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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
LBP-94-21
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'94 JUL 12 P1:31

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED JUL 12 1994

In the Matter of

Docket No. 030-30485-EA

INDIANA REGIONAL CANCER CENTER

EA 93-284

(Order Modifying and
Suspending Byproduct Material
License No. 37-28179-01)

ASLBP No. 94-685-02-EA

July 12, 1994

MEMORANDUM AND ORDER
(Ruling on Prediscovery
Dispositive Motions)

In this proceeding, licensee Indiana Regional Cancer Center (IRCC) and Dr. James E. Bauer, IRCC's Radiation Protection Officer (RSO) and sole authorized user, (collectively IRCC/Dr. Bauer) challenge a November 1993 immediately effective NRC staff enforcement order. The order in question suspends and modifies IRCC's byproduct materials license authorizing the use of a strontium-90 source for the treatment of superficial eye conditions. Currently pending before the Licensing Board are dispositive motions filed by IRCC/Dr. Bauer and the staff. In their motions, the parties address the issue of whether one of the chief grounds for the staff's order -- Dr. Bauer's involvement in a November 1992 incident at IRCC concerning the administration of a high dose rate (HDR) brachytherapy

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treatment under a different NRC license authorizing the use of iridium-192 -- is an appropriate basis for that order. In addition, the staff asserts that four of the central issues proposed for litigation by IRCC/Dr. Bauer are subject to dismissal from the proceeding.

For the reasons detailed herein, we find that the staff is not precluded as a matter of law from relying on the November 1992 incident as a basis for its November 1993 enforcement order. We further conclude, as the staff requests, that an IRCC/Dr. Bauer issue regarding "patient need" for strontium-90 skin lesion treatments should be dismissed. We decline, however, to grant the staff's petition to dismiss several other issues concerning the medical appropriateness and public health and safety risks of such treatments and whether the licensee's provision of a patient log constituted submitting "complete and accurate information" to the agency as NRC rules require.

I. BACKGROUND

The November 16, 1993 staff enforcement order at issue in this proceeding suspends IRCC's authority under Byproduct Materials License No. 37-28179-01 to receive or use any strontium-90 and modifies that license to, among other things, prohibit Dr. Bauer from engaging in any activities under the license. See 58 Fed. Reg. 61,932, 61,933 (1993). The order recites three principal bases as support for

suspending and modifying IRCC's byproduct materials license: 1) Dr. Bauer's purported performance of activities with the strontium-90 source that were not authorized under the license; 2) Dr. Bauer's alleged failure to provide complete and accurate information to NRC inspectors during a November 11, 1993 inspection of IRCC facilities; and 3) Dr. Bauer's supposed failure to cause an adequate survey of a patient to be made during a November 16, 1992 HDR brachytherapy treatment at IRCC that resulted in a significant radiation exposure to the patient and members of the general public. See id. at 61,932-33. This third matter is also a subject in dispute in a separate enforcement proceeding involving the suspension of an iridium-192 byproduct materials license held by IRCC's parent company, Oncology Services Corporation (OSC). See, e.g., Oncology Services Corp. (Order Suspending Byproduct Material License No. 37-28540-01), LBP-94-2, 39 NRC 11, 15 (1994).

Acting pursuant to the Board's December 17, 1993 initial prehearing order, see Memorandum and Order (Initial Prehearing Order) (Dec. 17, 1993) at 4-5 (unpublished), on January 18, 1994, the parties filed a joint prehearing report in which they specified the central issues for litigation in this proceeding. See Joint Prehearing Report (Jan. 18, 1994) at 1-4 [hereinafter Joint Prehearing Report]. Thereafter, in accordance with the Board's

February 1, 1994 prehearing conference order, see Order (Prehearing Conference Order) (Feb. 1, 1994) at 1-2 (unpublished), on February 28, 1994, both IRCC/Dr. Bauer and the staff filed dispositive motions relative to several of those issues. See NRC Staff Motion for Summary Disposition and Motion for Dismissal (Feb. 28, 1994) [hereinafter Staff Dispositive Motions]; Motion to Eliminate Basis for Suspension (Feb. 28, 1994) [hereinafter IRCC/Dr. Bauer Dispositive Motion]. The parties also have availed themselves of the opportunity to file a response to these motions and to submit a reply to the opposing party responses. See NRC Staff's Response to Motion to Eliminate Basis for Suspension (Mar. 31, 1994); Response to NRC Staff Motion for Summary Disposition and Motion for Dismissal (Mar. 31, 1994) [hereinafter IRCC/Dr. Bauer Response to Staff Dispositive Motions]; NRC Staff Reply to IRCC's Response to NRC Staff Motion for Summary Disposition and Motion for Dismissal (Apr. 15, 1994); Reply to NRC Staff's Response to Motion to Eliminate Basis for Suspension (Apr. 14, 1994).

In their dispositive motions, both the staff and IRCC/Dr. Bauer seek a ruling on whether the staff can rely on Dr. Bauer's purported involvement in the November 1992 iridium-192 HDR brachytherapy treatment incident as a basis its the November 1993 enforcement order regarding strontium-90 use by IRCC and Dr. Bauer. In addition, the staff asks

that four of the central issues for litigation proposed by IRCC/Dr. Bauer be dismissed from this proceeding. These include whether use of strontium-90 for treating skin lesions on two patients was medically appropriate (IRCC/Dr. Bauer Issue 1); whether use of strontium-90 for skin lesion treatments on two patients posed a risk to the public health, safety, or interest (IRCC/Dr. Bauer Issue 2); whether providing a patient treatment log constitutes providing complete and accurate information to the NRC (IRCC/Dr. Bauer Issue 3); and whether substantial patient need exists for strontium-90 treatments at IRCC (IRCC/Dr. Bauer Issue 14).

II. ANALYSIS

A. IRCC/Dr. Bauer Motion to Eliminate Basis and Staff Motion for Summary Disposition

1. The "Improper Basis" Issue. In their joint prehearing report, the parties mutually identified the following as the fifth central issue for litigation (Joint Issue 5) in this proceeding:

Whether Dr. Bauer's alleged conduct under License No. 37-28540-01 (HDR license), which is subject to pending litigation, can, as a matter of law, be a basis for the suspension of License No. 37-28179-01 (Strontium-90 license)?

Joint Prehearing Report at 2. Both IRCC/Dr. Bauer and the staff, albeit in somewhat different ways, seek a dispositive ruling on this issue.

In their pleading entitled "Motion to Eliminate Basis," IRCC/Dr. Bauer assert that the staff's reference to the November 1992 incident as a grounds for the November 1993 enforcement order violates fifth amendment due process guarantees. This is so, they contend, because the staff's allegations of conduct under the HDR license are unadjudicated, and thus cannot provide a basis for the enforcement order. In addition, they maintain that the staff's reliance on the November 1992 incident is improper because any allegations regarding Dr. Bauer's conduct relative to that incident are irrelevant and immaterial to this enforcement action. As a result, IRCC/Dr. Bauer conclude, we must prevent the staff from using the HDR incident as support for its November 1993 order by eliminating it as a basis for the order. See IRCC/Dr. Bauer Dispositive Motion at 4-11.

Asserting that there are no material factual issues relative to Joint Issue 5, the staff declares that it is entitled to summary disposition regarding that matter. According to the staff, its authority to utilize the HDR incident as a basis for suspending and modifying the IRCC license arises from 1) the agency's uniquely broad authority under the Atomic Energy Act (AEA), see Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968); 2) subsections b and i of AEA section 161, 42 U.S.C. § 2201(b), (i), which empower the Commission to issue orders to protect health or minimize

danger to life or property; 3) AEA section 186a, id. § 2236(a), which permits the Commission to revoke, and by implication suspend, a license for failure to observe any Commission regulation; and 4) 10 C.F.R. § 2.202(a)(1), which provides that in issuing orders the staff may consider any facts deemed a sufficient ground for a proposed enforcement action. See Staff Dispositive Motions at 8.

The staff declares that the foundation of the November 1993 order is its conclusion (presumably pursuant to AEA sections 161i and 161b) that it lacked the requisite reasonable assurance that IRCC's operations can be conducted consistent with agency regulations and in a manner that would adequately protect the public health and safety. This staff conclusion, in turn, is based in significant measure upon a determination that as the RSO and the only authorized user on the IRCC strontium-90 license, Dr. Bauer is unable or unwilling to assure that the Commission's requirements are being and will be followed. And, according to the staff, the November 1992 incident is pertinent to this finding because it casts doubt upon Dr. Bauer's ability to follow the Commission's regulations and to conduct licensed activities, including those under the strontium-90 license, in a manner that ensures protection of the public health and safety. See id. at 9.

Relative to its other cited authorities, the staff asserts that its reliance on the November 1992 incident is

consonant with AEA section 186 and with 10 C.F.R. § 35.18, which is a regulation providing that a byproduct materials license will be issued only if an applicant is found to be equipped and committed to observing the Commission's safety standards. The staff contends that consistent with these provisions it is free to consider any actions by the licensee or those, such as Dr. Bauer, who are named in the license, that bear on the safe conduct of licensed-activities. See id. In addition, the staff maintains that its reliance upon the November 1992 incident -- the staff's allegations about which are as yet unlitigated -- is fully in accord with 10 C.F.R. § 2.202 and the Commission's broad authority to protect the public health and safety. See id. at 9-11.

Finally, in its summary disposition motion the staff claims that of the fourteen other issues proposed for litigation by IRCC/Dr. Bauer, five appear to be closely related to Joint Issue 5. See id. at 7 n.4. Those issues are as follows:

4. Whether allegations regarding Dr. Bauer's conduct on November 12, 1992 are relevant to this proceeding in that they involve a different source, a different license, and an entirely distinguishable factual setting?
5. Whether admission of evidence regarding Dr. Bauer's conduct on November 12, 1992 is

improperly prejudicial given the posture of this proceeding and the confusion of issues likely to arise from the admission of that evidence?

6. Whether admission of evidence regarding Dr. Bauer's conduct on November 12, 1992 amounts per se to a denial of the due process rights of Dr. Bauer and the Licensee?
7. Whether admission of evidence into this proceeding regarding Dr. Bauer's conduct on November 12, 1992 amounts to a denial of due process rights of Dr. Bauer and the Licensee because Dr. Bauer and the Licensee have been denied the opportunity to review material in the NRC's possession regarding Dr. Bauer's conduct on November 12, 1992?
8. Whether allegations regarding Dr. Bauer's conduct on November 12, 1992 are admissible in this proceeding in that Dr. Bauer has yet to have the opportunity to contest any implication of fault at a hearing and there has been no finding of fault against him?

Joint Prehearing Report at 3. The staff asserts that a ruling in its favor regarding Joint Issue 5 compels the dismissal of these issues as well.

2. The Board's Determination. The staff correctly notes that under AEA provisions such as subsections (e) and (i) of section 161, the agency's authority to protect the public health and safety is uniquely wide-ranging. That,

however, is not the same as saying that it is unlimited. In exercising that authority, including its prerogative to bring enforcement actions, the agency is subject to some restraints. See, e.g., Hurley Medical Center (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 236-37 & n.5 (1987) (staff cannot apply a comparative-performance standard in civil penalty proceedings absent fair notice to licensees about the parameters of that standard).

One of those constraints is the requirements of constitutional due process, which IRCC/Dr. Bauer have invoked in challenging the staff's use of the November 1992 incident. See IRCC/Dr. Bauer Dispositive Motion at 4-8. It has been observed, however, that a party responding to an agency enforcement complaint has been accorded due process so long as the charges against it are understandable and it is afforded a full and fair opportunity to meet those charges. See Citizens State Bank v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984). Put somewhat differently, "[p]leadings in administrative proceedings are not judged by standards applied to an indictment at common law, but are treated more like civil pleadings where the concern is with notice" Id. (quoting Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979)).

Under these standards, the due process complaint posited by IRCC/Dr. Bauer is not persuasive. They do not claim a lack of understanding regarding the nature of the

charges; rather, they contend that they should not be required to meet the staff's claims because they do not "rise above the level of 'mere allegation.'" IRCC/Dr. Bauer Dispositive Motion at 11. The fact that the validity of the staff's assertions regarding the November 1992 incident has not been litigated is no reason to preclude the staff from utilizing those charges as a basis for the November 1993 order. Indeed, this very proceeding affords IRCC/Dr. Bauer with an opportunity to contest each of the charges that make up the staff's enforcement determination, an opportunity intended to protect their due process rights.¹ The "unlitigated" nature of the staff's allegations regarding the November 1992 incident thus is not a constitutional due process deficiency that bars staff reliance on the incident as a component of the enforcement order at issue here.²

¹ In fact, taking the IRCC/Dr. Bauer position to its logical conclusion, the staff would be hard pressed to bring just about any enforcement action because in most instances the bases for those proceedings are the activities of licensees or others that have not been the subject of litigation.

² As was noted earlier, a challenge to the staff's claims about the November 1992 incident also is pending in a separate proceeding. See supra p. 3. Whether the circumstances surrounding that incident are first tried in that case or in this proceeding may have implications in terms of invoking issue or claim preclusion principles (i.e., *res judicata* or collateral estoppel), which are applicable in NRC adjudicatory proceedings. See, e.g., Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 283 & n.27 (1992) (citing cases), petitions for review pending, Nos. 92-1665, 93-1665, 93-1672, 93-1673 (D.C. Cir.).

In addition to their due process concerns, IRCC/Dr. Bauer also contest the staff's reliance on the November 1992 incident on the general grounds of "relevance" and "materiality." Id. at 9-11. Their central contention in this regard -- which appears to hark back to their general due process concern, see id. at 5-6 -- is framed in terms of the uncorroborated "hearsay" nature of the allegations involved.

Even accepting their characterization of the staff's claims as "hearsay" allegations, this label alone does not provide sufficient reason to dismiss those claims ab initio. See Oncology Services Corp. (Order Suspending Byproduct Material License No. 37-28540-01), LBP-93-20, 38 NRC 130, 135 n.2 (1993) (hearsay evidence generally admissible in administrative hearing if reliable, relevant, and material). Rather, so long as those allegations are in dispute, the validity and sufficiency of any "hearsay" information upon which they are based generally is a matter to be tested in the context of an evidentiary hearing in which the staff must provide adequate probative evidence to carry its burden of proof.

Besides asserting that the staff's allegations are "hearsay," IRCC/Dr. Bauer also state that the staff's claims do not relate "in any substantive way" to the IRCC strontium-90 license. IRCC/Dr. Bauer Dispositive Motion at 9. Although in their initial motion they do not

delineate what this means, in their response to the staff's summary disposition request they contend that the November 1992 incident is too remote from the alleged-improper activities under the strontium-90 license given there are different licensees (OSC v. IRCC), different radiation safety officers (OSC corporate RSO Dr. David E. Cunningham v. Dr. Bauer), and different authorized nuclear materials (iridium-192 v. strontium-90). See IRCC/Dr. Bauer Response to Staff Dispositive Motions at 6.

There might well be instances in which one or more of the bases put forth by the staff as support for an enforcement order would be subject to dismissal as lacking a sufficient nexus to the regulated activities that are the focus of the staff's enforcement action. This is not such a case, however.

If, for the purpose of ruling on the IRCC/Dr. Bauer dispositive motion, we accept what has been plead by the staff in that order as true, the factual circumstances set forth in the order regarding the November 1992 incident and Dr. Bauer's activities relating to that incident bear a sufficient link to the challenged activities under the strontium-90 license to permit the November 1992 incident to provide a basis for this enforcement action. A central connecting factor is that Dr. Bauer, as an authorized user under both licenses, was substantially involved (either as a supervisor or the administering physician) in providing

treatments using licensed materials in a manner that the staff finds was not in conformance with agency requirements. This question about the ability of Dr. Bauer (and thus IRCC for whom he serves as RSO and sole authorized user) to operate in conformance with Commission regulatory requirements provides the nexus that links the November 1992 incident under the OSC iridium-192 license with events at IRCC under the strontium-90 license and allows the earlier incident to be invoked as support for the November 1993 enforcement order.

We thus deny the IRCC/Dr. Bauer motion to eliminate the November 1992 incident as a basis for the staff's November 1993 enforcement order. Further, there being no material factual issues in dispute regarding Joint Issue 5,³ we find in favor of the staff regarding that

³ In support of its summary disposition motion, the staff put forth two statements of material fact not in issue. The first declares that the November 1993 enforcement order relied upon Dr. Bauer's conduct under the iridium-192 license, while the other states that Dr. Bauer's conduct under the iridium-192 license is subject to another pending adjudicatory proceeding. See Staff Dispositive Motions at 5. Although IRCC/Dr. Bauer agree that the two statements of material fact put forth by the staff in support of its summary disposition motion are material and relevant, they nonetheless state that they "contest any assertion that there is no genuine issue to be heard with regard to these facts." IRCC/Dr. Bauer Response to Staff Dispositive Motions at 3. They fail, however, to make any showing establishing how there is a dispute over these factual statements, and we can perceive none. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-06, 39 NRC ____, ____ (slip op. at 33) (June 9, 1994) (mere assertions of dispute over material issues of fact do not invalidate grant of summary disposition).

issue, concluding that as a matter of law the staff is not precluded from utilizing Dr. Bauer's alleged conduct regarding the November 1992 incident as a basis for suspending and modifying the IRCC strontium-90 license. This finding, however, is made with the understanding that the staff continues to bear the burden of demonstrating that the allegations it has put forth in its November 1993 order are sufficient to sustain that order.

Having found in the staff's favor regarding Joint Issue 5, we must also consider the staff's assertion that the five additional IRCC/Dr. Bauer issues should be dismissed. We agree with the staff about four of those issues. IRCC/Dr. Bauer Issues 4, 5, 6, and 8 embody particular arguments as to why they should prevail on the general issue set forth in Joint Issue 5. Having dealt with those assertions in ruling in the staff's favor on Joint Issue 5, those particular issues are for all practical purposes moot and so can be dismissed from this proceeding.

IRCC/Dr. Bauer Issue 7 is different. Based on the information now before us, we are unable to conclude there are no material factual issues regarding the IRCC/Dr. Bauer assertion that they have been denied the opportunity to review material in the agency's possession regarding Dr. Bauer's conduct in the November 1992 incident. Nor have we been presented with any arguments demonstrating why such a denial would not be a deprivation of due process.

Accordingly, we deny the staff's request that this issue be dismissed, with the caveat that any of the parties is free to file a postdiscovery dispositive motion relative to this issue.

B. Staff Motion to Dismiss

The staff also seeks dismissal of four additional issues proposed by IRCC/Dr. Bauer for litigation in this proceeding. The four issues are as follows:

1. Whether the use of the strontium-90 as treatment for skin lesions on the two identified patients was medically appropriate treatment?
2. Whether there was any risk to the public health, safety or other interest by virtue of the use of the strontium-90 as treatment for skin lesions on the two identified patients?
3. Whether provision of the patient treatment log constitutes provision of complete and accurate information by the Licensee to the NRC?
14. Whether substantial patient need exists for Strontium-90 treatment at IRCC?

Joint Prehearing Report at 3, 4. As we have previously noted in the Oncology Services Corp. proceeding, if it can be established that there is no set of facts that would entitle IRCC/Dr. Bauer to relief relative to these proposed

issues, then dismissal is appropriate. See LBP-94-2, 39 NRC at 23 & n.8.⁴

1. IRCC/Dr. Bauer Issues 1 and 2. Regarding IRCC/Dr. Bauer Issue 1 -- the medical appropriateness of the strontium-90 skin lesion treatments -- the staff correctly points out that whether or not the treatments were medically appropriate would not, in and of itself, be a valid defense to the allegation in the order that Dr. Bauer performed activities that were not authorized under the license. Either Dr. Bauer's activities were or were not authorized by the license and, if they were not, then Dr. Bauer (as the sole authorized user) was conducting activities in violation of the license. Nonetheless, in conjunction with IRCC/Dr. Bauer Issue 2 concerning the public health and safety risks of the treatments, this "medically appropriate treatment" issue may be relevant to another aspect of our determination about whether the staff's order should be sustained. This is the question of the extent or duration of the license suspension and modification imposed by the order.

⁴ IRCC/Dr. Bauer suggest that the staff cannot properly seek dismissal of these issues because they are put forth as "defense issues." See IRCC/Dr. Bauer Response to Staff Dispositive Motions at 7-8. As we have noted previously, consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), these issues are subject to dismissal under the appropriate circumstances. See Oncology Services Corp., LBP-94-2, 39 NRC at 23 n.8.

As is evident from the Commission's enforcement policy statement, regulatory requirements -- including license conditions -- have varying degrees of public health and safety significance. See 10 C.F.R. Part 2, App. C, § IV & n.5. Consequently, as part of the enforcement process, the relative importance of each purported violation is evaluated, which includes taking a measure of its technical and regulatory significance, as well as considering whether the violation is repetitive or willful. See id. §§ IV.B, IV.C. Although, in contrast to civil penalty actions, there generally is no specification of a "severity level" for the violations identified in an enforcement order imposing a license termination, suspension, or modification, see id. § VI.C, this evaluative process nonetheless is utilized to determine the type and severity of the corrective action taken in the enforcement order.

In making a determination about whether a license suspension or modification order should be sustained, we⁵ must undertake a similar process in that we must assess, among other things, whether the bases assigned in the order support it both in terms of the type and duration of the enforcement action.⁵ And, just as with the staff's initial

⁵ As the Commission recently has noted, "the choice of sanction is quintessentially a matter of the agency's sound discretion." Advanced Medical Systems, Inc., CLI-94-06, 39 NRC at ___ (slip op. at 42) (footnote omitted). In this regard, our review would be limited to whether the staff's choice constituted an abuse of that discretion.

determination about imposition of the enforcement order, a relevant factor may be the public health and safety significance of the bases specified in the order.⁶

As a consequence, there may be a set of facts under which IRCC/Dr. Bauer Issue 2 would be relevant to our determination here. Further, the question of whether the treatment involved was "medically appropriate" may be germane to the public health and safety significance of some of the bases of the order. Accordingly, as it relates to IRCC/Dr. Bauer Issue 2, we find IRCC/Dr. Bauer Issue 1 to be an appropriate matter for litigation in this proceeding as well.

2. IRCC/Dr. Bauer Issue 3. With this issue, IRCC/Dr. Bauer apparently call into question the staff's finding that, contrary to agency regulations, staff inspectors were not provided with complete and accurate information regarding the use of strontium-90 for purposes other than the treatment of superficial eye conditions as authorized under the IRCC license. The staff asserts that because the focus of the order is on the alleged initial failure of Dr. Bauer to identify strontium-90 skin lesion treatments when questioned by inspectors, the licensee's

⁶ This, of course, can be contrasted with the staff's consideration of postenforcement order matters such as the licensee's order efforts to correct alleged deficiencies that are not necessarily appropriate subjects for litigation in a challenge to the enforcement action. See LBP-94-2, 39 NRC at 25-26.

subsequent action in turning over the patient treatment log is irrelevant to the regulatory violations involved. This, the staff concludes, mandates that the issue be dismissed.

We do not agree with the staff's analysis regarding this issue. As Joint Issues 2, 3, 4, and 9 indicate, the staff and IRCC/Dr. Bauer disagree regarding the substance and significance of the conversations between Dr. Bauer and agency inspectors regarding their information requests. Whether or not the patient log has any regulatory significance as "complete and accurate information" seemingly will depend upon how those factual disputes are resolved. Accordingly, we deny the staff's dismissal request relative to this issue as well.

3. IRCC/Dr. Bauer Issue 14. This issue is the same as one we dealt with previously in the Technology Services Corp. proceeding. As we indicated there, "[w]hatever the patient 'need' for the treatment with licensed materials, the agency cannot authorize their use until it is satisfied that the licensee will act consistent with [the AEA's] statutory mandate [of protecting the public health and safety]." LBP-94-2, 39 NRC at 26. We likewise find this issue to be irrelevant to our consideration of whether the staff's November 1993 order should be sustained and thus we dismiss it.

III. CONCLUSION

After evaluating the parties' filings, we conclude that there is no legal bar to the staff utilizing Dr. Bauer's conduct during the November 1992 incident as a basis for the November 1993 enforcement order at issue in this proceeding. We therefore deny the request of IRCC/Dr. Bauer to preclude the staff from using the incident as a basis for this proceeding and, finding no material issues in dispute, grant the staff's motion for summary disposition on the same point. This ruling also leads us to dismiss related IRCC/Dr. Bauer Issues 4, 5, 6, and 8 as moot. In addition, we grant the staff's request to dismiss IRCC/Dr. Bauer Issue 14 as not germane to this proceeding. Finally, because we find IRCC/Dr. Bauer Issues 1, 2, 3, and 7 involve matters for which IRCC/Dr. Bauer might be entitled to some relief, we deny the staff's request for dismissal of those issues.

For the foregoing reasons, it is this twelfth day of July 1994, ORDERED, that

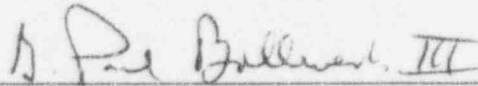
1. The IRCC/Dr. Bauer February 28, 1994 motion to eliminate basis for suspension is denied.
2. The staff's February 28, 1994 motion for summary disposition regarding Joint Issue 5 is granted and related IRCC/Dr. Bauer Issues 4, 5, 6, and 8 are dismissed as moot.

3. The staff's February 28, 1994 motion for summary disposition regarding IRCC/Dr. Bauer Issue 7 is denied.

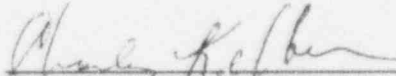
4. The staff's February 28, 1994 motion to dismiss regarding IRCC/Dr. Bauer Issues 1, 2, and 3 is denied.

5. The staff's February 28, 1994 motion to dismiss regarding IRCC/Dr. Bauer Issue 14 is granted.⁷

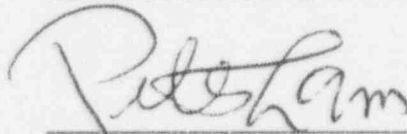
THE ATOMIC SAFETY
AND LICENSING BOARD



G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE



Charles N. Kelber
ADMINISTRATIVE JUDGE



Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 12, 1994

⁷ Copies of this memorandum and order are being sent this date to counsel for IRCC/Dr. Bauer by facsimile transmission and to staff counsel by E-mail transmission through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

INDIANA REGIONAL CANCER CENTER,
INDIANA, PA
(Byproduct Material License No.
37-23179-01 - EA 93-284)

Docket No.(s) 30-30485-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-94-21) (RULING...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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Dated at Rockville, Md. this
12 day of July 1994


Office of the Secretary of the Commission