replacement cylinder liners, and in view of the failure of the original defective cylinder liners only after 20 years of service, the Staff has reasonable assurance that the cylinder liners will function as designed and the EDGs will operate if called upon to fulfill their safety function.

As further set forth below in the discussion of the Petitioner's specific questions, the Staff concluded that the combination of maintenance, inspections, and surveillance testing conducted by the Licensee since October 1990, provides reasonable assurance that the diesel generators at the VYNPS will perform their intended safety function upon demand, and that they meet the regulatory requirements for adequate onsite emergency backup power systems.

Q1. "What other flaws with catastrophic potential might remain undiscovered in both generators as a result of the 1990 overload conditions? Given the inability of previous testing to identify the cylinder flaws,

what new testing procedures can be applied to provide assurance that hidden flaws are revealed?"

A1. As stated previously, the EDG overloading incidents did not initiate the cylinder liner flaws, but rather accelerated their propagation. Accordingly, the Staff is not aware of any flaws that were caused by the EDG overloading. If any further liner failures were to occur, they would be discovered during the Licensee's next scheduled monthly surveillance testing.

The Commission's regulations at Appendix B to 10 C.F.R. Part 50 require that the Licensee take reasonable measures to identify material and manufacturing defects before installing such components as cylinder liners in safety-related equipment. However, it is possible that the original flaws in the "A" EDG cylinder liners existed only as stress risers (stress concentrations in the cylinder liner material resulting from the manufacturing process) following manufacturing, and developed into discernible cracks only after experiencing fatigue from some number of EDG operating cycles. Given this, these flaws would not have been found before placing the cylinder liners in service, even using today's more advanced nondestructive examination (NDE) techniques. To compensate for such a possibility, the regulations also require the Licensee to implement maintenance and surveillance programs which will, with high confidence, prevent, or identify and replace, failed or failing components before they can cause a significant failure of the EDG. The Staff notes that the Licensee's EDG surveillance testing, required by TSs, was successful in identifying the cylinder liner cracks at VY.

Q2. "Why did the LIMITED inspection conducted in October 1990 fail to identify the 'original flaws' (LER 9[2]-017-01) in the cylinder walls?"

A2. The EDG inspections conducted in October 1990 were limited to load-bearing components which are directly affected by mechanical overloading of the engine. Had there been any damage as a result of the overloads, it would have been evident on one or more of these components. (The components of interest are those that are most sensitive to mechanical overload and include piston pins and bushings, connecting rods, and main bearings.) Cylinder liners (without original flaws) are not significantly affected by overloading and would not normally be inspected for the effects of an overload. The ability of the cylinder liners to withstand overload conditions has been adequately demonstrated by tests at the EDG vendor's facilities and, to a lesser extent, at VY. In addition, the original flaws in the cylinder liners had not developed into through-wall cracks at the time of the 1990

inspections, and would not have been discovered if a visual inspection had been conducted at that time.

Q2a. "Why did all surveillance and maintenance activities during the ensuing 2½ years fail to find this problem before it resulted in gross failure indications?"

A2a. Maintenance and surveillance activities during the 19 months after the overloads did not identify the cylinder liner flaws because the flaws had not propagated through wall until May 1992. During this time, the EDGs were operable. NDE procedures might have identified the flaws earlier, but such inspection would have required complete engine disassembly. Without any indication of the presence of such flaws, extensive engine disassembly was not warranted. The Staff notes that the original flaws were discovered as soon as they propagated through wall and that the liners were replaced before they could cause a significant EDG failure.

Q2b. "Was Vermont Yankee's desire not to jeopardize its capacity factor and its record-setting operations responsible for its decision not to undertake more thorough (though time-consuming and costly) investigations?"

A2b. The Staff did not assess the impact of economic factors in the Licensee's decision in this case. The Staff reviews the adequacy of a licensee's decision based on the technical merits to determine whether a licensee's actions are adequate to protect the public health and safety.

Immediately after the overload events, there was no information that indicated the existence of material weaknesses or manufacturing defects that could have been exacerbated by the overload conditions. Diesel engine inspections were conducted based on the manufacturer's recommendations. The Staff found that, following the overloads, the Licensee examined the load-bearing components that would be most vulnerable to damage from the loads applied. Finding no adverse effect on these components, there was no reason for the Licensee to suspect flaws in other components less susceptible to damage from mechanical overloads. Accordingly, the Staff concluded that the Licensee's inspections and subsequent testing provided reasonable assurance that the EDGs would perform their intended safety functions and, therefore, that the Licensee's decisions were adequate. The Staff does not know whether such factors as cost or capacity factor figured into any of the Licensee's decisions in this case.

Q2c. "How can the public have confidence in Vermont Yankee surveillance practices and NRC oversight to assure operability of safety systems

when these practices failed to identify the damage done to the machines by the overloading?"

A2c. As stated above, the Staff does not agree with the Petitioner's assertion that the cylinder liner flaws in the "A" EDG at VY were initiated by the overloading. With regard to surveillance practices, it was during surveillance testing of the "A" EDG that the Licensee observed an operational anomaly that ultimately led to identifying and correcting the cylinder liner through-wall cracks. Since the cylinder liner cracks were not caused by the overloading, and since their existence was discovered during surveillance testing, the Staff concludes that the VY surveillance practices were effective in identifying and correcting these flaws before a significant EDG failure occurred and that they provide adequate assurance of the ability of the EDGs to perform their safety functions upon demand.

Q3. "Given the pivotal safety role of the emergency diesel generators, why were the defects in the original components not identified at the time of manufacture, or by over 20 years of maintenance? What other unidentified flaws might exist in the units, or in other plant equipment with equally vital safety functions?"

A3. As discussed in the response to Question 1 (above), the original flaws in the cylinder liners may not have been detectable at the time of manufacture. With regard to the original flaws not being detected in nearly 20 years of maintenance, it took that long for the original flaws to propagate into through-wall cracks that could be identified during surveillance testing. Before that, the original flaws were not detectable by visual means. The flaws could have been previously detected during the service period of the engine only by inspection means that would have required extensive disassembly of the engine. Before May 29, 1992, when the Licensee observed low jacket coolant pressure and discolored jacket coolant water during surveillance of the "A" EDG, there was no indication that flaws existed in the cylinder liners. Since there was no information suggesting the existence of such flaws, extensive disassembly was not warranted.

Regarding other equipment, the Commission's regulations in Appendix B to 10 C.F.R. Part 50 require that licensees take reasonable measures to identify flaws in equipment or components prior to installation, and implement maintenance and surveillance programs to identify and replace those components that have developed flaws in service. (See the response to Question 1, above.) As demonstrated by the discovery of the flaws in the "A" EDG cylinder liners, these programs have accomplished their purpose.

Q4. "What other equipment used in normal plant operations and for back-up safety purposes has suffered similar abuses? Can the NRC provide assurance that potentially dangerous conditions have all been identified and corrected in these instances?"

A4. The EDGs are the only safety-related equipment for which the loading is controlled in a manner that could lead to overloading (although they are expected to be controlled without overload.) Therefore, it is extremely unlikely that there are any "potentially dangerous conditions" associated with other safety-related equipment. The Staff is not aware of similar mechanical overloads being applied to other equipment at VY.

Q5. "Vermont Yankee recently canceled plans to do a major overhaul of the "B" generator. Given the new evidence contained in the root-cause analysis of LER 92-017-01, is it prudent to postpone *any* service of this machine?"

A5. The Petitioner is incorrect in asserting that the overhaul of the "B" EDG was canceled; it was postponed from March 1993 to September 1993. In this question, the Petitioner refers to "new evidence contained in the root-cause analysis of LER 92-017-01." The Staff interprets this to be another reference to the Petitioner's conclusion that the EDGs were damaged by the 1990 overloads. As stated previously, the Staff does not agree that the overloads initiated the flaws or were the sole cause of the propagation of those flaws. The Staff position is supported by the results of thorough inspections of both EDGs. The absence of any abnormal indications on the "B" EDG, coupled with successful surveillance tests for nearly 3 years, provided more than adequate assurance that overhaul of the "B" EDG could be delayed until the next refueling outage without compromising safety. Moreover, the cylinder liners in the "B" EDG were replaced with new liners during the September 1993 refueling outage. As stated in the discussion section above, examination of the old liners showed no damage that could be related to the overload events.

Q6. "Did the NRC act prudently in allowing continued operation of Vermont Yankee in August 1990 after identification of a violation indicating that the emergency diesel generators' ability to handle expected emergency load had never been empirically verified?"

A6. The Staff disagrees with Petitioner's assertion that "the emergency diesel generators' ability to handle expected emergency load had never been empirically verified." Additionally, the Staff acted prudently in allowing continued operation of VY in August 1990 for the following reasons:

A. The expected maximum emergency load was, and still is, 2751.2 kW. Power factor has no significant bearing on real load, and 2751.2 kW represents the real load the "A" and "B" engines are expected to carry during an emergency, regardless of power factor. The engines at VY had been tested at approximately expected maximum emergency load for nearly 20 years. There was no reason to question the ability of the engines to carry the expected real load.

B. EDGs "A" and "B" were tested at or near 3200 kW in August 1990. Although not necessary, this testing provided assurance that the EDGs could handle not only the expected maximum emergency load, but also the associated generator heat load and a substantial mechanical overload. Therefore, there was no reason for requiring that the plant be shut down.

Q7. "What assurances can be made that the current testing regime in fact demonstrates the units' ability to meet expected emergency loads?"

A7. Once each month under the current testing regime, each engine is started and operated for at least 1 hour while carrying the expected maximum emergency load. RG 1.9, Revision 3, "Selection, Design, Qualification, and Testing of Emergency Diesel Generator Units Used as Class 1E Onsite Electric Power Systems at Nuclear Power Plants," requires that an EDG load run test demonstrate 90 to 100% of the continuous rating of the EDG. This testing regime is intended to provide assurance of the EDG's ability to operate reliably at its continuous rating. The EDGs at VY are tested at a minimum value of 2500 kW, or 91% of the expected maximum emergency load, consistent with the guidance in RG 1.9. This provides the necessary assurance that they can operate at the expected maximum emergency load of 2751.2 kW.

CONCLUSION

The Petitioner requested that the NRC take immediate enforcement action to require that the reactor at the VYNPS remain in cold shutdown until the licensee could provide proof that the EDGs at the plant were able to meet their safety function. Enforcement action as requested by the Petitioner is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). For the reasons discussed above, I find no basis for taking such action. Rather, on the basis of the review

efforts by the NRC Staff, I conclude that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied.

A copy of this Decision will be placed in the Commission's Public Document Room, Gelman Building, 2120 L Street, NW, Washington, DC 20555, and at the Local Public Document Room, Brooks Memorial Library, 224 Main Street, Brattleboro, VT 05301.

A copy of this Decision will also be filed with the Secretary for the Commission's review as stated in 10 C.F.R. § 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-293

BOSTON EDISON COMPANY
(Pilgrim Nuclear Power Station) December 14, 1993

A petition, dated May 26, 1993, requested the Commission to take immediate action to delay the scheduled startup of the Pilgrim Nuclear Power Station, or, in the alternative, to order its immediate shutdown if the Pilgrim Station was permitted to start up before the petition could be acted upon. The petition contended that hardware modifications were necessary to eliminate errors in reactor water-level measurement because the system in place at Pilgrim does not adequately measure the water level of the reactor vessel and thus constitutes an unacceptable risk to the health and safety of the public. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

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

INTRODUCTION

On May 26, 1993, Mr. Ernest C. Hadley (Petitioner) filed a petition in accordance with 10 C.F.R. § 2.206 with the Nuclear Regulatory Commission (NRC or Commission) on behalf of We the People, Inc., of the United States. This petition was referred to the Director, Office of Nuclear Reactor Regulation (NRR), for consideration.

The petition requested immediate action to delay the scheduled startup of the Pilgrim Nuclear Power Station (PNPS) operated by the Boston Edison Company (Licensee), or, in the alternative, to order its immediate shutdown if the Pilgrim

Station were permitted to start up before the petition could be acted on, pursuant to section 2.206.

The Petitioner requested that the PNPS not be permitted to operate until the Licensee completes hardware modifications designed to eliminate errors in reactor water-level measurement. The Petitioner contends that the system in place at the Pilgrim facility does not adequately measure the water level of the reactor vessel and thus constitutes an unacceptable risk to the health and safety of the public. The Petitioner alleges that the NRC Staff informed the public in February 1993 that the NRC had based its determination that continued operation of boiling water reactors (BWRs), such as the Pilgrim facility, did not pose a safety threat based upon generic studies performed by the Boiling Water Reactor Owners Group (BWROG). These studies showed that water-level errors would be measured in inches and would be self-correcting within a short period of time. The Petitioner alleges that these assurances were given despite the fact that on January 21, 1993, Washington Nuclear 2 (WNP-2) reported a significant event in which a water-level error lasted for more than 1 hour. It is further alleged that this error was significantly larger than those previously observed.

Additionally, the Petitioner alleges that it requested from the NRC information used by the Pilgrim Licensee to make its operability determination for the water-level measurement system as required by the technical specifications for the Pilgrim facility. Because the NRC failed to provide this information, the Petitioner concludes that such information either does not exist or would not withstand independent scrutiny.

Finally, the Petitioner refers to a meeting of the Advisory Committee on Reactor Safeguards (ACRS) held on May 12, 1993, which included the BWROG. It is the Petitioner's understanding that during a closed session of that meeting, the BWROG and the NRC Staff confirmed that water-level measurement errors could be on the order of 27 feet and that neither the BWROG nor the NRC Staff any longer believes the error will correct itself with the passage of time.

I have now completed my evaluation of the petition. For the reasons given in the discussion below, the Petitioner's request for action is denied.

BACKGROUND

On May 27, 1993, promptly upon receipt of the petition, members of my staff contacted the Petitioner by telephone to inform it that the NRC Staff had considered the information presented in the petition and that it had determined not to grant the immediate relief sought. A letter to Petitioner, dated June 22, 1993, documented that decision and informed it that the NRC would take additional action with regard to the specific issues raised in the petition within a reasonable time.

DISCUSSION

In August 1992, the NRC Staff issued Generic Letter (GL) 92-04 requesting that licensees submit a planned schedule for long-term corrective action that may include hardware modifications, and that licensees notify the NRC of certain short-term actions taken to address concerns about errors in level indication related to rapid depressurization. Actions addressed in the letter included periodic monitoring of level instrumentation leakage and implementation of procedures and operator training. Licensees were required to respond to GL 92-04 by September 27, 1992. The NRC Staff agreed to extend the deadline for the submission of plans for long-term actions to July 1993 in order to allow the BWROG to complete a test program that is discussed in more detail below. The Pilgrim Licensee implemented the short-term actions, which were verified by an NRC inspection.

To assist in resolution of the water-level issue, on August 12, 1992, the BWROG initiated a program, which included testing, to assess the potential errors in water-level instrumentation that could result from rapid depressurization events. In February and March of 1993, the NRC Staff visited the Electric Power Research Institute (EPRI) test facility in Charlotte, North Carolina, where the BWROG reference leg de-gas tests were conducted, to observe the reference leg de-gas tests and to discuss the technical details of the testing program with the BWROG. The NRC Staff also conducted a quality assurance inspection at Continuum Dynamics Inc. (CDI), in Princeton, New Jersey, on May 4 and 5, 1993. CDI performed the testing for the BWROG at the EPRI test facility. During the inspection, the NRC Staff collected raw test data from the reference leg de-gas test. These raw test data are the basis of the 27-foot value that was discussed at the ACRS meeting on May 12, 1993. It should be noted that the magnitude of the 27-foot error is not directly applicable to the Pilgrim plant, because the magnitude of any error is plant specific, but the 27-foot value is demonstrative of the significant effects of this phenomenon.

The NRC Staff has considered these data relative to the actions requested in GL 92-04 and concluded that the effectiveness of the short-term actions implemented by the Pilgrim Licensee in response to GL 92-04 is not changed by these test results. This is because the actions of GL 92-04 were based on the assumptions that maximum theoretical calculated errors could occur and would not be self-correcting and that significant errors would not occur until depressurization below 450 psig; the test data did not invalidate either of these two assumptions.

The NRC Staff also evaluated the significance of the event that occurred at WNP-2 on January 21, 1993.[1] This event demonstrated that water-level errors can occur even during slow depressurization. The NRC Staff issued NRC Information Notice 93-27 on April 8, 1993, to alert licensees to this event. The NRC Staff also requested the BWROG to perform a generic evaluation of level indication errors during normal reactor pressure vessel depressurization. The BWROG submitted a report on May 20, 1993, discussing the effect of level errors on automatic safety system response and operator actions during transients and accidents initiated from reduced pressure conditions of plant cooldown. This report indicated that operator actions would be necessary to mitigate a drain-down event if significant errors were present in multiple-level instruments.

Following its review of this report, the NRC Staff issued NRC Bulletin 93-03 on May 28, 1993. This bulletin requested each BWR licensee to implement short-term compensatory actions within 15 days to address concerns related to errors during slow depressurization. These actions were intended to ensure early detection of potential errors in level indication by requesting enhanced monitoring of level indication and supplemental operator training, and also to minimize evolutions that could result in draining the reactor vessel.

The Staff recognizes that Pilgrim was allowed to restart on June 2, 1993, before implementation of these short-term compensatory actions; however, this was considered acceptable due to the time dependency of the generation of noncondensible gases. During the 15 days following issuance of NRC Bulletin 93-03, when short-term actions were requested to be completed, it was not likely that gases would build up to a high concentration in the reference legs; therefore, it was not likely that significant errors in the level instrumentation would result. This is because gas buildup is a relatively slow process, and following a restart after a cold shutdown, as occurred at Pilgrim, the gas concentration in the reference legs is low because the reference legs have been depressurized. The NRC Staff concluded that continued operation of the PNPS was acceptable, both for the short time period prior to implementation of the short-term compensatory measures, and following implementation of compensatory measures as requested by Bulletin 93-03 and with the actions already completed by Boston Edison in response to GL 92-04, until a permanent hardware modification was made.

With regard to the Petitioner's allegation that the NRC failed to provide information used by PNPS to make its operability determination, the Licensee's operability evaluation was, however, reviewed by the Resident Inspector and that review is documented in Inspection Report 50-293/92-23, which stated,

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[1] The Petitioner stated that on January 21, 1993, WNP-2 reported this event. A report was received from the Licensee on January 21; however, the report did not discuss the level indication errors that occurred after the reactor scram. The NRC was informed of the significant level errors that occurred February 10, 1993, after the public meeting that was held in Plymouth, Massachusetts. A written report was received on February 17, 1993.

"The NRC Staff also independently reviewed the bases for BECO's operability determination, and agreed with its conclusions." The report is available at the local public document room located at Plymouth Public Library, 11 North Street, Plymouth, MA 02360.

The Staff has continued to monitor the Licensee's actions regarding this issue. It should be noted that the Pilgrim plant was shut down in July 1993, and the Licensee installed a hardware modification to their level instrumentation before plant restart from that outage. This modification provides a continuous backfill which prevents noncondensible gases from building up in the reference leg. Thus, the concern that noncondensible gases will lead to level indication errors is resolved.

CONCLUSION

The institution of proceedings in accordance with section 2.206, as requested by the Petitioner, is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). PNPS has completed all the action items outlined in Bulletin 93-03 and GL 92-04. Therefore, because I feel the changes already made in response to Bulletin 93-03 and GL 92-04 resolve the concerns raised, I decline to take any further action with respect to the issues in this Director's Decision. Further, this Director's Decision explains why the NRC Staff did not consider that the resumed operation of PNPS prior to installation of the continuous backfill modification raised a significant risk to the public health and safety. Accordingly, insofar as the Petitioner has requested action pursuant to 10 C.F.R. § 2.206 beyond that which has already been taken by the Licensee, the petition is denied.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary for the Commission to review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-324
50-325

CAROLINA POWER AND LIGHT
COMPANY
(Brunswick Steam Electric Plant,
Units 1 and 2)

December 14, 1993

A petition, dated April 28, 1993, requested the Commission to immediately shut down the Brunswick Steam Electric Plant on the basis of asserted receipt of allegations from a Brunswick employee. The petition alleged that operations at Brunswick Steam Electric Plant had reached crisis proportions, setting forth five statements as the bases for that conclusion and Petitioner's request for immediate shutdown. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

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

I. INTRODUCTION

On April 28, 1993, Mr. Stephen M. Kohn (the Petitioner) filed a petition with the U.S. Nuclear Regulatory Commission (NRC) on behalf of the National Whistleblower Center requesting that actions be taken regarding the Brunswick Steam Electric Plant, Units 1 and 2 (BSEP or Brunswick), of the Carolina Power & Light Company (CP&L or the Licensee). The Petitioner requested that the NRC immediately shut down BSEP on the basis of asserted receipt of allegations from a BSEP employee. In these allegations, the Petitioner

characterized CP&L's operation of BSEP as having reached crisis proportions. Specifically, the Petitioner stated that (1) there has been a complete breakdown in the quality assurance (QA) program overseeing the integrity of the plant's vendor manuals; (2) there has been a breakdown in the plant's security system, which may leave the facility open to terrorist attack; (3) there has been harassment and intimidation of employees who raise safety-related concerns to their management; (4) there has been a failure of CP&L to train the contractors it has employed in the proper QA procedures and a failure to implement a QA program in the work assignments of the contractors; and (5) there has been a breakdown in the plant's preventive maintenance program.

On June 7, 1993, I informed the Petitioner that the petition had been referred to my office for the preparation of a Director's Decision. I further informed the Petitioner that the NRC Staff had previously evaluated several of the concerns addressed in these allegations. I denied the Petitioner's request for immediate action because there was insufficient evidence provided in the petition or known to the NRC Staff to conclude that there was a substantial public health and safety hazard in allowing the continued operation of BSEP. At the time, the NRC Staff was still evaluating the allegations addressed in the Petitioner's letter and had not reached any final conclusions on any of the above concerns. Therefore, I informed the Petitioner that the NRC would review the petition in accordance with 10 C.F.R. § 2.206 and issue a final decision within a reasonable time.

My Decision in this matter follows.

II. DISCUSSION

The NRC Staff has conducted a thorough evaluation of each of the concerns raised in the petition. Each of the concerns is addressed below.

A. Breakdown in the Quality Assurance Program for Vendor Manuals

The Petitioner asserts that there has been a complete breakdown in the Quality Assurance program in the area encompassing the plant's vendor manuals, which increases the risk of incorrect or defective parts having been installed in the plant over a 10-year period.

The NRC Staff reviewed a similar allegation filed in early 1993, which dealt, in part, with vendor manual adequacy. During that review, the NRC Staff concluded that the Licensee was aware of deficiencies in its vendor manual program, as well as their engineering data base system (EDBS), and had taken compensatory measures to prevent related errors while they made improvements to the program. These compensatory measures dealt primarily with actions to ensure that the appropriate, quality-verified, parts are utilized during maintenance

and modifications. These measures include, but are not limited to, reviews of the original purchase orders, field verification of installed components, review of applicable drawings, as well as direct contact with the vendors. The CP&L procurement engineers also use a contracted vendor service, Visual Search Micro Form (VSMF), to assist in verifying the purchase requirements. This VSMF service maintains all applicable vendor catalogs and industry codes/standards and is required by contract to update the data files every 60 days. In the unlikely event that these program controls do not preclude installation of an incorrect part, the Licensee conducts post-maintenance operational tests to verify that the associated component or system meets design requirements and is acceptable to return to service. These measures have been reviewed by the NRC Staff, the results of which are documented in Inspection Report Nos. 324,325/93-19 and 93-27. Based on the results of routine maintenance inspections performed in this area, the NRC Staff has determined that the aforementioned program controls significantly reduce the risk of rendering a safety system inoperable due to the installation of an incorrect or defective part.

In the Brunswick Three-Year Plan, submitted to the NRC on December 15, 1992, CP&L committed to expeditiously complete the ongoing design-basis documentation program and the upgrades in the EDBS and vendor manual programs. The NRC Staff will continue to closely monitor the completion of each of these initiatives and the Licensee's compensatory measures regarding the use of correct information in purchase-order specifications and during maintenance and modification endeavors.

Based on the completed inspections in this area and the assessment of the Licensee's corrective actions taken in response to the identified deficiencies, the NRC Staff has concluded that the issues raised by the Petitioner have been satisfactorily addressed by the Licensee and do not present a risk to the health and safety of the public.

B. The BSEP Is Vulnerable to Terrorist Attack

The Petitioner has alleged that the facility may be open to a terrorist attack because of a breakdown in its security system. Although the Petitioner did not specify the aspects in which it believed that BSEP is vulnerable to a terrorist attack, the NRC Staff has reviewed the inspection history relative to physical security and has identified the following recent issue.

In January 1990, NRC safeguards personnel, assisted by U.S. Army Special Forces personnel, conducted a regulatory effectiveness review to evaluate the potential sabotage vulnerability of BSEP. The NRC Staff found no safeguards inadequacies that would give an external adversary unimpeded access to the safety-related vital equipment necessary for the safe shutdown of the reactors.

This conclusion was documented in a letter from the NRC to the Licensee, dated February 16, 1990.

Since 1990, the NRC Staff has conducted fifteen inspections of the Licensee's entire safeguards program. During that period, the NRC Staff identified deficiencies in the Licensee's maintenance of its security equipment. A special NRC inspection was performed in early 1992 to evaluate the Licensee's management and prioritization of resources in several areas, including plant security. The NRC Staff found that the Licensee's routine maintenance of aging security hardware was deficient. In its Systematic Assessment of Licensee Performance (SALP), the NRC downgraded BSEP to a Category 2 rating in the security area due to the failure to repair and maintain security hardware and systems. However, in a December 30, 1992 letter to the Licensee (SALP Report No. 92-30), the NRC found that the overall security program was acceptable and, in fact, improvements were identified during the later portion of the SALP period of November 1991 to October 1992.

More recently, during NRC Inspection No. 50-324,325/93-07, conducted February 22-26, 1993, No. 92-24, conducted August 17-21, 1992, and No. 92-08, conducted March 23-27, 1992, the NRC Staff observed that the Licensee has upgraded its maintenance of the BSEP security equipment. The Licensee had dedicated four technicians to work on security hardware, significantly reducing the need for compensatory security measures for out-of-service equipment. The Licensee also has upgraded barriers, lighting, and the camera assessment of perimeter alarms.

Because of these findings, the Staff assesses the BSEP security program as satisfactory in meeting the NRC criteria, and the Petitioner has not raised a significant health and safety issue. The allegation of the facility being vulnerable to a terrorist attack was not substantiated.

C. Harassment and Intimidation of Employees

The Petitioner alleges that there has been harassment and intimidation of employees who have raised safety concerns to their management. Although the Petitioner did not provide any details as to specific occurrence, the NRC Staff reviewed all of its records regarding alleged discrimination for protected activities going back to 1986.

Since 1986, the NRC has been notified of nine complaints from present or former CP&L employees who have alleged harassment, intimidation, discrimination, or other actions adversely affecting employment for having identified safety concerns to CP&L or contractor management. Seven of those complainants were CP&L contractor personnel and two were CP&L employees. The complainants in seven of the nine cases formally filed their employee discrimination complaint with the U.S. Department of Labor (DOL).

In the initial determination for the seven cases in which complaints were filed with DOL, the DOL District Director found in favor of the complainant in three cases. Two of the seven cases were subsequently settled, and two were dismissed without prejudice at the request of the complainant. The decision not to take enforcement action in the two settled discrimination complaints was based on a review of the DOL investigative record and information provided by the Licensee in response to a request for specific information related to both settled complaints. The Staff review included a review by the Office of Investigations in one of the settled complaints. The NRC concluded that there is insufficient evidence of harassment and intimidation to warrant NRC enforcement action in these cases. The remaining three cases filed with DOL were each the subject of an administrative hearing before a DOL Administrative Law Judge (ALJ). The ALJ found for the respondent in two of those cases and the third is currently pending an administrative hearing.

The complainants in the two of nine cases, who did not file a complaint with DOL, submitted their complaints directly to the NRC in March 1990 and February 1993, respectively. Those two complaints were investigated by the NRC Office of Investigations (OI). With regard to those two complaints, the OI investigators found that there was insufficient evidence of wrongdoing. Additionally, the NRC Staff is currently reviewing an allegation received in May 1993 that may involve a potential discrimination issue.

The Licensee has instituted the Quality Check Program that provides CP&L and contractor employees a mechanism to report concerns, anonymously if desired, in addition to the normal means for reporting safety concerns through the line management. Employees can submit their concerns by depositing a completed quality check report in one of several secured containers for that purpose at the BSEP, by mailing the report to the Quality Check Program, or by a personal or telephonic interview. CP&L has actively publicized this program through plant procedures, staff supervisory training, general employee training, discussion of the program by plant management at various plant staff meetings, policy statements, posters describing the program placed at various locations throughout the plant, and articles about the program in several plant publications, brochures, and in-plant television. In a recent NRC inspection that will be documented in Inspection Report No. 50-324,325/93-53, the Staff found that all plant personnel surveyed during the inspection were aware of the existence of the Quality Check Program and how to report concerns.

On the basis of the review of the employee discrimination cases at BSEP and CP&L's responses to NRC inquiries related to those cases, the NRC Staff has found that there is no pervasive problem related to employee discrimination and no chilling effect from these cases. The Staff concludes that there is no significant health and safety issue associated with this concern.

D. Failure to Train Contractors in QA Procedures and Failure to Implement QA Program for Contractors

The Petitioner asserts that CP&L has failed to train thousands of contractors on QA procedures and has failed to implement a QA program governing the work of contractors.

The NRC Staff, as part of its regular inspection program, inspects the Licensee's general employee training (GET) program. All CP&L employees and contractor personnel are required by the CP&L Physical Security Plan to complete the GET before being authorized unescorted access to the protected areas of the facility. The GET is provided in two courses; Level I and Level II. Level I training is required for permanent site employees and individuals on long-term (greater than 6 months) assignments to the plant. Level I training includes instruction in the areas of security, industrial safety, radiological controls, and quality performance. The training associated with quality performance includes, but is not limited to, instruction pertaining to personal quality performance, NRC inspections and investigations, the quality check program, the corporate quality assurance program, self-assessment, the STAR (Stop, Think, Act, and Review) program, and independent verification. The completion of Level I training is a prerequisite for Level II training which consists of instruction in various aspects of radiological controls. Successful completion of Level I and II training and the successful completion of written and practical examinations is required before personnel are authorized unescorted access to the protected area. Annual retraining is required of all personnel.

During an inspection performed in this area in May 1993, and documented in Inspection Report No. 50-324,325/93-23, the NRC Staff concluded that the content and quality of the training was adequate to familiarize an individual with the knowledge and skills needed to work safely at a nuclear plant.

During a subsequent inspection performed in this area in September 1993, and documented in Inspection Report No. 50-324,325/93-42, the NRC Staff concluded that individuals assigned to the facility for periods of less than 6 months, may not receive GET training. Therefore, these individuals may not receive training associated with BSEP QA process. It should be noted, however, that if these individuals perform any safety-related work, they do so under the auspices of an assigned escort and under the controls of either the Licensee's QA program or the contractor's QA program, as defined in the CP&L contract. The contractor's QA program is reviewed and approved by the Licensee and contains criteria as stringent as the Licensee's program. The Licensee has committed, in Brunswick Technical Specifications § 6.8, "Procedures and Programs," to NRC Regulatory Guide 1.33, "Quality Assurance Program Requirements (Operation)." This regulatory guide endorses the procedures in the American National Standards Institute (ANSI) Standard 3.2, "Administrative Controls and Quality

Assurance for the Operational Phase of Nuclear Power Plants." The ANSI standard permits the performance of quality activities by contractors to be under either the Licensee's QA program or a contractor's program that is periodically audited by the licensee.

The NRC is fully aware of CP&L's past failure to apply appropriate QA and quality control (QC) practices with regard to contractors. Previous failures in this area that were detected in early 1992 and documented in Inspection Report No. 50-324,325/92-12 resulted in the NRC taking significant enforcement action (severity level III violation with the imposition of a civil penalty of $225,000 for inadequate seismic qualification of EDG building walls). However, during the extended shutdown of both units, CP&L has demonstrated improved control of work activities, including implementation of appropriate QA practices.

Based on completed inspections in this area and an assessment of the Licensee's corrective actions taken in response to the identified inadequacies, the NRC Staff has concluded that the issues raised by the Petitioner have been satisfactorily addressed by the Licensee and do not pose a risk to the health and safety of the public.

E. Breakdown in the Preventive Maintenance Program

The Petitioner asserts that there has been a breakdown in the plant's preventive maintenance program.

A breakdown in the site preventive maintenance program had been identified in NRC Inspection Reports Nos. 50-325,324/92-19 and 92-21, and by the Licensee in its Nuclear Assessment Department (NAD) Report No. B-SA-92-05. The resident inspectors identified that preventive maintenance task items (PMs) were performed at approximately 180 different frequencies, which made them difficult to track and manage. The inspectors determined that the Licensee was not always requiring a technical basis to defer PM performance. The inspectors also identified that the Licensee was unable to readily identify PM failure history, or in some cases, the last time the PM was successfully performed. NRC Inspection Report No. 50-325,324/92-12 identified additional concerns that were the result of poor PM practices (i.e., corroded bolts, instrument racks, and cable trays, as well as other deferred maintenance issues).

The Licensee has initiated several efforts to address weaknesses in the PM program. The number of different schedular frequencies has been reduced from 180 to 25; thereby simplifying preventive maintenance tracking. The Licensee now requires a technical basis for all deferred PMs. CP&L is also evaluating PMs for consolidation and assignment of technically appropriate intervals to further improve program management.

Prior to the startup of BSEP, Unit 2, all outstanding Unit 2 PMs were analyzed by an independent third party, Failure Prevention Incorporated, under contract

with CP&L. The NRC evaluated those PMs that were deferred, and determined that none would affect the safe operation of Unit 2. The Unit 1 PM backlog is scheduled to be completed prior to restart, with the goal that no PMs will be deferred.

The Licensee has placed a high priority on improving the preventive maintenance program and has included it in the Brunswick Three-Year Plan that the NRC Staff has reviewed and found satisfactory. The development of a reliability-centered maintenance program is also included in this initiative. Based on the required pre-startup corrective maintenance efforts, in conjunction with the current preventive maintenance program, the NRC Staff has concluded that the concerns have been adequately addressed by the Licensee, and no threat to the health and safety of the public exists from them. In addition to the reports addressed above, results of NRC preventive maintenance inspections are also documented in Inspection Report Nos. 50-325,324/93-01, 93-10, 93-11, 93-16, 93-17, 93-19, and 93-30.

III. CONCLUSION

The NRC Staff has reviewed each of the concerns raised by the Petitioner and noted that several of the concerns addressed in these allegations have been the subject of previous evaluations by the NRC. Therefore, the Petitioner's allegations have been partially substantiated. The NRC Staff has conducted a detailed evaluation of the areas encompassed by these concerns as part of the extensive inspection activities related to the decision to authorize the restart of BSEP, Unit 2.

While several of the Petitioner's concerns describe problems that have occurred at BSEP, the Licensee was previously aware of the problems and had already taken appropriate corrective actions. The NRC Staff has assessed each of the specific issues and found that the corrective actions were appropriate and responsive to the NRC requirements. The NRC Staff's review did not reveal any substantial health and safety issues that call into question the continued safe operation of BSEP, Unit 2, or the restart of BSEP, Unit 1. With regard to the alleged harassment and intimidation of employees who raise safety concerns, the NRC has reviewed each of the complaints filed by CP&L and contract employees since 1986. From its review of the details of the complaints, the NRC Staff did not find that a pattern of harassment and discrimination existed at BSEP or observe any chilling effect from those instances where the Licensee had taken specific personnel actions.

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. (*See Consolidated Edison Co. of New York* (Indian Point, Units 1,

2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984)). This standard has been applied to determine if any action is warranted in response to the petition. For the reasons stated above, no basis exists for taking any action in response to the petition. Accordingly, no action pursuant to section 2.206 is being taken in this matter.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket Nos. 50-352
50-353
50-322

SHIPMENTS OF FUEL FROM
LONG ISLAND POWER AUTHORITY'S
SHOREHAM NUCLEAR POWER STATION
TO PHILADELPHIA ELECTRIC COMPANY'S
LIMERICK GENERATING STATION

December 23, 1993

The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed on behalf of the New Jersey Department of Environmental Protection and Energy requesting that the Nuclear Regulatory Commission (Commission): (1) amend Long Island Power Authority's (LIPA) license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to Philadelphia Electric Company (PECo); (2) perform an Environmental Assessment (EA) pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo, which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with Section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b) which addresses alternative means of transporting fuel from LIPA to PECo; and (4) immediately stay PECo's June 23, 1993 license amendments, the Certificate of Compliance regarding the IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA). The Petitioner further requested that

the Commission take immediate action to halt ongoing shipments of fuel from LIPA's Shoreham Nuclear Power Station to PECo's Limerick Generating Station pending consideration of the merits of the petition. As basis for the requests, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECo's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ACTION

Under the existing regulatory scheme, a licensee's transport of nuclear fuel is by general license. No NRC approval of the specific route by which the Shoreham fuel is transported to Limerick is required. Because route selection is a private decision not requiring federal approval, no route-specific NEPA analysis is necessary. The Commission has held that where a licensee can act without NRC approval, there is no federal action requiring an environmental review under NEPA.

NATIONAL ENVIRONMENTAL POLICY ACT: GENERIC ISSUES

Generic NRC resolution of environmental issues — and the consequent preclusion of case-specific reviews — is fully lawful.

NATIONAL ENVIRONMENTAL POLICY ACT: GENERIC ISSUES

The S-4 Table, 10 C.F.R. § 51.52, specifically provides that it applies when "irradiated fuel is shipped from the reactor by truck, rail, *or barge*" (emphasis added). The provisions of the Table encompass the environmental impacts of the shipment of fuel from one reactor to another regardless of whether those impacts are being contemplated as part of NRC action concerning the reactor receiving the fuel or the reactor from which the fuel is being shipped.

NATIONAL ENVIRONMENTAL POLICY ACT: CONSIDERATION OF ALTERNATIVES

Because the shipment of fuel falls within the "envelope" of environmental consequences that have already been analyzed (and found nil) either generically or in the ~~ori~~ginal impact statements for the specific plants at issue here, NEPA

does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

GENERAL LICENSE TO TRANSPORT LICENSED MATERIAL

A general license to transport licensed material is conferred under 10 C.F.R. § 71.12 to any licensee of the Commission, as long as certain provisions are met, provided the licensee obtains approval of the package under other provisions of Part 71.

NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ACTION

Since the transfer of the fuel from LIPA to PECo is expressly authorized by 10 C.F.R. § 70.42, which provides that any licensee may transfer nuclear material to an individual authorized to receive such material under terms of a specific or general license issued by the Commission, LIPA is not required to obtain NRC approval to transfer the fuel to PECo.

COASTAL ZONE MANAGEMENT ACT

The main purpose of the Coastal Zone Management Act is to encourage and assist states in preparing and implementing management programs to preserve, protect, develop, and restore the resources of the coastal zone of the United States.

COASTAL ZONE MANAGEMENT ACT

Where a state has an approved program, the Coastal Zone Management Act provides for submission of a consistency certification to obtain a "required Federal license or permit."

COASTAL ZONE MANAGEMENT ACT

The NRC did not issue any license or permit for LIPA's selection of a coastal route. Route selection, except in circumstances not applicable here, is a decision made by a private entity. It is not an activity for which LIPA or PECo applied for a "required Federal license or permit." 16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993) Because the NRC does not regulate the route selection, no NRC action fell within the Coastal Zone Management Act.

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

I. INTRODUCTION

On October 8, 1993, Mr. Fred DeVesa, Esq., Acting Attorney General of New Jersey, filed a petition with the Commission, on behalf of the New Jersey Department of Environmental Protection and Energy (NJDEPE or Petitioner), requesting that the Commission take immediate action to halt ongoing shipments of fuel from Long Island Power Authority's (LIPA's) Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECo's) Limerick Generating Station, pending consideration of the merits of the petition. Specifically, the petition requests that the Commission: (1) amend LIPA's license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to PECo; (2) perform an Environmental Assessment (EA), pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo, which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives, in accordance with section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b), which addresses alternative means of transporting fuel from LIPA to PECo; and (4) immediately stay PECo's June 23, 1993 license amendments, the Certificate of Compliance regarding the IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel, pursuant to 10 C.F.R. § 71.12, pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA).

The Petitioner asserts, in support of these requests, that the U.S. Nuclear Regulatory Commission has violated NEPA, the CZMA, and the Atomic Energy Act (AEA) by allowing the transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case-specific environmental impact analysis, or any consideration of alternatives to the means of transport. Specifically, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECo's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

By letter to Mr. DeVesa dated October 22, 1993, I acknowledged receipt of the petition and informed the Petitioner that the request that the Commission

take immediate action to halt ongoing shipments of fuel from Shoreham Nuclear Power Station to PECo's Limerick Generating Station is denied. I indicated in that letter that the Petitioner made no showing that there is any reason to believe that the shipments pose an immediate or substantial danger to public health and safety, and that the Commission has concluded on several occasions that its regulations for certifying shipping packages for radioactive material (10 C.F.R. Part 71) are adequate to protect the public against unreasonable risk in the transport of these materials. The shipping package used to transport the Shoreham fuel, the IF-300, has been properly certified as meeting the Commission's standards.

In addition, I noted that the IF-300 shipping package was certified for highly irradiated spent fuel up to 35,000 megawatt days per metric ton (MWD/MTU); the Shoreham fuel, by comparison, has a low degree of irradiation of 87 MWD/MTU (less that 1% of the value for which the package is certified).

Review of this denial was raised with the Commission by the Petitioner in its letter of November 5, 1993. In a letter of November 18, 1993, responding to Petitioner's request, the Commission stated that after its consideration of the reasons for my denial of the immediate action, it found no reason to disturb my conclusion that the shipments pose no immediate or substantial danger to the public health or safety.

In the acknowledgment letter of October 22, 1993, I also informed the Petitioner that the Commission would respond to the alternative request that the Petitioner be granted late intervention and a hearing on PECo's license amendment allowing it to receive and possess Shoreham's fuel, and asserting that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham fuel. By Memorandum and Order dated December 3, 1993, the Commission denied Petitioner's petition for leave to intervene and request for an adjudicatory hearing, noting that there are no "proceedings" in which the Petitioner may intervene or be provided a hearing and that, even if there were such a proceeding, the Petitioner has failed to satisfy the Commission rules governing intervention in hearings or reopening of proceedings.[1] I furthermore indicated that the remainder of the petition had been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations and that the NRC would take appropriate action, within a reasonable time, regarding the concerns raised in the petition.

I have decided not to take any action under section 2.206. Petitioner has offered no technical or other factual information calling into question the safety of the fuel shipments. Petitioner principally raises legal or policy arguments, which are unpersuasive for the reasons discussed below.

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[1] *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289 (1993).

My Decision in this matter follows.[2]

II. BACKGROUND

The Shoreham Nuclear Power Station in Wading River, New York, is being decommissioned pursuant to the NRC's Order Approving Decommissioning Plan and Authorizing Decommissioning of the Facility of June 11, 1992. The Shoreham facility has never been commercially operated, although 30 hours of low-power testing were performed in 1987. As part of the decommissioning, the Long Island Power Authority — a corporate municipal instrumentality and political subdivision of the State of New York — is arranging for the removal of the slightly irradiated nuclear fuel used during the low-power testing.[3] LIPA's status as an NRC licensee entitles it — under a general NRC license conferred by rule — to transport, or to deliver the fuel to a carrier for transport, in an NRC-certified shipping cask. 10 C.F.R. § 71.12(a).[4]

By February 1993, decommissioning had progressed to the point that the only remaining matter was the removal of the fuel at issue here. On March 1, 1993, LIPA entered into a Fuel Disposition Agreement with PECo and General Electric, pursuant to which PECo agreed to accept delivery of fuel from Shoreham, and therefore complete its decommissioning.

On June 23, 1993, the NRC amended PECo's Facility Operating License Nos. NPF-39 and NPF-85 for the Limerick Generating Station, a two-unit nuclear power reactor located near Pottstown, Pennsylvania. These amendments permit PECo to receive, possess, and use the slightly irradiated fuel originally intended for use at Shoreham Nuclear Power Station. Prior to issuing the amendments, the NRC evaluated the environmental impacts associated with the Limerick facility license amendments, pursuant to NEPA and the NRC's regulations requiring EAs. 10 C.F.R. § 51.21. In its (EA), dated May 11, 1993, the NRC concluded "that the proposed action will not have a significant effect on the quality of the human environment." 58 Fed. Reg. 29,010, 29,012 (May 16, 1993).

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[2] Prior to seeking relief from the NRC, the Petitioner filed a lawsuit in Federal District Court in New Jersey seeking similar relief. The District Court dismissed the claims against the NRC on jurisdictional grounds and the U.S. Court of Appeals for the Third Circuit recently affirmed the dismissal. *See New Jersey v. Long Island Power Authority*, No. 93-4269 (D.N.J., Oct. 12, 1993), *aff'd*, No. 93-5613 (3rd Cir., Dec. 1, 1993.) Some of my description and analysis of the controversy is drawn from the government briefs filed in that lawsuit. The NRC Staff, while for convenience adopting useful material from the government's court briefs, has re-examined the issues itself and reaches the conclusions discussed below. *Cf. Career Education, Inc. v. Department of Education*, 6 F.3d 817, 820 (D.C. Cir. 1993).

[3] This fuel is considered "special nuclear material" under the AEA and NRC regulations because it contains uranium that is enriched in the U-235 isotope. *See* 42 U.S.C. § 2014(aa); 10 C.F.R. § 50.2.

[4] That section provides: "A general license is hereby issued to any licensee of the Commission to transport, or to deliver to a carrier for transport, licensed material in a package for which a license, certificate of compliance, or other approval has been issued by the NRC."

On or about July 7, 1993, LIPA submitted to the Coast Guard an "Operations Plan for Marine Transportation of Fuel Shipment from Shoreham, New York to Eddystone, Pennsylvania" (Operations Plan). The Operations Plan details a plan for the transportation of fuel by barge from the Shoreham facility to the Eddystone Power Station located on the Delaware River, in Eddystone, Pennsylvania. The captain of the Port for Long Island Sound responded to this submission in a letter dated July 27, 1993.

The planned barge route for the shipments is around the tip of Long Island, south through the Atlantic Ocean, 15 miles off the New Jersey coast, around Cape May, and through New Jersey State waters in the Delaware Bay and up the Delaware River, docking in Eddystone, Pennsylvania. The slightly irradiated fuel is being shipped in thirty-three separate shipments over a period of approximately 8 months, beginning on September 25, 1993. The nuclear fuel is then shipped by rail from Eddystone to the Limerick facility. As of December 13, 1993, seventeen shipments have arrived at Limerick.

The fuel is being transported in an NRC-approved cask certified pursuant to 10 C.F.R. Part 71. On August 19, 1993, the NRC issued an amendment to the certificate of compliance for radioactive materials packages to non-party Pacific Nuclear Systems for its "IF-300" shipping cask.[5] The Shoreham fuel is being shipped in the IF-300 cask, which is authorized for fuel that has experienced reactor burnup of 35,000 MWD/MTU even though the fuel to be shipped from Shoreham has a reactor burnup of only 87 MWD/MTU of uranium (i.e., less than 1% of the value for which the cask is approved). Similarly, the cask being used for shipment of the Shoreham fuel is authorized for fuel having a total decay heat of up to 11,720 watts per cask. The fuel involved in this shipment has a decay heat of approximately 34 watts per cask. In short, the casks are designed to contain safely material of over 100 times the radioactivity of the fuel being shipped from Shoreham.

On or about August 9, 1993, LIPA submitted an "Application for a Certificate of Handling" (a "COH") to the State of New Jersey, consistent with N.J.A.C. § 7:28-12, which prohibits the transport of certain radioactive materials into or through New Jersey without first obtaining a COH issued by New Jersey.

New Jersey sent a letter dated September 15, 1993, to the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce demanding a CZMA consistency review of the Coast Guard's response to LIPA's Operations Plan. NOAA responded by requesting comments and the position of the Coast Guard and LIPA. On September 28, 1993, New Jersey submitted its reply to NOAA in response to LIPA's and the Coast Guard's positions. After consideration of the positions submitted on October 1, 1993, NOAA concluded

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[5] The IF-300 cask design was first approved about 20 years ago, but required modification of the support structure within the cask to accommodate the shipment of 17 Shoreham fuel assemblies.

that the shipments by LIPA do not involve the issuance of a federal license or permit by the Coast Guard as defined in the CZMA and, therefore, the shipments are not subject to consistency review.

III. DISCUSSION

A. Applicable Law and Regulations

Petitioner's NEPA claims address two distinct bodies of law: substantive standards established under the AEA and federal transportation safety statutes that govern the transportation of reactor fuel; and procedural requirements imposed by NEPA that govern the manner in which agencies take account of the environmental effects of proposed actions.

1. Federal Regulation of the Transportation of Radioactive Materials

The federal government regulates the transport of radioactive materials under standards devised and administered by the NRC and by the U.S. Department of Transportation (DOT). A 1979 Memorandum of Understanding (MOU) between the NRC and the DOT, adopted to promote "consistent and comprehensive regulations and requirements for the safe transportation of radioactive materials," delineates these agencies' respective roles.[6] The agreement gives the NRC, acting under the authority of the AEA and other statutes, a narrower role than the DOT. The NRC, in consultation with the DOT, is charged with "develop[ing] safety standards for design and performance of packages for certain higher-level radioactive materials," including nuclear reactor fuel. 44 Fed. Reg. at 38,690.[7] The DOT, acting under authority of the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. § 1801 *et seq.*[8]) is responsible for developing, in consultation with the NRC, standards for classifying and labeling radioactive materials, packaging certain low-level radioactive materials, and handling containers of radioactive materials during transport. In addition, the agreement assigns the DOT general responsibility for developing "all other

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[6] *See* "Memorandum of Understanding Between the U.S. DOT and the U.S. NRC for Regulation of Safety in the Transportation of Radioactive Materials," 44 Fed. Reg. 38,690 (1979); *see also Shipments of High-Level Nuclear Power Plant Waste Through and to Illinois*, DD-83-12, 18 NRC 713, 713-16 (1983) (elaborating on the division of responsibility between the NRC and DOT).

[7] The NRC bears primary responsibility for packaging used to transport "fissile materials and for quantities of other radioactive materials (other than [low specific activity] materials) exceeding Type A limits." *Id.* The partially irradiated reactor fuel at issue here contains uranium-235. It therefore qualifies as a "fissile material" as that term is defined in the NRC packaging regulations. (*See* 10 C.F.R. § 71.4.)

[8] HMTA empowers the Secretary of Transportation "to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. § 1801.

safety requirements except those" specifically assigned to the NRC. 44 Fed. Reg. at 38,690.

Together, these regulations are designed to ensure safety in transporting radioactive materials through adequate containment of the radioactive material, adequate control of the radiation emitted by the material, and prevention of nuclear criticality (i.e., prevention of a nuclear chain reaction). Primary reliance for safety in transport of radioactive material is placed on the packaging. The NRC regulations establishing the requirements for packaging, preparation for shipment, and transportation of licensed material are set forth in 10 C.F.R. Part 71. The other parts of Title 10 that most directly pertain to radioactive material transportation are Parts 20, 70, and 73, which deal with "Standards for Protection Against Radiation," "Special Nuclear Material," and "Physical Protection of Plants and Materials."

Under the MOU, the NRC administers regulations for "Type B" radioactive materials packages. The Shoreham fuel is being transported in Type B packages. NRC approval for the package design requires a finding that the package can withstand the performance tests in Part 71 without releasing its contents, without emitting radiation in excess of strictly defined limits, and without occurrence of a nuclear chain reaction. *See* 10 C.F.R. Part 71, Subparts E and F.

NRC's Part 71 regulations provide a "general license" that authorizes any licensee of the Commission to transport or to deliver to a carrier for transport, licensed materials in approved packages. 10 C.F.R. § 71.12; *see also* 49 C.F.R. § 173.416. This general license may only be used by NRC licensees with programs in place to ensure compliance with NRC operating requirements. 10 C.F.R. § 71.12(b). The NRC issues "certificates of compliance" to designers of packages for transport of nuclear material that meet the NRC safety criteria in 10 C.F.R. Part 71.

Except in circumstances not applicable here, NRC regulations do not provide for review of the routes over which radioactive materials are to be transported.[9] While the regulations augment packaging and operating requirements, in some limited situations, with rules limiting routes and modes of transportation,[10] nothing in the regulations applicable to the type of nuclear material at issue here requires case-specific administrative review of transportation routes.

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[9] The NRC's Part 73 regulations, which prescribe measures for the protection of special nuclear material against theft and sabotage, require advance approval by the NRC of transportation routes for certain highly irradiated reactor fuel — defined as material capable of delivering an external radiation dose in excess of 100 rems per hour at a distance of 3 feet under unshielded conditions. 10 C.F.R. § 73.37(a)(1), (b)(7). The Shoreham fuel, which has an external radiation dose of less then 25 rems per hour at 3 feet unshielded, falls far short of this standard. Long Island Power Authority Security Plan for the Shipment of Fuel from the Shoreham Nuclear Power Station to the Limerick Generating Station, Rev. 1, June 15, 1993, at 5.

[10] *See, e.g.*, 10 C.F.R. § 71.88 (NRC restrictions on air transport of plutonium).

2. *Evaluation of the Environmental Effects of Agency Actions Under NEPA*

Under section 102(2)(C) of NEPA, when a federal agency undertakes a "major federal action significantly affecting the quality of the human environment," it must prepare an environmental analysis of that action. 42 U.S.C. § 4332(2)(C). The environmental analysis ensures that an agency has considered the potential environmental consequences before undertaking a major federal action; and it affords the public access to information on those consequences. *See Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); NEPA does not control the substantive choice that an agency makes once it has adequately examined potential environmental consequences.

In 1978, the Council on Environmental Quality ("CEQ") established, by regulation, a general framework for federal agency compliance with NEPA. *See* 40 C.F.R. Part 1500. These regulations, which the courts have looked to for guidance in applying NEPA,[11] direct federal agencies to identify three categories of actions for NEPA purposes: Actions that normally do not require case-specific analysis; actions that normally require an EA to determine whether they will significantly affect the environment, but not necessarily a detailed "Environmental Impact Statement" (EIS); and actions that normally require an EIS. *See* 40 C.F.R. § 1507.3. Actions within the first class are said to be "categorically excluded" from NEPA provisions requiring detailed, case-specific environmental analysis.[12]

NRC has promulgated its own regulations implementing NEPA.[13] *See* 10 C.F.R. Part 51. They include provisions for sorting NRC licensing and regulatory actions into the categories described by the CEQ. *See* 10 C.F.R. § 51.21.

B. Petitioner's Claims

Petitioner's NEPA claims are concerned with how NEPA might apply to a hypothetical barge-routing decision that, in Petitioner's view, some federal regulators should make. But NEPA only requires analysis associated with an action the federal agency actually proposes to take that is "major" and that

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[11] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

[12] *See* 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4; *see also Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 780 (D.C. Cir. 1987); *City of Alexandria v. Federal Highway Administration*, 756 F.2d 1014, 1018 (4th Cir. 1985).

[13] The NRC does not consider itself bound by the CEQ regulations, but has committed "to take account" of them. 10 C.F.R. § 51.10(a); *see* Final Rule 49 Fed. Reg. 9352, 9359-60 (1984); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989).

might significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The requirements of NEPA are triggered when there is a proposal for "major federal action." Without such an "overt action," the environmental analysis requirements do not come into play.[14]

Petitioner, apparently, would prefer that federal regulators promote transportation safety not only through general packaging and operating requirements, but also through case-by-case reviews of transportation routes, focusing on the comparative risks of alternative routes. The State's complaint really lies not with the implementation of existing regulations, but with perceived deficiencies in the overall regulatory scheme.

Under the existing regulatory scheme, a licensee's transport of nuclear fuel is by general license. No NRC approval of the specific route by which the Shoreham fuel is transported to Limerick is required. Because route selection is a private decision not requiring federal approval, no route-specific NEPA analysis is necessary. In *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-08 (1990), the Commission held that where a licensee can act without NRC approval, there is no federal action requiring an environmental review under NEPA. In that case the challenged action was the decision not to operate the Shoreham facility. Here the action was the selection of a transport means and route of the fuel shipments from Shoreham. In either case there was no federal action triggering NEPA or requiring submission of a consistency certification under CZMA, and no basis to say that an AEA, NEPA, or CZMA review was necessary. *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991).

Petitioner is free to argue that existing regulations are inconsistent with authorizing statutes when seeking redress through appropriate means, such as a petition for rulemaking under 10 C.F.R. § 2.802(a) for changes to the NRC packaging and transportation regulations. Even if there were merit in the Petitioner's asserted deficiencies in the current regulatory scheme, however, I am not empowered to alter it in response to a 10 C.F.R. § 2.206 petition. Moreover, Petitioner has not offered any safety reason to alter the terms or conditions of the NRC licenses authorizing the transfer and the transport of the Shoreham fuel. In order to obtain further NRC review of the Shoreham shipment, Petitioner advances a number of arguments that challenge the adequacy of the NRC's environmental review of its transportation regulations in general and of the PECo amendment in particular. Each of those arguments is addressed below.

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[14] *See Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, 934 F.2d 327, 334 (D.C. Cir. 1991); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245, 1246 (D.C. Cir. 1980).

1. Petitioner's Claim That the NRC Failed to Consider Alternatives Under NEPA

Petitioner claims that the NRC failed to comply with NEPA requirements because alternative means of transporting LIPA's fuel from Shoreham to Limerick were not analyzed. In Petitioner's view, the NRC was required to consider the mode and route by which the fuel is shipped in the EA of PECo's amendment permitting receipt and possession of the fuel.

The Staff's EA of PECo's amendment concluded that the receipt and use of Shoreham's fuel at the Limerick plant would have no significant environmental effects. This conclusion rested in part upon a finding that any impact from the transportation of fuel is within the bounds of Table S-4.[15] The S-4 Table is premised upon a generic determination that the transport of nuclear fuel to and from power reactor sites would not cause significant environmental effects. Transportation of nuclear fuel was an anticipated necessary event in connection with licensing each nuclear reactor. Three basic safety requirements were established to ensure safety in transport: adequate containment of the material; adequate control of the radiation emitted by the materials; and prevention of nuclear criticality, i.e., that no nuclear chain reaction occurs. For irradiated fuel in transit, the means to satisfy the safety objectives lie primarily in the protection provided by an NRC-certified cask. *See generally,* 10 C.F.R. Part 71.

The original expectation was that unirradiated nuclear fuel would be brought in for initial operation of each reactor and for refueling, and that fully used irradiated spent fuel would be removed from the site for disposal. Comprehensive generic studies demonstrated that transportation in accordance with NRC requirements would be extremely safe. The environmental effect of transporting unirradiated nuclear fuel to the reactor and irradiated fuel in certified casks from the reactor was determined to be minimal. To avoid wasteful repetition of litigation in individual proceedings, the NRC established generic values for the environmental impacts of fuel transport in its S-4 Rule, 10 C.F.R. § 51.52.

Generic NRC resolution of environmental issues — and the consequent preclusion of case-specific reviews — is fully lawful. For example, the NRC evaluated generically the environmental impact of the fuel cycle in Table S-3. The Supreme Court upheld the NRC's "generic method" as "clearly . . . appropriate." *Baltimore Gas and Electric Co.,* 462 U.S. at 101. The Court pointed to the "[a]dministrative efficiency" and "consistency of decision" furthered by generic environmental review. *Id.; see also Ecology Action v. AEC,* 492 F.2d 998, 1002 (2d Cir. 1974).

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[15] *See* U.S. Atomic Energy Commission, WASH-1238, "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants" (1972); *see also* NUREG-0170, "Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes" (1977).

The regulation implementing the S-4 Table provides that the transportation of fuel and radioactive wastes shall be considered in the environmental report prepared for the construction permit stage of a nuclear reactor. 10 C.F.R. § 51.52. That statement does not imply that the effects of transportation need not be considered later on, at the operating license stage or at the time of an amendment that requires an environmental review under NEPA.[16] Likewise, the statement does not imply that the S-4 Table is not applicable at such times.

When, as in this case, a federal action requires analysis of environmental effects of transporting irradiated fuel, the NRC must consider whether the potential consequences are within the "envelope" of those that have already been evaluated. The analysis supporting the S-4 Table considered the environmental effects that would be expected over the operating life of a reactor. WASH-1238 at 3. The S-4 Table is the means to evaluate the impacts of particular fuel shipments that are made during operation of the plant. The "envelope" of environmental impacts therefore includes shipments of fuel that occur during operation of the plant. Indeed, for it to have any useful purpose, application of the Table cannot be limited to the construction permit phase of a reactor since no fuel shipments can be made until after construction is complete.

The analysis that formed the basis of the S-4 Table took into account shipments by barge. Accident probability was estimated on the basis of 310 million barge miles to be about 1.8 accidents per million miles. WASH-1238 at 68. An extreme accident was found to be so unlikely as to be incredible. *Id.* Overall, the probability of a barge accident was found to be lower than for truck or rail for each category of accident considered. *Id.* at 70. Moreover, the likelihood of cargo damage in the event of a barge accident was determined to be much lower than in the case of rail accidents. In sum, the potential consequences of a barge accident were thoroughly considered and found to be less than those of either a rail or truck accident. Petitioner's desire for more specific information does not provide any basis for concluding that the analysis was inadequate or that another environmental analysis is necessary.

The risk analysis in Table S-4 is applicable here despite the fact that fuel is only slightly irradiated and partially spent fuel, rather than fully spent fuel. Table S-4 is equally applicable to the shipment of fully irradiated spent fuel between reactors as to the shipment of such fuel from a reactor for waste disposal. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); *accord, Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). The language of the S-4

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[16] At the operating licensing stage, each applicant is required to submit an environmental report specifically addressing the environmental effects of the transportation of fuel and waste to the extent that they differ from those considered in the final environmental impact statement prepared in connection with the construction permit. 10 C.F.R. § 51.53(a) and *see* 10 C.F.R. § 51.25 with regard to the Staff's need to prepare an EIS or EA.

Rule does not explicitly cover the transfer of the barely used fuel rods from Shoreham to Limerick simply because it was not originally anticipated that a reactor would be shipping out slightly irradiated fuel after low-power testing to another reactor. The fact that LIPA is shipping slightly irradiated fuel is a distinction that increases the conservatism of section 51.52 (*see* Table S-4) as to the level of safety and environmental impact of the transportation event. Thus, the circumstances of this shipment of irradiated fuel make it predictably much safer than the typical approved safe transport of irradiated fuel.

In short, this fuel shipment is well within the bounds of the shipments encompassed by the S-4 Rule and by the original EIS's for both Shoreham and Limerick. The fuel was in use for 3 days at power under 5%, in contrast to typically irradiated spent fuel that had supported full-power operation for 3 years. Due to the fact that the fuel had cooled down for several years, it is considerably safer, in the highly unlikely event of an accident, than if it had only been cooled for the minimum 90-day period authorized by the rule.

Because this shipment falls within the "envelope" of environmental consequences that have already been analyzed either generically or in the original impact statements for the specific plants at issue here, NEPA does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

The decision by LIPA to transport the fuel by barge instead of rail or any other means does not impose any NEPA requirements on the NRC. NEPA requirements are triggered only by federal action. The determination of the route and mode by which the fuel is to be transported is within the purview of LIPA and PECo, not the federal government. Thus, the cases cited by Petitioner in support of its claim that alternative routes must be considered for the shipping of nuclear materials are inapposite. In both of those cases, a federal agency — the Department of Energy — directed the shipment of the materials. *See Sierra Club v. Watkins*, 808 F. Supp. 852 (D.D.C. 1991), and *Public Service Co. of Colorado v. Andrus*, 825 F. Supp. 1483 (D. Idaho 1993). The decisions regarding the routing and means of transporting nuclear materials were, therefore, federal actions requiring NEPA review. In this case, by contrast, those decisions were made by private parties.

2. *Petitioner's Claim That the NRC Failed to Perform an EA for the Transfer and Barge Transport of LIPA's Fuel*

Petitioner claims that the NRC should have performed an EA of the transfer and transport of the Shoreham fuel as part of the issuance of a general license to transport licensed material. A general license to transport licensed material is conferred under 10 C.F.R. § 71.12 to any licensee of the Commission, as long as certain provisions are met, provided the licensee obtains approval of

the package under other provisions of Part 71. The premise for Petitioner's claim is that because the general license issued pursuant to section 71.12 is not categorically excluded from NEPA review, its environmental impacts must be reviewed.

The NRC's NEPA review of the general license to transport fuel was performed generically in the Final Environmental Statement (FES) issued as part of a comprehensive review of the Commission's rules and procedures pertaining to transportation.[17] That review was initiated by the NRC soon after its inception under the Energy Reorganization Act of 1974. The purpose of the NRC's generic evaluation was to consider the environmental impacts of all transportation of radioactive materials within the United States, specifically including all fuel cycle shipments. In addition, the FES provided technical data necessary for the NRC to reevaluate the existing rules governing transportation of radioactive materials. Thus, while the Petitioner is correct in asserting that LIPA's general license to transport fuel is not categorically excluded, an environmental review of that license has been performed.

LIPA's general license to transport fuel was not issued for the transport of fuel from Shoreham to Limerick. Rather, the general license is conferred by regulation for all shipments of nuclear fuel in NRC-certified casks. Under that license, LIPA is authorized to transport its nuclear fuel without obtaining NRC approval for each specific shipment.[18] As stated by the Commission, "[a] general license . . . is granted by rule and may be used by anyone who meets the terms of the rule, 'without the filing of applications with the Commission or the issuance of licensing documents to particular persons' . . . . Thus . . . LIPA was not required to obtain an individual license or license amendment for transporting the Shoreham fuel to PECo." CLI-93-25, 38 NRC at 293-94. Because no NRC approval for this shipment was required, no case-specific NEPA review is necessary.

3. *Petitioner's Claim That the NRC's EA for PECo's License Amendment Was Inadequate*

Petitioner claims that the NRC's EA of PECo's amendments[19] was inadequate because it relied on the S-4 Table. In Petitioner's view, the S-4 Table does not

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[17] *See* NUREG-0170, "Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes" (December 1977). Preparation of the FES was directed as part of a reevaluation of the NRC's transportation regulations which was initiated as part of a rulemaking proceeding concerning air transportation of radioactive materials. 40 Fed. Reg. 23,768, 23,769.

[18] Moreover, NRC approval of the route selected by LIPA to ship its nuclear fuel is not required. The NRC only requires case-specific review of the routing of shipments involving certain highly irradiated materials not present here. *See* 10 C.F.R. § 73.37(a)(1), (b)(7).

[19] The amendments revised PECo's operating license to allow receipt and possession, but not to separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station. Under section 51.21, this action required an EA.

account for the environmental effects of barge shipments, in general, because it was not premised on data specific to barges or of the Shoreham shipment in particular. Petitioner also argues that the S-4 Table does not apply to PECo's amendment because it pertains only to transportation of fuel being removed from a reactor site for disposal.

The S-4 Table, 10 C.F.R. § 51.52, specifically provides that it applies when "irradiated fuel is shipped from the reactor by truck, rail, *or barge*" (emphasis added). The provisions of Table S-4 encompass the environmental impacts of the shipment of fuel from one reactor to another, regardless of whether those impacts are being contemplated as part of NRC action concerning the reactor receiving the fuel or the reactor from which the fuel is being shipped. *See Catawba*, ALAB-825, 22 NRC at 793; *accord, Shearon Harris*, ALAB-837, 23 NRC at 544.

The study that provided the data for Table S-4 analyzed the effects of transportation by barge. *See* discussion at pp. 377-78, *supra*. Because barge shipments were clearly contemplated in the development of the S-4 Table and in the implementing regulation, application of Table S-4 to the Shoreham shipment was proper.

Furthermore, the environmental effects of the Shoreham shipment are within the "envelope" of risks encompassed in the S-4 Table. The factors that affect risk were considered in the EIS and are incorporated into the provisions of the rule.[20] For example, the environmental survey that supported the S-4 Rule estimated the likelihood that a loaded cask would be involved in an accident when transported *by barge* as only once in 170 reactor years. In contrast, the likelihood of an accident when transported by truck was estimated as once in 20 reactor years. WASH-1238 at 45. Even in the event of an accident, the probability of a release of radiation was found to be so small as to be practically incredible. *Id.* at 47.

4. Petitioner's Claim That the NRC Violated NEPA by Segmenting the Approval of the Transfer and Transport by Barge

Petitioner's claim that the NRC improperly segmented approval of the Shoreham shipment route fails because it is based on a false premise — that LIPA's

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[20] Petitioner relies on *Limerick Ecology Action, supra* note 13, to argue that transportation of fuel and wastes cannot be treated generally. In *Limerick*, the Court invalidated an NRC generic policy statement that precluded consideration of severe-accident-mitigation design alternatives in individual licensing proceedings. The Court found that precluding consideration of such a matter must be premised on a judgment that the issue could not affect the ultimate decision, i.e., whether to license the plant. 869 F.2d at 737. Because the NRC had not made that judgment, the Court found that precluding the matter from consideration was an abuse of discretion. *Id. at* 738. In this case, by contrast, the NRC has determined that transporting fuel and waste in NRC-certified containers will, in all likelihood, have no significant environment impacts regardless of the mode of transport. Where impacts may differ from site to site but never rise to the level of a significant impact at any site, generic NEPA consideration is appropriate.

decision to ship the fuel by barge along the New Jersey coast is subject to NRC approval. As discussed above, LIPA is authorized to transport fuel under a general license as long as it uses NRC-approved casks. Except in a very limited number of circumstances, not applicable here, NRC approval of specific shipments is not required. Because there is no federal action associated with LIPA's decisions in this matter, no NEPA requirements are triggered. Thus, the simple answer to Petitioner's claim is that NRC approval is not being segmented because NRC approval is not necessary.[21]

5. *Petitioner's Claim That the NRC Failed to Require LIPA to Obtain Necessary Approvals*

Once again, Petitioner argues that the NRC should have required LIPA to obtain approval of the decision to ship the fuel by barge along the New Jersey coast. According to the Petitioner, although LIPA is permitted to transport fuel under its general license, LIPA must obtain NRC approval to *transfer* the fuel to PECo. Petitioner concludes that the NRC must perform an environmental analysis before approving the transfer, presumably to consider alternative means of transporting the fuel.

NRC regulations, however, do not require such approval. Transfer of the fuel from LIPA to PECo is expressly authorized by 10 C.F.R. § 70.42, which provides that any licensee may transfer nuclear material to an individual authorized to receive such material under terms of a specific or general license issued by the Commission. LIPA's authority to transfer the Shoreham fuel to PECo under that general license was explicitly acknowledged by the Commission in CLI-93-25, 38 NRC at 294 n.3. Because NRC regulations authorize both the transfer and the transport of nuclear materials by licensees in general, specific approval of individual shipments is not required. *Id.* at 294.

The environmental impacts of transporting radioactive materials were considered by the NRC in conjunction with the issuance of the Shoreham operating license[22] and the generic evaluation of NRC transportation regulations. Thus, the environmental implications of these shipments have been fully considered by the NRC. This is true even when the shipment is transported in order to effectuate the "transfer" of fuel from one plant to another.

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[21] Because no federal action approving LIPA's decision to transport fuel by barge is necessary, this case is distinguishable from *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (1980). In that case, the Court expressed the concern that segmentation could delay the preparation of an impact statement required by federal action until after the status quo had been changed to an extent that the view of the agency would be distorted. *Id.* at 240.

[22] *See* "Final Environmental Statement Related to Operation of Shoreham Nuclear Power Station," September 1972, at 5.3.

6. *Petitioner's Claim That the NRC Violated the Coastal Zone Management Act by Failing to Require Consistency Reviews*

The main purpose of the CZMA is to encourage and assist states in preparing and implementing management programs to preserve, protect, develop, and restore the resources of the coastal zone of the United States.[23] Accordingly, the CZMA grants to states the opportunity to develop coastal management programs in order to coordinate not only state and local planning, management, and development activities, but federal activities as well.

Most significantly for the claims of the instant petition, where a state has an approved program, the CZMA provides for submission of a consistency certification to obtain a required federal license or permit.[24]

> After final approval by the Secretary of a state's management program, any applicant for a *required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state* shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program . . . . No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed . . . .

16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993) (emphasis added).

Part 930 of 15 C.F.R. sets forth the regulations governing consistency determinations.

The Petitioner points out that the regulations (15 C.F.R. § 930.53(b)) require that states develop a list of federal license and permit activities that are likely to affect the coastal zone. Consistent with this requirement, the State of New Jersey developed a list that included NRC "[p]ermits and licenses required for the construction and operation of nuclear facilities under the Atomic Energy Act of 1954, Sections 6, 7, 8 and 10."[25] Based on this listing, the Petitioner claims that the NRC should have obtained consistency certifications.[26]

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[23] *See* S. Rep. No. 753, 92nd Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4776.

[24] New Jersey's Coastal Management Program was approved in September 1980.

[25] New Jersey Coastal Management Program (August 1980), at 248.

[26] A consistency certification is required to be submitted to the licensing agency with respect to an application for a federally licensed activity affecting the coastal zone. Section 930.57 of 15 C.F.R. provides in part:

> **Consistency certifications**
>
> (a) When satisfied that the proposed activity meets the Federal consistency requirements of this subpart, all applicants for Federal licenses or permits subject to State agency review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the State's approved management program. At the same time, the applicant shall furnish to the State agency a copy of the certification.

The flaw in the Petitioner's argument is that the activity it is concerned about is the coastal route that was selected by LIPA for the transportation of the Shoreham fuel. This route is not regulated by the NRC. No application was made for the coastal route. The NRC did not issue any license or permit for LIPA's selection of a coastal route. Route selection, except in circumstances not applicable here, is a decision made by a private entity. It is not an activity for which LIPA or PECo applied for a "required Federal license or permit." 16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993). Because the NRC does not regulate the route selection, no NRC action fell within the CZMA. Accordingly, Petitioner's claim is without merit.

IV. CONCLUSION

For the reasons discussed above, the Petitioner has provided no basis for its request to halt the ongoing shipments of fuel from LIPA's Shoreham Nuclear Power Station to PECo's Limerick Generating Station or the related requests concerning the adequacy of LIPA's decommissioning plan and the compliance of the NRC with NEPA, AEA, and CZMA. Furthermore, no basis exists for taking any action in response to the petition as no substantial health or safety issues have been raised by the petition. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). Accordingly, no action pursuant to section 2.206 is being taken in this matter.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

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

Dated at Rockville, Maryland,
this 23d day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 50-271

VERMONT YANKEE NUCLEAR POWER CORPORATION
(Vermont Yankee Nuclear Power Station)

December 28, 1993

A petition, dated September 1, 1993, requested the Commission to reconsider the August 2, 1993 proposed civil penalty assessed against the Vermont Yankee Nuclear Power Corporation for operating the Vermont Yankee Nuclear Power Station outside Technical Specifications from October 15, 1992, until April 6, 1993. The petition requested reconsideration based upon four assertions regarding the actions of the Licensee and the NRC's response to these actions. The Director of the Office of Enforcement has considered all of the matters raised in the petition and has denied the petition.

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

I. INTRODUCTION

On September 1, 1993, Messrs. Michael Daley and Jonathan M. Block filed a letter with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC), on behalf of the New England Coalition on Nuclear Pollution (Petitioner). The letter requests, pursuant to 10 C.F.R. § 2.206, that the NRC reconsider the civil penalty assessed against the Vermont Yankee Nuclear Power Corporation (Licensee) for operating the Vermont Yankee Nuclear Power Station (VY) outside Technical Specifications (TS) from October 15, 1992 to April 6, 1993. The letter is being treated as a petition under the

NRC's regulations contained in section 2.206, and has been referred to me for a response. By letter dated October 12, 1993, this Office acknowledged receipt of the request for reconsideration and indicated that a response would be provided within a reasonable time.

II. BACKGROUND

In a letter dated August 2, 1993, Mr. T. Martin, the NRC Region I Regional Administrator, issued a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) (EA 93-112) in the amount of $50,000 to the Licensee for three violations associated with the operation of VY in a condition prohibited by its TS. Specifically, contrary to TS 3.3.C.3, on October 15, 1992, the Licensee determined, as a result of a surveillance test, that the average scram time for the three fastest control rods in one two-by-two control rod array was 0.391 second (thus, greater than 0.379 second for the required drop-out from position No. 46). The reactor was not brought to hot shutdown, but continuously operated at power in this condition until April 6, 1993. Additionally, contrary to 10 C.F.R. Part 50 Appendix B, Criteria XI and XVI, upon occurrence of the unsatisfactory scram time on October 15, 1992, the Licensee failed to adequately evaluate the test results and failed to take adequate corrective actions for the one unsatisfactory scram time. Collectively, these violations were classified as a Severity Level III problem and a civil penalty equal to the base civil penalty of $50,000 was proposed after offsetting mitigation for the Licensee's corrective actions with escalation for the Licensee's declining overall performance. In a letter dated August 24, 1993, the Licensee responded to the Notice and paid the civil penalty.

Briefly, the Petitioner requests reconsideration of the enforcement action based on the view that: (A) the seriousness of the event was greater than that determined by the NRC; (B) the Licensee failed to adequately respond to a number of questions posed by the NRC in the cover letter to the May 24, 1993 inspection report documenting the review of the issue; (C) the Licensee has consistently failed to heed and learn from the industry practices, which in this case involved industry and NRC guidance on the materials used in scram solenoid pilot valves; and (D) the NRC failed to effectively penalize the Licensee in relation to the income generated during the period the plant operated in violation of the TS.

III. DISCUSSION

A. Inadequate Assessment of the Seriousness of the Violations

To support the view that the seriousness of the events at issue was greater than that determined by the NRC, the petition cited an internal NRC memorandum

from M.W. Hodges to Ellis W. Merschoff, dated May 26, 1987, that discusses the potential consequences of slower-than-required control rod scram times. The 1987 memorandum, actually dated May 28, 1987, has been reviewed and the scenario compared with the VY case that is the subject of the enforcement action in question. The scenario cited in the 1987 memorandum involved 119 of 121 control rods experiencing scram insertion times of 12 to 16 seconds when the TS allowed a scram insertion time of no more than 7 seconds. The VY problem initially involved a small variation (0.012 second) from the time requirement for the initial 4.51% of control rod movement of a single control rod array. Additionally, despite this problem with the single array being unable to meet the insertion time for the first few percent of rod travel, all the control rods at VY were able to meet the time requirements for full insertion. Accordingly, the issue at VY is much less significant than the issue discussed in the memorandum (had the scenario discussed in the memorandum occurred during power operations). However, notwithstanding the low potential safety consequences of the actual degradation at VY (the variation of 0.012 second from the TS requirement for a single control rod array from a single position is not by itself significant), as noted in the NRC's August 2, 1993 letter, that violation, in combination with the failure to recognize the underlying condition as a TS violation and the failure to correct the violation, raises the overall significance of this occurrence. Hence, the NRC classified the combined problem at Severity Level III and issued the Civil Penalty.

With regard to the failure to recognize and correct the TS violation, the Petitioner also argues that the NRC improperly assessed those situations when determining the severity level of the issue. The Petitioner states that the Licensee did not shut down VY, did not report the situation to the NRC, and then, when "more controls rods were slow" in April of 1993, requested that the NRC exercise enforcement discretion rather than require the plant to comply with its license requirements and shut down. The Petitioner has accurately characterized the Licensee's initial response to the discovery of the scram insertion time problem in this case. The question that needed to be answered to assess the proper severity level, however, was whether the Licensee knew at the time of occurrence that the out-of-specification condition identified in October of 1992 was in fact in violation of the TS. Based on the inspection that was conducted and the discussions at the enforcement conference, the NRC concluded that the Licensee should have recognized that the test results violated the TS but failed to do so because Licensee personnel misunderstood the applicability of the TS to the testing of the individual control rod arrays and erroneously concluded at the time that no plant shutdown was required. Given the erroneous determination by the Licensee, a shutdown was not initiated and no report was made to the NRC.

The citations for the TS violation and the 10 C.F.R. Part 50, Appendix B, Criterion XI violation resulted from the Licensee's erroneous determinations. Subsequently, when the Licensee requested enforcement discretion, it was the NRC's questioning that prompted the Licensee to evaluate and determine the root cause of the degrading scram times. Thus, while it was the Licensee that identified the October 1992 problem, the NRC issued the 10 C.F.R. Part 50, Appendix B, Criterion XVI violation for inadequate corrective action, in part, because, in the NRC's view, prior to requesting enforcement discretion, the Licensee should have ascertained the root cause of the problem on its own initiative, which would have led to the earlier identification of the October 1992 TS violation.

As stated in section IV of the NRC Enforcement Policy (10 C.F.R. Part 2, Appendix C) "Severity Level I and II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential impact on the public." As discussed above, the actual impact of the violations in this case was minimal. Additionally, while the Licensee's continuing failure to recognize and correct the problem could have eventually had a potential high impact on the public in the event of an accident, that threshold had not been reached. As of April 1993, control rod drive performance had degraded only slightly more from what was required by the TS. Based on subsequent analysis performed by the Licensee, scram times were still well within the performance envelope necessary to protect the reactor. Nevertheless, collectively these violations represented a significant regulatory concern which resulted in the NRC classifying the problem at Severity Level III. Based on the overall significance of the violations, I believe that classification of the violations as a Severity Level III problem was appropriate and that an increase in the civil penalty based on increasing the severity level would not be proper in this case.

B. Failure to Adequately Respond to NRC Questions

The Petitioner's assertion that the Licensee had not answered questions 2-5 of the NRC's May 24, 1993 letter was based "on an examination of available materials VY submitted to the NRC." From that statement, it is unclear whether the Petitioner had the opportunity to read the Licensee's August 24, 1993 response to the Notice, which clearly addresses a number of the questions at issue. Specifically, question two, regarding the specific reasons VY was not shut down, and question three regarding the delay in taking corrective actions, are directly addressed in the Licensee's response. Question four, regarding the results of the Licensee's historical review, is indirectly answered when the Licensee, in part, responded to the corrective action violation by stating "Our subsequent root cause analysis has shown that our various testing and

plotting methodologies were flawed and produced historical trends that were of questionable value." This response indicates that the historical review suggested in the question "to determine if there were previous Technical Specification violations" could not meaningfully be done.

With regard to question five concerning the Licensee's design control process, the issue was discussed at the enforcement conference. A specific violation was not identified in this area and, therefore, a written response was not required. However, this subject relates to the Petitioner's third area of concern, the alleged failure of the Licensee to learn from the industry experience, practice, and guidance with regard to scram insertion times. That issue is addressed in Subsection C, below.

In summary, I find that the questions in the NRC's May 24, 1993 letter were adequately addressed, and I find no basis for reconsidering the civil penalty based on the Petitioner's concern in this area.

C. Failure to Properly Use Industry Information

In support of the assertion that the Licensee has failed to learn from the industry experience, the Petitioner indicates that, based on a search of NUDOCS (an NRC document storage and retrieval system), "VY apparently never read or implemented the legal requirements of IE 78-14 [sic], Deterioration of Buna-N Components in ASCO Solenoids (Dec. 19, 1978). . . ." With respect to this assertion, I would note: first, documents such as IE Bulletin 78-14 do not impose "legal requirements," other than, in most cases, the requirement to respond to the NRC's request for information; and second, that the Licensee responded to IE Bulletin 78-14 by letter dated February 5, 1979. Review of that response indicates that the Licensee adequately addressed the concerns of the Bulletin.

In support of its position, the Petitioner asks a series of questions:

> (1) How did VY manage to substitute a different manufacturer's component (Viton O-Rings) in the pilot solenoids without consulting GE, ASCO or the NRC?;
>
> (2) Why did the components fail after VY had found them to be environmentally qualified as safety-grade? and;
>
> (3) How did the on-site inspectors fail to notice any problem with scram insertion times during any routine surveillance conducted between October 1992 and April 1993?

As to the first question, the Licensee did not need the permission of any of those entities to change the materials in the solenoid pilot valves. Rather, the Licensee had to meet all 10 C.F.R. Part 50, Appendix B requirements and perform any analysis that might be required under 10 C.F.R. § 50.59. In order

to satisfactorily accomplish those tasks, consultations with ASCO and GE might have been appropriate, but such consultations were not required. NRC approval would only be required in this instance if an unreviewed safety question, as defined in section 50.59, were found to exist.

With regard to the second question, I would note that the meaning of the phrase "environmentally qualified as safety-grade" is unclear. The term "safety-grade" is not defined in the petition but is assumed to mean that the material or component must meet the requirements of Part 50, Appendix B. A component that is environmentally qualified is a component that meets the requirements of 10 C.F.R. § 50.49. However, not all environmentally qualified components are necessarily Part 50, Appendix B components or "safety-grade." In any event, I assume that the Petitioner's intent was to question how a certain type of component shown to be "safety-grade" could, on a generic basis, begin to fail in service?

It must be recognized that Part 50, Appendix B components have finite service lives that vary from component to component. In this case, the Licensee, at the time, did an inadequate job of accounting for the service life of certain components used in the scram solenoid pilot valves (SSPV) which resulted in questions regarding the deterioration of the components, apparently due to thermal degradation. That deterioration, in turn, contributed to the out-of-specification scram times and the issuance of the TS violation. The components in question, from the point of view of service life, were Buna-N diaphragms and not the Viton O-rings. All of the SSPVs were replaced or refurbished in April 1993, which resolved the questions concerning the service life of the particular materials that had been installed. With regard to the issue of whether the material problems were programmatic, further information indicates that changes in scram time testing methodology may have had a more significant effect upon recorded scram times than did age-related degradation of the Buna-N diaphragms. Nevertheless, additional evaluations of the design and manufacturing of the materials are being conducted by ASCO and General Electric, and will be followed up by NRC inspection.

In summary, the NRC acknowledges that the Licensee had a problem with components made of Buna-N material. However, the NRC does not agree that the existence of such a problem indicates that the Licensee had failed to learn from and assess industry information. Rather, the NRC found the Licensee to have had an adequate written program, which was inadequately implemented, and found that the Licensee had an inadequate test program, both of which resulted in the NRC taking enforcement action.

Based on the inspections performed, the NRC did not find the change to the Viton O-rings to be a contributor to this event or to be an issue that required immediate resolution. The Viton O-ring modification is an issue that might indicate weaknesses in the Licensee's design control process. The NRC

inspector was unable to close out that issue during the inspection because time only allowed him to specifically review the circumstances surrounding the control rod problem. The Viton O-ring issue will be pursued further in a future inspection, and enforcement action will be taken, if appropriate.

With regard to the final question, Region I personnel have advised that the onsite NRC resident inspectors did not notice any problem with any routine scram insertion time surveillance performed between October 1992 and April 1993. This test is one that is required to be performed relatively infrequently (every 4 to 8 months) on only 50% of the control rods at a time. The NRC resident inspectors observed only portions of the October 1992 test and did not (nor were they required to) review the final test data. Because of the required periodicity, the test was not performed again until April 1993.

In summary, the Licensee's actions with regard to industry experience and replacement of the SSPV material does not appear improper other than as described in the enforcement action (EA 93-112) and I find no basis to reconsider the civil penalty in this regard.

D. The Civil Penalty Did Not Effectively Penalize the Licensee

The Petitioner asserts that based on the net income generated during the time period VY was operated in violation of the TS, "a $50,000 penalty is no penalty at all." Further, the Petitioner raises the question, "Given the large number of serious, unanswered questions in the investigation of this violation of safety rules, why is Mr. Martin able to mitigate the penalty in this case?"

Section 234 of the Atomic Energy Act of 1954 limits the maximum civil penalty the NRC can assess for each violation. As discussed in section VII.A of the NRC Enforcement Policy, civil penalties approaching the statutory limit are reserved for only the most significant violations. For other significant non-deliberate, nonrecurring violations, the NRC normally assesses civil penalties in accordance with sections VI.B.1 and 2 of the NRC Enforcement Policy. Civil penalties determined using this guidance rarely penalize reactor licensees at a level approaching the direct financial benefit derived by the licensee from operation of the plant during the time period of the violation(s). Rather, penalties that are assessed under the Enforcement Policy are normally set at a level which is judged to be sufficient to prompt the licensee to undertake timely and extensive corrective actions and to avoid similar violations in the future. Further, the assessment of any civil penalty can have longer-term effects such as influencing the size of future civil penalties and the NRC's appraisal of overall plant performance through the Systematic Assessment of Licensee Performance.

As established earlier, the NRC concluded that the Licensee should have recognized the problem but did not deliberately operate VY in violation of the TS. Therefore, the NRC assessed the civil penalty based on the normal

Enforcement Policy methodology, which does not attempt to penalize the Licensee with a civil penalty that is somehow tied to, or based on, the economic benefit that accrued to the Licensee from its operation of the plant in violation of the requirements.

With regard to the Petitioner's question about how the civil penalty could be mitigated given "the large number of serious, unanswered questions," I conclude that the discussions above have addressed those issues. While the Petitioner did not take issue with the specific bases for the application of the Enforcement Policy's civil penalty escalation and mitigation factors in this case, the Petitioner did take issue, in general, with this civil penalty. Therefore, a review of the application of the escalation and mitigation factors was performed. The mitigation of the civil penalty for corrective actions was found appropriate as was the offsetting escalation for Licensee performance.

The enforcement approach used in this case was consistent with established NRC enforcement practices and the Enforcement Policy and the questions posed by the Petitioner have been addressed. Therefore, I find no basis to reconsider the civil penalty in this case.

IV. CONCLUSION

In conclusion, I deny the petition because the Petitioner has failed to provide a valid basis upon which the civil penalty should be increased in this case. Denial of the petition in this case is consistent with section XIII of the Enforcement Policy which states that closed enforcement actions will normally only be reopened if significant new information is received.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 28th day of December 1993.