

Byproduct Materials License No. 19-08330-03. The license, which primarily covers the cobalt-60 used in a water shielded irradiation facility (cobalt facility) was renewed by the Office of Nuclear Material Safety and Safeguards on July 28, 1981.^{1/}

On August 7, 1981, CNRS requested, in a letter to the Secretary of the Commission, that a hearing be conducted with respect to the renewal of the license for the cobalt-60 facility. In that letter CNRS claimed potential injury to its members from accidents and sabotage or terrorist activities. As support for CNRS' concern, the letter noted that there had been an incident which occurred between April 22 and May 16, 1981, at the cobalt facility involving the malfunctioning of an elevator which was used to move the cobalt-60 source within the facility. In addition, CNRS attached to that letter an affidavit signed by one of its members who lives 3.0 miles from the AFFRI facility authorizing CNRS to represent her interests in any licensing renewal proceeding involving AFFRI.

Subsequently, CNRS filed with the Commission a Petition to Intervene (Petition) pursuant to Section 189(a) of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2239(a)) (Act) and Section 2.714 of the Commission's Rules of Practice (10 C.F.R § 2.714), dated August 20, 1981 again requesting a hearing. The Petition was opposed by the Licensee and NRC Staff.

^{1/} The NRC Staff's determination in this regard was made in accordance with 10 C.F.R. §§ 2.100, 2.103, which delegates to the Staff the authority to issue materials license amendments.

The Licensing Board established to rule on CNRS' Petition determined that CNRS lacked the requisite standing and denied CNRS' request for a hearing. Memorandum and Order (Resolving Issues Raised by Petition for Leave to Intervene) LBP-82-84, 15 NRC 652 (1982). CNRS appealed the decision.

On July 16, 1982, the Appeal Board issued its Decision (ALAB-682, 16 NRC ____ (1982)), which reversed the Licensing Board's decision and remanded the proceeding to the Licensing Board with instructions to allow CNRS to supplement its petition in accordance with 10 C.F.R. § 2.714(b) in order to propose one litigable contention.

On October 15, 1982, a special prehearing conference was held in which was discussed, inter alia, a schedule for CNRS to file contentions pursuant to 10 C.F.R. § 2.714(b). Tr. 160-161. Based upon the agreed-upon schedule, CNRS filed its Supplement containing five proposed contentions on January 6, 1983.

III. DISCUSSION

CNRS' Supplement contains five proposed contentions, but only one contention, entitled "Accidents" (Supplement at 2), is supported by a basis. This one contention, if admitted by the Licensing Board, would confer intervenor status on CNRS. As more fully discussed below, the Staff urges the Board to reject the remaining contentions for lack of the requisite bases.

A. Legal Principles Governing Admissibility of Contentions

The Staff acknowledges at the outset that NRC case law dealing with

the admission of contentions is found primarily in nuclear reactor licensing cases, and not, as here, in materials licensing cases. However, the Staff's review of the Commission's regulations and case law indicates no reason not to apply the requirements of the Commission's Rules of General Applicability set forth in 10 C.F.R. Part 2, Subpart G, particularly 10 C.F.R. § 2.714(b), to proposed contentions in cases where an adjudicatory hearing is proposed to be held.

Pursuant to 10 C.F.R. § 2.714(b), those petitioning for leave to intervene in an NRC proceeding are required to file "a list of contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity."^{2/} A petitioner who fails to file at least one contention which satisfies the requirements of § 2.714(b) will not be permitted to participate as a party. A contention must be rejected where:

- (1) It constitutes an attack on applicable statutory requirements;
- (2) It challenges the basic structures of the Commission's regulatory process or is an attack on the regulations;
- (3) It is nothing more than a generalization regarding the Intervenor's view of what applicable policies ought to be;
- (4) It seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) It seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The purpose of the basis

^{2/} The Statement of Considerations accompanying the April 4, 1978 amendments to 10 C.F.R. Part 2, Rules of Practice note that "[A] proposed contention must be set forth with particularity and with the appropriate factual basis." 43 Fed. Reg. 17798.

requirement of 10 C.F.R. § 2.714(b) is (a) to assure that the matter sought to be put into question does not suffer from any of the infirmities set forth in Peach Bottom, supra, at 20-21 (b) to establish sufficient foundation to warrant further inquiry into the subject matter and (c) to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra at 20.

At the early stages of a proceeding proposed contentions need only identify the reasons for each contention. See, Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980). In addition, the basis stated for each contention need not "detail the evidence which will be offered in support of each contention." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), 6 AEC 423, 426 (1973). Accordingly, in examining contentions and the basis therefore, a licensing board may not reach the merits of contentions. Id., Peach Bottom, supra at 20. Nevertheless, the basis for contentions must be sufficiently detailed and specific (a) to demonstrate that the issues raised are admissible and further inquiry into the matter is warranted and (b) to put the parties on notice as to what they will have to defend against or oppose. This is particularly important in a proceeding involving an application for an operating license or an amendment to an operating license, where a hearing is not mandatory, in order to assure that an asserted contention raises an issue which clearly is open to adjudication. See, 10 C.F.R. § 2.760(a) and App. A to Part 2, VIII: Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976);

Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974); River Bend, ALAB-444, 6 NRC 760, 768-69 (1977).

In addition, a board is not authorized "to admit conditionally for any reason, a contention that falls short of meeting the specificity requirements." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ____ (August 19, 1982), slip op. at 11. The NRC's Rules of Practice do not permit "the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff." Id., slip op. at 13.

Finally, a licensing board has no duty to recast contentions offered by a petitioner to remedy the infirmities of the type described in Peach Bottom, supra, for which they may be rejected, in order to make inadmissible contentions meet the requirements of 10 C.F.R. § 2.714. Commonwealth Edison Co. (Zion Station Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974). Should a Board nevertheless elect to rewrite a petitioner's inadmissible contentions so as to eliminate the infirmities which render the contentions inadmissible, the scope of the reworded contentions may be made no broader than the bases that were previously provided by the petitioner for the inadmissible contentions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114-16 (1982).

- B. Contention "Accidents" Section 1. Fulfills the Bases Requirement of 10 C.F.R. § 2.714(b)

Section 1. of CNRS' contention labeled "Accidents" states:

Licensee has not adequately demonstrated that there could not be a recurrence and escalation, with adverse impacts on the public health and safety, of the accident which began in its cobalt storage room on April 22, 1981 and continued unmitigated until

May 16, 1981, during which time radioactive cobalt remained continuously exposed above the shielding water.

The Staff submits that this contention meets the bases criteria of 10 C.F.R. § 2.714(b). Grand Gulf, supra; Allens Creek, supra. CNRS has referred to a recent malfunction at the cobalt facility and has alleged that such a malfunction could reoccur, with potential impacts on the public health and safety. This malfunction was also referred to by the Appeal Board in ALAB-682 supra (Slip op. at 3).

Therein, the Appeal Board stated:

We recognize that upon further analysis it may turn out that there is no way for the radiation emanating from the cobalt inventory of the AFRRI facility to cause harm to persons living nearby. Nonetheless, neither we nor the Licensing Board can decide, at this early state of the proceeding, that there is no reasonable possibility that such harm could occur. North Anna, supra, 9 NRC at 56. As we recognized in North Anna, CNRS' contentions will of course be susceptible to a motion for summary disposition under 10 C.F.R. 2.749. At that point, parties may challenge their bases in fact. Ibid. ALAB-682, slip op. at 8.

Thus it appears that while the Appeal Board considered that equipment malfunction was a hypothetical means of generating off-site doses, the Appeal Board indicated that the potential for such doses should be decided on the facts.

For the above reasons, the Staff supports admission of this proposed contention.

C. All CNRS' Remaining Proposed Contentions Lack the Requisite Bases.

Each of CNRS' remaining contentions do not state a basis and

therefore should be rejected. The contentions will be discussed below, in the order presented in CNRS' Supplement.

Security

CNRS states, without giving reasons, that the Licensee's renewal application is deficient in that it does not address the possibility or consequences of a terrorist attack. CNRS has neither stated why such an attack would happen, nor how. It has alleged no factual reason why this Licensing Board should consider the possibility of a terrorist attack as anything more than mere speculation. CNRS has not provided any credible scenario, supported by any factual reference, which would lend credence to its proposed contention.

Moreover, CNRS has not identified any regulatory standard which would be violated by the alleged deficiencies in the license renewal application.^{3/} In reviewing 10 C.F.R. Part 30 licenses of the cobalt facility type, the Staff utilizes Regulatory Guide 10.9, "Guide for the Preparation of Applications for Licenses for the Use of Gamma Irradiators. (April 1980)". While it is recognized that such a Guide is

^{3/} 10 C.F.R. Part 73, "Physical Protection of Plants and Materials" does not include 10 C.F.R. Part 30 licenses within its scope. 10 C.F.R. § 73.1(b).

not controlling on this Board^{4/}, the Staff did apply Regulatory Guide 10.9 when it approved the license amendment application now at issue. Specifically, § 3.4 of the Guide, "Safeguards", states:

No safeguard information is required in an application for licenses covered by this guide.

For the above reasons, the proposed contention should be rejected.

Accidents 2

The gist of this proposed contention is that the Licensee has not analyzed certain "accident" scenarios. CNRS has not stated any factual bases to support its allegation that such scenarios would be expected to happen, nor has CNRS described how such events, were they to occur, could impact upon the public health and safety. CNRS has not cited a single instance where such "accidents" have occurred at AFRI or at any other irradiator facility which has led to any impact on the public health and

4/ The following standard notice is found on NRC regulatory guides:

Regulatory Guides are issued to describe and make available to the public methods acceptable to the NRC staff of implementing specific parts of the Commission's regulations, to delineate techniques used by the staff in evaluating specific problems or postulated accidents, or to provide guidance to applicants. Regulatory Guides are not substitutes for regulations, and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.

safety. In sum, CNRS has not stated a basis for this proposed contention set forth with reasonable specificity as required by 10 C.F.R.

§ 2.714(b). Further, CNRS has not identified any regulatory requirement which would require the Licensee to analyze such accidents.

For the above reasons, this proposed contention should be rejected.

Emergency Planning

CNRS essentially alleges that it be allowed to litigate the emergency plan for the AFRRRI TRIGA reactor, whose license renewal is the subject of a companion proceeding. CNRS has given no basis for its allegation, other than a statement regarding the proximity of the reactor. CNRS has not cited any NRC regulatory requirement that byproduct materials licensees with sealed sources must prepare comprehensive emergency plans. As with the security contention discussed above, there is Staff guidance in this area. This is contained in NUREG-0767, "Criteria for Selection of Fuel Cycle and Major Materials Licenses Needing Radiological Contingency Plans (July 1981)". Specifically excluded from the licenses requiring such plans are "sealed sources" as defined in 10 C.F.R. § 30.4(r). This is the form of material used at the cobalt facility. Further, the Commission has published an Advance Notice of Proposed Rulemaking on this topic. 46 Fed. Reg. 106 (June 3, 1981). The Notice quotes NUREG-0767 as the bases for selecting materials licensees which must submit plans under the proposed rule.

CNRS has stated no bases for disregarding the criteria developed by the Staff.

Therefore, this proposed contention should be rejected.

Siting

CNRS asserts that the Licensee has not demonstrated why the location of the cobalt facility is not hazardous to health and safety. The sole attempt by CNRS to provide any factual basis in support of its assertion is to reference its other proposed contentions as the purported basis for this one. At best, this proposed contention is nothing more than a generalization regarding CNRS' view of what the NRC policies should be concerning the siting of gamma irradiators. As such, the proposed contention must be rejected according to the decision in Peach Bottom, discussed supra. Further, CNRS has not identified any regulatory requirements regarding siting which it believes Licensee is violating.^{5/}

Therefore, this proposed contention should be rejected.

National Environmental Policy Act

CNRS alleges that neither the Licensee nor the Staff has prepared a "legally adequate" environmental cost-benefit analysis. CNRS has cited no basis for its allegation that the proposed renewal of a materials license requires the preparation of an Environmental Impact Statement (EIS). 10 C.F.R. § 51.5(a) lists the actions for which an EIS must be prepared. The renewal of a byproduct license is not one of them. Further, under NRC regulations, an EIS or a negative declaration that an environmental impact statement will not be prepared, with an environmental impact appraisal supporting that determination, need not be prepared for the

^{5/} The Commission's siting criteria, found in 10 C.F.R. Part 100, only include 10 C.F.R. Part 50 licenses within their scope. 10 C.F.R. § 100.2.

renewal of a materials license. 10 C.F.R. § 51.5(d)(4). See
Edlow International Company (Agent for the Government of India on
Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563
(1976). To the extent that this contention alleges that the
environmental regulations in 10 C.F.R. § 51.5(d)(4) are invalid or
inadequate, this contention is barred by 10 C.F.R. § 2.758. Under
§ 2.758, the Commission has withheld jurisdiction from a licensing board
to entertain attacks on the validity of Commission regulations in
individual licensing proceedings, except in "special circumstances."
Potomac Electric Power Co. (Douglas Point Nuclear Generating Station,
Units 1 and 2), ALAB-218, 8 AEC 79, 88-89 (1974). 10 C.F.R. § 2.758 sets
out those special circumstances which an intervenor must show to be
applicable before a contention attacking the regulations will be
admissible. CNRS has not made any showing of special circumstances.


For the above reasons, this proposed contention should be rejected.

IV. CONCLUSION

For the reasons set forth above, the Staff submits:

- (1) CNRS has proposed one admissible contention, herein designated
Accident 1, and should be admitted as an intervenor to this
proceeding;
- (2) The remainder of CNRS' contentions should be rejected as
lacking basis.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of February, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

ARMED FORCES RADIOBIOLOGY RESEARCH
INSTITUTE

(Cobalt-60 Storage Facility)

Docket No. 30-6931

Renewal of Byproducts
Material License
No. 19-08330-03

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO CITIZENS FOR NUCLEAR REACTOR SAFETY'S SUPPLEMENT TO PETITION TO INTERVENE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 10th day of February, 1983.

Helen Hoyt, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Ernest E. Hill
Administrative Judge
Lawrence Livermore Laboratory
University of California
P.O. Box 808, L-123
Livermore, CA 94550

Dr. David R. Schink
Administrative Judge
Department of Oceanography
Texas A&M University
College Station, TX 77840

David Rickard, Esq.
Robert L. Brittigan, Esq.
General Counsel
Washington, DC 20305

Elizabeth B. Entwisle, Esq.
237 Hunt Road
Pittsburgh, PA 15215

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Richard G. Bachmann
Counsel for NRC Staff